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

To: **Hon. Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Richard C. Tallman, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

Subject: **Report of the Advisory Committee on Criminal Rules**

Date: **December 15, 2008**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met on October 20-21, 2008 in Phoenix, Arizona, to consider a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are attached.

Although the Committee did not approve any amendments for submission to the Standing Committee, it is continuing work on a number of proposals that will likely come to the Standing Committee in the near future. The remainder of this report discusses the following information items:

(1) proposed amendments to Rule 32 concerning sentencing procedures;
(2) a proposed amendment to Rule 12 concerning challenges for failure to state an offense;
(3) a review of all of the Rules of Criminal Procedure to identify candidates for change that need to be updated in light of new technologies;
(4) a proposed amendment to Rule 41 to allow probation and pretrial service officers to apply for and conduct searches; and
(5) continued implementation of the Crime Victims' Rights Act.

II. Information Items

A. Proposed Amendments to Rule 32 Concerning Sentencing

The Committee discussed at length two amendments to Rule 32 that would require additional disclosure to the parties during the sentencing process. The Committee solicited input from the United States Sentencing Commission, and representatives of the Commission participated in the discussion of these issues in subcommittee teleconferences and at the meeting in Phoenix.

The first proposal would amend Rule 32(h), which requires the district court to notify the parties if the court intends to depart from the guidelines range for a reason not identified in the presentence report or the parties' submissions. The proposed amendment has a lengthy history. After the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the Committee proposed an amendment extending the notice requirement in Rule 32(h) to *Booker* variances as well as departures. The proposed amendment to 32(h) was approved for publication in 2005, but it was remanded by the Standing Committee for further study in 2006 after the public comment period. The Rules Committee deferred action pending the Supreme Court's decision in *Irizarry v. United States*, 553 U.S. ___, 128 S.Ct. 2198 (June 12, 2008), which held that Rule 32(h), as presently drafted, does not apply to variances.

The Supreme Court's decision in *Irizarry* has cleared the way for the Committee to resume its consideration of the proposal to amend Rule 32(h) to require notice of *Booker* variances as well as departures. Although the Sentencing Commission, the government, and the defense bar have expressed support for the proposed amendment, several members of the Committee expressed the view that extending the requirement of notice was not necessary, would be impractical, and would generate frivolous appeals. Representatives of the Sentencing Commission stated that it was too soon after the decision in *Irizarry* for any data collected by the Commission to shed light on these issues. After extended discussion, the Committee referred the issue back to a subcommittee for further study.

The Committee also discussed a second amendment proposed by the American Bar Association House of Delegates, which approved the proposal at its August 2008 annual meeting. The ABA proposal would amend Rule 32 by requiring disclosure to the parties of all information upon which the probation officer relies in preparing the presentence report. Absent relief for good cause shown, the ABA proposal requires disclosure of:

(1) documentary evidence submitted to the probation officer by any party in connection with the presentence investigation;
(2) documentary evidence provided to the probation officer by any non-party in connection with the presentence investigation;

(3) a written summary of oral information received by the probation officer from any party (other than through an interview of the defendant) in connection with the presentence investigation; and
(4) a written summary of oral information received by the probation officer from any non-party in connection with the presentence investigation.

The ABA supported its proposal with a report describing a number of local court rules that provide for some or all of these forms of disclosure.

Discussion focused on a variety of issues, including the need to protect confidential witness information, concern that the proposed disclosure would impose burdens on the probation and pretrial services officers, and questions regarding the application to information provided by third parties. Members who supported the proposal praised it as a means of increasing the transparency of the process and the accuracy of presentence reports, but other members expressed concern that it could turn the production of the presentence report into even more of an adversary process and might cause the government to reduce the information provided to the probation officer.

There was general agreement that it would be desirable to have more information from the districts with the local rules that had served as a model for the ABA proposal. The staff of the Administrative Office will work with the Federal Judicial Center to develop this information, and the Criminal Law Committee will be consulted as well.

B. Rule 12(b) Challenges for Failure to State an Offense

Rule 12(b)(3) presently requires a motion alleging a defect in the indictment or information to be made before trial, but it excepts from this requirement "a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense." Failure to state an offense had been regarded as a "jurisdictional" defect, but in 2002 the Supreme Court in *United States v. Cotton*, 535 U.S. 625, held that the omission of an essential element from the defendant's indictment did not deprive the court of jurisdiction. The decision in *Cotton* provided the impetus for consideration of an amendment that would require a challenge for failure to state an offense, like other defects in an indictment or information, to be made prior to trial.

Although there was considerable support for the general notion that it would be desirable to require defects in the indictment or information to be raised prior to trial, the proposed amendment and committee note raised a number of thorny issues about how the change would affect cases in which a defect was not raised until later in the process, either during the trial or on appeal. Rule 12(e) provides that a party who does not raise an objection by the time set by 12(b)(3) "waives" that objection, but for "good cause" the court may grant relief from the waiver. Discussion focused principally on two issues, one concerning the breadth of the good cause relief from waiver, and the other concerning the impact of the Fifth Amendment grand jury clause.

Some members supported the proposed amendment on the understanding that the "good cause" relief from the waiver provisions of Rule 12 would apply when a defendant would be prejudiced by trial on an incomplete indictment. In other contexts, however, courts have interpreted the "good cause" language to require a showing of both "cause" and "prejudice." A proposed note attempted to resolve this issue by stating that good cause "may include injury to a defendant's substantial rights." Committee members recognized, however, that attempting to define "good cause" in a committee note referring to one subpart of the rule would be problematic.

Discussion also focused on the relationship between the proposed amendment and the cases holding that the Fifth Amendment precludes the court from constructively amending an indictment. Although a defendant has waived a defect in the indictment if he does not raise it before trial, the jury instructions raise a different issue. Would it violate the Fifth Amendment to instruct the jury on elements that were not presented to the grand jury? If the Fifth Amendment would preclude such a constructive amendment, then it appears that the court would be required to dismiss the case at mid trial, notwithstanding the amendment. There may also be due process fair warning issues in some cases where the defendant may be unfairly surprised at trial by the introduction of evidence of an element that was neither charged in the indictment nor drawn to his attention by other means. There is, of course, no precedent on these issues because the current rule provides that the issue can be raised at any stage in the proceeding, and courts therefore dismiss the indictment whenever such defects are raised.

The Committee voted 7 to 5 to continue working on the proposed Rule 12 amendment and accompanying committee note, and will return to this issue at its April meeting.

C. Use of Technology

New technologies have affected practice in many ways, and will continue to do so. Within the past year the Committee has proposed several amendments incorporating new technologies: Rule 6 (concerning the return of indictments by two-way video conference); Rule 15 (concerning depositions outside the United States where the defendant cannot be present, but is able to participate meaningfully), and Rule 41 (concerning searches for electronically stored information). Other rules already allow for the use of technology. For example, Rule 41(d)(3)(A) allows a magistrate judge to issue a warrant on the basis of information communicated "by telephone or other reliable electronic means."

To avoid taking new issues up in a piecemeal fashion, I have formed a technology subcommittee, chaired by Judge Tony Battaglia, and asked it to do a comprehensive review of all of the Rules of Criminal Procedure to assess where amendments authorizing the use of new technologies might be desirable. The subcommittee is proceeding with its review and will complete its report in time for the Committee's April meeting.

D. Rule 41, Proposal to Authorize Pretrial Services and Probation Officers to Seek and Execute Warrants

The Committee discussed a preliminary proposal from the Criminal Law Committee to authorize probation and pretrial service officers to seek and execute warrants as part of their efforts to enforce court-ordered supervision conditions. This nascent proposal was seen as a major policy change, and it generated a great deal of discussion. Authorizing judicial personnel to apply to the courts for warrants raises separation of power concerns. Probation officers may not want to do searches, and the new authority may not be compatible with their efforts to cultivate rehabilitative relationships with the individuals they supervise. Moreover, probation and pretrial services officers are not trained to deal with the dangerous situations that may arise when conducting a search. The Committee noted, however, that courts are creating this problem by charging probation officers with the enforcement of search conditions.

The Committee has conveyed these concerns to the Criminal Law Committee.

E. Implementation of the Crime Victims' Rights Act

The Committee is continuing to monitor issues arising under the Crime Victims' Rights Act (CVRA). It received a report concerning the efforts of the U.S. Government Accountability Office (GAO) to evaluate the implementation of the CVRA. The GAO has surveyed judges, victims, and prosecutors concerning their experiences. Although the GAO's report was not yet in final form, the Committee was briefed on a draft. The Committee was pleased to learn that the draft report included no criticism of the courts. It did, however, conclude that the CVRA's 72-hour time limit on appellate mandamus review was too short.

The Committee was also informed that the Department of Justice is continuing to meet with victim advocacy groups to learn of their concerns.