ADVISORY COMMITTEE ON CRIMINAL RULES

MINUTES

April 28-29, 2008
Washington, D.C.

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the "Committee") met in Washington, D.C., on April 28-29, 2008. All members participated during all or part of the meeting:

Judge Richard C. Tallman, Chair
Judge James P. Jones
Judge John F. Keenan
Judge Donald W. Molloy
Judge Mark L. Wolf
Judge James B. Zagel
Magistrate Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Andrew D. Leipold
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Thomas P. McNamara, Esquire
Alice S. Fisher, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Assistant Reporter

Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, its Reporter, Professor Daniel R. Coquillette, and liaison member, Judge Reena Raggi. Also supporting the Committee were:

Peter G. McCabe, Rules Committee Secretary and Administrative Office Assistant Director for Judges Programs
John K. Rabiej, Chief of the Rules Committee Support Office at the Administrative Office
James N. Ishida, Senior Attorney at the Administrative Office
Jeffrey N. Barr, Senior Attorney at the Administrative Office
Timothy K. Dole, Attorney Advisor at the Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center

Two other officials from the Department's Criminal Division — Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton, Deputy Chief of the Appellate Section — were present. Ruth E. Friedman, Director of the Federal Defenders' Capital Habeas Project, attended part of the meeting.

A. Chair's Remarks and Administrative Announcements

After welcoming everyone and making administrative announcements, Judge Tallman recognized Professor King for her years of distinguished service as a Committee member and thanked her for agreeing to serve further in the capacity of Assistant Reporter. Judge Tallman made a request that subcommittee chairs try to begin their work earlier in the period between meetings to ensure that it is completed in time for the next Committee meeting.

B. Review and Approval of the Minutes

A motion was made to approve the draft minutes of the October 2007 meeting.

The Committee unanimously approved the minutes.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Supreme Court

Mr. Rabiej reported that the following proposed rule amendments, which include those making conforming changes under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, were approved by the Supreme Court and submitted last week to Congress. Unless Congress enacts legislation to reject, modify, or defer them, they will take effect on December 1, 2008.

Rule 1. Scope; Definitions. The proposed amendment defines a "victim."

Rule 12.1. Notice of Alibi Defense. The proposed amendment provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised.

Rule 17. Subpoena. The proposed amendment requires judicial approval before service of a post-indictment subpoena seeking personal or confidential victim information from a third party and provides a mechanism for victim notification.

Rule 18. Place of Trial. The proposed amendment requires the court to consider the convenience of victims — in addition to the convenience of the defendant and witnesses — in setting the place for trial within the district.

Rule 32. Sentencing and Judgment. The proposed amendment deletes definitions of "victim" and "crime of violence or sexual abuse" to conform to other amendments, clarifies when a presentence report must include restitution-related information, clarifies the standard for including victim impact information in a presentence report, and provides that victims have a right "to be reasonably heard" in certain proceedings.

Rule 41(b). Search and Seizure. The proposed amendment authorizes magistrate judges to issue warrants for property outside the United States, but still subject to administrative control of the United States government such as legation properties in foreign countries or territorial possessions such as American Samoa.

Rule 60. Victim's Rights. The proposed new rule provides a victim the right to be notified, to attend public proceedings, and to be heard, and sets limits on relief.

Rule 61. Conforming Title. The proposed amendment renumbers Rule 60.

Mr. Rabiej reported no action in Congress on the Crime Victims' Rights Rules Act bill introduced in this session of Congress by Senator Jon Kyl (R-AZ). Judge Tallman noted that the Judicial Conference had voiced strong opposition to this new measure, which would circumvent the federal rulemaking process by directly changing the Federal Rules of Criminal Procedure without affording anyone the opportunity for notice and comment and bypassing the deliberative process that Congress previously established for judicial rulemaking under the Rules Enabling Act. Mr. Rabiej also reported that no responses had yet been received from the 20 or so different groups from which the Committee had requested suggestions for further CVRA-related rule amendments. Judge Tallman noted that, on the recommendation of this Committee and the Standing Committee, Chief Justice John Roberts had recently approved Director Duff's letter to Lewis & Clark Law School Professor Doug Beloof declining his suggestion that a permanent crime victims' advocate position be added to the Advisory Committee on Criminal Rules.

Ms. Hooper provided an update on the Federal Judicial Center's efforts to educate the Judiciary about the CVRA. The Center has produced a DVD, featuring Judge Jones and Judge Zagel, that examines the Act's requirements, the related rules amendments, and the experiences of judges and prosecutors in applying the Act. The Center has updated its monograph, "The Crime Victims' Rights Act of 2004 and the Federal Courts" and will distribute it, along with related materials, at all national workshops for district court judges this year. A panel session on "the CVRA and Issues and Challenges for the Federal Judiciary" will be held at the Sentencing Institute in Long Beach, CA on June 25-27, 2008, to be co-chaired by former Judge Paul Cassell and Benji McMurray. Also, the Center is nearing completion of a report, prepared at the Committee's request, reviewing victims' rights laws in all 50 states, the District of Columbia, and the territories. To understand how victims' rights laws operate in practice, the Center has conducted interviews with state judges, victim coordinators, prosecution staff, and defense counsel in six states, and with professionals from victim assistance organizations.

Ms. Hooper reported a few preliminary findings from the study. First, expansion of criminal proceedings to include greater participation and input from victims does not appear to impede judges' ability to effectively manage their caseloads even when multiple victims wish to participate. Second, although many jurisdictions require only that victims be treated with "fairness and respect," the lack of more detailed legislative guidance has not resulted in a significant increase in litigation seeking to broaden victims' rights. Third, most states allow a victim to be heard orally regarding a plea agreement and at sentencing, and a few permit victims to speak at a bail or bond hearing or an initial appearance. In practice, though, few victims

choose to speak, a phenomenon that some attribute to untimely notice. Fourth, most jurisdictions allow the victim to confer with the prosecutor, but states vary with regard to the type of information that is authorized to be disclosed to the victim by the prosecutor. Only 10 jurisdictions, for instance, allow victims some access to the presentence report — five allow victims to review the report, two allow them to receive copies, and three allow discretionary disclosure by the prosecutor. Fifth, a few jurisdictions have formalized complaint procedures for victims who believe that their rights were violated. Typically, this is done by filing a writ of mandamus, but one jurisdiction allows a nominal monetary damages remedy where there was an intentional failure to afford a victim his rights.

Ms. Hooper reported that the Center is still committed to producing a judge's pocket guide on victims' rights, but wanted to ensure that it would not be duplicative of the materials that have already been prepared. She also noted that the GAO is expected to issue a full report on the effect and efficacy of CVRA implementation in the federal courts by October 2008. If, after reviewing the GAO report, the Committee believes that further research is necessary, the Center is ready to undertake it.

Judge Tallman asked representatives from the Department of Justice whether, in their meetings with crime victims groups, any additional feedback had been obtained. Mr. Wroblewski reported meeting about two months ago with 20-25 people from a dozen or more victims' organizations and explaining the Department's involvement with the rules committees. Although the Department had not yet received any suggestions or comments, Mr. Wroblewski said that these meetings would continue to be held on a regular basis. Judge Tallman mentioned that he had recently been asked about the Department's efforts at automating victim notification. Mr. Wroblewski reported that the Department sends out millions of notices to victims each year through the computerized Victim Notification System.

B. Additional CVRA-Related Proposed Amendments

Mr. Rabiej noted that the three additional CVRA-related rule amendments had been approved for public notice and comment and would be published on August 15, 2008. Public hearing dates on each coast would be tentatively scheduled for sometime in January 2009.

> Rule 5. Initial Appearance. The proposed amendment directs a court to consider a victim's right to be reasonably protected when making the decision to detain or release a defendant.
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> Rule 12.3. Notice of Public-Authority Defense. The proposed amendment provides that for security and privacy the victim's address and telephone number should not be automatically provided to the defense. Courts remain free to authorize disclosure for good cause shown.
>
> Rule 21. Transfer for Trial. The proposed amendment requires consideration of the convenience of victims in determining whether to transfer the proceedings to another district for trial.

Professor Beale pointed out that the Style Consultant had slightly modified the original wording of these proposed amendments. Also, the Standing Committee had agreed that the arguably unnecessary statement in proposed Rule 5(d)(3) should be retained to underscore that, in making the determination on bail and release, "the court must consider any statute or rule that protects a victim from the defendant."

C. Proposed Forfeiture Rule Amendments

The Committee discussed the following three proposed rule amendments governing forfeiture that had been published for public comment.

> Rule 7. The Indictment and Information. The proposed amendment removes reference to forfeiture.
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> Rule 32. Sentencing and Judgment. The proposed amendment requires the government to state in the presentence report whether it is seeking forfeiture.
>
> Rule 32.2. Criminal Forfeiture. The proposed amendment clarifies certain procedures, such as that the government's notice of forfeiture need not identify the specific property or money judgment that is subject to forfeiture and should not be designated as a count in an indictment or information.

Professor Beale reported that the proposals had elicited a single comment, from Judge Lawrence Piersol of the District of South Dakota, who voiced concern that the proposed Rule 32.2 amendment could cause sentencing delays. But, she said, Proposed Rule 32.2(b)(2)(B) specifies that courts must enter preliminary forfeiture orders before sentencing "[u]nless doing so is impractical." Proposed Beale added that two changes to the published version were recommended: standardizing the references to "assets" and "property," and eliminating the bracketed language. A member pointed out that the "and" at the end of proposed Rule 32(d)(2)(E) on page 43, line 6, of the agenda book requires deletion.

There was discussion about the phrase "either party's request" in proposed 32.2(b)(1)(B), on page 46, lines 30-31, and the phrase "the date when the order granting or denying the amendment becomes final" in proposed Rule 32.2 (b)(4)(C) on page 51, lines 101-102. Clarification was also requested regarding the phrase "the government must submit a proposed Special Verdict Form." Following Committee discussion, it was decided that these various phrases should be retained as drafted.

Judge Zagel moved to approve the forfeiture rule amendments as revised.

The Committee voted unanimously to send the proposed forfeiture rule amendments, as revised, to the Standing Committee.

D. Proposed Rule 41 Amendment on Seizure of Electronically Stored Information

The Committee discussed the proposed Rule 41 changes recently published. Judge Battaglia, chair of the Electronically Stored Information Subcommittee, reported that one public comment had been received. The Jordan Center for Criminal Justice and Penal Reform had suggested that, by authorizing the "seizure of electronic storage *media*" rather than "*information*," the proposed change would violate the Fourth Amendment's particularity requirement by allowing information to be seized without establishing probable cause. Another objection was the absence of controls to prevent the government from using copied information for "general intelligence or other unauthorized or illicit purposes." The Jordan Center also recommended that the rule require that the seized materials be returned within a set time period.

Judge Battaglia reported that the subcommittee had decided to address those concerns by adding a clarification to the Committee Note that the "amended rule does not address the specificity of description that the Fourth Amendment may require in a warrant for electronically stored information, leaving this and the application of other constitutional standards to ongoing case law development." The subcommittee also proposed adding "copying or" to the last line of Rule 41(e)(2)(B) to clarify that copying, not just review, may take place off-site. Professor King noted the typographical error, the third "the," on page 63, line 11, which would be fixed.

The Committee discussed the proposed elimination of all case citations, for style reasons, from the Rule 41 Committee Note. Mr. Rabiej noted that certain members of the Standing Committee had strong views on how detailed Committee Notes should be. Judge Tallman said that, because this area of the law was evolving, it would be wise where possible to omit citations to cases that might soon be out of date.

One member raised concern about government handling of seized electronic media and the delay in the return of the media. Judge Tallman suggested that these issues were best left to case law development. After further discussion, Judge Wolf moved that the Committee Note's reference on page 65 to "other constitutional standards to ongoing case law development" be changed to "other constitutional standards concerning both the seizure and the search to ongoing case law development."

The motion was unanimously approved.

In response to a member's inquiry, Judge Tallman confirmed that the Jordan Center's suggestion that controls be added to prevent the government from using copied information for "general intelligence or other unauthorized or illicit purposes" had been declined because it would be a substantive change of law that should instead be the subject of case law development or congressional action.

Judge Keenan moved that the Committee send the proposed Rule 41 amendment, as revised, to the Standing Committee.

The Committee voted, with one dissent, to send the proposed Rule 41 amendment, as revised, to the Standing Committee.

E. Proposed Time Computation Rule Amendments

Professor Beale reported that no public comments had been received in response to publication of the following proposed time computation rule amendments.

> Rule 45. Computing and Extending Time. The proposed amendment simplifies the method for computing time.
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> Rules 5.1, 7, 8, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, and 59, and to Rule 8 of the Rules Governing §§ 2254 and 2255 Cases. Amendments to these rules are intended to adjust the deadlines in light of the new time computation principles.

Judge Rosenthal explained that the Criminal Rules Committee was the last of four advisory committees meeting to finalize this coordinated effort. She noted that the goal was to achieve seamless synchronization with Congress so that the rule amendments, statutory changes, and local rule changes all take effect on December 1, 2009. She said that congressional staff, many of whom were former law firm associates, had expressed general approval in recent meetings for simplifying time computation across the board. There was discussion whether the rule amendments should be made conditional on the proposed statutory changes or whether they should take effect even if Congress declined to enact the statutory changes. The consensus of the Committee seemed to be that every effort should be made to have the proposed time computation rule amendments take effect at the same time as the proposed statutory changes. Mr. Cunningham moved that the proposed rule amendments be approved.

The Committee voted unanimously to approve the proposed time computation rule amendments.

III. CONTINUING AGENDA ITEMS

A. Proposed Time Computation Statutory Amendments

The Committee discussed which statutes Congress should be asked to amend in light of the proposed time computation changes. Judge Tallman noted that unless statutes were changed, the rules committees' effort to simplify time computations would have the opposite effect, adding a new layer of complexity. Judge Rosenthal explained that there was a desire, first, not to have the rules be inconsistent with the statutes, and second, not to disadvantage practitioners by shortening their deadlines. One member pointed out that the rules expressly apply the new time computation approach to statutes unless a statute specifies a different approach. To increase the probability of passage in Congress, Judge Rosenthal noted that an effort was being made to keep all proposed statutory changes uncontroversial and outcome neutral.

The Committee discussed the report submitted by the Committee's Time Computation Subcommittee. The subcommittee was asked to explain why it was deviating from the "days are days" approach and recommending instead that Congress simply exclude Saturdays, Sundays, and legal holidays from the four-day periods set forth in 18 U.S.C. § 2339B(f)(5)(B)(iii)(I) and (III) and 18 U.S.C. App. 3 § 7(b)(1) and (3) within which appellate courts must hear arguments or render decisions in certain cases involving material support and the Classified Information Procedure Act. Judge Rosenthal explained that the Department of Justice had voiced significant concerns with converting these periods to seven calendar days and that keeping the proposed statutory changes uncontroversial was critical to the project's success. Assistant Attorney General Fisher said that these procedures had been used in the case of convicted terrorism conspirator Zacarias Moussaoui. Professor Beale noted that the subcommittee recommended a similar approach for the two-day deadline for dissolution of a temporary restraining order in 18 U.S.C. § 1514(a)(2)(E).

With respect to the current 10-day period in 18 U.S.C. App. 3 § 7(b) within which an interlocutory appeal in a CIPA case "shall be taken" after the trial court renders a decision, however, the Department supported recommending its extension to 14 calendar days. Ms. Fisher explained that this provision typically applied when a court is ordering the government to turn over classified information or sanctioning the government for not turning over classified information, in which case consulting with the applicable agencies sometimes took time.

Professor Beale reported subcommittee support for the following recommendations:

- extending to 14 calendar days the current 10-day period in 18 U.S.C. § 3771(d) within which a victim must file a motion for a writ of mandamus in the court of appeals to reopen a plea or sentence;
- extending to seven calendar days the current period of five days before trial in 18 U.S.C. § 3509(b)(1)(A) within which an order for a child's testimony to be taken via two-way closed circuit video must be sought; and
- extending to 14 calendar days the current 10-day period in 18 U.S.C. § 2252A(c) within which a defendant seeking to utilize certain affirmative defenses against child pornography charges must notify the court.

The Committee discussed the current three-day period in 18 U.S.C. § 3432: "A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial." Ms. Fisher said that the Department had no strong preference, but would recommend retaining the three days and only excluding Saturdays, Sundays, and legal holidays. One member noted that the three-day deadline in 18 U.S.C. § 3432 was important to prosecutors not in capital cases, but in non-capital cases, because it allows prosecutors to argue that if the deadline is three days in capital cases, it should be no greater in ordinary, non-capital cases. Judge Tallman suggested that the Department's compromise offer was probably advisable, given the witness security concerns.

It was noted that these proposed statutory changes were going to be published and, if problematic, might elicit public comment. Following further discussion, a motion was made to recommend retaining the current three-day period in 18 U.S.C. § 3432 within which a person charged with treason must be furnished with a copy of the indictment and a list of the jurors and witnesses, but to recommend excluding Saturdays, Sundays, and holidays from the three days.

The motion was approved, with minimal dissent.

A motion was made to recommend extending to 14 calendar days the current 10-day period in 18 U.S.C. App. 3 § 7(b) for interlocutory appeals of a trial court's ruling in a Classified Information Procedure Act case.

The motion was approved unanimously.

Judge Battaglia moved that the Committee recommend that the Standing Committee send to Congress the other proposed time computation statutory changes set forth on pages 123-125 of the agenda book.

The Committee voted unanimously to recommend that the Standing Committee send to Congress the other proposed time computation statutory changes.

B. Proposed Amendments to Rule 11 of the Rules Governing §§ 2254 and 2255 Cases

The Committee discussed the proposal to amend Rule 11 of the Rules Governing §§ 2254 and 2255 Cases to, among other things, require a judge to grant or deny the certificate of appealability at the time a final ruling is issued. Professor King noted that the proposal had been submitted by the Department originally after the Supreme Court decided *Gonzalez v. Crosby*, 545 U.S. 524 (2005). After considering the five public comments received on proposed Rule 11(a), all opposing the published proposal, the Writ Subcommittee, chaired by Mr. McNamara, concluded that the proposal required modification, but split 3-2 over how to modify it.

Two alternative drafts were included in the agenda book for the Committee's consideration. The majority retained the published proposed requirement that the certificate of appealability be ruled on "at the same time" as an adverse final order, but recommended adding the phrase, "unless the judge directs the parties to submit arguments on whether or not a certificate should issue." Also, the majority proposed adding the following sentence: "If the certificate is issued or denied upon entry of the final order, a party may move for reconsideration of the decision on the certificate not later than 14 days after the entry of the order." The minority proposed requiring only that motions for certificate of appealability be filed 14 days following a final order adverse to the applicant, a time frame that the minority contended was necessary for counsel to consider the final order. Judge Tallman thanked the subcommittee for working so diligently over the course of several months on this challenging area, whose numerous minefields for unwary petitioners had sometimes resulted in meritorious claims being procedurally barred.

Mr. Wroblewski said that the Department preferred the published version of Rule 11(a), designed to codify existing practice as explained in *Gonzalez*. One member said that requiring simultaneous rulings would not codify the practice in his own circuit, but that he considered it nonetheless desirable because judges would have to deal with a case only once, ruling on the certificate of appealability at the same time as the final order rather than long afterward. Another member said he favored the simultaneous ruling requirement because it gave judges a way to inform the parties when issuing the final order that they had struggled in reaching certain decisions. A motion was made to require the judge in Rule 11(a) to rule on the certificate of appealability "at the same time" as the judge enters a final order adverse to the applicant.

The Committee decided, with minimal dissent, to require the judge in Rule 11(a) to rule on the certificate of appealability "at the same time" as the final order.

Judge Tallman recommended making clear in the rule that filing a motion for reconsideration of the denial of a certificate of appealability does not toll the statute of limitation for filing the appeal — a point that has proven to be a trap for the unwary. Another member expressed concern about including a reference in the habeas rule to a motion for reconsideration because it could also pose a trap for the unwary and it would likely mislead pro se litigants into thinking that they needed to file them in every case. After extensive discussion, Judge Molloy moved that Rule 11(a) begin as follows: "The judge must issue or deny a certificate of appealability at the same time the judge enters a final order adverse to the applicant. The judge may direct the parties to submit arguments on whether or not a certificate should issue prior to entry of the final order."

The Committee decided unanimously to approve the proposed language at the beginning of Rule 11(a).

Judge Jones moved to eliminate the second sentence of the majority Rule 11(a) proposal on page 143, lines 6-9 — "If the certificate is issued or denied upon entry of the final order, a party may move for reconsideration of the decision on the certificate not later than 14 days after the entry of the order" — and to change "motion for reconsideration" in line 12 to "certificate of appealability." Several members voiced concern that, unless it was stated in the text of the rule that filing a motion for reconsideration did not toll the statute of limitation for filing the appeal, meritorious habeas claims would continue to be procedurally barred for lack of a timely appeal. After extensive discussion, Judge Tallman suggested taking a vote on Judge Jones' motion.

The Committee decided unanimously to eliminate the second sentence of the majority Rule 11(a) proposal and to change line 12 as proposed.

After additional discussion, Judge Tallman moved to add the following to the end of the majority Rule 11(a) proposal on page 143, line 15: "A motion for reconsideration of the denial of a certificate of appealability does not extend the time for filing a notice of appeal."

The Committee decided by a clear majority to add the proposed sentence to the end of the majority Rule 11(a) proposal.

Professor King described the changes to Rule 11(b) and (c) of the Rules Governing §§ 2254 and 2255 Cases recommended by a majority of the Writ Subcommittee. First, to prevent confusion in light of the previous subdivision's reference to an unrelated motion for reconsideration (i.e., of the denial of a certificate of appealability), it recommended changing the title of Rule 11(b) from "Motion for Reconsideration" to "Motion for Relief from Final Order." Second, the subcommittee suggested expanding the definition of permitted grounds for obtaining relief from a final order, beyond "a defect in the integrity of the § 2255 proceeding," to include "an error in a ruling in the § 2255 proceeding which precluded a determination of a claim on the merits." Third, it was thought that the proposed rule amendment should expressly supplant not only motions brought under Rule 60(b), but also those under Rule 52(b) and Rule 59. Fourth, the subcommittee sought to clarify that Rule 11(b) does not require a separate certificate of appealability. Finally, it recommended stating expressly that a timely notice of appeal is required even if a certificate of appealability is issued under Rule 11(a).

Professor King also summarized the objections raised by the Writ Subcommittee's minority: (1) the proposed change is unnecessary; (2) it unduly and unnecessarily shrinks the filing period to 30 days; (3) it bars certain grounds for relief still available post-*Gonzales*; (4) it bars other currently existing routes for relief, such as Rules 52 and 59, which were not addressed in *Gonzales*; and (5) it purports to make a significant policy change that the rules committees lack the authority to make under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077.

Ms. Ruth Friedman, director of the Federal Defenders Capital Habeas Project, said that by eliminating Rules 52 and 59 as avenues for relief, the proposed Rule 11(b) amendment would be going far beyond merely codifying *Gonzales*. She recommended against conflating Rules 52 and 60(b), two very different provisions. She suggested instead requiring that Rule 59 motions for correction of errors be filed within 10 days and that Rule 60(b) motions for addressing fairness issues be filed within a year. Asked whether the Department intended anything beyond codifying *Gonzales*, Mr. Wroblewski responded that the objective was simply to regularize the process and to lay out in the text of the Rules Governing §§ 2254 and 2255 Cases what was supposed to happen following entry of a final order. One member suggested that the proposal was premature and that additional time was needed for post-*Gonzales* case law to develop. The Department moved to approve for publication the Rule 11(b) amendment as drafted by the subcommittee majority.

The motion failed by a vote of 4 to 8.

One member explained that he had voted against the majority proposal for Rule 11(b) because eliminating Rules 52 and 59 as avenues for relief extinguished substantive rights. Professor King suggested that although *Gonzales* did not specifically deal with Rule 52 and 59, its rationale implied that other rules could not be used to circumvent the successive petition bar. Ms. Fisher moved to approve the proposed Rule 11(b) amendment for publication, omitting the references to Rules 52 and 59. After brief discussion, however, Ms. Fisher retracted her motion, explaining that the Department required additional time to consider the matter further.

The Committee turned its attention to the proposed Rule 11(c) amendment. It was noted that it would need to be redesignated as Rule 11(b). Judge Tallman expressed approval for Judge Molloy's earlier suggestion that "issues" in line 14 be changed to "issues or denies." A motion was made to approve proposed Rule 11(c) — now 11(b) — for publication as revised.

The Committee decided unanimously to approve proposed Rule 11(c), now 11(b), for publication as revised.

C. Proposed Amendment to Rule 15

The Committee discussed the Department's proposed amendment of Rule 15 to authorize depositions in a limited category of cases to take place outside the defendant's physical presence. Professor Beale noted that the current proposal included a few changes recommended by the Rule 15 Subcommittee, chaired by Judge Keenan. The scope of the proposed rule amendment is now restricted to situations where the witness is outside the United States. In subparagraph (c)(3)(A), the proposed authorization to hold depositions outside the defendant's presence under limited situations now applies to all witnesses, not just government witnesses. The existing case law standard for witness unavailability — "there is a substantial likelihood the witness's attendance at trial cannot be attained" — is reflected in proposed Rule (c)(3)(A)(ii). Proposed Rule (c)(3)(A)(iii) makes clear that a deposition outside the U.S. can only take place without the defendant present only when "it is not possible to obtain the witness's presence in the United States for a deposition." The Committee Note was revised to specify the applicable burden of proof and to clarify that the proposed rule amendment does not supersede statutes that independently authorize depositions outside the defendant's physical presence, such as certain cases involving child victims and witnesses identified in 18 U.S.C. § 3509.

Following extensive discussion regarding proposed Rule 15(c)(3)(B) and whether it should be placed in the Committee Note rather than in the rule, Judge Keenan moved to revise the proposed provision in the rule to read: "Nothing in this rule creates a right for the defendant to be present at a deposition of his/her witness that takes place outside the United States." After further discussion, though, Judge Keenan withdrew his motion.

Judge Zagel moved to approve in principle the proposed Rule 15(c)(3)(B) amendment. Ms. Fisher urged adoption of the proposed rule amendment as a way to correct a problem with Rule 15 depositions. She stressed that defendants must not be able to allege that they need to depose a critical witness in, say, Pakistan and to claim a right to be transported to Pakistan to attend the deposition. Judge Zagel requested a vote on his motion to publish the rule as drafted.

The motion failed by a vote of 5 to 6.

Judge Wolf moved to add "in the United States" on page 185 to proposed Rule 15(c)(1), line 7, and to (c)(2), line 20, to delete "Except as provided in paragraph (3)" from lines 4-5 and 18, and to delete (c)(3)(B).

The motion was approved, with one dissent.

To avoid the double use of the word "outside," Judge Molloy moved to change the title of proposed Rule 15(c)(3) to "Limited Authority to Hold Depositions Outside the United States Without the Defendant's Presence."

The motion was approved unanimously.

It was suggested that the situation covered by proposed Rule 15(c)(3)(B) could be addressed in the Committee Note. Professor Beale promised to circulate a draft by email after the meeting for Committee approval. Mr. Wroblewski noted that the bracketed language in the Note on page 188, lines 27-46, had been intended only for the benefit of the Committee and the Standing Committee and would not be part of the actual note. It was suggested and agreed that the Note not cite simply to cases decided before *Crawford v. Washington*, 541 U.S. 36 (2004). There was also consensus that the sentence on page 189, lines 8-13, should be deleted. Mr. Wroblewski moved to approve the proposed Rule 15 amendment, as revised, and forward it to the Standing Committee for publication.

The Committee voted unanimously to approve Rule 15, as revised, for publication.

D. Proposed Amendment to Rule 6(f)

The Committee discussed the proposed Rule 6(f) amendment, copies of which were distributed as a handout. The proposal would permit courts to receive the return of a grand jury indictment by video conference. Judge Battaglia, chair of the Rule 6(f) Subcommittee, noted that judges have sometimes had to travel up to 250 miles one-way to attend a 30-second proceeding. The subcommittee had two recommendations. The first was that the "open court" requirement be retained as a safeguard against the infamous Star Chambers proceedings. The second was that the "good cause" threshold be replaced with a showing that video conferencing is needed "to avoid unnecessary cost or delay." Professor Beale added that it was emphasized in the Committee Note that having the judge and grand jury in the same courtroom remained the preferred practice. She also noted that all "magistrate judge" references in the rules, such as in lines 4 and 10, include district judges by definition. There was agreement that line 5 should also refer to "magistrate judge" instead of "judge." It was also agreed that the characterization of a district as "unpopulated" in lines 26-27 of the Note was unnecessary and should be revised. The Committee also agreed to replace the phrase "in the court" in line 32 with "in a courtroom." Judge Battaglia moved to approve the proposed Rule 6(f) amendment for publication.

The Committee voted unanimously to send the proposed Rule 6(f) amendment to the Standing Committee for publication.

E. Proposed Amendment to Rule 12

Judge Wolf, appointed at the last meeting to chair the Rule 12 Subcommittee, reported that the group had conferred in several teleconferences, but that additional time was needed to formulate a recommendation. A report would be presented at the Committee's next meeting.

F. Proposed Amendments to Rules 32.1 and 46

Professor Beale said that the proposed amendments to Rules 32.1 and 46 had been deferred until the October 2008 meeting so that additional input could be obtained from the Criminal Law Committee and the Office of Probation and Pretrial Services.

G. Proposed Amendment to Rule 32.1(a)(6)

Professor Beale briefly reviewed the history of Magistrate Judge Robert Collings' suggestion that Rule 32.1(a)(6) be amended to clarify its reference to 18 U.S.C. § 3143(a) and to specify that the applicable burden of proof is clear and convincing evidence. Judge Battaglia emphasized that this was not a substantive change and that numerous courts have concluded, after extensive analysis, that only § 3143(a)(1) applies to the situation in the rule. Following a discussion of whether clear and convincing was indeed the appropriate burden of proof for alleged violations of the conditions of supervised release under Rule 32.1(a)(6), Judge Battaglia moved to send the proposed amendment to the Standing Committee for publication.

The Committee voted, with one dissent, to send the proposed Rule 32.1(a)(6) amendment to the Standing Committee for publication.

H. Rule 32(h)

Professor Beale explained that the proposed Rule 32(h) amendment had originally been part of the package of amendments proposed in the wake of *United States v. Booker*, 543 U.S. 220 (2005). But because the Supreme Court had granted certiorari and heard oral arguments in *Irizarry v. United States*, No. 06-7517, to resolve a circuit split, and because a decision was expected by June, the Rule 32(h) Subcommittee was deferring consideration of the proposed rule change. The Department noted that after *Booker*, the Constitution Project had proposed certain changes to Rule 32, which the American Bar Association was currently considering, to reform sentencing procedures and increase their transparency. Ms. Felton reported that, during oral argument in *Irizarry*, the Justices had asked counsel why the Supreme Court should not defer to the rulemaking process. Professor Beale promised to distribute copies of the *Irizarry* oral argument transcript and the *Irizarry* amicus brief filed by Catholic University of America Law Professor Peter B. Rutledge and Ohio State University Law Professor Douglas A. Berman.

IV. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES.

A. Proposal to Amend Rule 7

Judge Battaglia described his proposal to amend Rule 7(b) to permit a defendant to waive indictment by video conference. Several members voiced concern that recent rule amendment proposals authorizing court proceedings by video conference seemed to be on a slippery slope. Professor Coquillette suggested adding restrictive language similar to that used in the proposed Rule 6(f) amendment: "To avoid unnecessary cost or delay." He also noted that rule changes normally required empirical evidence of a problem. One member suggested perhaps examining

the Criminal Rules more comprehensively and assessing which proceedings should and should not be conducted by video conference. After significant discussion, Judge Battaglia moved to send the proposed Rule 7 amendment to the Standing Committee for publication.

The motion failed by a vote of 3-8.

It was suggested that Judge Battaglia's Rule 6(f) Subcommittee, perhaps under a new name, undertake a comprehensive look at how video conferencing is used in the courts and at which Criminal Rules should and should not permit its use. Judge Tallman agreed and requested the Federal Judicial Center's assistance in collecting relevant empirical data. Justice Edmunds asked if he could be replaced on the subcommittee, explaining that he would be unusually busy in coming months seeking re-election. Professor Leipold agreed to take his place.

B. Consent Calendar Suggestions:

Earlier in the meeting, Judge Tallman had drawn the Committee's attention to five suggested rule amendments included in the agenda book as consent calendar items:

03-CR-C: On April 1, 2003, attorney Carl Person suggested that each federal judge require, as a condition to approving plea agreements, that the prosecutor agree that one out of every 10 cases involving a plea bargain be selected at random to go to trial. Once the system is in place, he recommended adjusting the percentage of cases that must be randomly selected for trial based on the percentage of the defendants in randomly selected cases who are acquitted. Mr. Person reasoned that such a system would create an incentive for federal prosecutors to bring a smaller number of cases and prepare them more carefully. There were concerns that this proposal would burden the judicial system with trials in a way that might violate the substantive rights of criminal defendants.

03-CR-F: On November 5, 2003, attorney Steve Allen suggested that Rule 9(a) of the Rules Governing § 2254 Cases be amended to refer to a claim, not to a petition. He cited *Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003), which construed the one-year statute of limitation in 28 U.S.C. § 2244(d)(1) as applicable to all claims in a habeas petition, thereby reviving claims that might have otherwise been time-barred. In 2004, subdivision (a), to which Mr. Allens's proposal relates, was deleted as unnecessary in light of the one-year statute of limitation for § 2254 actions imposed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(d).

05-CR-C: On December 14, 2004, Judge James F. McClure, Jr., suggested that the Committee revise Rule 10 to permit waiver of arraignment. This proposal was discussed briefly at the Committee's October 2005 meeting in Charleston, but was tabled after several Committee members noted that during the general restyling of the Criminal Rules in 2002, the Committee had declined to allow waiver of the arraignment itself because it serves as a triggering event for several other rules.

05-CR-F: On November 2, 2005, Judge Michael Baylson suggested that the Committee discuss the increase in petitioner litigation under *Gonzalez*. Judge Baylson's recommendation is closely related to the work of the Writ Subcommittee, including the proposal to amend Rule 11 of the Rules Governing §§ 2254 and 2255 Cases.

07-CR-C: On October 2, 2007, Mr. Kelly D. Warfield suggested that "the one-year statute of limitation under 28 U.S.C. 2244 (d) should be rescind[ed]." The Rules Enabling Act, however, does not authorize the rules committees to rescind statutes.

It was moved that the Committee decline to take action on these suggestions.

The Committee decided unanimously not to take action on these suggestions.

V. RULES AND PROJECTS PENDING BEFORE CONGRESS, JUDICIAL CONFERENCE, AND OTHER COMMITTEES

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure

Judge Tallman summarized the legislation pending in Congress that would prohibit district judges from forfeiting corporate surety bonds for any reason other than failure to appear. Some districts are forfeiting bonds if the defendant violates other conditions of release and is rearrested, a scenario that corporate bail bondsmen want to see eliminated. Mr. Rabiej noted that the proposed Bail Bond Fairness Act would amend Rule 46(f) directly, thereby bypassing the rulemaking process. The Judiciary has opposed this legislation for 15 years, and the Department of Justice had recently sent a letter to Congress also opposing the bill. Nonetheless, the House passed it, and some Senators, including Senate Majority Leader Harry Reid, are supporting it.

B. Other Matters

1. Limiting Disclosure of Information About Plea Agreements and Cooperating Defendants

Professor Beale reported that the Committee on Court Administration and Case Management (CACM) had declined to recommend adoption of a national policy at this time on internet access to plea agreements and other case docket information revealing defendant cooperation with the government. The 68 public comments received in response to CACM's September 2007 publication in the *Federal Register* of the proposed removal of all plea agreements from the internet were 4-to-1 against the proposal. Courts have been experimenting with various ways of addressing the problem posed by websites such as www.whosarat.com. Professor Coquillette mentioned that the Standing Committee had established a task force to study how cases under seal are, and should be, docketed. One member noted that sealing requirements vary from circuit to circuit. Another member added that there is not yet public consensus on the proper balance between government transparency and individual privacy.

2. Questions Involving Implementation of Rule 49.1

Mr. Rabiej noted that the Administrative Office had received a variety of queries from courts regarding the proper implementation of Rule 49.1. Most involved the nine Rule 49.1(b) exemptions from the redaction requirement, which were resulting in the public having internet access to unredacted personal identifiers contained in the exempted documents. What was gained by requiring painstaking redaction of the names of all minors who are crime victims from most filings in a case, courts asked, if Rule 49.1(b)(9) allows those names to appear unredacted in, say, the criminal complaint? Ms. Fisher said that, to her knowledge, the government is diligently redacting personal identifiers from all court filings unless, for instance, the personal identifier is the subject of a warrant or part of the caption. If mistakes are indeed being made, she said, it may simply represent a training issue. Judge Tallman noted that Rule 49.1(d) and (e) offer courts a way to address those situations, albeit it only on a case by case basis.

3. Draft Revisions of Civil and Criminal AO Forms

Mr. McCabe reported that the Forms Working Group of judges and clerks had revised several forms in light of the new federal rules on privacy and to restyle their language in simple, modern English. He drew the members' attention to the draft revisions of 33 civil and criminal forms prepared by the working group, included in the agenda book for member comment.

4. Chart of Rule Amendment Activity by Committee

Mr. Rabiej explained the significance of several distributed charts showing the number of rule amendments by each advisory rules committee over the past 25 years. Judge Tallman suggested that the committees should generally take a conservative approach to changing rules given the significant increase of late in the number of proposed rule changes.

VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

After noting that the next meeting would be held on October 20-21, 2008, at the Biltmore Hotel in Phoenix, Judge Tallman adjourned the meeting.