ADVISORY COMMITTEE ON CRIMINAL RULES

MINUTES

September 5, 2006 - Special Session
Teleconference

I. ATTENDANCE AND OPENING REMARKS

The Judicial Conference Advisory Committee on the Rules of Criminal Procedure (the "committee") met in special session by teleconference on September 5, 2006. The following members participated:

Judge Susan C. Bucklew, Chair
Judge Richard C. Tallman
Judge David G. Trager
Judge Harvey Bartle, III
Judge James P. Jones
Judge Mark L. Wolf
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King
Robert B. Fiske, Jr., Esquire
Donald J. Goldberg, Esquire
Thomas P. McNamara, Esquire
Assistant Attorney General Alice S. Fisher (ex officio)
Professor Sara Sun Beale, Reporter

Also participating were:

Judge Mark R. Kravitz, Standing Committee Liaison to the Criminal Rules Committee
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Benton J. Campbell, Counselor to the Assistant Attorney General
Jonathan J. Wroblewski, Counsel, United States Department of Justice
Peter G. McCabe, Rules Committee Secretary and Administrative Office Assistant Director
John K. Rabiej, Chief of the Rules Committee Support Office at the Administrative Office
James N. Ishida, Senior Attorney at the Administrative Office
Timothy K. Dole, Attorney Advisor at the Administrative Office

Judge Bucklew began by noting that this special session was convened strictly to discuss the Department of Justice's proposed revision to the United States Attorneys' Manual on disclosure of exculpatory and impeaching information and to decide whether, given the proposal, the committee should still forward the draft Rule 16 amendment to the Standing Committee for

publication. She recalled that the advisory committee had voted last April to postpone further consideration of the matter to afford the Department time to finish revising the Manual, but to revisit the issue in a special session sometime before September 30, 2006, to allow two members who had spent considerable time on this issue to participate before the end of their tenures. After describing the written materials distributed electronically in advance of the meeting, Judge Bucklew invited the Department to make an opening oral statement, to be followed by questions, comments, and, finally, a committee vote.

II. DISCUSSION AND VOTE

Ms. Fisher reported that the Department had worked to improve the proposed Manual revision since the April meeting. She said that Mr. Fiske had met with her, Mr. Campbell, and Mr. Wroblewski to explore ways of addressing the concerns raised, and the Department was able to accommodate many, though not all, of them. Ms. Fisher said that the Manual revision had received final approval from all relevant Department officials, including Deputy Attorney General Paul McNulty, and would go into effect. She called the new Manual section real progress, noting that it exceeded the disclosure requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Section D.4. was added, she said, to require supervisory approval before prosecutors could delay for any reason the disclosure of impeachment or exculpatory information. Also, following such supervisory approval, the defendant had to be notified. Ms. Fisher noted that the policy applied to the sentencing as well as the guilt-innocence phases. Although the Manual revision might not be everything that Mr. Fiske and others wanted, she said, it constituted a substantial step in the right direction.

Judge Wolf requested clarification of the current status of the Manual revision. Ms. Fisher replied that it had been fully approved, would be implemented, and could be added to the Manual as soon as tomorrow. The reason that it had not already been added, she said, was in case some last-minute wording adjustments were needed because of the telephone conference with the Committee. Judge Wolf inquired whether the Department saw any substantive differences between the proposed Manual revision and the draft Rule 16 amendment. Ms. Fisher replied that certain language differences obviously remained, particularly with respect to disclosure of impeachment evidence. Judge Wolf said that, even if the proposed provisions were identical, the fundamental question was whether the policy on disclosure of exculpatory and impeaching information should be solely an internal Department matter or should also be included in a rule.

Mr. Goldberg inquired whether the Manual revision was still being offered strictly as an alternative to the proposed Rule 16 amendment or whether it would go into effect regardless. Ms. Fisher stated that it was both her understanding and the Deputy Attorney General's intention that the Manual revision on exculpatory and impeaching information would go into effect following the current telephone call even if the proposed rule change were voted out of committee. She added, though, that if that occurred, the Department would continue its opposition to the Rule 16 amendment when the issue is taken up by the Standing Committee.

Returning to an earlier topic, Mr. McNamara inquired whether there were not differences between the Manual revision and the draft rule amendment with respect to materiality. Mr. Campbell said that materiality had been "eliminated as the construct," but acknowledged that differences between the two provisions remained. Judge Wolf voiced concern that prosecutors might find the phrase "make the difference between guilt and innocence" in part C of the Manual provision confusing, as it appeared to be stricter than the materiality requirement in *Brady* and *Kyles v. Whitley*, 514 U.S. 419 (1995). Ms. Fisher said that she considered the comment helpful.

Judge Jones inquired whether proposed Manual descriptions of prosecutorial obligations using the term "must" differed in meaning from instances where "should" appeared instead. Ms. Fisher said that this was merely a style issue involving how obligations are described elsewhere in the Manual, but that if this issue proved significant enough to change the committee dynamic, the Department could look at it more closely, because no difference in meaning was intended.

Following the questions period, Judge Bucklew offered each member in turn an opportunity to comment, beginning with either Mr. Fiske or Mr. Goldberg.

Mr. Fiske reported having had several conversations with Ms. Fisher, Mr. Campbell, and Mr. Wroblewski in search of an acceptable solution, and he applauded their conscientious efforts in pursuing what he considered an extremely worthwhile and productive process. The Department had significantly improved the language of the proposed Manual revision, he said, particularly with respect to the obligation to disclose exculpatory information. The revised language would eliminate any subjective analysis by the prosecutor and require prosecutors to disclose any information — bar none — that was inconsistent with any element of a crime. The biggest remaining problem, though, he said, was the proposed inclusion of the qualifier "substantial" and "significant" in the Manual section on disclosure of impeaching information, which creates the same kind of issue as the materiality element by calling for a subjective assessment by the prosecutor. Also, unlike a rule, a Manual provision would be unenforceable, Mr. Fiske noted.

Following the committee's April 2006 meeting, Mr. Fiske said, he had commented to Mr. Campbell that the Manual provision could only serve as an acceptable substitute for a Rule 16 amendment if it were made as effective as a rule. In other words, he explained, it could not allow any subjective assessment by the prosecutor, and it would have to be functionally enforceable by, for instance, possibly requiring prosecutors to affirm to the court at some point during the discovery stage that they had fully complied with their Manual obligations to disclose exculpatory or impeaching information. Mr. Fiske said that the latest draft of the Manual provision fell short of satisfying those two requirements and was therefore not an adequate substitute for the draft Rule 16 amendment. Consequently, he would vote to go ahead with the Rule 16 amendment.

Mr. Goldberg agreed. He characterized the Manual proposal as a noble effort, but said that it would defeat what the draft Rule 16 amendment was designed to achieve. He noted that

the proposed Manual revision disclaims supersession of those sections of the Manual that discuss *Giglio*, thereby retaining the materiality element. He said that prosecutorial subjectivity also lived on in the "substantial doubt" and "significant bearing" phrases used in the Manual revision.

Judge Tallman said that he favored an incremental approach. He applauded the Department's recent changes to the proposed Manual revision. As a former criminal defense attorney, he said, he understood the points made in support of the rule. But he recommended that the committee defer consideration of a Rule 16 amendment until the impact of the Department's proposed revision to the Manual could be assessed. He added that he would not vote for the rule amendment if the Department intended to oppose it at the Standing Committee.

Judge Bartle said he had no comments.

Judge Wolf said that, although the recent changes to the proposed Manual revision represented great progress, he still favored a judicially enforceable rule. He said that he shared the concerns regarding the persistence of the subjective materiality test on disclosing impeaching information, adding that his main concern was that revising the Manual would not alter current practices, at least not for long. Judge Wolf said that he was amazed that only now was a discussion of prosecutors' constitutional duty under *Brady* and *Giglio* being added to a multi-volume policy guide for U.S. Attorneys. Nevertheless, only the rule, he said, would provide an effective remedy for violations and actually reduce the number of problems in this area.

Judge Trager said that he agreed with Judge Tallman. His concern was that convictions might be overturned on appeal under the draft Rule 16 amendment simply because prosecutors or law enforcement agents had mishandled exonerating or impeaching evidence. Judge Jones replied that the rule amendment was never intended to change the substantive requirement for reversing a conviction. As long as the exonerating or impeaching material that should have been disclosed would not have affected the outcome, the conviction would stand, he said. What the rule *would* do, however, is subject the prosecutor to sanctions in the event of an unexplained violation of a rule, thereby promoting compliance with the policy, Judge Jones said. Judge Trager said that he did not recall reading any statement to that effect in the draft committee note.

Judge Jones said that, although he appreciated and applauded the Department's efforts, he continued to believe that it was best to proceed with amending Rule 16.

Judge Battaglia said that he had nothing to add to the points already made.

Justice Edmunds said that he tended to favor Judge Tallman's point of view.

Professor King requested clarification from the Department on the relationship between sections D.2. and D.4. of the Manual revision proposal. She asked whether supervisory approval and notice to the defendant would also be required where information was not promptly disclosed for reasons other than the classified nature of the material, such as witness security.

Ms. Fisher said that yes, both provisions were intended to be parallel and that if a comma had to be moved to make that clear, the Department would do so. Professor King also requested clarification on whether or not the Department had agreed, in response to Judge Jones' inquiry, to change all instances of "should" to "must" and to convert advisory language such as "this policy encourages" in section B.1 to "this policy requires" or a comparable phrase more suggestive of a compulsory policy. Ms. Fisher replied that the Department intended to do so, as it saw no difference in meaning between "should" and "must" in the context of the U.S. Attorney's Manual. Professor King asked what the Department intended to do with respect to the supersession language in section A that caused Mr. Goldberg concern. Ms. Fisher said the Department would change the other Manual provision dealing with *Giglio* to make it consistent with this new provision. Mr. Campbell added that the Department would be reviewing all other provisions in the Manual to see where changes were required to ensure consistency with this new provision. Judge Bartle inquired whether that meant that the Department would be deleting the sentence beginning, "Additionally, this policy does not alter or supersede the *Giglio* policy adopted in 1996[.]" Ms. Fisher said that was correct.

Mr. McNamara said that the failure of prosecutors to disclose exculpatory or impeaching evidence is a daily problem for public defenders. He applauded the proposed Manual revision, but suggested that the policy needed enforcement teeth that only a rule could provide. For that reason, he supported sending the Rule 16 amendment to the Standing Committee.

Mr. Rabiej noted that the committee's decision was subject to review by both the Standing Committee and the Judicial Conference, the latter of which in the past had indicated strong reluctance to making changes in this area. Mr. Fiske responded that he was unaware that either the Standing Committee or the Judicial Conference had ever considered this particular issue. Moreover, Mr. Fiske added, the committee should do whatever it believes is right without concern for whether others further up the line might disagree. Mr. Fiske suggested addressing the concerns regarding conviction reversal by adding a committee note clarifying that the rule is not intended to create a new standard for review of a conviction, but is simply designed to put teeth into the requirement that prosecutors turn over any exculpatory and impeaching information without subjective reflections on whether non-disclosure would alter the outcome. Mr. Fiske expressed concern regarding Judge Tallman's recommendation to postpone consideration of the draft Rule 16 amendment until the committee could determine whether or not the Manual revision had succeeded in improving prosecutorial practices. Given the nature of the problem, Mr. Fiske warned, even two years from now, there would be no data or other means of making such a determination for 90% of cases. He noted that several years of effort had gone into amending Rule 16 and suggested that the rule change was ripe for an up or down vote.

Judge Tallman predicted that, notwithstanding Mr. Fiske's point, at least some jurisdictions would interpret the Rule 16 amendment in a way that would affect the scope of review, particularly in habeas cases, and would affect the sustainability of convictions. Mr. Goldberg disagreed, reporting that he and Professor King had spent a great deal of time studying whether the draft rule amendment would affect the law of reversal and had concluded that it

would not. To prevent any misinterpretation, he said, a statement could be added to the note, as Mr. Fiske had suggested.

Professor King explained that a rule amendment should have no effect on collateral review because it would not change the *constitutional* standard for reversal, which is the only type of issue reviewable in the habeas context. On direct appeal, a rule violation would be reviewed for harmless error and, although some courts of appeals currently place the burden of disproving prejudice on the government, others require the defendant to show prejudice from a rule violation to obtain relief on direct appeal. Consequently, revising the rule should have *no* effect on collateral review, and even on direct appeal it would not necessarily shift the burden in all circuits, she said. Judge Tallman remarked that the appellate standard was already difficult to apply and that a rule change would not ease that task. Judge Wolf commented that the only thing that *would* ease the job of appellate courts would be to reduce the number of these types of cases by promoting greater fairness and integrity at the trial level in what has proven to be a very problematic area. That was why, he added, he supported amending Rule 16 and providing a judicial role. Judge Wolf asked the Department whether it had given any consideration to how the Manual revision would be taught and implemented. Ms. Fisher responded that regular training programs were in place to educate prosecutors on changes to the Manual, but that the Department's focus in recent months had been on getting the new provision approved.

Judge Bucklew invited any final comments from the Department. Ms. Fisher said that the Manual revision represented a significant change and that its provisions were not that different from the draft Rule 16 amendment. She added that the Department was strongly opposed to amending Rule 16 and believed that these changes should be made incrementally.

Justice Edmunds inquired whether the problem prompting the Rule 16 amendment in the federal courts was limited to a few renegade prosecutors or whether it was, as Mr. McNamara suggested, widespread. Mr. McNamara said that the problems were across the board, and he predicted that the Manual revision would result in no appreciable improvement in compliance. Ms. Fisher disagreed, stressing the importance of the proposed Manual revision. The problem, she said, was limited to a few bad actors. Mr. Campbell suggested that bad actors who would violate a Manual provision would also disregard a rule. He stressed the seriousness of violating Manual policy, noting that it would subject a prosecutor to an Office of Professional Responsibility (OPR) investigation, possible dismissal, and even, as occurred in Detroit recently, criminal prosecution. Judge Wolf agreed that someone who wanted to disregard the policy would succeed. But he was skeptical of the effectiveness of OPR investigations, describing an "egregious" non-disclosure case he had in which an OPR investigation has still not concluded more than three years after it was initiated. What is worse, the subject of the investigation was just assigned to prosecution of police corruption cases, generating significant cynicism in Boston, he said. As someone who had worked for the Attorney General and served as a former prosecutor, Judge Wolf said he can appreciate the belief that a Manual revision will make a difference. But he has a principled view that there should be judicial review in this area and that,

in the interest of the administration of justice, a rule was needed to sharply diminish the number of arguable violations of constitutional rights.

Judge Bartle said that he was convinced that the committee should send the draft Rule 16 amendment to the Standing Committee. Having an effective, objective prophylactic rule would be in everyone's long-term best interest, including the Justice Department's. He agreed with Mr. Fiske that now was the time to amend Rule 16 and that no consideration should be paid to what others in the rulemaking process may or may not do.

Judge Trager warned the committee that defense counsel would try to use the draft Rule 16 amendment to try the prosecutor whenever they lacked a true defense, and that it would inevitably have implications for overturning convictions. He therefore recommended against going forward with the amendment. Mr. Goldberg recalled that, when the Rule 16 amendment had first been proposed, the Department denied that failure to disclose exculpatory and impeaching information was a big problem. Subsequent research, though, disclosed hundreds of cases that made clear that this was actually a huge problem, he said, and a "festering sore." Judge Trager said that the cases to which Mr. Goldberg referred were largely state cases and that there was no comparable problem in federal court.

Professor Beale said that she thought that the arguments had been well-stated both for and against proceeding with the Rule 16 amendment. However, she saw an inherent problem in the use of subjective standards and predicted that the inclusion of such qualifiers as "substantial" and "significant" in the Manual provision could lead to problems. She added that, at least in some circuits, the rule amendment could shift the burden to the government.

Judge Bucklew personally thanked Ms. Fisher for having successfully added a *Brady* provision to the Manual, something others before her had tried and failed to do.

Judge Jones moved to forward the draft Rule 16 amendment to the Standing Committee.

The committee voted 8-4 to forward the proposed Rule 16 amendment to the Standing Committee for publication.

Mr. Fiske noted his support for adding a statement to the committee note clarifying that the rule amendment was not intended to affect the substantive rights of defendants during review of their convictions. The session was adjourned.

Respectfully submitted,

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