COMMENTS OF DIVISION 18 (LITIGATION),
DISTRICT OF COLUMBIA BAR, ON PROPOSED
RULE 43(c)(5) of the SUPERIOR COURT **/
CRIMINAL RULES (Presence of Defendant)

Division 18
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STANDARD DISCLAIMER

The views expressed herein represent only those of Division 18 (Litigation) of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.

**/This statement of support for proposed Superior Court Criminal Rule 43(c)(5) is submitted out of time because the members of the Division 18 Steering Committee were unaware that there would be any comment on the proposed amendment until it received the counter-proposal of Division 5 on November 21, 1983, the day on which comments on that counter-proposal were due. Because of our concern, as litigators, for the issues involved in the consideration of the amendment and comments thereon, we felt compelled to take the time required to consider the issues carefully and to submit comments, albeit outside the established time.

SUMMARY OF THE COMMENTS

Division 18, the Litigation Division of the District of Columbia Bar, recommends and supports the proposed rule change promulgated by the Superior Court Rules Committee which would amend Criminal Rule 43 ("proposed amendment") and specifically opposes the counter-proposal of Division 5 ("Division 5 proposal") submitted November 21, 1983.

The recommendation of Division 18 is based on the following:

1. The criminal defendant's constitutional right to be present during his trial is met by the proposed amendment, inasmuch as the right to presence clearly does not include a right to confront prospective jurors during voir dire conducted at the bench in counsel's presence.

2. Precluding potential jurors from giving answers concerning sensitive matters outside the hearing of defendants (and other jurors) clearly diminishes the candor and comfort of veniremen, presents an opportunity for, or the appearance of the opportunity for, intimidation of prospective jurors, and therefore reduces the utility of the entire voir dire process and the impartiality of resulting juries.

STATEMENT IN SUPPORT OF PROPOSED AMENDMENT
TO SUPERIOR COURT CRIMINAL RULE 43(c)

Proposed Superior Court Criminal Rule 43(c)(5) clarifies the question created by recent decisions concerning a criminal defendant's right to be present at the bench during the individual voir dire of prospective jurors on matters of such sensitivity that they cannot be asked to respond in the presence of other potential jurors. Current Criminal Rule 43 (Presence of Defendant) does not specifically address this issue, and the proposed amendment would provide that a defendant's presence is not necessary at the bench for the individual questioning of or striking of jurors, provided that the defendant has the right to be present in the courtroom and to consult with counsel at any time. The amendment does not preclude a defendant's presence where the trial judge determines that it is appropriate; proposed subparagraph (5) simply acknowledges existing precedent that a defendant does not have an absolute right to be present for the limited portion of jury selection which must be conducted at the bench.

It is clear that defendants do not have a constitutional right to confront jurors during individual questioning, nor is there a constitutional due process guarantee involved requiring defendants' presence during such interrogation or during the actual exercise of strikes. We are aware of no case holding that any constitutional right exists mandating that defendants be present--with or without demand--during the portion of voir dire which is conducted at the bench or during the actual speaking of the words which constitute the challenges of the defense to seating of particular jurors.

It is argued that Robinson v. United States, 448 A.2d 853 (D.C. 1982), rehearing en banc denied by an equally divided court, 456 A.2d 848 (1983), confers such a right on defendants. While the Robinson Court decided that the trial court erred in conducting some portions of the jury selection at the bench while the appellant remained at counsel table, it is unclear from the text of the opinion which of appellant's constitutional rights were believed to have been abridged. The Court's discussion, taken as a whole, however, at least implies that appellant was deprived of due process because she was not present at the bench for exchanges with jurors upon which her later exercises of peremptory challenges were presumably based. This line of reasoning confuses a criminal defendant's right to be present at trial with the right to a fair and impartial jury. While a defendant in a criminal case has a right to be present as well as a right to a fair and impartial jury, a defendant does not have the hybrid constitutional right, which the Robinson decision appears to confer, to be personally present at every stage

of the jury selection process. Fundamental fairness is all that is required. It is satisfied where a criminal defendant is present at trial and is afforded adequate opportunity to consult with counsel during the jury selection process.*/ The general right to presence in the courtroom and the ability to consult with counsel freely are preserved by the proposed amendment to Rule 43.

Since the ruling in Robinson, the Court of Appeals has decided Donzell Brodis v. United States, No. 81-1142 (D.C. November 30, 1983). In Brodis, where the court determined that Robinson was clearly not retroactive, the Robinson issue was defined as one "dealing with rule interpretation" as opposed to announcing a new constitutional rule.

> ...even if we had announced in Robinson a new constitutional rule as opposed to a mere interpretation of a rule of procedure, retroactive application would be inappropriate. Since we are dealing with rule interpretation, the argument for retroactivity is weaker. Id. slip op. at 5 (emphasis supplied).

The Brodis Court similarly rejected the notion that, absent Robinson, there was any constitutional problem in denying an absolute right to defendant's presence during bench hearings involved in jury selection. The Brodis Court cited with approval a District of Columbia Circuit Court decision**/ finding no right of constitutional dimension involved in questions concerning a defendant's presence at the bench during jury selection.

> The constitutionally mandated minimum protection a defendant is entitled to under [federal criminal] rule 43(a) is fundamental fairness. This minimum of fairness was certainly met in this case, since peremptory challenges are statutory, not constitutional, in origin. We stress this only to amplify that our holding is based on rule 43(a) not directly on the Sixth Amendment confrontation clause or the due process guarantee of the Constitution....

Id., slip op. at 5-6 (emphasis omitted).

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*/ General presence and ability to consult during voir dire would also satisfy due process requirements, were they in issue. Any Sixth Amendment notion of a criminal defendant's right to confront his accusers has no place in the Robinson analysis since it would be applicable only to witnesses, not to prospective jurors, and any suggestion that there is a constitutional right, rather than a statutory right, to peremptory challenges is open to serious question. See Frazier v. United States, 335 U.S. 497 (1948).

**/ United States v. Washington, 705 F.2d 489 (D.C.Cir. 1983).

Prior to Robinson, the question of defendant participation in and presence for at-the-bench voir dire of prospective jurors had been addressed in Kleinbart v. United States, 426 A.2d 343 (D.C.App. 1981). In Kleinbart, the Court of Appeals found no error in the failure to allow the defendant, upon demand, to be present at the bench for jury selection proceedings. This question was decided in the context of defendant's claim that he was denied his right to participate pro se in voir dire and other portions of the trial held by the trial court to be "purely legal," a claim clearly constitutional in dimension in light of Faretta v. California, 422 U.S. 806 (1975). Despite the denial of defendant's constitutional claim to right to act as his own counsel in the voir dire context, the Court of Appeals found that there were a "few exceptional areas...which may properly be reserved to counsel." Kleinbart v. United States, supra at 349.

A defendant's right to a fair and impartial jury does not provide an absolute right to presence during sensitive portions of jury selection, and the right to confrontation allows a defendant to confront witnesses, not jurors. It seems clear that a system wherein jurors were not seen but responded in writing to questions propounded in writing by both sides, with strikes for cause and peremptory challenges being exercised thereon, would not affront any constitutional right of a defendant. How, then, can a system that also allows a defendant to see the veniremen and his attorney to hear all answers and to consult with the defendant be criticized as denying constitutional prerogatives?

Because criminal defendants have no constitutional right to be present at the bench during voir dire, the Litigation Division can find no compelling or even persuasive rationale for a rule which mandates the presence of criminal defendants at that most-sensitive portion of voir dire concerning personal experiences of veniremen and their families. Indeed, such a required presence creates potential for more harm than good.

The Litigation Division concurs in the statements of the Office of the United States Attorney for the District of Columbia concerning juror perceptions about the safety of being candid where candor gives a criminal defendant knowledge of the details of a juror's personal situation. No one who has participated in a criminal jury trial can be unaware of the discomfort jurors experience and even express at knowing that defendants have access to their names, addresses and places of employment from the jury list. From this obvious discomfort, it is not difficult to imagine the increased fear and resentment they would experience if they were required to give other personal information about themselves, children, and prior experiences while face-to-face with someone charged with a serious crime. That resentment might well manifest itself in lack of candor during voir dire or feeling that, since the system does not value jurors' rights to personal safety, their factfinding responsibilities should be treated in a similarly cavalier manner. As participants in the jury process, we have an obligation to ensure peace of mind for jurors and an atmosphere that will promote candor during the voir dire process.

Where specific facts argue for a defendant's presence at the bench, the decision should be left to the sound discretion of the trial judge, whose proximity to the parties, issues, prospective jurors, and potential for abuse permits the most incisive determination of rights, absent constitutional mandate. Such allocation of responsibility also permits, in the absence of a constitutional question, effective balancing of practical considerations, such as those which might be involved in multiple-defendant cases where all defendants are detained pre-trial, with considerations of fairness to the defendant.

It is interesting to note that the Division 5 proposal concedes that there are situations where imposing the defendant's presence on jurors at the bench is unacceptable. In these situations, their counter-proposal provides for elaborate, expensive, and time-consuming procedures such as listening devices, closed circuit television, even moving the proceedings out of the courtroom after each question requiring individual responses. Each of these methods is cumbersome and inefficient. We have demonstrated that there is no constitutional mandate requiring such practices. No practical rationale necessitating a defendant's physical presence was advanced by Division 5, nor was there any demonstration that consultation with counsel was insufficient as a practical matter. Accordingly, it is difficult to understand why extraordinary measures involving electronic hookups should be engaged. The time required to facilitate each defendant's presence at all phases of voir dire, whether pursuant to the Division 5 proposal or otherwise, will detract sufficiently from the expeditious conduct of criminal jury trials that it will impact the court's already-stressed ability to provide speedy consideration of other criminal matters before it.

We strongly urge the adoption of the Rule 43(c)(5) amendment. It will clarify existing requirements without extensive litigation of seemingly-confused precedent and without unnecessary burdens on prospective jurors resulting therefrom. The new rule will ensure that defendants receive all rights constitutionally provided for them, will expedite the proceedings in each criminal matter, and will ensure proper consideration of the safety, candor, and comfort of prospective jurors.