MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 25-26, 2002
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at Washington, D.C. on April 25 and 26, 2002. These minutes reflect the discussion and actions taken at that meeting.

I.CALL TO ORDER & ANNOUNCEMENTS

Judge Carnes, Chair of the Committee, called the meeting to order at 8:30 a.m. on Thursday, April 25, 2002. The following persons were present for all or a part of the Committee's meeting:

Hon. Edward E. Carnes, Chair
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. Harvey Bartle III
Hon. Tommy E. Miller
Hon. Reta M. Strubhar
Prof. Nancy J. King
Mr. Robert B. Fiske, Esq.
Mr. Donald J. Goldberg, Esq.
Mr. Lucien B. Campbell
Mr. John P. Elwood, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. A. Wallace Tashima, member of the Standing Committee and liaison to the Criminal Rules Committee; Hon. Roger Pauley of the Board of Immigration Appeals; Prof. Kate Stith, former member of the Committee; Mr. Peter McCabe, Ms. Nancy Miller, and Mr. James Ishida of the Administrative Office of the United States Courts, Mr. John Rabiej Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Mr. Joseph Spaniol, consultant to the Standing Committee; Ms. Laurel Hooper, of the Federal Judicial Center; and Mr. Christopher Jennings, briefing attorney for Judge Scirica.

Judge Carnes, the Chair, welcomed the attendees and noted the presence of new members of the Committee, Judge Bartle and Professor King. He also recognized the contributions and dedicated service of the outgoing members of the Committee, Judge Davis and Professor Stith. He also recognized the long years of service of Hon. Roger Pauley, who had represented the Department of Justice at the Committee meetings for many years, before accepting an appointment to the Board of Immigration Appeals.

II.APPROVAL OF MINUTES

Judge Miller moved that the minutes of the Committee's meeting in WashingtoS, D.C. in April 2001 be approved. The motion was seconded by Judge Bucklew and following minor corrections to the Minutes, carried by a unanimous vote.

III.RULES PENDING BEFORE THE SUPREME COURT

Professor Schlueter informed the Committee that the package of Style amendments to Rules 1-60, the proposed substantive amendments to Rules 5, 10, 12.2, 12.4, 26, 30, and 35; and the more recent proposed amendments to Rules 6 and 41, were pending before the Supreme Court.

IV.RULES PUBLISHED FOR PUBLIC COMMENT: RULE 35.

The Reporter informed the Committee that seven written comments had been received on the proposed amendment to Rule 35. He briefly reviewed the history of the pending amendment to the effect that although the restyled Rule 35 was in the process of being approved by the Supreme Court, the Advisory Committee believed it important to move forward with another amendment to Rule 35 that would more clearly spell out the starting point for the 7-day period for correcting a clear error in the sentence. Thus, the proposed new Rule 35(a) includes a definition of "sentencing"—only for purposes of Rule 35. He continued by reporting that the written comments were mixed. The Department of Justice, the Federal Bar Association, the Committee on the U.S. Courts of the State Bar of Michigan, and the NACDL opposed the amendment. On the other hand, the State Bar of California Committee on Federal Courts, the Federal Magistrate Judges Assn., and Judge David Lawson endorsed the amendment.

The Reporter further noted that the public comments opposing the amendment cited concerns about interjecting more uncertainty into the area, leaving open the possibility of the court changing the sentence, and adopting the minority, rather than majority view of the circuit courts that have addressed the issue. At least one commentator noted that the rule as proposed creates a special definition for "sentencing" that normally does not apply to other rules, such as Rule 32 itself. He also reported that those commentators endorsing the

amendment believed that it would clarify an ambiguity in the rule and make it more consistent with Appellate Rule 4.

The Reporter pointed out that, as reflected in the comment submitted by the Department of Justice, the Circuits are split on the question of what the term "sentencing" means in relation to the 7-day rule in Rule 35. The majority view (six circuits) is that the 7-day period is triggered by the oral pronouncement of the sentence. The minority view (one circuit), and the one adopted in the proposed amendment, is that the period commences with the entry of the judgment. He noted that the Committee had opted for the latter position in order to make the rule more consistent with Appellate Rule 4 and any other rules that might specify when the right to appeal is triggered.

Mr. Campbell indicated that he favored a change to the proposed amendment that would substitute the words "entry of judgment" in place "sentencing" throughout the rule. That option, he stated, would avoid the necessity of a separate definitional provision in the Rule. Mr. Elwood stated that the Department of Justice was opposed to the proposed amendment because it interjects yet another delay in the finality of the sentence for purposes of triggering the Rule 35 provisions. He noted that he favored substituting the words "oral announcement" or "oral pronouncement" of the sentence as the preferred language in place of entry of the judgment, which might not actually take place until weeks or perhaps months after the court announces the sentence.

Judges Bucklew and Roll, and Mr. Goldberg indicated that in their experience the entry of judgment usually follows the oral announcement of sentence within a short period of time.

Following additional discussion on whether to use the term "oral announcement" or "oral pronouncement," Mr. Campbell moved that the proposed amendment be changed to the effect that the proposed definitional provision in Rule 35(a) be dropped and that the term "entry of judgment" be used throughout the rule. Mr. Goldberg seconded the motion, which failed by a vote of 4 to 6.

Judge Roll moved that the amendment be revised by dropping the definitional provision in proposed Rule 35(a), and the term "oral announcement" be used throughout the rule and that the rule be forwarded to the Standing Committee for action. Judge Bucklew seconded the motion. Following additional brief discussion, the Committee approved the motion by a vote of 6 to 4. The Reporter responded that he would make the necessary changes in the Rule and the Committee Note and circulate the draft for the Committee's consideration.

V.PENDING PROPOSED AMENDMENTS TO RULES

A. Rule 41. Tracking Device Warrants

Judge Miller, as chair of the Rule 41 Subcommittee, reported that the Subcommittee had agreed on a number of proposed changes to Rule 41 that would address first, the issue of tracking-device warrants and second, delayed notification that a search warrant has been executed.

He provided a brief overview of the proposed changes, noting that the Department of Justice had raised the issue of tracking-device warrants in 1998 and that as a result of that proposal, he had polled magistrate judges on how they were handling those types of searches, in the absence of any guidance in Rule 41 itself. The response indicated that the practice varied throughout the districts. Any proposals to address the issue, however, were held pending the restyling project. He further noted that the issue of delayed notification that warrants had been executed had been addressed in Section 213 of the USA PATRIOT Act and that some amendment to Rule 41 would be appropriate.

Judge Miller reported that the Rule 41 Subcommittee had considered a number of issues in relation to the USA PATRIOT Act. First, it had considered whether Section 209 of the Act, which addresses the ability of the government to access unopened voicemail messages should be addressed in Rule 41. He reported that the Subcommittee recommended that the topic not be included. Second, the Subcommittee had decided not to address Section 216 of the Act, which concerns government's ability to capture certain addressing information from electronic facilities. He noted that such orders were not search warrants covered by Rule 41. And third, the Subcommittee decided not to address Section 220 of the Act, which addresses nationwide service of search warrants for electronic evidence. He noted that the section has a sunset provision of December 31, 2005.

The Committee concurred in the Subcommittee's recommendations not to amend Rule 41 to account for those three new statutory provisions.

Judge Miller also reported that Judge D. Brock Hornby (Chief Judge, D. Maine) had recommended that Rule 41 be amended to permit law enforcement officers to return executed search warrants to the clerk of the court, and not necessarily the issuing judge or magistrate. Judge Miller noted that the issue had been addressed during the restyling project and that the Committee had determined that it was preferable to have the returns made to the magistrate judge designated in the warrant. He also noted that the sense of the Subcommittee was that it would be better to maintain judicial monitoring of the warrants and that requiring the warrant to be returned to a judicial officer would further that interest. Judge Bartle spoke in favor of the proposed change, noting that in practice, warrants are returned to the clerk of the court and not to the issuing magistrate. Following additional discussion by the Committee, it voted 8 to 1 to reject the proposal to amend Rule 41 by requiring the return to be made to the clerk.

Turning to the Subcommittee's proposed amendments to Rule 41, Judge Miller noted that the Subcommittee had proposed that two new definitions for "domestic terrorism," "international terrorism," and "tracking device" be added to Rule 41(a)(2). He also pointed

out the proposed language in revised Rule 41(b)(4) that would explicitly address the authority of a magistrate judge to issue a tracking device warrant. He noted that the proposed amendment would authorize only magistrate judges, and not state judicial authorities, to issue tracking-device warrants. He noted that the Subcommittee believed that because such warrants often include monitoring across state and district lines, it would be preferable to vest that authority in federal judicial officers. Following additional brief discussion, the Committee voted 8 to 0 to adopt the proposed changes.

Professor Stith raised the question whether amendments to Rule 41 concerning tracking-device warrants might supersede other types of searches. The Committee generally agreed that amending Rule 41 would not preclude the development or recognition of others types of searches, not otherwise addressed in Rule 41. Several members noted that the traditional caselaw view is that Rule 41 is not intended to provide an exhaustive list of permissible search warrants.

Judge Miller noted that Subcommittee had decided to amend Rule 41(e)(2) into two main subdivisions, (e)(2)(A), which deals with contents of regular search warrants, and (e)(2)(B), which addresses the contents of tracking-device warrants. The Subcommittee used similar parallel construction in Rule 41(f), concerning executing and returning the warrant. Judge Miller informed the Committee that the Subcommittee had considered several possible alternatives for specifying the length of time a tracking-device warrant might be used and that it had settled on 45 days. Mr. Elwood responded that the Department of Justice would favor using time limits similar to those used in Title III wiretaps. Mr. Fiske agreed with that view. Other members, however, expressed reservations about including the Title III deadlines in Rule 41 and noted that the 45-day limit should normally provide ample time for authorities to install and monitor tracking devices. In addition, the proposed rule permitted officers to seek additional time periods. The Committee rejected the proposal to adopt the Title III time limits, instead of the Subcommittee's 45-day provision, by a vote of 2 to 7.

Discussion on the time limits continued with focus on the 10-day period for installing tracking devices in Rule 41(e)(2)(B)(i). Following additional discussion, the Committee voted 11-0 to amend the proposed rule to provide for 10 calendar days for installation, which would provide ample time for installation.

Several members raised the question whether in light of the time requirements, AO Form 93 was still correct. Mr. MaCabe indicated that those forms are the responsibility of the Director of the Administrative Office and they could be conformed to meet the Rule's requirements.

Judge Miller continued by pointing out that the Subcommittee had suggested a major revision of Rule 41(f) to accommodate the differences in regular warrants and warrants for tracking devices. Following discussion, the Committee agreed to provide in Rule 41(e)(2)(A) that the officer executing the warrant should be required to note on tracking-device warrants the date the device was installed, and the periods during which the device

was used. The Committee also agreed to the Subcommittee's proposed amendments for serving a tracking device warrant on the person who was tracked or whose property was tracked.

Finally, Judge Miller pointed out that the Subcommittee had recommended that Rule 41(f)(3) be added to the rule. That provision, which is co-extensive with Section 213 of the USA PATRIOT Act, permits a judge (including a state judicial officer) to grant a delay for any provision in Rule 41. The Committee discussed the question of whether that provision would extend only to the "sneak and peek" searches. There was general agreement that it was not so limited.

In that regard, Mr. Pauley urged the Committee to reconsider its decision not include amendments to Rule 41 that would provide explicitly for covert, or sneak and peek, searches. He pointed out that there was caselaw supporting such searches. Judge Miller responded that following the comment period for a proposed amendment in 2001 that would have addressed such searches, the Subcommittee had decided not to address that topic, given the great difficulty in addressing the variety of questions and objections to any attempt to include coverage of those searches in Rule 41. The Subcommittee had decided to recommend that the issue be left with any developing caselaw.

Following additional discussion on proposed changes to the proposed Committee Note, Judge Miller moved that the proposed amendments to Rule 41 be approved and forwarded to the Standing Committee with a recommendation that they be published for public comment. Judge Bucklew seconded the motion, which carried by a vote of 12-0.

B. Rules Governing § 2254 and § 2255 Proceedings

1. Consideration of Substantive Issues

Judge Trager, chair of the Habeas Rules Subcommittee, reported that the Subcommittee had considered style and substantive amendments to the Rules Governing § 2254 and § 2255 Proceedings. He began the discussion by noting that the Subcommittee had considered several substantive issues that might change current practice. First, he noted that the Subcommittee had addressed the issue of handling defective petitions or motions. He pointed out that before the Antiterrorism and Effective Death Penalty Act of 1996, defective petitions and motions were rejected and returned to the petitioner or moving party. That Act, however, created a one-year statute of limitations and thus if a court rejects a petition or motion because it does not conform to the rules, may penalize the person. Thus, the Subcommittee proposed eliminating Rule 2(e) of the § 2254 rules and Rule 2(d) of the § 2255 rules, and including a new provision in Rule 3 of each of those rules that would parallel Rule 5 of the Federal Rules of Civil Procedure and require the clerk to file such papers, even if they were in some way defective. If the papers are defective, the Subcommittee envisioned that the court would direct the petitioner or moving party to correct the deficiencies.

The Committee agreed with the Subcommittee's recommendations concerning Rule 2.

Second, Judge Trager stated that the Subcommittee had discussed whether Rule 9(a) of both the § 2254 and § 2255 rules was still necessary; that rule, he explained, addressed the issue of delayed petitions and motions. He noted that it was the view of some members that that rule no longer has any viability in light of the one-year statute of limitations. Judge Miller stated that the original position of the Subcommittee (in 1998) that the provisions might still have some utility for any petitions still pending in the state court systems. Following additional discussion, Judge Bartle moved that Rule 9(a) be deleted. Judge Miller seconded the motion, which carried by a vote of 10-0, with one abstention.

Third, Judge Trager noted that the Subcommittee had discussed whether Rule 5 of the rules should include a specific reference for replies from the petitioner or moving party to the government's response. He noted that in some districts, the court permits the petitioner or moving party to file a reply, particularly in those cases where they may have a response to the government's claim that a statute of limitations or exhaustion of remedies claim bars the petition or motion. To address that issue, he noted that the Subcommittee had proposed the addition of new Rule 5(e). Judge Bucklew observed that this would certainly be a substantive change to the rules, but noted that the petitioner and moving party should be provided with that opportunity. Following additional discussion, Judge Trager moved that new Rule 5(e), which addressed replies from petitioners and moving parties, be added to Rule 5. Judge Bartle seconded the motion, which carried by a vote of 12-0.

Fourth, Judge Trager informed the Committee that the Subcommittee had discussed the issue of what information, regarding exhaustion of remedies, etc., should be required on the habeas forms and what information should be explicitly required by the rules themselves. Judge Trager moved that the requested information should be placed on the forms, and not in the rules. Judge Miller seconded the motion, which carried by a vote of 11-0.

Fifth, Judge Trager noted that the Subcommittee had considered whether to reference specifically § 2241 petitions in the rules and that it had decided not to do so.

Finally, he informed the Committee that the Subcommittee had considered whether to attempt to blend the two sets of rules into one combined set of rules. Judge Miller had attempted to do so and concluded that doing so would not be feasible, given the differences in the rules and key terminology.

The Committee generally concurred in those proposals.

2. Consideration of Proposed Style Changes to Rules

Judge Trager informed the Committee that Professor Kimble and Mr. Spaniol had prepared the initial "style" draft of the rules, which had in turn had been assigned to individual members of the Subcommittee. The Committee considered each rule for § 2254 and § 2255 Proceedings in tandem. (The titles of the Rules in these minutes are as they appear currently).

Rule 1. Scope of Rules. Judge Miller informed the Committee that the Subcommittee had made several style changes to Rule 1 for both sets of Rules. The Committee approved the changes.

Rule 2. Petition (Motion). Judge Miller pointed out the style changes to Rule 2 for both sets of Rules. As previously discussed, the Committee deleted Rule 2(e) in the § 2254 Rules and Rule 2(d) in the § 2255 Rules, dealing with the court's return of an insufficient petition or motion. The Committee also deleted the language in current Rule 2(c), which requires the petitioner or moving party to specify all grounds for possible relief, including those that should have been known or reasonably known by the petitioner or moving party; members of the Committee believed that this language was probably unnecessary in light of the AEDPA. The Committee also modified the language in the rule that currently requires that the papers be signed personally by the petitioner or moving party under penalty of perjury; the Committee recognized that § 2242 permits someone representing the petitioner or moving party to sign the document. Following discussion, the Committee approved the proposed changes by a vote of 12-0.

Rule 3. Filing Petition. Judge Miller pointed out that the Subcommittee had proposed that the Committee include a new provision in Rule 3(b) that would require the clerk to accept an otherwise insufficient petition or motion and that it use language similar to that found in Federal Rule of Civil Procedure 5. He also pointed out that the Subcommittee had recommended adding a new Rule 3(c), that would call attention to the one-year statute of limitations; in the § 2254 Rules the cite is to § 2244(d) and in the § 2255 Rules the reference is to § 2255, para. 6. The Committee also discussed a new provision, Rule 3(d) that spells out when a paper filed by an inmate, using an institution's internal mailing system, is considered to have been filed. Following additional discussion on the proposed changes to Rule 3, the Committee approved them.

Rule 4. Preliminary Consideration by Judge. Professor King explained the Subcommittee's proposed changes to Rule 4. During the discussion, the Committee agreed to change the Rule to require that the court "serve" the petition or motion on the appropriate parties in § 2254 proceedings, rather than requiring in all cases that certified mail be used to accomplish the delivery of those documents. Judge Bartle also pointed out that the rule currently requires that the petition in § 2254 proceedings be served on the Attorney General of the State, when the actual practice in some states might be to serve some other official. The Committee changed the proposed amendment to permit service on the Attorney General, or another appropriate state officer. The Committee discussed whether to retain word "promptly" and ultimately decided to leave it in the Rule.

Rule 5. Answer; Contents. Professor King pointed out the Subcommittee's proposed style amendments to Rule 5. The Committee approved changes to Rule 5 for § 2254 proceedings that would require the respondent to supply the court with copies of any briefs it had submitted to an appellate court, and any opinions and dispositive orders from that appellate court.

Rule 6. Discovery. Professor King explained the minor style changes proposed by the Subcommittee; the Committee approved the changes.

Rule 7. Expansion of Record. Mr. Elwood pointed out the Subcommittee's minor style changes to the rule, which included moving the text of Rule 7(d) to revised Rule 7(a). The Committee approved the changes.

Rule 8. Evidentiary Hearing. Mr. Elwood explained the Subcommittee's proposed style changes to Rule 8, including substitution of the word "serve" in place of "certified mail."

Rule 9. Delayed or Successive Petitions (Motions). Mr. Campbell explained the proposed style changes to Rule 9. In particular he pointed out that the proposed revised rule specifically referenced the need to obtain approval from the appropriate court of appeals, a requirement imposed by the AEDPA. Judges Carnes and Trager raised the question about including a provision in Rule 9 to address the situation where a court recharacterizes a post-trial filing as a § 2255 motion, with or without notice to the moving party. Judge Carnes noted that several cases require the court to first notify the moving party that such recharacterization may prevent further filings which would become successive motions. Professor King suggested that if an amendment was in order, perhaps it should go in Rule 1. Several members raised the question about the content of such warnings or advice; eventually a consensus emerged that the issue should be left, for now, to further caselaw developments. Mr. Campbell raised the question whether the rule should address the situation where only a portion of the petition or motion could be dismissed on grounds that the petitioner or moving party had not exhausted all claims. The Committee decided not to include language about that issue.

Rule 10. Powers of Magistrate. Mr. Campbell noted the minor style suggestions to Rule 11, which were approved by the Committee.

Rule 11, § 2254 Proceedings. Applicability of Rules of Civil Procedure. The Committee approved the minor style changes to Rule 11, for § 2254 Proceedings.

Rule 11, § 2255 Proceedings. Time for Appeal. The Committee approved the minor style suggestions proposed by the Subcommittee.

Rule 12, § 2255 Proceedings. Applicability of Rules of Civil Procedure and Rules of Criminal Procedure. The Committee approved the minor style changes to Rule 11 of the § 2255 Rules.

Judge Carnes indicated that the Rules and accompanying forms would be presented to the Standing Committee with a view toward requesting that they be published for comment.

C. Other Proposed Amendments to Rules

1. Rule 12.2. Notice of Insanity Defense; Mental Examination

Judge Carnes stated that Mr. Pauley had written to the Committee suggesting that the revised Rule 12.2, currently pending before the Supreme Court, was missing a sanction provision for those cases where the defense fails to disclose the results of a mental examination conducted by the defense expert. Following additional brief discussion, Judge Carnes indicated that the matter would be placed on the agenda for the Committee's Fall 2002 meeting and he asked the Reporter to draft appropriate language for a possible amendment to Rule 12.2.

2. Rule 16; Discovery and Inspection

The Reporter indicated that Mr. Carl Peterson, an attorney practicing in New York City, had suggested an amendment to Rule 16 that would require the government to disclose automatically the identity of any government expert, in the same manner as that provided for in the Civil Rules. The Committee briefly discussed the proposal and decided to take no further action.

3. Rules 29, 33, and 34; Proposed Amendments re Rulings by Court

Judge Friedman discussed his proposed amendments to Rules 29, 33, and 34 concerning the 7-day time limit for filing motions filed under those rules, or obtaining from the court, within that same 7-day limit, a fixed deadline for filing a motion under those rules. He explained that the case might arise where the defendant files an extension of time within the 7 days but due to the judge's illness or absence, the judge does not, within the 7-day limit, extend the deadline. He noted that at least one Circuit had ruled that the 7-day limit is jurisdictional and that in those cases, through no fault of the defendant, the defendant is not permitted to file a late motion.

Mr. Elwood stated that he believed that that would be the exceptional case and Judge Trager observed that if the defendant was barred from filing a motion under one those three rules, the defendant could still file a § 2255 motion and seek relief. Judge Bartle noted that

in those cases there is no real prejudice because the defendant can raise the issue on appeal. And the Reporter observed that amending the Rules to address that situation might simply create another set of problems. Following additional discussion, Judge Friedman moved that Rules 29, 33, and 34 be amended to remove the requirement that the judge rule on a request for an extension of time within the 7-day time limit. Mr. Fiske seconded the motion, which carried by a vote of 10-2. Judge Carnes stated that the matter would be placed on the Committee's Fall 2002 meeting for a decision about the language to be used.

4. Rule 32. Sentencing; Issue of Finality.

The Reporter stated that Judge D. Brock Hornby had proposed an amendment to Rule 32 that would address the question of when a sentence is final where the court imposes forfeiture as part of the sentence but the actual amount is not set until later. Several members noted that the issue was probably addressed in 18 U.S.C. § 3664(d)(5). Judge Friedman suggested that amending Rule 32 might create a new set of problems; other members noted the interlocking issues of utilizing the statute, Rule 32 as written, and notices of appeal. Other members observed that they did not believe that there was uncertainty in the existing procedural rules. Following additional discussion, the Committee agreed to take no further action on the proposal.

5. Rule 32.1. Revoking or Modifying Probation or Supervised Release

Judge Carnes noted that he had provided the Committee with a copy of *United States v. Frazier*, ____ F.3d _____ (11th Cir. 2002), where the court noted that there is no explicit provision in Rule 32.1 for the defendant's right to allocution; he pointed out that the court had recommended that the Advisory Committee might wish to address that issue. Following additional discussion, Judge Bartle moved that Rule 32.1 be amended to include a right to allocution. Judge Roll seconded the motion, which carried by a vote of 12-0. Judge Carnes indicated that the language effecting the amendment would be on the agenda for the Committee's Fall 2002 meeting.

6. Proposed Rule Regarding Appeal of Rulings by Magistrate Judges

Judge Tashima discussed his proposal that the Committee consider adding a new rule to the Rules of Criminal Procedure that would parallel Rule of Civil Procedure 72(a). That rule addresses what counsel must do to preserve an issue for appeal from a magistrate judge's rulings on nondispositive, pretrial matters. He noted that issue had been raised in *United States v. Abonce-Barerra*, 257 F.3d 959, 969 (9th Cir. 2001), in which the court noted the absence of such a rule and concluded that in criminal cases, unlike civil cases, a defendant is not required to appeal a magistrate judge's decision to the district judge in order to preserve the matter for appeal.

Judge Miller reported that he had polled fellow magistrate judges and that there was no record of this ever being an issue. He supported a possible amendment, however. Following additional discussion, Judge Miller moved that the Committee consider an amendment to the Rules; Judge Roll seconded the motion, which carried by a vote of 11 to 1. Judge Carnes indicated that the matter of the language to be used for the amendment would be placed on the agenda for the Fall 2002 meeting.

7. Miscellaneous Proposed Amendments to Rules

Judge Carnes pointed out that Mr. Pauley had written an extensive memo to the Committee setting out a variety of proposals. He indicated that although some of the issues had already been discussed, the Committee might wish to consider others.

The Reporter briefly discussed each of the proposals, or categories of proposals. First, Mr. Pauley had identified several rules that may need to be amended to address international criminal activity—Rules 4, 5, 6, and 41. The Reporter observed that the Committee had actually accomplished some of those points, especially with recent amendments to Rules 6 and 41.

Second, the Reporter pointed out that Mr. Pauley had noted that the development of DNA evidence may support another global review of the rules. For example, he raised a number of questions about whether the current rules would permit an indictment of a yet unknown defendant who can be identified only by DNA evidence, in order to toll the statute of limitations. Another example is the possible relationship between Rule 33 (New Trial) and the Innocence Protection Act.

Third, Mr. Pauley had identified lingering issues that the Committee may wish to consider, i.e., the issue of intra-Departmental access to grand jury information for purposes of civil enforcement in Rule 6 and addressing the issue of equalizing the number of peremptory challenges in Rule 24.

Fourth, the Reporter noted that Mr. Pauley had suggested that the Committee reconsider the issue of whether the court in conducting a plea colloquy under Rule 11 should be required to apprise the defendant, who is an alien, about possible adverse immigration consequences following a guilty or nolo contendere plea.

Fifth, Mr. Pauley had offered additional views in support of adopting language (or a new rule) on the subject of covert searches and suggests that the Committee may wish to visit the issue of authorizing judges to issue warrants for persons or property "within or outside" the district. The Reporter indicated that the Committee had already addressed that point, at least with regard to terrorist activities and with regard to tracking-device warrants.

Finally, Mr. Pauley had offered a list of miscellaneous matters that may deserve attention; whether to adopt a new general rule regarding waiver vis a vis consent;

clarifying language in Rule 1 concerning the ability of a "judge" to act; and in Rule 16, extending the due diligence requirement to the subsection dealing with disclosure of documents and tangible evidence. Judge Carnes observed that some of those issues had been debated at length in the past, in particular the definition of "judge" in the Rules.

Following brief discussion on these items, Judge Carnes asked for and received a consensus that the proposals be tabled and that if any member wished to formally propose any particular amendment, after further considering any of Mr. Pauley's proposals, to contact him or the Reporter so that the proposal could be placed on the agenda for the Fall 2002 meeting.

VI.OTHER RULES AND PROJECTS PENDING BEFORE ADVISORY COMMITTEES, STANDING COMMITTEE AND JUDICIAL CONFERENCE

Judge Carnes informed the Committee that it had been requested to review model local rules concerning electronic filings in criminal cases. He indicated that last year, a subcommittee of the Committee on Court Administration and Management (CACM) developed a model local rule for accepting electronic filings in civil cases. The Judicial Conference ultimately approved that rule. Now, he said, it appeared that some courts will be able to accept electronic filings in criminal cases in the very near future and that the chair of CACM, Judge John Koeltl (S.D.N.Y) has offered suggested changes to the existing model local rule to accommodate criminal cases. The revised rule had been forwarded to Judge Fitzwater, chair of the Technology Subcommittee of the Committee on Rules of Practice and Procedure who in turn has asked the members of that subcommittee to review the attached draft and offer any comments or suggestions to Judge Koeltl.

Judge Carnes added that in the anticipation that a model local rule will be submitted, eventually, to the Judicial Conference, the Committee should review the enclosed draft and offer its views, suggestions, or comments on the proposed rule. He called on Ms. Nancy Miller, of the Administrative Office, who had been working on the issue, to provide additional background information about the proposed model rules.

The Committee held an extended discussion on what, if any, special problems might arise with electronic filings in criminal cases. Several members were of the view that anything signed by the defendant should be filed in its original form and not electronically. Others noted that a scanned document, electronically transmitted might meet that requirement. Ms. Laurel Hooper informed the Committee that some counsel are using that method to transmit documents to the courts involved in the pilot programs. That in turn lead to a discussion about what documents should be original or scanned, when they are filed.

There was also discussion about the ability of the parties themselves and the public to gain access to criminal court records. Ms. Miller pointed out that the current

system was to permit counsel to obtain access, including counsel for co-defendants. The courts were maintaining a private docket and a public docket; thus, although the public could obtain access electronically to certain filings, others were placed on the private docket of filings and were not generally available to the public.

Mr. Rabiej pointed out that the proposed local rules were designed to provide only preliminary guidance to the courts that wished to experiment with electronic filings in criminal cases. After they have used the system, he anticipated that further changes would be made to the model local rules.

Judge Trager observed that the Committee should not place too rigid limits on the ability of the courts to experiment with electronic filing. Following further discussion, Judge Friedman moved that the Committee recommend that all charging documents be filed in their original form and that everything signed by the defendant could be filed in the original or in scanned format, at the discretion of the court. Judge Miller seconded the motion, which carried by a vote of 10-2.

VII.DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee tentatively agreed to hold its next meeting on September 26 to 27, 2002 in Maine, depending on availability of accommodations.

Respectfully submitted

David A. Schlueter
Professor of Law
Reporter, Criminal Rules
Committee