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APPROVED
JUL 31 1975

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

JUL 30 1975

Posted in Helsinki, Finland 7/31/75

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 6799 - Federal Rules of Criminal Procedure Amendments Act
Sponsor - Rep. Hungate (D) Missouri and 3 others

To Archives 8/5/75

Last Day for Action

July 31, 1975 - Thursday (Because of the nature of this bill)

Purpose

To approve certain of the proposed amendments to the Federal Rules of Criminal Procedure and further amend certain additional amendments to those Rules.

Agency Recommendations

Office of Management and Budget	Approval
Department of Justice	Approval (informally)

Discussion

Pursuant to the Rules Enabling Acts (18 USC 3771-72) the Supreme Court promulgated proposed changes in the Federal Rules of Criminal Procedure on April 22, 1974. Those changes would have become effective on August 1, 1974 had Congress not intervened to delay the effective date. Congress did intervene because it felt the complexity of the Rules changes required more time for review than the normal process would permit. Accordingly, P.L. 93-361 was enacted providing for a delay in the effective date until August 1, 1975.

The enrolled bill embraces certain amendments to these Rules as proposed by the Court and further amends in whole or in part twelve of those proposed Rules. With the exception of the

amendment to Rule 11 adding Rule 11(e)(6), which shall take effect on August 1, 1975, the amendments to the Criminal Rules made by this bill shall take effect, upon your approval, on December 1, 1975.

As part of the Department of Justice's examination of the proposed amendments to the Criminal Rules, it queried all of the 94 United States Attorneys concerning the effect of the proposals upon the criminal justice system. In addressing the many amendments to the Rules in the course of its deliberations with the Members of the House Judiciary Committee, the Department recommended major amendments to the Supreme Court's proposed Rules 4, 9, and 16, the adoption of which, without further amendment, Justice believed would be a grave set back for criminal law enforcement.

The most important amendments contained within H.R. 6799 to these three Rules are summarized below:

Rule 4 - Arrest Warrant or Summons Upon Complaint and Rule 9 - Warrant or Summons Upon Indictment or Information

The Supreme Court proposed to amend these Rules to make a summons rather than a warrant the presumptive process for obtaining control over a suspect; accordingly a U.S. Attorney would have to present a "valid reason" to the court to secure a warrant. In testimony, the Attorney-General objected to these changes which would:

-- encourage an increase in fugitivity among individuals charged with Federal offenses;

-- effectively deprive government officers of the chance to arrest a person at a time when that person may have incriminating evidence or objects in his possession;

-- cause greater use of arrest without warrant based upon the office's reasonable belief that probable cause exists, thus increasing the probability for more illegal arrests; and

-- unnecessarily replicate subsequent procedures for the issuance of a warrant.

H.R. 6799 preserves the warrant for arrest as the primary vehicle for establishing jurisdiction over an individual, leaving the issuance of a summons to the discretion of the U.S. Attorney.

Rule 16 - Discovery and Inspection

Major attention to this proposed Rule addressed Rule 16(a)(1)(E) and related provisions. Under existing Rules regarding pretrial discovery, a defendant in a criminal case does not have the right to know the names of the witnesses that the government will call to testify against him until they take the witness stand. The Supreme Court proposed, in Rule 16(a)(1)(E), to grant a defendant a right, shortly after indictment, to learn the names and addresses of all witnesses the U.S. Attorney plans to call. A corresponding right was proposed to be given the government.

The Department of Justice opposed this provision because the consequent practice would be likely to jeopardize the safety and even the lives of many witnesses, not only in prosecution of organized crime cases but in the larger number of cases involving the prosecution of violent offenders, in addition to being predictably detrimental to the ability of the government to find "willing" witnesses to testify in serious felony cases. In the face of arguments by the proponents of the Supreme Court proposal that such an amendment to Rule 16 would enhance fairness, Justice noted that the law now requires:

-- the giving of ample pretrial notice to defendants;

-- that the indictment must contain a statement of all essential facts;

-- that defendants may be given bills of particulars elaborating the facts charged; and

-- that defendants can use Rule 16 to obtain their own statements, grand jury testimony, as well as copies of reports, documents, and other tangible objects material to the case.

In response to these arguments, the Supreme Court's proposed amendment to Rule 16(a)(1)(E) was deleted by H.R. 6799.

James M. Frey
Assistant Director
for Legislative Reference

Enclosures

DECISION

THE WHITE HOUSE

WASHINGTON

July 30, 1975

MEMORANDUM FOR THE PRESIDENT

THROUGH: PHILIP BUCHEN by R. H.

FROM: KENNETH LAZARUS

SUBJECT: Enrolled Bill: H.R. 6799, the Federal Rules of Criminal Procedure Amendments Act of 1975

This is to present the referenced bill for your immediate attention. In order to be absolutely certain that it is effective, the measure must be signed into law before August 1 (Washington time) -- 6:00 A.M., Friday, August 1 (Helsinki time).

Background

1. Enabling Acts. 18 U.S.C. Sections 3402, 3771 and 3772 constitute the Federal criminal rules enabling acts. By these provisions, the United States Supreme Court is empowered to promulgate rules of practice and procedure to govern criminal proceedings in our various Federal courts. The authority of the Supreme Court to promulgate such rules is limited, however, by a reserved power of Congress to disapprove any promulgated rule within a period of 90 days from the date of transmission to Congress or the prescribed effective date of the rule whichever is later. Moreover, the Congress is, of course, empowered to affirmatively legislate in this area at any time.

2. 1974 Criminal Rules. By order dated April 22, 1974, the Chief Justice transmitted to Congress a package of proposed changes to the Federal Rules of Criminal Procedure which were to take effect on August 1, 1974, absent Congressional disapproval.

3. Delayed Effective Date. Pub. L. 93-361, July 30, 1974, 88 Stat. 397 provided that the effective date of the proposed changes to the Federal Rules of Criminal Procedure which were embraced by the Supreme Court order of April 22, 1974, was postponed until August 1, 1975.

4. Enrolled Bill. H.R. 6799 contains a series of desirable amendments to the Rules as promulgated by the Supreme Court

on April 22, 1974. However, in order to be absolutely certain that they are carried into effect, it is necessary to secure Presidential approval of the legislation before August 1, 1975. Approval on August 1 could, create considerable confusion and litigation. Approval after August 1 could be a complete nullity as the Rules promulgated on April 22, 1974, are deisgned to automatically take effect on August 1.

Discussion

The Department of Justice strongly supported most of the amendments (and all of the major ones) contained in H.R. 6799. Two provisions are worthy of mention here.

1. Rules 4 and 9. The enrolled bill rejects the Supreme Court's proposal to transfer the discretion as to whether to use an arrest warrant or a summons, now exercised by United States Attorneys, to the district courts. In the view of the Department, the Court's proposal, because of its tendency to increase the use of a summons, thereby alerting a person that a criminal charge is imminent, would have exacerbated the problem of fugitivity as well as caused a loss of incriminating evidence.

2. Rule 16. The enrolled bill also rejects the Supreme Court's proposal to provide for mandatory pre-trial disclosure of government witnesses. The Court's proposal portended an increase in witness intimidation, assault and assassination, as well as an aggravation of the already difficult task of obtaining witness cooperation. In this area, too, the bill would leave current law intact.

H.R. 6799 passed the House and Senate by voice vote on July 30.

Recommendation

Due to the press of time, it was not possible to process this measure in the normal fashion. However, the Attorney General, Jim Cannon, Jack Marsh, Jim Lynn and Counsel's Office recommend you sign the subject bill into law as soon as possible and not later than 6:00 A.M., Friday August 1 (Helsinki Time).

To
7-30-75
5:00 p.m.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

JUL 30 1975

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 6799 - Federal Rules of Criminal Procedure Amendments Act
Sponsor - Rep. Hungate (D) Missouri and 3 others

Last Day for Action

July 31, 1975 - Thursday (Because of the nature of this bill)

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Office of Management and Budget	Approval
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The enrolled bill embraces certain amendments to these Rules as proposed by the Court and further amends in whole or in part twelve of those proposed Rules. With the exception of the

amendment to Rule 11 adding Rule 11(e)(6), which shall take effect on August 1, 1975, the amendments to the Criminal Rules made by this bill shall take effect, upon your approval, on December 1, 1975.

As part of the Department of Justice's examination of the proposed amendments to the Criminal Rules, it queried all of the 94 United States Attorneys concerning the effect of the proposals upon the criminal justice system. In addressing the many amendments to the Rules in the course of its deliberations with the Members of the House Judiciary Committee, the Department recommended major amendments to the Supreme Court's proposed Rules 4, 9, and 16, the adoption of which, without further amendment, Justice believed would be a grave set back for criminal law enforcement.

The most important amendments contained within H.R. 6799 to these three Rules are summarized below:

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The Supreme Court proposed to amend these Rules to make a summons rather than a warrant the presumptive process for obtaining control over a suspect; accordingly a U.S. Attorney would have to present a "valid reason" to the court to secure a warrant. In testimony, the Attorney-General objected to these changes which would:

-- encourage an increase in fugitivity among individuals charged with Federal offenses;

-- effectively deprive government officers of the chance to arrest a person at a time when that person may have incriminating evidence or objects in his possession;

-- cause greater use of arrest without warrant based upon the office's reasonable belief that probable cause exists, thus increasing the probability for more illegal arrests; and

-- unnecessarily replicate subsequent procedures for the issuance of a warrant.

H.R. 6799 preserves the warrant for arrest as the primary vehicle for establishing jurisdiction over an individual, leaving the issuance of a summons to the discretion of the U.S. Attorney.

Rule 16 - Discovery and Inspection

Major attention to this proposed Rule addressed Rule 16(a)(1)(E) and related provisions. Under existing Rules regarding pretrial discovery, a defendant in a criminal case does not have the right to know the names of the witnesses that the government will call to testify against him until they take the witness stand. The Supreme Court proposed, in Rule 16(a)(1)(E), to grant a defendant a right, shortly after indictment, to learn the names and addresses of all witnesses the U.S. Attorney plans to call. A corresponding right was proposed to be given the government.

The Department of Justice opposed this provision because the consequent practice would be likely to jeopardize the safety and even the lives of many witnesses, not only in prosecution of organized crime cases but in the larger number of cases involving the prosecution of violent offenders, in addition to being predictably detrimental to the ability of the government to find "willing" witnesses to testify in serious felony cases. In the face of arguments by the proponents of the Supreme Court proposal that such an amendment to Rule 16 would enhance fairness, Justice noted that the law now requires:

-- the giving of ample pretrial notice to defendants;

-- that the indictment must contain a statement of all essential facts;

-- that defendants may be given bills of particulars elaborating the facts charged; and

-- that defendants can use Rule 16 to obtain their own statements, grand jury testimony, as well as copies of reports, documents, and other tangible objects material to the case.

In response to these arguments, the Supreme Court's proposed amendment to Rule 16(a)(1)(E) was deleted by H.R. 6799.

(Signed) James M. Frey

James M. Frey
Assistant Director
for Legislative Reference

Enclosures

94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 94-247

FEDERAL RULES OF CRIMINAL PROCEDURE AMENDMENTS ACT

MAY 29, 1975.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HUNGATE, from the Committee on the Judiciary, submitted the following

REPORT

together with

SEPARATE AND SUPPLEMENTAL VIEWS

[To accompany H.R. 6799]

The Committee on the Judiciary, to whom was referred the bill (H.R. 6799) to approve certain of the proposed amendments to the Federal Rules of Criminal Procedure, to amend certain of them, and to make certain additional amendments to those Rules, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

The amendments are as follows:

On page 3, strike out line 11 and insert in lieu thereof the following:

"(4) Rule 4 is amended by adding at the end the following:".

On page 6, beginning in line 4, strike out "or another" and all that follows down through "plea agreement" in line 6.

On page 6, line 9, immediately after "shall" insert ", on the record,".

On page 6, line 11, immediately after "court" the first time it appears insert "or, on a showing of good cause, in camera,".

On page 8, line 20, strike out "trail" and insert in lieu thereof "trial".

On page 9, line 3, strike out "shall" and insert in lieu thereof "may".

On page 9, line 3, immediately before "witness" insert "undisclosed".

On page 9, beginning on line 8, strike out "this" and all that follows down through the end of line 9, and insert in lieu thereof the following:

subdivisions (a) through (d) of this rule.

On page 9, immediately after line 9, insert the following:

"(f) INADMISSIBILITY OF WITHDRAWN ALIBI.—Evidence of an intention to rely upon an alibi defense, later withdrawn, or

of statements made in connection with such intention, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.".

On page 9, line 19, strike out "on the issue of guilt in any criminal proceeding" and insert in lieu thereof "before the judge who or jury which determines the guilt of the accused, prior to the determination of guilt".

On page 10, line 24, insert "he" immediately after "deposition,".

On page 10, line 25, immediately after "place." insert the following:

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.

On page 11, line 21, strike out "exemption.".

On page 12, line 8, insert a comma immediately after "known".

On page 12, line 24, insert "GOVERNMENT WITNESSES.—" immediately after "(E)".

On page 15, beginning in line 23 and ending in line 24, strike out "made by" and insert in lieu thereof the following: "of".

On page 18, line 15, strike out "contendre" and insert in lieu thereof "contendere".

On page 19, line 18, strike out "Rule 3" and insert in lieu thereof "Rule 43".

PURPOSE

The purpose of this legislation is to approve certain proposed amendments to the Federal Rules of Criminal Procedure, to disapprove others, and to make certain additional amendments to those Rules.

BACKGROUND

On April 22, 1974, the Supreme Court (with Mr. Justice Douglas dissenting) promulgated a series of amendments to the Federal Rules of Criminal Procedure.[1] These amendments were promulgated pursuant to statutes known as the "rules enabling acts" [2] and were to become effective on August 1, 1974.

It became readily apparent that the proposed amendments were so numerous, diverse and controversial that Congress could not adequately investigate and consider them in the short time available before they were to become effective. Consequently, Congress enacted, and the President signed, legislation delaying the effective date of the proposed amendments until August 1, 1975.[3] This legislation was similar

[1] These amendments, together with the Notes of the Judicial Conference's Advisory Committee on Criminal Rules, are reprinted in House Document 93–292.

The Federal Rules of Criminal Procedure "govern the procedure in all criminal proceedings in the courts of the United States . . . ." They are also applicable, "whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrates and at proceedings before state and local judicial officers." Rule 1, Federal Rules of Criminal Procedure.

[2] The applicable statutes are 18 U.S.C. § § 3771–72, which empower the Court to prescribe rules of "pleading, practice and procedure." They provide that such rules shall not take effect until ninety days after they have been reported to Congress.

[3] Public Law 93–361. See Report No. 93–1144.

to the legislation, enacted earlier in the 93d Congress, that had deferred the effective date of the Federal Rules of Evidence promulgated by the Supreme Court.[4]

The proposed amendments were the result of much work and effort by the Advisory Committee on Criminal Rules of the Judicial Conference of the United States. The Advisory Committee did the initial drafting and passed its recommendations to the Judicial Conference's Standing Committee on Rules of Practice and Procedure. The Standing Committee made some changes in the Advisory Committee's draft and then sent it to the Judicial Conference. The Judicial Conference forwarded the draft together with its recommendations to the Supreme Court. The Supreme Court promulgated the amendments on April 22, 1974, and transmitted them to the Congress.

The proposed amendments were referred to the Committee on the Judiciary, where they were assigned to the Subcommittee on Criminal Justice. The Subcommittee held five days of hearings on the proposed amendments. In addition, the Subcommittee received numerous letters about them. All in all, the Subcommittee received comments about the proposed amendments from all segments of the legal profession—from judges; from prosecutors and defenders, like the Justice Department, the National Legal Aid and Defender Association, and the National Association of Criminal Defense Lawyers; from bar groups, like the American Bar Association's Criminal Justice Section, the Standing Committee on Criminal Law and Procedure of the State Bar of California, and the Bar Association of the District of Columbia; and from civil libertarian and public interest groups, like the American Civil Liberties Union and the Center for law and Social Policy.

H.R. 6799, the bill recommended by the Committee, makes some changes in the proposed amendments and, in addition, makes certain other limited changes in the Federal Rules of Criminal Procedure.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

SECTION 1

The first section of H.R. 6799 provides that the bill may be cited as the "Federal Rules of Criminal Procedure Amendments Act".

SECTION 2

Section 2 of H.R. 6799 provides that the proposed amendments promulgated by the Supreme Court on April 22, 1974, are approved except as otherwise provided in the legislation and shall take effect on August 1, 1975.

SECTION 3

Section 3 of H.R. 6799 sets forth the changes made by the Committee in the amendments proposed by the Supreme Court. Where the Committee makes no change, it does so because it finds itself in fundamental agreement with the policy behind the proposed amendment. In such instances, the Committee adopts the explanation of and

[4] See Public Law 93–12, which deferred the effective date of the Federal Rules of Evidence indefinitely—*i.e.*, until they had been enacted into law. See also Report 93–650 at 2, 17–19.

rationale for the proposed amendment that is contained in the Advisory Committee Note. A number of changes made by the Committee are perfecting or conforming amendments of a technical nature, but others reflect a change in policy or emphasis.

Rule 4

A. Amendments Proposed by the Supreme Court

Rule 4 of the Federal Rules of Criminal Procedure deals with arrest procedures when a criminal complaint has been filed. It provides in pertinent part:

> If it appears . . . that there is probable cause . . . a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the *request* of the attorney for the government a summons instead of a warrant *shall* issue. [emphasis added]

The Supreme Courts amendments make a basic change in Rule 4. As proposed to be amended, Rule 4 gives priority to the issuance of a summons instead of an arrest warrant. In order for the magistrate to issue an arrest warrant, the attorney for the government must show a "valid reason."

B. Committee Action

The Committee agrees with and approves the basic change in Rule 4. The decision to take a citizen into custody is a very important one with farreaching consequences. That decision ought to be made by a neutral official (a magistrate) rather than by an interested party (the prosecutor).

It has been argued that undesirable consequences will result if this change is adopted—including an increase in the number of fugitives and the introduction of substantial delays in our system of criminal justice.[5] The Committee has carefully considered these arguments and finds them to be wanting.[6] The present rule permits the use of a summons in lieu of a warrant. The major difference between the present rule and the proposed rule is that the present rule vests the decision to issue a summons or a warrant in the prosecutor, while the proposed rule vests that decision in a judicial officer. Thus, the basic premise underlying the arguments against the proposed rule is the notion that only the prosecutor can be trusted to act responsibly in deciding whether a summons or a warrant shall issue.

The Committee rejects the notion that the federal judiciary cannot be trusted to exercise discretion wisely and in the public interest.

The Committee recast the language of Rule 4(b). No change in substance is intended. The phrase "valid reason" was changed to "good cause," a phrase with which lawyers are more familiar.[7]

[5] See testimony of Assistant Attorney General W. Vincent Rahestraw in Hearings on Proposed Amendments to Federal Rules of Criminal Procedure Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93d Cong., 2d sess., Serial No. 61, at 41–43 (1974) [hereinafter cited as "Hearing I"].

[6] The Advisory Committee on Criminal Rules has thoroughly analyzed the arguments raised by Mr. Rakestraw and convincingly demonstrated that the undesirable consequences predicted will not necessarily result. See Hearings on Proposed Amendments to Federal Rules of Criminal Procedure Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 94th Congress, 1st Session, Serial No. 6, at 208–09 (1975) [hereinafter cited "Hearings II"].

The Committee deleted two sentences from Rule 4(c). These sentences permitted a magistrate to question the complainant and other witnesses under oath and required the magistrate to keep a record or summary of such a proceeding. The Committee does not intend this change to discontinue or discourage the practice of having the complainant appear personally or the practice of making a record or summary of such an appearance. Rather, the Committee intended to leave Rule 4(c) neutral on this matter, neither encouraging nor discouraging these practices.

The Committee added a new section that provides that the determination of good cause for the issuance of a warrant in lieu of a summons shall not be grounds for a motion to suppress evidence. This provision does not apply when the issue is whether there was probable cause to believe an offense has been committed. This provision does not in any way expand or limit the so-called "exlusionary rule."

Rule 9

A. Amendments Proposed by the Supreme Court

Rule 9 of the Federal Rules of Criminal Procedure is closely related to Rule 4. Rule 9 deals with arrest procedures after an information has been filed or an indictment returned. The present rule gives the prosecutor the authority to decide whether a summons or a warrant shall issue.

The Supreme Court's amendments to Rule 9 parallel its amendments to Rule 4. The basic change made in Rule 4 is also make in Rule 9.

B. Committee Action

For the reasons set forth above in connection with Rule 4, the Committee endorses and accepts the basic change in Rule 9. The Committee made changes in Rule 9 similar to the changes it made in Rule 4.

Rule 11

A. Amendments Proposed by the Supreme Court

Rule 11 of the Federal Rules of Criminal Procedure deals with pleas. The Supreme Court has proposed to amend this rule extensively.

Rule 11 provides that a defendant my plead guilty, not guilty, or nolo contendere. The Supreme Court's amendments to Rule 11(b) provide that a nolo contendere 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."

The Supreme Court amendments to Rule 11(c) spell out the advice that the court must give to the defendant before accepting the defendant's plea of guilty or nolo contendere. The Supreme Court amendments to Rule 11(d) set forth the steps that the court must take

[7] Rule 4, both as proposed by the Supreme Court and as changed by the Committee, does not in any way authorize a magistrate to issue a summons or a warrant sua sponte, nor does it enlarge, limit or change in any way the law governing warrantless arrests.

to insure that a guilty or nolo contendere plea has been voluntarily made.

The Supreme Court amendments to Rule 11(e) establish a plea agreement procedure. This procedure permits the parties to discuss disposing of a case without a trial and sets forth the type of agreements that the parties can reach concerning the disposition of the case. The procedure is not mandatory; a court is free not to permit the parties to present plea agreements to it.

The Supreme Court amendments to Rule 11(f) require that the court, before entering judgment upon a plea of guilty, satisfy itself that "there is a factual basis for the plea." The Supreme Court amendments to Rule 11(g) require that a verbatim record be kept of the proceedings at which the defendant enters a plea.

B. Committee Action

The proposed amendments to Rule 11, particularly those relating to the plea negotiating procedure, have generated much comment and criticism. No observer is entirely happy that our criminal justice system must rely to the extent it does on negotiated dispositions of cases. However, crowded court dockets make plea negotiating a fact that the Federal Rules of Criminal Procedure should contend with. The Committee accepts the basic structure and provisions of Rule 11(e).

Rule 11(e) as proposed permits each federal court to decide for itself the extent to which it will permit plea negotiations to be carried on within its own jurisdiction. No court is compelled to permit any plea negotiations at all. Proposed Rule 11(e) regulates plea negotiations and agreements if, and to the extent that, the court permits such negotiations and agreements.[7a]

Proposed Rule 11(e) contemplates 4 different types of plea agreements. First, the defendant can plead guilty or nolo contendere in return for the prosecutor's reducing the charge to a less serious offense. Second, the defendant can plead guilty or nolo contendere in return for the prosecutor dropping, or not bringing, a charge or charges relating to other offenses. Third, the defendant can plead guilty or nolo contendere in return for the prosecutor's recommending a sentence. Fourth, the defendant and prosecutor can agree that a particular sentence is the appropriate disposition of the case.[8]

The Committee added language in subdivisions (e)(2) and (e)(4) to permit a plea agreement to be disclosed to the court, or rejected by it, in camera. There must be a showing of good cause before the court can conduct such proceedings in camera. The language does not address itself to whether the showing of good cause may be made in open court or in camera. That issue is left for the courts to resolve on a case-by-case basis. These changes in subdivisions (e)(2) and (e)(4)

[7a] Proposed Rule 11(e) has been critized by some federal judges who read it to mandate the court to permit plea negotiations and the reaching of plea agreements. The Advisory Committee stressed during its testimony that the rule does not mandate that a court permit any form of plea agreement to be presented to it. See, *e.g.*, the remarks of United States Circuit Judge William H. Webster in Hearings II, at 196. See also the exchange of correspondence between Judge Webster and United States District Judge Frank A. Kaufman in Hearings II, at 289–90.

[8] It is apparent, though not explicitly stated, that Rule 11(e) contemplates that the plea agreement may bind the defendant to do more than just plead guilty or nolo contendere. For example, the plea agreement may bind the defendant to cooperate with the prosecution in a different investigation. The Committee intends by its approval of Rule 11(e) to permit the parties to agree on such terms in a plea agreement.

will permit a fair trial when there is substantial media interest in a case and the court is rejecting a plea agreement.

The Committee added an exception to subdivision (e)(6). That subdivision provides:

> 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.

The Committee's exception permits the use of such evidence in a perjury or false statement prosecution where the plea, offer, or related statement was made by the defendant on the record, under oath and in the presence of counsel. The Committee recognizes that even this limited exception may discourage defendants from being completely candid and open during plea negotiations and may even result in discouraging the reaching of plea agreements. However, the Committee believes that, on balance, it is more important to protect the integrity of the judicial process from willful deceit and untruthfulness.[9]

The Committee recast the language of Rule 11(c), which deals with the advice given to a defendant before the court can accept his plea of guilty or nolo contendere. The Committee acted in part because it believed that the warnings given to the defendant ought to include those that *Boykin* v. *Alabama*, 395 U.S. 238 (1969), said were constitutionally required. In addition, and as a result of its change in subdivision (e)(6), the Committee thought it only fair that the defendant be warned that his plea of guilty (later withdrawn) or nolo contendere, or his offer of either plea, or his statements made in connection with such pleas or offers, could later be used against him in a perjury trial if made under oath, on the record, and in the presence of counsel.

Rule 12

A. Amendments Proposed by the Supreme Court

Rule 12 of the Federal Rules of Criminal Procedure deals with pretrial motions and pleadings. The Supreme Court proposed several amendments to it. The more significant of these are set out below.

Subdivision (b) as proposed to be amended provides that the pretrial motions may be oral or written, at the court's discretion. It also provides that certain types of motions must be made before trial.

Subdivision (d) as proposed to be amended provides that the government, either on its own or in response to a request by the defendant, must notify the defendant of its intention to use certain evidence in order to give the defendant an opportunity before trial to move to suppress that evidence.

Subdivision (e) as proposed to be amended permits the court to defer ruling on a pretrial motion until the trial of the general issue or until after verdict.

[9] The Committee does not intend its language to be construed as mandating or encouraging the swearing-in of the defendant during proceedings in connection with the disclosure and acceptance or rejection of a plea agreement.

Subdivision (f) as proposed to be amended provides that the failure before trial to file motions or requests or to raise defenses which must be filed or raised prior to trial, results in a waiver. However, it also provides that the court, for cause shown, may grant relief from the waiver.

Subdivision (g) as proposed to be amended requires that a verbatim record be made of the pretrial motion proceedings and that the judge make a record of his findings of fact and conclusions of law.

B. Committee Action

The Committee modified subdivision (e) to permit the court to defer its ruling on a pretrial motion until after the trial only for good cause. Moreover, the court cannot defer its ruling if to do so will adversely affect a party's right to appeal. The Committee believes that the rule proposed by the Supreme Court could deprive the government of its appeal rights under statutes like section 3731 of title 18 of the United States Code. Further, the Committee hopes to discourage the tendency to reserve rulings on pretrial motions until after verdict in the hope that the jury's verdict will make a ruling unnecessary.

The Committee also modified subdivision (h), which deals with what happens when the court grants a pretrial motion based upon a defect in the institution of the prosecution or in the indictment or information. The Committee's change provides that when such a motion is granted, the court *may* order that the defendant be continued in custody or that his bail be continued for a specified time. A defendant should not automatically be continued in custody when such a motion is granted. In order to continue the defendant in custody, the court must not only determine that there is probable cause, but it must also determine, in effect, that there is good cause to have the defendant arrested.

Rule 12.1

A. Amendments Proposed by the Supreme Court

Rule 12.1 is a new rule that deals with the defense of alibi. It provides that a defendant must notify the government of his intention to rely upon the defense of alibi. Upon receipt of such notice, the government must advise the defendant of the specific time, date, and place at which the offense is alleged to have been committed. The defendant must then inform the government of the specific place at which he claims to have been when the offense is alleged to have been committed, and of the names and addresses of the witnesses on whom he intends to rely to establish his alibi. The government must then inform the defendant of the names and addresses of the witnesses on whom it will rely to establish the defendant's presence at the scene of the crime. If either party fails to comply with the provisions of the rule, the court may exclude the testimony of any witness whose identity is not disclosed. The rule does not attempt to limit the right of the defendant to testify in his own behalf.

B. Committee Action

The Committee disagrees with the defendant-triggered procedures of the rule proposed by the Supreme Court. The major purpose of a notice-of-alibi rule is to prevent unfair surprise to the prosecution. The

Committee, therefore, believes that it should be up to the prosecution to trigger the alibi defense discovery procedures. If the prosecution is worried about being surprised by an alibi defense, it can trigger the alibi defense discovery procedures. If the government fails to trigger the procedures and if the defendant raises an alibi defense at trial, then the government cannot claim surprise and get a continuance of the trial.

The Committee has adopted a notice-of-alibi rule similar to the one now used in the District of Columbia.[10] The rule is prosecution-triggered. If the prosecutor notifies the defendant of the time, place, and date of the alleged offense, then the defendant has 10 days in which to notify the prosecutor of his intention to rely upon an alibi defense, specify where he claims to have been at the time of the alleged offense, and provide a list of his alibi witnesses. The prosecutor, within 10 days but no later than 10 days before trial, must then provide the defendant with a list of witnesses who will place the defendant at the scene of the alleged crime and those witnesses who will be used to rebut the defendant's alibi witnesses.

The Committee's rule does not operate only to the benefit of the prosecution. In fact, its rule will provide the defendant with more information than the rule proposed by the Supreme Court. The rule proposed by the Supreme Court permits the defendant to obtain a list of only those witnesses who will place him at the scene of the crime. The defendant, however, would get the names of these witnesses anyway as part of his discovery under Rule 16(a)(1)(E). The Committee rule not only requires the prosecution to provide the names of witnesses who place the defendant at the scene of the crime, but it also requires the prosecution to turn over the names of those witnesses who will be called in rebuttal to the defendant's alibi witnesses. This is information that the defendant is not otherwise entitled to discover.

Rule 12.2

A. Amendments Proposed by the Supreme Court

Rule 12.2 is a new rule that deals with defense based upon mental condition. It provides that: (1) The defendant must notify the prosecution in writing of his intention to rely upon the defense of insanity. If the defendant fails to comply, "insanity may not be raised as a defense." (2) If the defendant intends to introduce expert testimony relating to mental disease or defect on the issue whether he had the requisite mental state, he must notify the prosecution in writing. (3) The court, on motion of the prosecution, may order the defendant to submit to a psychiatric examination by a court-appointed psychiatrist. (4) If the defendant fails to undergo the court-ordered psychiatric examination, the court may exclude any expert witness the defendant offers on the issue of his mental state.

B. Committee Action

The Committee agrees with the proposed rule but has added language concerning the use of statements made to a psychiatrist during the

[10] See Rule 2-5(b) of the Rules of the United States District Court for the District of Columbia. See also Rule 16-1 of the Rules of Criminal Procedure for the Superior Court of the District of Columbia.

course of a psychiatric examination provided for by Rule 12.2. The language provides:

> No statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused before the judge who or jury which determines the guilt of the accused, prior to the determination of guilt.

The purpose of this rule is to secure the defendant's fifth amendment right against self-incrimination. See *State* v. *Raskin*, 34 Wis. 2d 607, 150 N.W. 2d 318 (1967). The provision is flexible and does not totally preclude the use of such statements. For example, the defendant's statement can be used at a separate determination of the issue of sanity or for sentencing purposes once guilt has been determined. A limiting instruction to the jury in a single trial to consider statements made to the psychiatrist only on the issue of sanity would not satisfy the requirements of the rule as amended. The prejudicial effect on the determination of guilt would be inescapable.

The Committee notes that the rule does not attempt to resolve the issue whether the court can constitutionally compel a defendant to undergo a psychiatric examination when the defendant is unwilling to undergo one. The provisions of subdivision (c) are qualified by the phrase, "In an appropriate case." If the court cannot constitutionally compel an unwilling defendant to undergo a psychiatric examination, then the provisions of subdivision (c) are inapplicable in every instance where the defendant is unwilling to undergo a court-ordered psychiatric examination. The Committee, by its approval of subdivision (c), intends to take no stand whatever on the constitutional question.

Rule 15

A. Amendments Proposed by the Supreme Court

Rule 15 of the Federal Rules of Criminal Procedure provides for the taking of depositions. The present rule permits only the defendant to move that a deposition of a prospective witness be taken. The court may grant the motion if it appears that (a) the prospective witness will be unable to attend or be prevented from attending the trial, (b) the prospective witness' testimony is material, and (c) the prospective witness' testimony is necessary to prevent a failure of justice.

The Supreme Court promulgated several amendments to Rule 15. The more significant amendments are described below.

Subdivision (a) as proposed to be amended permits either party to move the court for the taking of a deposition of a witness. However, a party may only move to take the deposition of one of its own witnesses, not one of the adversary party's witnesses.

Subdivision (c) as proposed to be amended provides that whenever a deposition is taken at the instance of the government or of an indigent defendant, the expenses of the taking of the deposition must be paid by the government.

Subdivision (e) as proposed to be amended provides that part or all of the deposition may be used at trial as substantive evidence if the

witness if "unavailable" or if the witness gives testimony inconsistent with his deposition.

Subdivision (b) as proposed to be amended defines "unavailable." "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 of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his deposition for the purpose of preventing the witness from attending or testifying.

B. Committee Action

The Committee narrowed the definition of "unavailability" in subdivision (g). The Committee deleted language from that subdivision that provided that a witness was "unavailable" if the court exempts him from testifying at the trial on the ground of privilege. The Committee does not want to encourage the use of depositions at trial, especially in view of the importance of having live testimony from a witness on the witness stand.

The Committee added a provision to subdivision (b) to parallel the provision of Rule 43(b)(2). This is to make it clear that a disruptive defendant may be removed from the place where a deposition is being taken.

The Committee added language to subdivision (c) to make clear that the government must pay for the cost of the transcript of a deposition when the deposition is taken at the instance of an indigent defendant or of the government. In order to use a deposition at trial, it must be transcribed. The proposed rule did not explicitly provide for payment of the cost of transcribing, and the Committee change rectifies this.

The Committee notes that subdivision (e) permits the use of a deposition when the witness "gives testimony at the trial or hearing inconsistent with his deposition." Since subdivision (e) refers to the rules of evidence, the Committee understands that the Federal Rules of Evidence will govern the admissibility and use of the deposition. The Committee, by adopting subdivision (e) as proposed to be amended by the Supreme Court, intends the Federal Rules of Evidence to govern the admissibility and use of the deposition.

The Committee believes that Rule 15 will not encourage trials by deposition. A deposition may be taken only in "exceptional circumstances" when "it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved. . . ." A deposition, once it is taken, is not automatically admissible at trial, however. It may only be used at trial if the witness is unavailable, and the rule

narrowly defines unavailability. The procedure established in Rule 15 is similar to the procedure established by the Organized Crime Control Act of 1970 for the taking and use of depositions in organized crime cases. See 18 U.S.C. 3503.

Rule 16

A. Amendments Proposed by the Supreme Court

Rule 16 of the Federal Rules of Criminal Procedure regulates discovery by the defendant of evidence in possession of the prosecution, and discovery by the prosecution of evidence in possession of the defendant. The present rule permits the defendant to move the court to discover certain material. The prosecutor's discovery is limited and is reciprocal—that is, if the defendant is granted discovery of certain items, then the prosecution may move for discovery of similar items under the defendant's control.

As proposed to be amended, the rule provides that the parties themselves will accomplish discovery—no motion need be filed and no court order is necessary. The court will intervene only to resolve a dispute as to whether something is discoverable or to issue a protective order.

The proposed rule enlarges the scope of the defendant's discovery to include a copy of his prior criminal record and a list of the names and addresses, plus record of prior felony convictions, of all witnesses the prosecution intends to call during its case-in-chief. It also permits the defendant to discover the substance of any oral statement of his which the prosecution intends to offer at trial, if the statement was given in response to interrogation by any person known by defendant to be a government agent.

Proposed subdivision (a)(2) provides that Rule 16 does not authorize the defendant to discover "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. . . ."

The proposed rule also enlarges the scope of the government's discovery of materials in the custody of the defendant. The government is entitled to a list of the names and addresses of the witnesses the defendant intends to call during his case-in-chief. Proposed subdivision (b)(2) protects the defendant from having to disclose "reports, memoranda, or other internal defense documents . . . made in connection with the investigation or defense of the case. . . ."

Subdivision (d)(1) of the proposed rule permits the court to deny, restrict, or defer discovery by either party, or to make such other order as is appropriate. Upon request, a party may make a showing that such an order is necessary. This showing shall be made to the judge alone if the party so requests. If the court enters an order after such a showing, it must seal the record of the showing and preserve it in the event there is an appeal.

B. Committee Action

The Committee agrees that the parties should, to the maximum possible extent, accomplish discovery themselves. The court should become involved only when it is necessary to resolve a dispute or to issue an order pursuant to subdivision (d).

Perhaps the most controversial amendments to this rule were those dealing with witness lists. Under present law, the government must turn over a witness list *only* in capital cases.[11] The defendant never needs to turn over a list of his witnesses. The proposed rule requires both the government and the defendant to turn over witness lists in every case, capital or noncapital. Moreover, the lists must be furnished to the adversary party upon that party's request.

The proposed rule was sharply criticized by both prosecutors and defenders. The prosecutors feared that pretrial disclosure of prosecution witnesses would result in harm to witnesses. The defenders argued that a defendant cannot constitutionally be compelled to disclose his witnesses.

The Committee believes that it is desirable to promote greater pretrial discovery, As stated in the Advisory Committee Note,

> 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. . . .

The Committee, therefore, endorses the principle that witness lists are discoverable. However, the Committee has attempted to strike a balance between the narrow provisions of existing law and the broad provisions of the proposed rule.

The Committee rule makes the procedures defendant-triggered. If the defendant asks for and receives a list of prosecution witnesses, then the prosecution may request a list of defense witnesses. The witness lists need not be turned over until 3 days before trial. The court can modify the terms of discovery upon a sufficient showing. Thus, the court can require disclosure of the witness lists earlier than 3 days before trial, or can permit a party not to disclose the identity of a witness before trial.

The Committee provision promotes broader discovery and its attendant values—informed disposition of cases without trial, minimizing the undesirable effect of surprise, and helping insure that the issue of guilt or innocence is accurately determined. At the same time, it avoids the problems suggested by both the prosecutors and the defenders.

The major argument advanced by prosecutors is the risk of danger to their witnesses if their identities are disclosed prior to trial. The Committee recognizes that there may be a risk but believes that the risk is not as great as some fear that it is. Numerous states require the prosecutor to provide the defendant with a list of prosecution witnesses prior to trial.[12] The evidence before the Committee indicates

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[11] Section 3432 of title 18 of the United States Code provides:
A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness.

[12] These States include Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, Oklahoma, Oregon, Tennessee, and Utah. See Advisory Committee Note, House Document 93-292, at 60.

that these states have not experienced unusual problems of witness intimidation.[12a]

Some federal jurisdictions have adopted an omnibus pretrial discovery procedure that calls upon the prosecutor to give the defendant its witness lists. One such jurisdiction is the Southern District of California. The evidence before the Committee indicates that there has been no unusual problems with witness intimidation in that district. Charles Sevilla, Chief Trial Attorney for the Federal Defenders of San Diego, Inc., which operates in the Southern District of California, testified as follows:

> 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 lists 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. It simply doesn't happen except on the rarest of occasion. When the Government has that fear it can resort to the protective order.[13]

Mr. Sevilla's observations are corroborated by the views of the U.S. Attorney for the Southern District of California:

> Concerning the modifications to Rule 16, we have followed these procedures informally in this district for a number of years. We were one of the districts selected for the pilot projects of the Omnibus Hearing in 1967 or 1968. We have found that the courts in our district will not require us to disclose names of proposed witnesses when in our judgment to do so would not be advisable. Otherwise we routinely provide defense counsel with full discovery, including names and addresses of witnesses. We have not had any untowards results by following this program, having in mind that the courts will, and have, excused us from discovery where the circumstances warrant.[14]

Much of the prosecutorial criticism of requiring the prosecution to give a list of its witnesses to the defendant reflects an unwillingness to trust judges to exercise sound judgment in the public interest. Prosecutors have stated that they frequently will open their files to defendants in order to induce pleas.[15]

Prosecutors are willing to determine on their own when they can do this without jeopardizing the safety of witnesses. There is no reason why a judicial officer cannot exercise the same discretion in the public interest.

The Committee is convinced that in the usual case there is no serious risk of danger to prosecution witnesses from pretrial disclosure of their identities. In exceptional instances, there may be a risk of danger. The Committee rule, however, is capable of dealing with those exceptional instances while still providing for disclosure of witnesses in the usual case.

[12a] See the comments of the Standing Committee on Criminal Law and Procedure of the State Bar of California in Hearings II, at 302.

[13] Hearings II, at 42.

[14] Hearings I, at 109.

[15] See testimony of Richard L. Thornburgh, United States Attorney for the Western District of Pennsylvania, in Hearings I, at 150.

The Committee recognizes the force of the constitutional arguments advanced by defenders. Requiring a defendant, upon request, to give to the prosecution material which may be incriminating, certainly raises very serious constitutional problems. The Committee deals with these problems by having the defendant trigger the discovery procedures. Since the defendant has no constitutional right to discover any of the prosecution's evidence (unless it is exculpatory within the meaning of *Brady* v. *Maryland*, 373 U.S. 83 (1963)), it is permissible to condition his access to nonexculpatory evidence upon his turning over a list of defense witnesses. Rule 16 currently operates in this manner.

The Committee also changed subdivisions (a)(2) and (b)(2), which set forth "work product" exceptions to the general discovery requirements. The subsections proposed by the Supreme Court are cast in terms of the type of document involved (*e.g.*, report), rather than in terms of the content (*e.g.*, legal theory). The Committee recast these provisions by adopting language from Rule 26(b)(3) of the Federal Rules of Civil Procedure.

The Committee notes that subdivision (a)(1)(C) permits the defendant to discover certain items that "were obtained from or belong to the defendant." The Committee believes that, as indicated in the Advisory Committee Note,[16] items that "were obtained from or belong to the defendant" are items that are material to the preparation of his defense.

The Committee added language to subdivision (a)(1)(B) to conform it to provisions in subdivision (a)(1)(A). The rule as changed by the Committee requires the prosecutor to give the defendant such copy of the defendant's prior criminal record as is within the prosecutor's "possession, custody, or control, the existence of which is known, or by the exercise of due diligence may become known" to the prosecutor. The Committee also made a similar conforming change in subdivision (a)(1)(E), dealing with the criminal records of government witnesses. The prosecutor can ordinarily discharge his obligation under these two subdivisions, (a)(1)(B) and (E), by obtaining a copy of the F.B.I. "rap sheet."

The Committee made an additional change in subdivision (a)(1)(E). The proposed rule required the prosecutor to provide the defendant with a record of the felony convictions of government witnesses. The major purpose for letting the defendant discover information about the record of government witnesses, is to provide him with information concerning the credibility of those witnesses. Rule 609(a) of the Federal Rules of Evidence permits a party to attack the credibility of a witness with convictions other than just felony convictions. The Committee, therefore, changed subdivision (a)(1)(E) to require the prosecutor to turn over a record of all criminal convictions, not just felony convictions.

The Committee changed subdivision (d)(1), which deals with protective orders. Proposed (d)(1) required the court to conduct an *ex parte* proceeding whenever a party so requested. The Committee changed the mandatory language to permissive language. A Court *may*, not must, conduct an *ex parte* proceeding if a party so requests. Thus,

if a party requests a protective or modifying order and asks to make its showing *ex parte*, the court has two separate determinations to make. First, it must determine whether an *ex parte* proceeding is appropriate, bearing in mind that *ex parte* proceedings are disfavored and not to be encouraged.[17] Second, it must determine whether a protective or modifying order shall issue.

Rule 17

A. Amendments Proposed by the Supreme Court

Rule 17 of the Federal Rules of Criminal Procedure deals with subpoenas. Subdivision (f)(2) as proposed by the Supreme Court provides:

> The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court.

The Committee added language to the proposed amendment that directs the court to consider the convenience of the witness and the parties when compelling a witness to attend where a deposition will be taken.

Rule 20

A. Amendments Proposed by the Supreme Court

Rule 20 of the Federal Rules of Criminal Procedure deals with transferring a defendant from one district to another for the purpose of pleading and being sentenced. It deals with the situation where a defendant is located in one district (A) and is charged with a crime in another district (B). Under the present rule, if such a defendant desires to waive trial and plead guilty or nolo contendere, a judge in district B would issue a bench warrant for the defendant, authorizing his arrest in district A and his transport to district B for the purpose of pleading and being sentenced.

The Supreme Court amendments permit the defendant in the above example to plead guilty or nolo contendere in district A, if the United States Attorneys for district A and B consent.

B. Committee Action

The Committee has added a conforming amendment to subdivision (d), which establishes procedures for dealing with defendants who are juveniles.

Rule 29.1

A. Amendments Proposed by the Supreme Court

Rule 29.1 is a new rule that was added to regulate closing arguments. It prescribes that the government shall make its closing argument and then the defendant shall make his. After the defendant has argued, the government is entitled to reply in rebuttal.

[16] House Document 93–292, at 59.

[17] An *ex parte* proceeding would seem to be appropriate if any adversary proceeding would defeat the purpose of the protective or modifying order. For example, the identity of a witness would be disclosed and the purpose of the protective order is to conceal that witness' identity.

B. Committee Action

The Committee endorses and adopts this proposed rule in its entirety. The Committee believes that, as the Advisory Committee Note has stated, fair and effective administration of justice is best served if the defendant knows the arguments actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply. Rule 29.1 does not specifically address itself to what happens if the prosecution waives its initial closing argument. The Committee is of the view that the prosecutor, when he waives his initial closing argument, also waives his rebuttal.[18]

Rule 32

A. Amendments Proposed by the Supreme Court

Rule 32 of the Federal Rules of Criminal Procedure deals with sentencing matters.

Proposed subdivision (a)(2) provides that the court is not duty-bound to advise the defendant of a right to appeal when the sentence is imposed following a plea of guilty or nolo contendere.

Proposed subdivision (c) provides that the probation service must make a presentence investigation and report unless the court orders otherwise "for reasons stated on the record." The presentence report will not be submitted to the court until after the defendant pleads nolo contendere or guilty, or is found guilty, unless the defendant consents in writing. Upon the defendant's request, the court must permit the defendant to read the presentence report, except for the recommendation as to sentence. However, the court may decline to let the defendant read the report if it contains (a) diagnostic opinion that might seriously disrupt a rehabilitation program, (b) sources of information obtained upon a promise of confidentiality, or (c) any other information that, if disclosed, might result in harm to the defendant or other persons. The court must give the defenant an opportunity to comment upon the presentence report. If the court decides that the defendant should not see the report, then it must provide the defendant, orally or in writing, a summary of the factual information in the report upon which it is relying in determining sentence. No party may keep the report or make copies of it.

B. Committee Action

The Committee added language to subdivision (a)(1) to provide that the attorney for the government may speak to the court at the time of sentencing. The language does not require that the attorney for the government speak but permits him to do so if he wishes.

The Committee recast the language of subdivision (c)(1), which defines when presentence reports must be obtained. The Committee's provision makes it more difficult to dispense with a presentence report. It requires that a presentence report be made unless (a) the defendant waives it, or (b) the court finds that the record contains sufficient information to enable the meaningful exercise of sentencing dis-

[18] See the remarks of Senior United States Circuit Judge J. Edward Lumbard in Hearings IL, at 207.

cretion and explains this finding on the record. The Committee believes that presentence reports are important aids to sentencing and should not be dispensed with easily.

The Committee added language to subdivision (c) (3) (A) that permits a defendant to offer testimony or information to rebut alleged factual inaccuracies in the presentence report. Since the presentence report is to be used by the court in imposing sentence and since the consequence of any significant inaccuracy can be very serious to the defendant, the Committee believes that it is essential that the presentence report be completely accurate in every material respect. The Committee's addition to subdivision (c) (3) (A) will help insure the accuracy of the presentence report.

The Committee added language to subdivision (c) (3) (D) that gives the court the discretion to permit either the prosecutor or the defense counsel to retain a copy of the presentence report. There may be situations when it would be appropriate for either or both of the parties to retain the presentence report. The Committee believes that the rule should give the court the discretion in such situations to permit the parties to retain their copies.

Rule 43

A. Amendments Proposed by the Supreme Court

Rule 43 of the Federal Rules of Criminal Procedure deals with the presence of the defendant during the proceedings against him. It presently permits a defendant to be tried in absentia only in noncapital cases where the defendant has voluntarily absented himself after the trial has begun.

The Supreme Court amendments provide that a defendant has waived his right to be present at the trial of a capital or noncapital case in two circumstances: (1) when he voluntarily absents himself after the trial has begun; and (2) where he "engages in conduct which is such as to justify his being excluded from the courtroom."

B. Committee Action

The Committee added language to subdivision (b) (2), which deals with excluding a disruptive defendant from the courtroom. The Advisory Committee Note indicates that the rule proposed by the Supreme Court was drafted to reflect the decision in *Illinois* v. *Allen*, 397 U.S. 337 (1970). The Committee found that subdivision (b) (2) as proposed did not fully track the *Allen* decision. Consequently, language was added to that subsection to require the court to warn a disruptive defendant before excluding him from the courtroom.

Oversight

The Committee on the Judiciary has oversight responsibility for the operations of the Department of Justice. The Attorney General publishes an Annual Report outlining the activities of that Department for the preceding calendar year.

The Criminal Justice Subcommittee held oversight hearings on the activities of the Criminal Division of the Justice Department on April 14, 1975.

New Budget Authority

This bill creates no new budget authority.

Statement of the Budget Committee

No statement on this bill has been received from the House Committee on the Budget.

Statement of the Committee on Government Operations

No statement on this bill has been received from the House Committee on Government Operations.

Inflation Impact Statement

This Federal Rules of Criminal Procedure Amendments Act will have no foreseeable inflationary impact on prices or costs in the operation of the national economy.

Committee Vote

This bill was reported out of Committee on May 20, 1975, by voice vote. Thirty-one Members of the Committee were present.

Comparison of the Rules as Amended by the Court and the Changes Proposed by H.R. 6799, as Reported

Changes in existing rules made by the bill, as reported, are shown as follows (existing part of rule, as amended by the Court, proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing part of rule, as amended by the Court, in which no change is proposed is shown in roman):

* * * * * * *

Rule 4. Arrest warrant or summons upon complaint.

(a) Issuance 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 appear 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.]

(*b*) *Issuance of an Arrest Warrant.*—

(*1*) *An arrest warrant shall issue whenever a defendant fails to appear in response to a summons.*

(2) Upon good cause presented, the magistrate shall issue an arrest warrant in lieu of a summons.

(3) A summons having issued, the magistrate, upon good cause presented, shall issue an arrest warrant. A magistrate either in the district in which the summons was issued or in the district in which the defendant is found may issue a warrant under this paragraph.'

(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] *and* by mailing [it] *a copy of the summons* 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.

(f) SUPPRESSION OF EVIDENCE.—A determination that an arrest warrant shall issue after a summons or 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. 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 court, upon good cause presented by the attorney for the government, shall order that a warrant shall issue in lieu of a summons.* 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. *A determination that a warrant shall issue after a summons or 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 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]

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

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; 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 [.]*; and*

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for prejury or false statement.

(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 dimissal 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] *parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera,* 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 *a* plea *agreement.*—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 *a* plea *agreement.*—If the court rejects the plea agreement, the court shall, *on the record,* inform the parties of this fact,

advise the defendant personally in open court *or, on a showing of good cause, in camera,* 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.]

(6) Inadmissibility of Pleas, Offers of Pleas, and Related Statements.—Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty to the crime charged or any other crime, or of statements made in connection with, and relevant to, 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. However, evidence of such a plea, offer, or relevant statement is admissible in a criminal proceeding for perjury or false statement if made on the record by the defendant, under oath and in the presence of counsel.

(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 injuiry 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, *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.* 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] *continued* 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.]

(a) Notice by Defendant.—Upon written demand of the attorney for the government 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 attorney for the government a written notice of his intention to offer a defense of alibi. Such notice by the defendant shall state the specific places 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 attorney for the government 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) 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)] *(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 [(b) of this rule] *(a) or (b)*, the party shall promptly notify the other party or his attorney of the existence and identity of such additional witness.

[(e)] *(d)* 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)] *(e)* Exceptions.—For good cause shown, the court may grant an exception to any of the requirements of *subdivisions (a) through (d) of* this rule.

(f) Inadmissibility of withdrawn alibi.—Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with such intention, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.

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. *No statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused before the judge who or jury which determines the guilt of the accused, prior to the determination of guilt.*

(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] *exceptional* 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, *unless, after being warned by the court that disruptive conduct will cause him to be removed from the place of the taking of the deposition, he persists in conduct which is such as to justify his being excluded from that place.* 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] *expenses* of the taking of the deposition, the court may direct that the [expenses] *expense* of travel and subsistence of the defendant and his attorney for attendance at the examination *and the cost of the transcript of the deposition* 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 of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his deposition for the purpose of preventing the witness from attending or testifying.]

(g) UNAVAILABILITY.—*"Unavailability" as a witness includes situations in which the deponent: (1) persists in refusing to testify concerning the subject matter of his deposition despite an order of the judge to do so; or (2) testifies to a lack of memory of the subject matter of his deposition; or (3) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (4) 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 refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his deposition 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] *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.

(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, *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, *and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.*

(E) Government witnesses.—Upon request [of] *by* the defendant, *and subject to subdivision (d)(1), the attorney for* the government shall furnish to the defendant, *three days in advance of trial,* a written list of the names and addresses of all *the* government witnesses [which] *whom* the attorney for the government intends to call in the presentation of the case in chief, together with any record of prior [felony] *criminal* convictions of any such witness which is within the [knowledge of] *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. 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 mental impressions, conclusions, opinions, or legal theories of* the attorney for the government or other govenment 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] *section 3500 of title 18, United States Code.*

(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] *If the defendant requests disclosure under subdivision (a) (1) (C) or (D) of this rule, upon compliance with such request by* the government, the defendant, *on request of the government*, 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] *If the defendant requests disclosure under subdivision (a) (1) (C) or (D) of this rule, upon compliance with such request by the government, the defendant, on* 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] *If the defendant requests disclosure under subdivision (a) (1) (E), upon compliance with such request by* the government, the defendant [shall furnish the government a] *on request of the government, and subject to subdivision (d) (1), shall furnish to the attorney for the government, three days in advance of trial, a written* list of the names and addresses of [the witnesses he] *all of the witnesses the defendant* 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, memoranda, or other internal defense documents made by] *the mental impressions, conclusions, opinions, or legal theories of* 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 the government [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, *which is subject to discovery or inspection under this rule*, 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 *and modifying* 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, *including an order extending the three-day time limit of subdivision (a) (1) (E) or (b) (1) (C)*. Upon request by a party, the court [shall] *may* 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] *an ex parte* 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) (1) * * *

(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, *taking into account the convenience of the witnesses and the parties.*

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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 States 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 *for each district*, 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.

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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. *The attorney for the Government shall have an equivalent opportunity to speak to the court.*

(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], *with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding 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.

(2) Report.—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 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 *and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.*

(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, *unless the court, in its discretion otherwise directs.* [Copies of the presentence investigation report shall not be made by the defendant, his counsel, or 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 Cor-

rection 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.]

(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists 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.

* * * * * * *

SEPARATE VIEWS OF MS. HOLTZMAN AND MR. DRINAN

The proposed Federal Rules of Criminal Procedure contain some very troublesome provisions. I am nonetheless supporting the enactment of the Rules because the alternative, if they are defeated, is much worse: the inferior original version proposed by the Judicial Conference and approved by the Supreme Court [1] will automatically go into effect on August 1, 1975.

A. Objections to Particular Rules

Some of the major flaws in the Committee bill are:

1. *Sanctioning secret, ex parte proceedings.* Secret, *ex parte* proceedings are subversive of the fundamental concepts of our judicial process. They undermine the adversary system; they smack of the Star Chamber.

Rule 16(d)(1) substantially changes the well-established rule respecting motions to prevent disclosure of certain evidence before the trial begins (i.e., protective orders). The proposed rule sanctions the routine availability of secret, *ex parte* hearings in such cases by:

(*a*) permitting a party to seek a protective order without notifying the other party;

(*b*) allowing the judge to decide the request in secret—without allowing the opposing party to be present or be heard;

(*c*) foreclosing the effective right of appeal from such an *ex parte* order since the opposing party may never learn of its existence.

There is no justification for permitting a proceeding to take place without notice to the opposing party, and without allowing him to protect his rights before the trial judge and on appeal.[2]

The argument advanced for secrecy is baseless. It is claimed that notifying or permitting the presence of the opposing party or his counsel will reveal the material to be protected. This is incorrect. Protective order motions are made routinely in virtually every court of this country regarding husband-wife privilege, doctor-patient privilege, and the like. Such motions are made and decided without disclosing the confidential material.

After Watergate, we ought not to make judicial secrecy and one-sided hearings routine in our federal courts—particularly in a criminal trial where loss of liberty is at stake.

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[1] The Supreme Court's imprimatur is misleading. See dissent of Justice Douglas to adoption of the Rules, *Proposed Amendments to the Federal Rules of Ciriminal Procedure*, H. Doc. 93–292 (1974) at 22.

[2] The original proposal by the Judicial Conference was highly suspect, since it *mandated* secrecy. (The Committee wisely returned the discretionary language to the rule.) If the original amendment had been in effect during the Ellsberg trial, Judge Byrne would never have been able to disclose the government's phony claim of national security in connection with its illegal wiretaps.

2. *Unfairly limiting the defendant's right to discover his own oral statements.* The proposed rules generally opt for further disclosure than is now permitted of each party's case before the trial begins. Thus, under proposed Rule 16(a)(1)(A), a defendant is permitted to obtain before trial (i.e., "discover") all of his written statements which the government possesses. With respect to his oral statements, however, he is permitted to obtain those statements which the government intends to use at trial *only* if they were made to known government agents. There is no justification for this limitation: the defendant should be able to obtain any statement he made *if the government intends to use it at trial.*

The proponents of this provision argue that disclosure of oral statements could create dangers by revealing the identity of an informer or undercover agent. This argument is spurious, since the government intends to reveal the statement (and, thus, the identity) at trial. If there is a legitimate need to conceal the identity of an informer until the trial begins, the government can obtain a protective order.

3. *Mandating discovery of a defendant's alibi witnesses.* Under our system of criminal justice, the government has the burden of proof. It is required to prove its case without any help from the defendant. The defendant is entitled to stand mute—he is entitled not to incriminate himself.

The Committee recognized this concept by amending the proposed general discovery provisions (Rule 16). Under the Committee bill, a defendant does not have to disclose the names of his witnesses unless he requests and receives the names of the government's witnesses. If he makes no request, no request can be made of him. He is permitted therefore to remain silent.

The Committee, however, failed to adopt this principle in dealing with alibi discovery (Rule 12.1). As a result, the government may require the defendant to disclose before trial his alibi (if any) *and* any witness he intends to present who will confirm his alibi.

I do not object to the government's learning the defendant's alibi before trial; but I do think it improper to mandate disclosure of his witnesses. Furthermore, the rule may unconstitutionally interfere with a defendant's right to present witnesses in his own behalf, since it prohibits him from presenting any undisclosed alibi witnesses (Rule 12.1(d)).

4. *Limiting a defendant's right to see his presentence report.* Sentencing is a critical proceeding. The result may be harmful—both to a defendant and society—if the decision is based on unchallenged and unchallengeable misstatements by secret informers.

The presentence report, prepared by probation officers, is an essential tool for the sentencing judge. Under proposed Rule 32(c)(3)(A), however, a defendant is prevented from seeing that presentence report if it contains sources of information obtained upon a promise of confidentiality. This may virtually nullify the defendant's right to see the report and contest misstatements, since material in presentence reports may be routinely obtained upon a promise of confidentiality. This provision should be deleted. (The judge already has ample power to protect the identity of informants in cases of possible harm.)

5. *Encouraging trial by deposition.* The right to confront one's accusers and the jury's ability to evaluate the credibility and demeanor of a witness are important values to be protected in a criminal trial. The proposed Rule 15, respecting depositions, goes far to undermine those values and to create the danger of "trial by deposition".

The proposed rule broadens (1) the circumstances under which depositions may be taken (Rule 15(a)) and (2) the conditions under which they may be used at trial as substantive evidence (Rule 15(g)). It is substantially worse than the present rule.

6. *Penalizing a guilty plea by prosecution for perjury.* The purpose of Rule 11(e)(6) is to facilitate the plea bargaining process and thus allow criminal cases to be concluded without going to trial. The proposed rule makes inadmissible in any trial evidence that the defendant had pleaded guilty and later withdrew that plea—with one exception. The exception is that such evidence may be admitted in a subsequent proceeding for perjury against a defendant.

While I have grave reservations about the desirability of plea bargaining, if bargaining is permitted then the defendant should not be penalized for participating in the process. Proposed Rule 11(e)(6) is unfair. It can lead to the anomaly of having an innocent defendant convicted for claiming he was guilty. Under this rule, a defendant subjects himself to perjury if he pleads guilty and then the plea is not accepted. Thus, for example, if a defendant pleaded guilty, and that guilty plea were overturned by an appellate court on the grounds that it was coerced, the government could then prosecute the defendant for perjury on the ground that he said he was guilty. Similarly, if the defendant and the prosecutor reach an agreement about a plea, and the trial judge rejects that plea bargain agreement, the prosecution can then go after the defendant for perjury.

In my opinion, this rule will undermine—not facilitate—plea bargaining.

B. Committee Improvement

Despite a number of highly objectionable provisions, the proposed rules on the whole represent a substantial improvement over the rules presently in effect. This is mainly due to the work of the Subcommittee on Criminal Justice, chaired by Congressman Hungate.

The improvements in this bill include the following: expanding the defendant's pre-trial discovery rights without jeopardizing his right to stand silent (Rule 16(b)); expanding the warnings the court must give a defendant prior to accepting a guilty plea (Rule 11(c)); prohibiting the use, at trial, of a withdrawn alibi for impeachment purposes (Rule 12.1(f)); prohibiting the admission of statements made by a defendant to a court-appointed psychiatrist before the jury which determines guilt, until after guilt has been determined (Rule 12.2(c)); permitting a defendant (at the discretion of the court) to introduce testimony challenging the validity of information contained in a presentence report (Rule 32(c)(3)(A)); requiring the court to give a defendant adequate warning before removing him from the courtroom for disruptive conduct (Rule 43(b)(2)); requiring the government to pay the cost of a deposition and of the transcript of a deposition which is taken at the instance of the government or an indigent defendant

(Rule 15(c)); and narrowing the work product exception by conforming the definition of work product in criminal cases to that contained in the Federal Rules of Civil Procedure (Rules 16(a)(2) and 16(b)(2)).

C. Conclusion

There is no doubt that this bill, if enacted, will provide a substantially better set of rules of Criminal Procedure than the version proposed by the Judicial Conference. It is unfortunate, however, that we are presented with only those two options.

In my judgment, the statutory procedures for promulgating these rules—the Enabling Acts—ought to be revised. Otherwise, we will continue to get rules that have been fashioned by the Judicial Conference without adequate debate, discussion, or even after-the-fact explanation. The Supreme Court will continue to act as a rubber stamp. Congress will again be put in the position of having to take affirmative action to modify proposed rules or prevent them from going into effect.

What is at stake is not merely housekeeping rules for federal courts. Procedural rights, particularly in criminal cases, are an ultimate guarantee of a free society.

Elizabeth Holtzman.
Robert F. Drinan.

SUPPLEMENTAL VIEWS OF MESSRS. WIGGINS, HYDE, MANN, RUSSO, HUTCHINSON, McCLORY, RAILSBACK, DANIELSON, BUTLER, COHEN, MOORHEAD, ASHBROOK, KINDNESS, AND HUGHES

The Supreme Court of the United States, acting through the Judicial Conference, carries on a continuous evaluation of the effectiveness of the Federal Rules of Criminal Procedure pursuant to section 331 of Title 28 of the United States Code. The Supreme Court formulates amendments to the Rules which are communicated to Congress by the Chief Justice. Such amendments take effect in 90 days unless Congress acts to rescind, modify or delay them. 18 U.S.C. 3771, 3772.

The amendments we consider here were communicated on April 22, 1974. The 90 day effective date was delayed until August 1, 1975, by Public Law 93—361. An important reason for that delay was that the Attorney General of the United States, in a letter to the Judiciary Committee on June 17, 1974, stated that certain proposed changes to Rules 4, 9 and 16 were highly objectionable to the Department of Justice.

The Subcommittee on Criminal Justice and the full Judiciary Committee have carefully considered all of the Supreme Court amendments and have amended many of them. Those modifications are reflected in H.R. 6799 which, in large part, has our complete support.

However, we are constrained to strongly object to the amendments proposed in H.R. 6799 to Rules 4, 9(a) and the inclusion of Rule 16(a)(1)(E). We agree with 90 of the 94 United States Attorneys that these modified Rules will be "injurious to the administration of justice."

Rule 4

ARREST WARRANT OR SUMMONS UPON COMPLAINT

Rule 9

WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

The existing Rule 4 provides that, if a U.S. Magistrate determines that probable cause exists that a certain person committed a federal crime, the Magistrate shall issue a warrant for the person's arrest. Existing Rule 9 provides that, when a grand jury returns an indictment, or if an information supported by oath, states a certain person committed a federal crime, the court shall issue a wrrant for that defendant's arrest. In these cases, the United States Attorney has the discretion to request that a summons, instead of a warrant, be issued for the defendant.

The Supreme Court proposes that both Rules be changed so that, upon a finding of probable cause or after the return of an indictment or information, a summons for the appearance of the named defendant shall issue unless the United States Attorney can present "good cause" for the issuance of a warrant of arrest.

Neither the Committee nor the Supreme Court has come to grips with defining what factors, reasons, or standards should predicate an arrest rather than a summons, so that the words "good cause" have no defined meaning. Every United States Magistrate and district judge will be on his own to determine the meaning of "good cause."

However the judiciary copes with the problem of defining "good cause", the proposed amendments will increase the use of summonses in lieu of arrest warrants. This change of procedure will have the following undesirable results:

(1) The existing serious problem of fugitivity among individuals charged with federal felonies will be signficantly exacerbated. In the District of Columbia, 20 to 25 percent of the persons charged with felonies are fugitives. Furthermore, defendants, never before charged with crimes, may flee before the government can photograph and fingerprint them, which will make their apprehension extremely difficult. And further, there is no federal statute which prohibits flight to avoid prosecution for a federal crime. Defendants who flee after receiving a summons and remain fugitives for a sufficient period to make impossible the presentation of the case for which they were originally charged, can never be prosecuted. Under existing law and procedure, such defendants are prosecuted under the bail-jumping statute. 18 U.S.C. 3150. Defendants only served summonses are not arrested and so are not released on bail.

(2) Alerting defendants to the fact they are charged with federal crimes by mailing them a summons will afford them the opportunity to secrete and destroy evidence, to get rid of stolen property, and to dispose of firearms, narcotics or other incriminating evidence or contraband they might normally carry on their peson. Valid seaches incident to arrest, which are extremely helpful to law enforcement, will be sharply cut back.

(3) Federal law enforcement agents have the right to arrest, without a warrant, any person the agent has probable cause to believe has committed a federal crime. Because the changes in these Rules will make the agent's duties more difficult, more dangerous and less productive, it can be expected that they will by-pass warrant procedures and arrest without warrants. This is highly undesirable since now both the U.S. Magistrate and U.S. Attorney review the sufficiency of the agent's probable cause. Without this review, there will be more illegal arrests, more suppression of evidence and more criminal cases lost because of carelessness or error.

Finally, a word about the operation of the criminal justice system. These amendments will cause addresses to be ascertained, summons to be prepared, mailed or served or both; only to have to later prepare, issue, and serve arrest warrants for the same individuals. Magistrates, Assistant U.S. Attorneys, federal agents, witnesses, marshals, and others will be sitting around waiting for defendants who don't appear at the appointed times. If there ever was a time not to burden this

system with new paperwork, procedures, and delays, this is that time. We believe that point was clearly made when just six months ago, the Speedy Trial Act of 1974 was debated and enacted.

Rule 16

DISCOVERY AND INSPECTION

Under the existing Rules regarding pretrial discovery, a defendant in a criminal case does not have the right to know the names of the witnesses that the goverenment will call to testify against him until they take the witness stand.

The Supreme Court proposed that the defendant would have the right to the names and addresses of all witnesses the United States Attorney plans to call shortly after that defendant is indicted. The Department of Justice testified that, among other objections:

> 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 now are to threats, pressures, and physical harm.

The Committee has amended that proposal to provide that such names and addresses shall be given to the defendant "three days in advance of trial." While this modification makes subdivision (a)(1)(E) less onerous, it is still totally unacceptable in our opinion.

Those who support this Rule have apparently reached the remarkable conclusion that a defendant's right to expanded pretrial discovery is more important than the physical safety of witnesses to crimes.

In testimony before the Subcommittee a panel of United States Attorneys vigorously opposed the pretrial disclosure of witness lists on three basic grounds:

(1) They cited and documented hundreds of instances in virtually every judicial district in the United States where, under existing Rules, government witnesses are murdered, threatened or suborned to commit perjury.

(2) The prosecutors explained that many citizens are hesitant to come forward and report crime or testify at criminal trials because they fear retribution from the defendant. To identify them to criminal defendants before a trial will greatly enhance this climate of fear of reprisal. The U.S. Attorneys contend, and we agree, that to make this "fear of getting involved" worse, is not only unwise, it is unreasonable.

(3) Providing a defendant with a witness list, in addition to all of the other evidence he will receive pursuant to the new expanded right of discovery found in these proposals, will give him a reasonably clear understanding of the details of the government's case. A trial should be a search for truth and not a game. Unscrupulous defendants will use this information to shape their tactics and defenses to fit every configuration of the government's case. Unscrupulous defendants will forego certain defenses, gear their case to cultivating reasonable doubt, and will be generally safeguarded from tripping themselves up.

The Supreme Court recognizes the dangerousness of this Rule, but argues that, if the government believes a witness may be killed or

intimidated, it can take that witness' sworn disposition for use at trial. This is a hollow safeguard because, among other problems, depositions are taken only after notice. A defendant will have ample time to kill or intimidate the witness before the deposition can be taken. The Supreme Court also points out that, if the government fears for the safety of its witnesses, it can seek a protective order and if it is successful in obtaining it, not turn the names of witnesses over to the defendant. This provision will be unworkable in the great majority of cases because the government doesn't know until it is too late that a certain defendant was capable of murder or subornation of perjury.

Conclusion

For the reasons stated above, we, the undersigned, believe that the proposed amendments to Rules 4, 9(a) and 16, objected to in detail above, be rejected and that the existing Rules and Procedures be continued.

Charles E. Wiggins.
Henry J. Hyde.
James R. Mann.
Martin A. Russo.
Edward Hutchinson.
Robert McClory.
Tom Railsback.
George Danielson.
M. Caldwell Butler.
William S. Cohen.
Carlos J. Moorhead.
John M. Ashbrook.
Thomas N. Kindness.
William J. Hughes.

94TH CONGRESS } SENATE { REPORT
1st Session } { No. 94-336

FEDERAL RULES OF CRIMINAL PROCEDURE AMENDMENTS ACT OF 1975

JULY 28, 1975.—Ordered to be printed

Mr. MCCLELLAN, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 6799]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 6799) to approve certain of the proposed amendments to the Federal Rules of Criminal Procedure, to amend certain of them, and to make certain additional amendments to those Rules, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

That this Act may be cited as the "Federal Rules of Criminal Procedure Amendments Act of 1975".

SEC. 2. The amendments proposed by the United States Supreme Court to the Federal Rules of Criminal Procedure which are embraced in the order of that Court on April 22, 1974, are approved except as otherwise provided in this Act and shall take effect on December 1, 1975. Except with respect to the amendment to Rule 11, insofar as it adds Rule 11(e)(6), which shall take effect on August 1, 1975, the amendments made by section 3 of this Act shall also take effect on December 1, 1975.

SEC. 3. The Federal Rules of Criminal Procedure, as amended by the amendments that were proposed by the United States Supreme Court to the Federal Rules of Criminal Procedure which are embraced by the order of that Court on April 22, 1974, are further amended as follows:

(1) Rule 4 is amended by striking out subdivisions (a), (b), and (c), and inserting in lieu thereof the following:

"(a) ISSUANCE.—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, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

"(b) PROBABLE CAUSE.—The finding of probable cause may be based upon hearsay evidence in whole or in part.".

(2) Rule 4 is further amended by redesignating subdivision (d) as (c).

(3) Rule 4 is further amended by redesignating subdivision (e) as (d), and paragraph (3) of such subdivision is amended to read as follows:

"(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 and by mailing a copy of the summons to the defendant's last known address.".

(4) Rule 9(a) is amended to read as follows:

"(a) ISSUANCE.—Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment. The clerk shall issue a summons instead of a warrant upon the request of the attorney for the government or by direction of the court. Upon like request or direction he shall issue more than one warrant or summons for the same defendant. He shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue.".

(5) Rule 11(c) is amended to read as follows:

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

"(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

"(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

"(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; 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; and

"(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement."

(6) Rule 11(e)(1) is amended to read as follows:

"(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 do any of the following:

"(A) move for dismissal of other charges; or

"(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

"(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.".

(7) Rule 11(e)(2) is amended to read as follows:

"(2) NOTICE OF SUCH AGREEMENT.—If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.".

(8) Rule 11(e)(3) is amended to read as follows:

"(3) ACCEPTANCE OF A PLEA AGREEMENT.—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.".

(9) Rule 11(e)(4) is amended to read as follows:

"(4) REJECTION OF A PLEA AGREEMENT.—If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, 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.".

(10) Rule 11(e)(6) is amended to read as follows:

"(6) INADMISSIBILITY OF PLEAS, OFFERS OF PLEAS, AND RELATED STATEMENTS.—Except as otherwise provided in this paragraph, 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, and relevant to, 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. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel."

(11) Rule 12(e) is amended 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. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.".

(12) Rule 12(h) is amended to read as follows:

"(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 continued 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.".

(13) Rule 12.1 is amended to read as follows:

"RULE 12.1. NOTICE OF ALIBI

"(a) NOTICE BY DEFENDANT.—Upon written demand of the attorney for the government 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 attorney for the government 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 attorney for the government 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), 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 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.

"(e) EXCEPTIONS.—For good cause shown, the court may grant an exception to any of the requirements of subdivisions (a) through (d) of this rule.

"(f) INADMISSIBILITY OF WITHDRAWN ALIBI.—Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with such intention, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.".

(14) Rule 12.2(c) is amended to read as follows:

"(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. No statement made by the accused

in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.".

(15) Rule 15(a) is amended to read as follows:

"(a) WHEN TAKEN.—Whenever due to exceptional 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.".

(16) Rule 15(b) is amended to read as follows:

"(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, unless, after being warned by the court that disruptive conduct will cause him to be removed from the place of the taking of the deposition, he persists in conduct which is such as to justify his being excluded from that place. 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.".

(17) Rule 15(c) is amended to read as follows:

"(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 expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and his attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.".

(18) Rule 15(e) is amended by striking out "as defined in subdivision (g) of this rule" and inserting in lieu thereof the following: "as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence".

(19) Rule 15(g) is deleted and subdivision (h) is redesignated as (g).

(20) Rule 16(a)(1)(A) is amended to read as follows:

"(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 (1) 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 conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

(21) Rule 16(a)(1)(B) is amended to read as follows:

"(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 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.".

(22) Rule 16(a)(1)(D) is amended to read as follows:

"(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, or copies thereof, 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, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.".

(23) Rule 16(a)(1)(E) is deleted.

(24) Rule 16(b)(1)(A) is amended to read as follows:

"(A) DOCUMENTS AND TANGIBLE OBJECTS.—If the defendant requests disclosure under subdivision (a)(1) (C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, 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.".

(25) Rule 16(b)(1)(B) is amended to read as follows:

"(B) REPORTS OF EXAMINATIONS AND TESTS.—If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, 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.".

(26) Rule 16(b)(1)(C) is deleted.

(27) Rule 16(c) is amended to read as follows:

"(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, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.".

(28) Rule 16(d)(1) is amended to read as follows:

"(1) PROTECTIVE AND MODIFYING 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 motion by a party, the court may 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 an ex parte 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.".

(29) Rule 17(f)(2) is amended to read as follows:

"(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, taking into account the convenience of the witness and the parties.".

(30) Rule 20(d) is amended to read as follows:

"(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 for each district, 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.".

(31) Rule 32(a)(1) is amended to read as follows:

"(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. The attorney for the government shall have an equivalent opportunity to speak to the court.".

(32) Rule 32(c)(1) is amended to read as follows:

"(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, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding 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.".

(33) Rule 32(c)(3)(A) is amended to read as follows:

"(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, but not to the extent that 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 and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.".

(34) Rule 32(c)(3)(D) is amended to read as follows:

"(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, unless the court, in its discretion otherwise directs.".

(35) Rule 43(b)(2) is amended to read as follows:

"(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.".

And the Senate agree to the same.

JOHN L. MCCLELLAN,
PHILIP A. HART,
JAMES ABOUREZK,
ROMAN L. HRUSKA,
HUGH SCOTT,
Managers on the Part of the Senate.

JAMES R. MANN,
RAY THORNTON,
MARTIN A. RUSSO,
CHARLES E. WIGGINS,
HENRY J. HYDE,
Managers on the Part of the House.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 6799) to approve certain of the proposed amendments to the Federal Rules of Criminal Procedure, to amend certain of them, and to make certain additional amendments to those Rules, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House and Senate conferees met twice to resolve the differences between the House and Senate versions of H.R. 6799. As a result of these meetings, the Managers on the part of the House and the Managers on the part of the Senate have resolved all differences between the two versions of H.R. 6799.

The conferees agreed to several technical, perfecting and nonsubstantive changes made by the Senate amendment. In addition, the Conferees made a few technical and nonsubstantive changes in the Senate amendment. The Conference, besides adopting these technical, perfecting and nonsubstantive changes, adopted the following provisions:

Rule 4(e)(3)

Rule 4(e)(3) deals with the manner in which warrants and summonses may be served. The House version provides two methods for serving a summons: (1) personal service upon the defendant, or (2) service by leaving it with someone of suitable age at the defendant's dwelling *and* by mailing it to the defendant's last known address. The Senate version provides three methods: (1) personal service, (2) service by leaving it with someone of suitable age at the defendant's dwelling, or (3) service by mailing it to defendant's last known address.

The Conference adopts the House provision.

Rule 11(c)

Rule 11(c) enumerates certain things that a judge must tell a defendant before the judge can accept that defendant's plea of guilty or nolo contendere. The House version expands upon the list originally proposed by the Supreme Court. The Senate version adopts the Supreme Court's proposal.

The Conference adopts the House provision.

Rule 11(e)(1)

Rule 11(e)(1) outlines some general considerations concerning the plea agreement procedure. The Senate version makes nonsubstantive change in the House version.

The Conference adopts the Senate provision.

Rule 11(e)(6)

Rule 11(e)(6) deals with the use of statements made in connection with plea agreements. The House version permits a limited use of pleas of guilty, later withdrawn, or nolo contendere, offers of such pleas, and statements made in connection with such pleas or offers. Such evidence can be used in a perjury or false statement prosecution if the plea, offer, or related statement was made under oath, on the record, and in the presence of counsel. The Senate version permits evidence of voluntary and reliable statements made in court on the record to be used for the purpose of impeaching the credibility of the declarant or in a perjury or false statement prosecution.

The Conference adopts the House version with changes. The Conference agrees that neither a plea nor the offer of a plea ought to be admissible for any purpose. The Conference-adopted provision, therefore, like the Senate provision, permits only the use of statements made in connection with a plea of guilty, later withdrawn, or a plea of nolo contendere, or in connection with an offer of a guilty or nolo contendere plea.

Rule 12.2(c)

Rule 12.2(c) deals with court-ordered psychiatric examinations. The House version provides that no statement made by a defendant during a court-ordered psychiatric examination could be admitted in evidence against the defendant before the trier of fact that determines the issue of guilt, prior to the determination of guilt. The Senate version deletes this provision.

The Conference adopts a modified House provision and restores to the bill the language of H.R. 6799 as it was originally introduced. The Conference-adopted language provides that no statement made by the defendant during a psychiatric examination provided for by the rule shall be admitted against him on the issue of guilt in any criminal proceeding.

The Conference believes that the provision in H.R. 6799 as originally introduced in the House adequately protects the defendant's fifth amendment right against self-incrimination. The rule does not preclude use of statements made by a defendant during a court-ordered psychiatric examination. The statements may be relevant to the issue of defendant's sanity and admissable on that issue. However, a limiting instruction would not satisfy the rule if a statement is so prejudicial that a limiting instruction would be ineffective. Cf. practice under 18 U.S.C. 4244.

Rule 15(g)

Rule 15 deals with the taking of depositions and the use of depositions at trial. Rule 15(e) permits a deposition to be used if the witness is unavailable. Rule 15(g) defines that term.

The Supreme Court's proposal defines five circumstances in which the witness will be considered unavailable. The House version of the bill deletes a provision that said a witness is unavailable if he is exempted at trial, on the ground of privilege, from testifying about the subject-matter of his deposition. The Senate version of the bill, by cross reference to the Federal Rules of Evidence, restores the Supreme Court proposal.

The Conference adopts the Senate provision.

Rule 16

Rule 16 deals with pretrial discovery by the defendant and the government. The House and Senate versions of the bill differ on Rule 16 in several respects.

A. *Reciprocal vs. Independent Discovery for the Government.*—The House version of the bill provides that the government's discovery is reciprocal. If the defendant requests and receives certain items from the government, then the government is entitled to get similar items from the defendant. The Senate version of the bill gives the government an independent right to discover material in the possession of the defendant.

The Conference adopts the House provisions.

B. *Rule 16(a)(1)(A).*—The House version permits an organization to discover relevant recorded grand jury testimony of any witness who was, at the time of the acts charged or of the grand jury proceedings, so situated as an officer or employee as to have been able legally to bind it in respect to the activities involved in the charges. The Senate version limits discovery of this material to testimony of a witness who was, at the time of the grand jury proceeding, 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.

The Conferees share a concern that during investigations, ex-employees and ex-officers of potential corporate defendants are a critical source of information regarding activities of their former corporate employers. It is not unusual that, at the time of their testimony or interview, these persons may have interests which are substantially adverse to or divergent from the putative corporate defendant. It is also not unusual that such individuals, though no longer sharing a community of interest with the corporation, may nevertheless be subject to pressure from their former employers. Such pressure may derive from the fact that the ex-employees or ex-officers have remained in the same industry or a related industry, are employed by competitors, suppliers, or customers of their former employers, or have pension or other deferred compensation arrangements with former employers.

The Conferees also recognize that considerations of fairness require that a defendant corporation or other legal entity be entitled to the grand jury testimony of a former officer or employee if that person was personally involved in the conduct constituting the offense and was able legally to bind the defendant in respect to the conduct in which he was involved.

The Conferees decided that, on balance, a defendant organization should not be entitled to the relevant grand jury testimony of a former officer or employee in every instance. However, a defendant organization should be entitled to it if the former officer or employee was personally involved in the alleged conduct constituting the offense and was so situated as to have been able legally to bind the defendant in respect to the alleged conduct. The Conferees note that, even in those situations where the rule provides for disclosure of the testimony, the Government may, upon a sufficient showing, obtain a protective or modifying order pursuant to Rule 16(d)(1).

The Conference adopts a provision that permits a defendant organization to discover relevant grand jury testimony of a witness who (1) 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 conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

C. *Rules 16 (a)(1)(E) and (b)(1)(C) (witness lists).*—The House version of the bill provides that each party, the government and the defendant, may discover the names and addresses of the other party's witnesses 3 days before trial. The Senate version of the bill eliminates these provisions, thereby making the names and addresses of a party's witnesses nondiscoverable. The Senate version also makes a conforming change in Rule 16(d)(1). The Conference adopts the Senate version.

A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.

D. *Rules 16 (a)(2) and (b)(2).*—Rules 16 (a)(2) and (b)(2) define certain types of materials ("work product") not to be discoverable. The House version defines work product to be "the mental impressions, conclusions, opinions, or legal theories of the attorney for the government or other government agents." This is parallel to the definition in the Federal Rules of Civil Procedure. The Senate version returns to the Supreme Court's language and defines work product to be "reports, memoranda, or other internal government documents." This is the language of the present rule.

The Conference adopts the Senate provision.

The Conferees note that a party may not avoid a legitimate discovery request merely because something is labelled "report", "memorandum", or "internal document". For example if a document qualifies as a statement of the defendant within the meaning of Rule 16(a)(1)(A), then the labelling of that document as "report", "memorandum", or "internal government document" will not shield that statement from discovery. Likewise, if the results of an experiment qualify as the results of a scientific test within the meaning of Rule 16(b)(1)(B), then the results of that experiment are not shielded from discovery even if they are labelled "report", "memorandum", or "internal defense document".

Effective Date

The House version provides that the effective date of the proposed amendments, together with the further amendments made by this Act, is August 1, 1975. The Senate version provides that such effective date shall be December 1, 1975.

The Conference adopts the Senate provision with a change.

The Conferees intend that the amendments proposed by the Supreme Court, together with the amendments made by this Act, shall, except as to Rule 11(e)(6), take effect on December 1, 1975.

Section 2 of the Act as proposed by the Conferees further delays the effective date of the rules changes proposed by the Supreme Court, which had been delayed to August 1, 1975, by Public Law 93-361. Until December 1, 1975, he rules presently in force shall apply. It is provided that Rule 11(e)(6) shall take effect on August 1, 1975.

John L. McClellan,
Philip A. Hart,
James Abourezk,
Roman L. Hruska,
Hugh Scott,
Managers on the Part of the Senate.

James R. Mann,
Ray Thornton,
Martin A. Russo,
Charles E. Wiggins,
Henry J. Hyde,
Managers on he Part of the House.

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94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 94-414

FEDERAL RULES OF CRIMINAL PROCEDURE AMENDMENTS ACT OF 1975

JULY 28, 1975.—Ordered to be printed

Mr. Mann, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 6799]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 6799) to approve certain of the proposed amendments to the Federal Rules of Criminal Procedure, to amend certain of them, and to make certain additional amendments to those Rules, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

That this Act may be cited as the "Federal Rules of Criminal Procedure Amendments Act of 1975".

SEC. 2. The amendments proposed by the United States Supreme Court to the Federal Rules of Criminal Procedure which are embraced in the order of that Court on April 22, 1974, are approved except as otherwise provided in this Act and shall take effect on December 1, 1975. Except with respect to the amendment to Rule 11, insofar as it adds Rule 11(e)(6), which shall take effect on August 1, 1975, the amendments made by section 3 of this Act shall also take effect on December 1, 1975.

SEC. 3. The Federal Rules of Criminal Procedure, as amended by the amendments that were proposed by the United States Supreme Court to the Federal Rules of Criminal Procedure which are embraced by the order of that Court on April 22, 1974, are further amended as follows:

(1) Rule 4 is amended by striking out subdivisions (a), (b), and (c), and inserting in lieu thereof the following:

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"(a) ISSUANCE.—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, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

"(b) PROBABLE CAUSE.—The finding of probable cause may be based upon hearsay evidence in whole or in part.".

(2) Rule 4 is further amended by redesignating subdivision (d) as (c).

(3) Rule 4 is further amended by redesignating subdivision (e) as (d), and paragraph (3) of such subdivision is amended to read as follows:

"(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 and by mailing a copy of the summons to the defendant's last known address.".

(4) Rule 9(a) is amended to read as follows:

"(a) ISSUANCE.—Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment. The clerk shall issue a summons instead of a warrant upon the request of the attorney for the government or by direction of the court. Upon like request or direction he shall issue more than one warrant or summons for the same defendant. He shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue.".

(5) Rule 11(c) is amended to read as follows:

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

"(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

"(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

"(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; 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; and

"(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement."

(6) Rule 11(e)(1) is amended to read as follows:

"(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 do any of the following:

"(A) move for dismissal of other charges; or

"(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

"(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.".

(7) Rule 11(e)(2) is amended to read as follows:

"(2) NOTICE OF SUCH AGREEMENT.—If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.".

(8) Rule 11(e)(3) is amended to read as follows:

"(3) ACCEPTANCE OF A PLEA AGREEMENT.—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.".

(9) Rule 11(e)(4) is amended to read as follows:

"(4) REJECTION OF A PLEA AGREEMENT.—If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, 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.".

(10) Rule 11(e)(6) is amended to read as follows:

"(6) INADMISSIBILITY OF PLEAS, OFFERS OF PLEAS, AND RELATED STATEMENTS.—Except as otherwise provided in this paragraph, 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, and relevant to, 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. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel."

(11) Rule 12(e) is amended 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. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.".

(12) Rule 12(h) is amended to read as follows:

"(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 continued 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.".

(13) Rule 12.1 is amended to read as follows:

"RULE 12.1. NOTICE OF ALIBI

"(a) NOTICE BY DEFENDANT.—Upon written demand of the attorney for the government 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 attorney for the government 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 attorney for the government 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), 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 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.

"(e) EXCEPTIONS.—For good cause shown, the court may grant an exception to any of the requirements of subdivisions (a) through (d) of this rule.

"(f) INADMISSIBILITY OF WITHDRAWN ALIBI.—Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with such intention, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.".

(14) Rule 12.2(c) is amended to read as follows:

"(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. No statement made by the accused

in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.".

(15) Rule 15(a) is amended to read as follows:

"(a) WHEN TAKEN.—Whenever due to exceptional 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.".

(16) Rule 15(b) is amended to read as follows:

"(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, unless, after being warned by the court that disruptive conduct will cause him to be removed from the place of the taking of the deposition, he persists in conduct which is such as to justify his being excluded from that place. 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.".

(17) Rule 15(c) is amended to read as follows:

"(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 expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and his attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.".

(18) Rule 15(e) is amended by striking out "as defined in subdivision (g) of this rule" and inserting in lieu thereof the following: "as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence".

(19) Rule 15(g) is deleted and subdivision (h) is redesignated as (g).

(20) Rule 16(a)(1)(A) is amended to read as follows:

> *"(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 (1) 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 conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

(21) Rule 16(a)(1)(B) is amended to read as follows:

"(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 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.".

(22) Rule 16(a)(1)(D) is amended to read as follows:

"(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, or copies thereof, 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, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.".

(23) Rule 16(a)(1)(E) is deleted.

(24) Rule 16(b)(1)(A) is amended to read as follows:

"(A) DOCUMENTS AND TANGIBLE OBJECTS.—If the defendant requests disclosure under subdivision (a)(1) (C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, 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.".

(25) Rule 16(b)(1)(B) is amended to read as follows:

"(B) REPORTS OF EXAMINATIONS AND TESTS.—If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, 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.".

(26) Rule 16(b)(1)(C) is deleted.

(27) Rule 16(c) is amended to read as follows:

"(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, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.".

(28) Rule 16(d)(1) is amended to read as follows:

"(1) PROTECTIVE AND MODIFYING 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 motion by a party, the court may 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 an ex parte 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.".

(29) Rule 17(f)(2) is amended to read as follows:

"(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, taking into account the convenience of the witness and the parties.".

(30) Rule 20(d) is amended to read as follows:

"(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 for each district, 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.".

(31) Rule 32(a)(1) is amended to read as follows:

"(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. The attorney for the government shall have an equivalent opportunity to speak to the court.".

(32) Rule 32(c)(1) is amended to read as follows:

"(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, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding 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.".

(33) Rule 32(c)(3)(A) is amended to read as follows:

"(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, but not to the extent that 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 and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.".

(34) Rule 32(c)(3)(D) is amended to read as follows:

"(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, unless the court, in its discretion otherwise directs.".

(35) Rule 43(b)(2) is amended to read as follows:

"(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.".

And the Senate agree to the same.

JAMES R. MANN,
RAY THORNTON,
MARTIN A. RUSSO,
CHARLES E. WIGGINS,
HENRY J. HYDE,
Managers on the Part of the House.

JOHN L. MCCLELLAN,
PHILIP A. HART,
JAMES ABOUREZK,
ROMAN L. HRUSKA,
HUGH SCOTT,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 6799) to approve certain of the proposed amendments to the Federal Rules of Criminal Procedure, to amend certain of them, and to make certain additional amendments to those Rules, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House and Senate conferees met twice to resolve the differences between the House and Senate versions of H.R. 6799. As a result of these meetings, the Managers on the part of the House and the Managers on the part of the Senate have resolved all differences between the two versions of H.R. 6799.

The conferees agreed to several technical, perfecting and nonsubstantive changes made by the Senate amendment. In addition, the Conferees made a few technical and nonsubstantive changes in the Senate amendment. The Conference, besides adopting these technical, perfecting and nonsubstantive changes, adopted the following provisions:

Rule 4(e)(3)

Rule 4(e)(3) deals with the manner in which warrants and summonses may be served. The House version provides two methods for serving a summons: (1) personal service upon the defendant, or (2) service by leaving it with someone of suitable age at the defendant's dwelling *and* by mailing it to the defendant's last known address. The Senate version provides three methods: (1) personal service, (2) service by leaving it with someone of suitable age at the defendant's dwelling, or (3) service by mailing it to defendant's last known address.

The Conference adopts the House provision.

Rule 11(c)

Rule 11(c) enumerates certain things that a judge must tell a defendant before the judge can accept that defendant's plea of guilty or nolo contendere. The House version expands upon the list originally proposed by the Supreme Court. The Senate version adopts the Supreme Court's proposal.

The Conference adopts the House provision.

Rule 11(e)(1)

Rule 11(e)(1) outlines some general considerations concerning the plea agreement procedure. The Senate version makes nonsubstantive change in the House version.

The Conference adopts the Senate provision.

Rule 11(e)(6)

Rule 11(e)(6) deals with the use of statements made in connection with plea agreements. The House version permits a limited use of pleas of guilty, later withdrawn, or nolo contendere, offers of such pleas, and statements made in connection with such pleas or offers. Such evidence can be used in a perjury or false statement prosecution if the plea, offer, or related statement was made under oath, on the record, and in the presence of counsel. The Senate version permits evidence of voluntary and reliable statements made in court on the record to be used for the purpose of impeaching the credibility of the declarant or in a perjury or false statement prosecution.

The Conference adopts the House version with changes. The Conference agrees that neither a plea nor the offer of a plea ought to be admissible for any purpose. The Conference-adopted provision, therefore, like the Senate provision, permits only the use of statements made in connection with a plea of guilty, later withdrawn, or a plea of nolo contendere, or in connection with an offer of a guilty or nolo contendere plea.

Rule 12.2(c)

Rule 12.2(c) deals with court-ordered psychiatric examinations. The House version provides that no statement made by a defendant during a court-ordered psychiatric examination could be admitted in evidence against the defendant before the trier of fact that determines the issue of guilt, prior to the determination of guilt. The Senate version deletes this provision.

The Conference adopts a modified House provision and restores to the bill the language of H.R. 6799 as it was originally introduced. The Conference-adopted language provides that no statement made by the defendant during a psychiatric examination provided for by the rule shall be admitted against him on the issue of guilt in any criminal proceeding.

The Conference believes that the provision in H.R. 6799 as originally introduced in the House adequately protects the defendant's fifth amendment right against self-incrimination. The rule does not preclude use of statements made by a defendant during a court-ordered psychiatric examination. The statements may be relevant to the issue of defendant's sanity and admissable on that issue. However, a limiting instruction would not satisfy the rule if a statement is so prejudicial that a limiting instruction would be ineffective. Cf. practice under 18 U.S.C. 4244.

Rule 15(g)

Rule 15 deals with the taking of depositions and the use of depositions at trial. Rule 15(e) permits a deposition to be used if the witness is unavailable. Rule 15(g) defines that term.

The Supreme Court's proposal defines five circumstances in which the witness will be considered unavailable. The House version of the bill deletes a provision that said a witness is unavailable if he is exempted at trial, on the ground of privilege, from testifying about the subject-matter of his deposition. The Senate version of the bill, by cross reference to the Federal Rules of Evidence, restores the Supreme Court proposal.

The Conference adopts the Senate provision.

Rule 16

Rule 16 deals with pretrial discovery by the defendant and the government. The House and Senate versions of the bill differ on Rule 16 in several respects.

A. *Reciprocal vs. Independent Discovery for the Government.*—The House version of the bill provides that the government's discovery is reciprocal. If the defendant requests and receives certain items from the government, then the government is entitled to get similar items from the defendant. The Senate version of the bill gives the government an independent right to discover material in the possession of the defendant.

The Conference adopts the House provisions.

B. *Rule 16(a)(1)(A).*—The House version permits an organization to discover relevant recorded grand jury testimony of any witness who was, at the time of the acts charged or of the grand jury proceedings, so situated as an officer or employee as to have been able legally to bind it in respect to the activities involved in the charges. The Senate version limits discovery of this material to testimony of a witness who was, at the time of the grand jury proceeding, 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.

The Conferees share a concern that during investigations, ex-employees and ex-officers of potential corporate defendants are a critical source of information regarding activities of their former corporate employers. It is not unusual that, at the time of their testimony or interview, these persons may have interests which are substantially adverse to or divergent from the putative corporate defendant. It is also not unusual that such individuals, though no longer sharing a community of interest with the corporation, may nevertheless be subject to pressure from their former employers. Such pressure may derive from the fact that the ex-employees or ex-officers have remained in the same industry or a related industry, are employed by competitors, suppliers, or customers of their former employers, or have pension or other deferred compensation arrangements with former employers.

The Conferees also recognize that considerations of fairness require that a defendant corporation or other legal entity be entitled to the grand jury testimony of a former officer or employee if that person was personally involved in the conduct constituting the offense and was able legally to bind the defendant in respect to the conduct in which he was involved.

The Conferees decided that, on balance, a defendant organization should not be entitled to the relevant grand jury testimony of a former officer or employee in every instance. However, a defendant organization should be entitled to it if the former officer or employee was personally involved in the alleged conduct constituting the offense and was so situated as to have been able legally to bind the defendant in respect to the alleged conduct. The Conferees note that, even in those situations where the rule provides for disclosure of the testimony, the Government may, upon a sufficient showing, obtain a protective or modifying order pursuant to Rule 16(d)(1).

The Conference adopts a provision that permits a defendant organization to discover relevant grand jury testimony of a witness who (1) 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 conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

C. *Rules 16 (a)(1)(E) and (b)(1)(C) (witness lists).*—The House version of the bill provides that each party, the government and the defendant, may discover the names and addresses of the other party's witnesses 3 days before trial. The Senate version of the bill eliminates these provisions, thereby making the names and addresses of a party's witnesses nondiscoverable. The Senate version also makes a conforming change in Rule 16(d)(1). The Conference adopts the Senate version.

A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.

D. *Rules 16 (a)(2) and (b)(2).*—Rules 16 (a)(2) and (b)(2) define certain types of materials ("work product") not to be discoverable. The House version defines work product to be "the mental impressions, conclusions, opinions, or legal theories of the attorney for the government or other government agents." This is parallel to the definition in the Federal Rules of Civil Procedure. The Senate version returns to the Supreme Court's language and defines work product to be "reports, memoranda, or other internal government documents." This is the language of the present rule.

The Conference adopts the Senate provision.

The Conferees note that a party may not avoid a legitimate discovery request merely because something is labelled "report", "memorandum", or "internal document". For example if a document qualifies as a statement of the defendant within the meaning of Rule 16(a)(1)(A), then the labelling of that document as "report", "memorandum", or "internal government document" will not shield that statement from discovery. Likewise, if the results of an experiment qualify as the results of a scientific test within the meaning of Rule 16(b)(1)(B), then the results of that experiment are not shielded from discovery even if they are labelled "report", "memorandum", or "internal defense document".

Effective Date

The House version provides that the effective date of the proposed amendments, together with the further amendments made by this Act, is August 1, 1975. The Senate version provides that such effective date shall be December 1, 1975.

The Conference adopts the Senate provision with a change.

The Conferees intend that the amendments proposed by the Supreme Court, together with the amendments made by this Act, shall, except as to Rule 11(e)(6), take effect on December 1, 1975.

Section 2 of the Act as proposed by the Conferees further delays the effective date of the rules changes proposed by the Supreme Court, which had been delayed to August 1, 1975, by Public Law 93–361. Until December 1, 1975, the rules presently in force shall apply. It is provided that Rule 11(e)(6) shall take effect on August 1, 1975.

James R. Mann,
Ray Thornton,
Martin A. Russo,
Charles E. Wiggins,
Henry J. Hyde,
Managers on the Part of the House.

John L. McClellan,
Philip A. Hart,
James Abourezk,
Roman L. Hruska,
Hugh Scott,
Managers on the Part of the Senate.

O

JULY 31, 1975

Office of the White House Press Secretary
(Helsinki, Finland)

NOTICE TO THE PRESS

The President has signed H. R. 6799--Federal Rules of Criminal Procedure Amendments Act--which will approve certain of the proposed amendments to the Federal Rules of Criminal Procedure and further amend certain additional amendments to those Rules.

This bill will embrace certain amendments to these Rules as proposed by the Court and further amends in whole or in part twelve of those proposed Rules.

H. R. 6799 will preserve the warrant for arrest as the primary vehicle for establishing jurisdiction over an individual, leaving the issuance of a summons to the discretion of the U. S. Attorney.

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"(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.".

Carl Albert

Speaker of the House of Representatives.

Nelson Rockefeller

~~*Vice President of the United States and*~~ *Acting President of the Senate pro Tem*

Gerald R. Ford

July 31, 1975

Signed in Helsinki, Finland.

Ninety-fourth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the fourteenth day of January, one thousand nine hundred and seventy-five

An Act

To approve certain of the proposed amendments to the Federal Rules of Criminal Procedure, to amend certain of them, and to make certain additional amendments to those Rules.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Rules of Criminal Procedure Amendments Act of 1975".

SEC. 2. The amendments proposed by the United States Supreme Court to the Federal Rules of Criminal Procedure which are embraced in the order of that Court on April 22, 1974, are approved except as otherwise provided in this Act and shall take effect on December 1, 1975. Except with respect to the amendment to Rule 11, insofar as it adds Rule 11(e)(6), which shall take effect on August 1, 1975, the amendments made by section 3 of this Act shall also take effect on December 1, 1975.

SEC. 3. The Federal Rules of Criminal Procedure, as amended by the amendments that were proposed by the United States Supreme Court to the Federal Rules of Criminal Procedure which are embraced by the order of that Court on April 22, 1974, are further amended as follows:

(1) Rule 4 is amended by striking out subdivisions (a), (b), and (c), and inserting in lieu thereof the following:

"(a) ISSUANCE.—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, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

"(b) PROBABLE CAUSE.—The finding of probable cause may be based upon hearsay evidence in whole or in part.".

(2) Rule 4 is further amended by redesignating subdivision (d) as (c).

(3) Rule 4 is further amended by redesignating subdivision (e) as (d), and paragraph (3) of such subdivision is amended to read as follows:

"(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 and by mailing a copy of the summons to the defendant's last known address.".

(4) Rule 9(a) is amended to read as follows:

"(a) ISSUANCE.—Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment. The clerk shall issue a summons instead of a warrant upon the request of the attorney for the government or by direction of the court. Upon like request or direction he shall issue more than one warrant or summons for the same defendant. He shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue.".

(5) Rule 11(c) is amended to read as follows:

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

"(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

"(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

"(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; 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; and

"(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.".

(6) Rule 11(e)(1) is amended to read as follows:

"(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 do any of the following:

"(A) move for dismissal of other charges; or

"(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

"(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.".

(7) Rule 11(e)(2) is amended to read as follows:

"(2) NOTICE OF SUCH AGREEMENT.—If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.".

(8) Rule 11(e)(3) is amended to read as follows:

"(3) ACCEPTANCE OF A PLEA AGREEMENT.—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.".

(9) Rule 11(e)(4) is amended to read as follows:

"(4) REJECTION OF A PLEA AGREEMENT.—If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, 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.".

(10) Rule 11(e)(6) is amended to read as follows:

"(6) INADMISSIBILITY OF PLEAS, OFFERS OF PLEAS, AND RELATED STATEMENTS.—Except as otherwise provided in this paragraph, 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, and relevant to, 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. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel."

(11) Rule 12(e) is amended 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. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.".

(12) Rule 12(h) is amended to read as follows:

"(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 continued 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.".

(13) Rule 12.1 is amended to read as follows:

"RULE 12.1. NOTICE OF ALIBI

"(a) NOTICE BY DEFENDANT.—Upon written demand of the attorney for the government 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 attorney for the government 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 attorney for the government 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), 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 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.

"(e) EXCEPTIONS.—For good cause shown, the court may grant an exception to any of the requirements of subdivisions (a) through (d) of this rule.

"(f) INADMISSIBILITY OF WITHDRAWN ALIBI.—Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with such intention, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.".

(14) Rule 12.2(c) is amended to read as follows:

"(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. No statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.".

(15) Rule 15(a) is amended to read as follows:

"(a) WHEN TAKEN.—Whenever due to exceptional 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.".

(16) Rule 15(b) is amended to read as follows:

"(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, unless, after being warned by the court that disruptive conduct will cause him to be removed from the place of the taking of the deposition, he persists in conduct which is such as to justify his being excluded from that place. 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.".

(17) Rule 15(c) is amended to read as follows:

"(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 expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and his attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.".

(18) Rule 15(e) is amended by striking out "as defined in subdivision (g) of this rule" and inserting in lieu thereof the following: "as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence".

(19) Rule 15(g) is deleted and subdivision (h) is redesignated as (g).

(20) Rule 16(a)(1)(A) is amended to read as follows:

"(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 (1) 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 conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.".

(21) Rule 16(a)(1)(B) is amended to read as follows:

"(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 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.".

(22) Rule 16(a)(1)(D) is amended to read as follows:

"(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, or copies thereof, 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, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.".

(23) Rule 16(a)(1)(E) is deleted.

(24) Rule 16(b)(1)(A) is amended to read as follows:

"(A) DOCUMENTS AND TANGIBLE OBJECTS.—If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, 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.".

(25) Rule 16(b)(1)(B) is amended to read as follows:

"(B) REPORTS OF EXAMINATIONS AND TESTS.—If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, 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.".

(26) Rule 16(b)(1)(C) is deleted.

(27) Rule 16(c) is amended to read as follows:

"(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, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.".

(28) Rule 16(d)(1) is amended to read as follows:

"(1) PROTECTIVE AND MODIFYING 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 motion by a party, the court may 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 an ex parte 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.".

(29) Rule 17(f)(2) is amended to read as follows:

"(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, taking into account the convenience of the witness and the parties.".

(30) Rule 20(d) is amended to read as follows:

"(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 for each district, 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.".

(31) Rule 32(a)(1) is amended to read as follows:

"(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. The attorney for the government shall have an equivalent opportunity to speak to the court.".

(32) Rule 32(c)(1) is amended to read as follows:

"(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, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding 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.".

(33) Rule 32(c)(3)(A) is amended to read as follows:

"(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, but not to the extent that 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 and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.".

(34) Rule 32(c)(3)(D) is amended to read as follows:

"(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, unless the court, in its discretion otherwise directs.".

(35) Rule 43(b)(2) is amended to read as follows:

"(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.".

Carl Albert

Speaker of the House of Representatives.

Richard Nixon

~~*Vice President of the United States and*~~ *Acting President of the Senate pro Tempore.*

July 30, 1975

Dear Mr. Director:

The following bills were received at the White House on July 30th:

H.R. 3130
H.R. 6799

Please let the President have reports and recommendations as to the approval of these bills as soon as possible.

Sincerely,

Robert D. Linder
Chief Executive Clerk

The Honorable James T. Lynn
Director
Office of Management and Budget
Washington, D. C.