DIVISION 5: CRIMINAL LAW AND INDIVIDUAL RIGHTS
CRIMINAL RULES AND LEGISLATION COMMITTEE

PROPOSED PUBLIC STATEMENT

ON

D.C. SUPERIOR COURT CRIMINAL RULE 43

Division 5 Steering Committee

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The views expressed herein represent only those of the Criminal Law and Individual Rights Division (Division 5) of the District of Columbia Bar and not the D.C. Bar or its Board of Governors.

SUMMARY

The Criminal Rules and Legislation Committee of Division 5, Criminal Law and Individual Rights, opposes the adoption of proposed amendment 43(c)(5) of D.C. Superior Court Criminal Rule 43. The proposed amendment would modify the rule to state that the defendent need not be present at a bench conference when a juror is being questioned or strikes are being excercised. The committee recognizes that voir dire practices should encourage openness without fear of reprisal or intimidation. Therefore, the committee, in an effort to balance the defendent's constitutional rights with the safety concerns of prospective jurors, recommends the following three suggestions:

1. All questioning that requires an answer outside the hearing of the prospective jury be reserved until the end of voir dire. At this time, all individuals who seek private examination could be questioned in the jury room in the presence of counsel, the defendent, the court, the prosecutor, and the court reporter.

2. The defendent could be provided with a listening device for bench conferences.

3. In extraordinary cases, the defendent's right to be present could be satisfied by use of a closed circuit television.

STATEMENT CONCERNING PROPOSED AMENDMENT TO RULE 43
CRIMINAL RULES AND LEGISLATION COMMITTEE
DIVISION V

Under the terms of Rule 43(a), every person charged with a criminal offense in the District of Columbia has the right to be present at "every stage of the trial including the impaneling of the jury." It is the Committee's view that the right to be present necessarily includes the right to hear, first-hand, all prospective juror responses to questions, regardless of whether they are taken at the bench or in open court. This view is based on the decisions in Welch v. United States, A.2d (D.C. 1983), United States v. Washington, 705 F.2d 489 (D.C. Cir. 1983)(per curiam), and Robinson v. United States, 448 A.2d 853 (D.C. 1982).

In Welch, supra, the Court of Appeals assessed whether the defendant's rights under Rule 43(a) were violated because he had not directly participated in the voir dire questioning conducted in the anteroom. While the Court found that the trial court did not commit plain error (the Court found that the defendant waived his right to be present because he did not request to be present), it did find that a defendant has a right of constitutional dimension to be present in a first-hand sense.

> We agree, of course, with appellant that Superior Court Criminal Rule 43(a), which incorporates the protections afforded by the Sixth Amendment Confrontation Clause, the Fifth Amendment Due Process Clause, and the common law right of presence, necessitates a defendant's presence during all critical states of criminal proceedings against him; that such protection includes the right to "be present and to consult with counsel during the jury selection process," Tatum v. United States, 330 A.2d 522, 524 (D.C. 1974); that the right of the defense to exercise peremptory challenges, which can be used on arbitrary and inexplicable criteria and reaction, may require direct consultation with a defendant and that "something more than second hand descriptions of the prospective jurors' responses to questions during voir dire" can be required, United States v. Washington, ... 705 F.2d 489, 497 ([D.C. CIR.] 1983)(per curiam); and that any request by a defendant to permit his or her participation in the voir dire process should be granted. Robinson v. United States, supra, 448 A.2d at 855-56; see also United States v. Allessandrello, 637 F.2d 131, 138 (3d Cir. 1980), cert. denied, 451 U.S. 949 (1981).

Id. at

In Washington, supra, the Circuit Court of Appeals decided that a defendant had a right to be present during the examination of prospective jurors at the bench.

> Peremptory challenges can be arbitrary and inexplicable; consequently, a defendant who requests the court to permit him to participate should be allowed to obtain as much first hand information as feasible to facilitate his ability to participate in the selection of a jury.
>
> Rule 43 recognizes this concern as well. Though rule 43 does not define presence, the rule distinguishes between circumstances where a defendant's presence is required, see Fed. R. Crim. P. 43(a), and circumstances where a defendant need not be present, see Fed. R. Crim. P. 43(c). For instance, a defendant's presence is not required when issues of law are being discussed with the court, Fed. R. Crim. P. 43(c)(3), since defendant's counsel can adequately protect the interests covered by rule 43. But, because the interests served by the rights of confrontation and effective assistance of counsel may require knowing participation by the defendant to be fully exercised, part (a) of rule 43 requires the defendant's presence at most phases of a criminal proceeding. Since the exercise of peremptory challenges also requires knowing participation, there is little doubt that under rule 43, the appellant had a right to hear that part of the voir dire conducted at the bench after counsel made his request. It was error to exclude her from the examinations of the last seven jurors conducted at the sidebar. See United States v. Robinson, 448 A.2d 853, 855-56 (D.C. App. 1982), reh. denied, Robinson v. United States, No. 81-145 (D.C. App. Jan. 31, 1983); United States v. Brown, 571 F.2d 980, 985-987 (6th Cir. 1978); United States v. Dioguardi, 428 F.2d 1033, 1039-40 (2d Cir.,), cert. denied, 400 U.S. 825 (1970).

Id. at 497.

Finally, in Robinson, supra, the Court of Appeals found that the jury selection process conducted in that case 1/ denied the defendant any meaningful opportunity to be present because she could not hear the majority of juror responses to the propounded questions.

> As such she has not had "an opportunity beyond the minimum requirements of fair selection to express an arbitrary

1/ Such process is the normal practice in the Superior Court.

> preference ..." which the peremptory challenge is designed to ensure, Franzier v. United States, 335 U.S. 497, 506 (1948), and was "[un]able to assist [her] counsel in the selection of the jurors." Arnold v. United States, D.C. App., 443 A.3d 1318, 1327 (1982).

Id. at 856.

As a consequence of the Committee's view of the rights provided defendants by Rule 43(a) and the United States Constitution, the Committee opposes the proposed modification of Rule 43*. However, the Committee believes that voir dire practices should encourage openness without fear of reprisal or intimidation. In an effort to balance the defendant's constitutional rights with the safety concerns of prospective jurors, the Committee recommends that alternative methods of handling bench questioning be used. The Committee proposes the following three suggestions:

1. All questioning that requires an answer outside the hearing of the prospective jury be reserved until the end of voir dire. At this time, all individuals who seek private examination could be questioned in the jury room in the presence of counsel, the defendant, the court, the prosecutor, and the court reporter. Because of the size of this room, the prospective juror could sit sufficiently away from the defendant to avoid any intimidation. As long as the prospective juror was referred to by his or her juror number, the problem of embarrassment or humiliation would be minimized.

2. The defendant could be provided with a listening device for bench conferences. This procedure is used in translation cases and could easily be adopted for routine use.

3. In extraordinary cases, the defendant's right to be present could be satisfied by use of a closed circuit television. (See note 4, United States v. Washington, supra at 497.)

In short, the Committee agrees with the view expressed in footnote 8 of Welch v. United States, supra, that where the defendant requests the right to be present he/she should be permitted to exercise this right. When the exercise of this right raises intimidation or other problems, the trial court must develop flexible ways to accommodate the competing interests

* The committee opposes the adoption of proposed rule 43(c)(5)

of all participants. Simply eliminating the defendant's right to be present, however, is not the way to resolve this conflict. 2/

(Note: The views expressed in this statement reflect the opinion of the majority of the Committee. Attached to this statement is the minority viewpoint.)

2/ In fact, it is unclear whether the proposed Rule 43(c)(3) would even eliminate this problem. Since the wording of the Rule provides that a defendant "need not be present", it is arguable that he nonetheless retains the right to be present if he asserts this right.

In addition, although the Court of Appeals cannot issue advisory opinions and must have an actual case and controversy before it in order to pass on the merits of such a rule change, we are concerned that under the circumstances of present case law, approval of the proposed rule change will improperly be viewed as judicial approval of the merits of the rule and an implied overruling of this jurisdiction's case law.

Division 5
District of Columbia Bar
Criminal Rules and Legislation Committee

Minority Position
Proposed Amendment to Criminal Rule 43

A minority of the Criminal Rules and Legislation Committee agrees with the recommendation of the Superior Court Rules Committee to an amendment of Criminal Rule 43. Proposed Rule 43(c)(5) indicates that the defendant need not be present at a bench conference when a juror is being questioned or strikes are being exercised.

In Robinson v. United States, 448 A.2d 853 (D.C. Ct. App. 1982), petition for rehearing en banc denied 456 A.2d 848 (1983), the Court held the defendant has a right to be present at the bench when a juror is being questioned or when the jury selection is occurring. The Court's opinion was not premised on a constitutional right, but rather on a construction of Rule 43(c). Indeed, in Arnold v. United States, 443 A.2d 1318, 1326 n.9 (D.C. Ct. App. 1982) (en banc), the count held that the defendant's right to be present during "jury selection [is] based on the common law privilege of presence and not on the Constitution." The Robinson opinion's practical effect has already been dramatic since the defendant's presence is intimidating to jurors and may restrict their candor in their answers. The defendant can be meaningfully involved and satisfactorily represented by allowing his counsel unlimited consultation with him at the defendant's table during questioning of a juror or during jury selection.

Respectfully submitted,

David S. Krakoff /pc

David S. Krakoff

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Notice of Proposed Rule Change

The Superior Court Rules Committee has recently recommended the amendment of Criminal Rule 43 (Presence of the Defendant).

The Committee will propose the adoption of this change by the Board of Judges unless the revision is subsequently modified or withdrawn after consideration of comments from members of the Bar or the general public.

Written comments concerning this change may be submitted within thirty (30) days of the publication of this notice in the Daily Washington Law Reporter to Peter George Djinis, Attorney Advisor to the Rules Committee, District of Columbia Superior Court, 500 Indiana Avenue, N.W., Washington, D.C. 20001.

The text of the proposed rule and its comment appears below. It is followed by a statement from the Rules Committee describing the reasons for the amendment.

Proposed Amendments to SCR Crim 43

PRESENCE OF THE DEFENDANT

(a) (unchanged)

(b) (unchanged)

(c) PRESENCE NOT REQUIRED. A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the Court, with the written consent of the defendant, may permit arraignment, plea, trial, and the imposition of sentence in the defendant's absence.

(3) At a conference or argument upon a question of law.

(4) At a reduction of sentence under Rule 35.

(5) At a bench conference attended by counsel in which (A) a juror is being questioned, or (B) strikes of jurors are being exercised, provided that the defendant shall have the right to be present in the courtroom and to consult with counsel at any time during the impaneling of the jury.

COMMENT: This rule ~~is identical to~~ modifies Federal Rule of Criminal Procedure 43 by adding new subparagraph (c)(5). This amendment is intended to clarify a defendant's right to be present in court and to consult with counsel at any time during the impaneling of the jury, while at the same time making clear that a defendant need not be present at a bench conference during which a juror is being questioned or strikes of jurors are being exercised.

The amendment is intended to modify a recent interpretation of Rule 43(c) by the District of Columbia Court of Appeals concerning whether a defendant has a right under the existing rule to be present at such conferences. See Robinson v. United States, 448 A.2d 853 (D.C.App. 1982), pet'n for reh'r'g en banc denied, 456 A.2d 848 (1983). See also United States v. Washington,

U.S.App.D.C. , 705 F.2d 489 (D.C.Cir. 1983) and Welch v. United States, A.2d (D.C.App. No. 81-840, decided September 2, 1983). Compare Tatum v. United States, 330 A.2d 522, 524 (D.C.App. 1974) (Superior Court Criminal Rule 24(b) does not require the defendant's presence at a bench conference at which counsel are present and peremptory challenges are being exercised.)

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DATE: October 13, 1983

Judge George H. Revercomb, Chairman
Superior Court Rules Committee