ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
April 25, 2013, Durham, North Carolina

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met in at Duke Law School in Durham, North Carolina on April 25, 2013. The following persons were in attendance:

Judge Reena Raggi, Chair
Carol A. Brook, Esq.
Judge Morrison C. England, Jr.
Kathleen Felton, Esq.
Mark Filip, Esq. (by telephone)
Chief Justice David E. Gilbertson
James N. Hatten, Esq.
Judge John F. Keenan
Judge David M. Lawson
Professor Andrew D. Leipold
Judge Donald W. Molloy
Judge Timothy R. Rice
John S. Siffert, Esq.
Jonathan Wroblewski, Esq.
Judge James B. Zagel
Professor Sara Sun Beale, Reporter
Professor Nancy King, Reporter

Judge Jeffrey Sutton, Standing Committee Chair
Professor Daniel Coquillette, Standing Committee Reporter
Judge Marilyn L. Huff, Standing Committee Liaison
Judge Richard C. Tallman, Former Advisory Committee Chair

The following persons were present to support the Committee:

Laural L. Hooper, Esq.
Jonathan C. Rose, Esq.
Benjamin J. Robinson, Esq.

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Raggi introduced new members Mark Filip (who participated by telephone) and John S. Siffert. She also thanked Judge Richard Tallman, the former chair of the Committee, for attending. Judge Tallman played a critical role in the development of the proposed amendment

to Rule 12.

Judge Raggi noted that the Department of Justice recently conferred significant honors on Jonathan Wroblewski and Kathleen Felton. Mr. Wroblewski received the John C. Keeney award for Exceptional Integrity and Professionalism. Ms. Felton received the most prestigious award given by the Criminal Division, the Henry E. Peterson Memorial Award, in recognition of her "lasting contribution to the Division." Judge Raggi congratulated Mr. Wroblewski and Ms. Felton, and thanked them for their exceptional contributions to the Committee's work. Judge Raggi also noted with regret Ms. Felton's plan to retire before the next meeting of the Committee.

B. Review and Approval of Minutes of April 2012 Meeting

A motion to approve the minutes of the April 2012 Committee meeting in San Francisco, California, having been moved and seconded:

The Committee unanimously approved the April 2012 meeting minutes by voice vote.

C. Proposed Amendments Approved by the Supreme Court for Transmittal to Congress

Judge Raggi reported that the following proposed amendments, approved by the Supreme Court and transmitted to Congress, will take effect on December 1, 2013, unless Congress acts to the contrary:

Rule 11. Advice re Immigration Consequences of Guilty Plea.

Rule 16. Government Disclosure: Proposed technical and conforming amendment.

III. CRIMINAL RULES ACTIONS

A. Proposed Amendments to Rules 12 and 34

Judge Raggi noted that the main work before the Committee was consideration of Rules 12 and 34. Because the proposed amendments have such a lengthy history and the materials in the agenda book were voluminous, Judge Raggi asked the Reporters to begin with a summary of the history of the proposal.

Professors Beale and King stated that following the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), in 2006 the Department of Justice asked the Criminal

Rules Committee to consider amending Rule 12(b)(3)(B) to require defendants to raise *before trial* any objection that the indictment failed to state an offense by eliminating the provision that required review of such a claim even when raised for the first time after conviction. (In the remainder of these minutes, failure to state an offense will be referred to as FTSO.) At the urging of members of the Advisory Committee and at the Standing Committee, the proposal evolved and expanded over the course of eight years to address other features of Rule 12's treatment of pretrial motions in general.

As published, the proposed amendment:

- stated that the requirement that certain claims and defenses be raised before trial applies only if the basis for the motion is "reasonably available" before trial;

- enumerated the common types of motions that courts have found to constitute defects "in instituting the prosecution" and "in the indictment or information" that must be raised before trial;

- included FTSO among the defects "in the indictment or information" that must be raised before trial; and

- clarified the general standard for relief from the rule that late-filed claims may not be considered, resolving confusion created by the non-standard use of the term "waiver" to reach situations in which there was no intentional relinquishment of a known right.

Judge Raggi noted that she had encouraged the defense bar to review the published amendment, and that the Committee had received thoughtful extended comments that were extremely helpful. The Reporters then drew the Committee's attention to the various issues raised in the public comments, particularly the concerns raised by the defense bar.

To consider the issues raised in the public comments the Rule 12 Subcommittee met in person in San Francisco and held numerous additional meetings by telephone. Judge Raggi thanked the Subcommittee for its extraordinary efforts, and asked Judge England, the Subcommittee chair, to give an overview of the Subcommittee's proposal for amendment as revised following publication.

Judge England prefaced his presentation by noting that, in contrast to earlier proposals for amendment of Rule 12, which had passed the Subcommittee by divided votes, the proposal he would now present had been approved by the Subcommittee unanimously. The proposed amendment would increase the clarity of guidance provided by Rule 12 to both courts and practitioners by listing the common motions that must be raised before trial and delineating the standard of review for late-raised claims. For claims other than FTSO, the proposed standard

was cause and prejudice. For FTSO, the recommended standard was prejudice alone. The Subcommittee also concluded that the district courts needed to have significant discretion to handle claims in the period before trial, and it added language to make that clearer. Finally, at the urging of Judge Raggi, the Subcommittee reconsidered features of the proposed rule that applied the standards for late-raised claims to appellate courts. The Subcommittee ultimately agreed it was best not to try to tie the hands of the appellate courts. Accordingly, it agreed to delete from the proposed rule the statement that Rule 52 does not apply. This would allow the appellate courts to determine whether to apply the standards specified in Rule 12(c) or the plain error standard specified in Rule 52 when untimely claims are raised for the first time on appeal.

When Judge England completed his presentation of the Subcommittee proposal, Judge Raggi agreed that the proposed rule provides greater clarity in identifying motions that must be filed before trial. She also noted that proposed 12(c)(2) gives district judges the needed flexibility to consider untimely motions and claims raised before jeopardy attaches, which could have the practical advantage of minimizing later claims of ineffective assistance of counsel. The proposed amendments also clarify that if the circumstances giving rise to a claim or defense identified in Rule 12(b)(3) are not known before trial, no pretrial motion is required. At that point, Judge Raggi invited Subcommittee members to add their views.

Speaking individually, Subcommittee members agreed that the proposed amendment reflected compromise. Nevertheless, the proposed rule was a considerable improvement over the current one. A defense representative noted that some features of the proposed rule might not benefit defendants in particular cases, but she voiced strong support for retaining the prejudice-only standard for late-raised FTSO claims and the abundant discretion afforded to trial judges. A judge characterized the Subcommittee proposal as a "delicate but exquisite compromise," and he noted that like Civil Rule 12 it "clears the decks before trial" and affords the trial judge abundant discretion to do substantial justice. Representatives of the Department of Justice noted that they began with a narrow policy-based proposal to require FTSO claims to be raised before trial, so that errors would be raised promptly and rectified. However, if the charging document did not give the defendant notice, and he could show prejudice, the Department has always agreed that relief should be afforded. The current proposal also clarifies what claims must be raised before trial, provides substantial discretion to the district judge before the jury is sworn, eliminates the term "waiver," and bifurcates the standard for late-raised claims, providing for cause and prejudice (a clarification of what the law currently is) for all claims except FTSO, for which prejudice alone is sufficient. In resolving conflicts that had developed in the lower courts, the proposal used terms that had been litigated and defined in the case law.

Judge Raggi noted that the proposal raises two different standard of review questions, because it:

(1) changes "good cause" to "cause and prejudice" in order to reflect the interpretation given by most courts, and

(2) provides a different standard, "prejudice," for late raised FTSO claims.

Following *Cotton*, many appellate courts are now applying plain error to FTSO claims raised for the first time on appeal, and Judge Raggi said she had urged the Subcommittee to consider whether it was desirable to mandate the prejudice standard for late-raised FTSO claims on appeal.

Judge Raggi then opened the floor for general discussion by all committee members. A member asked the purpose of limiting the motions that must be raised before trial to those where the basis is "*reasonably* available." The Reporters and Subcommittee members explained that "available" appears to be a binary factual concept: information was or was not available. In contrast, "reasonably available" includes both this factual component and a qualitative judgment. For example, if the information necessary to raise the motion was included on one page of a massive data dump only one day before the date for filing pretrial motions, it might be deemed available in a factual sense, but not reasonably available. The requirement that a motion "must" be raised before trial applies only if the basis for the motion was "then reasonably available." This allows the defense to argue that, given the circumstances, it was not reasonable to expect a claim or defense to be raised. If the court determines that the basis for the motion was not reasonably available, then proposed Rule 12(b)(3) does not require the motion to be raised before trial. Therefore a later motion would <u>not</u> be untimely under Rule 12(c), and there would be no need to show good cause.

A defense member expressed a variety of concerns with the proposed amendment. First, he argued, the proposal shifts the burden of proof/burden of production by requiring the defense to raise certain "defenses" before trial. But the law generally permits the defense to remain silent and not to assert defenses before trial. For example, in the Third Circuit a statute of limitations defense is timely whether raised before trial, during trial, or at the time of jury instructions. The defendant can wait until the government rests, and then raise its claim that the government has not proven conduct that occurred within the limitations period. In the member's view, requiring this issue to be raised before trial would be a radical change. It would alert the prosecution to the problem. The proposal may also work a change for other claims or defenses. For example, even if some circuits require venue to be raised before trial, the matter may be open in other circuits. In some cases, it may also be to the advantage of the defense not to raise selective or vindictive prosecution before trial, because the government might change its presentation of the case. The member noted that requiring such defenses to be raised before trial may be efficient, but efficiency is not the concern of the defense. In some cases it might also be problematic for the defense to raise multiplicity before trial. These are not merely procedural issues. They are defenses. A defendant has a constitutional right to remain silent, and the government has the

burden of proof. Finally, he expressed concern about the uncertainty created by the new standard "reasonably available." There will be substantial litigation about what the defendant should have known. What if the defendant gets a gigabyte of data one year before trial? The member proposed as an alternative that claims must be raised before trial only when the defense has "actual knowledge." And even that would not solve the problem with shifting the burden of proof, especially for venue and statute of limitations.

Judge Raggi asked the member who first raised the issue of "reasonably available" if he was satisfied with the explanations. He responded that he now understood the rationale for including the word and the issues it would generate.

Judge Raggi then asked for any other concerns about the rule, so that the Subcommittee could respond to all of the issues. One member asked what kind of error could occur in a preliminary hearing, and given grand jury secrecy, how would a defendant know before trial that an error had occurred. Another participant asked why the Subcommittee proposed to substitute "cause and prejudice" for the traditional "good cause." Judge Raggi noted that Judge Sutton had also raised that issue, and asked him for his comments on the proposed amendment.

Judge Sutton noted that he was relatively new to Rule 12. He thanked the Committee for its extensive work on the proposal and expressed his sense that after eight years it was very important to complete the project. He identified a number of strengths of the proposal. First, it is valuable to clarify what issues must be raised before trial. Second, it is imperative to get rid of the term "waiver" in Rule 12(e). The current language was drafted before the Supreme Court clarified the distinction between waiver and forfeiture, and it makes no sense now. Giving district judges more flexibility before trial is very important. It's becoming clearer that this is a rule addressed to the district courts, which he characterized as positive.

Judge Sutton also provided perspective on the Supreme Court's role in the rulemaking process. Although the Court has the authority to approve rules over the dissent of a justice, under Chief Justice Roberts unanimity has been required. So rules must, in effect, be approved by all nine justices. With that in mind, Judge Sutton agreed that it was appropriate to omit double jeopardy from the non-exhaustive list of claims that must be raised before trial. But given the agreement that the word "waiver" should be eliminated, why not substitute "forfeiture"? Finally, he predicted that there would be a lot of push back on the proposed change from "good cause" to "cause and prejudice." "Good cause" is a well established concept, and it gives the court wide discretion. Prejudice is part of that traditional enquiry. But when you codify a standard, it ordinarily carries with it the meaning it has developed. Because "cause and prejudice" is now the standard in habeas litigation, its meaning in that context (including the exception for actual innocence) could carry over to Rule 12.

Judge Tallman explained that you could say the original rule was drafted, at least in part,

on the erroneous assumption that failure to state an offense was a jurisdictional error. *Cotton* then made it clear that failure to state an offense is not jurisdictional. In response to the concerns raised by the defense member, Judge Tallman noted that the proposal does reflect a policy judgment that the rules should discourage sandbagging. It does attempt to flush out issues that could be dispositive, which from the court's perspective should be raised early for effective case management. It may require the defense to play a card earlier than it wishes, but it does not require the defense to come forward with evidence. As an appellate judge, he shared some of the concerns that using "cause and prejudice" in Rule 12 could import some of the habeas case law. But trial judges understand "good cause." Finally, he noted that all of the issues raised at the meeting had been thoroughly vetted on multiple occasions. He commended the latest proposal as a very good rule and one that was a significant improvement over current Rule 12. The Supreme Court has now clarified the distinction between jurisdictional issues and merits claims, and there's no reason to allow sandbagging on non-jurisdictional issues.

Judge Raggi noted that the speakers had raised concerns about four main aspects of the Subcommittee's proposed rule:

(1) "then reasonably available";
(2) items on the enumerated list of claims (particularly statute of limitations);
(3) substituting "forfeiture" for "waiver"; and
(4) substituting "cause and prejudice" for "good cause."

She declared a break in the meeting and asked the Subcommittee to use the time to consider its response to these concerns and report back to the full Committee.

Following the break, Judge England announced the Subcommittee's views on the issues identified by Judge Raggi. In all cases, the Subcommittee was unanimous.

(1) The Subcommittee reaffirmed its strong support for "then reasonably available."
(2) The Subcommittee agreed that it would be acceptable to remove statute of limitations from the list of claims that must be raised before trial.
(3) The Subcommittee rejected the proposal to substitute "forfeiture" for "waiver" in subdivision (e).
(4) The Subcommittee agreed to retain "good cause" rather than "cause and prejudice."

He noted if the Committee as a whole endorsed this approach, it would be necessary to rework the language to incorporate "good cause." Members then explained the Subcommittee's views.

(1) <u>"then reasonably available"</u>

The Subcommittee was unanimous in the view that the qualifier "then *reasonably*

available" should be retained. The mandate of the rule (and the potential sanction) should be restricted to cases in which the court finds the basis of the defense was "reasonably" available. This is very important from the defense perspective, and it gives appropriate flexibility to the court.

A question arose as to whether the Committee Note could be used to clarify the meaning of "reasonably" in this context. Professor Coquillette reminded everyone that Committee Notes cannot be used to change the meaning of the rule. Professor Beale noted that as published the proposed Committee Note included the following:

> The "then reasonably available" language is intended to ensure that a claim a party could not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(3) and (4). Cf. 28 U.S.C. § 1867(a) & (b) (requiring claims to be raised promptly after they were "discovered or could have been discovered by the exercise of due diligence").

She stated that the Cf. citation had been added only to provide an illustration of the kind of analysis that courts might undertake. Although the note could not properly be used to narrow or restrict the rule itself, there was general agreement that it would be beneficial to delete the Cf. citation.

Discussion focused on the effect of including the word "reasonably." A member stated that even if the word reasonably were omitted courts might nonetheless read in the same concept. Another member responded that it was nonetheless desirable to include the word in the text. Judge England observed that on the facts of any given case courts might disagree about what is reasonable, but that's inevitable. A member commented that judges already disagree about when a witness is "available." On his court, for example, the judges disagree about whether soldiers serving in Afghanistan are "available," depending on their view of the efficacy of video technology. The Reporters noted that inclusion of the "reasonably available" criteria is important because it short circuits the analysis: unless the basis for a late-filed motion was reasonably available, there is no need to show either cause or prejudice. Professor King also pointed out that inclusion of the word "reasonably" had been praised by defense commentators, and its deletion might be understood to make the rule significantly harsher. On this view, deletion might require republication.

A member sought clarification of who bore the burden of establishing that the basis for a motion was reasonably available. Several members expressed the view that the government would have this burden because it would be seeking to bar the claim or defense as untimely. In contrast, if the basis for the motion was reasonably available and the motion was thus untimely, the defense would have the burden of showing good cause. The chair and members discussed the possibility of adding a discussion of this issue to the Committee Note, but no action was taken

on this point.

(2) changes to the list of enumerated claims

Professor King explained the Subcommittee's willingness to delete statute of limitations from the list of claims which must be raised before trial. The Subcommittee had previously agreed to remove double jeopardy from the list, and it agreed to treat statute of limitations in the same way. Professor King noted that the 1944 Committee Note had described both double jeopardy and statute of limitations as defenses that need not be raised before trial. The Subcommittee's preference was to add both to the list of defenses that must be raised before trial with the understanding that other aspects of the rule – the limitation to motions for which the basis was "then reasonably available" which "can be determined without a trial on the merits" – would respond to the relevant concerns. However, the Subcommittee was amenable to deleting statute of limitations from the list of claims. The list is illustrative, not exhaustive. Many but not all courts now treat both double jeopardy and statute of limitations as defects in the indictment or institution of the prosecution that must be raised before trial, and deleting these claims from the rule simply allows the case law to continue to develop. Although the Subcommittee would prefer to clarify the law and bring about uniformity, the members agreed to delete both double jeopardy and statute of limitations in the interest of achieving the broadest support for the proposed amendment.

The member who had previously enquired about the inclusion of errors in the grand jury and preliminary hearing indicated that he was satisfied that there were rare instances in which such claims could be raised and determined before trial.

(3) substitution of "forfeiture" for "waiver"

The Subcommittee unanimously rejected the suggestion to substitute "forfeiture" for "waiver" in subdivision (e). Judge Raggi noted that she had discouraged the use of the term "forfeiture" because it was the language of appellate courts, and the rule was principally directed at the district courts. Looking ahead to the question how this might be viewed by the Supreme Court, she observed that the portion of the rule that included the "waiver" language when the Court decided *Cotton* was being eliminated. The new provisions on relief were part of a comprehensive revision of Rule 12. Judge Sutton stated he was satisfied with the explanation that "forfeiture" was principally an appellate standard, and it was not desirable to import that into the rule. Judge Tallman indicated that the disagreement in the application of forfeiture in the appellate cases was another reason not to import that phrase into the rule. Finally, Judge Raggi noted that forfeiture is generally associated with the plain error standard, not the good cause/cause and prejudice standards.

(4) retention of "good cause"

The Subcommittee also agreed to retain "good cause" (the term in the present rule) rather than "cause and prejudice" (the phrase substituted in the amendment published for public comment). The Subcommittee concluded that retaining the familiar "good cause" standard would assuage concerns that habeas case law would be imported into Rule 12, garner support in the Standing Committee, and avoid problems when the proposal is transmitted to the Supreme Court. Again, in a cost benefit calculus, the benefit of clarification was outweighed by the problems that might be caused. The Subcommittee noted, however, this change would require some additional revisions to the text. Judge Raggi deferred discussion of any changes in the language to accommodate "good cause." If the Committee approved the proposed rule in concept, she suggested, then the Subcommittee could use the lunch hour to draft the necessary language.

In light of the Subcommittee's resolution of the issues that had been raised for discussion, and with no member seeking further discussion, Judge Raggi then called for a vote on the proposed amendment to Rule 12 as modified in the following respects:

(1) eliminating statute of limitations defenses from (b)(3)(A),
(2) specifying that a court may consider an untimely claim if the party shows "good cause," and
(3) deleting the Cf. reference in the Committee Note accompanying (b)(3).

With the understanding that specific language to incorporate "good cause" into (c)(3) would be submitted for review, the Committee voted unanimously to transmit Rule 12, as amended following publication, to the Standing Committee.

By voice vote, the Committee also unanimously approved transmitting the conforming amendment to Rule 34.

Following the lunch break, the Subcommittee presented the following revised language for proposed Rule 12(c)(3):

(3) ***Consequences of Not Making a Timely Motion Under Rule 12(b).*** If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. In such a case, a court may consider the defense, objection, or request if:

(A) the party shows good cause; or
(B) for a claim of failure to state an offense, the defendant shows prejudice.

Judge Raggi called for discussion. A member asked why (A) referred to the "party" and (B) to the "defendant." Professor Beale explained that only a defendant can raise a claim of failure to state an offense, but the prosecution as well as the defense may raise other pretrial motions governed by Rule 12.

After time for review of the proposed language, Judge Raggi asked whether there were any further concerns. Hearing none, she declared that the morning vote approving Rule 12 for transmission to the Standing Committee would stand with the inclusion of the new language for Rule 12(c)(3). The Reporters would make the necessary changes to the Committee Note to incorporate the other changes made by the Committee. The revised rule would also be subject to restyling. Judge Raggi assured members that any restyling changes that might be significant would be referred to the Rule 12 Subcommittee and, if necessary, to the Committee.

Judge Sutton asked for the Committee's view on the need for republication. Judge Raggi stated that in her view none of the post-publication changes warranted republication, as they did not change the balance among the parties. Professor Beale observed that certain controversial features supported by the Department of Justice had been deleted, but the Department had agreed to those changes as part of an overall agreement to move the rule forward. No member of the Committee supported republication.

B. Proposed Amendments to Rules 5 and 58

This is the Committee's second effort to amend Rules 5 and 58 to provide for advice concerning consular notification. The first proposed amendments were published for public comment and subsequently approved by the Advisory Committee, the Standing Committee, and the Judicial Conference. However, in April 2012 the Supreme Court returned the Rule 5(d) and Rule 58 amendments to the Advisory Committee for further consideration. In response, the Committee revised the language of the proposed amendments, which were approved for publication by the Standing Committee in August 2012.

Rules 5 and 58 govern the procedure for initial appearances in felony and misdemeanor cases. Both provide, inter alia, that the judge must inform the defendant of various procedural rights (including the right to retain counsel or request that counsel be appointed for him, any right to a preliminary hearing, and the right not to make incriminating statements). Parallel amendments to Rules 5 and 58 were proposed by the Department of Justice to facilitate the United States' compliance with Article 36 of the Vienna Convention on Consular Relations ("the Vienna Convention"), which provides for detained foreign nationals to be advised of the opportunity to contact the consulates of their home country. Various bilateral agreements also contain consular notification provisions.

As published in 2012, the proposed rules require the court to inform non-citizen defendants at their initial appearance that (1) they may request that a consular officer from their country of nationality be notified of their arrest, and (2) in some cases international treaties and agreements require consular notification without a defendant's request. The proposed rules do not, however, address the question whether treaty provisions requiring consular notification may

be invoked by individual defendants in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36 of the Vienna Convention. More particularly, as the Committee note emphasizes, the proposed rules do not themselves create any such rights or remedies.

Opening the discussion, Judge Raggi noted that, in twice proposing amendments to Rules 5 and 58, the Committee had carefully considered the policy question of whether the judiciary should be involved in the executive's efforts to satisfy its consular notification requirements under various treaties. The Committee had answered that question in the affirmative, albeit not unanimously. Further, the Committee's 2012 redrafting of the amendment in response to the Supreme Court's remand had been approved for publication by the Standing Committee. Thus, the immediate issue before the Committee was the comments received in response to publication.

Professor Beale described the public comments, which urged changes in the introductory clause of the proposed rules providing that the advice must be given "if the defendant is held in custody and is not a United States citizen." The Federal Magistrate Judges Association (FMJA) recommended that the quoted language be deleted and that the advice requirement apply to all defendants. Two reasons informed the recommendation. First, the FMJA expressed concern that the amendment could be interpreted to require that the arraigning judge determine whether a defendant is a U.S. citizen before providing the advice regarding consular notification. An inquiry of this nature would be undesirable, because defendants might make incriminating statements. Professor Beale endorsed the FMJA's suggestion that it would be better to rephrase the new provisions to parallel proposed Rule 11(b)(1)(O), which is being transmitted from the Supreme Court to Congress. Proposed Rule 11(b)(1)(O) requires the court to give warnings to all defendants about the possible collateral immigration consequences of a guilty plea. The Committee Note explains:

> The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

Second, the FMJA submitted that the proposed advice requirement should not be limited to defendants "in custody" at the time of their initial appearance.[1] After consultation with the

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[1] There was some disagreement between the Department of State and the FMJA concerning the scope of the obligation under Article 36, but it was not necessary for the Committee to resolve this disagreement. The FMJA noted that Article 36 of the Vienna Convention covers any national who is "arrested or committed to prison or to custody pending trial or is detained in any other manner." Because all defendants who are brought to the court for an initial appearance are arrestees, the FMJA concludes that the proposed amendment should provide for all

Department of State, the Department of Justice had no objection to removing the "in custody" language in the proposed rule if the Committee considers that appropriate. The National Association of Criminal Defense Attorneys also expressed concern with the "in custody" language, though for other reasons.

Professor Beale noted that the revised language now proposed had been agreed to by the Department of Justice after consultation with the Department of State, and vetted by the Style Consultant.

Judge Raggi stated that the key post-publication change was expanding the notification to all defendants, not only those in custody. Although there is always a concern about adding to the long list of information judges are already required to provide, she explained that in this instance there was a practical reason to provide the required advice to all defendants at their initial appearance. Specifically, a defendant who was not in custody at the time of his first appearance might later be remanded for various reasons, such as violation of the conditions of bail. It would be more efficient to provide the warning to all defendants at the first appearance, rather than try to ensure that advice is given later under the varying circumstances that might occur in individual cases.

Professor Coquillette questioned the inclusion in the Committee Note of a reference to the Code of Federal Regulations governing consular advice by arresting officers. He noted that if the regulations were altered it would not be possible to change the Note to update the citation. The Committee agreed to delete the citation and explanatory parenthetical.

A member asked what the consequence would be if a judge does not provide the advice. The proposed rule does not provide for a right or a remedy. Judge Raggi noted that the

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defendants to receive advice concerning consular notification irrespective of their custodial status at arraignment.

Although the Department of Justice had no objection to removing the "in custody" language in the proposed rule if the Committee considers that appropriate, as noted in the March 25, 2013 letter from Ms. Felton and Mr. Wroblewski, the Department of State does not agree with the FMJA's reading of the Vienna Convention. As reflected in U.S. DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS at 17 (3rd ed. 2010) http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf , the Department construes the Vienna Convention to cover only situations in which a foreign national's ability to communicate with or visit consular officers is impeded as a result of actions by government officials limiting the foreign national's freedom. (For example, the Department of State would not consider a "detention" to include a brief traffic stop or similar event in which a foreign national is questioned and then allowed to resume his or her activities.) In light of the magistrates' concern, however, the Department saw no harm in offering this advice to every arrestee at the first appearance if the Committee considers that appropriate.

Departments of State and Justice see value in incorporating this advice into the rules as part of the effort to satisfy our treaty obligations, even absent a remedial provision. Speaking on behalf of the Justice Department, Ms. Felton noted that there is often no record of advice given by arresting officers; providing the warning at the initial appearance would create a record of compliance with treaty obligations. Additionally, the federal rule may provide a model for similar state rules and thus indirectly bring about more widespread compliance with Article 36.

By voice vote, the Committee unanimously agreed that Rule 5, as modified after publication, be transmitted to the Standing Committee.

By voice vote, the Committee unanimously agreed that Rule 58, as modified after publication, be transmitted to the Standing Committee.

IV. NEW PROPOSAL FOR DISCUSSION

Judge Raggi asked Mr. Wroblewski to provide an introduction to the Department of Justice proposal to amend Rule 4.

Mr. Wroblewski explained that Rule 4 has become an obstacle to the prosecution of foreign corporations that commit offenses in the United States but cannot be served because they have no known last address or principal place of business in the U.S. Some courts have held that efforts to serve by other means were insufficient even if they would provide notice. He stated that this issue is now coming up with some frequency.

Judge Raggi noted that the next step would be the appointment of a subcommittee, but that some initial discussion might be helpful. She asked how the provision sought by the Department would work in practice. What if the foreign corporation were served, but it entered no appearance. Did the Department contemplate that it would be able to prosecute without an appearance, and, if not, what would be the benefit of the change?

Mr. Wroblewski said he was not prepared to answer all facets of the question, but he drew attention to several points. First, to date foreign corporations have not generally ignored service. They have appeared but contested the adequacy of service. Additionally, even if a corporation has not entered an appearance, effective service would have other beneficial consequences, such as asset forfeiture, regardless of whether the government could proceed with the prosecution.

Judge Raggi noted that these were among the issues to be considered by a Subcommittee. She announced that Judge David Lawson had agreed to chair the Rule 4 Subcommittee, and that Judge Rice, Mr. Siffert, and representatives of the Department of Justice would serve as

members. She asked the Subcommittee to report at the October meeting.

V. STATUS REPORT ON CRIMINAL RULES

Mr. Robinson stated that in response to the trial of Senator Ted Stevens, hearings were held in Congress to consider disclosure obligations of Federal Prosecutors. The Administrative Office worked with Judge Raggi to prepare a voluminous submission that contained all of the Committee's work on Rule 16. Informally we heard that staff found our materials very helpful.

Ms. Brook stated that she had testified at the hearing as a Federal Defender, not as a member of the Committee. She provided written testimony, was questioned extensively, and then provided written comments.

VI. INFORMATION ITEMS

Judge Raggi reported to the Committee that the FJC's Benchbook Committee had acted on the Criminal Rules Committee's suggestion that a discussion of Brady/Giglio obligations be included in the next edition of the Benchbook. A copy of the new Benchbook's detailed and comprehensive section on Brady/Giglio was included in the Committee's agenda book. Judge Raggi expressed her gratitude to the Benchbook Committee for allowing her to participate in its discussions leading to the preparation of this new section.

Judge Lawson, who served as a liaison to the Synonym Subcommittee, was asked to comment on the Subcommittee, whose report was included in the Agenda Book. He noted that the Subcommittee report includes a chart detailing a very large number of words and phrases that appear in more than one set of rules. At this point, no action to standardize these many terms is contemplated.

Judge Raggi announced that the Committee's next meeting would be held October 17-18, 2013, in Salt Lake City, where the Committee will be hosted by the University of Utah School of Law.