February 15, 1998

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Bldg.
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Changes in Federal Rules
of Criminal Procedure
(Other than with Respect to Criminal Forfeitures):
Request for Comments Issued September 1997

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit the following comments with respect to the proposed changes in the Federal Rules of Criminal Procedure on behalf of the 9600 members of our association, and its 80 affiliates in all 50 states, with a total membership of almost 28,000. The comments of NACDL on the proposed changes in the rules governing criminal forfeitures are being submitted separately.

Rule 6. The Grand Jury

a. Subparagraph (d) - Use of Interpreters

The proposed amendment to paragraph (d) of Rule 6 would divide it into two subparagraphs, the second of which, subparagraph (d)(2), effects the change proposed by the amendment. That change would be to allow an interpreter necessary to assist a grand juror to be present during deliberations.

As initially proposed by the Advisory Committee, the amendment only made reference to, and was thereby limited to, interpreters for deaf jurors. That limitation was removed by the Standing Committee "to provide an oppor-

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tunity for the widest range of public comment on all issues raised by the presence of an interpreter during deliberations."

Both as initially proposed and as modified, the amendment is based on the assumption that under the existing rule an interpreter may be present while the grand jury is in session in order to assist a juror (rather than to assist a witness). If that assumption is true, the proposed amendment would seem to be not only a good idea, but essential -- if a juror needs the presence of an interpreter during the grand jury sessions, there is no apparent reason why that need would not be present during deliberations. We doubt that this underlying assumption is valid, however, for two related reasons. First, as initially proposed, the amendment was limited to deaf jurors, a limitation that would make no sense if other types of interpreters were already permitted to be present to assist jurors while in session. Second, in removing that limitation, the Standing Committee did not give as its reason the inconsistency of allowing interpreters to be present to assist jurors during the grand jury's sessions, but only allowing interpreters needed by deaf jurors to be present during deliberations.

The only reference to interpreters in paragraph (d) as it currently reads, is in the sentence identifying "who may be present while the grand jury is in session," which includes "interpreters when needed ...." While this language obviously is not determinative by itself of whether interpreters may be present during the grand jury sessions for the purpose of assisting jurors, we suspect it was drafted for the purpose of authorizing interpreters to be present to assist in the presentation of evidence to the jurors, not in its receipt and comprehension by the jurors.

The preliminary question that has to be addressed is whether individuals who need the assistance of interpreters should be considered qualified to serve as grand jurors and, if so, what criteria are to be used in making that determination. If there are any circumstances under which grand jurors who need the assistance of interpreters during deliberations may be deemed qualified to serve, than the Rule should be amended to specifically authorize the presence of interpreters to assist jurors at all times. However, the Jury Selection and Service Act of 1968 disqualifies from service any potential juror who "is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form," anyone who "is unable to speak the English

language," and anyone who "is incapable, by reason of mental or physical infirmity, to render satisfactory jury service." 28 U.S.C. § 1865(b)(2,3,4). We are hard-pressed to think of anyone, other than a deaf person, who would need an interpreter to deliberate as a grand juror yet would not fall into one of these categories.

For these reasons, we believe that the proposed amendment should not be adopted at this time. Instead, the broader question concerning the ability of a person needing the assistance of an interpreter to be qualified to serve as a grand juror consistent with the statutory limitations must first be reviewed, and an appropriate amendment, if any, made at the conclusion of that review.

b. Subparagraph (f) - Attendance at Return of Indictment.

The proposed amendment to subparagraph (f) would eliminate the requirement that all grand jurors be present at the time the indictment is returned to the magistrate judge, and authorize the foreperson or deputy foreperson to do so on their behalf. NACDL opposes this amendment.

Requiring all grand jurors to be present when an indictment is returned serves a number of important objectives. In the minds of the grand jurors, it should help to mark the independence of the grand jury from the prosecutor, by making it clear to all grand jurors that it is the Court to whom they ultimately answer and return any indictment. In much the same way, the requirement that all jurors be present for the return of an indictment against any accused person would seem to help make the jurors take the process in which they are engaged more seriously, and their own role and responsibility in that process equally seriously. The difference between a process where one's final act is to appear before a federal judge, even if only as part of a group, and one where one simply goes home after being told by a prosecutor that the group is excused is significant and symbolic. Finally, requiring all jurors to be present ensures that all will be allowed to communicate with the Court for whatever reason or reasons a particular juror might deem necessary or appropriate.

The reason for the proposed amendment -- that the physical process of having all the jurors appear before the judge may be "difficult and time consuming" as well as "cumbersome" -- is evaluated only in comparison to whether it is legally required for a constitutional indictment. That an indictment may not be legally defective if all jurors are not present when it is

returned, does not mean it has no other purpose. NACDL rejects the assumption that no procedural rights should be protected by the Rules unless they are constitutionally mandated. The salutary purposes served by Rule 6(f) outweigh whatever minor inconveniences and administrative problems may be encountered in achieving them. NACDL therefore urges that this amendment not be adopted.

Rule 11(e). Guilty Plea: Waiver of Right to Appeal

The Committee's proposed amendment to Rule 11(c)(6) of the Federal Rules of Criminal Procedure would require courts to "determine that the defendant understands ... the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence." NACDL strongly opposes the requirement on both substantive and procedural grounds. Although we recognize that the purpose of the amendment is to ensure that persons who enter guilty pleas understand what they are doing, we believe that its inclusion in the rules would have the additional consequence of signaling the Judicial Conference's approval of appeal waivers. Because we believe appellate waivers are so inherently coercive and unfair that they should not be tolerated in our system of justice, we oppose language that would signal approval from the Federal Judiciary. On a procedural level, we believe the amendment is premature because it appears to settle the question of appeal waivers by rule before the question has been decided in the courts. In addition, the meaning of the proposed amendment is fraught with uncertainty because even those courts that permit appeal waivers do not agree on what may be waived. We will discuss the procedural problems first.]

a. The Amendment is premature because it puts the Committee in the position of making law.

As made clear in the opinions of United States v. Terry Leon Raynor, Crim. No. 97-186 (D.D.C. Dec. 29, 1997), and United States v. Demetrius Johnson, Crim. No 97-305 (D.D.C. Aug. 8, 1997), the federal courts in this country are a long way from reaching consensus on whether appellate waiver provisions are even permissible. Yet, if the Committee adopts language requiring courts to ensure that defendants understand they have waived their appeals, the Committee is implicitly authorizing and

functionally encouraging appellate waivers. Authorization from the Judicial Conference will go far toward taking the question out of the adversarial forum and resolving it through rulemaking. Thus, we believe the inclusion of language that implicitly authorizes the acceptance of appeal waivers prematurely removes an important substantive issue from the judicial process and puts this Committee in the position of making law.

This is not a situation where the Committee is called upon to clarify the effect of a particular rule, or the relationship between one rule and another, as in the 1983 amendment to Rule 11(h) which clarified that the harmless error rule of Rule 52(a) is applicable to Rule 11. Rather, the Committee is adding to the specific warnings a court must make to ensure that a plea is knowing and voluntary. By doing so, the Committee is saying, in effect, that where a plea agreement contains an appeals waiver provision, that plea will be upheld as knowing and voluntary as long as the court explains the provision to the defendant.

That very point was made by the Department of Justice in a Memorandum to all United States Attorneys authored by Assistant Attorney General John C. Keeney, dated October 5, 1995, entitled, "Use of Sentencing Appeal Waivers to Reduce the Number of Sentencing Appeals." In that Memorandum, which is discussed in the recent District of Columbia Terry Leon Raynor opinion, the Department recommends that the Rule 11 colloquy "specifically refer[] the defendant to the sentencing appeal waiver provision and obtain[] the defendant's express waiver of his right to appeal during the Rule 11 hearing." Under those circumstances, the Memo says, courts of appeals "will readily find a knowing and intelligent waiver of appeal ...." DOJ Mem. at 5. But the law has not yet accepted the proposition that appeal waivers can ever be knowing and voluntary. That issue continues to be litigated in all its various forms. Now is not the time to be sending a message that appeal waivers are permissible in the eyes of the Judiciary.

b. The Amendment is premature because the courts do not agree on what an appeal waiver means.

Even those courts that have accepted some form of an appeals waiver do not agree on what can be waived. See, e.g., United States v. Rutan, 956 F.2d 827 (8th Cir. 1992) (appeal waiver insulated government breach of plea agreement from review); United States v. Yemitan, 70 F.3d 746 (7th Cir. 1995) (appeal

waiver may not foreclose appeal in every circumstance). Thus, there is currently no way to give the courts any guidance regarding an acceptable explanation. Are defendants waiving any or all of their habeas corpus rights? Are they waiving their right to file ineffective assistance of counsel claims? Are they waiving later-found claims of prosecutorial misconduct? Do they give up jurisdictional claims? What if the substantive caselaw changes, as it did in the wake of Bailey v. United States, 516 U.S. 137 (1995), and Lopez v. United States, 514 U.S. 549 (1995), and numerous other cases? What about cases where the Sentencing Commission lowers the guideline range after sentencing and the defendant wishes to file a motion pursuant to 18 U.S.C. sec. 3582(c)(2) requesting a sentence reduction?

The answer to each of these questions is the same -- we do not know. This lack of clarity counsels patience. There is no compelling reason to "rush to judgment" in this situation. To the contrary, waiting until the case law is clearer would undoubtedly make for a better rule. If the government wishes to obtain appeal waivers, prosecutors have been instructed to ask the courts to explain the waivers. Nothing prevents this practice in those courts where waivers are accepted. At the present time, the Rule would add nothing to the Department's practice.

c. Appeal waivers should not be permitted.

We are aware that the Committee has received much of the available literature written for and against and do not wish to repeat arguments already before it. Therefore, at the outset, we would simply express our wholehearted agreement with the views expressed by Judges Friedman and Green in United States v. Terry Leon Raynor, Crim. No. 97-186 (D.D.C. Dec. 29, 1997) and United States v. Demetrius Johnson, Crim. No 97-305 (D.D.C. Aug. 8, 1997). A perusal of the cases discussing the issue of appeal waivers reveals that the cases upholding appeal waivers must resort to conclusory analysis, whereas the cases refusing to uphold appeal waivers engage in a more reasoned analysis. We submit that the conclusory analysis of the cases upholding appeal waivers cannot withstand scrutiny, as we will demonstrate below.

i. Some waivers are not permissible.

Supreme Court precedent establishes that the Courts need not accept all waivers agreed to by a party. In United States v. Mezzanatto, 513 U.S. 196 (1995), for example, the Court said:

"[T]here may be some evidentiary provisions that are so fundamental to the reliability of the fact-finding process that they may never be waived without irreparably discredit[ing] the federal courts." And in Wheat v. United States, 486 U.S. 153 (1988), the Court refused to allow a criminal defendant to waive the right to conflict-free counsel. The Court held that the waiver would not only "constitute[] a breach of professional ethics and invite[] disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver." Id. at 162, quoting United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978).

It follows that courts may decide as a matter of public policy not to accept appellate waivers. And, as this Committee knows, some courts have. See, e.g., United States v. Melancon, 972 F.2d 566, 568 (5th Cir. 1992) ("Nothing in this opinion, however, should be interpreted as indicting that a district court is not free to determine whether plea waivers of the right to appeal are unacceptable. We recognize that there may be sound policy reasons for refusing to accept such waivers, and that district courts might disagree with the policy choice made by the court in this case to accept a plea agreement appeal waiver."); United States v. Raynor, supra; United States v. Johnson, supra.

ii. Appeal waivers violate the Constitution.

Under Johnson v. Zerbst, 304 U.S. 458, 464 (1938), a waiver is "an intentional relinquishment or abandonment of a known right or privilege." One cannot knowingly waive an unknown future right. The Supreme Court long ago rejected commercial contracts that waive in advance, with respect to causes of action not yet even identifiable, the Seventh Amendment right to a jury trial. Home Ins. Co. V. Morse, 87 U.S. 445, 451 (1874). And, under the current balance in the federal system of criminal laws, a person who stands accused cannot be said to voluntarily waive the right to appeal before judgment has been entered, much less before conviction has even occurred.

Nonetheless, several courts opine that waiving one's right to appeal is no different from waiving one's right to trial. The argument goes that as long as defendants understand they had a right to appeal and are giving up that right, the waiver is knowing and voluntary since you cannot know what the outcome at trial would be anymore than the outcome on appeal. But this analysis compares apples to oranges.

As defense lawyers, we know how important it is to provide our clients with as much information as possible before asking them to choose between trial and plea. We are ethically required to obtain as much information as possible before advising our clients. That is one reason why pretrial discovery is so important. A defendant does not waive the right to trial without knowing the issues that are to be tried. To make the appellate waiver process analogous to this process, we would have to be able to tell our clients about the potential appellate and habeas issues, and advise them on the likelihood of succeeding on each of those issues. That kind of advice is not possible with repect to appeal waivers contained in proposed plea agreements. The current practice is more aptly compared to agreeing to take a pig in a poke than to a knowing and intelligent waiver. Simply because a court tells a defendant that he or she is giving up a right to appeal does not make the waiver knowing.

Nor can language from the court transform what is basically a contract of adhesion into a voluntary waiver of a right. The Supreme Court has made clear that plea bargaining comports with due process principles because the parties retain "relatively equal bargaining power," Parker v. North Carolina, 397 U.S. 790, 809 (1970) and because "the accused 'is free to accept or reject the prosecution's offer.'" United States v. Goodwin, 457 U.S. 368, 378 (1982). Many commentators believe this "mutuality of advantage" as it was described in Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) no longer exists. See, e.g., Malvina Halberstam, "Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process," 72 J. Crim. L. & Crimin. 1, 48 (1982). They argue, and we agree, that opinions such as Bordenkircher, which allow the prosecution to threaten accused persons with life in prison if they do not plead to a two to ten year sentence, effectively destroyed any bargaining equality.

Even if this were not so, the adoption of the Federal Sentencing Guidelines together with increased mandatory minimum sentences, has shifted much power from the courts to the prosecution. In the process, the bargaining power of the defense has been significantly diminished, while the bargaining power of the prosecution has been significantly enhanced. What does it mean to say a defendant is totally free to accept or reject the government's offer when the government's offer determines the sentence? As Professor Alschuler recognized twenty years ago, "A

prosecutor who can threaten only a penalty of three years ... plainly has less bargaining power than a prosecutor who can threaten a sentence of twenty-five years." Albert W. Alschuler, "Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for 'Fixed' and 'Presumptive' Sentencing," 126 U. Pa. L. Rev. 550, 569 (1978).

iii. Appeal waivers violate public policy.

Appeal waivers result in a skewed and unfair system. They allow prosecutors to determine which cases would be reviewed -- with the inevitable result of skewing the body of decisional law toward the prosecution. Yet, the process would be hidden from public view because the plea bargaining process is not subject to court review. Therefore, a general trend of unfairness would go forever undetected because there would be no ability to bring it into the open. Both from an actual risk of unfairness as well as the appearance of unfairness, this hidden shift of power cannot be allowed.

iv. Appeal waivers inherently invite and implicitly encourage illegal sentences.

We have no research on how appellate waivers would affect sentencing. It would appear, however, that where both parties and the court know that nothing they do will be subject to review, we are on the road to encouraging lawlessness. Even if courts were to agree that one could not waive appeal of an illegal sentence (and courts do not agree on that point), there would be strong disagreement over the definition of an illegal sentence. Under the guidelines, for example, a miscalculation of the guideline range is surely an illegal sentence as it results in a sentence that is not within the correct range as required under 18 U.S.C. § 3553(b). Yet such claims are exactly what most appeal waivers intend to waive.

Moreover, although some courts have held that ineffective assistance of counsel claims cannot be waived, United States v. Attar, 38 F.3d 727 (4th Cir. 1994), the prosecution continues to ask for their waiver. See plea provision proposed in Raynor, supra. Putting aside the impossible and unethical task of a lawyer's advising a client to waive that lawyer's own potential ineffectiveness, what effect might such a practice have on the participants in the justice system? And what message does such a practice send?

Consider also how the acceptance of appeal waivers erodes the foundation of the Federal Sentencing Guidelines. A basic premise of the guidelines is that judicial input will guide the Commission in its work. See, e.g., 28 U.S.C. § 994(o), which mandates the Commission to "review and revise" the guidelines in light of commentary from representatives of the criminal justice system; 28 U.S.C. § 994(w), which requires the Commission to collect and analyze written reports of judicial sentences in order to make recommendations for legislation.

If section 994(o) is eviscerated, what happens to 18 U.S.C. § 3582(c)(2)? Section 3582(c)(2) authorizes the courts to reduce sentences when the Commission lowers a sentencing range pursuant to section 994(o). In making a reduction, the courts are to consider the factors delineated in section 3553(a). One of these factors is unwarranted sentencing disparity. The wholesale use of appellate waivers will make it impossible for the Commission to "review and revise" sentences in a rational way. Thus, section 994(o) will become a nullity. Without section 994(o), section 3582(c) will become a nullity as well.

Perhaps even more startling than the evisceration of these two statutes, is the effect on 18 U.S.C. § 3553(a). Under that section, sentencing disparity is one of only seven factors the Commission mandated courts to consider in imposing sentence. Without a complete review of sentences, it will be impossible to determine whether or when unwarranted disparity of sentences exists. Eliminating one-seventh of these factors does such irreparable damage to the fabric of the statute, that it simply cannot be allowed.

For all these reasons, the only proper course of action would be for the Committee to amend Rule 11 to ban anticipatory waivers of the right to appeal. Barring that move, the current proposed amended should not be adopted.

Rule 24. Trial Jurors:

Subparagraph (c) - Discharge of Alternates

The proposed amendment would eliminate the current requirement of subparagraph (b) that alternate trial jurors be discharged at the time the jury retires to deliberate. The proposed amendment only makes sense, however, if a more important and fundamental question of criminal procedure is first decided: May an alternate juror replace a regular juror after deliberations have commenced and, if so, under what circumstances?

Otherwise, there is no reason not to discharge alternate jurors. At this time, however, there is no provision that authorizes an alternate to replace a regular juror after deliberations have commenced.

It may be that by negative implication the amendment would itself be read as authorizing the replacement of regular jurors with alternative jurors during deliberations. Assuming that such a change is within the scope of the rulemaking process, the question that is most deserving of comments and ideas is not the time at which alternate jurors must or may be discharged, but whether and under what circumstances alternate jurors should be allowed to replace regular jurors after commencement of deliberations.

For this reason, NACDL urges that the proposed amendment not be adopted. If the Committee's intent is to enable a procedure where alternates can replace regular jurors during deliberations, an amendment saying so forthrightly should be proposed, accompanied by a proposed Note offering to justify this innovation. A subsidiary amendment would then be appropriate to make alternates available for that purpose by dropping the provision requiring their discharge upon commencement of deliberations.

Rule 30. Jury Instructions.

The proposed amendment to Rule 30 would permit the trial court, in its discretion, to require the parties to file their requests for jury instructions before commencement of trial. As currently written, Rule 30 does not permit a trial court to require that such requests for instructions be filed so early. Rather, while the current version of Rule 30 permits the trial court to direct the parties to file written requests before the close of evidence, if "reasonabl[e]," the time for filing points for charge must be "during the trial."

NACDL objects to this proposed amendment on the ground that it appears to authorize the district court to require the defendant to reveal the theory of the defense prior to the commencement of trial. Thus, the amendment threatens to give the government yet another undue advantage in the prosecution of criminal cases.

The defendant is always entitled to a theory-of-defense instruction so long as "there exists evidence sufficient for a reasonable jury to find in his favor." Mathews v. United States, 485 U.S. 58, 63 (1988). Indeed, the Supreme Court has recognized

that a defendant is even entitled to have the jury instructed on inconsistent defenses, so long as each defense is supported by the evidence. Id. at 64. Because the federal rules of criminal procedure do not permit depositions in criminal cases (except in rare circumstances), see Fed.R.Crim.P. 15, a defendant typically does not know what defense will be supported by the evidence until the government's witnesses take the witness stand. Thus, a defendant will often not formulate or settle upon a theory of defense until after the government begins its presentation of the evidence, or even until the prosecution rests.

It is often in a defendant's best interest to decide on an affirmative defense, such as entrapment, self-defense, misidentification, duress or coercion, etc., based on factors that can only be learned after the commencement of trial. These factors include, but are not limited to, the manner in which the evidence develops and the composition of the jury. The amended rule is unfair in that it would permit district courts to require a defendant to make those decisions before the commencement of trial.

As currently formulated, the federal rules of criminal procedure require a defendant to provide notice of his intended defense at trial only when the defendant intends to raise one of three specifically enumerated defenses: alibi (Fed.R.Crim.P. 12.1), insanity (Fed.R.Crim.P. 12.2), and public authority (Fed.R.Crim.P. 12.3). In those three contexts, the reason for requiring pretrial notice is identified by the Advisory Committee or is readily apparent in the rule itself, and is based on the perceived need for fairness as well as to avoid unnecessary and substantial trial delays. In the case of alibi, notice helps avoid unnecessary interruption and delays in the trial while the government conducts an investigation to locate rebuttal witnesses to meet the defense of alibi. See Rule 12.1, Advisory Committee Notes. In the case of an insanity defense, "the objective is to give the government time to prepare to meet the issue, which will usually require reliance upon expert testimony," thus avoiding the need for a continuance in the middle of trial. See Rule 12.2, Advisory Committee Notes. Finally, in the case of public authority, the unstated purpose is also to give the government time to obtain and review intelligence information to determine whether the defendant was actually exercising public authority on behalf of law enforcement. These circumstances are exceptional; pretrial disclosure of the defense theory should be be routine.

A rule permitting the district court to require a defendant to file requested instructions prior to trial would, in effect, expand Fed.R.Crim.P. 12 to require notice of the theory of defense in all cases. Yet, there has been no showing, much less an informed debate, to suggest that the needs of fairness and judicial economy identified in the three contexts discussed above apply across the board. Indeed, it appears that the purpose of the proposed amendment to Rule 30 is based solely on convenience to the trial judge, rather than on any perceived need to promote the administration of justice.

For these reasons, any amendment to Rule 30 should make clear that the defense must never be required to submit its points for charge before the government has rested its case. At the very least, the Rule should reserve to the defendant an absolute right (not committed to the trial court's discretion) to submit additional requested instructions, after the close of all the evidence, based on the evidence adduced at trial.

NACDL appreciates the opportunity to offer our comments on the Standing Committee's proposals. We look forward to working with you further on these important matters.

Very truly yours,

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