11/20/00

118 Mimosa Drive
Williamsburg, VA 23185

November 16, 2000

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

00-CR- D

To Whom It May Concern:

It has come to my attention that the neither the Federal Rules of Criminal Procedure, nor the proposed amendments thereto, deal expressly with the question of when a jury trial is authorized. In the federal system, the issue is resolved by the Constitution rather than by the rules of criminal procedure, which are surprisingly silent on the question and, consequently, not helpful on the matter.[1] It is the proposition of this comment that the Criminal Rules should include a provision expressly dealing with the question of when a jury trial is authorized. By not confronting the issue in the latest amendments, the Committee has missed yet another opportunity to address the problem.

According to Rule 2, the purpose of the Rules is, *inter alia*, "to secure simplicity in procedure and fairness in administration."[2] Considering the inadequately defined law prior to 1996, criminal defendants confronted with the issue of when they are entitled to a jury trial are likely to encounter anything but "simplicity in procedure." The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States could have taken a large stride towards their intended purpose by amending the rules to include a provision outlining when a jury trial is authorized. Both practicing attorneys and criminal defendants alike would benefit

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[1] *See* NEIL P. COHEN & DONALD J. HALL, CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS, CASES AND MATERIALS 554 (1995).

[2] FED. R. CRIM. P 2.

from such a modification of the rules. The current realities of modern federal criminal practice require a reevaluation of the current Rules.

For decades the law on when jury trials are authorized was undefined and in constant flux. After the controversial 1996 decision in *Lewis v. United States*,[3] however, the Supreme Court has provided the criminal defendant with some much-needed clarity. Although the *Lewis* decision has been widely criticized by myriads of legal commentators,[4] it is currently binding precedent and a clear enumeration of the law concerning the right to a jury trial. Consequently, there are no good reasons for not modifying the Rules to include a provision explaining when a jury trial is authorized.

Before it is possible to adequately argue that the Criminal Rules should be amended to include a provision delineating when a jury trial is authorized, it is first necessary to supply a brief historical and constitutional overview of the law concerning this issue. It has always been well accepted that a criminal defendant is entitled to a jury trial. In fact, the 6th Amendment provides in part that in "all criminal prosecutions" the defendant is entitled to trial "by an impartial jury of the State and district wherein the crime shall have been committed."[5] Despite the seemingly clear language of the 6th Amendment, the Supreme Court, in *Duncan v.*

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[3] 518 U.S. 322 (1996).

[4] *See, e.g.*, Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133 (1997) (arguing that *Lewis* was wrongly decided, both in terms of precedent and the constitutional role of the jury in our criminal justice system); Peter J. Schmidt, Note, *Mr Lewis Goes to Washington (and Gets His Constitutional Rights Stepped On): A Criticism of the Supreme Court Decision in Lewis v. United States*, 47 DEPAUL L. REV. 191 (1997) (arguing, *inter alia*, that the court's decision in *Lewis* was incorrect).

[5] U.S. CONST. amend. VI.

Louisiana,[6] has interpreted the language to apply only to "serious," as opposed to "petty," offenses.

The traditional approach for gauging the seriousness of a crime was to examine both its common law indictability and its moral nature.[7] This approach, however, "proved nettlesome and yielded incongruous results."[8] The *Duncan* Court, consequently, "sought more objective indications of the seriousness with which society regards [an] offense."[9] In addition, the Court wanted to establish more "objective criteria" to aid in jury trial determinations.[10] In furtherance of its goal, the Court looked to "the penalty authorized by the law of the locality ... as a gauge of its social and ethical judgements ... ."[11] Moreover, while the Court declined to designate a specific term of imprisonment to distinguish petty offenses from serious ones, it did clearly establish that potential sentence exposure, not the sentence actually imposed, is the proper measure of an offense's seriousness.[12]

Shortly after *Duncan*, the Supreme Court further developed its new standard. In *Baldwin v. New York*[13] the Court held that "no offense can be deemed 'petty' for purposes of the right to

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[6] 391 U.S. 145 (1968).

[7] *See* Christine E. Pardo, *Multiple Petty Offenses With Serious Penalties. A Case for the Right to Trial By Jury*, 23 FORDHAM URB. L.J. 895 (1996).

[8] *Id.* (citing Brief for Appellee at 7, United States v. Lewis, 518 U.S. 322 (1996) (brief prepared by Assistant United States Attorneys Susan Corkery and James Walden of the United States Attorney's Office for the Eastern District of New York)).

[9] Blanton v. City of Las Vegas, 489 U.S. 538, 541 (quoting Frank v. United States, 395 U.S. 147, 148 (1969)).

[10] *See* Pardo, *supra* note 7, at 901.

[11] Duncan 391 U.S. at 160 (quoting District of Columbia v. Clawans, 300 U.S. 617, 628 (1937)).

[12] *See* Pardo, *supra* note 7, at 901.

trial by jury where imprisonment for more than six months is authorized."[14] The Court again addressed the issue in 1989 in the case of *Blanton v. City of North Las Vegas.*[15] In *Blanton* the Court limited its earlier ruling in *Baldwin* and held that the when determining if a jury trial is authorized the focus is upon the various penalties which the legislature has attached to the offense in question.[16]

Given the preceding discussion on the ever-changing law on when jury trials are authorized, it is easy to understand why the Committee has been hesitant to include a provision in the Criminal Rules dealing with the issue. This, however, is no longer a problem as the law has since been clearly defined. It is now well accepted that any crime punishable by a prison sentence greater than six months triggers the right to a jury trial regardless of the sentence ultimately imposed.[17] Furthermore, it is now known that for crimes punishable by a sentence of six months or less, the right to a jury trial attaches only if additional statutory or regulatory penalties "are so severe that the legislature clearly determined that the offense is a 'serious' one."[18] In addition, in the absence of a statutory maximum penalty, an appellate court will consider the sanction actually imposed.[19]

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[13] 399 U.S. 66 (1970).

[14] *Id.* The Court pointed out that this was also true even in cases where the actual sentence imposed is less than 6 months.

[15] 489 U.S. 538 (1989). With all of this flux in the law it is easy to see why the Committee chose not to include a section within the Criminal Rules dealing with when jury trials were authorized.

[16] *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL AND NANCY J. KING, CRIMINAL PROCEDURE § 22.1(b) (3d ed. 2000).

[17] *See* Michael Hatcher and Kalea Seitz, *Right to Jury Trial*, 88 GEO L.J. 1345, 1346 (citing Blanton v. City of North Las Vegas, 489 U.S. 538, 542 (1989)).

[18] *Id.* (quoting U.S. v. Nachtigal, 507 U.S. 1, 5 (1993)).

[19] *See* Hatcher and Seitz, *supra* note 17, at 1347.

Despite this newly discovered clarity, there was still a valid excuse for the Committee to point to in defending their decision to remain silent on the question of when a jury trial is authorized. Until 1996 the Committee could have argued that it would have had a difficult time outlining the law in the Rules as there were still lingering questions surrounding the issue. This too is no longer a problem as we now have an answer to perhaps the most controversial question in this area. Specifically, in an majority opinion delivered by Justice O'Connor, the Court held in 1996 that a defendant charged with multiple offenses does not have a right to a trial by jury when the aggregate sentences exceed six months.[20] O'Connor's own words are worth quoting:

> Here, by setting the maximum authorized prison term at six months, the legislature categorized the offense of obstructing the mail as petty. The fact that the petitioner was charged with two counts of a petty offense does not revise the legislative judgment as to the gravity of that particular offense, nor does it transform the petty offense into a serious one, to which the jury-trial right would apply.

Thus, after *Lewis*, it became clear that it is the gravity of the offense that implicates the right to a jury trial, not the number of offenses. In other words, a criminal defendant could conceivably be charged with five petty offenses that in the aggregate could require years of jail time and he or she would still not be afforded the right to a jury trial.[21] Not surprisingly, this decision sparked criticism from legal scholars everywhere.[22] However, a discussion into the logic and rationale supporting the decision is beyond the scope of this comment. Even if one believes that the *Lewis* decision was clearly wrong, that does not change the fact that it illustrates controlling federal

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[20] *See* Lewis v. United States, 518 U.S. 522 (1996).

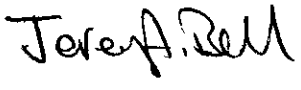
[21] My Criminal Procedure Professor gave an example in which one could be pulled over for many different petty offenses on a popular road outside of Williamsburg, Virginia and potentially be sentenced to years of jail time and not have the right to a trial by jury. This is because the traffic infractions on the particular road used in the illustration, the Colonial Parkway, impose sentences that carry large fines and even jail time, although none of the potential sentences by themselves impose more than six months of jail time.

law. As such, one of the critical remaining questions in the realm of trial by jury law has been answered. Consequently, the Committee can no longer use the fact that there is uncertainty in the law as a buttress to its decision not to address the issue in the Criminal Rules.

Federal Rule of Criminal Procedure 23(a) deals specifically with the criminal trial by jury. Unfortunately, however, Rule 23(a) is silent on the question of when a jury trial is authorized. This omission on the part of the Committee was understandable and even justifiable for many years as the law was in flux and there were many unanswered questions. These problems, however, are no longer present as the law is now well enumerated and the difficult and controversial questions have now been addressed and answered. Thus it is time for the Committee to address the issue of when a jury trial is authorized.

Rule 23(a) has remained largely unchanged in the half century since its enactment. It is now time for the Committee to reevaluate the current Rule and, ultimately, amend Rule 23(a) to include a provision addressing the issue of when a jury trial is authorized. Not only does fair and efficient administration of criminal justice require that the Committee amend Federal Rule of Criminal Procedure 23(a), such a modification would also further the intended purpose of the rules.

Thank you for your time and consideration.



Jeremy A. Bell

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[22] *See supra* note 4 (listing examples of works criticizing the *Lewis* decision).

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

November 21, 2000

Mr. Jeremy A. Bell
118 Mimosa Drive
Williamsburg, VA 23185

Dear Mr. Bell:

Thank you for your suggestion to amend Criminal Rule 23. A copy of your letter was sent to the chair and reporter of the Advisory Committee on Criminal Rules for their consideration.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe

cc: Honorable W. Eugene Davis
Professor David A. Schlueter