BENCH COMMENT

Federal Judicial Center

1981, Number 1 March 23, 1981

SUBJECT: Making Explicit Findings When Balancing Probative Value Against Prejudicial Effect Before Admitting Proof of Prior Conviction of Witness Under Fed. R. Evid. 609(a)

Rule 609(a) of the Federal Rules of Evidence provides:

> "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted . . . only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment." (Emphasis added)

Evidence of a prior conviction, not involving dishonesty or false statement, is admissible only if the trial judge makes a determination that the probative value of evidence of the prior conviction outweighs its prejudicial effect to the defendant.

Courts of Appeals for various circuits have been laying down the requirement with respect to this balancing of probative value against prejudicial effect that the trial judge must on the record make an explicit finding with his reasons as to why the probative value does or does not outweigh the prejudicial effect to the defendant of the prior conviction.

The following excerpts are typical of recent comments by Courts of Appeals as to the procedure to be followed by a trial court:

> "In the future, to avoid the unnecessary raising of the issue of whether the judge has meaningfully invoked his discretion under Rule 609, we urge trial judges to make such determinations after a hearing on the record . . . and to explicitly find that the prejudicial effect of the evidence to the defendant will be outweighed by its probative value."
>
> United States v. Mahone, 537 F.2d 922 (7th Cir. 1976)

BENCH COMMENT

Federal Judicial Center

1981, Number 2 May 15, 1981

SUBJECT: Need for trial court to identify contempt proceeding as being civil contempt or criminal contempt

The purpose, procedure and penalty for civil contempt differ from those for criminal contempt. It is essential, therefore, that the trial judge make clear on the record whether the proceeding is by way of civil contempt or by way of criminal contempt.

With the exception of the rare situation in which summary contempt is appropriate, criminal contempt requires notice, a jury trial if provided by law, proof of the contempt beyond a reasonable doubt, bail and a determinate sentence. Civil contempt requires no jury, a lesser standard of proof and the sentence may be indefinite, though punishment may not continue after the termination of the underlying controversy.

Civil contempt has as its primary purpose the compelling of someone to do or not to do a certain act. The contemnor is able to purge himself of civil contempt by complying with the court's order. (Civil contempt, of course, may also be used to compensate a complainant for loss or expense incurred because of wrongdoing.) The following are examples of orders in civil contempt:

> A.B. is committed to the custody of the Attorney General or his authorized representative until he provides handwriting exemplars as ordered by the court.
>
> XYZ Corporation is fined $5,000 per day until it terminates the discharge of chemical waste into the Ohio River.

By contrast criminal contempt has as its purpose the punishment of a person for a past act of contempt. It has the characteristics of a crime, and the contemnor is cloaked with the safeguards of one accused of a crime. The following are examples of orders in criminal contempt:

> A.B. is committed to the custody of the Attorney General or his authorized representative for a period of ten days for creating a disturbance and shouting obscenities in the courtroom.
>
> A.B. is committed to the custody of the Attorney General or his authorized representative for a period of six months for his refusal to answer at trial certain questions which he was ordered by the court to answer.

BENCH COMMENT

Federal Judicial Center

1981, Number 3 July 8, 1981

SUBJECT: Excluding the defendant, his counsel, the public or the press from any portion of the voir dire examination of prospective jurors.

In order to avoid the possibility that, during voir dire, the responses of one prospective juror might contaminate the entire panel, trial judges sometimes interrogate prospective jurors singly, particularly when there has been considerable pretrial publicity. This has commonly been done by the judge taking the single prospective juror, the parties and their counsel into chambers or someplace else where the questioning can proceed out of the presence of the other prospective jurors.

Several recent cases suggest that caution be exercised with respect to that practice.

In United States v. Alessandrello, 637 F.2d 131 (3rd Cir. 1980), the trial judge, because of the limited space in the anteroom where the questioning was to take place, excluded the defendants during a portion of the voir dire. This was done over the objection of the defense counsel. The Court of Appeals held that defendants had an explicit, unqualified right under Rule 43 of the Federal Rules of Criminal Procedure to be present during the jury selection as well as at all other stages of the trial and that their "exclusion was a clear violation of Rule 43(a), pursuant to a method of impaneling the jury which we cannot countenance." The majority, however, held that the exclusion was harmless error under the circumstances and upheld the conviction. A vigorous dissent argued that exclusion of the defendants from a portion of the voir dire mandated reversal.

In United States v. Pappas, 639 F.2d 1 (1st Cir. 1980), the trial judge conducted part of the voir dire at the bench out of the hearing of the court reporter, attorneys and defendant. The judge then recounted his discussions with the prospective jurors to the attorneys. The Court of Appeals affirmed the conviction but disapproved the procedure.

> We view this procedure with disfavor. Intonation, visceral reactions, and nonverbal signals are important to a vigilant attorney's participation in jury selection. These are lost when counsel is barred from hearing the comments of candidate jurors. The only rationale offered for the exclusion--promoting candid replies--is too weak to justify this potentially serious incursion on the defendant's trial rights. This rationale is weaker still when offered as the reason for preventing a silent and inconspicuous court reporter from recording the interchange.

BENCH COMMENT

Federal Judicial Center

1981, Number 4 August 24, 1981

SUBJECT: Procedures for Dealing with Communications from the Jury

When the court receives a communication from the jury during a criminal trial, procedures should be followed that will preserve counsel's right to be heard before any response is made by the court.

In Rogers v. United States, 422 U.S. 35 (1975), the Supreme Court held that messages from a jury should be answered in open court with an opportunity for counsel to be heard before the court responds. Several Courts of Appeals have indicated how and why great care should be exercised when handling communications from the jury.

A recent case has set out very specifically the preferred procedure in the Second Circuit. In United States v. Ronder, 639 F.2d 931 (2nd Cir. 1981), the court reversed a conviction because the trial court failed to disclose to counsel written inquiries from the jury before responding to the inquiries. It outlined the steps the court should take when it receives a message:

> The proper practice should include these steps. (1) The jury's inquiry should be submitted in writing. This is the surest way of affording the court and counsel an appropriate opportunity to confer about a response. (2) Before the jury is recalled, the note should be marked as a court exhibit and read into the record in the presence of counsel and the defendant. This avoids any later claim by the defendant that he remained unaware of the note's content, despite his counsel's knowledge of it. (3) Counsel should be afforded an opportunity to discuss appropriate responses. During this colloquy, it is also helpful for the judge to inform counsel of the substance of his proposed response, or even to furnish a written text of it, if available. . . . (4) After the jury is recalled, the trial judge should generally precede his response by reading into the record in their presence the content of any note concerning substantive inquiries. This assures that all jurors appreciate the questions to which the response is directed, in the event the note was not discussed among all the jurors. It also provides an opportunity to correct any failure by the foreman to convey accurately the inquiry of one or more of the jurors, in the event the foreman has undertaken to author all substantive notes.

BENCH COMMENT

Federal Judicial Center

1981, Number 5 September 28, 1981

SUBJECT: Factors to be Considered in Balancing Probative Value Against Prejudicial Effect Before Admitting Proof of Prior Conviction of a Defendant-Witness under Fed. R. Evid. 609(a)(1)

Bench Comment No. 1 indicated that some Courts of Appeals have been requiring that the trial judge must on the record make an explicit finding with his reasons as to why the probative value of a prior conviction under Fed. R. Evid. 609(a)(1) does or does not outweigh its prejudicial effect to the defendant.

The balancing is particularly delicate when it is a defendant who is to be impeached by such evidence.

As was noted in a dissenting opinion in United States v. Cook, 608 F. 2d 1175 (9th Cir. 1979):

> The probative value to be balanced is the tendency of the prior crimes evidence to persuade the jury that defendant was not a credible person while the prejudice to be balanced is the tendency of the prior conviction evidence to persuade the jury that defendant probably committed the crime charged on trial or its tendency to persuade the jury that defendant was simply a 'bad man' and probably deserved to be in jail.

The opinions in United States v. Cook, 608 F.2d 1175 (9th Cir. 1979), in United States v. Hawley, 554 F.2d 50 (2d Cir. 1977), in United States v. Mahone, 537 F.2d 922 (7th Cir. 1976) and in United States v. Jackson, 627 F.2d 1198 (D.C. Cir. 1980) suggest that, when the defendant is the witness, the following factors may profitably be considered by the trial court in a 609(a)(1) balancing:

1. The impeachment value of the prior crime;
2. The point in time of the conviction and the defendant's subsequent history;
3. The similarity between the past crime and the charged crime;
4. The importance of the defendant's testimony;
5. The centrality of the credibility issue.

For a fuller discussion of the foregoing factors see 3 Weinstein & Berger, Evidence ¶ 609 [03].

BENCH COMMENT

Federal Judicial Center

1981, Number 6 December 31, 1981

SUBJECT: Verbatim adoption of proposed findings of fact and conclusions of law

Rule 52(a) of the Federal Rules of Civil Procedure provides that, when sitting without a jury, "the court shall find the facts specifically and state separately [the] conclusions of law thereon."

The court may elicit assistance from counsel by ordering the preparation of proposed findings of fact and conclusions of law. The court must, however, make its own, independent determination of fact and law.

The verbatim adoption of the prevailing party's proposed findings and conclusions, though not error, has led some Courts of Appeals to question whether an independent determination has been made. A recent Tenth Circuit opinion, in which the case was remanded for new findings, contains a good discussion of this problem.

> Verbatim adoption of a party's proposed findings of fact and conclusions of law may be acceptable under some circumstances. Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence. However, the mechanical adoption of a litigant's findings is an abandonment of the duty imposed on trial judges by Rule 52, F.R.Civ.P., because findings so made fail to reveal the discerning line for decision.
>
> Appellate review of mechnically adopted findings is difficult. Those findings drawn with the insight of a disinterested mind are . . . more helpful to the appellate court. However the trial judge's duty to make formal findings exists not only to aid appellate review. Rule 52 also seeks to evoke care on the part of the trial judge in considering and adjudicating the facts in dispute. The purpose of [Rule 52] is to require the trial judge to formulate and articulate his findings of fact and conclusions of law in the course of his consideration and determination of the case and as a part of his decision making process, so that he himself may be satisfied that he has dealt fully and properly with all the issues in the case before he decides it. . . .
>
> Even though we may not summarily reject findings adopted verbatim, we must view the challenged findings and the record as a whole with a more critical eye to insure that the trial court has adequately performed its judicial function. The greater the extent to which the court's eventual decision reflects no independent work on its part, the more careful we are obliged to be in our review.
>
> . . .

BENCH COMMENT

Federal Judicial Center

1982, Number 1 January 27, 1982

SUBJECT: Declaring mistrial over objection of defendant in criminal prosecution

In the normal case, the defendant in a criminal prosecution has a right to have his trial completed and his guilt or innocence determined by the jury originally selected.

> The purpose of the constitutional prohibition against double jeopardy is to prevent the government from making repeated attempts to convict an individual of an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. . . . Thus a defendant has a valued right to have his trial completed by a particular tribunal.
>
> United States v. Tinney, 473 F.2d 1085 (3rd Cir. 1973)

As the Fourth Circuit has recently noted.

> An improvidently granted mistrial precludes the particular tribunal, whether judge or jury, from passing on the accused's guilt and thus ending the confrontation between him and society.
>
> Harris v. Young, 607 F.2d 1081 (4th Cir. 1979)

Thus, if a mistrial is improvidently declared by the trial court, double jeopardy will preclude retrial of the defendant. It is imperative, therefore, that a mistrial be declared by the trial court only after the most careful consideration.

A mistrial is properly declared by a trial court only if there is a "manifest necessity" for its declaration or if "the ends of public justice" would otherwise be defeated.

> We think that in all cases of this nature, the law has invested Courts of Justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public

BENCH COMMENT

Federal Judicial Center

1982, No. 2 April 23, 1982

SUBJECT: Procedure to be followed when potentially prejudicial publicity has occurred during a criminal trial

Not infrequently during the course of a criminal trial the news media will disseminate information which, if seen or heard by a juror, has the potentiality of being prejudicial to the accused.

If defense counsel claims that there has been publicity of that nature, the trial court must determine what, if any, action to take in order to protect the rights of the accused.

In order to make that determination, the court must conduct a two-step inquiry: first, whether the publicity was in fact prejudicial, and second, if prejudicial, whether that publicity came to the attention of any one of the jurors.

With respect to the first step of the inquiry, courts of appeals have given this guidance:

> The critical question here is whether that material goes beyond the record...and raises serious questions of possible prejudice to the litigants. Of necessity, this question is a complex one. The court should consider how closely related to the case the material is. In this connection, the court should also examine the nature of any defenses raised in order to weigh the effects of the publicity on those defenses. Another important consideration is the timing of the publicity. Did it arise at a critical moment of the trial...? And, of course, occasionally there are cases where material is disseminated which not only recounts facts outside the record but also speculates directly on a defendant's guilt or innocence.
>
> United States v. Herring, 568 F.2d 1099 (5th Cir. 1978)

> Once the [prejudicial] material is before the judge, he must determine whether it is prejudicial. That entails a determination of whether the publicity disclosed information about the defendant that would not be admissible before the jury, or that was not in fact adduced before the jury in open court.
>
> United States v. Crowell, 586 F.2d 1020 (4th Cir. 1978)

If, after making the initial inquiry, the court determines that a juror, if exposed to the material, might be prejudiced against the accused, the court must

See also United States v. Richardson, 651 F.2d 1251 (8th Cir. 1981); United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974); Mares v. United States, 383 F.2d 805 (10th Cir. 1967); and Coppedge v. United States, 272 F.2d 504 (D.C. Cir. 1959) cert. denied 368 U.S. 855 (1961).

If prejudicial publicity has reached one or more jurors, the choice of remedial action is within the sound discretion of the trial court.

> If any of the jurors have been exposed, the questioning procedure will open the way for appropriate corrective measures -- cautionary instructions, excusing individual jurors when alternates are available, or a mistrial if nothing else will cure the prejudice.
>
> ...What to do about the problem should remain the sound discretion of the district judge, and he should exhaust other possibilities before aborting a trial.
>
> United States v. Hankish,
> 502 F.2d 71 (4th Cir. 1974)

BENCH COMMENT

Federal Judicial Center

1982, No. 3 June 10, 1982

SUBJECT: The jury is not to be instructed on the admissibility of coconspirator statements

Trial judges continue to instruct juries on the admissibility of coconspirator statements even though Courts of Appeals have repeatedly held that it is now error or, at least, unnecessary and incorrect to give such an instruction.

> [T]he admissibility of a coconspirator's statement under Fed.R.Evid. 801(d)(2)(E) [is] exclusively a question for the judge. The judge therefore erred by permitting the jury to consider the admissibility question.
>
> United States v. Chaney, 662 F.2d 1148 (5th Cir. 1981)

> This type of instruction giving the defendant a "second bite at the apple," has been repeatedly held by our circuit to be altogether unnecessary.
>
> United States v. Enright, 579 F.2d 980 (6th Cir. 1978)

See also United States v. Federico, 658 F.2d 1337 (9th Cir. 1981).

At one time the accepted practice was for the trial court to instruct the jury that they were not to take into consideration in their deliberations any statement of an alleged coconspirator unless they found that the government had proven that a conspiracy existed, that the declarant and the defendant were members of that conspiracy and that the statement was made in furtherance of and in the course of the conspiracy. This meant, of course, that a jury could make the determination that it should not take into consideration a statement already admitted into evidence by the court.

Since the adoption of the Federal Rules of Evidence the appellate courts have made clear that the decision to admit or reject a coconspirator statement is that of the trial court alone -- the jury plays no part in that decision. If the statement is admitted, the jury treats it as it does any other piece of evidence.

> [Rule 104(a) of the Federal Rules of Evidence] clearly requires that the judge alone shall determine the admissibility of the evidence. Shortly before the promulgation of the Federal Rules of Evidence, the Supreme Court in U.S. v. Nixon, 418 U.S. 683 (1974), stated that the issue is "to be decided by the trial judge." 418 U.S. at 701, n. 14.

BENCH COMMENT

Federal Judicial Center

1982, No. 4 September 24, 1982

SUBJECT: Instructing defendant prior to an effective waiver of right to counsel

In Faretta v. California, 422 U.S. 806 (1975) the Supreme Court held that a defendant had a constitutional right to represent himself. In exercising that right, however, the Supreme Court stated that the defendant must be "made aware of the dangers and disadvantages of self-representation so that the record will establish that he knows what he is doing and his choice is made with eyes open." Only if defendant is aware of the implications of self-representation is it clear that any waiver of the right to be represented by counsel is made "competently and intelligently."

The Courts of Appeals have held that it is the responsibility of the trial judge to make sure the defendant understands these implications.

> [I]n the case of the defendant who articulately and unmistakably asserts his desire to avail himself of the constitutional right to self-representation established by Faretta, the fact of central concern to the Supreme Court is awareness by the defendant of "the dangers and disadvantages" attendant upon that course. The most certain assurance of that awareness is by a colloquy on the record between judge and defendant. The inquiry so made by the trial court should be addressed, and normally may be confined to that subject. . . .
>
> In the future, cases involving a criminal defendant's claim of his constitutional right to self-representation, we, in the exercise of our supervisory power over the administration of criminal justice in this circuit, enjoin upon the District Court the practice of making clear on the record the awareness by defendants of the dangers and disadvantages of self-representation as to which the Supreme Court in Faretta has voiced its concern.
>
> United States v. Bailey, 675 F.2d 1292 (D.C. Cir. 1982)

As the court in United States v. Johnson, 659 F.2d 415 (4th Cir. 1981) indicated, "Merely asking a defendant if he wants an attorney is inadequate to inform the defendant of his right to counsel." While it is generally up to the trial court to conduct the colloquy with the defendant as it deems appropriate under the circumstances, the court in United States v. Welty, 674 F.2d 185 (3d Cir. 1982) has given some guidance.

BENCH COMMENT

Federal Judicial Center

1983, No. 1 May 3, 1983

SUBJECT: The Right to Jury Trial in Criminal Contempt Proceedings

In an earlier Bench Comment (1981, No. 2), the need for the trial court to identify contempt proceedings as being civil or criminal was discussed. It was noted there that the contemnor in a criminal contempt "is cloaked with the safeguards of one accused of a crime." One of those safeguards is the right to have the issues of fact tried to a jury.

The Sixth Amendment right to a jury trial applies to criminal contempt to the same extent that it does to any other criminal proceeding. United States v. Troxler Hoisery Co., Inc., 681 F.2d 934, 935 (4th Cir. 1982). While "petty" contempts, like other petty crimes, may be tried without a jury, there is a right to jury trial in prosecutions for "serious" criminal contempts. Bloom v. Illinois, 391 U.S. 194 (1968). Further, Rule 42(b) of the Federal Rules of Criminal Procedure provides for the right "in any case in which an act of Congress so provides."

While the pettiness or seriousness of an offense is determined ordinarily by reference to the punishment authorized by statute, "Congress, perhaps in recognition of the scope of criminal contempt, has authorized courts to impose penalties but has not placed any specific limits on their discretion." Frank v. United States, 395 U.S. 147, 148 (1969). Accordingly, the severity of the penalty actually imposed serves as the best indication of the seriousness of a particular criminal contempt. In this regard, the Supreme Court has adopted a "bright line" test to determine whether a term of imprisonment imposed on a contemnor is petty or serious; it relies on 18 U.S.C. §1(3) which defines petty offenses as those for which punishment does not exceed six months imprisonment or a fine of not more than $500. Muniz v. Hoffman, 422 U.S. 454, 476-477 (1975).

As to individual contemnors, it has been uniformly held that imprisonment for longer than six months without opportunity for jury trial is constitutionally impermissible. Codespoti v. Pennsylvania, 418 U.S. 506, 512 (1974); Frank v. United States, supra. However, the Frank Court further distinguished the imposition of a prison sentence from the imposition of a probation sentence and concluded that the imposition of a term of probation, even for a period as long as five years, did not raise an otherwise petty offense to the level of a serious crime and, therefore, did not warrant a jury trial. Id. at 510-511. See United States v. Gedraitis, 690 F.2d 351 (3rd Cir. 1982). Finally, several courts of appeals have also noted the significance of the $500 fine level for individual defendants; once that amount is exceeded, the offense is serious and a jury trial required. United States v. McAlister, 630 F.2d 772 (10th Cir. 1980); United States v. Hamdan, 552 F.2d 276

Because the applicable law is to some extent still in a state of flux, trial courts should, of course, consult the controlling decisions in their own circuits as to the applicable quantum of proof pertaining to the admission of coconspirator statements and the action to be taken by a trial court upon a motion to strike a conditionally admitted coconspirator statement.

BENCH COMMENT

Federal Judicial Center

1983, No. 2 June 30, 1983

SUBJECT: The Quantum of Proof Required for the Admission of Coconspirator Statements

Before admitting a coconspirator statement, the trial judge is required to find that a conspiracy existed, that the defendant and the maker of the statement were members of that conspiracy, and that the statement was made during the course of and in furtherance of the conspiracy.

The rules do not specify, however, the quantum of proof required to support the court's findings. All the courts of appeals have now fixed that quantum for their respective circuits. However, the circuits are not in agreement.

The majority of the circuits have held that the findings of the trial court must be supported by a "preponderance of the evidence," that is, that each of the requisite findings must be more probably true than not. See United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977); United States v. Stanchich, 550 F.2d 1294 (2d Cir. 1977); United States v. Trowery, 542 F.2d 623 (3d Cir. 1976), cert. denied, 429 U.S. 1104 (1977); United States v. Stroupe, 538 F.2d 1063 (4th Cir. 1976); United States v. Enright, 579 F.2d 980 (6th Cir. 1978); United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978); United States v. Bell, 573 F.2d 1040 (8th Cir. 1978); United States v. Andrews, 585 F.2d 961 (10th Cir. 1978).

The D.C., Fifth, Ninth, and Eleventh Circuits have enunciated the standard of admissibility in terms of "substantial independent evidence." See United States v. Jackson, 627 F.2d 1198 (D.C. Cir. 1980). The Fifth Circuit (followed by the Eleventh Circuit in United States v. Bulman, 667 F.2d 1374 (11th Cir.), cert. denied, 456 U.S. 1010 (1982)), has expressed its standard in these words:

> "We conclude that . . . a declaration by one defendant is admissible against other defendants only when there is a 'sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy,' . . . and that 'as a preliminary matter, there must be substantial, independent evidence of a conspiracy at least enough to take the question to the jury.'"
>
> United States v. James, 590 F.2d 575, 581 (5th Cir.), cert. denied, 442 U.S. 917 (1979)

THERE WAS NO BENCH COMMENT ISSUED THAT WAS LABELED 1983, NO. 3.

BENCH COMMENT

Federal Judicial Center

1983, No. 4 November 8, 1983

SUBJECT: The Victim and Witness Protection Act of 1982 and Pleas of Guilty or Nolo Contendere: Duty of the Court to Advise That the Defendant May Be Ordered to Make Restitution

Rule 11(c) of the Federal Rules of Criminal Procedure requires a court, prior to its acceptance of a plea of guilty or nolo contendere, to inform the defendant of, and to determine whether he understands, not only the nature of the charges to which the plea has been tendered and the mandatory minimum penalty, if any, but also the maximum possible penalty provided by law.

Section 5 of the Victim and Witness Protection Act of 1982 creates, among other things, another penalty to which a defendant may be subject if convicted of an offense under Title 18 of the United States Code or an offense under subsection (h), (i), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. § 1472). If convicted, the defendant may be ordered to make restitution to any victim of the offense. 18 U.S.C. § 3579.

While no court to date has ruled on the applicability of Rule 11(c) to the defendant's potential liability under the restitution provisions of the Victim and Witness Protection Act, the Judicial Conference Advisory Committee on Criminal Rules has proposed that Rule 11(c) be amended to make explicit the court's obligation to advise the defendant of its power to order restitution, as "restitution is deemed a part of the defendant's sentence, S. Rept. No. 97-532, 97th Cong., 2d Sess. 30-33 (1982)." As proposed, Rule 11(c) would read in part:

> (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) . . . and when applicable, that the court may also order him to make restitution to any victim of the offense;

The Bench Book Committee of the Federal Judicial Center has also taken cognizance of the possible sentencing consequences of 18 U.S.C. § 3579, and has suggested that trial judges advise the defendant of his being subject to an order making restitution to the victims of the offense under which he has pled. See Chapter 1.06E of the Bench Book for United States District Court Judges.

(over)

BENCH COMMENT

Federal Judicial Center

1984, No. 1 January 25, 1984

SUBJECT: Defendants May Not Waive Requirement of Unanimous Verdicts in Federal Criminal Trials

Although rule 31(a) of the Federal Rules of Criminal Procedure provides that the verdict in a federal criminal trial "shall be unanimous," the rule does not expressly forbid a waiver of unanimity by a defendant. Several courts of appeals, however, in cases where the deliberating jury had indicated a deadlock, have held that a unanimous verdict is mandatory and may not be waived.

The Second Circuit, in United States v. Pachay, 711 F.2d 488 (2d Cir. 1983), distinguishing the acceptance of a jury of less than twelve, stated that there were two strong reasons for concluding that unanimity could not be waived. First, "the general practice of the drafters of the Criminal Rules was to authorize waiver in express terms whenever waiver of a mandatory requirement concerning the jury was to be permitted." Id. at 490. Unlike rules 23(a) and 23(b) (as well as rules 5(c) and 7(b)) where waiver is expressly noted in the rule, rule 31(a) contains no such language. Second, "the intent of the drafters . . . not to permit waiver of unanimity is evident from the history of the Rule." Id. Early drafts of the rule (prepared in 1942 and 1943) contained a provision that would have permitted the parties to agree to non-unanimous verdicts. In response to criticism about that provision, including a concern that defendants might be coerced into accepting a less-than-unanimous verdict rather than risk other prejudicial consequences upon refusal, the drafters subsequently deleted that clause thereby reflecting a "deliberate decision to omit a provision for waiver of unanimity." Id. at 491. Accord United States v. Lopez, 581 F.2d 1338 (9th Cir. 1978); Hibdon v. United States, 204 F.2d 834 (6th Cir. 1953). But see United States v. Chavis, 719 F.2d 46 (2d Cir. 1983) (suggesting that waiver might be effective if trial judge makes "searching inquiry" to insure that it is intelligent, voluntary, and not as a result of "a promise, threat, or someone's suggestion").

While noting that the language and history of rule 31(a) provides further evidence that the unanimity requirement may not be waived, the Third Circuit also found constitutional grounds for that conclusion. In United States v. Scalzitti, 578 F.2d 507, 511 (3d Cir. 1978), that court noted:

> Five Justices of the Supreme Court have concurred in the view "that unanimity is one of the indispensable features of federal jury trial." Apodaca v. Oregon, 406 U.S. 404, 369, 92 S. Ct. 1628, 1637, 32 L. Ed. 2d 184 (1972) (Powell, J., concurring) (emphasis in original).

See also United States v. Morris, 612 F.2d 483 (10th Cir. 1979) (unanimity applies not only because of the criminal rules but also by reason of the Sixth Amendment).

BENCH COMMENT

Federal Judicial Center

1984, No. 2 August 15, 1984

SUBJECT: Recent developments regarding standards and procedures for barring the public from the courtroom during a criminal trial

Public access to criminal trials is not an absolute right, but courts that opt for closure must first hold a hearing, then make specific findings to justify their departure from the norm of an open courtroom, several circuits have held.

The circuits' guidance has been necessary because the Supreme Court has found a presumption of openness but it has not spelled out how that presumption should be tested. In Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819 (1984), the Court ruled that trial proceedings should generally be open to the public, and held that "the presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Id. at 824.

Press-Enterprise, which dealt with jury-selection proceedings, relied on the Court's earlier holdings in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) and Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982). In Richmond Newspapers, the Supreme Court found "a presumption of openness inheres in the very nature of a trial under our system of justice," 448 U.S. at 573, and held that "[a]bsent an overriding interest [in closure] articulated in findings, the trial of a criminal case must be open to the public." Id. at 581. In Globe Newspaper Co., the Court held that "[a]lthough the right of access to criminal trials is of Constitutional stature, it is not absolute," and required that the justification for denying access "must be a weighty one." 457 U.S. at 606.

At issue in all three cases was the public's independent right of access to trial proceedings, not the defendants' right to an open trial. The defendants did not object to the closed trials, or, in the case of Press-Enterprise, to the closed jury-selection proceedings.

The leading case on access to pretrial proceedings, Gannett v. DePasquale, 443 U.S. 368 (1979), did not grant the broad public access that Richmond Newspapers and its progeny granted to trials. In Gannett the defendant did not oppose closure, and the Court found that the public had no independent Sixth Amendment right of access. Very recently, however, the Supreme Court stated in Waller v. Georgia, 104 S. Ct. 2210 (1984), that "[c]losure of a suppression hearing over the objections of the accused must meet the tests set out in Press-Enterprise and its successors." Id. at 2216. But none of these cases--Richmond Newspapers, Globe Newspaper, Press-Enterprise and Waller--provide standards for deciding whether there is an overriding interest in closure of a trial or pretrial proceedings. To fill that void, two circuits have adopted a test proposed by Justice Blackmun in his Gannett dissent as a standard for measuring the need for closure.

defendant's fair-trial rights, that alternative safeguards would be ineffective, and that closure would prevent the anticipated harm. Therefore, the court held that closure was justified. In re Greensboro News Co., 727 F.2d at 1324-25.

In United States ex rel. Pulitzer Publishing Co., 635 F.2d 676 (8th Cir. 1980), which posed the same issue as Greensboro News, the Eighth Circuit ordered jury selection to be held openly. It did not refer to the Blackmun test explicitly, but appeared to embrace it by disapproving closure because

> [t]he trial judge did not inquire or attempt to find an alternate solution which would have met the need to insure fairness . . . and, most importantly, the trial judge made no findings on the record to support closure, as required by Richmond Newspapers. . . .
>
> Id. at 677

In a subsequent case, the Eighth Circuit added the requirement that closure be preceded by an opportunity to be heard:

> Here, the District Court declined to hear objections that a reporter wished to voice, informing her instead that the hearing would be closed and that it would consider her objections at some later time. We think this action was too precipitate. Whenever an objection to closure is made, the Court must allow the objecting parties a reasonable opportunity to state their objections.
>
> In re Iowa Freedom of Information Council, 724 F.2d 658, 661 (8th Cir. 1983)

In light of these decisions, it would appear prudent for a trial court not to close trial proceedings unless the court conducts a hearing and makes a finding that, in the absence of closure, there is a substantial probability that (1) the right of the defendant to a fair trial would be impaired, (2) steps less drastic than closure would be ineffective to preserve the defendant's right to a fair trial, (3) closure would achieve the desired goal of protecting the defendant's right to a fair trial, and (4) the closure ordered by the court was as narrow as possible.

BENCH COMMENT

Federal Judicial Center

1984, No. 3 September 15, 1984

SUBJECT: Disclosure of presentence reports to third parties

Under Federal Rule of Criminal Procedure 32(c)(3), defendants have the right to examine presentence reports at a reasonable time before sentencing. While the rule contains detailed provisions limiting such disclosure and procedures for challenging the accuracy of the reports, it is entirely silent about disclosures to third parties. In the face of that silence, courts have had to decide, for example, whether coconspirators who are being tried separately, state agencies that regulate corporate defendants, or defendants' judgment creditors are entitled to disclosure of such reports to further their own interests.

None of the courts of appeals that have reviewed third-party requests have approved disclosure; however, three circuits (the Second, Fourth, and Seventh) would permit disclosure in certain circumstances, while two circuits (the Fifth and Tenth) prohibit third-party disclosure entirely. The Second Circuit recently held that a balancing test should be applied; "the district court should not authorize disclosure of a pre-sentence report to a third person in the absence of a compelling demonstration that disclosure of the report is required to meet the ends of justice." United States v. Charmer Industries, 711 F.2d 1164, 1175 (2d Cir. 1983). In that case, the defendant--a liquor-distributing corporation--had been convicted of antitrust violations, triggering the preparation of a presentence report. That report was later sought by a state liquor-regulatory agency that had jurisdiction over a liquor business affiliated with the corporate defendant.

In ruling that the report should not be disclosed to the state agency, the Second Circuit enumerated factors that generally mitigate against disclosure. They include the fact that presentence reports "frequently contain hearsay and information not relevant to the crime charged," and that even a successfully challenged statement, excluded for purposes of sentence determination, "remains in the report," so that "the presumption of accuracy is not necessarily warranted in an unrelated context." Id. at 1175-76.

Furthermore, the court found, the presentence report remains "a court document," and

> [t]he implication of Rule 32(c)(3)(D) is that the report should not routinely be made available to third persons, for that subpart provides that, unless the court directs otherwise, any copies of the report that are provided to the defendant, his counsel, or the attorney for the government must be returned to the probation officer immediately after sentence is imposed.
>
> 711 F.2d at 1172

BENCH COMMENT

Federal Judicial Center

1985, No. 1 April 15, 1985

SUBJECT: Procedures for dealing with stipulations of fact in criminal trials

Stipulations of fact in criminal actions are usually significant and sometimes virtually the equivalents of guilty pleas. Some defendants who have made such stipulations and then been convicted have subsequently challenged their convictions on the ground that they did not receive the warnings mandated by Fed. R. Crim. P. 11 before entering what amounted to a guilty plea.

Rule 11 requires, inter alia, that a defendant be advised of the consequences of his guilty plea and that the court inquire into its voluntariness.

Circuits that have addressed the issue have held that there is a functional difference between stipulations of fact and pleas of guilty and that the rule 11 requirements do not apply to the former.

In United States v. Robertson, 698 F.2d 703 (5th Cir. 1983), the defendant did not dispute the allegation that he had escaped from prison, but asserted several defenses, including violation of his right to a speedy trial, in a pretrial motion to dismiss. The case was tried on stipulated facts, with Robertson conceding the acts charged but not pleading guilty, in order to preserve his right to appeal the denial of the motion to dismiss. Robertson was convicted. On appeal he argued that the stipulation should have been treated as a guilty plea and that rule 11 should have been applied.

That contention was incorrect, the Fifth Circuit ruled. Rule 11 "was designed to insure that guilty pleas are not tainted." Id. at 708. Taint flows from plea bargains, the court held, stating:

> The only two situations in which the Federal Rules of Criminal Procedure authorize a prosecutor to bargain with a defendant is where a defendant agrees to plead guilty or nolo contendere.

Id. See also United States v. Foundas, 610 F.2d 298, 302, reh'g denied, 615 F.2d 1130 (5th Cir. 1980).

In United States v. Stalder, 696 F.2d 59 (8th Cir. 1982), the defendant stipulated to all the government's allegations but did not plead guilty, because he wanted to appeal the decision on a pretrial suppression motion. When he later contended that the rule 11 requirements applied to him, the court held that "'[a]n inquiry as thorough as that presented by Fed. R. Crim. P. 11 is not required before the District Court accepts a stipulation of facts establishing guilt from a criminal defendant.'" Id. at 62, quoting United States v. Lawriw, 568 F.2d 98,

In United States v. Strother, 578 F.2d 397 (D.C. Cir. 1978), the defendant moved before trial to suppress evidence. After an adverse ruling on the motion, he agreed to waive a jury trial and stipulate to key facts, with the understanding that he would then appeal any adverse judgment. On appeal he challenged not only the decision on the suppression motion but the trial court's failure to follow rule 11 procedures. The conviction was affirmed. Rule 11, read literally, is inapplicable, the court held, but added,

> [W]e have a continuing concern with cases like this where it seems reasonably clear that appellant, and certainly his counsel, realistically viewed their hope of success as mainly residing in an appellate reversal of the trial court's denial of the pretrial motion to suppress. Although the acceptability to them of a trial to the court on stipulated evidence cannot in law be equated with a guilty plea, in these circumstances the prospects of victory at trial, as distinguished from prevailing on appeal with respect to a legal point, were, at best, obscure.
>
> It would appear, therefore, that waiver of a jury trial in this context is freighted with what is perhaps more than ordinary significance, and the trial judge should arguably be at some special pains to satisfy himself that the defendant is fully informed about precisely what it is that he is giving up. One way of doing that would be to take heed of at least some of the advices enumerated in Rule 11(c).

Id. at 404. See also United States v. Dorsey, 449 F.2d 1104, 1107-08 (D.C. Cir. 1971), and cases cited therein.

It thus appears that although rule 11 does not apply to the acceptance of stipulations of fact, in cases in which such stipulations are so extensive as to amount to the virtual equivalent of a guilty plea, it is the better practice for a court to ensure itself--by inquiry of the defendant on the record, both that the defendant is acting voluntarily in entering into such stipulations and that he understands their legal effect.

Specifically, the inquiry on the record should make clear that the defendant has read and signed the stipulation of facts, and that he understands

° That he has a constitutional right to public and speedy trial.

° That he has a right to a trial by jury.

° That he has a privilege against self-incrimination.

° That he has a right to be confronted by, and to cross-examine, all witnesses who may accuse him and a right to use the court's process to subpoena witnesses to testify on his behalf.

° That by signing the stipulation, he knowingly waives his constitutional rights as they pertain to the trial.

BENCH COMMENT

Federal Judicial Center

1985, No. 2 July 15, 1985

The six circuits that have ruled on the bail-pending-appeal provisions of the Crime Control Act of 1984 have all concluded that the legislation requires a convicted defendant seeking bail pending appeal to show (1) that the pending appeal will involve a substantial question of law, and (2) that if the question is decided in the defendant's favor, it will likely produce a reversal or a new trial. The rulings do not require the defendant to persuade the trial judge that reversal is likely.

The act's bail-pending-appeal provision, 18 U.S.C. § 3143, was first examined in detail by the Third Circuit in United States v. Miller, 753 F.2d 19 (3d Cir. 1985). The appellants were denied bail after their convictions, pursuant to the new legislation's provision that convicted defendants who have filed appeals are not entitled to bail while the appeal is pending unless the appeal "raises a substantial question of law or fact likely to result in reversal or an order for a new trial" (18 U.S.C. § 3143(b)(2)).

The trial court refused to grant the motion for bail, pending the determination of the defendants' appeal. The trial judge interpreted the statute to mean virtually that "'the district judge has to determine that he has probably made an error in the decision that he has rendered....'" Miller, 753 F.2d at 22.

The Third Circuit concluded that "this is not the correct interpretation of the statutory language, [which] cannot be read as meaning, as the district court apparently believed, that the district court must conclude that its own order is likely to be reversed." Id. at 22-23.

The error in that interpretation, the court said, is that it

> would render language in the statute surplusage because every question that is likely to be reversed must by definition be "substantial."...Instead, that language must be read as going to the significance of the substantial issue to the ultimate disposition of the appeal.... A court may find that reversal or a new trial is "likely" only if it concludes that the question is so integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction or a new trial.

Id. at 23.

Applying its interpretation, the court devised a bifurcated restatement of section 3143 (b)(2), requiring the district court to find "(3) that the appeal raises

formulation. It separately defined what "likely to result in reversal or...a new trial" means. "We assign to 'likely' its ordinary meaning of 'more probable than not.'" United States v. Valera-Elizondo, 761 F.2d 1020, 1025 (5th Cir. 1985).

The Eighth Circuit has also followed the Miller formulation and the Giancola close-question analysis. It, too, spelled out the definition of likely in the context of reversal or remand as "more likely to happen than not." United States v. Powell, 761 F.2d 1227, 1233 (8th Cir. 1985) (en banc). But the court noted that "[o]n the other hand, the defendant does not have to show that it is likely or probable that he or she will prevail on the issue on appeal." Id. at 1234.

BENCH COMMENT

Federal Judicial Center

1985, No. 3 December 4, 1985

SUBJECT: What does Federal Rule of Criminal Procedure 32(c)(3)(D) require a sentencing judge to do when a defendant challenges the accuracy of the presentence report?

Fed. R. Crim. P. 32(c)(3)(D), which became effective August 1, 1983, provides:

> If the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission.

A number of appellate decisions make clear that a failure to comply with the procedural requirements of this rule may cause an otherwise valid sentence to be vacated.

In United States v. Velasquez, 748 F.2d 972 (5th Cir. 1984), the defendant pled guilty to illegal transportation of aliens. At sentencing, his attorney objected to the label "notorious alien smuggler" used in the presentence report to describe the defendant. The attorney argued that the description implied that the defendant was actively involved in smuggling aliens and was known by law enforcement officials for such activities when in fact the defendant had only allowed illegal aliens to stay in his apartment and to use his car. The district court sentenced the defendant without making any response to the attorney's objection. The Fifth Circuit vacated the sentence. In so doing, the court stated at page 974:

> Once Velasquez met his burden under the rule, the court was required to make either a finding as to the allegation or a statement that the controverted matter would not be considered. . . . Once it is found that the district court failed to

In United States v. Pettito, 767 F.2d 607 (9th Cir. 1985) the defendant challenged the accuracy of the presentence report. The trial court permitted defendant to comment on the report, but did not make written findings and attach them to the report. In remanding the matter for resentencing, the court of appeals stated at page 610:

> Unless the court makes written findings, even if it finds a challenged allegation in the presentence report untrue, and does not rely on it for sentencing, prison or parole officials may subsequently receive the uncorrected report and rely on the false allegation in correctional or parole decisions. That possibility is precisely what rule 32(c)(3)(D) seeks to prevent.

These decisions make plain that rule 32(c)(3)(D) means what it says and that when the accuracy of a presentence report is challenged in any way, the sentencing judge must directly respond to that challenge by stating on the record (a) the court's findings concerning the challenged matter or (b) that the court will not take the controverted matter into account in sentencing the defendant. The court must in addition attach a written record of its findings to the presentence report, or it may comply with the rule by an oral statement from the bench. In that event, a transcript of that statement should be attached to the presentence report. See United States v. Castillo-Roman, 774 F.2d 1280 (5th Cir. 1985) (remand to permit district court to append copy of transcript to presentence report).

Although some appellate courts may interpret the requirements of the rule differently, see United States v. Hill, 766 F.2d 856, 858 (4th Cir. 1985) (trial court must state on record how it treats controverted fact in sentencing, but need not make finding that the controverted fact is true or not true) a trial court may well find it prudent and not burdensome to make explicit and detailed findings.

BENCH COMMENT

Federal Judicial Center

1986, No. 1 January 15, 1986

SUBJECT: The timing of pretrial detention motions and hearings on such motions under the Bail Reform Act of 1984

The Bail Reform Act of 1984, 18 U.S.C. § 3141 et seq., permits pretrial detention of certain defendants where, after a hearing, a judicial officer determines that no conditions of release will assure the safety of the community and the presence of the defendant for trial. Under the statute, a hearing on a motion for pretrial detention of a defendant must be held "immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance." 18 U.S.C. § 3142(f). Continuances are limited to three days upon motion of the Government and five days upon motion of the defense, except upon a showing of good cause. Id. The circuit courts have now begun to interpret these timing requirements.

"First Appearance"

The circuits have reached differing interpretations of the "first appearance" requirement. Typical of courts holding that this requirement does not preclude a motion for pretrial detention--by the court or by the government--at a time later than the defendant's initial appearance in court is the holding of a 5-4 majority of the Eighth Circuit in United States v. Maull, 773 F.2d 1479 (8th Cir. 1985):

> A fair reading of the statute is not that a detention hearing must be held "immediately" when a defendant first appears in court, else to be forever barred, but rather that once a motion for pretrial detention is made, a hearing must occur promptly thereafter.

Id. at 1483. The district court could therefore hold a detention hearing on its own motion at the time of reviewing a magistrate's order setting conditions of release. Id. The Eleventh Circuit, on similar reasoning, held that a detention hearing could be held upon motion of the government at the preliminary hearing even though bond had been set at the defendant's initial appearance before a magistrate. United States v. Medina, 775 F.2d 1398 (11th Cir. 1985). See also United States v. Delker, 757 F.2d 1390, 1393-94 (3d Cir. 1985) (statutory language does not require "that a hearing may be had only upon the defendant's appearance before the first judicial officer he or she faces"; therefore, district court may conduct second evidentiary hearing on detention issue upon review of magistrate's previous determination that detention is not required).

magistrate, it was permissible for the magistrate to set a detention hearing for five days later to enable the defendant to obtain counsel. United States v. Fortna, 769 F.2d 243, 248-49 (5th Cir. 1985).

Under the statute, a continuance of more than five days upon motion of defense counsel may be granted for "good cause." The Al-Azzawy court held that an eight-day continuance at the simple request of defense counsel was improper:

> [A] continuance to suit the schedule of counsel for a detained individual is not a continuance for good cause, at least in the absence of a showing that no other lawyer is available to handle an earlier hearing, that the time is in fact necessary for preparation, or of some other valid reason clearly set forth in the record.

Id. at 1146. Similarly, the Hurtado court held that, even if defense counsel's suggestion of a hearing date constituted a motion for a continuance, it was error for the magistrate to grant a continuance of more than five days solely in order to permit the other defendants to obtain counsel. Slip op. at 1619-22.

BENCH COMMENT

Federal Judicial Center

1986, No. 2 January 30, 1986

SUBJECT: When does Rule 12(e) require a judge to rule on an evidentiary motion before trial begins?

Must a court rule on every evidentiary motion before trial begins if failure to rule before trial adversely affects the government's right to appeal? That is the question raised by the interplay of Fed. R. Crim. P. 12 and the Criminal Appeals Act, 18 U.S.C. § 3731 (1982). Section 3731 allows prosecutors--but not defendants--to take interlocutory appeals of district court decisions on certain motions, such as those to allow or exclude proposed testimony. Rule 12(e) requires such motions to be decided before trial if a right to appeal would be adversely affected by a delayed ruling.

The issue may arise, for example, when an action must be retried. In that event the government will sometimes seek a pretrial ruling that evidence rejected at the first trial will be admitted at the second.

The Criminal Appeals Act and Rule 12(e), taken in conjunction, would seem to compel a district court to rule before trial on every pretrial evidentiary motion since a failure to do so might adversely affect the government's right to appeal.

The first court to address this issue ruled, however, that the trial court need not always rule upon such motions in advance of trial. United States v. Barletta, 644 F.2d 50 (1st Cir. 1981).

In Barletta certain government evidence was ruled inadmissible at the defendant's first trial. That trial ended in a hung jury. Before retrial the government moved for an order admitting the excluded evidence. When the district court declined to rule before trial, the government sought mandamus.

As a threshold ruling, the appellate court held that the government may appeal from any pretrial evidentiary ruling but observed that there were inherent problems in compelling a court

> to rule prior to trial on all such [evidentiary] issues. We share in full the district court's concerns for crowded dockets and judicial economy, and we agree that many motions to exclude can be decided only on the basis of detailed consideration of other evidence to be introduced at trial. Requiring such motions to be decided prior to trial

> [O]nce a district court has decided that a motion may be raised prior to trial under 12(b)--that an issue is sufficiently "capable of determination without the trial of the general issue"--it may then find no "good cause" for deferring a ruling under 12(e), since to do so would adversely affect the government's right to appeal under § 3731.

Id. at 59.

That a district court must rule in advance of trial on certain motions but has the discretion to avoid so ruling on others was also the holding in United States v. Layton, 720 F.2d 548, 553 (9th Cir. 1983) ("In deciding whether to hear a motion before trial, the district judge must balance a desire to preserve the government's right of appeal against the inefficiency created by conducting a mini-trial before the actual trial"), cert. denied, 465 U.S. 1069 (1984), later appeal, 767 F.2d 549 (9th Cir. 1985).

BENCH COMMENT

Federal Judicial Center

1986, No. 3 April 1, 1986

SUBJECT: Application and Effect of Rebuttable Presumptions Created by the Bail Reform Act of 1984

The Bail Reform Act of 1984 permits pretrial detention of a criminal defendant where, after a hearing, a judicial officer determines that no conditions of release will reasonably assure the safety of the community and the appearance of the defendant at subsequent proceedings. The statute creates two rebuttable presumptions:

> (1) No conditions of release will reasonably assure the safety of the community where the defendant is accused of one of numerous specified crimes, such as crimes of violence, and has previously been convicted of committing one of the specified crimes while free on bail (the "previous violator presumption").
>
> (2) No conditions of release will reasonably assure defendant's appearance and the safety of the community where a judicial officer finds probable cause to believe that defendant has committed a federal drug offense carrying a maximum prison term of ten years or more, or has used a firearm to commit a felony (the "drug and firearm offender presumption").

18 U.S.C. § 3142(e).

Two groups of issues, one concerning the circumstances necessary to trigger the drug and firearm offender presumption, and the other involving the nature and effect of the statutory presumptions, have been the subject of recent court of appeals opinions. The courts' rulings are discussed below.

Application of Drug and Firearm Offender Presumption

Four courts of appeals have ruled that in cases where a grand jury has indicted a defendant on a serious drug offense, the statute does not require a judicial officer to make an independent finding of probable cause in order to invoke the drug and firearm offender presumption. The indictment by itself establishes probable cause to believe that defendant committed the offense charged and triggers the presumption that defendant constitutes a danger to the community and poses a risk of flight. United States v. Dominguez, ___ F.2d ___, No. 85-2990, slip op. at 9 n.7 (7th Cir. Feb. 13, 1986); United

this case also included the magistrate's "specific determination," based on evidence presented by the government, that defendant posed a danger to the community. Id. at 367, 371 n.15.

Once the defendant has produced some evidence to rebut the drug and firearm offender presumption, the presumption that such offenders pose special risks remains in the case as one factor among many that the statute requires a judicial officer to consider in determining whether detention is appropriate. Jessup, 757 F.2d at 384. Accord Dominguez, slip op. at 10; Martir, 782 F.2d at 1144; Diaz, 777 F.2d at 1238.

In Jessup the First Circuit adopted what it called a "middle ground" position, holding that the presumption neither shifts the burden of persuasion nor "bursts" once contrary evidence is presented. 757 F.2d at 383. This "middle ground" position has been specifically adopted by the Seventh Circuit, Dominguez, slip op. at 10, and the Second Circuit, Martir, 782 F.2d at 1144. The courts have concluded that giving the presumption some weight, without shifting the burden of persuasion, accomplishes the legislative purpose of ensuring that judges and magistrates, "who typically focus only upon the particular cases before them," also take note of the congressional finding that drug offenders, "as a general rule, pose special risks of flight." Jessup, 757 F.2d at 384 (emphasis in original).

> Since the presumption is but one factor among many, its continued consideration by the magistrate does not impose a burden of persuasion upon the defendant. And, since Congress seeks only consideration of the general drug offender/flight problem, the magistrate or judge may still conclude that what is true in general is not true in the particular case before him. He is free to do so, and to release the defendant, as long as the defendant has presented some evidence and the magistrate or judge has evaluated all of the evidence with Congress's view of the general problem in mind.

Id. Although only the drug and firearm presumption was at issue in Jessup, the court noted that the intended effect of both of the statutory presumptions was the same. Id. at 381.

* * *

This special issue of Bench Comments, summarizing recent case law on the application and effect of rebuttable presumptions created by the Bail Reform Act, has been prepared at the suggestion of the Federal Judicial Center Advisory Committee on Education Concerning 1984 Crime Legislation.

The Committee is Chaired by Judge A. David Mazzone and includes Judge John D. Butzner, Jr., Judge Gerald B. Tjoflat, Judge William H. Orrick, Jr. and Judge Edward R. Becker.

BENCH COMMENT

Federal Judicial Center

1986, No. 4 May 30, 1986

SUBJECT: Limitations on a defendant's right under Rule 43 to be present at every stage of trial

Although Rule 43(c)(3) of the Federal Rules of Criminal Procedure provides that a defendant need not be present at a conference or argument upon a question of law, some trial judges are uneasy about holding a bench conference or conference in chambers upon a legal question in the absence of defendant.

Defendants in a number of cases have argued on appeal that the holding of conferences out of their presence, albeit with counsel, violated their constitutional right to be present at every stage of trial. Those courts of appeals that have addressed this issue have uniformly held, however, that Rule 43(c)(3) means what it says and that a defendant does not have a constitutional right to be present either at a bench conference or at a conference in chambers at which only legal questions are considered.

Situations found to fall within the Rule 43(c)(3) exception include an informal conference between the trial court and counsel concerning jury instructions, United States v. Graves, 669 F.2d 964, 972 (5th Cir. 1982); a pretrial conference with counsel concerning defendant's motion for an evidentiary hearing regarding his competency to stand trial, his motion for permission to show good cause for the untimely filing of a notice of his reliance on an insanity defense and his motion for a continuance, United States v. Veatch, 674 F.2d 1217, 1225-26 (9th Cir. 1981), cert. denied, 456 U.S. 946 (1982); the granting of a continuance, United States v. Killian, 639 F.2d 206, 209-10 (5th Cir.), cert. denied, 451 U.S. 1021 (1981); an in camera evidentiary hearing concerning additional identification evidence that the prosecution sought to introduce, United States v. Gunter, 631 F.2d 583, 589 (8th Cir. 1980); and a conference regarding marijuana smoking by jurors, United States v. Provenzano, 620 F.2d 985, 998 (3d Cir.), cert. denied, 449 U.S. 899 (1980).

If there is any question that a conference may not be limited to questions of law, or in a situation not excepted by Rule 43(c)(3), such as when a judge interviews a juror, the reported cases indicate that the better practice is to have defendant present.

In the event that a judge should decide over defendant's objections to conduct an in camera interview of a juror out of defendant's presence, some recent cases have suggested remedial measures the judge may take to reduce

The procedure of interviewing each juror with only a court reporter present was also approved in Polizzi v. United States, 550 F.2d 1133, 1137 (9th Cir. 1976) and in United States v. Jorgenson, 451 F.2d 516, 521 (10th Cir. 1971), cert. denied, 405 U.S. 922 (1972).

Despite these holdings that a court did not commit reversible error in interviewing a juror out of the presence of counsel and the defendant, it would appear to be a better and safer practice to conduct such interviews in the presence of the defendant or at least in the presence of defendant's counsel unless there are persuasive reasons for their exclusion.

The District of Columbia Circuit has suggested that when security is a problem or a dangerous defendant or a group of defendants is involved, defendant's right to be present at the judge's examination of a juror can be satisfied by use of closed circuit television and the opportunity to consult with counsel. United States v. Washington, 705 F.2d 489, 497 (D.C. Cir. 1983).

BENCH COMMENT

Federal Judicial Center

1987, No. 1 January 23, 1987

SUBJECT: Blanket assertions of the privilege against self-incrimination

A number of courts of appeals have considered whether a witness who invokes a legitimate fifth amendment claim of privilege against self-incrimination can thereby be excused from further testifying. The cases have held that even if the trial judge sustains a claim of privilege, the judge must require the witness to assert the privilege question-by-question, rather than assert a blanket privilege as to all questions. Only in the "unusual case" in which the trial judge is justified in finding that the privilege applies to any relevant question would a blanket privilege apply.

The standard for determining the validity of a claimed privilege against self-incrimination is set forth in Hoffman v. United States, 341 U.S. 479 (1951), which holds that in order to sustain a claim of privilege under the fifth amendment, "it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Id. at 486-87. Courts have held, however, that even when a district court is satisfied that a witness has a valid fifth amendment claim with regard to some issues, the court must permit questioning to establish the scope of the witness's claim and to determine whether there are other issues as to which the witness would not be able to assert the privilege. The Ninth Circuit has stated:

> A proper application of [the Hoffman] standard requires that the Fifth Amendment claim be raised in response to specific questions propounded by the investigating body. This permits the reviewing court to determine whether a responsive answer might lead to injurious disclosures. [Citation omitted.] Thus a blanket refusal to answer any question is unacceptable.

United States v. Pierce, 561 F.2d 735, 741 (9th Cir. 1977), cert. denied, 435 U.S. 923 (1978). Accord United States v. Moore, 682 F.2d 853, 856 (9th Cir. 1982); United States v. Tsui, 646 F.2d 365, 367 (9th Cir. 1981), cert. denied, 455 U.S. 991 (1982); United States v. Goodwin, 625 F.2d 693, 701 (5th Cir. 1980).

In United States v. Moore, 682 F.2d 853 (9th Cir. 1982), and United States v. Tsui, 646 F.2d 365 (9th Cir. 1981), cert. denied, 455 U.S. 991 (1982), the Ninth Circuit also rejected the idea that a potential witness can avoid testifying by making a blanket assertion of the fifth amendment privilege. In Moore, the court held that the trial judge erred in accepting the blanket refusal to testify of a codefendant who had already pleaded guilty to one count in connection with the offense. 682 F.2d at 856-57. The court found, however, that such error was harmless in that case because "there is such clear evidence of guilt." Id. at 858. See also United States v. Arnott, 704 F.2d 322, 325 (6th Cir. 1983) (court erred in not allowing defendant to confront witness and elicit all nonprivileged testimony, but no "fundamental rights were affected by the court's ruling"), cert. denied, 464 U.S. 948 (1983).

In Tsui, the court stated that accepting a witness's blanket assertion of the fifth amendment privilege rather than forcing the witness to assert the privilege in response to specific questions "is unacceptable in the ordinary case." 646 F.2d at 367. Nonetheless, the court held that in some circumstances:

> [a] trial court may sustain a claimed right to refuse to testify if the court, based on its knowledge of the case and of the testimony expected from the witness, can conclude that the witness could "legitimately refuse to answer essentially all relevant questions."

Id. at 368 (quoting United States v. Goodwin, 625 F.2d 693, 701 (5th Cir. 1980) (quoting United States v. Gomez-Rojas, 507 F.2d 1213, 1220 (5th Cir.), cert. denied, 423 U.S. 826 (1975))). Because of the district court's knowledge of the case in Tsui, the court of appeals held that the trial court did not abuse its discretion in granting a blanket privilege to the witness under the facts of the case.

Such an exception to the general rule has also been recognized in United States v. Thornton, 733 F.2d 121, 126 (D.C. Cir. 1984) ("[i]n unusual cases . . . a district judge may sustain a blanket assertion of privilege after determining that there is a reasonable basis for believing a danger to the witness might exist in answering any relevant question") (emphasis in original), and in United States v. Rodriguez, 706 F.2d 31 (2d Cir. 1983). The exception, however, "is a narrow one, only applicable where the trial judge has some special or extensive knowledge of the case that allows evaluation of the claimed fifth amendment privilege even in the absence of specific questions to the witness." Moore, 682 F.2d at 856.

BENCH COMMENT

Federal Judicial Center

1987, No. 2 February 23, 1987

SUBJECT: Considering a motion by a recalcitrant grand jury witness who claims his or her civil contempt incarceration should be terminated because it has lost its coercive effect

District courts are not infrequently called upon to determine whether to release a witness who has been jailed in civil contempt for refusing to testify before a grand jury, upon the witness's plea that incarceration has lost its coercive effect. Courts of appeals that have considered this issue have emphasized that a judge must make an "individualized decision" in assessing the likelihood that continued confinement will have a coercive effect upon the particular contemnor. If the judge is persuaded that incarceration has ceased to have a coercive effect upon the particular contemnor, the civil contempt sanction should be ended. The criminal contempt sanction remains available, however, to vindicate the court's authority.

Several circuit court opinions have attempted to provide the district courts with some guidance in performing what one court has described as the "perplexing task" of determining whether in a particular case continued confinement of a recalcitrant witness retains any realistic possibility of achieving its intended purpose.

It is well established that a civil contempt sanction is a coercive device, imposed to secure compliance with a court order. Shillitani v. United States, 384 U.S. 364 (1966); Maggio v. Zeitz, 333 U.S. 56 (1948). When, however, "it becomes obvious that [civil contempt] sanctions are not going to compel compliance, they lose their remedial characteristics and take on more of the nature of punishment." Matter of Parrish, 782 F.2d 325, 327 (2d Cir. 1986) (quoting Soobzokov v. CBS, Inc., 642 F.2d 28, 31 (2d Cir. 1981)). See also In re Grand Jury Investigation (Braun), 600 F.2d 420, 423-24 (3d Cir. 1979). "Where incarceration for civil contempt . . . ceases to be coercive and becomes punitive, 'due process considerations oblige a court to release a contemnor from civil contempt . . . .'" Matter of Crededio, 759 F.2d 589, 590-91 (7th Cir. 1985) (citing Simkin v. United States, 715 F.2d 34, 37 (2d Cir. 1983); Soobzokov, 642 F.2d at 31; Grand Jury Investigation (Braun), 600 F.2d at 423-24; Lambert v. Montana, 545 F.2d 87, 89-91 (9th Cir. 1976)).

With respect to recalcitrant witnesses before federal grand juries, Congress has determined that 18 months is the maximum period of confinement for civil contempt. 28 U.S.C. § 1826(a) (Recalcitrant Witness Statute). It has been held that "in the absence of unusual circumstances, a reviewing court

In short, the trial court must make an "individualized decision, rather than application of a policy that the maximum eighteen-month term must be served by all recalcitrant witnesses." Simkin, 715 F.2d at 38. "If a judge orders continued confinement without regard to its coercive effect upon the contemnor or as a warning to others who might be tempted to violate their testimonial obligations, he has converted the civil remedy into a criminal penalty." Id. But see Crededio, 759 F.2d at 592 (factors a district court may consider in determining whether to release a contemnor include concern that releasing the witness would undermine the civil contempt sanction).

Thus, "[t]he exercise of . . . discretion confronts a district judge with a perplexing task." Simkin, 715 F.2d at 37. On the one hand, "the contemnor's assertion that he will never testify need not be accepted at face value." Parrish, 782 F.2d at 327. See also Simkin, 715 F.2d at 37; Grand Jury Investigation (Braun), 600 F.2d at 425 ("the civil contempt power would be completely eviscerated were a defiant witness able to secure his release merely by boldly asserting that he will never comply with the court's order"). On the other hand, "[t]hat a judge need not accept such an avowal [not to testify] does not mean that he may not." Sanchez, 725 F.2d at 31.

The district court, having observed the witness at the time of the contempt adjudication and having reviewed the contemnor's subsequent papers or affidavits, is not required to hear further testimony in person. Sanchez, 725 F.2d at 32; Simkin, 715 F.2d at 38 ("we think a district judge has virtually unreviewable discretion both as to the procedure he will use to reach his conclusion, and as to the merits of his conclusion"). "Objectively identifiable facts" the district court may use in making its decision include the age, state of health, and length of imprisonment of the contemnor. Grand Jury Investigation (Braun), 600 F.2d at 425.

As noted above, if the court determines that the civil contempt incarceration should be terminated because it is ineffective, the criminal contempt sanction is nonetheless available to vindicate the court's authority. Crededio, 759 F.2d at 593; Simkin, 715 F.2d at 37. Moreover, in vacating an incarceration order, the district court may choose to impose a coercive daily fine on the contemnor when it believes the circumstances are such that a fine would likely be more effective on the contemnor than incarceration. See Matter of Dickinson, 763 F.2d 84 (2d Cir. 1985).

It should also be noted that the principles discussed above would apply by the same reasoning to any witness who is incarcerated in civil contempt under the Recalcitrant Witness Statute, as, for example, in the case of a witness who has been confined for failure to comply with a court order enforcing an IRS summons.

BENCH COMMENT

Federal Judicial Center

1987, No. 3 August 12, 1987

SUBJECT: Instructing Deadlocked Juries - The Allen Charge in Federal Courts

In Allen v. United States, 164 U.S. 492, 501 (1896), the Supreme Court approved a supplemental instruction to a deadlocked jury in a criminal case that urged jurors to reconsider their opinions and try again to reach a verdict. The "Allen charge" has been criticized for its potential to coerce minority jurors and thus threaten the requirement of a unanimous verdict. See, e.g., United States v. Rey, 811 F.2d 1453, 1458-60 (11th Cir. 1987); United States v. Martin, 756 F.2d 323, 326 (4th Cir. 1985). Nevertheless, every federal circuit permits use of the Allen charge or a modified version thereof. The substantive and procedural requirements for Allen charges vary from circuit to circuit, so trial judges must look to the law of their particular circuit.

If a court is inclined to give an instruction to a deadlocked jury, it is important for the court to remember that it must not inquire as to the numerical division of the jury. To do so invites reversible error, even though the court does not inquire as to how the jurors are divided. Brasfield v. United States, 272 U.S. 448, 450 (1926). Some circuits have held that it may not be reversible error, however, if the jury reveals its division without any solicitation by the court. See, e.g., United States v. Rengifo, 789 F.2d 975, 985 (1st Cir. 1986) ("not reversible error for the jury to reveal its division voluntarily"); United States v. Cook, 663 F.2d 808, 809 n.3 (8th Cir. 1981) ("unsolicited revelation concerning the jury's division does not constitute reversible error").

Appellate courts have fashioned guidelines for the use of Allen charges, and the basic practice in each circuit is summarized below. Only those aspects of Allen charges actually addressed by a circuit are included in the discussion of the law of each circuit. Most circuits have a suggested or required form of instruction, taken from model instructions or prior case law. Generally, the charge must treat majority and minority jurors equally, and should stress that each juror must reach an individual decision and not surrender an honest or conscientious conviction for the purpose of returning a verdict. Except as noted, the timing of an Allen charge is left to the trial judge's discretion.

D.C. CIRCUIT: Courts must use the instruction in W. Mathes, Jury Instructions and Forms for Federal Criminal Cases, Instruction 8.11, 27 F.R.D. 39, 97-98 (1969) (reprinted in Criminal Jury Instructions, District of Columbia, No. 2.91 (3d ed. 1978)), and follow the American Bar Association Standards Relating to Trial by Jury § 5.4 (1968) (now § 15-4.4 in ABA, Standards for Criminal

781, 787 n.7 (5th Cir. 1981) (upholding charge similar to Trial Instruction No. 6 in Committee on Pattern Jury Instructions, District Judges Association, Fifth Circuit, Pattern Jury Instructions (Criminal Cases) (1979)). Deviations from approved charges are permitted, but "cannot be so prejudicial to the defendants as to require reversal." Bottom, 638 F.2d at 787. The instruction should neither threaten the jury nor set a deadline. See United States v. Anderton, 679 F.2d 1199, 1203-04 (5th Cir. 1982).

Initial and repeated charges are reviewed "in light of [their] language and the facts and circumstances which formed their context." United States v. Fossler, 597 F.2d 478, 485 (5th Cir. 1979). Accord United States v. Kimmel, 777 F.2d 290, 295 (5th Cir. 1985), cert. denied, 106 S. Ct. 1947 (1986).

6th CIRCUIT: No specific form is required, but "variations from the charge approved in Allen 'imperil[] the validity of the trial.'" Williams v. Parke, 741 F.2d 847, 850 (6th Cir. 1984) (quoting United States v. Scott, 547 F.2d 334, 337 (6th Cir. 1977)), cert. denied, 470 U.S. 1029 (1985). However, no "single substantive variation from the original Allen charge inevitably requires reversal," and a "totality of the circumstances" test is used to determine whether a charge is so coercive as to require reversal. Williams, 741 F.2d at 851 n.6, 852. See also United States v. Giacalone, 588 F.2d 1158, 1166-67 (6th Cir. 1978), cert. denied, 441 U.S. 944 (1979), and United States v. Lewis, 651 F.2d 1163, 1165 (6th Cir. 1981) (indicating, respectively, approval of §§ 18.14 and 18.15 of Devitt & Blackmar, Federal Jury Practice and Instructions (3d ed. 1977)). Reference to a court's crowded docket is "impermissibly coercive," Scott, 547 F.2d at 337, and reference to the expense of a retrial is disfavored, but not absolutely prohibited, see Giacalone, 588 F.2d at 1167.

An Allen charge may be repeated if that is not coercive under the circumstances. See United States v. Granger, No. 85-1833, slip op. (6th Cir. Oct. 17, 1986) (text in Westlaw).

7th CIRCUIT: A modified Allen charge may be given to a deadlocked jury only if included in the initial instructions. United States v. Silvern, 484 F.2d 879, 883 (7th Cir. 1973) (en banc reconsideration); United States v. Brown, 634 F.2d 1069, 1070 (7th Cir. 1980).

The approved form of Allen charge was set forth in Silvern, 484 F.2d at 83 (later modified by the Committee on Federal Jury Instructions of the Seventh Circuit, Federal Criminal Jury Instructions § 7.06 (1980)). Any other instruction will require reversal. Silvern, 484 F.2d at 883. Trial judges are advised to give the jury a written or taped copy of the charge to preclude the need for instruction during deliberations, id., though an instruction may still be reread at "the discretion of the court," United States v. Hamann, 688 F.2d 507, 511 (7th Cir. 1982), cert. denied, 460 U.S. 1013 (1983). The trial judge may make additional comments if, "when viewed in the context of the entire instructions," the court's remarks do not "pressure[] the jury to surrender their honest opinions for the mere purpose of returning a verdict." Id.

8th CIRCUIT: If given at all, an Allen charge is "preferred as part of the regular jury instruction before deadlock has occurred," and courts should "consider with particular care whether a supplemental Allen instruction is absolutely necessary under the circumstances." Potter v. United States, 691 F.2d 1275, 1277 (8th Cir. 1982).

BENCH COMMENT

Federal Judicial Center

1987, No. 4 October 23, 1987

SUBJECT: Bourjaily v. United States: Admission of Co-Conspirator Statements under Federal Rule of Evidence 801(d)(2)(E)

In Bourjaily v. U.S., 107 S. Ct. 2775 (1987), a 6-3 decision, the Supreme Court announced three rules that will change current practices in many circuits concerning the admission of co-conspirator statements.

The first rule, already followed in most circuits, is that the offering party must establish the necessary prerequisites for admission of a co-conspirator statement by a preponderance of the evidence.

Second, the Court ruled that trial courts may now consider the content of a proposed co-conspirator statement when determining admissibility of that statement under the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E). Prior to Bourjaily, most circuits admitted only evidence that was independent of the proposed statement itself.

Third, if a co-conspirator statement has met the prerequisites for admission under rule 801(d)(2)(E), the trial court need not make a further inquiry as to whether the statement satisfies the Confrontation Clause of the Sixth Amendment. The circuits had been closely divided as to whether the Confrontation Clause mandated an independent inquiry into reliability before a proposed co-conspirator statement was admissible. Now, such an inquiry need not be made.

Initially, the Bourjaily Court addressed the burden of proof when the preliminary facts relevant to admission of a co-conspirator's statement are disputed. Rule 801(d)(2)(E) requires the offering party to demonstrate the existence of a conspiracy, the nonoffering party's involvement in it, and that the statement was made during the course and in furtherance of the conspiracy. Noting that the Federal Rules of Evidence, particularly rule 104(a), "nowhere define the standard of proof the court must observe in resolving" preliminary questions concerning admissibility, the Court stated:

> We have traditionally required that these matters be established by a preponderance of proof. [Citations omitted.] . . . Therefore, we hold that when the preliminary facts relevant to Rule 801(d)(2)(E) are disputed, the offering party must prove them by a preponderance of the evidence.

107 S. Ct. at 2778-79. This ruling upholds the standard currently used in most of the circuits.

The Court left open the question of "whether the courts below could have relied solely upon [the co-conspirator's] hearsay statements to determine that a conspiracy had been established by a preponderance of the evidence." Id. at 2781-82. But see 107 S. Ct. at 2783 (Stevens, J., concurring) ("An otherwise inadmissible hearsay statement cannot provide the sole evidentiary support for its own admissibility entirely by tugging on its own bootstraps.").

The Court further held that if the prerequisites for admission under rule 801(d)(2)(E) are met, the requirements of the Confrontation Clause are also satisfied and no separate inquiry into reliability is necessary:

> While a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, this Court has rejected that view as "unintended and too extreme." Ohio v. Roberts, 448 U.S. 56, 63 (1980). . . . [T]he Court has, as a general matter only, required the prosecution to demonstrate both the unavailability of the declarant and the "indicia of reliability" surrounding the out-of-court declaration. Id., at 65-66. Last Term in United States v. Inadi, 475 U.S. 387 (1986), we held that the first of these two generalized inquiries, unavailability, was not required when the hearsay statement is the out-of-court declaration of a co-conspirator. Today, we conclude that the second inquiry, independent indicia of reliability, is also not mandated by the Constitution.

107 S. Ct. at 2782.

The Roberts Court had concluded "that no independent inquiry into reliability is required when the evidence 'falls within a firmly rooted hearsay exception.'" Id. at 2782-83 (quoting Roberts, 448 U.S. at 65). Applying Roberts, the Bourjaily Court stated:

> We think that the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under this Court's holding in Roberts, a court need not independently inquire into the reliability of such statements. . . . Accordingly, we hold that the Confrontation Clause does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirements of Rule 801(d)(2)(E).

Id. at 2783.

To summarize, Bourjaily set forth the following rules in determining whether a proposed co-conspirator statement should be admitted into evidence:

1. Factual requirements must be proved by a preponderance of evidence.

2. The content of an alleged co-conspirator statement may be considered.

3. Once the requirements for admissibility are met, no further inquiry is needed to satisfy the Confrontation Clause of the Sixth Amendment.

BENCH COMMENT

Federal Judicial Center

1987, No. 5 December 1, 1987

SUBJECT: Postindictment restraining orders under the Comprehensive Forfeiture Act

Provisions of the Comprehensive Forfeiture Act of 1984 (CFA) permit the issuance of ex parte restraining orders and injunctions following indictment on RICO and certain drug trafficking offenses. See 18 U.S.C. § 1963(d)(1); 21 U.S.C. § 853(e)(1). The provisions are silent as to notice and hearing requirements and the duration of the restraining orders. Several circuits have held that a prompt postrestraint hearing must be provided upon the issuance of an ex parte postindictment restraining order under the CFA freezing or seizing defendants' assets. U.S. v. Harvey, 814 F.2d 905, 928-29 (4th Cir. 1987); U.S. v. Thier, 801 F.2d 1463, 1468-69 (5th Cir. 1986); U.S. v. Crozier, 777 F.2d 1376, 1383-84 (9th Cir. 1985). When an order simply prohibits transfer or disposition of property without notice and permission of the court, however, one circuit has held that an evidentiary hearing is not required. U.S. v. Musson, 802 F.2d 384, 386-87 (10th Cir. 1986).

The statutes amended by the CFA to permit issuance of restraining orders in RICO and drug trafficking cases provide in part:

> Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property . . . for forfeiture under this section--
>
> > (A) upon the filing of an indictment or information charging a violation of [drug or RICO provisions for which forfeiture is a penalty] and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture . . . .

18 U.S.C. § 1963(d)(1); 21 U.S.C. § 853(e)(1).

Two courts of appeals have held that to the extent the CFA authorizes issuance of ex parte restraining orders upon the filing of an indictment, without any hearing on the imposition of the order before trial or conviction, it violates fifth amendment due process guarantees. U.S. v. Harvey, 814 F.2d 905, 928-29 (4th Cir. 1987); U.S. v. Crozier, 777 F.2d 1376, 1383-84 (9th Cir. 1985). Cf. U.S. v. Spilotro, 680 F.2d 612, 616-17 (9th Cir. 1982) (pre-CFA case held due process required postdeprivation evidentiary hearing in accordance with Fed. R. Civ. P. 65 after entry of ex parte temporary restraining order).

In Crozier, the district court issued an ex parte restraining order preventing Crozier from selling, transferring, or encumbering almost all of his real and personal property. The order also restrained a codefendant who lived with

> tections accorded by Rule 65 included, the statute comports with procedural due process.

Id. at 1468.

The court found that return of the proper form of indictment satisfied rule 65's pre-order notice and irreparable loss requirements for issuance of an ex parte restraining order. Id. at 1468-69. The court held, however, that "[t]he remainder of Rule 65 must be satisfied as it would be in any other context":

> Under Rule 65 an ex parte restraining order is effective for a maximum of ten days unless the court extends it for one additional ten day period for good cause shown, or unless the defendant consents to an extension. Prompt notice to the defendant and an adversary hearing must follow the order and precede the entry of an injunction that freezes the defendant's assets for any further period of time. The district court must also hold a prompt hearing if the defendant moves to modify or dissolve a restraining order.

Id. at 1469. Cf. U.S. v. Gelb, 826 F.2d 1175, 1177 (2d Cir. 1987) ("The initial ex parte order will ordinarily be very broad and subsequent fine-tuning may be necessary to avoid unnecessary or collateral effects. This fine-tuning should occur upon a motion by the defendants and a record made in the district court as to the precise effects of the order.").

The procedural requirements for a postindictment restraining order may differ depending on whether the order merely restricts alienation of property or instead rises to the level of a seizure. In the former situation, the Tenth Circuit has determined that neither the CFA nor due process requires a court to hold an evidentiary hearing before issuing the order. U.S. v. Musson, 802 F.2d 384, 386-87 (10th Cir. 1986). The restraining order in Musson required notice to the government and an opportunity for hearing and court approval before sale or transfer of certain property. The district court held a hearing on the government's motion for the restraining order, but not an evidentiary hearing to establish reasonable probability of ultimate forfeiture. 802 F.2d at 385.

Defendants specifically asked the appeals court to adopt the Ninth Circuit's reasoning in Crozier that due process required an evidentiary hearing and compliance with the requirements of rule 65 in order to issue such a restraining order. Id. Distinguishing Crozier on its facts, however, the court found:

> The restraining order in this instance prohibited transfers or dispositions of the subject property without notice and permission of the court. The nature of the infringement therefore is a restraint upon its free alienation which it must be conceded is far less intrusive than a physical seizure of the subject property. . . . In contrast, the court in [Crozier] was faced with a situation where the defendants' property was seized and a wrongful seizure apparently could not be challenged until after the completion of the criminal case.

Id. at 387 (citation omitted). The court held: "[W]e cannot conclude that the reliance of the district court upon the grand jury indictment in issuing a restraining order which restricted free alienation of the subject property failed to comport with due process." Id.

BENCH COMMENT

Federal Judicial Center

1988, No. 1 January 4, 1988

SUBJECT: Use of Oral Testimony in an Evidentiary Hearing on a Motion for Summary Judgment--Fed. R. Civ. P. 43(e)

Receiving oral testimony under Fed. R. Civ. P. 43(e) at a hearing on a summary judgment motion may provide a trial court with a pretrial clarification of the rival contentions and a needed appraisal of whether there actually exists a genuine issue for trial. Requiring the party with the burden of proof to present its evidence in the form of testimony may make it clear there are, or are not, material issues of fact in dispute, and a trial is, or is not, required.

The use of evidence taken at a rule 43(e) hearing must remain within the framework of the summary judgment rule, and is not to be equated with the use of similar proof at trial. The hearing is not a means to test the credibility of claims or to resolve disputed facts; rather, it goes only to matters of competency, materiality, and sufficiency of the proffered proof as a matter of law. Because of the limited nature of the hearing, and the danger of going beyond its proper scope, oral testimony is inappropriate in most cases, and should be used "sparingly." Moreover, if a hearing is to be held, notice should be given to each party to prevent unfair surprise. This Bench Comment examines the benefits and problems of taking oral testimony on a summary judgment motion.

An evidentiary hearing on a motion is authorized by rule 43(e):

> When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

Rule 43(e) permits a trial court to consider oral testimony in a summary judgment proceeding. See, e.g., Hancock Indus. v. Schaeffer, 811 F.2d 225, 230-31 & n.2 (3d Cir. 1987) ("Testimony given in an evidentiary hearing is no different from testimony given in a deposition and may be treated the same in summary judgment proceedings.").

A recent example of the utility of rule 43(e) is Argus, Inc. v. Eastman Kodak Co., 612 F. Supp. 904 (S.D.N.Y. 1985), aff'd, 801 F.2d 38 (2d Cir. 1986), cert. denied, 107 S. Ct. 1295 (1987). After the defendant moved for summary judgment in this complex antitrust action, the trial court determined that a limited rule 43(e) hearing would prove beneficial:

> The instant litigation presents a model for such treatment in light of the substantial discovery which has been had. In limine consideration of expert testimony and other

we would be required to reverse and remand for a full hearing."). In addition, "oral testimony under Rule 43(e) [may] be redundant":

> Because the judge may not evaluate the credibility of the witnesses, the principal advantage of oral testimony is unavailable in hearings under Rule 43(e) on motions for summary judgment. If there is no disputed issue, a few affidavits should show that. . . . Because the judge may not resolve evidentiary disputes, he will do the same thing after hearing the testimony he should have done after reading the affidavits. . . .

Stewart, 790 F.2d at 629. In the court's view, therefore, "Rule 43(e) hearings on motions for summary judgment . . . should be rare," limited, for example, to situations where oral testimony could serve to "test[] the completeness of [a witness's] affidavit," show that "the current story [is] irrefutably contradicted by documentary evidence," or would otherwise "focus the disputes and send them on their way." Id. at 628-30.

Using oral testimony in summary judgment hearings raises other concerns:

> "[T]he court should use oral testimony on a summary judgment motion sparingly and with great care. The purpose of summary judgment--providing a speedy adjudication in cases that present no genuine issue of material fact--would be compromised if the hearing permitted by Rule 43(e) and Rule 56(c) became a preliminary trial. Furthermore, oral testimony might come as a surprise to the other litigants and therefore they might not have had an opportunity to prepare themselves to rebut that type of evidence."

Hayden v. First Nat'l Bank, 595 F.2d 994, 997 (5th Cir. 1979) (quoting 10 Wright & Miller, Federal Practice & Procedure § 2723 (footnotes omitted)) (emphasis added).

Note also that evidence introduced via rule 43(e) must be admissible:

> "[I]n addition to pleadings, depositions, admissions on file, answers of a party to interrogatories, and affidavits, which Rule 56(c) specifically enumerates, a court may consider oral testimony and any other . . . materials that would be admissible in evidence or otherwise usable at trial."

Association for Reduction of Violence v. Hall, 734 F.2d 63, 67 (1st Cir. 1984) (quoting 6 Moore's Federal Practice ¶ 56.11[1.-8] at 56-205 to -207 (1983) (footnotes omitted, emphasis added)).

One district judge has suggested that, since rule 43(e) explicitly authorizes hearings "partly on oral testimony," affidavits may in some instances be used in lieu of direct examination. Such affidavits should comply with rule 56(e) so as to be free of inadmissible hearsay and objectionable conclusions. Affiants may then be produced only for cross-examination and redirect, thus reducing hearing time without impairing development of relevant evidence.

BENCH COMMENT

Federal Judicial Center

1988, No. 2 April 13, 1988

SUBJECT: Expert Testimony on Insanity and Mental State Under Revised Federal Rule of Evidence 704(b)

The Insanity Defense Reform Act of 1984 (IDRA) added a second section to Fed. R. Evid. 704, prohibiting expert testimony on the ultimate issue of a defendant's mental condition as follows:

> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

When insanity is raised as a defense, rule 704(b) prohibits expert testimony on the "ultimate issue" of whether the defendant was legally insane at the time of the offense.* In addition, when a defendant claims to have lacked the "mental state or condition constituting an element of the crime charged" due to mental abnormality, the rule excludes expert testimony concerning the defendant's intent to commit the offense. In either case, an expert may testify as to any mental disease or defect, and as to the symptoms and characteristics of such a condition, but not as to whether that condition rendered the defendant legally insane or lacking the requisite intent.

I. Rule 704(b) and the Insanity Defense

In U.S. v. Ader, No. 86-5127, slip op. (4th Cir. Apr. 10, 1987), cert. denied, 108 S. Ct. 90 (1987), an expert witness testified that defendant had a severe mental disease and brain damage. The trial court, however, excluded testimony that "because of this mental disease Ader could not appreciate the wrongfulness of his acts." Id. at 4. The Fourth Circuit affirmed, noting that the legislative history of rule 704(b) "shows congressional intent that psychiatrists be limited to testifying about medical concepts, not legal concepts":

> For example, juries should not hear conflicting psychiatric testimony that the defendant is "sane" or "insane", or that he

*Note: Pursuant to the IDRA, insanity is a defense if the defendant was "unable to appreciate the nature and quality or the wrongfulness of his acts." 18 U.S.C. § 17 (1986) (formerly 18 U.S.C. § 20). For crimes committed before Oct. 12, 1984, the IDRA's effective date, the definition of insanity may include inability to conform one's conduct to the requirements of law. See U.S. v. Cox, 826 F.2d 1518, 1522 n.1 (6th Cir. 1987), cert. denied, 108 S. Ct. 756 (1988).

Id. at 276. The court also upheld the testimony of an expert who challenged the multiple personality defense:

> The government's witness testified that Davis . . . was simply exhibiting an antisocial personality. . . . [The expert] at no time stated that Davis could or could not conform his conduct to the law at the time of the robbery; rather, he diagnosed and defined Davis' condition and indicated that Davis' behavior supported the diagnosis.

Id. at 276-77.

II. Lack of Mental State or Condition Defense

The IDRA narrowed the definition of insanity, but did not preclude the introduction of evidence of mental abnormality to dispute other elements of the offense. See U.S. v. Pohlot, 827 F.2d 889, 890 (3d Cir. 1987) (may use "evidence of mental abnormality to negate specific intent or any other mens rea, which are elements of the offense"), cert. denied, 108 S. Ct. 710 (1988). Experts may testify on the nature of the defendant's mental condition, but not on the ultimate issue of intent.

The Seventh Circuit has stressed that intent is an issue for the jury in affirming that a question relating to whether the defendant had the capacity to form the requisite intent violated rule 704(b):

> [T]he question called for the jury to take on faith the opinion of the expert as to [defendant's] ability to form the intent required to commit murder. This is not a case where the psychologist gave an opinion in psychological or lay terms that, if accepted, would logically require a particular finding on an ultimate question of fact, but left that inference for the jury to make; the question called for the expert himself to make that final inference and decide the question in legal terms.

U.S. v. Hillsberg, 812 F.2d 328, 332 (7th Cir.), cert. denied, 107 S. Ct. 1981 (1987). See also U.S. v. Felak, 831 F.2d 794, 797 (8th Cir. 1987) (proffered testimony that defendant could not have formed requisite intent due to mental condition properly excluded).

One court has determined that when lack of intent is claimed, an expert may offer opinions that would not be allowed in an insanity defense. In U.S. v. Cox, 826 F.2d 1518 (6th Cir. 1987), cert. denied, 108 S. Ct. 756 (1988), a defense witness testified on cross-examination that defendant "was aware of the wrongfulness of his act." Id. at 1523-24. Holding that this opinion did not violate rule 704(b), the court noted that "the ultimate issue of Cox's mental state was not his sanity or insanity, but his intent." Id. at 1524. Thus, the testimony would violate rule 704(b) only if it stated that defendant did or did not have the intent to commit the crime charged. Id. Here, the testimony "merely provided the jury with an expert opinion to the effect that Cox's mental illness . . . did not cause, or compel, Cox's act of bank robbery. As such, [the] testimony was not prohibited by Rule 704(b)." Id. at 1525.

BENCH COMMENT

Federal Judicial Center

1988, No. 3 June 16, 1988

SUBJECT: Determining a prima facie case under Batson v. Kentucky

Under Batson v. Kentucky, 476 U.S. 79, 96 (1986), to establish a prima facie case of discrimination in jury selection a defendant must show "that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race," and "that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." This Bench Comment examines federal appellate court decisions discussing the factors relevant to establishing a prima facie case of discrimination under Batson. A future Bench Comment will examine procedure after a prima facie case is demonstrated.

Before attempting to establish a prima facie case, a defendant must raise the issue in a timely fashion. It has been held that when a defendant "failed to make any objection at the close of voir dire, he waived his present claim" that the prosecutor unconstitutionally excluded members of his race from the jury. Government of the Virgin Islands v. Forte, 806 F.2d 73, 76 (3d Cir. 1986). See also U.S. v. Erwin, 793 F.2d 656, 667 (5th Cir.) (Batson Court "envisioned that a motion to strike would be made promptly, probably before the venire was dismissed"), cert. denied, 107 S. Ct. 589 (1986). But see U.S. v. Thompson, 827 F.2d 1254, 1257 (9th Cir. 1987) (while it may be "the better practice to raise the objection just after the jury was selected but before it was sworn," government suffered no prejudice from delay, and defendant's objection after jury sworn is timely).

Once an objection has been made, the trial court must first determine whether the defendant "is a member of a cognizable racial group" and the prosecutor has "remove[d] from the venire members of the defendant's race." Batson concerned a black defendant and black jurors, so courts have had to determine whether Batson also applies to other groups. The Tenth Circuit found that American Indians are a cognizable racial group for Batson purposes. U.S. v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987). The First Circuit has stated that Batson may apply to ethnic, as well as racial, groups: "We think that the [Batson] Court's specific reference to Castaneda [v. Partida, 430 U.S. 482 (1977)], which found Mexican-Americans a cognizable group under the equal protection clause, means that its decision applies to all ethnic and racial minority groups . . . that meet its criteria." U.S. v. Bucci, 839 F.2d 825, 833 (1st Cir. 1988). Cf. U.S. v. Dennis, 804 F.2d 1208, 1210 (11th Cir. 1986) (per curiam) ("test we apply to determine whether appellants are members of a cognizable racial group under Batson is the test applied in Castaneda"),

The presence of minority members on the jury has been seen as evidence that the prosecution has not discriminated. See, e.g., U.S. v. Dennis, 804 F.2d at 1211 ("unchallenged presence of two blacks on the jury undercuts any inference of impermissible discrimination that might be argued to arise from the fact that the prosecutor used three of the four peremptory challenges he exercised to strike blacks"); U.S. v. Montgomery, 819 F.2d 847, 851 (8th Cir. 1987) (accepting two blacks on jury "shows that the government did not attempt to exclude all blacks, or as many blacks as it could, from the jury").

When the prosecution uses a high percentage of its strikes to exclude most, but not all, minority members from the jury, it may or may not demonstrate a prima facie case of discrimination. Compare U.S. v. Battle, 836 F.2d 1084, 1085-86 (8th Cir. 1987) (fact that "government exercised five of its six (83%) allowable peremptory challenges to strike five of the seven (71%) blacks from the jury panel" sufficient to establish prima facie case) with U.S. v. Montgomery, 819 F.2d 847, 850-51 (8th Cir. 1987) (Defendant argued "government used a disproportionate number of its peremptory challenges to substantially reduce the number of black jurors." Court held that "Batson does not require that the government adhere to a specific mathematical formula in the exercise of its peremptory challenges."). The Third Circuit has rejected "as contrary to the letter and spirit of Batson" a government request for "a per se rule that no prima facie case of purposeful discrimination exists unless a certain number or percentage of the challenged jurors are black." U.S. v. Clemons, 843 F.2d 741, 746 (3d Cir. 1988). The court found that "establishing some magic number or percentage to trigger a Batson inquiry would short-circuit the fact-specific determination expressly reserved for trial judges." Id.

BENCH COMMENT

Federal Judicial Center

1988, No. 4 July 15, 1988

SUBJECT: Procedure under Batson v. Kentucky when prima facie case of discrimination demonstrated

In Batson v. Kentucky, 476 U.S. 79, 99 (1986), the Supreme Court expressly declined "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's [peremptory] challenges." This Bench Comment examines circuit court opinions that have addressed the issue of trial court procedure when a prima facie case of discriminatory juror exclusion has been shown and the government required to explain its reasons for peremptorily excluding minority jurors.

Four circuits have addressed the issue of hearing the prosecution's reasons ex parte. In U.S. v. Davis, 809 F.2d 1194 (6th Cir.), cert. denied, 107 S. Ct. 3234 (1987), the trial court excluded defense counsel from an in camera, off-the-record proceeding in which the prosecution explained its peremptory challenges. The defendants contended that this procedure violated their constitutional right to be present at trial, and the similar right under Fed. R. Crim. P. 43(a). Id. at 1200. Citing the Batson Court's reluctance "to construct new procedures," the appellate court declined "to issue a per se rule to be followed in this circuit whenever a Batson challenge arises" and limited its analysis to the case before it. Id. at 1201.

The court noted that defense counsel had objected to the government's challenges three times, both sides were allowed to argue the issue each time, and "the defendants' position on the motivations of the Government in its peremptory challenges was zealously advanced by defense counsel and put before the district court." Id. Based on this record, the court concluded that defendants were not "deprived of fundamental fairness or prejudiced by their absence from the in camera proceeding. Their presence both before and after the in camera proceeding achieved the desired result--serious treatment by the district court of their claim of racially motivated juror exclusion." Id.

The court emphasized that district courts have discretion in each case to investigate Batson challenges in the manner they deem most appropriate:

> Batson does not require rebuttal of the Government's explanation by defense counsel. Nor does Batson require the participation of defense counsel while the Government's explanations are being proffered. This is not to say that rebuttal and participation by a defendant in the "neutral explanation" phase of a Batson challenge are always inappropriate. To the contrary, the Supreme Court left it up to the trial court to determine what role defendants were to

the prosecution and defense present and participating, to determine whether the prosecution's reasons for excluding the . . . potential jurors were neutral or pretextual." U.S. v. Alcantar, 832 F.2d 1175, 1180 (9th Cir. 1987).

The Seventh Circuit, in U.S. v. Tucker, 836 F.2d 334 (7th Cir. 1988), "agree[d] with the Sixth Circuit that Batson neither requires rebuttal of the government's reasons by the defense, nor does it forbid a district court to hold an adversarial hearing." Id. at 340. The court disagreed with the Ninth Circuit "that Batson requires adversarial hearings once a defendant establishes a prima facie case of purposeful discrimination," and pointed to the language in Batson stressing reliance on district court discretion in procedural matters. Id. The court nevertheless concluded:

> [W]e believe that adversarial hearings are the appropriate method for handling most Batson-type disputes. In this case, for example, we believe that the prosecution could have explained its reasons . . . in open court. Thus, while we hold that it is up to the trial judge to decide what procedure is best-suited for a particular case, we trust that the trial judge will utilize an adversarial procedure whenever possible.

Id.

The Fourth Circuit, citing Thompson, concluded "that the important rights guaranteed by Batson deserve the full protection of the adversarial process except where compelling reasons requiring secrecy are shown." U.S. v. Garrison, No. 87-7649, slip op. at 6 (4th Cir. June 7, 1988). The court added: "Like [the Ninth Circuit], we recognize that instances may arise in which to reveal the grounds for striking a juror would unduly prejudice the government. . . . But the government must make a substantial showing of necessity to justify excluding the defendant from this important stage of the prosecution." Id. at 6-7. The court held that, while in this case an ex parte examination of the prosecutor's voir dire notes was permissible, "if the court decides to consider any notes, other documents, or statements pertaining to the prosecutor's explanation, we . . . counsel that a trial court should ordinarily conduct adversary, rather than ex parte, proceedings." Id. at 8. See also U.S. v. Blake, 819 F.2d 71, 73 (4th Cir. 1987) (if prima facie case is established "the court should conduct an evidentiary hearing on the Government's reasons").

Other circuits have found that defendants were entitled to attempt to rebut the prosecution's reasons for excluding minority jurors. See U.S. v. Gordon, 817 F.2d 1538, 1541 (11th Cir. 1987) (case remanded, in part, to allow defendant "the opportunity to offer rebuttal evidence pertaining to the Government's reasons"), vacated in part on rehearing on other grounds, 836 F.2d 1312 (11th Cir. 1988); U.S. v. Wilson, 816 F.2d 421, 423 (8th Cir. 1987) (defendant must "be given the chance to rebut the proffered explanation as a pretext"). Cf. U.S. v. Leslie, 813 F.2d 658, 659 (5th Cir. 1987) (on remand, district court directed to "hold a hearing respecting the prosecution's use of its peremptory challenges, at which time the prosecution will submit its explanations for its referenced challenges and, as may be appropriate, other evidence may be considered").

BENCH COMMENT

Federal Judicial Center

1988, No. 5 October 25, 1988

SUBJECT: The Fifth Amendment and Production of Corporate Documents by Custodians and Compelled Consent to Release of Records by Third Parties

The Supreme Court last term decided two cases concerning fifth amendment challenges to government subpoenas that order the production of corporate records or compel consent to authorize the release of records held by third parties. In Braswell v. U.S., 108 S. Ct. 2284 (1988), a 5-4 decision, the Court held that a custodian of corporate records, who in this case was also the sole shareholder of the corporation, "is not entitled to resist a subpoena [for such records] on the ground that his act of production will be personally incriminating" in violation of the fifth amendment. Id. at 2295. In Doe v. U.S., 108 S. Ct. 2341 (1988), the Court held that the fifth amendment privilege against self-incrimination was not violated by "a court order compelling a target of a grand jury investigation to authorize foreign banks to disclose records of his accounts, without identifying those documents or acknowledging their existence." Id. at 2243. In both cases the Court noted limitations on the use of the evidence thereby obtained.

In Braswell, petitioner was president of two corporations and sole shareholder of one of them. A federal grand jury issued a subpoena to him in his capacity as president, ordering him to produce the corporations' books and records. Petitioner moved to quash the subpoena, the district court denied the motion, and the Fifth Circuit affirmed. See In re Grand Jury Proceedings, 814 F.2d 190 (5th Cir. 1987).

Petitioner claimed "that his act of producing the documents has independent testimonial significance, which would incriminate him individually, and that the Fifth Amendment prohibits government compulsion of that act." 108 S. Ct. at 2287. In essence, petitioner argued that, while the fifth amendment does not protect the contents of the corporate records, the act of producing those documents will be privileged if a potential for self-incrimination inheres in that act. Id. at 2290. The circuits had split on this issue. See id. at 2287 n.2. The Court rejected petitioner's argument, reasoning as follows:

> [T]he custodian of corporate or entity records holds those documents in a representative rather than a personal capacity. Artificial entities such as corporations may act only through their agents, . . . and a custodian's assumption of his representative capacity leads to certain obligations, including the duty to produce corporate records on proper demand by the Government. Under those circumstances, the custodian's act of production is not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation--which of course possesses no such privilege.

Id. at 2291. The Court explained that:

> Had petitioner conducted his business as a sole proprietorship, [U.S. v. Doe, 465 U.S. 605 (1984)] would require that he be provided the opportunity to show that his act of production would entail testimonial self-incrimination. But petitioner has operated his business through the corporate form, and we have long recognized that for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from

> exemplar, . . . or a voice exemplar, . . . to stand in a lineup, . . . and to wear particular clothing . . . . The Court . . . held that the privilege was not implicated in each of those cases, because the suspect was not required "to disclose any knowledge he might have," or "to speak his guilt."

Id. at 2347-48 (footnote and citations omitted).

The Court concluded that Doe's execution of the consent directive would not have testimonial significance "because neither the form, nor its execution, communicates any factual assertions, implicit or explicit, or conveys any information to the Government." Id. at 2350. Thus, the "consent directive itself is not 'testimonial,'" and because of the form's hypothetical phraseology

> petitioner's compelled act of executing the form has no testimonial significance either. By signing the form, Doe makes no statement, explicit or implicit, regarding the existence of a foreign bank account or his control over any such account. Nor would his execution of the form admit the authenticity of any records produced by the bank.

Id. The execution of the directive neither admits nor asserts consent, since the directive "explicitly indicates that it was signed pursuant to a court order," and therefore petitioner's "compelled execution of the form sheds no light on his actual intent or state of mind." Id. at 2351. The court concluded that signing the form "is not an assertion of fact or . . . a disclosure of information. In its testimonial significance, the execution of such a directive is analogous to the production of a handwriting sample or voice exemplar: it is a nontestimonial act." Id.

In addition, the Court noted that "the only factual statement made by anyone will be the bank's implicit declaration, by its act of production in response to the subpoena, that it believes the accounts to be petitioner's. . . . Indeed, the Second and Eleventh Circuits have concluded that consent directives virtually identical to the one here are inadmissible as an admission by the signator of either control or existence." Id. at 2352 (emphasis in original).

BENCH COMMENT

Federal Judicial Center

1989, No. 1 March 6, 1989

SUBJECT: Bifurcation of Criminal Forfeiture Proceedings: Is a Separate Evidentiary Hearing on Forfeiture Required?

A previous Bench Comment (1987, No. 5) examined procedural requirements for post-indictment restraining orders to prevent disposition of assets subject to forfeiture under the RICO (18 U.S.C. § 1963(a)) or drug offense (21 U.S.C. § 853(a)) forfeiture provisions, as amended by the Comprehensive Forfeiture Act of 1984. This Bench Comment examines whether, in addition to the special verdict procedure required under Fed. R. Crim. P. 31(e), it is necessary to bifurcate the trial of a defendant facing forfeiture and hold a separate evidentiary hearing on forfeiture after the defendant is found guilty.

The circuit courts that have analyzed the issue since the 1984 amendments* have reached different conclusions as to whether, and to what extent, bifurcation is required. The Third Circuit, citing the "potential for clashes between competing constitutional rights" inherent in unitary proceedings, used its supervisory powers to require bifurcation of forfeiture and guilt phases, with separate evidentiary hearings for each phase. The D.C. Circuit, in a RICO case, determined that bifurcated proceedings were not constitutionally required and that the defendant suffered no prejudice from the unitary proceeding. Also in a RICO case, a Ninth Circuit panel held that separate jury deliberations and argument of counsel are required, but that trial courts have discretion whether separate evidentiary hearings are necessary to protect defendants' rights.

In U.S. v. Sandini, 816 F.2d 869 (3d Cir. 1987), the defendant was charged under the Continuing Criminal Enterprise statute (21 U.S.C. § 848), and subject to the forfeiture provisions of 21 U.S.C. § 853. The government presented evidence relevant to forfeiture during the guilt phase of the trial, but the defendant chose not to testify. During the forfeiture proceedings that followed the guilty verdict the district court barred defendant from testifying, and "limited the forfeiture phase to the arguments of counsel and instructions to the jury." Id. at 872.

The appellate court found that "efficiency suggests that the issues of culpability and forfeiture be determined in the same proceeding. . . . Completely merging the guilt and forfeiture phases of a trial, however, presents the potential for clashes between competing constitutional rights":

> A criminal defendant has the right to decline to testify at trial. He also may insist that his property not be taken without due process of law. Where some reasonable accommodation of both is available, the defendant's right to retain property arguably not subject to forfeiture should not be compromised or defeated by his decision to stay off the witness stand during the guilt phase of the trial.

*Prior to the 1984 amendments, at least one circuit recommended that "the forfeiture issue should be withheld from [the jury] until after they have returned a general verdict. At that time the trial judge can instruct the jurors fully about forfeiture and submit the special verdict to them." U.S. v. Cauble, 706 F.2d 1322, 1348 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984). The court did not address the issue of a separate evidentiary hearing.

The court specifically noted that it was not "willing to follow" the Sandini court in requiring bifurcation of forfeiture proceedings, and also declined "to adopt a blanket rule allowing instructions on forfeiture only after the verdict on guilt has been returned." Id.

In U.S. v. Feldman, 853 F.2d 648 (9th Cir. 1988), cert. denied, No. 88-6238 (U.S. Feb. 21, 1989), where forfeiture was sought under 18 U.S.C. § 963(a), the court concluded that trial judges have discretion whether to hold a separate evidentiary hearing on forfeiture matters. The trial court in Feldman gave the jury separate instructions and a special verdict form for the forfeiture issue, but declined defendant's request for a separate evidentiary hearing on the issue of the extent of defendant's interest in the forfeitable property. Although the appellate court noted that "[t]he procedure used by the trial court was not necessarily unconstitutional," it nonetheless found "that the procedure used at [defendant's] trial may have forced [defendant] to choose between his right not to incriminate himself and his need to present evidence on the extent of his assets subject to forfeiture, thus posing a real possibility of prejudice." Id. at 661.

The court reviewed the decisions of the Third and D.C. Circuits and concluded: "Although we find the reasoning in Sandini to be particularly persuasive, we do not adopt a blanket requirement that guilt and forfeiture proceedings be bifurcated completely." Id. at 662. The court noted that

> the forfeiture provision at issue in Sandini, 21 U.S.C. § 853(d), creates "a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter . . . is subject to forfeiture" if the prosecution shows by a preponderance of the evidence that the property was acquired during the relevant period and likely came from no other source.

Id., n.2 (citing Sandini, 816 F.2d at 874). By contrast, the RICO provision at issue in Feldman "establishes no such presumption. To that extent, [defendant's] position is more favorable than that of the defendant in Sandini." Id. The court determined that the decision to hold a separate evidentiary hearing on the forfeiture issue should be made according to the facts of each case:

> Under some circumstances a single procedure may be unfair, where for example the evidence is very complex, there are evidentiary difficulties, or testimonial privileges are clearly implicated. There may be other situations, however, in which any evidence the defendant might present after trial will not affect the jury's decision on forfeiture. For example, when the government seeks forfeiture of a defendant's interest in a RICO enterprise under 18 U.S.C. § 1963(a)(2), "issues of guilt and forfeiture are likely to converge," as the forfeiture of the entire interest follows automatically on a finding that the enterprise was conducted through a pattern of racketeering. . . . By contrast, when the jury orders forfeiture of the proceeds of illegal activity, it must determine the extent of the proceeds or whether a particular interest or profit was acquired or maintained in violation of RICO. . . .
>
> We therefore exercise our supervisory power to hold that trial courts should bifurcate forfeiture proceedings from ascertainment of guilt, requiring separate jury deliberations and allowing argument of counsel. The trial judge may exercise discretion in deciding whether to hold an evidentiary hearing. If the defendant can show, by affidavits or otherwise, that a hearing is required on the extent of his or her assets subject to forfeiture, the court should allow evidence on the issue. Evidence received at this phase may not be used on appeal or at retrial to sustain the conviction, nor in post-trial motions. See Sandini, 816 F.2d at 874.

Id. at 662 (citations omitted). But see U.S. v. Linn, 862 F.2d 735, 742 (9th Cir. 1988) (holding, in drug distribution case, that trial court did not abuse its discretion in failing to bifurcate forfeiture and guilt determinations because defendant "did not make any showing of manifest error").

BENCH COMMENT

Federal Judicial Center

1989, No. 2 July 12, 1989

SUBJECT: Applicability of *Batson* to Civil Cases

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that the constitutional guarantee of equal protection forbids the prosecutor in a state criminal action from exercising peremptory challenges to remove members of the defendant's race from the venire. The Court ruled that when a criminal defendant makes a prima facie showing of purposeful discrimination in the selection of the petit jury, the burden shifts to the government to provide a neutral explanation for challenging jurors of the defendant's race. 476 U.S. at 96-97. (*See Bench Comment* Nos. 3-4, 1988.)

Two circuits have recently extended the *Batson* principle to civil cases, holding that equal protection forbids the exercise of peremptory challenges on racial grounds by a private litigant in a federal civil trial. *Edmonson v. Leesville Concrete Co.*, 860 F.2d 1308, 1314 (5th Cir. 1988); *Fludd v. Dykes*, 863 F.2d 822, 829 (11th Cir. 1989). One circuit has expressed "strong doubts about whether *Batson* was intended to limit the use of peremptory strikes in civil cases," but has not specifically ruled on this issue. *See Wilson v. Cross*, 845 F.2d 163, 164-65 (8th Cir. 1988); *Swapshire v. Baer*, 865 F.2d 948, 953-54 (8th Cir. 1989). Another circuit has assumed "arguendo . . . that *Batson* applies to civil actions," but concluded that it should not be applied retroactively in the civil context. *Jones v. Lewis*, 874 F.2d 1125, 1129 (6th Cir. 1989). Cf. *Teague v. Lane*, 109 S. Ct. 1060 (1989), and *Allen v. Hardy*, 478 U.S. 255 (1986), on retroactivity of *Batson* in collateral review of criminal convictions.

The courts that applied *Batson* in civil cases first had to determine that the exercise of peremptory challenges by a private litigant in a civil action is a government action subject to the equal protection clause. In *Edmonson*, the Fifth Circuit reasoned:

> That the statutory right to challenge jurors is exercised by a private litigant does not of itself make the action private. The government is intimately involved in the process by which a litigant challenges a prospective juror: the government summons the venire to appear in court at a particular time and place; the right to peremptory challenges is granted by a federal statute; the challenges are invoked in the course of a judicial proceeding, and on a facility operated by the government, usually in a federal courtroom or, for convenience, in the judge's chambers; they are not self-executing but are effected by the action of the judge; and the judge as government official acts in a court required by the Constitution to be open to the public which may thereby observe the court's toleration of the practice. The litigant exercises the peremptory challenge, but it is the judge, acting in a judicial capacity, who excuses the prospective juror.

860 F.2d at 1312.

The Eleventh Circuit found in *Fludd* that when a trial judge overrules a party's objection to the racial composition of the venire,

> [t]he trial judge's decision—to proceed to trial, over the party's objection, with a jury selected from the venire on the basis of race—is the one that harms the objecting party. In overruling the objection, which informed the court that the peremptory challenger may be excluding blacks from the venire on account of their race, the judge becomes guilty of the sort of

BENCH COMMENT

Federal Judicial Center

1989, No. 3 November 9, 1989

SUBJECT: Curbing Abuses by *In Forma Pauperis* Litigants

In two cases last term the Supreme Court denied *in forma pauperis* status to, and placed filing limitations on, pro se litigants with histories of repeated frivolous claims. *See In re McDonald,* 109 S. Ct. 993 (1989) (per curiam) (5-4 decision); *Wrenn v. Benson,* 109 S. Ct. 1629 (1989) (per curiam) (6-3 decision). In *McDonald* the Court noted that although it had "not done so previously, lower courts have issued orders intended to curb serious abuses by persons proceeding *in forma pauperis.*" 109 S. Ct. at 996 (citing, e.g., *In re Martin-Trigona,* 737 F.2d 1254 (2d Cir. 1984) (filing limitation); *Peck v. Hoff,* 660 F.2d 371, 374 (8th Cir. 1981) (per curiam) (pre-filing review procedure)). This *Bench Comment* examines the two Supreme Court decisions and some of the measures, beyond dismissal under 28 U.S.C. § 1915(d), that federal courts have taken to curb abuses by *in forma pauperis* litigants.

The petitioner in *McDonald,* who sought a writ of habeas corpus, had made 73 separate filings with the Court since 1971 and eight more in the current term. *Id.* at 994. The Court denied petitioner leave to proceed *in forma pauperis* (hereinafter IFP) and directed the Clerk of the Court "not to accept any further petitions from petitioner for extraordinary writs pursuant to 28 U.S.C. §§ 1651(a), 2241 and 2254(a), unless he pays the docketing fee required by Rule 45(a)." *Id.* at 994.

The Court noted that "[w]ithout recorded dissent, the Court has denied all of [petitioner's] appeals and denied all of his various petitions and motions," and that "[p]etitioner has put forward this same argument—unsuccessfully—in at least four prior filings with the Court." *Id.* at 995. The Court justified the restrictions on petitioner by reasoning that

> paupers filing *pro se* petitions are not subject to the financial considerations—filing fees and attorneys fees—that deter other litigants from filing frivolous petitions. Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice. The continual processing of petitioner's frivolous requests for extraordinary writs does not promote that end.

Id. at 996.

In *Wrenn* the Court placed restrictions on petitioner's filings for IFP status after he had filed 22 petitions for certiorari since the October 1986 Term. "[A] review of the affidavits he has filed with his last nine petitions . . . indicates that his financial condition has remained substantially unchanged. The Court denied him leave to proceed *in forma pauperis* with respect to each petition. Petitioner has nonetheless continued to file for leave to proceed *in forma pauperis.*" 109 S. Ct. at 1630-31. Citing *McDonald,* the Court concluded: "We do not think that justice is served if the Court continues to process petitioner's requests to proceed *in forma pauperis* when his financial condition has not changed from that reflected in a previous filing in which he was denied leave to proceed *in forma pauperis.*" *Id.* at 1631. The Court directed the Clerk "not to accept any further filings from petitioner in which he seeks leave to proceed *in forma pauperis* . . . unless the affidavit submitted with the filing indicates that petitioner's financial condition has substantially changed." *Id.*

contempt of court and punished accordingly.'" 745 F.2d at 1232 (quoting *In re Green,* 669 F.2d 779, 787 (D.C. Cir. 1981) (per curiam)). *See also Green v. Carlson,* 649 F.2d 285, 287 (5th Cir.) ("commend[ing] the contempt sanction" if previously enjoined IFP litigant continues abusive filings), *cert. denied,* 454 U.S. 1087 (1981).

The Eighth Circuit affirmed restrictions on an inmate who had filed more than 100 cases for himself and other inmates in less than two years, repeatedly filed claims that had previously been dismissed, and occasionally named as parties fictitious characters such as "Li'l Red Riding Hood." *In re Tyler,* 839 F.2d 1290 (8th Cir. 1988) (per curiam). To curb this abuse while preserving the inmate's access to the courts, the district court fashioned an order that limited the inmate to one IFP filing per month, required him to provide copies of any pleadings or claims made in state court that were later asserted in federal court, and prohibited him from drafting complaints for other inmates. In addition, if "abusive language" was included in any filing, leave to proceed IFP would be denied and that claim counted toward the one filing per month limit. *Id.* at 1294-95. The appellate court affirmed, and "endorse[d] the policy and rationale of the district court." *Id.* at 1290-91.

Sanctions. Courts have also used sanctions, including monetary penalties as well as dismissal, against frivolous or vexatious IFP litigants. These sanctions are often based on the Federal Rules of Civil Procedure, including Rule 11. In *Moon v. Newsome,* 863 F.2d 835 (11th Cir.), *cert. denied,* 110 S.Ct. 180 (1989), a prisoner who had brought a civil rights action and refused to cooperate in a deposition was ordered to pay the full costs of the deposition. When he did not, the district court dismissed the case pursuant to Fed. R. Civ. P. 41(b).

The appellate court affirmed, finding that "the damage suit of a *pro se* plaintiff proceeding in forma pauperis can be dismissed for failure to pay costs assessed as a penalty for unreasonable refusal to obey a discovery order." *Id.* at 836. "[O]nce a *pro se* IFP litigant is in court, he is subject to the relevant law and rules of court, including the Federal Rules of Civil Procedure. . . . If a *pro se* litigant ignores a discovery order, he is and should be subject to sanctions like any other litigant. Courts can assess costs and monetary sanctions against IFP litigants." *Id.* at 837. Moreover, "[i]f a plaintiff has incurred sanctions for misconduct, a more stringent standard for allowing him to proceed with his case is appropriate because he has been given access to the courts and has abused that privilege." *Id.* at 838. The court cautioned, however, that "[w]here monetary sanctions are imposed on an IFP litigant and the litigant comes forward showing a true inability to pay, it might be an abuse of discretion for the court then to dismiss for failure to pay." *Id.* Here, however, plaintiff did not even attempt to make such a showing.

In *American Inmate Paralegal Ass'n v. Cline,* 859 F.2d 59 (8th Cir.) (per curiam), *cert. denied,* 109 S. Ct. 565 (1988), the Eighth Circuit affirmed the dismissal of inmate group's action as a sanction under Fed. R. Civ. P. 41(b) for intentional refusal to comply with a court order to submit an amended complaint. "Pro se litigants are not excused from complying with court orders or substantive and procedural law." *Id.* at 61. Dismissal of the action with prejudice was also warranted as a sanction under Fed. R. Civ. P. 11 for the group's frivolous filings. *Id.* at 62. *See also Whittington v. Lynaugh,* 842 F.2d 818, 821 (5th Cir.) (per curiam) (affirming dismissal of IFP prisoner suit as frivolous and imposition of $15 sanction under Fed. R. Civ. P. 11 for court costs), *cert. denied,* 109 S. Ct. 108 (1988); *Papas v. Hanlon,* 849 F.2d 702, 704 (1st Cir. 1988) (per curiam) (allowing costs to be assessed, under Fed. R. Civ. P. 54(d), against IFP litigants for $300 in stenographer's fees for three no-show depositions—granting IFP status "does not completely immunize an indigent litigant from eventual liability for costs").

Note: The July 12, 1989 edition of *Bench Comment,* on the applicability of the *Batson* principle to civil cases, contained an account of *Edmonson v. Leesville Concrete Co.,* 860 F.2d 1308 (5th Cir. 1988). The decision in *Edmonson* was vacated for rehearing en banc on January 23, 1989. 860 F.2d 1317. The case was argued en banc on June 19, 1989. No opinion has been issued.

Attention Readers:

No issues of ***Bench Comment*** were published in 1990.

Bench Comment

Federal Judicial Center
1991, No. 1, August 1991

A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT: Jury requests to have transcripts of testimony read back or furnished

During deliberations, juries sometimes ask the court to have transcripts of trial testimony read back or furnished. The trial court's compliance with or rejection of such a request is reviewed on an abuse of discretion standard. Different circuits have strikingly different views and practices as to whether such requests should ordinarily be granted. Several considerations guide the exercise of trial courts' discretion in this area.

Is there a preference in favor of or against granting the jury's request?

It depends on the circuit. The Sixth, Ninth, and Tenth Circuits caution against having transcripts of testimony read or furnished to a jury. *See U.S. v. Keys*, 899 F.2d 983, 988 (10th Cir.) (granting jury request "disfavored"), *cert. denied*, 111 S. Ct. 160 (1990); *U.S. v. Portac, Inc.*, 869 F.2d 1288, 1295 (9th Cir. 1989) (same), *cert. denied*, 111 S. Ct. 129 (1990); *U.S. v. Padin*, 787 F.2d 1071, 1077 (6th Cir.) (it is "'incumbent upon the trial judge to exercise extreme care in . . . permitting any evidence to be restated or re-read to the jurors'") (quoting *Henry v. U.S.*, 204 F.2d 817, 821 (6th Cir. 1953)), *cert. denied*, 479 U.S. 823 (1986).

By contrast, the Second and Third Circuits favor compliance with such requests. *See U.S. v. Holmes*, 863 F.2d 4, 5 (2d Cir. 1988) ("generally the better course of action is for a district court to allow the reading of testimony requested by the jury"), *cert. denied*, 110 S. Ct. 99 (1989); *U.S. v. Zarintash*, 736 F.2d 66, 70 (3d Cir. 1984) (request should be denied only in "limited" circumstances).

Many circuit courts have not indicated a preference either in favor of or against granting such a jury request. However, as many circuit judges previously sat or practiced in a district of the circuit, it is useful in predicting circuit court attitude to be aware of prevailing practice in the district courts of the circuit. If the district courts of the circuit routinely grant or deny such requests, there is some likelihood that the circuit court will hold the same preference when it comes to rule.

What factors should trial courts consider?

Courts have advanced two primary concerns that justify denying the jury's request. First, the jury may overemphasize the requested testimony, at the expense of other evidence. *See, e.g., U.S. v. Keskey*, 863 F.2d 474, 477 (7th Cir. 1988); *U.S. v. Castillo*, 866 F.2d 1071, 1084 (9th Cir. 1988); *U.S. v. Varsalona*, 710 F.2d 418, 421 (8th Cir. 1983); *U.S. v. Pimental*, 645 F.2d 85, 87 (1st Cir. 1981).

Second, reading back or providing transcripts of testimony may interfere with the expeditious and efficient administration of justice. *See, e.g., U.S. v. George*, 752 F.2d 749, 757 (1st Cir. 1985) ("court's determination that the requested testimony was too 'scattered' and voluminous to be reread provides sufficient justification for its decision" to reject jury's request); *U.S. v. Croft*, 750 F.2d 1354, 1367 (7th Cir. 1984) ("logistical problems of sequestering the jury for an extended period of time" while transcripts were prepared justified court's denial of jury's request); *U.S. v. Almonte*, 594 F.2d 261, 265 (1st Cir. 1979) (court may consider "difficulty of complying" with jury's request).

The court may also take into account the importance of the requested testimony to the jury's deliberations. *See, e.g., U.S. v. Thomas*, 875 F.2d 559, 563 n.2 (6th Cir.) (testimony "of limited exculpatory value"), *cert. denied*, 110 S. Ct. 189 (1989); *U.S. v. Varsalona*, 710 F.2d 418, 421 (8th Cir. 1983) (testimony "not so critical"); *U.S. v. Peltier*, 585 F.2d 314, 334 (8th Cir. 1978) ("testimony was not crucial to

Bench Comment

Federal Judicial Center
1991, No. 2, October 1991

A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT: What constitutes "just cause" to dismiss a juror in a criminal trial after deliberations have begun

Before 1983, Rule 23(b) of the Federal Rules of Criminal Procedure required that juries consist of 12 members unless the parties stipulated in writing with the court's approval "that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences." A 1983 amendment added the following:

> Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

The amendment was designed to avoid unnecessary mistrials. The advisory committee noted that "[t]he problem is acute when the trial has been a lengthy one and consequently the remedy of mistrial would necessitate a second expenditure of substantial prosecution, defense and court resources."

Rule 23(b) dismissals of jurors have occurred in two types of situations: when circumstances rendered a juror temporarily unavailable, threatening a delay in deliberations, and when a court concluded that a juror could not properly perform his or her duties.

Dismissals of unavailable jurors

When a juror is dismissed because of temporary unavailability, courts of appeals focus on the expected length of the absence. The risks inherent in a delay—that jurors' recollection of evidence may dim or that they may discuss the case with outsiders—are greater if the delay is lengthy. The longer the expected absence of a juror the greater the justification for dismissal.

In *U.S. v. Wilson*, 894 F.2d 1245 (11th Cir.), *cert. denied*, 110 S. Ct. 3284 (1990), a pregnant juror became ill during deliberations on a Friday, prompting early dismissal of the jury for the weekend. On Sunday, she told the court clerk that she could not return until Tuesday at the earliest. On Monday, the judge, expressing doubt that the juror would return the next day, dismissed her from the case. The 11-person jury returned a guilty verdict, and the Eleventh Circuit affirmed. The court noted that the trial judge expressed concern about the juror's health several times during the trial, and that on one occasion the juror told the court that she had been taken to the hospital the night before and her doctor feared she might miscarry. The Eleventh Circuit held that "[b]ased on these incidents, when she again became ill during the deliberations, the district judge was entitled to conclude that she might not return the following day as she had hoped, and that even if she did she might become ill again, further delaying the deliberations." *Id.* at 1250.

In *U.S. v. Stratton*, 779 F.2d 820 (2d Cir. 1985), *cert. denied*, 476 U.S. 1162 (1986), deliberations were to begin on a Tuesday. On Monday, a juror informed the court that she would have to leave at noon on Wednesday to observe a religious holiday that would last the rest of the week. The court suggested substituting an alternate juror before deliberations began, but defendants objected. When the juror left on Wednesday, the court dismissed her and continued with 11 jurors, denying defendants' request to adjourn the trial until Monday. The Second Circuit rejected defendants' argument that Rule 23(b) applies only when a juror suffers permanent or at least lengthy incapacitation.

> We read the "just cause" standard more broadly to encompass a variety of temporary problems that may arise during jury deliberations . . . . The appellants suggest that it was not "necessary to excuse [the juror] for just cause" since her absence due to religious observance would have lasted only 4.5 days. However, the

juror's capacity or qualifications it will likely be upheld, but if the juror's position in the case may have affected the determination to dismiss, it will be reversed.

The cases also suggest that when a court comes to doubt the ability of a juror to perform his or her duties, it generally should interview the juror.[1] *See, e.g., U.S. v. Ruggiero*, 928 F.2d 1289, 1300 (2d Cir. 1991) (trial court's "two extensive interviews of the juror" were adequate basis for Rule 23(b) determination); *U.S. v. Ramos*, 861 F.2d 461, 466 (6th Cir. 1988) (interview of juror "was in accordance with pronounced judicial protocol"), *cert. denied*, 489 U.S. 1071 (1989).

In certain circumstances no interview is necessary. *See Peek v. Kemp*, 784 F.2d 1479, 1484 (11th Cir.) (because "Juror Greeson was unquestionably too ill" to deliberate, "the trial judge's failure to question Greeson personally before dismissing him" was not error), *cert. denied*, 479 U.S. 939 (1986); *see also U.S. v. Barker*, 735 F.2d 1280, 1283 (11th Cir.) (no hearing needed where juror patted defendant on back "in light of the fact that it is indisputed that the incident in question did, in fact, occur"), *cert. denied*, 469 U.S. 933 (1984).

Note

1. Some courts have held that when doubts about a juror's partiality arise during deliberations, the court should interview all of the jurors to ascertain whether they were tainted by the juror in question. *See U.S. v. Gabay*, 923 F.2d 1536, 1543 (11th Cir. 1991); *U.S. v. Fafowora*, 865 F.2d 360, 363 (D.C. Cir.), *cert. denied*, 110 S. Ct. 98 (1989).

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Federal Judicial Center
1520 H Street, N.W.
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Bench Comment

Federal Judicial Center
1991, No. 3, December 1991

A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT:
What district courts should do when defendants, at guilty plea hearings, acknowledge having recently taken narcotics or medication.

The First Circuit recently joined the Second and Third Circuits in holding that a guilty plea cannot stand if the trial court does not inquire further upon learning that the defendant has recently ingested narcotics or medication. The trial court must specifically ascertain whether the drugs are affecting the defendant's ability to enter a voluntary and intelligent plea.

In *U.S. v. Parra-Ibanez*, 936 F.2d 588 (1st Cir. 1991), at a change of plea hearing the defendant acknowledged that he had undergone psychiatric treatment and had a history of drug abuse. At a subsequent change of plea hearing, the court asked the defendant whether he had taken medication or drugs during the preceding twenty-four hours. Defendant said he had taken Atavin, Halcion, and Restoril. The court asked, "Atavin, is that a drug to control your nerves or something?" and defendant said yes. Though the court then inquired about defendant's general ability to comprehend the proceedings, it did not specifically inquire about the potential effect of the drugs on defendant's state of mind. The First Circuit remanded for further factfinding:

> Although the judge's further questions did elicit (1) from Parra assurances that he understood the proceedings and knew that a maximum sentence of forty years could be imposed, and (2) from defense counsel and prosecutor their joint assurance that appellant was competent to plead guilty, the judge did not inquire what dosages of Atavin, Halcion, and Restoril Parra had ingested and what effects, if any, such medications might be likely to have on Parra's clear-headedness. The judge, though plainly making a substantial inquiry, did not probe deeply enough. We join the Third Circuit, and hold that the judge was obligated by Rule 11 to ask further questions.

Id. at 595-96.

The Third Circuit case referred to is *U.S. v. Cole*, 813 F.2d 43 (3d Cir. 1987). In *Cole*, the court asked defendant if he was under the influence of any "medication or substances" and defendant replied that "I had some drugs last night." Because the court did not follow up with questions concerning the effect of those drugs on defendant's state of mind, the Third Circuit vacated the guilty plea:

> Rule 11 counsels a district court to make further inquiry into a defendant's competence to enter a guilty plea once the court has been informed that the defendant has recently ingested drugs or other substances capable of impairing his ability to make a knowing and intelligent waiver of his constitutional rights.

Id. at 46.

Likewise, in *U.S. v. Rossillo*, 853 F.2d 1062 (2d Cir. 1988), the court asked the defendant whether he was under the influence of any drugs, and the following colloquy took place:

> [DEFENSE COUNSEL]: Your Honor, this is an exceptional circumstance.
> THE COURT: He has—his heart condition.
> [DEFENSE COUNSEL]: Yes.
> THE COURT: Thank you.

No follow-up questions about the medication were asked. The Second Circuit vacated the guilty plea:

> [W]hen the district judge asked Rossillo for a response to its question, the *court* simply alluded to defendant's heart condition. [It] never received a definitive "yes" or "no" answer from defendant. By acknowledging Rossillo's heart condition, the district court apparently assumed that defendant's condition did not interfere with his mental capabilities. As *McCarthy* [*v. United States*] makes clear, however, Rule 11 is not satisfied unless the district court determines the voluntariness of the guilty plea based upon on-the-record responses to its questions. *See also Irizarry v. United States*, 508 F.2d 960, 964 (2d Cir. 1974) (stressing that to the extent district judge "'resorts to "assumptions" not based upon recorded responses to his inquiries,'" he fails to comply with Rule 11) (quoting *McCarthy*, 394 U.S. at 467).

Id. at 1065 (emphasis in original). *See also Manley v. U.S.*, 396 F.2d 699, 700 (5th Cir. 1968) (government erroneously told trial court

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that defendant had not recently been injected with a narcotic, hence no inquiry was made; appeals court vacated plea and noted that Rule 11 "requires a court to determine the effect of narcotics administered to a defendant upon his understanding of the charge and the voluntariness of his proffered plea before accepting it").

No circuit requires a formal competency hearing whenever a trial court is apprised of a defendant's use of medication or narcotics. However, the court should delve into the type of drug or medication used, the amount, and its possible effect on the defendant. Some district courts ensure that a probation officer skilled in drug evaluation and treatment is available to state on the record the effect of the drug on a defendant's ability to comprehend and participate knowingly and voluntarily in a Rule 11 colloquy.

Other sources on this topic

Bench Comment readers can find information on this and related subjects in Bench Book for United States District Court Judges (Federal Judicial Center 3d ed. 1986) at § 1.06.

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Federal Judicial Center
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Bench Comment

Federal Judicial Center
1992, No. 1, January 1992

A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT: May a court summarily find an attorney in criminal contempt under Fed. R. Crim. P. 42(a) for tardiness or failure to appear?

Federal Rule of Criminal Procedure 42(a) states in part: "A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." Rule 42(b), governing any other criminal contempt, requires notice and a hearing. The question often arises whether an attorney's tardiness or failure to appear may be punished summarily. Most circuits have held that it may not: Rule 42(b), not 42(a), applies.

The consensus is that summary disposition is inappropriate because the alleged contempt displayed by tardiness or failure to appear is not "committed in the actual presence of the court." Two rationales have been advanced in support of this proposition. In early cases, courts held that a defendant's *absence* does not occur within the *presence* of the court. *See In re Allis*, 531 F.2d 1391, 1392 (9th Cir.) ("[attorney's] presence elsewhere was, of course, not in the actual presence of the Court"), *cert. denied*, 429 U.S. 900 (1976); *United States v. Delahanty*, 488 F.2d 396, 397 (6th Cir. 1973) ("[attorneys'] absence from the courtroom . . . did not occur within the actual presence of the Court"); *In re Lamson*, 468 F.2d 551, 552 (1st Cir. 1972) ("the presence of the offender is in the court's absence"); *U.S. v. Willett*, 432 F.2d 202, 205 (4th Cir. 1970) ("the failure of Mr. Willett to appear as scheduled . . . was not an act committed 'in the actual presence of the court'").

In recent cases, courts have emphasized that the contempt (if any) lies not in the absence or tardiness itself but in the reasons for it or in the conduct that resulted in it. Such reasons or conduct do not take place in the presence of the court. *See, e.g., U.S. v. KS&W Offshore Engineering*, 932 F.2d 906, 909 (11th Cir. 1991) ("the conduct which is subject to a sanction is not the absence itself but the failure to provide sufficient justification for the absence or delay"); *In re Chandler*, 906 F.2d 248, 250 (6th Cir. 1990) ("the court could not have heard the conduct constituting contempt because the court could not know why the attorney was late until the attorney arrived"); *U.S. v. Onu*, 730 F.2d 253, 256 (5th Cir.) ("[A]bsence alone is not contempt. Contempt results only from the lack of good reason for the lawyer's absence."), *cert. denied*, 469 U.S. 856 (1984). These courts have noted that a major rationale for the summary contempt procedure is that, in the words of the Supreme Court, "there is no need of evidence or assistance of counsel before punishment, because the court has seen the offense." *Cooke v. U.S.*, 267 U.S. 517, 534 (1925). That rationale does not apply when an attorney is late or absent, because the court does not necessarily know the reasons for the tardiness or absence.

Several courts have noted that another rationale underlying summary contempt is that to "preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court." *Id.* Courts have observed that this rationale applies when disruptive behavior occurs in the midst of a proceeding, not when an attorney is late or absent. *See, e.g., S.E.C. v. Simpson*, 885 F.2d 390, 396 (7th Cir. 1989) (tardiness not punishable by summary contempt because there was "no compelling reason for an immediate remedy"); *Jessup v. Clark*, 490 F.2d 1068, 1072 (3d Cir. 1973) (summary contempt reversed because there "was no disruption of the orderly course of proceedings in progress. There was no affront to the court before the general public, as might occur during a trial, and . . . immediate vindication of judicial authority was not necessary.").

The D.C. Circuit is the only circuit explicitly to permit summary contempt under Rule 42(a) for tardiness or absence. *See In re Farquhar*, 492 F.2d 561, 563 (D.C. Cir. 1973); *In re Niblack*, 476 F.2d 930 (D.C. Cir.), *cert. denied*, 414 U.S. 909 (1973). However, the D.C. Circuit has expressed doubts about its own position. In *Farquhar*, the court felt compelled to follow *Niblack*, but raised the question "whether the 'spirit of Rule 42(a) does not call upon the judge, when he apprehends that the issue of contempt for tardiness

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in the court room involves, by way of excuse, matters outside the presence of the court, to proceed by . . . invocation of Rule 42(b),'" 492 F.2d at 563-64, *quoting In re Gates*, 478 F.2d 998, 1000 (D.C. Cir. 1973). *Cf. U.S. v. Baldwin*, 770 F.2d 1550, 1555-56 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986) (summary contempt permissible in rare case where attorney told the court in advance his reason for not appearing).

Other sources on this topic

Bench Comment readers can find information on this and related subjects in Bench Book for United States District Court Judges (Federal Judicial Center 3d ed. 1986) at §§ 1.24-3–1.24-9, and in Voorhees, Manual on Recurring Problems in Criminal Trials (Federal Judicial Center 3d ed. 1990) at 57–62.

Some courts have held that while a Rule 42(a) summary contempt is inappropriate when an attorney is late or absent, the full, formal Rule 42(b) procedures may not be necessary.[1] In some circumstances, Rule 42(b) is satisfied as long as the defendant was on notice that contempt was contemplated, and was given an opportunity to justify his or her tardiness or absence. *See, e.g., U.S. v. Onu*, 730 F.2d 253, 257 (5th Cir. 1984) (defendant "did have notice in fact and an opportunity to be heard. . . . [H]e had the procedural protections sought to be assured by Rule 42(b). The court read [him] the essential facts constituting criminal contempt and informed him that the charge was criminal contempt. While the court referred to Rule 42(a) as the source of its authority, the defendant was fully informed of the essential elements of the charge . . . ."); *In re Allis*, 531 F.2d at 1392-93 (9th Cir.) (although trial court mistakenly relied on Rule 42(a), contempt conviction affirmed because court "notified Allis of the charges and afforded him the opportunity to consult with counsel and an opportunity for himself and counsel to be heard. . . . No extension of time to prepare a defense was warranted in these circumstances and none was requested . . . . The facts were clear and undisputed. At no time was an indication given of the availability of other witnesses or evidence . . . .").

However, if there is a dispute over facts, the defendant should be given the full hearing prescribed by Rule 42(b). In *U.S. v. Nunez*, 801 F.2d 1260, 1264 (11th Cir. 1986), the court explained that

> In some instances . . . where the reason for the absence or tardiness is known to the court, "it may be that all the procedures of Rule 42(b) need not be followed." (citation omitted) In the present case, it is clear from the record that Judge Tidwell was aware of the reasons for Mr. Burstyn's absence before adjudging him in contempt. . . . There is, however, some dispute as to whether defendant Nunez experienced an eleventh hour change of heart [leading to Burstyn's absence]. . . . This is exactly the kind of situation where the appellant can benefit from the opportunity to obtain counsel, prepare a defense and present witnesses . . . .

Accord In re Lamson, 468 F.2d 551, 552 (1st Cir. 1972) ("[A] failure to appear on time may often only be explained by witnesses who may not be immediately available . . . . An opportunity to summon the witnesses or obtain material necessary to the defense seems only fair.").

Note

1. Rule 42(b) states: "A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

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1520 H Street, N.W.
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Bench Comment

Federal Judicial Center
1992, No. 2, February 1992

A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT: What district courts should do when parties or potential jurors refuse to take an oath or affirmation because of religious objections.

The Fifth Circuit recently joined the Ninth and Fourth Circuits in holding that courts may not penalize someone who, for religious reasons, refuses to take an oath or make an affirmation prior to a court proceeding. The trial court must seek to accommodate such persons by finding a means for them to express a commitment to speak truthfully that does not offend their religious beliefs.

In *Society of Separationists v. Herman*, 939 F.2d 1207 (5th Cir. 1991), Robin Murray-O'Hair, an atheist summoned for jury duty, refused to take the required prevoir dire oath because it included a reference to God. The trial judge permitted her to make an affirmation instead, but it too referred to God and she declined. The court then offered her the option of raising her hand and affirming, without reference to God, that she would tell the truth. She declined, explaining that an affirmation "is just as religious as an oath." After a colloquy about what constitutes a "religious statement," the court held Murray-O'Hair in contempt and removed her from the jury pool.

Murray-O'Hair brought suit against the judge, alleging a violation of her First and Fourteenth Amendment rights and seeking damages and declaratory relief. Though holding that the district judge was immune from damages, the Fifth Circuit granted the declaratory relief. It had "little trouble concluding that [the trial court's] attempt to coerce Murray-O'Hair to take an affirmation, despite her sincere religious objections, was a violation of the Free Exercise Clause." *Id.* at 1215. The court explained at length its reasons for reaching this conclusion:

> It is true that Free Exercise jurisprudence admits an exception for claims "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." But Murray-O'Hair's claim—that a God-free affirmation is nonetheless a "religious statement," hence objectionable—is not this farfetched. . . . [T]o her and others, affirmation has become a surrogate word that is suspect because of its traditional association with religion. . . .
>
> . . . Nor can Murray-O'Hair's objections be dismissed as trivial, in the way that one might dismiss a Free Exercise challenge to the presence of "In God We Trust" on U.S. coins and bills. An affirmation is a public attestation, "readily associated with" the speaker, whereas "currency is generally carried in a purse or pocket and need not be displayed to the public. . . ." The personal, public and active nature of a coerced affirmation renders it far from trivial . . . .
>
> . . . [I]t might be argued that some limits are necessary, even in religion-plus-speech cases, in order to ensure that accommodating the individual's religious belief does not "radically restrict the operating latitude" of the government. . . . [W]e willingly set such a limit in the instant case, because it is clear, for example, that an outright refusal to make *some* kind of pledge would frustrate the operation of the judicial system. In any event, Murray-O'Hair did not exceed these limits. She indicated that she was willing to serve her jury duty, but the judge, rather than asking her what sort of pledge she could make, instead debated the correctness of her religious beliefs.

Id. at 1215-17 (citations and footnotes omitted).

The court gave detailed instructions to district courts faced with a prospective juror who refuses to take an oath or affirmation because of religious objections:

> [T]he judge should either allow the person to withdraw from jury duty without penalty or allow the prospective juror an alternative that requires him or her to make some form of serious public commitment to answer truthfully that does not transgress the prospect's sincerely held beliefs. The judge may require a prospective juror to state: (1) the specific basis for objection, and (2) what form of serious public commitment would accord with the prospective juror's constitutionally protected beliefs. The judge may require any form of avowal that "state[s] or symbolize[s] that [the witness will] tell the truth and which . . . purports to impress upon [her] the necessity for so doing." Nothing more may be compelled if it impinges upon sincere, constitutionally protected beliefs. It is not for the judge to determine the validity or logic of the prospective juror's beliefs. Beliefs may be rejected only if they are patently insincere, bizarre, or not related to the free exercise of religion. If the prospective juror is unwilling to make a required avowal of the type stated, the judge may impose such penalty as may be provided by law for refusal to perform jury duty.

Id. at 1219 (brackets in original;

Bench Comment:

What district courts should do when parties or potential jurors refuse to take an oath or affirmation because of religious objections.

citations and footnotes omitted).

The court suggested that its decision was compelled by its previous per curiam opinion in *Ferguson v. Commissioner of Internal Revenue*, 921 F.2d 588 (5th Cir. 1991). There, a tax court dismissed a party's petition because of her religious objections to taking an oath or affirmation prior to testifying. She requested the following alternative to an oath or affirmation: "I do hereby declare that the facts I am about to give are, to the best of my knowledge and belief, accurate, correct and complete." The tax court denied the request, stating that an affirmation does not violate any religious conviction. Because the party's case rested on her testimony, the action was dismissed. The Fifth Circuit reversed.

The court noted that Fed. R. Evid. 603 requires witnesses to declare they will testify truthfully, "by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." The court noted further the advisory committee notes that state: "The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special formula is required." The court then stated:

> If [the judge] had attempted to accommodate Ms. Ferguson by inquiring into her objections and considering her proposed alternative, the entire matter might have been resolved without an appeal to this court. Instead, however, [the judge] erred . . . in evaluating Ms. Ferguson's religious belief, and concluding that [an affirmation] did not violate any "recognizable religious scruple". . . .

Id. at 590-91.

The Ninth Circuit reached a similar conclusion in *Gordon v. Idaho*, 778 F.2d 1397 (9th Cir. 1985). Defendants in a civil suit served Gordon with a notice requiring him to appear at a deposition and testify under oath. He appeared but, because of religious beliefs, refused to swear under oath or make an alternative affirmation. The court granted a motion by defendants to compel discovery and issued an order that, at a rescheduled deposition, Gordon must swear or affirm that he would tell the truth. The court's order stated that the manner of swearing or affirmation must take one of two forms. One was a religious oath, the other as follows: "You do affirm upon pain and penalty of perjury that the testimony you will give in this deposition will be the truth, the whole truth, and nothing but the truth." At the second deposition Gordon refused to take an oath or make the prescribed affirmation, because he objected to using the word "affirm." The court then dismissed his action.

The Ninth Circuit reversed, noting that "Fed. R. Civ. P. 43(d) allows the substitution of a 'solemn affirmation' in lieu of an oath" and "[w]e have found no authority insisting on the use of the word 'affirm' in such alternative affirmations." *Id.* at 1400. The court cited the "parallel provision" in Fed. R. Evid. 603 and the advisory committee notes accompanying it (both quoted above) as counselling flexibility where the form of truth assertion is concerned. It concluded:

> This reasoning should also apply to affirmations at depositions under the Federal Rules of Civil Procedure. We therefore conclude that any statement indicating that the deponent is impressed with the duty to tell the truth and understands that he or she can be prosecuted for perjury for failure to do so satisfies the requirement for an oath or affirmation under Fed. R. Civ. P. 30(c) and 43(d). Deponents, furthermore, need not raise their hand when they state the words necessary to satisfy Fed. R. Civ. P. 30(c) and 43(d) if to do so impinges on sincerely-held religious beliefs. . . . . The district court, therefore, should have explored the least restrictive means of assuring that Gordon would testify truthfully at his deposition. At oral argument before our court, Gordon said that before his deposition is taken he is willing to state: "I understand that I must tell the truth. I agree to testify under penalty of perjury. I understand that if I testify falsely I may be subject to criminal prosecution." This statement, we believe, would satisfy Fed. R. Civ. P. 30(c) and 43(d).

Id. at 1400-01. *Accord U.S. v. Looper*, 419 F.2d 1405, 1407 (4th Cir. 1969) ("The common law . . . requires neither an appeal to God nor the raising of a hand as a prerequisite to a valid oath. All that the common law requires is a form or statement which impresses upon the mind and conscience of a witness the necessity for telling the truth.").

The *Gordon*, *Ferguson*, and *Herman* courts cited for support *Moore v. U.S.*, 348 U.S. 966 (1955), a one-paragraph, per curiam opinion in a case where certain witnesses were not permitted to testify because, on account of religious scruples, they refused to use the word "solemnly" in their pledge to tell the truth. The Supreme Court reversed, stating simply that there "is no requirement that the word 'solemnly' be used in the affirmation . . . ."

Bench Comment
1992, No. 2, February 1992

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Bench Comment

Federal Judicial Center
1992, No. 3, April 1992

A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT: A district court may not order a new trial on the basis of jurors' testimony about factors that influenced the verdict.

Federal Rule of Evidence 606(b) authorizes a trial court to inquire into the validity of a verdict. During such an inquiry, "a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." However, the rule also states that a juror may not testify about the "effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith." The latter provision has been a source of some reversals and confusion.

The recent case of *Haugh v. Jones & Laughlin Steel*, 949 F.2d 914 (7th Cir. 1991), should help clarify matters for two reasons. First, *Haugh* overruled an earlier Seventh Circuit case and thus established unanimity among the circuits by holding that Rule 606(b) should essentially be taken at face value: "The rule forbid[s] the questioning of jurors concerning the impact of improper communications." *Id.* at 918. *Accord U.S. v. Ortiz*, 942 F.2d 903, 909 (5th Cir. 1991); *Mahoney v. Vondergritt*, 938 F.2d 1490, 1492 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1195 (1992); *U.S. v. Maree*, 934 F.2d 196, 201 (9th Cir. 1991); *Capps v. Sullivan*, 921 F.2d 260, 262–63 (10th Cir. 1990); *U.S. v. Small*, 891 F.2d 53, 56 (3d Cir. 1989); *Stockton v. Virginia*, 852 F.2d 740, 744–46 (4th Cir. 1988), *cert. denied*, 489 U.S. 1071 (1989); *U.S. v. Sjeklocha*, 843 F.2d 485, 487–88 (11th Cir. 1988); *U.S. v. Krall*, 835 F.2d 711, 715–16 (8th Cir. 1987); *U.S. v. Calbas*, 821 F.2d 887, 896–97 (2d Cir. 1987), *cert. denied*, 485 U.S. 937 (1988); *U.S. v. Shackleford*, 777 F.2d 1141, 1145 (6th Cir. 1985), *cert. denied*, 476 U.S. 1119 (1986); *U.S. v. Brooks*, 677 F.2d 907, 913 (D.C. Cir. 1982) (per curiam). In addition, the court set forth the procedure a trial court should follow when informed of an alleged improper communication with the jury.

In *Haugh*, shortly after the jury rendered its verdict, the foreman wrote the trial judge a letter complaining "that the marshal who shepherded the jurors during deliberations had told them that there was no such thing as a hung jury and that they would be kept in custody for as long as it took them to reach a verdict." Upon receiving the letter, the court held a hearing at which it questioned each juror and the marshal. At one point the court said to a juror: "Let me ask you this. The reason that you agreed to the verdict that ultimately was rendered . . . , for what reason did you do that, because you believed in the verdict or that you wanted to go home." The juror responded, "Because they wanted to go home." The trial court ultimately concluded that there was a reasonable possibility that the jury was swayed by the marshal's improper communication and granted a motion for a new trial.

The Seventh Circuit found that the trial court's questioning violated Rule 606(b) and stated:

> The proper procedure . . . is for the judge to limit the questions asked the jurors to whether the communication was made and what it contained, and then, having determined that the communication took place and what exactly it said, to determine—without asking the jurors anything further and emphatically without asking them what role the communication played in their thoughts or discussion—whether there is a reasonable possibility that the communication altered their verdict. . . .
>
> . . . Such questions [about the impact of the communication] invade the privacy of the jury beyond what is necessary to determine whether there has been a miscarriage of justice. They are forbidden. If (were it not for this prohibition), "jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict," McDonald v. Pless, 238 U.S. 264, 267 (1915), likewise they "would be harassed and beset" by the victorious party in an effort to defeat the loser's effort to get the verdict set aside because of an improper communication to the jury.

Id. at 917–18.[1]

Rule 606(b) has also been construed to prohibit considering jurors' statements about the effect

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A district court may not order a new trial on the basis of jurors' testimony about factors that influenced the verdict.

that information learned after the trial would have had on their verdict. In *U.S. v. Sjeklocha*, 843 F.2d 485 (11th Cir. 1988), the Eleventh Circuit reversed the grant of a new trial. After defendant was convicted of selling arms to Iran, it was revealed that the United States government had been negotiating similar sales at the same time it was prosecuting defendant. A newspaper article quoted the foreman of the jury as saying that, in light of these disclosures, he would now be inclined to change his vote. Defendant moved for a new trial based on this newspaper article and an affidavit from the foreman reiterating and explaining his statements. The trial court granted the motion, finding this "a paradigm case for a new trial." The appellate court reversed:

> The district judge erred in relying upon the affidavit and the statement appearing in the Orlando newspaper given by the jury foreman, when deciding if a new trial was appropriate . . . . Rule 606(b) strikes a balance between protecting the defendant's right to a fair trial free from substantial juror misconduct, while protecting the legitimate interests of preventing the harassment of jurors, supporting the finality of verdicts, and preserving the community's trust in a system that relies on the decisions of lay people. . . .
>
> Clearly the information contained in the affidavit of the jury foreman and the statement attributed to the jury foreman that appeared in *The Orlando Sentinel* concerned "the effect of anything upon that . . . juror's mind or emotions as influencing the juror to assent to . . . the verdict." Fed.R.Evid. 606(b). As the juror would be prohibited under the Federal Rules of Evidence from giving such testimony at a hearing on a motion by the appellees for a new trial, the trial court erred in considering the juror's affidavit and the newspaper statement attributed to the juror when deciding whether the appellees were entitled to a new trial based upon newly discovered evidence.

Id. at 487–88. *Accord Capps v. Sullivan*, 921 F.2d 260, 262 (10th Cir. 1990) (in habeas action alleging ineffective assistance of counsel, "district court erred in considering evidence from two jurors who indicated that they would have voted differently had they been given an entrapment instruction").

The teaching of these decisions is clear: a district court may not order a new trial on the basis of jurors' testimony about factors that influenced the verdict.

Note to Readers

Bench Comment 1992, No. 2 (Subject: What district courts should do when parties or potential jurors refuse to take an oath or affirmation because of religious objections) discussed *Society of Separationists ve Herman*, 939 F.2d 1207 (5th Cir. 1991). Subsequently, the panel opinion was vacated for rehearing en banc. A future Bench Comment will report the en banc decision.

Note

1. The Seventh Circuit appeared to hold otherwise in *U.S. ex rel. Buchkana v. Lane*, 787 F.2d 230 (7th Cir. 1986). There, though the court stated that "the intent of Rule 606(b) is to prohibit the questioning of jurors regarding the effect of extraneous information," *id.* at 239, it proceeded to uphold such questioning. In *Haugh*, the Seventh Circuit acknowledged as much and "overrule[d] *Buchkana* to the extent of its inconsistency with the present opinion." 949 F.2d at 918.

Bench Comment
1992, No. 3, April 1992

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Bench Comment

Federal Judicial Center
1992, No. 4, June 1992

A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT: A district court must consider less severe sanctions before dismissing a case.

Fed. R. Civ. P. 37(b)(2)(C) authorizes a trial court to dismiss an action with prejudice or render judgment by default if a party violates a discovery order. Rule 41(b) authorizes the court to dismiss because of "failure of the plaintiff to prosecute or to comply with these rules or any order of court." However, all of the circuits have held that it is generally an abuse of discretion to dismiss a case in these instances without considering less severe sanctions, e.g., a warning or formal reprimand, a fine or imposition of fees and costs, placement of the case at the bottom of the calendar, suspension of counsel from practice before the court, or preclusion of claims or defenses. Dozens of reversals have resulted from trial courts' failures to heed this admonition.

While not all of the circuits require the identical approach, two rules of thumb emerge from the cases. First, the offending party should be warned that its misconduct could result in a dismissal. Second, the trial court should explain on the record both the conduct that merits sanction and why dismissal, rather than a less severe sanction, is in order. These procedures will minimize the likelihood of reversal. The following cases provide district courts more specifics on what is expected in their circuit.

First Circuit

Velazquez-Rivera v. Sea-Land Serv., 920 F.2d 1072, 1076 (1st Cir. 1990): "In determining whether conduct is sufficiently serious to warrant the harsh action of dismissal, the court must consider all of the factors involved. A court is not necessarily required to take less severe action before imposing the sanction of dismissal, but dismissal should be employed only if the district court has determined that it could not fashion an 'equally effective but less drastic remedy'" (citations omitted).

Second Circuit

Chira v. Lockheed Aircraft, 634 F.2d 664, 665 (2d Cir. 1980): "The remedy [of dismissal] is pungent, rarely used, and conclusive. A district judge should employ it only when he is sure of the impotence of lesser sanctions." A subsequent case identified the factors the trial court must consider: the duration of the misconduct, whether the party received notice that further misconduct would result in dismissal, the extent of prejudice to the opposing party, and the efficacy of lesser sanctions. *Harding v. Federal Reserve Bank*, 707 F.2d 46, 50 (2d Cir. 1983).

Third Circuit

Poulis v. State Farm, 747 F.2d 863, 868 (3d Cir. 1984): "[W]e will be guided by the manner in which the trial court balanced the following factors . . . and whether the record supports its findings: (1) the extent of the *party's* personal *responsibility*; (2) the *prejudice* to the adversary . . . ; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad faith*; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of *alternative sanctions*; and (6) the *meritoriousness* of the claim or defense" (emphasis in original).

Fourth Circuit

Doyle v. Murray, 938 F.2d 33, 34 (4th Cir. 1991): "[T]his court has laid down a four-part analysis courts should consider before levying the sanction of dismissal. A court must balance: '(1) the degree of personal responsibility of the plaintiff, (2) the amount of prejudice caused the defendant, (3) the existence of a "drawn out history of deliberately proceeding in a dilatory fashion," and (4) the existence of sanctions less drastic than dismissal'" (citations omitted).

Fifth Circuit

Sturgeon v. Airborne Freight Corp., 778 F.2d 1154, 1159 (5th Cir. 1985): "Because of the severity of dismissal with prejudice, we have determined that ordinarily such action will be affirmed only (1) upon a showing of 'a clear record of delay *or* contumacious conduct by the plaintiff' and (2) when 'lesser sanctions would not serve the best interests of justice.' . . . The district court's consideration of lesser sanctions should appear in the record for review of the court's exercise of its discretion" (emphasis in original; citations omitted).

Sixth Circuit

Regional Refuse Sys. v. Inland Reclamation Co., 842 F.2d 150, 155 (6th Cir. 1988): "While it would be inappropriate to dismiss without considering the severity of this sanction and the availability of lesser sanctions, it is not an abuse of discretion to dismiss, even though other sanctions might be workable, if dismissal is supportable on the facts. Dismissal is generally imposed only for egregious misconduct, such as *repeated* failure to appear for deposition" (emphasis in original).

Seventh Circuit

Schilling v. Walworth County Park & Planning Comm'n, 805 F.2d 272, 275

(7th Cir. 1986): "We have previously indicated the limited appropriateness of the sanction of dismissal: 'A dismissal with prejudice is a harsh sanction which should usually be employed only in extreme situations, when there is a clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailing.' Absent those circumstances, the careful exercise of judicial discretion requires that a district court consider less severe sanctions and explain, where not obvious, their inadequacy for promoting the interests of justice." (citations omitted).

Eighth Circuit

Pardee v. Stock, 712 F.2d 1290, 1292 (8th Cir. 1983): "[T]he trial judge should consider alternative sanctions which do not impact so decisively upon the litigant. The court should resort to dismissal of an action only when there has been a 'clear record of delay or contumacious conduct by the plaintiff.'" (citations omitted). That case involved a Rule 41(b) dismissal. In a recent case involving a Rule 37(b) dismissal, the Eighth Circuit held that "[t]he court must investigate whether a sanction less extreme than dismissal would suffice, *unless* the party's failure was deliberate or in bad faith. . . . When the facts show willfulness and bad faith, the selection of a proper sanction, including dismissal, is entrusted to the sound discretion of the district court." *Avionic Co. v. General Dynamics*, 957 F.2d 555, 558 (8th Cir. 1992) (emphasis in original; citations omitted).

Ninth Circuit

Malone v. U.S. Postal Serv., 833 F.2d 128, 131-32 (9th Cir. 1987), *cert. denied*, 488 U.S. 819 (1988): "'The district court abuses its discretion if it imposes a sanction of dismissal without first considering the impact of the sanction and the adequacy of less drastic sanctions.' Our case law reveals that the following factors are of particular relevance in determining whether a district court has considered alternatives to dismissal: (1) Did the court explicitly discuss the feasibility of less drastic sanctions and explain why alternative sanctions would be inadequate? (2) Did the court implement alternative methods of sanctioning or curing the malfeasance before ordering dismissal? (3) Did the court warn the plaintiff of the possibility of dismissal before actually ordering dismissal?" (citation omitted).[1]

Wanderer v. Johnston, 910 F.2d 652, 656 (9th Cir. 1990), illustrates the type of circumstance that justifies a dismissal or default judgment. For the two years after discovery commenced, defendants failed to appear at several scheduled depositions and did not comply with repeated court orders to answer interrogatories and produce documents. They were warned, once by the magistrate judge and once by the court, that continued non-compliance would result in a default judgment. Finally, the magistrate judge recommended a default judgment, noting that "the lesser sanctions imposed . . . have been met with complete indifference by defendants." The district court approved the recommendation and entered a default judgment. The Ninth Circuit affirmed, stating "[T]he key factors are prejudice and availability of lesser sanctions. . . . [Defendants' actions] constituted a clear interference with the plaintiffs' ability to prove the claims and to obtain a decision in the case. The existence of prejudice is palpable. . . . The record [also] fully supports the court's conclusion that to repeat the imposition of lesser sanctions would be unavailing."

Tenth Circuit

In re Russell, 746 F.2d 1419, 1420 (10th Cir. 1984): "Obviously dismissal is a possible sanction, a drastic sanction, and one to be used in the proper circumstances. . . . We [have] stated the need an appellate court has for the trial court's statement or recitation as to *why* the particular circumstances demonstrated a need for the sanctions imposed ." (emphasis in original).

Eleventh Circuit

Hashemi v. Campaigner Publications, 737 F.2d 1538, 1538-39 (11th Cir. 1984): "While we agree that the sanction of dismissal is a most extreme remedy and one not to be imposed if lesser sanctions will do, the district court retains the discretion to dismiss a complaint where the party's conduct amounts to 'flagrant disregard and willful disobedience' of the court's discovery orders" (citation omitted).

D.C. Circuit

Camps v. C & P Tel. Co., 692 F.2d 120, 124-25 (D.C. Cir. 1981): "'Dismissal is a harsh sanction and should be resorted to only in extreme cases.' We do not question the authority of the District Court, in the exercise of its sound discretion, to dismiss cases that truly are unworthy of further judicial time and attention. We must insist, however, that the circumstances—particularly unavailability of an alternative sanction—make dismissal really appropriate . . . . We might well assess the situation differently if this had not been [plaintiff's] first infraction, and especially if the court . . . had informed [him] of the consequences of late arrival." (citation omitted).

Notes

1. The Ninth Circuit recently reversed a sua sponte dismissal because the trial court failed to warn plaintiff about dismissal and consider less severe sanctions. *Oliva v. Sullivan*, 958 F.2d 272, 274 (9th Cir. 1992). The appellate court stated that "there is a closer focus on these two considerations" in cases involving sua sponte dismissal rather than a noticed motion under Rule 41(b).

Bench Comment
1992, No. 4, June 1992

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Bench Comment

Federal Judicial Center
1992, No. 5, August 1992

A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT: When ruling on a motion for judgment notwithstanding the verdict,[1] may a district court exclude from consideration evidence that was erroneously admitted?

In the course of ruling on a motion for judgment notwithstanding the verdict, a trial court sometimes determines that evidence favorable to the non-moving party was erroneously admitted at trial. May trial courts exclude such evidence from their consideration when deciding the motion?

The Sixth Circuit recently held that they may not, thus joining the other two circuits to decide this question. *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343–44 (6th Cir. 1992). *Accord Sumitomo Bank v. Product Promotions*, 717 F.2d 215, 218 (5th Cir. 1983); *Midcontinent Broadcasting v. North Central Airlines*, 471 F.2d 357, 358–59 (8th Cir. 1973). These courts all hold that if the trial court believes that the verdict could not stand absent evidence that should have been excluded, rather than grant a motion for judgment notwithstanding the verdict, the appropriate remedy is a new trial (assuming the losing party has moved for one).

In reaching this conclusion, the Sixth Circuit said:

> [We] believe that it is wholly improper for a district judge to ignore evidence admitted at trial from its consideration in granting a judgment notwithstanding the verdict. We agree . . . that "[a] motion for judgment notwithstanding the verdict, like a motion for a directed verdict, does not raise questions relating to the competency or admissibility of evidence. Therefore, in considering a motion for judgment notwithstanding the verdict, the evidence must be taken as it existed at the close of the trial. . . . The proper remedy for disposing of evidence erroneously admitted during the course of the trial is a new trial where motion therefor has been made [citation omitted].

956 F.2d at 1343–44.

The rationale for this position was spelled out in *Midcontinent Broadcasting* and quoted approvingly in *Sumitomo* and *Douglas*. There, in granting the motion for judgment notwithstanding the verdict, the trial court ruled that expert testimony had been erroneously admitted; absent such evidence, it held, there was insufficient support for the verdict. In reversing, the Eighth Circuit said:

> The subsequent ruling, after the verdict, that the expert opinion was not admissible after it had been originally received and considered by the jury, placed plaintiff in a relative position of unfair reliance. If plaintiff had been forewarned during the trial that such testimony was not admissible it conceivably could have supplied further foundation or even totally different evidence. Under these circumstances the grant of the judgment n.o.v. was not a proper remedy.

471 F.2d at 359. *But cf. Aloe Coal v. Clark Equip.*, 816 F.2d 110, 116 (3d Cir.), *cert. denied*, 484 U.S. 853 (1987) (court expressed misgivings about the Eighth Circuit's argument, noting that it "does not address . . . the competing reliance concerns of the defendant"; however, finding that judgment notwithstanding the verdict was in order even if the evidence that was improperly admitted were considered, the court declined to decide whether improperly admitted evidence may be excluded from consideration).

Note

1. Under amended Rule 50, judgments notwithstanding the verdict and directed verdicts are now referred to as "judgments as a matter of law." The change in nomenclature did not result in any change in the substantive or procedural law governing such motions.

Note to Readers

Bench Comment 1992, No. 2 (Subject: What district courts should do when parties or potential jurors refuse to take an oath or affirmation because of religious objections) discussed *Society of Separationists v. Herman*, 939 F.2d 1207 (5th Cir. 1991), where an atheist summoned for jury duty was held in contempt after refusing to take an oath or affirmation. The Fifth Circuit granted declaratory relief, holding that the trial judge violated the prospective juror's Free Exercise rights. After the Bench Comment went to press, the Fifth Circuit, sitting en banc, vacated the panel opinion. 959 F.2d 1283 (5th Cir. 1992) (en banc). The opinion did not reach the merits of the dispute, instead holding that the prospective juror lacked standing to obtain prospective relief. Thus it remains the case that all the circuits to consider the question (including the Fifth, in an earlier case) hold that a trial court must seek to accommodate those who object to an oath or affirmation, by finding a means for them to express a commitment to speak truthfully that does not offend their religious beliefs.

Bench Comment

Federal Judicial Center
1992, No. 6, October 1992

A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT: Defendants' rights under the Speedy Trial Act are not waivable.

The Speedy Trial Act provides that the trial of a defendant who pleads not guilty must commence "within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court," 18 U.S.C. § 3161(c)(1), or the case shall be dismissed, 18 U.S.C. § 3162(a)(2). The Act excludes periods of time in specified circumstances, including a "delay resulting from a continuance granted by any judge on his motion or at the request of the defendant or his counsel . . . if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A).[1] The statute specifies that

> [n]o such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

Id.[2]

Every circuit to address the matter interprets these provisions as binding and as precluding a defendant's waiver of the right to a speedy trial. *U.S. v. Willis*, 958 F.2d 60, 63 (5th Cir. 1992); *U.S. v. Kucik*, 909 F.2d 206, 210–11 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 791 (1991); *U.S. v. Berberian*, 851 F.2d 236, 239 (9th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989); *U.S. v. Ray*, 768 F.2d 991, 998 n.11 (8th Cir. 1985); *U.S. v. Pringle*, 751 F.2d 419, 433–34 (1st Cir. 1984); *U.S. v. Carrasquillo*, 667 F.2d 382, 388–90 (3d Cir. 1982). If a defendant does not want trial to commence within seventy days, the proper procedure is to move for a continuance in accordance with section 3161(h)(8). The court must then make the necessary findings in order for a continuance to be justified.

Most of the cases cited above involved a similar fact pattern. Defendant agreed to a delay, but no motion for a continuance was filed and no findings were made. Then, when the seventy-day period expired, defendant moved for dismissal. The trial court held that defendant waived the right to a speedy trial, but the appellate court stated that this right is not waivable. Some of the courts nevertheless refused to reverse, essentially on estoppel grounds. *See, e.g., Kucik*, 909 F.2d at 211 ("Where a defendant actively participates in a continuance . . . he cannot then 'sand-bag' the court and the government by counting that time in a speedy trial motion."); *Pringle*, 751 F.2d at 434 ("Defense counsel may not simultaneously use the Act as a sword and a shield. We think it unethical and dishonest for defense counsel to waive the Act in the trial court and then disclaim such waiver upon appeal."). In other cases, however, courts have reversed, emphasizing the *public's* right to a speedy trial. *See, e.g., Carrasquillo*, 667 F.2d at 390.

The Fifth Circuit took the latter path in the recent *Willis* case, and it analyzed the limitations of the estoppel approach in this context. Its opinion serves as a reminder to district courts that the safest course is to follow the procedures set forth in section 3161(h)(8).

In *Willis*, defendant filed a motion requesting additional time to prepare for trial. At the motion hearing, the district court told him that in order for the request to be granted, defendant would have to give up his right to a speedy trial. Defendant agreed, and the court granted a continuance. However, no formal motion was filed nor were findings made. Several months later, the court became concerned about the validity of defendant's waiver of his right to a speedy trial and requested that one of the parties move for a continuance. Defendant so moved and the court, after making the necessary findings, granted a continuance. Months later, defendant moved to dismiss the indictment against him, alleging a violation of the Speedy Trial Act. The court denied the motion, finding that the delay resulted from defendant's waiver. The Fifth Circuit reversed:

Bench Comment:
Defendants' rights under the Speedy Trial Act are not waivable.

The Act is intended both to protect the defendant from undue delay in his trial and to benefit the public by ensuring that criminal trials are quickly resolved. . . . In the vast majority of cases, the defendant will be quite happy to delay the final determination of his guilt or innocence. The Act's central intent to protect society's interests requires that a defendant's purported waiver of his rights under the Act be ineffective to stop the speedy trial clock from running.

. . . The more vexing question . . . is whether Willis can take advantage of this delay to attain the dismissal of his indictment.

Other sources on this topic

Bench Comment readers can find information on this and related subjects in Bench Book for United States District Court Judges (Federal Judicial Center 3d ed. 1986) at section 1.19-1–1.19-2.

. . . [We have] called sensible the *Pringle* maxim that "defendants ought not to be able to claim relief on the basis of delays which they themselves deliberately caused." 875 F.2d at 1108. This sensible maxim must not be taken too far. The major concern of the *Pringle* court was that a defendant not be able to have it both ways by convincing the district court that delay was appropriate and then using that delay to obtain a dismissal. . . .

A district court is not sandbagged or otherwise misled, however, by a defendant's simple request for or acquiescence in a continuance and its own insistence on a waiver. Our holding that the provisions of the Act are non-waivable would be meaningless if we adopted the rule that the defendant waives his ability to move for dismissal of the indictment simply by asking for or agreeing to a continuance. It is the responsibility of the district court to ensure that a request for a continuance in a criminal case which threatens to delay trial past the 70-day mark falls within one of the Act's exceptions.

958 F.2d at 63–64.

This case serves as a reminder that the provisions of the Speedy Trial Act regarding exceptions are mandatory, that defendants cannot waive their rights under the Act, and that failure to follow these rules can result in reversal of a conviction and dismissal of an indictment.

Notes

1. For cases where the public's and/or defendant's interest in a speedy trial was outweighed and a continuance held proper, see *U.S. v. Driver*, 945 F.2d 1410, 1414 (8th Cir. 1991) (newly appointed counsel), *cert. denied*, 112 S. Ct. 1209 (1992); *U.S. v. Tanner*, 941 F.2d 574, 583 (7th Cir. 1991) (unavailability of counsel), *cert denied*, 112 S. Ct. 1190 (1992); *U.S. v. Vega*, 860 F.2d 779, 787 (7th Cir. 1988) (61-count, 32-defendant indictment requiring severance); *U.S. v. Kamer*, 781 F.2d 1380, 1390 (9th Cir.) (key documents and witnesses overseas), *cert. denied*, 479 U.S. 819 (1986); *U.S. v. Studnicka*, 777 F.2d 652, 657 (11th Cir. 1985) (defendant yet to retain counsel).

For cases where the speedy trial interest outweighed the factors counseling delay and continuances were held properly denied or improperly granted, see *U.S. v. Ortega-Mena*, 949 F.2d 156, 160 (5th Cir. 1991) (trial court abused discretion in granting continuance because he was tied up with other proceedings); *U.S. v. Blandina*, 895 F.2d 293, 298 (7th Cir. 1989) (denial of continuance upheld where defendant requested more time after learning of new government witness; defendant had rejected two alternative dates, and fourteen days to prepare for witness's testimony was adequate); *U.S. v. Moya-Gomez*, 860 F.2d 706, 742 (7th Cir. 1988) (denial proper where defendant had twenty-one days to prepare following his decision to proceed pro se and would have had more time but for his earlier decision to switch counsel), *cert. denied*, 492 U.S. 908 (1989); *U.S. v. Punelli*, 892 F.2d 1364, 1369 (8th Cir. 1990) (denial upheld where defendant failed to show that he would be prejudiced by lack of time to prepare a defense in light of superseding indictment). *See also* 18 U.S.C. §§ 3161(h)(8)(B), (C) (listing factors which may and may not be taken into account when an ends of justice continuance is sought).

2. In addition to delay resulting from a continuance, the Speedy Trial Act excludes delays resulting from assorted circumstances, *e.g.*, interlocutory appeals, transfer or removal of the case, and consideration by the court of a proposed plea agreement. *See* 18 U.S.C. §§ 3161(h)(1)–(h)(7).

Bench Comment
1992, No. 5, October 1992

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Bench Comment

Federal Judicial Center
1992, No. 7, December 1992

A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT:
May a magistrate judge conduct voir dire in a civil case over the objection of a party?

The Federal Magistrates Act, 28 U.S.C. §§ 631–639, authorizes district courts to assign magistrate judges various functions, enumerated in sections 636(b)(1), (2). Section 636(b)(3) permits the assignment of "such additional duties as are not inconsistent with the Constitution and laws of the United States." Section 636(c)(1) states that, "[u]pon the consent of the parties," a magistrate judge may be assigned to "conduct any or all proceedings in a jury or nonjury civil matter." Section 636(c)(2) states that the parties "are free to withhold consent without adverse substantive consequences" and that rules of the court "shall include procedures to protect the voluntariness of the parties' consent."

In *Gomez v. U.S.*, 490 U.S. 858 (1989), the Supreme Court rejected the claim that the seeming catch-all provision, section 636(b)(3), permits a magistrate judge to conduct voir dire in a criminal case over the defendant's objection. The Court did not address whether its holding applies to civil cases, a question that is arising in the courts of appeals.[1]

The Sixth Circuit recently joined the Seventh in holding that it is error to permit a magistrate judge to conduct voir dire in civil cases over the objection of a party. Both courts reversed verdicts by juries selected by magistrate judges, rejecting the contention that such error is harmless.

The Seventh Circuit said:

> The parties describe the question as being whether *Gomez* . . . should be "extended" to civil cases. We conceive the question differently, as whether the statute authorizes magistrates to conduct voir dire in a civil case. We cannot find where it does, unless it is in section 636(b)(3), authorizing the assignment to a magistrate of "such additional duties as are not inconsistent with the Constitution and laws of the United States." The location of this provision in the middle of the statute rather than at the end makes us doubt that it was intended to be as comprehensive a catch-all as its words literally suggest. If it were, *Gomez* would have been decided differently, since section 636(b)(3) is not limited to civil cases. . . . Nor would there be much point to the elaborate provisions in section 636(c) for the conduct of civil trials (including jury trials) by a magistrate *with the consent of both parties* if a district judge could compel the parties, against their wishes, to submit to a magistrate's conducting vital stages in the trial, such as the voir dire of the jury.

Olympia Hotels Corp. v. Johnson Wax Dev. Corp., 908 F.2d 1363, 1368 (7th Cir. 1990) (emphasis in original).

The court bolstered its conclusion with the argument that in many cases (including the case sub judice), permitting a magistrate judge to conduct a vital stage of the trial over the objection of a party would violate the Constitution:

> [T]he federal courts have jurisdiction over [many cases] only by virtue of the grant of judicial power in Article III of the Constitution. There is no suggestion that the district court was exercising power conferred by any other provision of the Constitution, as it might have been if this were a "core" controversy in a bankruptcy suit or a suit to which the United States was a party. Article III confers the judicial power of the United States on judicial officers who have guarantees of tenure and of undiminished compensation that federal magistrates lack. Parties may be able to consent to have their legal disputes resolved by non-Article III officers even if the dispute is within the judicial power conferred by Article III
>
> . . . . But they cannot be *forced* to try a dispute that is subject to federal jurisdiction only by virtue of Article III before a judge who is not authorized to exercise the power conferred by that article.

Id. at 1368–69 (emphasis in original).

The court noted that "it can be argued that the voir dire is no more an essential, nondelegable stage of trial than pretrial discovery, which the statute—without thereby engendering constitutional qualms—authorizes magistrates to conduct without the parties' consent." However, the court expressed doubts that discovery and voir dire are analogous, since discovery is generally conducted

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with minimal judicial involvement whereas voir dire "is a vital stage of every jury trial." The court then concluded:

> Whether the trial is so diminished by the use of magistrates to conduct the voir dire that Article III is violated we do not decide. . . . The constitutional doubts that we have expressed are rooted in a serious concern about the rights of persons to a trial before a federal judge, a concern likely to be shared by legislators in their reflective moments. For that reason these doubts reinforce our conclusion that section 636 was not intended and should not be read to confer on magistrates, by means of a vague clause buried deep in the statute, the power to conduct jury voir dire without the consent of both parties.

Id. at 1369.

Finally, the court rejected the contention that the assignment to the magistrate judge of voir dire was harmless error. The court stated that the error "is indeed harmless in the sense that [appellant] made no effort to show how it was harmed. But issues of entitlement to a particular kind of tribunal are in general not subject to the harmless error rule." The court noted that the Supreme Court in *Gomez* refused to apply a harmless error analysis, reasoning that because a transcript cannot capture the atmosphere of voir dire, it would be nearly impossible to show actual harm. The Seventh Circuit pointed out that although *Gomez* was a criminal case, the harmless error rule is the same in criminal and civil cases.

Similarly, in *Stockler v. Garratt*, 974 F.2d 730 (6th Cir. 1992), the Sixth Circuit reversed a verdict by a jury selected by a magistrate judge. The court expressed agreement with the Seventh Circuit's analysis of the text of the Federal Magistrates Act, and emphasized that voir dire is as vital in civil trials as in criminal trials. (The court did not discuss the constitutional issue.) The court also rejected the harmless error argument, endorsing the Seventh Circuit's reasoning on this matter, and adding another consideration:

> [I]f a litigant is forced into having a magistrate preside over *voir dire* against his will, the issue is not whether the magistrate was a competent and impartial adjudicator, but whether the magistrate, as a judicial actor, had the authority to conduct the *voir dire* in the first place . . . . It is the perceived threat of injury of not having an Article III judge preside over this important function, not the actual harm, which is relevant.
>
> We do not believe that if a party in a civil action explicitly objects to having a magistrate conduct *voir dire* and the court consciously ignores this objection and allows the magistrate to conduct *voir dire*, it can be considered harmless error. Otherwise, courts could ignore the dictates of the Federal Magistrates Act with impunity and force civil litigants to submit to the jurisdiction of a magistrate without their consent unless a party could demonstrate exactly how the trial would have been different if an Article III judge, rather than the magistrate, had conducted the *voir dire*.

Id. at 733.

In light of the fact that the Sixth and Seventh Circuits reached the same conclusion, district courts should be on notice that assigning a magistrate judge to conduct voir dire may result in reversal. However, because parties in *Stockler* and *Olympia* explicitly objected, the courts did not address whether magistrate judge-conducted voir dire requires *express consent* of the parties or simply the absence of an objection. It seems likely that if the parties do not object, they will either be deemed to consent or at least to waive any objection on appeal. *See Peretz v. U.S.*, 111 S. Ct. 2661, 2668–69 (1991) (*Gomez* "does not apply when the defendant has not objected to the magistrate's conduct of the *voir dire*"). Nevertheless, the safe course is to secure the parties' consent.

Note

1. The Court also did not decide whether a magistrate judge may conduct voir dire in a criminal case if the defendant consents. Subsequently, the Court held that the magistrate judge may conduct voir dire in such a case. *Peretz v. U.S.*, 111 S. Ct. 2661 (1991).

Bench Comment
1992, No. 7, December 1992

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Bench Comment

Federal Judicial Center
1993, No. 1, March 1993

A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT:
District judges may not participate in plea bargain discussions.

Federal Rule of Criminal Procedure 11(e)(1) states that "[t]he court shall not participate in any [plea bargain] discussions." Two recent cases reaffirm the tendency of the courts of appeals to apply this provision strictly and to vacate plea agreements where it is violated.

In *U.S. v. Barrett*, No. 91-4095, 1992 U.S. App. LEXIS (6th Cir. Dec. 23, 1992), the trial judge arranged a pretrial conference call between himself, the prosecutor, and defense counsel to facilitate a plea by resolving a disagreement over the U.S. Sentencing Guidelines. During the discussion, the judge suggested a possible plea and indicated what kinds of sentences he might impose. He also indicated that he thought defendant lacked a strong defense if the case went to trial. Throughout the discussion, however, the judge emphasized that he was not pressuring defendant to plead guilty and would not punish him for going to trial. Defendant eventually pled guilty, but appealed the conviction on the ground that the conference call violated Rule 11(e)(1). The Sixth Circuit agreed and vacated the plea agreement, noting that "[t]he District Judge's comments . . . went far beyond an interpretation of the guidelines or a warning. They were a direct comment on the facts of the case during the bargaining process rather than after the parties had worked out their bargain."

Similarly, in *U.S. v. Bruce*, 976 F.2d 552 (9th Cir. 1992), the prosecutor and defendants discussed a proposed plea agreement with the trial court. Defendants resisted the agreement, and the court forcefully reminded them that they faced life sentences if they went to trial and urged them to give serious consideration to the government's offer. The next day defendants pled guilty. They were sentenced in accordance with the plea agreement, but on appeal one defendant argued that he should be allowed to withdraw his plea because the court's participation in the plea discussions violated Rule 11(e)(1). The Ninth Circuit agreed, drawing on case law and legislative history to emphasize the absolute nature of the rule and noting that "[b]efore the parties have concluded a plea agreement and have disclosed that final agreement in open court, 'the judge must refrain from all forms of plea discussions.'" *Id.* at 555, *quoting U.S. v. Adams*, 634 F.2d 830, 835 (5th Cir. 1981). The court went on to characterize the prohibition as a bright-line rule and to note three purposes behind it: protecting defendants from being coerced into accepting a plea agreement; protecting the integrity of the judicial process by ensuring that the judge is perceived as impartial; and preserving the judge's objectivity after negotiations are completed.[1] The court observed that some of these rationales "apply *whenever* a judge participates in plea negotiations," but cautioned that "even were none to apply in a particular case, a judge would nevertheless be required to follow the mandate—perhaps in part prophylactic—of Rule 11." *Id.* at 558 (emphasis in original).

The Fifth and Second Circuits also give an absolutist construction to Rule 11(e)(1). *Adams*, *supra*; *United States v. Werker*, 535 F.2d 198, 201 (2d Cir.), *cert. denied*, 429 U.S. 926 (1976). So, too, did the Eighth Circuit in *U.S. v. Olesen*, 920 F.2d 538 (8th Cir. 1990). There, the trial court accepted defendant's guilty plea as part of an agreement specifying a term of imprisonment. Prior to sentencing, however, the court issued an order modifying the plea agreement to increase the term of imprisonment. The court gave defendant eight days to decide whether to accept the agreement, warning him that trial would commence shortly if he did not accept it. Defendant accepted the agreement, but challenged it on appeal. The Eighth Circuit reversed and remanded for specific performance of the original agreement. The court said:

Bench Comment:
District judges may not participate in plea bargain discussions.

> When the district court modified the original plea agreement . . . it violated Rule 11. Furthermore, by telling [defendant] that he had eight days to make up his mind and that the district court would not accept [his] former plea, the district court became even more of an advocate for its proposed reformation. Rule 11's absolute prohibition against judicial involvement in plea bargaining is specifically designed to prevent this loss of objectivity.

Id. at 543.

The cases involve various kinds of judicial involvement in the plea bargaining process, e.g., exerting pressure, mediating, offering advice, initiating ideas, modifying terms, and drafting terms. The case law suggests that *all* such participation is improper: The safe course is for the court to eschew any involvement in the process until an agreement has been presented in open court, and then to stick to the judicial role prescribed by Rule 11. *See, e.g., U.S. v. Kerdachi*, 756 F.2d 349, 352 (5th Cir. 1985) ("We do not suggest that the trial court should become involved in the plea bargain discussions. The trial court correctly declined to so participate . . . . But when a question arises about a material term of the agreement, the trial court must ascertain the defendant's understanding of the term in question and the significance of that term in the plea decision.").

Nor does it matter that a defendant acquiesces in or even requests the court's involvement. Violation of Rule 11(e)(1) is plain error, which can be raised for the first time on appeal. *See Bruce*, 976 F.2d at 554, 558; *U.S. v. Sammons*, 918 F.2d 592, 601 (6th Cir. 1990); *Adams*, 634 F.2d at 836, 839. Indeed, in *Adams* the issue was raised *sua sponte* by the court of appeals. In short, the safest course is for district courts to make a point of avoiding participation in plea discussions.

Note

1. The latter concern is illustrated by *Adams*, *supra*. The trial court actively involved itself in the plea bargaining process, but defendant nevertheless went to trial. He was convicted, but the court of appeals vacated his sentence and remanded for resentencing by another judge because the trial court compromised its objectivity by involving itself in plea discussions.

Other sources on this topic

Bench Comment **readers can find information on this and related subjects in Bench Book for United States District Court Judges (Federal Judicial Center 3d ed. 1986) at § 1.06.**

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Bench Comment

Federal Judicial Center
1993, No. 2, April 1993

A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT:
The "deliberate ignorance" instruction should be given in rare situations only.

While conviction for most crimes requires *mens rea* (criminal intent), it does not necessarily require actual knowledge by the defendants that their conduct is illegal. District courts frequently instruct juries that the *mens rea* requirement is satisfied if the defendants deliberately ignored the likelihood that their actions were prohibited. Every court of appeals has approved some form of the "deliberate ignorance" instruction (also referred to as the "willful blindness," "conscious avoidance," or "ostrich" instruction).

However, in light of a strong trend in the courts of appeals, district courts should be cautious about giving such an instruction. Numerous reversals have resulted from the giving of a deliberate ignorance instruction in cases where it was inappropriate, and several courts of appeals have recently emphasized that the instruction is appropriate in only a narrow class of cases. The Tenth Circuit finds such an instruction "rarely appropriate," *U.S. v. Francisco-Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991), and the Fifth Circuit agrees that it "should rarely be given." *U.S. v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992). Similarly, the Ninth Circuit says it should "be used sparingly," *U.S. v. Sanchez-Robles*, 927 F.2d 1070, 1073 (9th Cir. 1991), and the Eleventh Circuit cautions against "overly liberal use of such an instruction." *U.S. v. Rivera*, 944 F.2d 1563, 1571 (11th Cir. 1991).[1]

These courts expressed concern that such an instruction may lead a jury to employ a negligence standard and convict defendants solely because they should have known that their conduct was illegal. The courts emphasized that mere negligence does not support a conviction. Rather, convictions based on deliberate ignorance require affirmative evidence that defendants suspected their conduct was illegal and went out of the way to avoid confirming that suspicion. Absent such evidence, juries should not be given a deliberate ignorance instruction. The formulations by different circuits are strikingly similar:

First Circuit

"[A] willful blindness instruction is proper [only] if a defendant claims a lack of knowledge, the facts suggest a conscious course of deliberate ignorance, and the instruction, taken as a whole, cannot be misunderstood as mandating an inference of knowledge." *U.S. v. Littlefield*, 840 F.2d 143, 147 (1st Cir.), *cert. denied*, 488 U.S. 860 (1988).

Third Circuit

"[T]he 'deliberate ignorance' instruction must make clear that the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability." *U.S. v. Caminos*, 770 F.2d 361, 365 (3d Cir. 1985).

Fifth Circuit

"This court has framed a two part test which must be met before a deliberate ignorance instruction can properly be given. The evidence must show that: (1) the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct." *U.S. v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992).

Seventh Circuit

"[E]vidence that a person suspects wrongdoing, by itself, is not sufficient to justify giving an ostrich instruction; the instruction is not meant to allow a jury to convict a person for negligence . . . . [T]he ostrich instruction is proper only when there is evidence that a person suspects he is involved in wrongdoing and that he took deliberate steps to avoid acquiring knowledge." *U.S. v. Rodriguez*, 929 F.2d 1224, 1227 (7th Cir. 1991).

Bench Comment:

The "deliberate ignorance" instruction should be given in rare situations only.

Eighth Circuit

"[I]f the evidence in the case demonstrates only that the defendant either possessed or lacked actual knowledge of the facts in question—and did not also demonstrate some deliberate efforts on his part to avoid obtaining actual knowledge—a willful blindness instruction should not be given." *U.S. v. Barnhart*, 979 F.2d 647, 651 (8th Cir. 1992).

Ninth Circuit

"The instruction enables the jury to deal with willful blindness, where a person suspects a fact, realizes its probability, but refrains from obtaining final confirmation in order to be able to deny knowledge if apprehended. . . . The instruction is inappropriate where the evidence could justify one of two conclusions, either that the defendant had knowledge, or that the defendant did not, but not a third conclusion, that the defendant deliberately shut her eyes to avoid confirming the existence of a fact she all but knew." *U.S. v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1992).

Tenth Circuit

"We emphasize that the deliberate ignorance instruction should be given *only* when evidence has been presented showing that defendant purposely contrived to avoid learning the truth." *U.S. v. Francisco-Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991) (emphasis in original).

Eleventh Circuit

"[S]uch an instruction is warranted only when: 'the facts . . . support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution.'" *U.S. v. Rivera*, 944 F.2d 1563, 1571 (11th Cir. 1991), *quoting U.S. v. Alvarado*, 838 F.2d 311, 314 (9th Cir. 1987), *cert. denied*, 487 U.S. 1222 (1988). (This language was also cited approvingly by the Eighth Circuit in *Barnhart*, *supra*.)

* * *

Where the district court finds a deliberate ignorance instruction appropriate, the safe course is to emphasize, as part of the instruction, that negligence alone does not support a conviction. *See, e.g., U.S. v. Campbell*, 977 F.2d 854, 857 (4th Cir. 1992) (approving such an instruction), *cert. denied*, – U.S. – (Feb. 22, 1993); *U.S. v. MacKenzie*, 777 F.2d 811, 818 (2d Cir. 1985) (same), *cert. denied*, 476 U.S. 1169 (1986).

Note

1. Only the Second Circuit has explicitly resisted this trend, see *U.S. v. Rodriguez*, 1993 U.S. App. LEXIS 576 (2d Cir. 1993) ("In this circuit, a 'conscious avoidance' instruction has been authorized somewhat more readily than elsewhere"), though the Seventh Circuit too has approved the instruction in numerous cases and rarely found it erroneous.

Other sources on this topic

Bench Comment readers can find information on related subjects in Bench Book for United States District Court Judges (Federal Judicial Center 3d ed. 1986) at §§ 1.16-1–1.16-3.

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Bench Comment

Federal Judicial Center
1993, No. 3, May 1993

A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT:
What district courts should do when the government breaches a pretrial agreement.

A recent Eighth Circuit case, *U.S. v. Gullickson*, 982 F.2d 1231, 1234–35 (8th Cir. 1993), reminds district courts of the appropriate analysis to employ when the government violates a pretrial agreement with a criminal defendant. The court should not ignore the breach, but neither must it automatically hold the government to the agreement. Rather, the court should analyze the adequacy of notice and whether the reason for the breach outweighs prejudice to defendant, and consider measures that reduce or eliminate prejudice to defendant. It should also explain the basis for its decision on the record.

In *Gullickson*, several months before the trial the government agreed to produce a key witness, Huff, within ten days for interview by defense counsel. However, Huff was not made available in the allotted time. In response to inquiries by defense counsel, the government explained that Huff was out of state and would appear a few days before the trial. He failed to appear. At the opening of the trial, defendants moved for dismissal because of the government's failure to produce Huff. The court denied the motion on the grounds that Huff's identity had been disclosed, he was not in the government's control or custody, and the government would make him available for interview that evening. On appeal, defendants argued that the government's breach of the pretrial agreement prevented their adequate preparation and required reversal and retrial. The Eighth Circuit agreed:

> [The government] violated its pretrial agreement to produce Huff in July without adequate excuse. When the government seeks to be released from a pretrial agreement, the district court must first consider whether the government provided adequate notice of its breach, and second, whether the government's reason for being unable to perform its agreement outweighs the prejudice to the defendant. . . . Though the district court has considerable discretion in releasing the government from its promise . . . we cannot approve the district court's ruling in this case. . . . [I]t is not at all clear from the record that the government was unable to live up to its agreement. Furthermore, Huff's testimony was crucial. . . . The defendants were prejudiced by the government's failure to produce Huff in time for the defendants to investigate his story and plan their defenses accordingly.

The other circuits to consider the question have employed the same analysis applied by the Eighth Circuit. The Fifth Circuit introduced this approach in *U.S. v. Scanland*, 495 F.2d 1104, 1105–07 (5th Cir. 1974), which reversed a conviction because the prosecution broke its promise not to introduce at trial evidence of prior bad acts. The court stated that "[w]hen the Government and the accused voluntarily enter into pre-trial agreements we believe the parties are entitled to rely on such agreements in the preparation of their case." The court recognized that subsequent developments may make it necessary to release parties from an agreement and acknowledged the "sound discretion vested in the district court to grant such releases." But the court added that "[e]ven minimal standards of fairness, however, would require a sound analysis of the attempted deviation. The court should inquire as to whether reasonable notice was given to the adversary of the change in strategy. Furthermore, the potential for prejudice should be balanced against the reason for the release." The government claimed that notice was given when, just before the trial, the witness who later testified about the prior bad act testified (about other things) at an *in camera* hearing. The court held that this alleged notice was too little, too late:

> The *in camera* hearing occurred during the lunch recess after the jury had been chosen in the morning and before the trial began in the early afternoon. Even a clear and express notice at this time may leave inadequate time to alter trial preparation. Moreover, defense counsel should be able to rely on such an agreement. It should not be presumed that the commitment would be breached in such a casual manner.

The court also found potential prejudice, because the defense could have revised its theory of the case if it knew this witness

would testify about the prior bad act.

The court noted that even where there is inadequate notice and potential prejudice, "there may be some cases where the reason for the requested release from an agreement . . . will outweigh all other factors. . . . In the present case, however, the district court in making its ruling advanced no substantial reason for releasing the Government from its agreement." *Accord U.S. v. Jackson*, 621 F.2d 216, 219–21 (5th Cir. 1980) (reversing conviction where government breached agreement not to introduce evidence of prior bad acts, citing "district judge's failure to inquire as to reasonable notice and his failure to balance the potential for prejudice against the reason for the requested release").

Another Fifth Circuit case, and a more recent First Circuit case, both citing *Scanland* and *Jackson*, illustrate circumstances where the breach of an agreement may be permitted. In *U.S. v. McKinney*, 758 F.2d 1036, 1045–48 (5th Cir. 1985), on redirect examination the government asked a witness about a prior bad act by defendant, and defense counsel objected on the ground that the government had agreed not to introduce such evidence. The government responded that the agreement covered only its case-in-chief and that defendant's cross-examination opened the door. The trial court determined that the parties had misunderstood each other, and because the agreement was neither reduced to writing nor made in the presence of the court, its actual scope could not be determined. To prevent prejudice to defendant, the court ordered a continuance, giving defendant an opportunity to investigate the prior bad act raised by the government. The court of appeals affirmed the subsequent conviction:

> [W]e agree with the district court that McKinney did not suffer substantial prejudice. Assuming that the agreement existed . . . the fact remains that McKinney learned of the repudiation of the agreement before the commencement of the defense's case-in-chief. The district court provided McKinney ample time to investigate the Standard Metals theft. Moreover, the district court indicates that, if evidence of the gold theft was received, the court would consider allowing McKinney to conduct additional cross-examination of witnesses who had already testified. McKinney alleges that he suffered additional prejudice because, had he not relied on the government's promises, either he would have requested jury voir dire on extraneous offenses and would have discussed the gold theft in his opening statement or he would have requested more extensive voir dire on his right not to testify. We agree with the district court's conclusion that this asserted prejudice is not substantial.

Similarly, in *U.S. v. Laboy*, 909 F.2d 581, 586–87 (1st Cir. 1990), the court affirmed a conviction despite the government's breach of a pretrial agreement not to introduce any incriminating statements by defendants:

> [T]here is no question that the appellant was adequately on notice of the government's intention to use the statement. The appellant was informed in chambers of the government's intention, given the opportunity to interview the FBI agent, and was advised of the availability of a § 3501 hearing on several occasions. . . . Although, clearly the statement may be considered prejudicial, because of the notice afforded the appellant as to its use, upon review, we cannot say that the district court abused its discretion in allowing the release.

Some courts have affirmed convictions because defendants failed to show prejudice caused by a breach. *See, e.g., U.S. v. DeSimone*, 660 F.2d 532, 543 (5th Cir. 1981) (government breached agreement to disclose all witnesses before trial, but the surprise witness was insignificant), *cert. denied*, 455 U.S. 1027 (1982); *U.S. v. Phillips*, 585 F.2d 745, 747 (5th Cir. 1978) (government breached agreement to disclose all relevant expert reports in its file, but the report in question, which was not introduced at trial, would only have hurt defendant's case). In other cases, courts found that defendants opened the door to the introduction of matters which the government had agreed not to raise. *See U.S. v. Tinker*, 985 F.2d 241, 243 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1872 (1993); *U.S. v. Reece*, 614 F.2d 1259, 1262 (10th Cir. 1980).

The cases reversing and affirming are mutually consistent and establish some rules of thumb for dealing with a breach of a pretrial agreement by the government: analyze the adequacy of notice and whether the reason for the breach outweighs prejudice to defendant, consider measures that reduce or eliminate prejudice to defendant, and explain the basis for the decision on the record.

Bench Comment
1993, No. 3, May 1993

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Bench Comment

Federal Judicial Center
1993, No. 4, June 1993

A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT:

District courts should hold an evidentiary hearing before enforcing a disputed settlement agreement.

The Tenth Circuit recently reversed an order summarily enforcing a settlement agreement where the parties disagreed about the terms of the settlement. *U.S. v. Hardage*, 982 F.2d 1491, 1496–97 (10th Cir. 1993). The court noted that "the majority of our sister circuits agree that where material facts concerning the existence or terms of an agreement to settle are in dispute, the parties must be allowed an evidentiary hearing." Numerous reversals have resulted from failure to heed this point.

The seminal case is *Autera v. Robinson*, 419 F.2d 1197, 1201–03 (D.C. Cir. 1969). There, defendants filed a motion for "Entry of Judgment in Accordance with the Agreement of the Parties," alleging that plaintiffs' attorney had orally accepted their settlement offer. Through new counsel, plaintiffs filed an opposition to the motion, asserting that one plaintiff did not understand the offer and the other had not accepted or authorized acceptance. The trial court held a five-minute hearing consisting of brief remarks by counsel for the parties as well as plaintiffs' former counsel who had entered into the agreement. The court then issued an order enforcing the settlement. The D.C. Circuit reversed:

> Had no factual dispute arisen to plague the parties' substantive rights, we would perceive no difficulty in the judge's acceptance, as a predicate for his action, of the facts represented through statements by members of the bar and affidavits of the parties or others. In this case, however, despite the factual questions developing as the hearing moved along, no opportunity was afforded anyone to test any representation by the chastening process of cross-examination. . . . The opportunity to judge credibility was nonexistent as to the absent affiants; the opportunity to probe by cross-examination was completely lacking. . . . A motion to enforce a settlement contract is neither ordinary nor routine. . . . Its relative simplicity is a concession to the policy favoring settlements, but only to the extent that full and fair opportunities to prove one's point are substantially preserved. The parties on both sides of appellants' lawsuit had valuable interests at stake in the motion proceeding entertained by the District Court. To the extent that their several representations to the court left issues of fact for determination, they are entitled to an evidentiary hearing.

Since *Autera*, numerous reversals have resulted from orders to enforce disputed settlements without an evidentiary hearing. *See Tiernan v. Devoe*, 923 F.2d 1024, 1031 (3d Cir. 1991); *Adams v. Johns-Manville*, 876 F.2d 702, 708 (9th Cir. 1989); *Gatz v. Southwest Bank of Omaha*, 836 F.2d 1089, 1095 (8th Cir. 1988); *Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987); *Russell v. Puget Sound Tug & Barge*, 737 F.2d 1510, 1511 (9th Cir. 1984); *Mid-South Towing v. Har-Win, Inc.*, 733 F.2d 386, 390 (5th Cir. 1984); *Millner v. Norfolk & W. Ry.*, 643 F.2d 1005, 1009–10 (4th Cir. 1981); *Wood v. Virginia Hauling Co.*, 528 F.2d 423, 425 (4th Cir. 1975); *Kukla v. National Distillers Prods.*, 483 F.2d 619, 621 (6th Cir. 1973); *Massachusetts Casualty Ins. Co. v. Forman*, 469 F.2d 259, 260–61 (5th Cir. 1972) (per curiam). These courts stated that although a trial court generally has inherent power to enforce a settlement agreement summarily, when there is a material dispute over the existence or terms of the agreement, an evidentiary hearing should be held.

In *Tiernan*, 923 F.2d at 1031, the Third Circuit offered useful elaboration on when a hearing is necessary:

> The central issue—whether there was any disputed issue of material fact as to the validity of the settlement agreements—is similar to that which any court must address when ruling on a motion for summary judgment. . . . This is not mere coincidence. The stakes in summary enforcement of a settlement agreement and summary judgment on the merits of a claim are roughly the same—both deprive a party of his right to be heard in the litigation.

The court stated, therefore, that the basic rules governing summary judgment—courts must accept the non-movant's assertions as true, draw all reasonable inferences in

the non-movant's favor, and deny summary disposition in the face of genuine and material factual disputes—also apply in determining whether an evidentiary hearing is required before a settlement is enforced. *Accord U.S. v. International Bhd. of Teamsters*, 986 F.2d 15, 21 (2d Cir. 1993) (summary judgment standard applies).

As noted, the Tenth Circuit is the most recent to reverse a district court for failure to hold an evidentiary hearing. While noting the rule in many circuits that a dispute over a material fact requires an evidentiary hearing, the court said that "we have not adopted an ironclad rule." *Hardage*, 982 U.S. at 1496. Nevertheless, the court found it necessary to remand for an evidentiary hearing because of the factual dispute in the case at bar.

The Tenth Circuit's statement that it has not adopted an ironclad rule is the closest any circuit court has come to suggesting that an evidentiary hearing may not always be necessary when there is a material factual dispute over the existence or terms of a settlement agreement. However, since seven circuits require a hearing, the safe course for district courts is to conduct one.

Bench Comment
1993, No. 4, June 1993

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Bench Comment

Federal Judicial Center
1993, No. 5, December 1993

A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT:

What district courts should do when counsel make improper comments in closing argument

Attorneys' comments in closing arguments to the jury sometimes require trial courts to decide two questions: (1) What constitutes improper argument? and (2) What should the trial judge do when it occurs? ABA Standards for Criminal Justice 3-5.8(a) through (d) spell out the basic categories of impermissible comment.[1] Subsection (e) focuses on the trial court's responsibility "to ensure that final argument to the jury is kept within proper, accepted bounds." The Supreme Court has underscored that duty: "[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct." *Quercia v. U.S.*, 289 U.S. 466, 469 (1933). *See also U.S. v. Young*, 470 U.S. 1, 10 (1985) (quoting *Quercia*). This *Bench Comment* examines recent cases discussing the trial court's responsibility when counsel make improper remarks in closing argument.

Several circuits have cited the trial court's failure to take adequate steps to cure improper argument as a significant factor in their decision to reverse. In *U.S. v. Mitchell*, 1 F.3d 235 (4th Cir. 1993), for example, the Fourth Circuit concluded that the extensive and pervasive nature of the prosecutor's improper comments and the failure of the district court "to even attempt to cure that error" with a limiting instruction presented the court with "the 'rare instance' where fundamental fairness requires that we grant . . . a new trial."

In *Mitchell*, the U.S. attorney in closing argument encouraged the jury to convict the defendant because his brother had been convicted of participating in the same conspiracy. The prosecutor repeatedly argued that the brother's testimony for the defense should be discredited because a previous jury had not believed his story. These comments were usually linked to references to the brothers' relationship. The appellate court emphasized that "[d]espite the clear implication in the prosecution's closing argument that Joel's conviction should be considered as evidence of the appellant's guilt, the district court failed to instruct the jury that Joel's conviction after trial could not be used as substantive evidence of the appellant's guilt . . . ." Even though the Fourth Circuit expressed skepticism "that any limiting instruction could have cured the prejudicial effect of the prosecution's repeated improper comments," it stressed that the trial court "should have given an instruction '. . . limiting [the jury's] use of Joel's conviction to impeachment."[2]

In *U.S. v. Baker*, 999 F.2d 412 (9th Cir. 1993), the Ninth Circuit held that appellants' due process rights were violated when the prosecutor commented in closing argument on their post-Miranda silence. In his summation, the U.S. attorney discussed the "natural human response" an innocent person would have to being arrested for bank robbery and emphasized that "[t]here was no word from [the defendants] after they were told what they were being arrested for." The prosecutor continued: "So there was no contesting by either defendant. . . . You know how we all act when we're accused of something?"

The court of appeals found that the government's argument broadly condemned the defendants' silence—both pre- and post-Miranda—for the purpose of implying that they "would not have remained silent if they were innocent." Remanding for a new trial, the court noted that the district judge had overruled defense counsel's objection and "did not give the jury a limiting instruction which might have avoided a constitutional violation." In the Ninth Circuit's view, even if the prosecutor intended to refer only to the defendants' pre-Miranda silence, his subjective intent could not offset the impact of his sweeping statements: "Without an explanation of Miranda and a limiting instruction from the court, there is no reason to believe the jury understood the narrow grounds on which counsel's statements may have been permissible."

In *U.S. v. Friedman*, 909 F.2d 705 (2d Cir. 1990), the Second Circuit stressed that "[i]n those cases where a prosecutor's improper remarks have not been deemed prejudicial, the record has disclosed emphatic curative instructions by the trial judge." The prosecutor in *Friedman* sought to respond to defense criticism of the investigation of the case by stating in his rebuttal argument:

> And some people would have you pull down the wool over your eyes and forget all that, because while some people . . . go out and investi-

Bench Comment:
What district courts should do when counsel make improper comments in closing argument

> gate drug dealers and prosecute drug dealers and try to see them brought to justice, there are others who defend them, try to get them off, perhaps even for high fees. [*Id.* at 708]

The district judge sustained defense counsel's objection, but denied a motion for mistrial.

According to the Second Circuit, with that comment, "the prosecutor managed in one breath to undermine the presumption of innocence, the Government's obligation to prove guilt beyond a reasonable doubt, and the standards of propriety applicable to public prosecutors." The court cited other remarks in the summation "that conveyed to the jury a fundamental misconception of the role of defense counsel":

> By repeatedly characterizing defense counsel as a "witness" and his opening statement as "unsworn testimony," the prosecutor was urging the jury to ignore defense counsel's entirely legitimate role as an advocate, discharging as important a responsibility in representing the defendant as the prosecutor has in representing the United States. The prosecutor continued his assault with the grossly improper accusation that defense counsel "will make any argument he can to get that guy off. . . ." [*Id.* at 709]

The court of appeals characterized the trial judge's response as "modest," noting that when the judge sustained defense counsel's objection, he said only, "I don't think that is appropriate." Expanding on this point, the court said:

> Perhaps the experienced trial judge thought that an extensive reprimand to the prosecutor and a cautionary instruction to the jury would call undue attention to the improper remark. However understandable such motivation might be, the result was to leave with the jury the prosecutor's seriously distorted views of the adversary process. [*Id.* at 710]

In a civil case, *Polansky v. CNA Ins. Co.*, 852 F.2d 626 (1st Cir. 1988), the First Circuit declared that the trial court's blanket instruction that argument of counsel is not evidence did not rectify the misconduct of plaintiff's attorney in his closing argument.[3] Throughout the summation, the attorney stated his opinions and personal beliefs and made extensive, inflammatory references to irrelevant "death" claims that had no bearing on the evidence before the jury. Among the statements he made were the following:

> [Defendant's explanation of a piece of evidence] wasn't convincing to me. . . . I don't believe [a witness] with regard to the vandalism claim. . . . I would never ask [another witness] if she was coming in here to lie . . . . CNA's motives, I think, were clear and calculated. . . . I say that [CNA is] making [the claim that plaintiff set the fire] because . . . they [won't] have to pay any of the death claims." [*Id.* at 628, 629]

The appeals court noted that defense counsel objected four times, and the judge stated twice that he would advise the jury that counsel's argument is not evidence; twice, the court "apparently ignored the exception." Stressing the "elementary principle" that "statements of counsel's opinions or personal beliefs have no place in a closing argument of a criminal or civil trial," the appeals court voiced its reluctance "to condone such behavior of counsel when . . . there has been timely objection, no provocation by the opposition, and no 'timely curative instruction directed particularly to [counsel's] comments.' . . . The court erred by not dealing promptly with counsel's remarks . . . ."[4] Regarding the attorney's death claim comments, the First Circuit stated that the trial court "committed serious error by allowing Polansky's counsel to present this argument to the jury."

These decisions indicate that, even though attorneys are given considerable latitude in presenting arguments to a jury in accordance with the principles enunciated in *U.S. v. Young*, 470 U.S. 1 (1985), appellate courts expect trial judges to act as "governors" of the proceedings, taking prompt, corrective action to "ensure that final argument . . . is kept within proper, accepted bounds."

Other sources on this topic

Bench Comment **readers can find information on this and related subjects in Voorhees, Manual on Recurring Problems in Criminal Trials (Federal Judicial Center 3d ed. 1990) at 141–49.**

Notes

1. *See also* ABA Model Code of Professional Responsibility DR 7-106(C) (1980) and ABA Model Rules of Professional Conduct, Rule 3.4(e) (1984).

2. In two recent decisions, the Sixth Circuit found that no cautionary instruction could have cured the prejudice caused by the prosecutor's remarks. *U.S. v. Payne*, 2 F.3d 706 (6th Cir. 1993); *U.S. v. Solivan*, 937 F.2d 1146 (6th Cir. 1991).

3. In a recent criminal case, the First Circuit held that the standard instruction given by the trial judge was not sufficient to overcome the prosecutor's "150-proof rhetoric" in urging the jury "to view this case as a battle in the war against drugs, and the defendants as enemy soldiers." *Arrieta-Agressot v. U.S.*, 3 F.3d 525 (1st Cir. 1993).

4. *See also Suarez Matos v. Ashford Presbyterian Community Hosp.*, 4 F.3d 47 (1st Cir. 1993) ("[C]ounsel violated the elementary rule that counsel should never state his opinion. . . . The total argument was outrageous. We can only think that this experienced court, in permitting it, had a bad day.")

Bench Comment
1993, No. 5, December 1993

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Bench Comment

Federal Judicial Center
1994, No. 1, January 1994

A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT:
Hypothetical questions that assume guilt are generally impermissible

A reversal of a conviction in a recent Fourth Circuit case serves as a reminder that it is generally impermissible for the government, in cross-examining character witnesses for a defendant, to ask a hypothetical question that calls on the witness to assume the guilt of the defendant.

In *U.S. v. Mason*, 993 F.2d 406 (4th Cir. 1993), two character witnesses for the defendant testified that he had a good reputation in the community. On cross-examination, the government asked them whether their high opinion of the defendant would change if they knew that he distributed drugs. The trial court overruled defense counsel's objection that it was improper to posit hypothetical questions that assumed the defendant's guilt. The Fourth Circuit reversed defendant's subsequent conviction:

> In *United States v. Siers*, 873 F.2d 747 (4th Cir. 1989), this court . . . stated that questions put to defense character witnesses that assumed a defendant's guilt of the crime for which he was charged were improper . . . .
>
> Attempting to distinguish *Siers*, the Government argues that the cross-examination was proper because defense counsel attempted to elicit the personal opinions of the two character witnesses, rather than community reputation, and thus guilt-assuming hypothetical questions were proper in response. . . . In either case, this type of cross-examination is not proper and should not have been allowed.
>
> Character testimony in a criminal trial is admitted pursuant to Rule 405(a) of the Federal Rules of Evidence only as it may bear on the issue of guilt. . . . [A]n opinion elicited by a question that assumes that the defendant is guilty can have only negligible probative value as it bears on the central issue of guilt. . . . And, in addition to a proper application of the rules of evidence, adherence to a basic concept of our justice system, the presumption of innocence, is not served by this line of questioning.

993 F.2d at 408–09.

The Second, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits all agree that a witness who testifies about a defendant's reputation in the community may not be asked hypotheticals that assume guilt. *See U.S. v. Wilson*, 983 F.2d 221, 223–25 (11th Cir. 1993); *U.S. v. Oshatz*, 912 F.2d 534, 539 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1695 (1991); *U.S. v. Barta*, 888 F.2d 1220, 1224–25 (8th Cir. 1989); *U.S. v. McGuire*, 744 F.2d 1197, 1204–05 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985); *U.S. v. Williams*, 738 F.2d 172, 176–77 (7th Cir. 1984); *U.S. v. Polsinelli*, 649 F.2d 793, 796–97 (10th Cir. 1981); *U.S. v. Candelaria-Gonzales*, 547 F.2d 291, 294 (5th Cir. 1977). No circuit has disagreed with this proposition. *Cf. U.S. v. Velasquez*, 980 F.2d 1275, 1277 (9th Cir. 1992) ("We find it unnecessary . . . to consider whether as a general matter it is appropriate to pose guilt-assuming hypothetical questions to character witnesses."), *cert. denied*, 113 S. Ct. 2979 (1993); U.S. v. *White*, 887 F.2d 267, 274 (D.C. Cir. 1989) (such questions "may be improper").

The situation is slightly less clear where the witness has expressed a personal opinion about defendant's character. In addition to the Fourth Circuit in *Mason* as quoted above, the Second and Seventh Circuits find hypotheticals that assume guilt improper in that circumstance as well. *See Oshatz*, *supra*; *Williams*, *supra*. The D.C. Circuit disagrees. *See U.S. v. White*, 887 F.2d 267, 274–75 (D.C. Cir. 1989). While acknowledging that it may be improper to ask hypotheticals that assume guilt of witnesses who testify only about defendant's community reputation, the court held that "similar cross-examination of witnesses who . . . give their own opinion of the defendant's character is not error."

Some questions may be improper in certain situations, but not in others, as the Eleventh Circuit noted in *Wilson*, *supra*. In that case, a defendant charged with fraud admitted during his testimony that he had sold credit card numbers to an undercover agent, but denied that he had fraudulent intent. The Eleventh Circuit found it permissible for the government to ask defendant's character witnesses whether their opinion of him would change if they knew he sold credit card numbers. The court noted that "[t]he witnesses were asked about nothing more than Wilson already had ad-

mitted during his time on the stand . . . . [T]he questions attributed no intent to him. Therefore, the questions did not assume Wilson's guilt." *Accord Velasquez*, *supra*, 980 F.2d at 1277 ("The factual content of the prosecutor's questions had already been presented to the jury by the defense counsel in his opening statement."). However, the court of appeals made it clear that it was not endorsing hypotheticals that assume guilt, and the questions were permissible only because Wilson had admitted the sales. "[I]t is clear that the questions may necessitate reversal in some instances," the court observed. Indeed, "[u]nder different circumstances, questions virtually identical to those that Wilson finds offensive might create serious problems by requiring witnesses to assume something that a defendant has not conceded."

* * *

To summarize: Every circuit that has decided the question (all but the First, Third, Ninth, and D.C. have) has held that hypotheticals that assume guilt may not be asked of witnesses who testify about a defendant's reputation in the community. The D.C. Circuit permits such questions where the witnesses give their personal opinion about a defendant's character, but three other circuits (the Second, Fourth, and Seventh) do not. Despite the above, questions that sound like hypotheticals that assume guilt may be permissible if they ask the witness to "assume" only matters the defendant has conceded. The actual ruling, then, may depend on the factual nuances of the case as well as the law of the circuit. But all district courts are well advised to give serious attention to objections based on hypotheticals that assume guilt.

Bench Comment
1994, No. 1, January 1994

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Bench Comment

Federal Judicial Center
1994, No. 2, May 1994

A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT:

Proper application of the *Roviaro* test may require district courts to conduct *in camera* hearings

The Supreme Court ruled in *Roviaro v. U.S.*, 353 U.S. 53 (1957), that the government has a limited privilege to withhold an informant's identity. But if disclosure would be relevant and helpful to an accused's defense or essential to a fair determination of a cause, the privilege must give way. In making such a determination, a trial judge must balance the public's interest in protecting the flow of information against the individual's right to prepare his or her defense. The Court said that disclosure must be determined on a case-by-case basis, "taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." Several circuits have held recently that trial courts must conduct *in camera* proceedings with the informants to elicit the information relevant to the *Roviaro* test and have remanded cases for this purpose.

In *U.S. v. Spires*, 3 F.3d 1234, 1238 (9th Cir. 1993), the Ninth Circuit held that an *in camera* hearing is required "where the defendant makes a 'minimal threshold showing' that disclosure would be relevant to at least one defense." According to the court, defendant Spires made such a showing:

> One theory of his defense is that the weapons and drugs that the police seized belonged to his roommate. If the roommate was the informant, that fact would be relevant to the jury's determination whether Spires knowingly possessed the firearms, drugs, and related paraphernalia. . . . While Spires could make the argument that the weapons and drugs were his roommate's in any event, his contention would be significantly more persuasive if it turned out that the roommate was the confidential informant.

Id. at 1238–39.

Finding that the "judge's failure to provide Spires with an *in camera* hearing constituted an abuse of discretion," the court vacated the order denying the disclosure motion and remanded the case so the district court could conduct the required hearing and the defendant could withdraw his guilty plea. *See also U.S. v. Amador-Galvan*, 9 F.3d 1414 (9th Cir. 1993).

In *U.S. v. Moralez*, 908 F.2d 565 (10th Cir. 1990), the Tenth Circuit remanded the case for an *in camera* hearing because it was unable to determine from the record "whether and how the district court balanced the benefits of disclosure and production for Mr. Moralez against the resulting harm to the government as required by *Roviaro*." The court of appeals noted defense counsel's statement that the confidential informant was a witness to the crime and "would testify to critical issues in the case: who owned the marijuana and whether [the defendant] was involved in [the] drug operations." According to the appellate court, defense counsel further contended that the informant's testimony would not be cumulative and would provide defendant with a way to impeach the testimony of prosecution witnesses. Nevertheless, the Tenth Circuit stated, "[w]ith no more before it than the prosecutor's representation [that the informant was a 'mere tipster'], the

Bench Comment

Federal Judicial Center
1995, No. 1, Sept. 1995

A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT:

Failure to give a defendant adequate advice concerning the direct consequences of a guilty plea violates Rule 11

In recent opinions several circuits have invalidated lower court decisions because district judges failed to ensure that defendants were completely aware of the direct consequences of their guilty pleas. These opinions involve supervised release terms, mandatory minimum sentences, and sentence appeal waivers. They indicate that during the Rule 11 hearing to determine whether a guilty plea is knowing and voluntary, a district judge should establish on the record that the defendant is aware of and fully understands the terms and ramifications of each of these elements of sentencing.

Supervised Release Term

In *U.S. v. Osment*, 13 F.3d 1240 (8th Cir. 1994), the Eighth Circuit considered "whether a court advising a defendant of the 'maximum possible penalty,' prior to acceptance of a plea of guilty pursuant to Rule 11(c)(1), must inform the defendant of the *possible effect* of a term of supervised release *upon revocation*." The court of appeals noted that in the plea colloquy, the district court told the defendant he faced a maximum prison term of five years but failed to mention that he also could be subject to a mandatory term of supervised release if the prison sentence exceeded one year. Thereafter, the court sentenced Osment to fifteen months' imprisonment, followed by a three-year term of supervised release.

The defendant contended that "the prescribed consequences in the event of revocation of a supervised release term should be treated as part of the 'maximum possible penalty' as construed under Rule 11(c)(1)." Therefore, the district court's failure to advise him of the maximum possible penalty he might be subject to rendered his guilty plea involuntary. The government argued that under Rule 11(h) the court's error was harmless: Osment's sentence fell within the maximum five-year term of imprisonment authorized by the statute, and "the mere possibility of revocation of the supervised release resulting in an additional period of incarceration cannot sustain defendant's burden of demonstrating an effect on substantial rights." *Id.* at 1241.

The Eighth Circuit found that Rule 11(c)(1) required a district court, in advising a defendant of the maximum penalty, to tell him or her not only of the applicability of a term of supervised release, but also of its effect, which the court emphasized "includes the consequences upon revocation of that release term." After determining that the district court's failure to advise Osment of these consequences was error, the appeals court considered whether the error was harmless under Rule 11(h). The court observed that Osment's sentence of fifteen months' imprisonment and three years' supervised release did not exceed the five-year statutory maximum penalty of which the court had informed him. However, if the supervised-release term were revoked under 18 U.S.C. § 3583(e)(3), Osment could be required to serve an additional two years in prison without credit for time served post-release.

> Thus the maximum possible penalty, i.e., the worst case scenario, including the effect of the supervised release term, would be as follows: fif-

> teen months imprisonment, two years and 364 days supervised release, and two years imprisonment, for a total of seventy-five months less one day. This total exceeds the five-year or sixty-month term of imprisonment the district court advised Osment.

Id. at 1243. In light of this possibility, the court held the error was not harmless and remanded the case so the defendant could plead anew.

In *U.S. v. Hekimain*, 975 F.2d 1098 (5th Cir. 1992), the defendant was sentenced to five years' imprisonment and three years of supervised release. During the earlier plea colloquy the prosecutor had said that if the supervised-release term were violated, Hekimain could be imprisoned for the remainder of the term. The Fifth Circuit explained that this statement was incorrect. Under 18 U.S.C. § 3583(e), for violation of the supervised-release term the defendant could potentially be imprisoned for two years, without credit for any time already served under supervised release. Thus, the defendant was not correctly advised regarding the time of imprisonment that might occur upon revocation of the release term.

The court of appeals pointed out that the defendant faced a maximum aggregate period of *incarceration* (five years under the statutory maximum and two years upon revocation of supervised release) that exceeded both the statutory maximum and the amount of incarceration time he was informed of at the plea hearing. It then spelled out the "worse case assumption" that "Hekimain would (1) serve every day of his five year prison term, (2) have his supervised release revoked and be returned to prison on the last day of his supervised-release term, and (3) serve every day of his additional two year prison time after revocation of supervised release." In this situation, the total period of elapsed time from his first to last day in prison would be ten years. "As each of these [scenarios] exceeds the five year maximum statutory sentence of which he was correctly advised," the court said, "Hekimain was prejudiced by the district court's failure to properly describe the effect of supervised release." *Id.* at 1103.

See also U.S. v. Saenz, 969 F.2d 294 (7th Cir. 1992) ("So long as the defendant is apprised of the maximum jail term, a failure to address the supervised release element of his sentence should not warrant *automatic* reversal. Nevertheless, if the term of supervised release plus the prison term (the maximum aggregate term of incarceration) exceeds the maximum prison term of which the defendant was advised, then the error is not harmless, and reversal is necessary."); *U.S. v. Renaud*, 999 F.2d 622 (2d Cir. 1993) (understatement of the supervised-release maximum combined with the sentencing of defendant to a supervised-release term longer than that of which he was advised is harmless in this case because the defendant did not want to withdraw his plea); *U.S. v. Alber*, 56 F.3d 1106 (9th Cir. 1995) (The court's failure to inform the defendant of the specific number of years of supervised release he could receive was harmless error. Under the worst-case scenario, Alber's liberty could be restricted for one day less than eleven years, which is less than the term of twenty-five years he knew could be imposed when he pleaded guilty.).

Note: Newly enacted 18 U.S.C. § 3583(h), permitting the reimposition of supervised release after revocation and imprisonment, is likely to add to the complexities of advising defendants accurately about the maximum period of incarceration they may face.

Mandatory Minimum Sentence

The Fifth Circuit held in *U.S. v. Watch*, 7 F.3d 422 (5th Cir. 1993), that a district court's failure to advise a defendant that he might be subject to certain statutorily required minimum sentences "misled [the defendant] as to the statutory minimum term of imprisonment to which he subjected himself by pleading guilty and thereby amounted to a complete failure to address the plea-consequences concern of Rule 11." The defendant was initially indicted on a charge of possessing with intent to distribute at least fifty grams of "crack" cocaine in violation of 21 U.S.C. § 841(a)(1). He agreed to plead guilty to a superseding information that alleged violation of § 841(a)(1) but did not mention the amount of drugs involved.

At the plea hearing, Watch asked a series of questions about the sentence applicable to the charge contained in the superseding information and the potential effects of the presentence report on the sentence. The U.S. attorney explained to the court that under the original indictment the

defendant was subject to a minimum sentence of ten years and a maximum of life, but under the plea agreement based on the superseding information, the range was zero to a statutory maximum of twenty years' imprisonment. After the judge asked the defendant whether he was "completely satisfied" that he understood and the defendant said yes, the judge accepted the guilty plea. The defendant was not advised that he would be subject to a mandatory minimum sentence of ten years if the amount of cocaine base involved was found at sentencing to exceed fifty grams. Subsequently, he was sentenced to 120 months in prison.

To decide whether the lower court erred in informing the defendant of the penalty range he faced, the appeals court first grappled with the question of how, in a Sentencing Guidelines case, the absence from an indictment or information of an allegation of a specific quantity of drugs affects application of the quantity-based minimum sentences set out in 21 U.S.C. § 841(b). It determined that the government could not avoid application of the statutory minimum by simply leaving out a quantity allegation, as it did in this case. In view of this and of the fact that at the time of the defendant's guilty plea the quantity of drugs involved in the offense had not been determined, the Fifth Circuit said the district court incorrectly advised Watch that he was subject only to a term of imprisonment of between zero and twenty years. The error in failing to inform the defendant that "depending on the outcome of the pending quantity determination, he might be subject to certain statutorily required minimum sentences" violated the requirement of Rule 11(c)(1) that the defendant be fully advised of the consequences of his plea. *Id.* at 428.

In remanding the case so that Watch could replead, the appellate court gave the following advice to lower courts confronting the same problem:

> The practical consequence of this determination is that a prudent district judge hearing a plea from a defendant charged under an indictment or information alleging a § 841(a) violation but containing no quantity allegation may simply walk a defendant through the statutory minimum sentences prescribed in § 841(b) explaining that a mandatory minimum may be applicable and that the sentence will be based on the quantity of drugs found to have been involved in the offense with which the defendant is charged.

Id. at 429.

In *U.S. v. Padilla*, 23 F.3d 1220 (7th Cir. 1994), the Seventh Circuit cited the Fifth Circuit's advice in *Watch* with approval, finding that the district court's failure to provide the defendant with an explanation of likely mandatory minimum penalties entitled him to the opportunity to withdraw his plea. "It is not costly in time or effort," the court of appeals said, "to enumerate during the plea colloquy the several mandatory penalties potentially applicable when attributable drug quantities are uncertain. We recommend the practice."

Although Padilla was advised in his plea agreement that he could receive a maximum penalty of forty years in prison, the agreement did not mention that he would be subject to a ten-year mandatory minimum sentence if five or more kilograms of cocaine were involved or to a five-year mandatory minimum for less than five kilograms. At the plea hearing, the district judge neglected to advise the defendant about these mandatory minimums. The Seventh Circuit commented that such an error is not necessarily "a serious oversight" when the defendant "was aware when pleading guilty that the sentencing guidelines would subject him to a sentence well in excess of any statutory mandatory minimum likely applicable to his case:" But where it is not clear that the defendant had such knowledge, "the failure to inform him of the probable applicability of statutorily mandated minimums may well have impaired his ability to understand his situation fully." *Id.* at 1222.

The appeals court concluded that the judge's omission in this case probably influenced Padilla's decision to plead guilty, and rejected the government's argument that the error was harmless because, as a result of the defendant's cooperation with the prosecution, his sentence was actually reduced from ten years to eighty-seven months in prison, the low end of the Guideline range.[1] The downward departure did not mitigate the harm, the court said, since the defendant apparently was never informed that he also faced

the lower mandatory minimum of five years, which his actual sentence exceeded; and because he did not know about the ten-year minimum, he probably pled guilty expecting that his cooperation could potentially decrease a Guideline sentence of eighty-seven months to something less. Instead, even with the decrease, he ended up at eighty-seven months, "a consequence Padilla may not have projected because of the flawed plea colloquy. The mandatory term, therefore, was relevant to the sentence Padilla ultimately received." The court of appeals underscored the district court's "responsibility to make a defendant aware of his likely exposure," despite the "speculative" nature of the information on minimum and maximum penalties the judge could present at the plea hearing. *Id.* at 1223–24.

The Seventh Circuit indicated its willingness to remand the case so the defendant could start over by entering a new plea. Padilla did not seek that remedy, however, but wanted instead to have his sentence reduced to his "purported understanding of the agreement—namely, eighty-seven months minus some amount of time for his assistance in the other prosecutions." Since the sentence was in accordance with the law and not precluded by the plea agreement, the court said the defendant was not entitled to a more favorable sentence than the one he got. Consequently, his disavowal of the only relief appropriate to the error left the appeals court with no alternative except to affirm his conviction and sentence. (In *U.S. v. Mitchell*, 58 F.3d 1221 (7th Cir. 1995), the Seventh Circuit measured the record by "the standards of *Padilla*." The record demonstrated clearly, the court said, that the defendant had received "critically important information" about the minimum penalty mandated in his case.)

In *U.S. v. Hourihan*, 936 F.2d 508 (11th Cir. 1991), the defendant pled guilty to a violation of 21 U.S.C. § 841(a)(1), which provided for a mandatory minimum prison term of five years and a maximum of forty years. However, the plea agreement stated that sentencing would be in accordance with the Guidelines and that the offense carried a maximum sentence of forty years in prison. The government agreed to recommend offense level reductions under the Guidelines and not to oppose a sentence at the low end of, or below, the Guideline range. Taking such reductions into account, the plea agreement contemplated a sentencing range of thirty-three to forty-one months. At the plea hearing, the district judge asked the defendant if she understood that the maximum sentence the court could impose was five to forty years in prison. The judge also asked whether the defendant's attorney had explained to her that she was facing sixty-three to seventy-eight months under the Sentencing Guidelines. Hourihan responded that she understood both points. When she received the presentence report, the defendant learned for the first time of the five-year mandatory minimum penalty and filed a motion to withdraw her plea.[2] The district court denied the motion and subsequently sentenced Hourihan to the mandatory minimum term of five years.

The government contended that the district court satisfied Rule 11 by advising the defendant that the sentencing range was five to forty years, which implied a minimum of five years. The Eleventh Circuit disagreed, emphasizing that the district court "clearly referred to the range of five to 40 years as a maximum sentence." The court likewise rejected the government's argument that the judge's inquiry regarding the defendant's understanding of the Guideline range of sixty-three to seventy-eight months was sufficient to inform Hourihan that the minimum sentence would be at least sixty-three months. Pointing to the Rule 11 transcript, the appeals court said it clearly indicated "that the discussion of 63–78 months referred to the guideline range without the reductions . . . which the government agreed to recommend in the plea agreement." It found equally without merit the prosecution's assertion that the indictment informed the defendant of the mandatory minimum sentence, especially in light of the plea agreement and colloquy. The error was not harmless under Rule 11(h), the court said, because not only was there no indication in the record that the defendant knew of the five-year mandatory minimum sentence, but the plea agreement made it apparent "that Hourihan, her attorney, and the government's attorney contemplated a sentence considerably below five years." *Id.* at 510–11.

The Tenth Circuit has wrestled with these issues as well. *See U.S. v. McCann*, 940 F.2d 1352

(10th Cir. 1991) (guilty plea was involuntary because court erroneously failed to advise the defendant that he was subject to the mandatory minimum sentence despite the government's stipulation that it was not charging a specific quantity of drugs in the indictment); *U.S. v. Reyes*, 40 F.3d 1148 (10th Cir. 1994) (mandatory minimum sentence affirmed because the defendant received notice of it in the plea agreement). *See also U.S. v. Lopez-Pineda*, 55 F.3d 693 (1st Cir. 1995) (district court's failure to inform the defendant during the plea colloquy of the mandatory minimum sentence and supervised release term, which were explicitly stated in the plea agreement, did not vitiate "the core Rule 11 findings" made by the court and was therefore harmless error).

Sentence Appeal Waiver

The Eleventh Circuit ruled in *U.S. v. Bushert*, 997 F.2d 1343 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 652 (1994), that a sentence appeal waiver included in a guilty plea agreement was unenforceable. The defendant did not make the waiver knowingly and voluntarily, the court held, because the district court failed to address adequately an essential element of Rule 11: "The defendant's knowledge and understanding of the sentence appeal waiver is one of the components that constitutes the 'core concern' of the defendant's right to 'be aware of the direct consequences of his guilty plea.'" *Id.* at 1351 (citation omitted).

Bushert's plea agreement contained a waiver provision stating that he "'knowingly and voluntarily agrees to waive his right to appeal or contest, directly or collaterally, his sentence on any ground, unless the Court should impose a sentence in excess of the statutory maximum or otherwise impose a sentence in violation of law apart from the sentencing guidelines.'" In the Rule 11 hearing, the district judge informed the defendant that he was "waiving his right to appeal the *charges* against him" but "might have the right to appeal his *sentence* under some circumstances." The court of appeals found this language confusing.

> It is true that even under the terms of the sentence appeal waiver, Bushert could appeal his sentence under some circumstances. The district court's statement, however, did not clearly convey to Bushert that he was giving up his right to appeal under *most* circumstances.

Id. at 1352–53.

The Eleventh Circuit concluded that the Rule 11 colloquy was deficient: "Without a manifestly clear indication in the record that the defendant otherwise understood the full significance of the sentence appeal waiver, a lack of sufficient inquiry by the district court during the Rule 11 hearing will be error." *Id.* at 1352. The appropriate remedy for this error was severance of the defective sentence appeal waiver from the remainder of the plea agreement so that "the concerns posed by an involuntary and unknowing guilty plea" can be distinguished from those raised by "an involuntary and unknowing sentence appeal waiver." *Id.* at 1353. Since the waiver was invalid, the court proceeded to the merits of the appeal, citing similar decisions by the Fourth and Fifth Circuits: *U.S. v. Wessells*, 936 F.2d 165 (4th Cir. 1991), and *U.S. v. Baty*, 980 F.2d 977 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2457 (1993).

In *Wessells* the Fourth Circuit found that the appeal was not precluded by the defendant's waiver, which he had signed as part of the plea agreement, because he "did not knowingly agree to an absolute waiver of all rights to appeal his sentencing." The court distinguished *Wessells* from *U.S. v. Wiggins*, 905 F.2d 51 (4th Cir. 1990), in which "the district court went to elaborate lengths during the defendant's Rule 11 hearing to ascertain that the defendant did indeed understand the meaning of the waiver he was preparing to sign." In contrast, "the transcript of Wessells' Rule 11 hearing . . . reveals that the court did not question Wessells specifically concerning the waiver provision of the plea agreement," and the only state-

Other sources on this topic

***Bench Comment* readers can find information on this and related subjects in *Bench Book for United States District Court Judges* (Federal Judicial Center 3d ed. 1986) at §§ 1.06A and B and in *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues, April 1995* (Federal Judicial Center) at §§ VII.B.1 and IX.A.5.**

ment on the issue was by the defendant's attorney, who said he "had advised Wessells that the waiver would *not* prevent [him] from appealing an improper application of the [Sentencing] Guidelines." 936 F.2d at 167–68.

In *Baty*, the Fifth Circuit rejected the government's contention that the defendant had waived her right to appeal in the plea agreement and stressed that "[i]t is up to the district court to insure that the defendant fully understands her right to appeal and the consequences of waiving that right." The court observed that defendant's counsel told the district court she had explained to her client "'as best I could how I reviewed her choices'" after the U.S. attorney refused counsel's request to delete the waiver from the agreement. The district judge then advised Baty that she had to decide whether she wanted to plead guilty "with that in there or . . . go ahead and have a trial." He made no further effort to ascertain whether the defendant understood the consequences of the waiver. 980 F.2d at 979.

The Fifth Circuit said that the defendant's waiver not only deserved but required the district court's "special attention" and held the waiver ineffective because "Baty never understood the consequences of waiving her right to appeal." In a footnote, the appellate court indicated that the district judge may also have been unsure about the consequences of the waiver, noting that after sentencing Baty, he told her that she had "the right to appeal this case, my sentence, if you wish to appeal that. And you also have the right to file for a free appeal, free of cost in attorneys if you are unable to afford the cost of the appeal." *Id.* at n.2.

But see U.S. v. Michlin, 34 F.3d 896 (9th Cir. 1994) (colloquy concerning waiver is not required so long as plea agreement contains express waiver of appellate rights); *U.S. v. Wenger*, 58 F.3d 280 (7th Cir. 1995) (the court does not have to include in a Rule 11 colloquy a warning about a waiver of appeal that is expressly included in a voluntary plea agreement).

Notes

1. The court also dismissed the government's contention that the error was harmless because the presentence report correctly set out the ten-year minimum. "[T]he fact that information conveyed to Padilla *after* he pleaded guilty corrected earlier omissions or misstatements does not abate the concern that such information was not provided to him at the crucial time—during the plea hearing." *Id.* at 1222 n.2.

2. *See also U.S. v. Goins*, 51 F.3d 400 (4th Cir. 1995) (Mention of the mandatory minimum sentence in the presentence report, which was prepared at least two months after the plea had been accepted, was not sufficient. "Violations of Rule 11 . . . cannot be cured by the presentence report.").

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Bench Comment

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A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT:
A growing number of circuits find anonymous juries do not infringe defendants' constitutional rights when genuinely needed and properly used

In *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979), the Second Circuit approved the use of an anonymous jury in a multidefendant drug conspiracy case. In a series of decisions rendered during the 1980s, it remained the only court of appeals that expressly endorsed the practice. Since 1988, however, a growing number of circuits have joined the Second Circuit in affirming the empanelment of anonymous juries in noncapital cases[1] meeting certain criteria. Rulings by the Third, Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits[2] upholding broad trial court discretion in using such juries have relied on the two-pronged test first enunciated by the Second Circuit in *United States v. Thomas*, 757 F.2d 1359, 1365 (2d Cir. 1985): "[T]here must be, first, strong reason to believe that the jury needs protection and, second, reasonable precaution must be taken to minimize the effect that such a decision might have on the jurors' opinions of the defendants." While the courts acknowledged that empaneling an anonymous jury poses a threat to a defendant's constitutional right to a presumption of innocence and to the exercise of his or her right to use peremptory challenges during voir dire, they found that "when genuinely needed and when properly used, anonymous juries do not infringe a defendant's constitutional rights." *United States v. Ross*, 33 F.3d 1507, 1519 (11th Cir.), *cert. denied*, 115 S. Ct. 2558 (1995).

In applying the *Thomas* test, appellate courts have considered two basic questions: (1) Were there factors in the case that warranted use of an anonymous jury? (2) If so, did the district judge take adequate precautions to minimize prejudice to the defendant?

Factors that warrant use of an anonymous jury

The Eleventh Circuit stated in *Ross, supra*, that courts have invoked "some combination" of the following five factors to justify their decisions to empanel anonymous juries:

> (1) the defendant's involvement in organized crime, (2) the defendant's participation in a group with the capacity to harm jurors, (3) the defendant's past attempts to interfere with the judicial process, (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties, and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment.

33 F.3d at 1520.

The Eleventh Circuit held in *Ross* that the district court did not abuse its discretion in ordering an anonymous jury, but the court of appeals took issue with two of the grounds relied upon by the trial court. It declared erroneous the district court's finding that pretrial publicity warranted imposition of anonymity. "This case received minimal pretrial publicity, including two newspaper stories and one radio report." This was not reversible error because a court's decision depends upon the totality of the circumstances. The appellate court also found error "to the extent that the court based its finding on Appellant's dealings with the Sicilian Mafia and the Irish Republican Army." 33 F.3d at 1521 n.26.

Bench Comment:

Anonymous juries don't infringe defendants' constitutional rights when genuinely needed, properly used

In *United States v. Branch*, 91 F.3d 699 (5th Cir. 1996), the trial of surviving Branch Davidians for offenses arising out of their gun battle with agents of the federal Bureau of Alcohol, Tobacco, and Firearms, the Fifth Circuit enumerated the five "usual considerations" that justify empaneling an anonymous jury, but emphasized that "other circumstances may also justify its use." Over several defendants' objection that there was no evidence that they or individuals associated with them posed a threat to the jury, the district court had decided sua sponte that an anonymous jury was appropriate "because of the 'enormous amount of world-wide media attention' generated by the case and the emotionally charged atmosphere surrounding it." The court of appeals acknowledged that not all high-profile trials merit juror anonymity, but in this case it was not just the media attention that was of concern. "This trial aroused deep passions. The district court feared the potentially disruptive effects of such public attention on the trial in general and the jurors in particular." *Id.* at 724. The district court's concern was confirmed, it said, by the fact that several jurors received mail regarding the case during the trial. Also, the trial court was worried that "persons bent on mischief" might mistake the jurors in the Davidian case for jurors in a notorious organized crime trial going on simultaneously. These concerns justified the district court's decision, the appellate court held.

Cf. United States v. Sanchez, 74 F.3d 562, 565 (5th Cir. 1996) (rejecting use of an anonymous jury where "there was no indication that the jurors in this case would be subjected to the type of extensive publicity that might bring about intimidation and harassment").

The D.C. Circuit in *United States v. Edmond*, 52 F.3d 1080 (D.C. Cir. 1995), upheld the district court's sua sponte order withholding from both counsel and the defendants the identities and addresses of prospective jurors and requiring sequestration of the jury during trial. The trial judge explained that he took the action because of a realistic threat of violence, "'as all defendants are allegedly members of a drug conspiracy that resorted to violence in order to achieve the conspiracy's ends.'" *Id.* at 1089. The court of appeals concluded that at least four of the *Ross* factors were present in the case and rejected appellants' argument that anonymity was unnecessary because there was no evidence that they had a history of, or inclination toward, jury tampering. Such evidence is not necessary in every case, it said, and even if it were required, the evidence existed in the record before the district court. The trial judge had received from the government an in camera submission from two confidential sources describing threats to witnesses. *Id.* at 1091–92.

The appellants' assertion that sequestration alone would have been sufficient to protect the jury was equally meritless, the court held. "Although sequestration might have addressed the District Court's concerns with juror safety during the trial itself, it would have done nothing to insulate jurors against retaliatory attacks after the guilty verdict was rendered." *Id.* at 1092. The appellate court also disagreed with appellants' contention that the district court should have held a hearing before ordering an anonymous jury. "Although a hearing might be required where the need for juror anonymity is doubtful, here the allegations in the indictment and other submissions to the court adequately justified the use of precautionary measures, and the District Court was not obliged to conduct 'a trial within a trial to determine whether the alleged wrongdoing could be proven to have occurred.'" *Id. Accord United States v. Eufrasio*, 935 F.2d 553, 574 (3d Cir. 1991) ("A trial court has discretion to permit an anonymous jury without holding an evidentiary hearing on juror safety, if the court believes there is potential for juror apprehension.").

In *United States v. Vario*, 943 F.2d 236 (2d Cir. 1991), the Second Circuit emphasized that an obstruction of justice charge, especially involving jury tampering, "has always been a crucial factor in our decisions regarding anonymous juries." The court also underscored that pretrial publicity "may militate in favor of an anonymous jury because it can 'enhance the possibility that jurors' names would become public and thus expose them to intimidation by defendants' friends or enemies, or harassment by the public.'" 943 F.2d at 240 (quoting *United States v. Persico*, 621 F. Supp. 842, 878 (S.D.N.Y. 1985)). Although the government's prediction that there would be continuing publicity about the case did not prove true, the court of appeals could not say "viewing the situation as it was then presented to the trial judge, that there were insufficient grounds to believe that this case warranted the use of an anonymous jury." *Id. See*

also United States v. Wong, 40 F.3d 1347, 1377 (2d Cir.), *cert. denied*, 115 S. Ct. 2568 (1995) ("The prospect of publicity militates in favor of jury anonymity to prevent exposure of the jurors to intimidation or harassment.").

As additional factors in support of its decision to empanel an anonymous jury, the *Vario* trial court had also noted evidence linking the defendant to an organized crime family and pointed to jury tampering in a recent unrelated organized crime trial. The appellate court acknowledged that "the specter of organized crime has played into our previous decisions to uphold the use of anonymous juries, but in these decisions, it was the reasonable likelihood of juror intimidation, not the incantation of the words 'the mob' or 'organized crime,' that prompted the anonymous jury." *Id.* at 241. Thus, the court concluded that the organized crime connection may only be considered when the judge has determined that it "has some direct relevance to the question of juror fears or safety in the trial at hand." *Id.*

Evidence of the defendant's connection to organized crime offered "ample justification" of the decision to use an anonymous jury in *United States v. Crockett*, 979 F.2d 1204 (7th Cir. 1992), the Seventh Circuit held. "[T]he evidence at trial was to include (and did include) a depiction of a pattern of violence by members of the Tocco organization, including the murder of a potential witness . . . . Moreover, there was evidence of attempts by Mr. Tocco to influence or intimidate witnesses." *Id.* at 1216. The court of appeals also noted that the district court knew there had been pretrial publicity about the case, which could be expected to continue throughout the trial.

Precautions to minimize prejudice to the defendant

Appellate courts have approved a variety of jury instructions and other steps—including comprehensive questionnaires and voir dire—that district courts have used to ensure defendants were not prejudiced by empanelment of anonymous juries.

In *United States v. Wong*, *supra*, the Second Circuit concluded that the district court had taken adequate precautions to protect defendants' rights through an extensive voir dire that explored prospective jurors' bias regarding the defendants and issues in the case. This "'was more than sufficient to enable the defendants to exercise their challenges meaningfully, and to obtain a fair and impartial jury.'" 40 F.3d at 1377. The court dismissed one defendant's complaint that the district judge had erred by telling jurors at the outset of trial that government transportation would be provided to them "because of their 'anonymous' status" without further explaining the reasons for that status, and by failing to make any reference to their status in explaining to jurors that they had to eat lunch in the courthouse because it would not be possible for so many jurors and alternates to be accommodated at restaurants during the one-hour lunch break. "These incidents provide no basis to conclude that this status prejudiced the jury's deliberations to the disadvantage of defendants–appellants." *Id.*

The Fifth Circuit stressed the "great care" the trial judge had taken to protect the defendants' rights in *United States v. Branch*, *supra*. The court furnished defendants with answers to eighty detailed questions given by prospective jurors, and at voir dire, the judge asked questions proposed by the defendants and elicited further information concerning potential juror bias. In addition, the judge provided the defendants "with a wealth of information about the venire, including occupations and names of employers." Only their names and addresses were withheld. The judge also explained to the jury that his decision to require anonymity was based on the public attention surrounding the Branch Davidian case and the fear that the jurors would be confused with jurors in the organized crime trial taking place at the same time. He cautioned: "I have no indication whatsoever that any of these Defendants or their families or friends would be any threat to any juror selected in this case, and I want to be sure you fully understand that." 91 F.3d at 725. The judge instructed the jury on the presumption of innocence both at voir dire and in the final charge.

The Eighth Circuit approved of the steps the district court took to protect the defendants' rights in *United States v. Darden*, 70 F.3d 1507, 1533 (8th Cir. 1995). The judge told the venirepersons that "they were being identified by numbers rather than their names so that members of the media would not ask them questions," an approach the Eighth Circuit observed had been approved by the Second Circuit several times. *See, e.g., United*

States v. Paccione, 949 F.2d 1183 (2d Cir. 1991). Also, the district court conducted a thorough voir dire.

The Third Circuit in *United States v. Scarfo*, 850 F.2d 1015 (3d Cir. 1988), found no abuse of the wide discretion accorded the trial judge, "familiar as he is with the local ambience." In particular, it approved of the judge's "frank" instruction to the jury regarding his decision to preserve their anonymity. The court noted that the *Scarfo* trial judge had rejected as a subterfuge the approach approved by the Second Circuit in three cases in which judges advised jurors that their anonymous status protected them from undesired publicity and media inquiries. Instead, he told the jury that they were engaging in an "experimental procedure" which had nothing to do with the guilt or innocence of the defendant. The judge pointed out that there would be "a lot of testimony regarding organized crime and the activities of people in organized crime."

> We want to make sure that you are able to reach your verdict in this case without having to concern yourselves about the possibility of any harm or other improper influence on yourself or members of your family.
>
> I want to emphasize very strongly that this in no way suggests that the defendant would ever have dreamed of interfering with you or your family. I have been a judge now for 27 years, and in all that time I have never heard of a case where any defendant ever tried to cause harm to a juror or a member of the juror's family. . . .
>
> . . . .
>
> . . . [T]his is done in order to provide laboratory conditions so that both sides will get a fair trial. It is most emphatically not being done because of any apprehension on the part of the court that you would have been endangered or subject to improper pressures if your names had been disclosed.

850 F.2d at 1027–28.

The court of appeals agreed with the judge's decision to be straightforward with the jury but wondered whether "if the judge had not made a point of discussing anonymity, the jurors might have simply assumed that to be the normal procedure." *Id.* at 1025–26.

The Eleventh Circuit held in *United States v. Ross*, *supra*, that the district court's "careful instruction eviscerated any possible inference of Appellant's guilt arising from the use of an anonymous jury." The instruction stated:

> Now one of the methods employed to ensure the viability of the jury and to protect the jury members from any unwanted phone calls or contact by the press or by any person concerning this trial, is to not make your name, where you live, or where you or your spouse work, public. . . .
>
> . . . .
>
> Now in any potentially high-profile case, we are all subject to crank phone calls and anonymous letters and that sort of thing. I want to protect the defendant, as well as the government, from any belief on any part of the jury that any such communications are coming from one side or the other. In other words, I don't want the defendant to be characterized as someone who would be sending anonymous communications to the jury, and I don't want the government to be characterized as someone who is trying to influence the jury improperly.

33 F.3d at 1521 n.27.

The D.C. Circuit found the voir dire flawed in *United States v. Edmond*, *supra*, because of the trial court's "limited inquiry into the prospective jurors' exposure and reaction to pretrial publicity," but nevertheless held that it was adequate to compensate for information denied defendants by juror anonymity. The court of appeals noted several other steps the district court had taken: Every prospective juror had to complete a twenty-page questionnaire and the judge conducted an extensive voir dire regarding their personal backgrounds. Furthermore, the district court instructed jurors before they filled out their questionnaires that keeping their names and identities confidential "is [in] no way unusual. It is a procedure being followed in this case to protect your privacy even from the Court." 52 F.3d at 1093. The court also instructed the jury several times, including at the beginning and conclusion of trial, that the defendants enjoyed a presumption of innocence.

The court of appeals rejected appellants' further argument that in instructing the jury regarding the reasons for its sequestration, the district judge implied that he perceived a threat from the defendants by making reference to "'outside or extrajudicial pressures' and to the need for a marshal to 'protect' jurors during a lunch break." The D.C. Circuit said appellants inferred too much from these statements, which were prefaced by a

discussion of press interest in the case. Considering the totality of the district court's instructions, the appellate court concluded that the jurors most likely would have interpreted the judge's comments consistently with his earlier explanation that the court "was taking all measures necessary to 'protect [the jurors'] *privacy*' from all parties." *Id.* at 1093–94.

In *United States v. Crockett*, *supra*, the Seventh Circuit held that the district court provided an acceptable explanation for the jury's anonymous status. The trial judge implied "that it was 'not the result of threats from the defendants' . . . but rather was one of a number of procedures used by the federal courts to avoid any contact between the jurors and the parties to ensure that 'both sides in the case receive a fair and impartial determination by the members of the jury.'" 979 F.2d at 1217. Also, the judge repeatedly admonished the jury at various stages of the trial that the defendant enjoyed a presumption of innocence.

Notes

1. Disclosure of the venire list three days before trial was mandatory in capital cases until 1994, when Congress amended 18 U.S.C. § 3432 to state that the list does not have to be provided if "the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person."

2. The Fourth Circuit has not ruled on the issue, but in *In re Baltimore Sun Co.*, 841 F.2d 74 (4th Cir. 1988), it held that the press had the right under *Press Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501 (1984), to obtain the names and addresses of persons on the venire list in a highly publicized criminal trial. The court stated that "we think the risk of loss of confidence of the public in the judicial process is too great to permit a criminal defendant to be tried by a jury whose members may maintain anonymity." It noted that sequestration is an option in a high-profile case. In a footnote, however, the court of appeals emphasized that "we do not deal here with a situation in which there existed realistic threats of violence or jury corruption," citing *United States v. Barnes*, *supra*.

Bench Comment

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A periodic guide to recent appellate treatment of practical procedural issues

SUBJECT:
Ex parte communications between judge and jury often violate defendants' Rule 43 right to be present at every stage of trial, but rarely constitute reversible error

In *Rogers v. United States*, 322 U.S. 35 (1975), the Supreme Court emphasized that to fulfill the mandate of Fed. R. Crim. P. 43(a) giving defendants the right to be present "at every stage of the trial," a trial judge must respond to juror questions or concerns in open court after affording the defendant an opportunity to be heard. The Court further observed, however, that "a violation of Rule 43 may in some circumstances be harmless error," citing Fed. R. Crim. P. 52(a). In a variety of recent cases, appellate courts have ruled that ex parte communications between judge and jury violated Rule 43; three circuits found reversible error.

Reversible error

In *United States v. Smith*, 31 F.3d 469 (7th Cir. 1994), before the commencement of deliberations, the trial judge responded to the jurors' request to speak with him by going into the jury room, accompanied by a clerk, to meet with them. The jurors indicated their concern that he had distributed to counsel for the parties outline sheets identifying the jurors, including their places of residence. To assuage their concern, the judge told the jury that he would take back the outline sheets and redraft them to delete their addresses. Thereafter, he told the parties about this private meeting; defendant's counsel objected. The judge later returned to the jury room and gave the jurors the original outline sheets, telling them to destroy them. He instructed the jury that there was no reason for them to be afraid.

The Seventh Circuit held that the defendant's Rule 43(a) rights "were violated when the judge communicated privately with the jury." It noted that because predeliberation contacts between courts and jurors often are for "housekeeping" purposes, "even highly experienced judges [may] assume that a private meeting with jurors prior to deliberations will not create problems." But such contacts "are no less of a problem than those occurring after deliberations have started." *Id.* at 471. In this case, the subject of the initial ex parte meeting was not housekeeping, but the jurors' concern about disclosure of their addresses, which could indicate that they had already decided the defendant was guilty and posed a potential threat to them. The defendant therefore "had a right to be present when the judge communicated with the jury to ensure that the court's actions would not be interpreted as a confirmation of the jury's bias." *Id.* at 472. The second private meeting between the judge and jury compounded the problem and raised an additional issue. The judge gave a private jury instruction, and "[b]ecause neither Smith nor his counsel were present . . . Smith had no opportunity to correct any possible errors in the . . . instruction."

These violations of Rule 43(a) required reversal of the defendant's conviction, the Seventh Circuit said, "unless the 'record completely negatives any reasonable possibility of prejudice arising from such error.' *Santiago*, 977 F.2d at 523 (quoting *United States v. Jorgenson*, 451 F.2d 516, 520–21 (10th Cir. 1971))." *Id.* at 473. The record in this case showed that the ex parte communications "touched on a fundamental issue—whether the jury had concluded before the submission of all the evidence that the defendant was guilty." *Id.* Since the judge's oral instruction was not recorded, there was no way for the court of appeals to determine whether it might have cured any

misunderstanding the jurors might have had about removal of the outline sheets. Thus, the court could not say that the record completely negatived the possibility of prejudice to the defendant. *See also United States v. Neff*, 10 F.3d 1321, 1327 (7th Cir. 1993) ("[E]very communication with the jury outside the presence of the defendant will not necessarily violate the Sixth Amendment. This case reaches that threshold because there is no record showing who was present when the answers to the jury's questions were determined nor how whoever was present came up with the answers. And since the answers contained facts not in evidence which could have influenced the jury's decision, the Sixth Amendment was clearly breached.").

The First Circuit held that the district court committed reversible error by mishandling a note from the jury in *United States v. Parent*, 954 F.2d 23 (1st Cir. 1992). Shortly after retiring to deliberate, the jury sent a note to the judge asking him to "'clarify the term constructive possession . . . in all of its aspects." The judge consulted with attorneys for the parties and then in open court reinstructed the jury. The next day, the jury sent the judge another note, asking if they could "visually review" the instruction. Without informing counsel, the judge sent two sheets from the government's requests to charge, defining constructive possession and citing authority in support of the definition, into the jury room. Two hours later, the jury returned a guilty verdict. Counsel for the parties did not learn of the note or the judge's response to it until after the verdict.

The judge's handling of the second note was error, the court said. "[M]essages from a deliberating jury, pertaining to ongoing deliberations, ought to be fully disclosed to the lawyers when received, so that the latter may be heard before the judge implements a course of action." *Id.* at 25. Under ordinary circumstances, the court's action might have been harmless, but the circumstances in this case were "far from ordinary."

> One salient circumstance, of course, is that the critical exchange between judge and jury took place without the parties' knowledge. The Court has made clear that, in such a situation, the real harm is not that the trial judge might have misstated the law . . . but that the aggrieved party will have lost the value of . . . the opportunity to convince the judge that some other or different response would be more appropriate, the circumstances considered.

Id. at 26 (citation omitted). The court found it "entirely plausible" that defense counsel might have succeeded in convincing the judge to withhold the written version of the instruction, or to supplement it, or at least to remind the jury of its obligation to heed the charge in its entirety.

There was also the danger that the jurors would give special credence to the written instruction, especially in view of the list of citations that accompanied it. Moreover, the supplemental instruction "was delivered at a critical juncture in the case" and "went directly to the heart of Parent's case." *Id.* "In short, the defendant lost the opportunity to argue, at a time and place when arguing might have been meaningful, not about some peripheral matter, but about the crux of his defense." *Id.* at 27.

In *United States v. Brown*, 832 F.2d 128 (9th Cir. 1987), the jury asked to hear portions of a tape recording that had been played during the trial. The trial judge's court clerk called counsel for the government and asked her to have the case agent who played the tape during the government's case-in-chief replay it for the jury. The agent did so in a courtroom that was empty except for the jury and the court clerk. Shortly thereafter, the jury again requested that the tape be replayed and the agent did so at least twice. Neither defendants nor their attorneys were notified of the jury's requests until sometime prior to the sentencing hearing.

The government did not contest that replaying the tape in the absence of the defendants was a violation of Rule 43, but argued that it was harmless. The Ninth Circuit disagreed. Because the defendants objected to the violation below, the court noted, "[w]e must reverse unless the prosecution can show beyond a reasonable doubt that the error was harmless." The court could not find the replaying of taped evidence in the absence of the defendants, defense counsel, and the judge to be harmless beyond a reasonable doubt. "Any number of prejudicial events might have taken place when the case agent replayed the tape for the jury." *Id.* at 130. The "only evidence suggesting harmlessness" was an affidavit of the case agent, and the court could not say "that the case agent is the sort of neutral observer in this controversy, whose uncorroborated affidavit should convince us beyond any reasonable doubt that the Rule 43 violation was harmless." *Id.*

Harmless error

Both the Ninth and Seventh Circuits found harmless error in other cases where the record was insufficient to support the contentions of defendants who did not object at trial. In *United States v. Throckmorton*, 87 F.3d 1069 (9th Cir. 1996), the deliberating jury sent a note to the judge requesting a second viewing of a videotape that had been played during the trial. The trial judge informed the parties later that day that "he had 'received a few notes which [he] responded to.' The defendants were shown the notes, did not inquire as to how the court responded, and raised no objection." *Id.* at 1071. There was no record of what the trial judge said to the jury. The Ninth Circuit concluded that the district court's violation of Rule 43 did not require reversal. Because the defendants failed to object at trial, they had the burden, pursuant to Fed. R. Crim. P. 52(b), "to show that the district judge's response to the jury note affected their substantial rights." *Id.* at 1073. With a record "barren of anything said between the district court judge and the jury," they failed to carry that burden.

> The district court disclosed in open court and on the record that he had communicated ex parte with the jury. If counsel had been concerned about this they could have voiced their concern to the district court and an appropriate record could have been made. For some reason, either purposefully or through oversight, defense counsel did not do this.

Id.

In *United States v. Rodriguez*, 67 F.3d 1312 (7th Cir. 1995), the Seventh Circuit held that the trial court's failure to secure the defendant's presence when jury inquiries were discussed by the judge and counsel on three occasions, and its failure to notify counsel before responding to the jury's request for transcripts on another occasion violated the defendant's Rule 43 rights. These errors were harmless, the court concluded, even though the defendant had not waived his right to be present. "We cannot conceive of any input Mr. Rodriguez might have offered that would have swayed the judge. . . . Mr. Rodriguez offers no indication of what he might have said to propose a different course [from that agreed to by his counsel]." *Id.* at 1316. However, the court was troubled by the trial court's failure to consult counsel before it had transcripts delivered to the jury in response to its second request, and said it would reverse for this error had it not been for an earlier colloquy between the trial court and counsel regarding the jury's first request for transcripts:

> With nothing in the record to support an inference that Mr. Rodriguez and his counsel would have objected to providing the transcripts requested on Monday after counsel assented to providing other transcripts on Friday, the conclusion that the error was harmless is inescapable.

Id. at 1317. *See also United States v. Pressley*, 100 F.3d 57 (7th Cir. 1996). (Defense counsel's failure to object when given the opportunity renders the action more analogous to *Rodriguez* than to *United States v. Smith*, *supra*. "[E]ven if the judge's comments had touched upon a fundamental issue, the record here, unlike the record in *Smith*, affirmatively demonstrates that the judge's comments did not affect the jury's verdict.")

Decisions from other circuits holding violations of Rule 43 to be harmless include *United States v. Koskela*, 86 F.3d 122 (8th Cir. 1996) (district court's cautionary instruction about codefendant's disruptive behavior should have been given in the presence of defendants and counsel, but the nature of the instruction was not prejudicial; indeed, its purpose and presumed effect were to prevent any potential prejudice); *United States v. Bertoli*, 40 F.3d 1384 (3d Cir. 1994) (defendant waived any right he may have had under Rule 43 because his counsel did not object to the trial court's stated intention to conduct *in camera* interviews with jurors, nor did he request to be present); *United States v. Rhodes*, 32 F.3d 867, 874 (4th Cir. 1994) (it was harmless error to conduct, without defendant's presence, an in-chambers discussion with counsel concerning the jury's inquiry about an instruction because "[t]he answer that the district court gave to the jury's question was so patently legally correct that it is beyond argument [and] was the answer which Rhodes's counsel urged the district court to use"); *United States v. Harris*, 9 F.3d 493 (6th Cir. 1993) (the defendant failed "to state a reasonable possibility of prejudice" resulting from the trial court's providing the jury with a complete written set of all instructions in response to the jury's inquiry about instructions on entrapment); *United States v. Hagmann*, 950 F.2d 175 (5th Cir. 1991) (the judge merely responded to the jury's request by turning over evidence they requested; defendant's opportunity on an earlier occasion to persuade the judge to include tape recordings in material the jury could request came and passed without objection).

Bench Comment

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A periodic guide to recent appellate treatment of practical procedural issues

Subject:
Three circuits hold that, with defendant's consent, a magistrate judge has authority to conduct guilty plea proceedings in felony cases

The question of whether a magistrate judge has authority under the Federal Magistrates Act, 28 U.S.C. §636, and Article III of the Constitution to conduct guilty plea proceedings in felony cases has been answered affirmatively by three circuits. In all three cases, defendants consented to referral of the proceedings to a magistrate judge.

In United States v. Dees, 125 F.3d 261 (5th Cir. 1997), the Fifth Circuit held that the taking of a guilty plea falls within the "additional duties" clause, section 636(b)(3), as interpreted by the Supreme Court in United States v. Peretz, 501 U.S. 923 (1991). The court found that the procedure bears a close relationship to conducting an evidentiary hearing on voluntariness of a plea, which it had previously ruled delegable to a magistrate judge. In both situations, the district court has "the same authority to review a magistrate judge's performance" of the task. 125 F.3d at 265. In fact, the court said, the magistrate judge performed more of a ministerial function in conducting the uncontested plea proceeding than in holding the evidentiary hearing.

Regarding the constitutionality of the practice under Article III, the court of appeals explained that in Peretz the Supreme Court delineated two categories of rights: the personal right to have a felony case heard by an Article III judge, which may be waived, and structural guarantees to protect separation-of-powers principles that are not waivable. The Peretz Court held that "the consensual delegation of [voir dire] to a magistrate judge does not implicate the structural guarantees of Article III" because the district court retains the ultimate decision-making authority over the makeup of the jury panel. The Fifth Circuit reasoned: "If magistrate judges can oversee voir dire without interfering with the exclusive trial domain of Article III judges, so too must they be able to conduct plea proceedings," which "are far more ministerial." Id. at 267–68. An Article III problem only arises "when a magistrate judge possesses final decisionmaking authority over a substantial issue in a case." Id. at 268. Since the right to have an Article III judge preside over a plea proceeding is personal rather than structural, the defendant may waive that right, allowing a plea allocution to be delegated to a magistrate judge.

The Second Circuit likewise concluded that Peretz controlled its decision in United States v. Williams, 23 F.3d 629 (2d Cir. 1994). It found that administering an allocution "is less complex than a number of duties the Magistrates Act specifically authorizes magistrates to perform," such as hearing and determining various pretrial matters and conducting evidentiary hearings. Id. at 632–33. Therefore, the taking of a guilty plea falls within the "additional duties" that may be assigned to magistrate judges pursuant to section 636(b)(3). Even if it were viewed as an additional duty of greater importance than duties specifically assigned to magistrate judges, "the consent requirement—fulfilled in this case—saves the delegation." Id. at 633. Noting that parties can consent to the conduct of civil and misdemeanor trials by magistrate judges, the court declared that these duties are "comparable in responsibility and importance to administering a Rule 11 felony allocution." Id. The Second Circuit distinguished its holding in In re United States, 10 F.3d 931 (2d Cir. 1993), that a district court cannot delegate the power to review wiretap applications to a magistrate judge.

"That holding explicitly relied on Congress' plan . . . to protect individuals from an invasion of their right to privacy" by entrusting such review to Article III judges only. In this case, by contrast, there was "no contrary overriding congressional purpose" to restrict the taking of guilty pleas in felony cases to district judges. Thus, so long as the defendant consents, a magistrate judge may administer a Rule 11 allocution as an additional duty. With regard to Article III concerns, the court of appeals stressed that "[a] defendant's consent again is the crucial difference in the constitutional analysis." Id. at 634. It found that "the structural protections of Article III are not implicated" because the district court remains in control of the proceeding. "A district judge may readily read the transcript of the allocution for infirmities, if any, and may readminister the allocution if it is thought necessary." Id.

In United States v. Ciapponi, 77 F.3d 1247 (10th Cir. 1996), the Tenth Circuit cited the "well-reasoned analysis" of the Williams decision and found its conclusion "persuasive." The court observed that unlike the defendant in Williams, the defendant in this case did not object to the magistrate judge's taking of the plea until the appeal:

> Defendant's failure to object or otherwise request review by the district court leaves him in no position to now complain that the magistrate judge's taking of his guilty plea, a proceeding to which he expressly consented, violated his constitutional rights. . . . Consistent with Peretz and Williams, we hold that, with a defendant's express consent, the broad residuary "additional duties" clause of the Magistrates Act authorizes a magistrate judge to conduct a Rule 11 felony plea proceeding, and such does not violate the defendant's constitutional rights.

Id. at 1251.

The court of appeals also addressed and rejected a point not raised in Williams–defendant's complaint that the district judge did not review the plea proceeding. The court noted first that, as indicated in the sentencing record, the district judge had reviewed the facts of the case and the basis for the defendant's guilty plea and, in the absence of defendant's objection or request for review, was not required to do any more formal examination of the plea proceedings. "Second, to the extent that defendant challenges the delegation of the plea proceedings because section 636(b)(3) contains no express procedures for de novo review, the Supreme Court rejected this argument in Peretz." Id. Peretz held that de novo review was not required unless requested by the parties.

Summing up, the Tenth Circuit stressed that referral to a magistrate judge does not have to be conditioned on subsequent review by the district judge, so long as a defendant's right to demand an Article III judge is preserved. "Federal Rule of Criminal Procedure 32(d) preserves a defendant's right to demand an Article III judge by providing for review of a plea proceeding, as a matter of right, through a motion to withdraw a guilty plea prior to sentencing." Id. at 1252.