ADVISORY COMMITTEE
ON
CRIMINAL RULES

Portland, OR
April 11-12, 2011

AGENDA
CRIMINAL RULES COMMITTEE MEETING
APRIL 11-12, 2011
PORTLAND, OREGON

I. PRELIMINARY MATTERS

A. Chair's Remarks, Introductions, and Administrative Announcements

B. Review and Approval of Minutes of September 2010 meeting in Cambridge, Massachusetts

C. Status of Criminal Rules: Report of the Rules Committee Support Office

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved By the Judicial Conference for Transmittal to the Supreme Court (No Memo)

1. Rule 1. Scope: Definitions. Proposed amendment broadens the definition of telephone.

2. Rule 3. The Complaint. Proposed amendment allows complaint to be made by telephone or other reliable electronic means as provided by Rule 4.1.

3. Rule 4. Arrest Warrant or Summons on a Complaint. Proposed amendment adopting concept of "duplicate original," allowing submission of return by reliable electronic means, and authorizing issuance of arrest warrants by telephone or other reliable electronic means as provided by Rule 4.1.

4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. Proposed amendment provides comprehensive procedure for issuance of complaints, warrants, or summons.

5. Rule 6. The Grand Jury. Proposed amendment authorizing grand jury return to be taken by video teleconference.

6. Rule 9. Arrest Warrant or Summons. Proposed amendment authorizing issuance of warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.

7. Rule 32. Sentencing and Judgment. Proposed technical and conforming amendment concerning information in presentence report.

8. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. Proposed amendment authorizing use of video teleconferencing.

9. Rule 41. Search and Seizure. Proposed amendment authorizing request for warrants to be made by telephone or other reliable electronic means as provided by Rule 4.1 and return of warrant and inventory by reliable electronic means, and proposed technical and conforming amendment deleting obsolescent references to calendar days.

10. Rule 43. Defendant's Presence. Proposed amendment authorizing defendant to participate in misdemeanor proceedings by video teleconference.

11. Rule 49. Serving and Filing Papers. Proposed amendment authorizing papers to be filed, signed, and verified by electronic means.

B. Proposed Amendment Approved By the Standing Committee for Publication in August 2011 (No Memo)

1. Rule 11. Advice re Immigration Consequences of Guilty Plea; Advice re Sex Offender Registration and Notification Consequences of Guilty Plea.

C. Proposed Amendments Approved By the Standing Committee for Publication in August 2010 (Memos)

1. Rule 5. Initial Appearance. Proposed amendment providing that initial appearance for extradited defendants shall take place in the district in which defendant was charged, and that non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

2. Rule 58. Initial Appearance. Proposed amendment providing that in petty offense and misdemeanor cases non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

3. Rule 37. Indicative Rulings. Proposed amendment authorizing district court to make indicative rulings when it lacks authority to grant relief because appeal has been docketed.

III. CONTINUING AGENDA ITEMS

A. Rule 12(b). Challenges for Failure to State an Offense; Rule 34 (Memo)

B. Rule 15 (Memo)

C. Rule 16. (Memo)

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

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure (No Memo)

B. Rule 45(c) and the "3 days added" rule (Memo)

V. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

A. Fall Meeting

B. Other

ADVISORY COMMITTEE ON CRIMINAL RULES

Chair:	**Reporter:**
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Honorable Donald W. Molloy United States District Court Russell E. Smith Federal Building 201 East Broadway Street Missoula, MT 59802	Honorable Timothy R. Rice United States District Court James A. Byrne United States Courthouse 601 Market Street, Room 3041 Philadelphia, PA 19106
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Representative:	**Liaison Member:** Honorable Reena Raggi United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East Brooklyn, NY 11201-1818
Secretary: Peter G. McCabe Secretary, Committee on Rules of Practice & Procedure Washington, DC 20544	**Chief Counsel:** Andrea Kuperman Chief Counsel to the Rules Committees 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600

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Dean C. Colson	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Arthur I. Harris	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
Judge Paul S. Diamond	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Rules Committee)
Judge Marilyn Huff	(Standing Committee)

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Advisory Committee on Criminal Rules

Members	Position	District/Circuit	Start Date		End Date
Richard C. Tallman Chair	C	Ninth Circuit	Member: Chair:	2004 2007	---- 2011
Lanny A. Breuer*	DOJ	Washington, DC		----	Open
Rachel Brill	ESQ	Puerto Rico		2006	2012
Leo P. Cunningham	ESQ	California		2006	2012
Morrison C. England, Jr.	D	California (Eastern)		2008	2011
David E. Gilbertson	CJUST	South Dakota		2010	2013
John F. Keenan	D	New York (Southern)		2007	2013
David M. Lawson	D	Michigan (Eastern)		2009	2012
Andrew Leipold	ACAD	Illinois		2007	2013
Thomas P. McNamara	FPD	North Carolina		2005	2011
Donald W. Molloy	D	Montana		2007	2013
Timothy R. Rice	M	Pennsylvania (Eastern)		2009	2012
James B. Zagel	D	Illinois (Northern)		2007	2013
Sara Sun Beale Reporter	ACAD	North Carolina		2005	Open

Principal Staff: Peter G. McCabe 202-502-1800

* Ex-officio

TAB I. A

Oral Report

TAB I. B

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

Sept. 27-28, 2010
Cambridge, Massachusetts

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the "Committee") met in Cambridge, Massachusetts, on September 27-28, 2010. The following members participated:

Judge Richard C. Tallman, Chair
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Justice Robert H. Edmunds, Jr.
Judge Morrison C. England, Jr.
Judge John F. Keenan
Judge David M. Lawson
Professor Andrew D. Leipold
Thomas P. McNamara, Esquire
Judge Donald W. Molloy
Judge Timothy R. Rice
Judge James B. Zagel
Professor Sara Sun Beale, Reporter
Professor Nancy King, Assistant Reporter
Hon. Lanny A. Breuer, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)

Representing the Standing Committee were its Chair, Judge Lee H. Rosenthal, and liaison member, Judge Reena Raggi. Supporting the Committee were:

Peter G. McCabe, Committee Secretary
John K. Rabiej, Rules Committee Support Office
Jeffrey N. Barr, Senior Attorney, Administrative Office
Henry Wigglesworth, Attorney Advisor, Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center
David Rauma, Senior Research Associate, Federal Judicial Center

Also participating from the Department of Justice were Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton, Deputy Chief of the Appellate Section.

A. Chair's Remarks, Introductions, and Administrative Announcements

Judge Tallman welcomed everyone, particularly Mr. Thomas P. McNamara, who had missed the April 2010 meeting due to illness. Judge Tallman also welcomed two distinguished visitors: the Honorable Emmet G. Sullivan, United States District Judge for the District of Columbia, and the Honorable Mark L. Wolf, Chief United States District Judge for the District of Massachusetts.

B. Review and Approval of the Minutes

A motion was made to approve the draft minutes of the April 2010 meeting.

The Committee unanimously approved the minutes.

C. Status of Criminal Rules: Report of the Rules Committee Support Office

Mr. Rabiej reported that the various proposed rules amendments recently approved by the Supreme Court (listed below in Section II.A) were on track to take effect on December 1, 2010, unless Congress were to act to the contrary. Based on his communications with Congressional staff, Mr. Rabiej reported that, at present, no changes were foreseen.

Mr. Rabiej further reported that the Judicial Conference had recently approved the Committee's proposed rules amendments, including technology-related amendments, listed below in Section II.B. The Administrative Office will transmit the amendments to the Supreme Court shortly. Finally, Mr. Rabiej reported that additional proposed amendments had been approved by the Standing Committee for publication (listed below in Section II.C) and had been posted on the rulemaking Web site in August 2010. He expects pamphlets of these amendments to be ready soon for distribution. Hearings on the proposed amendments have been scheduled for January 5, 2011, in San Francisco and January 25, 2011, in Atlanta. (The hearings will not be held if there is insufficient interest in presenting oral testimony.)

Judge Rosenthal reported on the status of the proposed amendment to Rule 15, which would authorize the taking of depositions outside the presence of a defendant in special, limited circumstances, with the district judge's approval. The Judicial Conference had transmitted the proposed amendment to the Supreme Court, but the Court remanded it to the Committee for further consideration. One suggestion is to revise the proposed amended Rule 15 to emphasize that it does not predetermine whether depositions conducted outside the presence of the defendant are admissible at any subsequent trial. Rather, it is limited to providing assistance on

pretrial discovery. Accordingly, Judge Tallman directed that the matter be recommitted to the Rule 15 subcommittee chaired by Judge Keenan.

II. CRIMINAL RULES UNDER CONSIDERATION

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

Mr. Rabiej reported that the following proposed amendments had been approved by the Supreme Court for transmittal to Congress:

1. Rule 12.3. Notice of Public Authority Defense. The proposed amendment implements the Crime Victims' Rights Act.

2. Rule 21. Transfer for Trial. The proposed amendment implements the Crime Victims' Rights Act.

3. Rule 32.1. Revoking or Modifying Probation or Supervised Release. The proposed amendment clarifies the standard and burden of proof regarding the release or detention of a person on probation or supervised release.

B. Proposed Amendments Approved by the Judicial Conference for Transmittal to the Supreme Court

Mr. Rabiej further reported that the following proposed technology-related amendments had been approved by the Judicial Conference for transmittal to the Supreme Court:

1. Rule 1. Scope: Definitions. The proposed amendment broadens the definition of telephone.

2. Rule 3. The Complaint. The proposed amendment allows a complaint to be made by telephone or other reliable electronic means as provided by Rule 4.1.

3. Rule 4. Arrest Warrant or Summons on a Complaint. The proposed amendment adopts the concept of a "duplicate original" warrant from existing Rule 41 and allows returns to be transmitted by reliable electronic means, and authorizes issuance of arrest warrants by telephone or other reliable electronic means as provided by Rule 4.1.

4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. The proposed amendment provides a comprehensive

procedure for issuing complaints, warrants, or summons by telephone or other reliable electronic means.

5. Rule 6. The Grand Jury. The proposed amendment authorizes grand jury returns to be taken by video teleconference.

6. Rule 9. Arrest Warrant or Summons. The proposed amendment authorizes issuing a warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.

7. Rule 32.1. Revoking or Modifying Probation or Supervised Release. The proposed amendment permits a defendant to participate by video teleconference.

8. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. The proposed amendment authorizes the use of video teleconferencing.

9. Rule 41. Search and Seizure. The proposed amendment authorizes requests for warrants, the return of warrants, and inventories to be made by telephone or other reliable electronic means as provided by Rule 4.1, and makes a technical and conforming amendment deleting obsolete references to calendar days.

10. Rule 43. Defendant's Presence. The proposed amendment authorizes a defendant to participate in misdemeanor proceedings by video teleconference.

11. Rule 49. Serving and Filing Papers. The proposed amendment authorizes papers to be filed, signed, and verified by electronic means.

C. Proposed Amendments Approved By the Standing Committee for Publication

Mr. Rabiej further reported that the following proposed amendments had been approved by the Standing Committee for publication:

1. Rule 5. Initial Appearance. The proposed amendment provides that an initial appearance for an extradited defendant must take place in the district in which the defendant was charged. In addition, a non-citizen defendant in U.S. custody must be informed that a consular official from the defendant's country of nationality will be notified upon the defendant's request, and that the government will make any other consular notification required by its international obligations.

2. Rule 37. Indicative Rulings. The proposed amendment authorizes a district court to make indicative rulings when it lacks authority to grant relief because an appeal has been docketed.

3. Rule 58. Initial Appearance. The proposed amendment provides that in petty offense and misdemeanor cases non-citizen defendants in U.S. custody must be informed that a consular official from the defendant's country of nationality will be notified upon the defendant's request, and that the government will make any other consular notification required by its international obligations.

III. CONTINUING AGENDA ITEMS

A. Rule 16 (Discovery and Inspection)

Judge Tallman asked Laural Hooper and David Rauma to describe the preliminary results of a Federal Judicial Center survey on Rule 16 conducted at the Committee's request. Judge Tallman noted that the survey had already garnered many compliments, which were reflected in the high response rate that it had generated.

Ms. Hooper presented the preliminary survey results. She began by describing how the survey had been distributed to all district and magistrate judges and 16,000 defense attorneys (both federal public defenders and private defense attorneys). With the help of the Department of Justice, the survey was sent to all 93 U.S. Attorney's Offices nationwide, but not to individual prosecutors.

The response rate was very high for a survey of this type: 43% of the judges, 32% of the defense attorneys, and 91% of the U.S. Attorney's Offices responded. In addition, respondents provided written comments that Ms. Hooper estimated would amount to over 700 pages of text.

David Rauma described the survey methodology in more detail. He noted that the list of defense attorneys had been collected from all criminal cases terminated in federal courts in 2009. He pointed out that the responses were personal opinions and estimates, and they should not be confused with actual case-related data. He also cautioned that the responses from the U.S. Attorney's Offices were aggregate responses – one response was submitted for all the federal prosecutors in that particular district, as opposed to individual responses by the line prosecutors themselves.

Ms. Hooper reported that the survey focused on the central issue of whether Rule 16 should be amended to require pretrial disclosure of exculpatory and impeachment information. It also asked many subsidiary questions, such as whether federal prosecutors and defense attorneys understand their disclosure obligations, whether they fulfill those obligations, how violations of Rule 16 are addressed by the courts, and whether the 2007 proposal to amend Rule 16 should be

reconsidered. In compiling the answers, the survey distinguished between districts that rely primarily on Rule 16 to guide discovery, and districts that supplement Rule 16 with local rules, standing orders, or other means, to impose broader disclosure requirements. The survey referred to the former districts as "traditional Rule 16 districts" and the latter districts as "broader disclosure districts."

Summarizing the survey results, Ms. Hooper reported that 51% of the judges and slightly more than 90% of the defense attorneys favor amending Rule 16, while the Department opposes any type of amendment. Breaking it down further, Ms. Hooper noted that in the broader disclosure districts, 60% of the judges favor an amendment while in the traditional Rule 16 districts, only 45% favor an amendment.

Regarding the frequency of non-compliance with discovery obligations, 61% of judges in the broader disclosure districts, and 74% of judges in the traditional districts, reported no violations by prosecutors within the past five years. Similarly, 64% of judges in the broader disclosure districts and 68% of judges in the traditional Rule 16 districts reported no violations by defense attorneys within the past five years.

Regarding overall satisfaction with prosecutors' compliance with discovery obligations, 90% of judges in both the broader disclosure districts and the traditional districts said they were either "very satisfied" or "satisfied" with the prosecutors' compliance. As to defense attorney compliance, almost 80% of judges in both types of districts expressed satisfaction.

Among the districts that have broader disclosure, some require prosecutors to disclose exculpatory or impeaching information without regard to the *Brady* "materiality" requirement. *See Strickler v. Greene*, 527 U.S. 281, 281-82 (1999) (defining "materiality" as creating a "reasonable probability that the suppressed evidence would have produced a different verdict.") The survey asked respondents in these districts whether elimination of the materiality requirement reduced discovery problems. Seventy-one percent of defense attorneys believed that elimination of the requirement lessened problems, while 60% of U.S. Attorney's Offices reported that removing the requirement made no difference.

Regarding harm to prosecution witnesses, 73% of judges reported no threats or harm to witnesses due to disclosure of exculpatory or impeaching information in the past five years. Approximately 40% of U.S. Attorney's Offices reported that in the past five years no protective orders had been requested to address security concerns.

In both the broader disclosure districts and the traditional Rule 16 districts, judges most frequently cited two reasons for favoring an amendment: (1) to eliminate confusion surrounding the use of materiality as a measure of a prosecutor's pretrial disclosure obligations; and (2) to reduce variations that currently exist across circuits. Defense attorneys cited the first reason –

eliminating confusion caused by the materiality requirement – as the primary justification for favoring an amendment.

The reasons most commonly given by judges for opposing an amendment were that: (1) there is no demonstrated need for a change; and (2) the current remedies for prosecutorial misconduct are adequate. The Department added a third reason: recent reforms instituted by the Department will significantly reduce disclosure violations.

The survey asked respondents for their view on the possible effects of a proposal to amend Rule 16 that the Committee advanced in 2007, which required the government to release all exculpatory and impeaching information no later than 14 days before trial. Overall, a majority of judges thought that such a proposal would have, or could have, negative consequences in witness security and privacy. Conversely, a majority of defense attorneys felt the opposite – that the 2007 amendment would have no adverse effect, or a minimal effect, on the safety and privacy of witnesses. The Department criticized the broad disclosure required by the 2007 amendment, arguing that it would in effect turn a witness's life into "a virtual open book."

Following Ms. Hooper and Mr. Rauma's presentation, members asked a number of questions and made several comments. One member questioned how the U.S. Attorney's Offices garnered information to respond to the survey. Mr. Wroblewski answered that the survey requested that the U.S. Attorney or a designee solicit the views of individual prosecutors in each district before responding on behalf of each U.S. Attorney's Office.

Ms. Felton asked whether the 43% response rate by judges fell into any sort of distribution pattern, *e.g.*, whether the responses predominately come from urban or rural districts. Mr. Rauma replied that he did not recall either type of district being dominant, but acknowledged that determining whether the distribution of responses to a survey is sufficiently representative is always difficult. However, he reassured members that at least one judge had responded to the Rule 16 survey from every district and that he saw no anomalies in the overall distribution.

A member observed that the frequency of Rule 16 problems is difficult to assess because attorneys often work out problems themselves without involving a judge. A judge member pointed out that the dimensions of the problem are unknowable because "you don't know what you don't know." Although he said that he does not see Rule 16 problems very often, the member added that when they do arise, they tend to be egregious.

Chief Judge Wolf thanked the chair for inviting him to the meeting and made several observations. He said he agreed that it is essentially impossible to measure the scope of discovery problems. Further, in his district, a broad disclosure district, problems continue to arise, even after the Department's recent efforts to emphasize compliance with *Brady* obligations, and his most common remedy is to compel disclosure. Judge Wolf noted that Rule 16 does not currently require disclosure of even "core *Brady* material."

Judge Sullivan also thanked the chair for inviting him and offered comments. He praised recent efforts by the Department to train prosecutors to better meet their discovery obligations. However, he worries that the strength of the Department's commitment relies too heavily on the support of certain officials, who may not be in charge in the future. Therefore, he favors the more permanent solution of amending Rule 16. He pointed out that a preponderance of judges favors an amendment and urged the Committee to act in the face of such strong support for change. He suggested that further study is not necessary because a well-crafted amendment would generate informative responses when published for comment. The Committee would subsequently have ample time to study the details of any proposal.

Assistant Attorney General Lanny Breuer offered his comments and an update on the Department's efforts. He said that even though statistics reveal that discovery violations by prosecutors are extremely rare, any misconduct by a federal prosecutor is unacceptable. The Department now requires training for all federal prosecutors and paralegals, and it recently hired a deputy to assist the National Coordinator for Criminal Discovery in these efforts. Furthermore, the Department is creating a discovery deskbook to provide guidance to prosecutors. General Breuer added that he is working with federal law enforcement agencies within the Department, including the Federal Bureau of Investigation and the Drug Enforcement Agency, and with key agencies outside the Department to address "data management problems" that currently complicate prosecutors' efforts to make sure they can meet their discovery obligations.

Responding to Judge Sullivan's comments, General Breuer submitted that the Department's current commitment to improving criminal discovery practices will be permanent. He added that the dangers of amending Rule 16 to broaden disclosure were great, particularly as to witnesses' security, and these dangers were most pronounced along the U.S. border with Mexico. He concluded by saying that the Department forcefully opposes any amendment to Rule 16.

Judge Tallman reminded the Committee that the Department's opposition to amending Rule 16 in 2007 had been a significant factor in the Standing Committee's decision not to approve the proposed amendment and to recommit the matter to the Criminal Rules Committee for further study. Essentially, the 2007 proposal was halted based on the Department's promise to address disclosure problems internally. The Department's reform efforts in 2007, Judge Tallman observed, were not nearly as extensive as its current efforts. Therefore, Judge Tallman said, the Department's continued opposition to changing Rule 16 is problematic for the future success of any proposed amendment.

Chief Judge Wolf said that amending Rule 16 would be in the Department's own best interest because an amendment would clarify a prosecutor's discovery obligations and make it easier to satisfy those obligations. Currently, he observed, Rule 16 does not even incorporate the constitutional mandates of *Brady* and *Giglio*. Further, Judge Wolf argued that dispensing with the *Brady* "materiality" requirement would benefit prosecutors because it would relieve them of

the impossible burden of trying to foresee all the defenses that might arise at trial. For these reasons, the Department should support amending Rule 16, and Judge Wolf said he hoped that the Committee would recommend an amendment for publication.

Professor Coquillette observed that any amendment to Rule 16 would be seeking to change attorney conduct, and he questioned whether modifying conduct can best be accomplished through a change in the rules.

A member questioned whether amending Rule 16 to broaden disclosure obligations might run afoul of the Jencks Act, 18 U.S.C. § 3500, which sets out strict parameters for disclosure of statements by government witnesses. Judge Tallman responded that in the event of a conflict between a rule and a statute, the supersession clause of the Rules Enabling Act, 28 U.S.C. § 2072, could resolve the conflict in favor of the rule. However, he pointed out that reliance on the supersession clause is a last resort and that it is Judicial Conference policy that such conflicts should be avoided if at all possible. Otherwise, Judge Tallman noted, Congress might focus on the conflict between a proposed change to Rule 16 and the Jencks Act, which could threaten the entire rulemaking process. These risks all underscore the importance of trying to get the Department to agree to support any amendment to Rule 16 that might ultimately be advanced by the Committee.

Judge Sullivan proposed that Rule 16 could be amended by adding a checklist, informing prosecutors of the type of material that must be disclosed. A member added that in addition to the checklist, a "safety valve" could be added that would allow prosecutors to refrain from disclosing certain material if disclosure posed a threat to a witness's safety. Professor Beale noted that some local rules in the broader disclosure districts already employ similar checklists, which could serve as models for a national rule.

A member voiced the view that the Committee was attempting to solve a problem that might be attributable in part to the large size of the federal government. He pointed out that due to the sheer number of federal agents involved in a case, a prosecutor might not even know about the existence of some exculpatory information. The Committee should defer acting on an amendment until the Department has had a chance to address these information-sharing problems, the member argued. The problem is amplified if local, state, or foreign law enforcement officers are involved in a multi-agency investigation.

Judge Tallman observed that the checklist proposed by Judge Sullivan could be placed in the Federal Judicial Center's Judges' Benchbook, as opposed to becoming part of Rule 16. In addition, the Federal Judicial Center might be interested in publishing a guide to the "best practices" in criminal discovery. Supplementing the Benchbook or publishing such a guide could be effective measures that would avoid the pitfalls of amending Rule 16. Judge Rosenthal added that the recent Civil Litigation Conference at Duke Law School had highlighted the

limitations of the rules process and had underscored the usefulness of alternative approaches to solving problems.

Chief Judge Wolf urged the Committee not to be deterred by the nearly even split among judges who responded to the survey. Publication of a proposed amendment would prompt judges to reconsider their views, he predicted, and the resulting debate about the amendment's pros and cons could lead to further support for the amendment.

Ms. Hooper asked Judge Tallman for guidance on how to disseminate the extensive comments that had been submitted in response to the survey. After some discussion, Judge Tallman requested that Ms. Hooper and her colleagues continue to categorize the comments and also to redact any information identifying the authors of the comments. Judge Tallman and members agreed that because respondents had been told that their comments would be confidential, the redacted version should be available only to Committee members. Ms. Hooper will circulate redacted materials when they are ready to be released to the Committee for further study.

Judge Tallman concluded the discussion on Rule 16 by recommitting consideration of any proposed amendment to the Rule 16 subcommittee.

B. Rule 12 (Pleadings and Pretrial Motions)

Judge England, Chair of the Rule 12 subcommittee, briefly summarized the history of the Committee's consideration of whether to amend Rule 12. In April 2009, the Committee voted to send to the Standing Committee, with a recommendation that it be published for comment, an amendment attempting to change Rule 12 in light of *United States v. Cotton*, 535 U.S. 625 (2002). The proposed amendment would have required defendants to raise a claim that an indictment fails to state an offense *before* trial, and it would have provided relief for failure to raise the defense in certain narrow circumstances. However, the Standing Committee declined to publish the proposed amendment and remanded it to the Committee to consider the implications of using the term "forfeiture" instead of "waiver" in the relief provision.

In response, Judge England reported that the Rule 12 subcommittee had drafted a new amendment (located on page 120 of the Agenda Book) that was more expansive than the original. Despite having produced a draft, Judge England pointed out that a minority of members of the subcommittee were against the concept embodied in the amendment, *i.e.*, requiring defendants to raise this claim before trial.

A member amplified these comments, explaining that he was against amending Rule 12 because: (1) there is no demonstrated need for the amendment; (2) the amendment creates a trap for unwary defense attorneys; and (3) it might unintentionally lead to prosecutors becoming lax in crafting indictments.

Another attorney member agreed that the amendment is not needed and also expressed dismay that after trial begins, a defendant would not be able to challenge whether he is charged with a crime, without overcoming procedural hurdles such as those contained in the proposed amendment. A judge member agreed.

Mr. Wroblewski said that the original idea for amending Rule 12 had come from the late Judge Edward Becker, Chief Judge of the United States Court of Appeals for the Third Circuit. The basis for the suggestion was to create a more orderly process for handling pretrial motions. Judge Rosenthal added that an amendment might help sort out the confusion among the courts over how to interpret Rule 12. Ms. Felton agreed that the justification for amending the rule is to clarify for litigants which motions must be raised before trial.

In light of the debate over whether an amendment to Rule 12 was advisable, Judge Tallman called for a vote on whether the Committee should proceed with consideration of the proposed amendment.

The Committee voted 8-4 in favor of proceeding with consideration of the proposed amendment.

Following this vote, discussion centered on seeking a compromise to satisfy the concerns of some members that the proposed amendment would pose an unfair burden to defendants. Chief among these concerns was the procedural barrier that a defendant would face by missing the pretrial deadline for filing a motion. Under the proposed amendment, a defendant who missed the deadline would be deemed to have waived the claim and must show "cause and prejudice" in order to receive relief from the waiver and bring the motion. The change was intended to reflect existing law.

To provide more leeway to a defendant who misses the pretrial deadline, a member noted that there is usually a short period between the pretrial motion deadline and the start of trial and suggested that if the defendant seeks to raise the claim during this period, a district judge should be permitted to consider it without regard to "cause and prejudice." A judge participant agreed, saying that a district judge's discretion to consider such a motion should be unfettered if the motion is filed before jeopardy attaches.

To incorporate this concept into the proposed amendment, a member moved to modify the proposed amendment by deleting in subdivision 12(e)(1) the sentence that reads: "Upon a showing of cause and prejudice, the court may grant relief from the waiver." (lines 91-93 on page 125 of Agenda Book), and inserting in its place the following language:

> The district court, in its discretion, may grant relief from the waiver any time before jeopardy attaches. Thereafter, the court may grant relief from waiver upon a showing of cause and prejudice.

A judge member expressed concern that the proposed modification would be read liberally by attorneys as condoning last-minute motions. He said he preferred the current rule's strict deadlines. Another judge member countered that he thought the amendment captured the current practice in federal court.

Judge England voiced misgivings over crafting a rule that seems solicitous of attorneys who miss an important deadline. Another judge said that he favored the modification because a district judge should have maximum discretion to correct errors when a person's liberty is at stake. A member added that many defense attorneys are inexperienced and make mistakes. They deserve to be helped by the rules.

Professor King pointed out that the proposed amendment already contains new language intended to help defense attorneys: In Rule 12(b)(3), the phrase "if the basis for the motion is then available" (line 15 on page 120 of Agenda Book) was added to allow defense lawyers to raise motions after the pretrial deadline, without a showing of cause and prejudice, if the grounds for the motion were not previously available.

The Committee voted 6-5 against the proposed modification to the proposed amendment to Rule 12(e)(1).

A member moved to insert the word "reasonably" before "available" in subdivision Rule 12(b)(3) (line 15 on page 120 of Agenda Book).

The motion was approved with two dissents.

Discussion turned to proposed Rule 12(e)(2), which would create a different standard of review for a class of specified untimely claims. Instead of requiring a showing of "cause and prejudice," this provision would permit review for plain error, as defined by Rule 52. A member suggested that in addition to an untimely claim that a charge failed to state an offense, untimely motions raising double jeopardy and limitation errors should also receive this more generous standard of review, and moved to insert "double jeopardy" and "statute of limitations" in the bracketed part of subdivision Rule 12(e)(2) (lines 97-98 on page 125 of Agenda Book). Professor Beale noted that the precise wording of this amendment would be subject to revision by the style consultant.

The motion was approved unanimously.

It was moved that the Committee approve the entire proposed amendment to Rule 12 and a conforming amendment to Rule 34 and send both the amendments to the Standing Committee for publication.

The Committee voted 8-4 to approve the proposed amendment to Rule 12, as modified, and a conforming amendment to Rule 34, and send the amendments to the Standing Committee for publication.

C. Rule 11 (Pleas)

Judge Rice, Chair of the Rule 11 subcommittee, reported that the subcommittee had prepared a draft amendment to Rule 11 (page 129 of Agenda Book). It would add a new item to the list of notifications a judge must give a defendant when taking a guilty plea. In response to the recent Supreme Court decision in *Padilla v. Kentucky*, __U.S.__ (No. 08-651; March 31, 2010), which held that defense counsel has a duty to inform a defendant whether a guilty plea carries a risk of deportation (formally known as "removal"), the proposed amendment would require a judge to inform a defendant that a guilty plea may have significant immigration consequences.

Judge Rice also reported that the subcommittee recommended that the Federal Judicial Center amend the Judges' Benchbook by adding the risk of deportation to the list of collateral consequences that a judge must address when taking a guilty plea from a defendant.

A judge member expressed his strong opposition to the proposed amendment. Adding to the list of matters that must be addressed during a plea colloquy was a "slippery slope," that would open the door to future amendments and eventually turn a plea colloquy into a minefield for a judge. In addition, he noted that *Padilla* is based solely on the constitutional duty of defense counsel and does not speak to the duty of judges. Finally, the member said he had no objection to amending the Benchbook, but urged the Committee not to make the additional warning mandatory by incorporating it into Rule 11.

Another judge member echoed the concern about adding to the already long list of warnings that are compulsory under Rule 11. He mentioned that in his home state, pleading guilty to certain crimes may cause the defendant to forfeit a state pension. He asked whether that consequence should now also be included in the plea colloquy.

A member spoke out in strong support of the amendment, arguing that it is necessary because immigration cases now comprise a huge portion of the federal caseload and because *Padilla* emphasized the importance of immigration consequences.

Ms. Felton pointed out that the Department has advised prosecutors to include a discussion of immigration consequences in plea agreements because of the significance of those consequences. Similarly, she believes that judges should warn a defendant who pleads guilty that the plea could implicate his or her right to remain in the United States or to become a U.S. citizen.

Several other members spoke in favor of the proposed amendment. One agreed that *Padilla* was limited to the duty of defense counsel to warn a defendant about immigration consequences, but argued that the Supreme Court's logic also supported requiring a judge to issue a similar warning. Addressing the "slippery slope" argument, a member pointed out that the Committee is not a judicial body and if it approved the addition of this new warning to Rule 11, the addition would not create binding precedent that would force the Committee to add more warnings in the future. Deportation, the member continued, is qualitatively different than the loss of other rights triggered by a guilty plea and therefore warrants inclusion on the list of matters that must be discussed during a plea colloquy.

In light of the debate over whether an amendment to Rule 11 should be considered at all, Judge Tallman called for a vote on whether the Committee should proceed with consideration of the proposed amendment.

The Committee voted 7-5 in favor of proceeding with consideration of the proposed amendment.

Following this vote, Judge Rice moved to adopt the actual language of the proposed amendment, which adds a new subparagraph to the list contained in Rule 11(b)(1). (Text of the amendment is located on page 129 of Agenda Book.) Following a brief discussion, it was moved that the proposed amendment be modified by deleting it and substituting the following:

> (O) that a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

The motion was approved unanimously.

The Committee acknowledged that the language would be subject to additional restyling by the style consultant.

Turning to the recommended amendment to the Judges' Benchbook (page 130 of Agenda Book), members debated whether it was advisable for a judge to ask a defendant directly if he or she is a United States citizen. Several suggested it was not advisable and recommended that a judge could preface any warning about immigration consequences with a phrase such as, "If you are not a U.S. citizen, then . . . ." However, it was agreed that the publisher of the Benchbook, the Federal Judicial Center, should resolve the issue.

It was moved that the Judges' Benchbook be amended by adding the language on page 130 of the Agenda Book. Judge Rosenthal asked that the Federal Judicial Center keep the Committee informed of any changes to the Benchbook in order to ensure consistency with the Committee's proposed change to Rule 11.

The motion was approved unanimously.

In light of the previous discussion that highlighted the Committee's reluctance to impose greater burdens on judges to give additional warnings under Rule 11, Judge Rice withdrew the proposed amendment dealing with sex offenses (located on page 130 of Agenda Book). He recommended, however, that the Judges' Benchbook be amended by adding the warning (located on page 131 of Agenda Book).

Several members argued that the proposed warning should include broader language to avoid unintentionally omitting any important consequences of pleading guilty to a sex offense, such as the possibility of civil commitment. Judge Rice agreed and requested that Professors Beale and King revise the proposed language accordingly and circulate a draft to members for approval by e-mail. Judge Tallman added that he would also circulate a proposed letter to the Federal Judicial Center recommending the Committee's proposed changes to the Benchbook.

IV. RULES AND PROJECTS PENDING BEFORE CONGRESS, JUDICIAL CONFERENCE, STANDING COMMITTEE, OR OTHER ADVISORY COMMITTEES

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

Mr. Rabiej reported that it appeared that Congress would not consider any rules-related legislation before adjourning in October for the mid-term elections.

Mr. Wroblewski noted that the Crime Victims' Rights Act ("CVRA") is due to be reauthorized next year and he anticipates that the law might be revised slightly. He added that in furtherance of the Department's outreach program under the CVRA, the Department has increased its efforts to contact victims' rights groups and solicit their views.

B. Update on Work of the Sealing Subcommittee

Judge Zagel reported that the Standing Committee's Sealing Subcommittee had issued its report to the Standing Committee. It surveyed sealing practices in federal court and made several recommendations. The full report is available on page 136 of the Agenda Book.

C. Update on Work of the Privacy Subcommittee

Judge Raggi reported that the Standing Committee's Privacy Subcommittee had concluded its work and would issue its report in January 2011. It will recommend continued study of several problematic areas but will not suggest any specific changes to the rules.

A judge member voiced his concern about protecting the privacy of jurors. He said that he had recently concluded a high-profile trial after which some jurors had been harassed by the

press. He related how one juror was afraid to go home because her house was being monitored from the air by a helicopter deployed by the media. According to the member, this treatment of jurors highlights the need for a rule that would require the media to honor a juror's request not to be contacted after a trial. It was suggested that failure to honor the request would result in sanctions.

Judge Raggi agreed that juror privacy was of paramount concern, as the jury's critical role in the administration of justice deserves special consideration. While the Privacy Subcommittee will not make specific proposals to address the matter, she said that the issue will be monitored as the federal courts grapple with how best to resolve it.

D. Administrative Office Forms Regarding Appearance Bonds

Mr. McCabe briefed the Committee on revision of a national form, AO Form 98 (Appearance Bond), designed to ensure the appearance of a criminal defendant in federal court. The AO Forms Working Group of judges and clerks had studied the form and a subcommittee chaired by Magistrate Judge Boyd Boland (D. Colorado) had produced a draft. In addition, other related forms were also revised. (Drafts of the forms are located on pages 155-160 of the Agenda Book). The principal substantive change is to transfer a defendant's agreement to appear from another form to the face of the appearance bond itself. As Judge Boland explained in his memorandum to the Forms Working Group, "the agreement to appear is so fundamental to the purpose of the appearance bond . . . that it should be contained in the Appearance Bond itself." (Agenda Book at 149).

Mr. McCabe reported that he was working on several stylistic changes to the proposed new forms to make them more readable. He added that a style consultant would also be reviewing and revising the forms. Once these changes are made, the final forms will be forwarded to the Criminal Law Committee, which will review them before the forms are posted on the J-Net, the judiciary's intranet, for review and comment.

As an initial matter, Judge Tallman asked whether the Committee had any authority to make suggestions to change the forms, given that a different committee, the Criminal Law Committee, is charged with overseeing them. Mr. McCabe responded that the Director of the Administrative Office has ultimate authority over the forms, and the Forms Working Group would welcome any suggestions by the Committee.

Members then offered several suggestions. One suggested that the various promises listed in the first sentence of the Appearance Bond Form would be easier to follow if they were broken out and listed separately. Professor King suggested that the condition of release listed on Form 199B (Additional Conditions of Release) as subsection "r" (page 160 of Agenda Book) might be more appropriately listed as a condition of release on Form 199A (Order Setting Conditions of Release). Judge Tallman noted that Form 199A appeared to be missing a signature

line for the judge issuing the Order Setting Conditions of Release. Finally, Judge Rosenthal suggested that the word "execute" be changed to "sign" on the bottom of Form 199A.

V. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman reminded members that the next meeting would take place in Portland, Oregon, on Monday and Tuesday, April 11-12, 2011. He thanked all the members and guests for attending and adjourned the meeting.

Respectfully submitted,

Henry Wigglesworth
Attorney Advisor

Draft Minutes of the Standing Committee Meeting of January 6-7, 2011, will be provided at the meeting.

TAB I. C

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

September 14, 2010

The Judicial Conference of the United States convened in Washington, D.C., on September 14, 2010, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Sandra L. Lynch
Chief Judge Mark L. Wolf,
District of Massachusetts

Second Circuit:

Chief Judge Dennis Jacobs
Chief Judge William K. Sessions III,
District of Vermont

Third Circuit:

Chief Judge Theodore A. McKee
Chief Judge Harvey Bartle III,
Eastern District of Pennsylvania

Fourth Circuit:

Chief Judge William B. Traxler, Jr.
Judge James P. Jones,
Western District of Virginia

Fifth Circuit:

Chief Judge Edith Hollan Jones
Judge Sim Lake III,
Southern District of Texas

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Amendments. The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Appellate Rules 4 (Appeal as of Right — When Taken) and 40 (Petition for Panel Rehearing), together with committee notes explaining their purpose and intent. The Judicial Conference approved the proposed rules amendments and authorized their transmittal to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Statutory Amendment. The Committee also recommended seeking legislation to amend 28 U.S.C. § 2107, consistent with the proposed amendment to Appellate Rule 4, to clarify and make uniform the treatment of the time to appeal in all civil cases in which a federal officer or employee is a party. The Conference adopted the Committee's recommendation.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Amendments. The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Bankruptcy Rules 2003 (Meeting of Creditors or Equity Security Holders), 2019 (Representation of Creditors and Equity Security Holders in Chapter 9 Municipality and Chapter 11 Reorganization Cases), 3001 (Proof of Claim), 4004 (Grant or Denial of Discharge), 6003 (Interim and Final Relief Immediately Following the Commencement of the Case — Applications for Employment; Motions for Use, Sale, or Lease of Property; and Motions for Assumption or Assignment of Executory Contracts), and new Rules 1004.2 (Petition in Chapter 15 Cases) and 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence), together with committee notes explaining their purpose and intent. The Judicial Conference approved the proposed rules amendments and new rules and authorized their transmittal to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Forms Amendments. The Committee also submitted to the Judicial Conference proposed revisions to Official Forms 9A, 9C, 9I, 20A, 20B, 22A, 22B, and 22C. The Judicial Conference approved the revised forms to take effect on December 1, 2010.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Criminal Rules 1 (Scope; Definitions), 3 (The Complaint), 4 (Arrest Warrant or Summons on a Complaint), 6 (The Grand Jury), 9 (Arrest Warrant or Summons on an Indictment or Information), 32 (Sentencing and Judgment), 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District), 41 (Search and Seizure), 43 (Defendant's Presence), and 49 (Serving and Filing Papers), and new Rule 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means), together with committee notes explaining their purpose and intent. The Judicial Conference approved the proposed amendments and new rule and authorized their transmittal to the Supreme Court for its consideration with a recommendation

that they be adopted by the Court and transmitted to Congress in accordance with the law.

FEDERAL RULES OF EVIDENCE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed restyled Evidence Rules 101-1103, together with committee notes explaining their purpose and intent. The restyling of the Evidence Rules is the fourth in a series of comprehensive style revisions to simplify, clarify, and make more uniform all of the federal rules of practice, procedure, and evidence. The Judicial Conference approved the proposed restyled rules amendments and authorized their transmittal to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

COMMITTEE ACTIVITIES

The Committee on Rules of Practice and Procedure reported that it approved publishing for public comment proposed amendments to Bankruptcy Rules 3001, 7054, and 7056, proposed revisions of Bankruptcy Official Forms 10 and 25A, and a proposed new attachment and supplements to Bankruptcy Official Form 10, and proposed amendments to Criminal Rules 5 and 58, and a new Criminal Rule 37. The comment period expires on February 16, 2011.

TAB II. A

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 1. Scope; Definitions

* * * * *

(b) **Definitions.** The following definitions apply to these rules:

* * * * *

(11) "Telephone" means any technology for transmitting live electronic voice communication.

~~(11)~~(12) "Victim" means a "crime victim" as defined in 18 U.S.C. § 3771(e).

* * * * *

Committee Note

Subdivisions (b)(11) and (12). The added definition clarifies that the term "telephone" includes technologies enabling live voice conversations that have developed since the traditional "land line" telephone. Calls placed by cell phone or from a computer over the internet, for example, would be included. The definition is limited to live communication in order to ensure contemporaneous communication and excludes voice recordings. Live voice

*New material is underlined; matter to be omitted is lined through.

communication should include services for the hearing impaired, or other contemporaneous translation, where necessary.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The text was rephrased by the Committee to describe the telephone as a "technology for transmitting live electronic voice communication" rather than a "form" of communication.

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. ~~It~~ Except as provided in Rule 4.1, it must be made under oath before a magistrate judge or, if none is reasonably available, before a state or local judicial officer.

Committee Note

Under the amended rule, the complaint and supporting material may be submitted by telephone or reliable electronic means, however, the rule requires that the judicial officer administer the oath or affirmation in person or by telephone. The Committee concluded that the benefits of making it easier to obtain judicial oversight of the arrest decision and the increasing reliability and accessibility to electronic communication warranted amendment of the rule. The amendment makes clear that the submission of a complaint to a

judicial officer need not be done in person and may instead be made by telephone or other reliable electronic means. The successful experiences with electronic applications under Rule 41, which permits electronic applications for search warrants, support a comparable process for arrests. The provisions in Rule 41 have been transferred to new Rule 4.1, which governs applications by telephone or other electronic means under Rules 3, 4, 9, and 41.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the amendment as published.

Rule 4. Arrest Warrant or Summons on a Complaint

* * * * *

(c) Execution or Service, and Return.

* * * * *

(3) ***Manner.***

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the original or a duplicate original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must

inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the original or a duplicate original warrant to the defendant as soon as possible.

* * * * *

(4) ***Return.***

(A) After executing a warrant, the officer must return it to the judge before whom the defendant is brought in accordance with Rule 5. The officer may do so by reliable electronic means. At the request of an attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local judicial officer.

* * * * *

(d) **Warrant by Telephone or Other Reliable Electronic Means.** In accordance with Rule 4.1, a magistrate judge may issue a warrant or summons based on information communicated by telephone or other reliable electronic means.

Committee Note

Rule 4 is amended in three respects to make the arrest warrant process more efficient through the use of technology.

Subdivision (c). First, Rule 4(c)(3)(A) authorizes a law enforcement officer to retain a duplicate original arrest warrant, consistent with the change to subdivision (d), which permits a court to issue an arrest warrant electronically rather than by physical delivery. The duplicate original warrant may be used in lieu of the original warrant signed by the magistrate judge to satisfy the requirement that the defendant be shown the warrant at or soon after an arrest. *Cf.* Rule 4.1 (b)(5) (providing for a duplicate original search warrant).

Second, consistent with the amendment to Rule 41(f), Rule 4(c)(4)(A) permits an officer to make a return of the arrest warrant electronically. Requiring an in-person return can be burdensome on law enforcement, particularly in large districts when the return can require a great deal of time and travel. In contrast, no interest of the accused is affected by allowing what is normally a ministerial act to be done electronically.

Subdivision (d). Rule 4(d) provides that a magistrate judge may issue an arrest warrant or summons based on information submitted electronically rather than in person. This change works in conjunction with the amendment to Rule 3, which permits a magistrate judge to consider a criminal complaint and accompanying documents that are submitted electronically. Subdivision (d) also incorporates the procedures for applying for and issuing electronic warrants set forth in Rule 4.1.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the amendment as published.

Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means

(a) **In General.** A magistrate judge may consider information communicated by telephone or other reliable electronic means when reviewing a complaint or deciding whether to issue a warrant or summons.

(b) **Procedures.** If a magistrate judge decides to proceed under this rule, the following procedures apply:

(1) ***Taking Testimony Under Oath.*** The judge must place under oath — and may examine — the

applicant and any person on whose testimony the application is based.

(2) ***Creating a Record of the Testimony and Exhibits.***

(A) *Testimony Limited to Attestation.* If the applicant does no more than attest to the contents of a written affidavit submitted by reliable electronic means, the judge must acknowledge the attestation in writing on the affidavit.

(B) *Additional Testimony or Exhibits.* If the judge considers additional testimony or exhibits, the judge must:

(i) have the testimony recorded verbatim by an electronic recording device, by a court reporter, or in writing;

(ii) have any recording or reporter's notes transcribed, have the transcription certified as accurate, and file it;

(iii) sign any other written record, certify its accuracy, and file it; and

(iv) make sure that the exhibits are filed.

(3) ***Preparing a Proposed Duplicate Original of a Complaint, Warrant, or Summons.*** The applicant must prepare a proposed duplicate original of a complaint, warrant, or summons, and must read or otherwise transmit its contents verbatim to the judge.

(4) ***Preparing an Original Complaint, Warrant, or Summons.*** If the applicant reads the contents of the proposed duplicate original, the judge must enter those contents into an original complaint, warrant, or summons. If the applicant transmits the contents by

reliable electronic means, the transmission received by the judge may serve as the original.

(5) ***Modification.*** The judge may modify the complaint, warrant, or summons. The judge must then:

(A) transmit the modified version to the applicant by reliable electronic means; or

(B) file the modified original and direct the applicant to modify the proposed duplicate original accordingly.

(6) ***Issuance.*** To issue the warrant or summons, the judge must:

(A) sign the original documents;

(B) enter the date and time of issuance on the warrant or summons; and

(C) transmit the warrant or summons by reliable electronic means to the applicant or direct the

applicant to sign the judge's name and enter the date and time on the duplicate original.

(c) **Suppression Limited.** Absent a finding of bad faith, evidence obtained from a warrant issued under this rule is not subject to suppression on the ground that issuing the warrant in this manner was unreasonable under the circumstances.

Committee Note

New Rule 4.1 brings together in one rule the procedures for using a telephone or other reliable electronic means for reviewing complaints and applying for and issuing warrants and summonses. In drafting Rule 4.1, the Committee recognized that modern technological developments have improved access to judicial officers, thereby reducing the necessity of government action without prior judicial approval. Rule 4.1 prescribes uniform procedures and ensures an accurate record.

The procedures that have governed search warrants "by telephonic or other means," formerly in Rule 41(d)(3) and (e)(3), have been relocated to this rule, reordered for easier application, and extended to arrest warrants, complaints, and summonses. Successful experience using electronic applications for search warrants under Rule 41, combined with increased access to reliable electronic communication, support the extension of these procedures to arrest warrants, complaints, and summonses.

With one exception noted in the next paragraph, the new rule preserves the procedures formerly in Rule 41 without change. By

using the term "magistrate judge," the rule continues to require, as did former Rule 41(d)(3) and (e)(3), that a federal judge (and not a state judge) handle electronic applications, approvals, and issuances. The rule continues to require that the judge place an applicant under oath over the telephone, and permits the judge to examine the applicant, as Rule 41 had provided. Rule 4.1(b) continues to require that when electronic means are used to issue the warrant, the magistrate judge retain the original warrant. Minor changes in wording and reorganization of the language formerly in Rule 41 were made to aid in application of the rules, with no intended change in meaning.

The only substantive change to the procedures formerly in Rule 41(d)(3) and (e)(3) appears in new Rule 4.1(b)(2)(A). Former Rule 41(d)(3)(B)(ii) required the magistrate judge to make a verbatim record of the entire conversation with the applicant. New Rule 4.1(b)(2)(A) provides that when a warrant application and affidavit are sent electronically to the magistrate judge and the telephone conversation between the magistrate judge and affiant is limited to attesting to those written documents, a verbatim record of the entire conversation is no longer required. Rather, the magistrate judge should simply acknowledge in writing the attestation on the affidavit. This may be done, for example, by signing the jurat included on the Administrative Office of U.S. Courts form. Rule 4.1(b)(2)(B) carries forward the requirements formerly in Rule 41 to cases in which the magistrate judge considers testimony or exhibits in addition to the affidavit. In addition, Rule 4.1(b)(6) specifies that in order to issue a warrant or summons the magistrate judge must sign all of the original documents and enter the date and time of issuance on the warrant or summons. This procedure will create and maintain a complete record of the warrant application process.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

Published subdivision (a) referred to the action of a magistrate judge as "deciding whether to approve a complaint." To accurately describe the judge's action, it was rephrased to refer to the judge "reviewing a complaint."

Subdivisions (b)(2) and (3) were combined into subdivisions (b)(2)(A) and (B) to clarify the procedures applicable when the applicant does no more than attest to the contents of a written affidavit and those applicable when additional testimony or exhibits are presented. The clauses in subparagraph (B) were reordered and further divided into items (i) through (iv). Subsequent subdivisions were renumbered because of the merger of (b)(2) and (3).

In subdivision (b)(5), language was added requiring the judge to file the modified original if the judge has directed an applicant to modify a duplicate original. This will ensure that a complete record is preserved. Additionally, the clauses in this subdivision were broken out into subparagraphs (A) and (B).

In subdivision (b)(6), introductory language erroneously referring to a judge's approval of a complaint was deleted, and the rule was revised to refer only to the steps necessary to issue a warrant or summons, which are the actions taken by the judicial officer.

In subdivision (b)(6)(A) the requirement that the judge "sign the original" was amended to require signing of "the original documents." This is broad enough to encompass signing a summons, an arrest or search warrant, and the current practice of the judge signing the jurat on complaint forms. Depending on the nature of the case, it might also include many other kinds of documents, such as

the jurat on affidavits, the certifications of written records supplementing the transmitted affidavit, or papers that correct or modify affidavits or complaints.

In subdivision (b)(6)(B), the superfluous and anachronistic reference to the "face" of a document was deleted, and rephrasing clarified that the action is the entry of the date and time of "the approval of a warrant or summons." Additionally, (b)(6)(C) was modified to require that the judge must direct the applicant not only to sign the duplicate original with the judge's name, but also to note the date and time.

Rule 6. The Grand Jury

* * * * *

(f) Indictment and Return. A grand jury may indict only if at least 12 jurors concur. The grand jury — or its foreperson or deputy foreperson — must return the indictment to a magistrate judge in open court. To avoid unnecessary cost or delay, the magistrate judge may take the return by video teleconference from the court where the grand jury sits. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly

and in writing report the lack of concurrence to the magistrate judge.

* * * * *

Committee Note

Subdivision (f). The amendment expressly allows a judge to take a grand jury return by video teleconference. Having the judge in the same courtroom remains the preferred practice because it promotes the public's confidence in the integrity and solemnity of a federal criminal proceeding. But there are situations when no judge is present in the courthouse where the grand jury sits, and a judge would be required to travel long distances to take the return. Avoiding delay is also a factor, since the Speedy Trial Act, 18 U.S.C. § 3161(b), requires that an indictment be returned within thirty days of the arrest of an individual to avoid dismissal of the case. The amendment is particularly helpful when there is no judge present at a courthouse where the grand jury sits and the nearest judge is hundreds of miles away.

Under the amendment, the grand jury (or the foreperson) would appear in a courtroom in the United States courthouse where the grand jury sits. Utilizing video teleconference, the judge could participate by video from a remote location, convene court, and take the return. Indictments could be transmitted in advance to the judge for review by reliable electronic means. This process accommodates the Speedy Trial Act, 18 U.S.C. § 3161(b), and preserves the judge's time and safety.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the amendment as published.

Rule 9. Arrest Warrant or Summons on an Indictment or Information

* * * * *

(d) Warrant by Telephone or Other Means. In accordance with Rule 4.1, a magistrate judge may issue an arrest warrant or summons based on information communicated by telephone or other reliable electronic means.

Committee Note

Subdivision (d). Rule 9(d) authorizes a court to issue an arrest warrant or summons electronically on the return of an indictment or the filing of an information. In large judicial districts the need to travel to the courthouse to obtain an arrest warrant in person can be burdensome, and advances in technology make the secure transmission of a reliable version of the warrant or summons possible. This change works in conjunction with the amendment to Rule 6 that

permits the electronic return of an indictment, which similarly eliminates the need to travel to the courthouse.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the amendment as published.

Rule 32. Sentencing and Judgment

* * * * *

(d) Presentence Report.

* * * * *

(2) ***Additional Information.*** The presentence report must also contain the following:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be

helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation;

~~(F) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a); and~~

~~(G) specify whether the government seeks forfeiture under Rule 32.2 and any other provision of law;~~

(F) a statement of whether the government seeks forfeiture under Rule 32.2 and any other law; and

(G) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

* * * * *

Committee Note

Subdivision (d)(2). This technical and conforming amendment reorders two subparagraphs describing the information that may be included in the presentence report so that the provision authorizing the inclusion of any other information the court requires appears at the end of the paragraph. It also rephrases renumbered subdivision (d)(2)(F) for stylistic purposes.

Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District

* * * * *

(d) **Video Teleconferencing.** Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.

Committee Note

Subdivision (d). The amendment provides for video teleconferencing in order to bring the rule into conformity with Rule 5(f).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The amendment was rephrased to track precisely the language of Rule 5(f), on which it was modeled.

Rule 41. Search and Seizure

* * * * *

(d) Obtaining a Warrant.

* * * * *

(3) ***Requesting a Warrant by Telephonic or Other Reliable Electronic Means.*** In accordance with Rule 4.1, a magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.

~~(A) *In General.* A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.~~

~~(B) *Recording Testimony.* Upon learning that an applicant is requesting a warrant under Rule 41(d)(3)(A), a magistrate judge must:~~

~~(i) place under oath the applicant and any person on whose testimony the application is based; and~~

~~(ii) make a verbatim record of the conversation with a suitable recording~~

~~device, if available, or by a court reporter, or in writing.~~

~~(C) *Certifying Testimony.* The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk.~~

~~(D) *Suppression Limited.* Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.~~

(e) Issuing the Warrant.

* * * * *

(2) Contents of the Warrant.

* * * * *

(C) *Warrant for a Tracking Device.* A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 ~~calendar~~ days;

(ii) perform any installation authorized by the warrant during the daytime, unless

the judge for good cause expressly authorizes installation at another time; and

(iii) return the warrant to the judge designated in the warrant.

~~(3) *Warrant by Telephonic or Other Means.* If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:~~

~~(A) *Preparing a Proposed Duplicate Original Warrant.* The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge.~~

~~(B) *Preparing an Original Warrant.* If the applicant reads the contents of the proposed~~

~~duplicate original warrant, the magistrate judge must enter those contents into an original warrant. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original warrant.~~

~~(C) *Modification.* The magistrate judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means under Rule 41(e)(3)(D) or direct the applicant to modify the proposed duplicate original warrant accordingly.~~

~~(D) *Signing the Warrant.* Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact date and time it is issued,~~

~~and transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant.~~

(f) Executing and Returning the Warrant.

(1) ***Warrant to Search for and Seize a Person or Property.***

* * * * *

(D) *Return*. The officer executing the warrant must promptly return it — together with a copy of the inventory — to the magistrate judge designated on the warrant. The officer may do so by reliable electronic means. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) ***Warrant for a Tracking Device.***

(A) *Noting the Time.* The officer executing a tracking-device warrant must enter on it the exact date and time the device was installed and the period during which it was used.

(B) *Return.* Within 10 ~~calendar~~ days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant. The officer may do so by reliable electronic means.

(C) *Service.* Within 10 ~~calendar~~ days after the use of the tracking device has ended, the officer executing a tracking-device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property,

was tracked; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3).

* * * * *

Committee Note

Subdivisions (d)(3) and (e)(3). The amendment deletes the provisions that govern the application for and issuance of warrants by telephone or other reliable electronic means. These provisions have been transferred to new Rule 4.1, which governs complaints and warrants under Rules 3, 4, 9, and 41.

Subdivision (e)(2). The amendment eliminates unnecessary references to "calendar" days. As amended effective December 1, 2009, Rule 45(a)(1) provides that all periods of time stated in days include "every day, including intermediate Saturdays, Sundays, and legal holidays[.]"

Subdivisions (f)(1) and (2). The amendment permits any warrant return to be made by reliable electronic means. Requiring an in-person return can be burdensome on law enforcement, particularly in large districts when the return can require a great deal of time and travel. In contrast, no interest of the accused is affected by allowing what is normally a ministerial act to be done electronically. Additionally, in subdivision (f)(2) the amendment eliminates unnecessary references to "calendar" days. As amended effective December 1, 2009, Rule 45(a)(1) provides that all periods of time stated in days include "every day, including intermediate Saturdays, Sundays, and legal holidays[.]"

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

Obsolescent references to "calendar" days were deleted by a technical and conforming amendment not included in the rule as published. No other changes were made after publication.

Rule 43. Defendant's Presence

* * * * *

(b) When Not Required. A defendant need not be present under any of the following circumstances:

(1) ***Organizational Defendant.*** The defendant is an organization represented by counsel who is present.

(2) ***Misdemeanor Offense.*** The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.

* * * * *

Committee Note

Subdivision (b). This rule currently allows proceedings in a misdemeanor case to be conducted in the defendant's absence with the defendant's written consent and the court's permission. The amendment allows participation through video teleconference as an alternative to appearing in person or not appearing. Participation by video teleconference is permitted only when the defendant has consented in writing and received the court's permission.

The Committee reiterates the concerns expressed in the 2002 Committee Notes to Rules 5 and 10, when those rules were amended to permit video teleconferencing. The Committee recognized the intangible benefits and impact of requiring a defendant to appear before a federal judicial officer in a federal courtroom, and what is lost when virtual presence is substituted for actual presence. These concerns are particularly heightened when a defendant is not present for the determination of guilt and sentencing. However, the Committee concluded that the use of video teleconferencing may be

valuable in circumstances where the defendant would otherwise be unable to attend and the rule now authorizes proceedings in absentia.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

Because the Advisory Committee withdrew its proposal to amend Rule 32.1 to allow for video teleconferencing, the cross reference to Rule 32.1 in Rule 43(a) was deleted.

Rule 49. Serving and Filing Papers

(a) When Required. A party must serve on every other party any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.

* * * * *

(e) Electronic Service and Filing. A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing

only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is written or in writing under these rules.

Committee Note

Subdivision (e). Filing papers by electronic means is added as new subdivision (e), which is drawn from Civil Rule 5(d)(3). It makes it clear that a paper filed electronically in compliance with the Court's local rule is a written paper.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the rule as published.

TAB II. B

Rule 11. Pleas.

* * * * *

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); ~~and~~

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

Committee Note

Subdivision (b)(1)(O). The amendment requires the court to include a general statement concerning the potential immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.

For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.

The amendment mandates a generic warning, and does not require the judge to provide specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without first attempting to determine the defendant's citizenship.

TAB II. C

MEMO TO: Criminal Rules Advisory Committee Members

FROM: Professor Sara Sun Beale, Reporter

RE: Rules 5 and 58

DATE: March 18, 2011

The Committee's published amendments to Rule 5 and Rule 58 were designed to (1) deal with unique aspects of the international extradition process and (2) ensure that the treaty obligations of the United States are fulfilled. The proposed amendments, as published, appear at the conclusion of this memorandum.

Comments relating to these rules were received from the Federal Magistrate Judges Association (FMJA) and the National Association of Criminal Defense Lawyers (NACDL) during the public comment period. Both suggested changes in the text of the rules and/or the committee note. The Department of Justice provided a written response (included at the end of this memorandum) to these comments which concludes that the Advisory Committee should not adopt the proposed changes to the rules. The Department notes, however, that it does not oppose an addition to the Committee Note.

Rule 5(c)(4). The proposed amendment clarifies the district in which an initial appearance should take place for persons who have been surrendered to the United States pursuant to an extradition request to a foreign country. Both the FMJA and NACDL express concern that the provision does not require the initial appearance in such cases to occur "without delay," and they recommend including such language in the amendment to Rule 5(c)(4). Although noting that it "does not disagree with the concept of specifying the charging district as the location for the initial appearance for a person extradited," the FMJA recommends the addition of language "similar to that in Rule 5(a)(1)(A) and (B) to minimize unreasonable delay in such cases." Similarly, the NACDL recommends that the amendment be revised to state that "the attorney for the government must ensure that the defendant is presented for an initial appearance without unnecessary delay in the district (or one of the districts) where the offense is charged."

As noted in the response prepared by the Department of Justice, the structure of the rule presently places the requirement that the initial appearance must take place "without unnecessary delay" in Rule 5(a)(1)(A) (for cases in which the arrest is made in the U.S.) and 5(a)(1)(B) (for cases where the arrest is "outside the United States). Subsections (c) and (d) determine the district in which the hearing will take place and the procedures. The amendment will be located in (c)(4), with other provisions governing the district in which the initial hearing must take place. As stated in the Committee note as published, Rule 5(a)(1) requires that this hearing take place without delay.

It is common ground that the hearing must take place without "unnecessary delay," and the only question is whether the current structure of the rule makes it clear that this general requirement applies to the new provision clarifying the district for the hearing in extradition cases.

Rules 5(d) and 58(b)(2)(H). These parallel amendments provide that at the initial hearing the magistrate judge must inform a non-citizen defendant who is held in custody that (1) the attorney for the government will notify a consular officer from the defendant's country of nationality that the defendant has been arrested if the defendant so requests, or (2) that the attorney for the government will make any other consular notification required by treaty or other international agreement.

Although both the FJMA and NACDL generally support the proposed amendment, the FJMA expresses some reservations and the NACDL suggests that the advice to defendants should be expanded.

The FMJA concludes that "the proposed rules do provide adequate notice if the judiciary does become involved" in what it characterizes as the "executive function" of complying with the treaties governing consular notification. But it notes that (1) compliance with the obligations of Article 36 of the Vienna Convention and other bilateral treaties regarding consular notifications are executive branch functions – "not necessarily the function of the judiciary" – and (2) great care must be taken to ensure that defendants held in custody and given such advise do not incriminate themselves by supplying information about their non-citizen status.

The NACDL also expresses two concerns, and it proposes redrafting to address each. First, it is concerned that the phrase "if the defendant is held in custody" is ambiguous and does not convey the full range of cases to which the rule applies. It might not be applied, for example, to a defendant who makes his appearance in response to a summons. Second, in NACDL's view the amendment as published erroneously suggests that provision of the consular notification need not occur until the initial hearing. The NACDL suggests that the amendment be redrafted to (1) define the custody requirement more clearly, (2) require that the magistrate judge determine whether the defendant has already received consular notification, and (3) ensure that the defendant understands these rights by reiterating the advice. Draft language is proposed.

The Department of Justice opposes modification of the rules as published. It agrees that the advice should be given "without delay" when a non-citizen is arrested, and notes that the Department proposed the amendment as an <u>additional</u> means of ensuring that the obligations imposed by the Vienna Convention are satisfied (and as a mechanism for providing a record in federal cases that this notification has been given). The State Department has taken numerous steps (described on page 2 of the Department of Justice letter) to provide notification without delay, and the Department notes that nothing in the rule suggests that the required notice should be delayed. However, the Department does not oppose adding language to the committee note that would make it clear that the advice is designed merely as "an additional assurance" of compliance with the Vienna Convention and other treaty obligations. If additional language for the Committee Note is needed, the Department suggests the following language be added:

Consular notification advice is required to be given "without delay," and arresting officers are primarily responsible for providing this advice. See 28 C.F.R. 50.5 (requiring consular notification advice to arrested foreign nationals by Department of Justice arresting officers). Also providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that our treaty obligations are fulfilled.

The Department opposes the expanded advice advocated by NACDL on the grounds that the advice provided should be "simple and straightforward," and it disagrees with NACDL's suggestion that "held in custody" is ambiguous.

The rules as published, and the comments of the FJMA, NACDL, and the Department of Justice are provided below.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 5. Initial Appearance

* * * * *

(c) Place of Initial Appearance; Transfer to Another District.

* * * * *

(4) ***Procedure for Persons Extradited to the United States.*** If the defendant is surrendered to the United States in accordance with a request for the defendant's extradition, the initial appearance must be in the district (or one of the districts) where the offense is charged.

(d) Procedure in a Felony Case.

(1) ***Advice.*** If the defendant is charged with a felony, the judge must inform the defendant of the following:

* * * * *

(D) any right to a preliminary hearing; ~~and~~

*New material is underlined; matter to be omitted is lined through.

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant; and

(F) if the defendant is held in custody and is not a United States citizen, that an attorney for the government or a federal law enforcement officer will:

(i) notify a consular officer from the defendant's country of nationality that the defendant has been arrested if the defendant so requests; or

(ii) make any other consular notification required by treaty or other international agreement.

* * * * *

Committee Note

Subdivision (c)(4). The amendment codifies the longstanding practice that persons who are charged with criminal offenses in the United States and surrendered to the United States following extradition in a foreign country make their initial appearance in the jurisdiction that sought their extradition.

This rule is applicable even if the defendant arrives first in another district. The earlier stages of the extradition process have already fulfilled some of the functions of the initial appearance. During foreign extradition proceedings, the extradited person, assisted by counsel, is afforded an opportunity to review the charging document, U.S. arrest warrant, and supporting evidence. Rule 5(a)(1)(B) requires the person be taken before a magistrate judge without unnecessary delay. Consistent with this obligation, it is preferable not to delay an extradited person's transportation to hold an initial appearance in the district of arrival, even if the person will be present in that district for some time as a result of connecting flights or logistical difficulties. Interrupting an extradited defendant's transportation at this point can impair his or her ability to obtain and consult with trial counsel and to prepare his or her defense in the district where the charges are pending.

Subdivision (d)(1)(F). This amendment is designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of this amendment, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions.

PUBLIC COMMENTS CONCERNING RULE 5

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL agrees with the amendment in principle, but suggests amendments (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing, and (3) make clear that the initial hearing in extradition cases must be held "without unnecessary delay."

10-CR-002. Federal Magistrate Judges Association. FMJA (1) recommends that proposed Rule 5(c)(4) be revised to require that the initial hearing for extradited defendants must be held "without unnecessary delay," (2) expresses some reservations about imposing upon courts the executive function of giving consular notification, and (3) notes that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(b) Pretrial Procedure.

* * * * *

(2) ***Initial Appearance.*** At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

* * * * *

(F) the right to a jury trial before either a magistrate judge or a district judge – unless the charge is a petty offense; ~~and~~

(G) any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release; and

(H) if the defendant is held in custody and is not a United States citizen, that an attorney for the government or a federal law enforcement officer will:

(i) notify a consular officer from the defendant's country of nationality that the defendant has been arrested if the defendant so requests; or

(ii) make any other consular notification required by treaty or other international agreement.

* * * * *

COMMITTEE NOTE

Subdivision (b)(2)(H). This amendment is designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of this amendment, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions.

PUBLIC COMMENTS CONCERNING RULE 58

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL agrees with the amendment in principle, but suggests amendments (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing, and (3) make clear that the initial hearing in extradition cases must be held "without unnecessary delay."

10-CR-002. Federal Magistrate Judges Association. FMJA (1) recommends that proposed rule be revised to require that the initial hearing for extradited defendants must be held "without unnecessary delay," (2) expresses some reservations about imposing upon courts the executive function of giving consular notification, and (3) notes that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

10-CR-001

February 15, 2011
via e-mail

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
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One Columbus Circle, N.E., suite 4-170
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COMMENTS OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Concerning Proposed Amendments to the Federal Rules of Criminal Procedure Published for Comment in August 2010

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit our comments with respect to the proposed changes in the Federal Rules of Criminal Procedure. NACDL's comments on the proposed rewording of the Evidence Rules have been submitted separately. Our organization has more than 12,000 members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of about 35,000 private and public defenders. NACDL, which celebrated its 50th Anniversary in 2008, is the preeminent organization in the United States representing the views, rights and interests of the defense bar and its clients.

In the following pages, we address the August 2010 proposed amendments to the Federal Rules of Criminal Procedure.

NACDL endorses this year's proposed amendments in principle, with a few comments and suggestions.

RULES 5(d) and 58(b) - VIENNA CONVENTION

These companion proposals would add to the litany of subjects to be covered by the judicial officer presiding at an initial appearance the question of consular notification for noncitizens. The phrasing of the new requirement could be clearer, however. The right of consular notification and consultation conferred by the 1963 Vienna Convention on Consular Relations applies to any person detained in a nation other than his or her own, whether on a criminal charge or otherwise, and includes a right conferred directly on the detained person to be informed of the right of consular assistance. VCCR art. 26(1)(b). This right attaches "without delay," and thus imposes the corresponding duty on the detaining law enforcement agency to inform the detainee of his or her VCCR rights as soon as the person is detained, not just if and when the person is presented before a judicial officer. The amended rule should be drafted carefully so as not to imply otherwise.

The phrase "if the defendant is held in custody" seems to us to be ambiguous, and in any even does not convey the full range of cases to which the right applies. First, "if the defendant is held in custody" could be read to mean "if the defendant is brought before the judge while in custody" (as contrasted with cases where the defendant makes his or her initial appearance in response to a summons). On the other hand, it could be read to mean "if the defendant, at the conclusion of the appearance, is detained rather than released." The intended meaning should be made clear. In any event, neither describes all the cases where the right of consular notice under VCCR applies; as already noted, the right applies to any person detained by officers of a country other than his own. By the time the defendant makes his or her initial appearance, the arresting agency should already have advised the non-citizen arrestee of his or her VCCR rights and have taken other action to protect and implement those rights. What the new rule should require, therefore, is that the magistrate judge (1) ascertain from the attorney for the government whether the defendant's VCCR rights have been timely afforded; and (2) that the defendant understands these rights, by reiterating the advice (as described in the draft). If it appears that the defendant's rights under VCCR may not been timely respected, the magistrate should then at least direct that the required or requested contacts be made promptly (as suggested in the draft). As presently phrased, the proposed rule could be readily misunderstood to suggest that the advice and notice need not be given by the arresting agency because it will instead by given by the judge at the initial appearance. That would be incorrect, and a violation of the treaty.

RULE 5(c) - INITIAL APPEARANCE FOLLOWING EXTRADITION

NACDL supports this amendment, and is pleased to see that the Advisory Committee Note addresses the relationship between the amendment and the general rule that an arrested person be presented "without unnecessary delay." We

agree with the implication of the Note that the question of "unnecessary delay" under Rule 5(a) arises in the case of an extradited defendant no later than the time that s/he arrives in the United States in custody. To make this important point even more clear, NACDL suggests that the key guarantee of presentment "without unnecessary delay" be added to new Rule 5(c)(4), so that the principal clause of the new rule would read, "the attorney for the government must ensure that the defendant is presented for an initial appearance without unnecessary delay in the district (or one of the districts) where the offense is charged."

RULE 37 - INDICATIVE RULINGS

NACDL is pleased to see a criminal rule added to coordinate with new Fed.R.App.P. 12.1. We have no problem with the proposed wording. In the Advisory Committee Note, we believe it would be helpful to practitioners who are less experienced with appellate jurisdiction to add to the parenthetical, in addition to the reference to Fed.R.App.P. 4(b)(3), a mention of the fact that the conditions of a defendant's release or detention pending execution of sentence or pending appeal can also be modified in the district court without resort to this procedure. Similarly, if the Advisory Committee Note is to reference Rule 33, Rule 35(b) and § 3582(c) motions as the primary examples -- and particularly if the phrase "if not exclusively" is retained -- then a reference to motions under 28 U.S.C. § 2255 should be added to the list. Particularly where a sentence is short, if the defendant not only has grounds for appeal but also has a potentially valid basis to claim ineffective assistance of counsel, an immediate § 2255 motion can sometimes serve the interests of justice and of judicial economy alike. The indicative ruling procedure can be useful in such cases as well.

The National Association of Criminal Defense Lawyers is grateful for the opportunity to submit its views on these important and difficult issues. We look forward to continuing to work with the Committee in the years to come.

Very truly yours,

s/Peter Goldberger
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HON. ALICE SENECHAL
Grand Forks, ND

February 8, 2011

Peter G. McCabe, Secretary
Committee on Rules of Practice & Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Comments on Proposed Amendments to Federal Rules of Criminal Procedure and Evidence

Dear Mr. McCabe:

The Federal Magistrate Judges Association submits the attached comments to the Rules Advisory Committee. The comments were first considered by the Standing Rules Committee of the FMJA. The committee members are:

Honorable S. Allan Alexander, Northern District of Mississippi, Chair
Honorable Clint Averitte, Northern District of Texas
Honorable William Baughman, Norther District of Ohio
Honorable Alan J. Baverman, Norther District of Georgia
Honorable Hugh Warren Brenneman, Jr., Western District of Michigan
Honorable Joe B. Brown, Middle District of Tennessee
Honorable Geraldine Soat Brown, Northern District of Illinois
Honorable Waugh B. Crigler, Western District of Virginia
Honorable Judith Dein, District of Massachusetts
Honorable Steven Gold, Eastern District of New York
Honorable Margaret Kravchuck, Eastern District of Maine
Honorable Kristin L. Mix, District of Colorado
Honorable David Peebles, Northern District of New York
Honorable Mary Pat Thynge, District of Delaware
Honorable David A. Sanders, Northern District of Mississippi
Honorable Nita L. Stormes, Eastern District of Pennsylvania
Honorable Diane K. Vescovo, Western District of Tennessee
Honorable Linda T. Walker, Northern District of Georgia
Honorable Andrew J. Wistrich, Central District of California

The committee members come from several kinds of districts and have varying types of duties. Many of them consulted with their colleagues in the course of preparing these comments. The comments were then reviewed and unanimously approved by the Officers and Directors of the FMJA.

The comments reflect the considered position of magistrate judges as a whole. The FMJA has also encouraged individual magistrate judges to forward comments to you.

We are pleased to have this opportunity to present written comments representing the view of the FMJA, and we welcome the opportunity to testify.

Sincerely,

Barry M. Kurren

Enclosure

COMMENTS OF
THE FEDERAL MAGISTRATE JUDGES ASSOCIATION
ON PROPOSED AMENDMENTS TO

THE FEDERAL RULES OF CRIMINAL PROCEDURE
(Class of 2012)

COMMENTS OF FEDERAL MAGISTRATE JUDGES ASSOCIATION RULES COMMITTEE ON PROPOSED CHANGES TO THE FEDERAL RULES OF CRIMINAL PROCEDURE (Class of 2012)

I **PROPOSED RULES 5(c)(4)** [Initial Appearance; Procedure for Persons Extradited to the United States]:

COMMENT: The Federal Magistrate Judges Association does not disagree with the concept of specifying the charging district as the location of the initial appearance for a person extradited to the United States, but recommends that the proposed rule be amended to add language similar to that in Rule 5(a)(1)(A) and-(B) to minimize unreasonable delay in such cases.

DISCUSSION: The Committee Note to the proposed rule states that its purpose for requiring an initial appearance in the charging district(s) is to reduce the risk that delay resulting from an initial appearance in any district other than the district[s] charging the defendant will impair an extradited person's ability to obtain and consult with counsel and prepare a defense. The proposed rule does not contain language identical or similar to that contained in Fed. R. Crim. P. 5(a)(1)(A) and -(B), which each require that the person making an arrest take the defendant before a magistrate judge or state or local judge "without unnecessary delay" for an initial appearance.

Despite subsection 5(a)(1)(B)'s requirement that "*a person making an arrest* outside the United States" take the defendant before a magistrate judge without unnecessary delay, past experiences of FMJA members lead to some concern that the amendment and the committee comments may be interpreted by those

transporting the defendant as excusing delays in the arrival district or in transit without the defendant being advised of rights or having contact with counsel. The FMJA therefore believes the insertion of the following language will make clear that an extradited defendant is entitled to the same prompt appearance before the court in the charging district that is required under subsection 5(a)(1)(A) for a domestic defendant in the district of arrest and under subsection 5(a)(1)(B) for a defendant who was arrested outside the United States but did not have to be extradited:

> (4) ***Procedure for Persons Extradited to the United States.*** If the defendant is surrendered to the United States in accordance with a request for the defendant's extradition, the initial appearance must be in the district (or one of the districts) where the offense is charged, and the defendant must be presented there without unnecessary delay.

II. PROPOSED RULES 5(d)(1)(F) [Initial Appearance – Procedure in a Felony Case] **and 58(b)(2)(H)** [Petty Offenses and Other Misdemeanors – Initial Appearance]:

COMMENT: The FMJA has some reservations about the necessity for these two rules, but believes that if any procedure on consular notification is to be adopted, the proposed rule provides adequate notice.

DISCUSSION: It appears that the duties under Article 36 of the Vienna Convention on consular relations and other bilateral treaties are executive-branch functions and are not necessarily the function of the judiciary. The FMJA also

has concern that despite the Committee notes about unresolved issues, including establishing individual rights, the adoption of this formal requirement in the rules could lend substantial credence to the creation of such rights.

In addition, many of the defendants who would be given this advice are charged with some form of illegal entry, or could be so charged if their non-citizen status were established. Great care would have to be taken to insure that defendants in custody, having been advised of their rights against self-incrimination, would not then be asked to incriminate themselves by supplying information about their non-citizen status.

Because the courts currently follow no uniform practice to advise defendants of their rights concerning consular notification or inquire whether the United States Attorney or arresting agents have provided such advice, the FMJA believes that the proposed rules do provide adequate advice if the judiciary is to become involved in this executive function.

III. PROPOSED RULE 37 [Indicative Ruling on a Motion for Relief That is Barred By a Pending Appeal:

COMMENT: The FMJA endorses the proposed changes.

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

March 11, 2011

Honorable Richard C. Tallman, Chair
Advisory Committee on the Criminal Rules
902 William Kenzo Nakamura Courthouse
1010 Fifth Avenue
Seattle, Washington 98104-1195

Re: Department of Justice Response to Comments from the National Association of Criminal Defense Lawyers and the Federal Magistrate Judges Association on Proposed Amendments to Rule 5 of the Federal Rules of Criminal Procedure

Dear Judge Tallman:

The Department of Justice has reviewed the letter of February 8, 2011, from the Federal Magistrate Judges Association, and the letter of February 15, 2011, from the National Association of Criminal Defense Lawyers, concerning proposed amendments to Rule 5 of the Federal Rules of Criminal Procedure. Both letters suggest that the proposed amendment to the procedures for first appearance in extradition cases specifically include language that the initial appearance be accomplished "without unnecessary delay." The NACDL's letter further expresses the concern that, with respect to the advice concerning the opportunity for consular notification, the rule may suggest that the notification can wait until the initial appearance, when in fact such notice is supposed to occur promptly after the arrest or detention. The NACDL suggests an expanded form of advice that first ascertains whether the defendant has already been advised of his opportunity for consular notification, and then gives the advice so as to ensure that he understands what the Vienna Convention on Consular Relations (VCCR) affords him.

1. With respect to the portion of the Rule 5 proposal concerning extradition cases, the Department does not believe the suggested addition of the language "without unnecessary delay" is necessary. Of course it is true that extradited defendants, just as other defendants, are entitled to the same prompt appearance required by Rule 5(a). But that requirement is already stated in the rule. Thus, Rule 5(a)(1) requires an initial appearance "without unnecessary delay" for those arrested "within the United States" (Rule 5(a)(1)(A)) and for those arrested "outside the United States" (Rule 5(a)(1)(B)). There is no exception for those who are arrested outside the United States and then extradited. Subsections (a)(1)(A) and (a)(1)(B) comprise the universe of federal defendants and make clear that they are all to be brought to court "without unnecessary delay." The rest of the rule, in subsections (b) and (c), describes the various procedures to be followed in different circumstances, specifying in which district the appearance should take place where it is not otherwise clear. The proposal concerning extradited defendants is placed within this part of

the rule and would add a subsection (c)(4) to clarify that the first appearance should take place not in the district of first arrival but where the offense is charged. The language "without unnecessary delay" is not contained anywhere in subsections (b) or (c) in which the district where the appearance should occur is specified, presumably because it is already clear that the appearance, wherever it occurs, should be accomplished "without unnecessary delay." Accordingly, because this language would be inconsistent with the present structure of the rule and seems superfluous, we recommend that it not be added.

2. With respect to the portion of the Rule 5 proposal that concerns advising a non-citizen defendant who is in custody of applicable consular notification requirements, the Department agrees that some clarification in the Committee Note may be advisable. We agree that consular notification advice is to be accomplished "without delay" after a non-citizen is arrested or detained, and the proposed rule is not intended to suggest that advice about consular notification should be routinely delayed until the first appearance. Indeed, as we explained in the original letter proposing this rule amendment, the government has taken substantial measures to ensure prompt compliance with the consular notification requirements of the Vienna Convention, including Justice Department regulations establishing a uniform procedure for consular notification when non-U.S. citizens are arrested or detained by officers of the Department; State Department instructions for federal, state, and local law enforcement officials on providing consular notification advice, which are available on a public website and published in a booklet; and regular training of law enforcement authorities provided by the State Department. The present Rule 5 proposal was conceived as just one more assurance that our Vienna Convention obligations are satisfied, and to provide a record of the consular notification advice that we anticipate, in most federal cases, will already have been given.

We recognize, however, that the proposed rule does not indicate that consular notification advice is expected to be given promptly after a non-United States citizen is detained, and that law enforcement officers are not relieved of their obligation to provide this advice by virtue of this rule. We believe that the advice provided for in the proposed rule should be kept simple and straightforward, and that it should be the same for any defendant who is in custody; we therefore do not favor changing the advice to a multi-layered alternative colloquy. We have no objection, however, to adding some language to the Committee Note making clear that this advice is designed to be merely an additional assurance of our compliance with the Vienna Convention and is not meant to suggest that arresting officers need not provide this advice. We suggest adding language after the third sentence of the current Note that might read as follows: "Consular notification advice is required to be given 'without delay,' and arresting officers are primarily responsible for providing this advice. *See* 28 C.F.R. 50.5 (requiring consular notification advice to arrested foreign nationals by Department of Justice arresting officers). Also providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that our treaty obligations are fulfilled."

As for the additional comment of the National Association of Criminal Defense Lawyers that the phrase "held in custody" is ambiguous, we believe that it is sufficiently clear that the rule

applies to arrested defendants who have remained in custody and would therefore not have been free to contact their consular officials on their own. We thus do not believe that clarifying language is necessary.

We appreciate the opportunity to reply to these comments and look forward to continue working with the Committee on this proposal.

Sincerely,

Kathleen A. Felton

Kathleen A. Felton
Deputy Chief, Appellate Section

Jonathan J. Wroblewski
Director, Office of Policy and Legislation

MEMO TO: **Criminal Rules Advisory Committee Members**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Rule 37**

DATE: **March 18, 2011**

Appellate Rule 12.1 and Civil Rule 62.1, which went into effect on December 1, 2009, create a mechanism for obtaining "indicative rulings." They establish procedures facilitating the remand of certain post-judgment motions filed after an appeal has been docketed in a case in which the district court indicates that it would grant the motion. Proposed Rule 37, which was published for comment in 2010, parallels Civil Rule 62.1 and makes it clear that this procedure is available in criminal cases.

During the public comment period, two comments concerning Rule 37 were received. The Federal Magistrate Judges Association "endorses the proposed changes." Writing on behalf of the National Association of Criminal Defense Lawyers (NACDL), Peter Goldberger expresses support for the proposal and suggests two additions to the Committee Note that might be helpful to practitioners with little experience in appellate procedures:

> (1) a parenthetical mentioning the possibility that the conditions of release or detention pending execution of sentence or pending appeal may be modified in the district court without resort to the new procedure; and
>
> (2) a reference to the availability of the procedure in Section 2255 cases.

Mr. Goldberger's first suggestion is to expand the following parenthetical of the Committee Note as published:

> (Federal Rule of Appellate Procedure 4(b)(3) lists three motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the judgment of conviction is entered and the last such motion is ruled upon. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

Following the receipt of his letter, the reporters communicated with Mr. Goldberger and learned that he has published a treatise which, inter alia, identifies a series of exceptions to the rule that a district court loses jurisdiction while a case is on appeal. In addition to the examples identified in his letter, Mr. Goldberger's treatise also identifies other circumstances under which a district court may act even though a criminal appeal is pending.

Although we agree with Mr. Goldberger's observation that the district court retains various forms of limited authority to act while a criminal case is on appeal, we are doubtful that it would be appropriate to expand on the parenthetical in the Committee Note to list some or all of the additional authority. This goes substantially beyond the focus of the amendment itself, and risks being over or underinclusive. Moreover, it is inconsistent with the Standing Committee's policy of keeping Committee Notes short.

Mr. Goldberger's second suggestion is to add a reference to Section 2255 actions to the following portion of the Committee Note:

> In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). Rule 37 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal.

This portion of the Committee Note tracks the language of the Committee Note accompanying Appellate Rule 12.1, which was approved by the Standing Committee after considerable discussion about what to say concerning the use of the indicative rulings procedure in criminal cases. With regard to the use of the indicative ruling procedure in Section 2255 cases, the Advisory Committee wrestled with language suggesting that the procedure was inapplicable. It eventually decided, however, to include only the language that already appears in the Committee Note, which makes it clear that the identified uses are not exclusive.

We are concerned that adding the proposed reference to particular situations in which the indicative ruling procedure might be useful in connection with a 2255 motion would do more harm than good. There may be situations—such as the very short sentence referred to in Mr. Goldberger's letter—in which it may be desirable to use the indicative ruling procedure in connection with an action under Section 2255. But in our view, it is not generally desirable to encourage any defendant whose direct appeal is pending to file a motion seeking relief under Section 2255 in the district court followed by a request for an indicative ruling, even if some courts would permit consideration of such a motion in extraordinary circumstances. Inviting prisoners to file Section 2255 motions before their appeals are complete is likely to complicate procedures, and may result in litigation over whether potentially valid claims should be barred if they are later raised in second or subsequent motions.[1]

[1] *Cf.* Wall v. United States, 619 F.3d 152 (2d Cir. 2010) (concluding second 2255 motion was not a successive petition because earlier motion had been filed prematurely).

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 37. Indicative Ruling on a Motion for Relief That Is Barred by a Pending Appeal

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Federal Rule of Appellate Procedure 4(b)(3) lists three motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the judgment of conviction is entered and the last such motion is ruled upon. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

The procedure formalized by Federal Rule of Appellate Procedure 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). Rule 37 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appellate jurisdiction. Rule 37 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or

that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Federal Rule of Appellate Procedure 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

PUBLIC COMMENTS CONCERNING RULE 37

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL "is pleased with" the proposed rule, but suggests amendments to the committee note to provide additional guidance to practitioners.

10-CR-002. Federal Magistrate Judges Association. FMJA "endorses" the proposed rule.

TAB III. A

MEMO TO: Criminal Rules Advisory Committee Members

FROM: Professors Sara Sun Beale and Nancy King

RE: Rule 12

DATE: March 18, 2011

I. Background

In 2006, in the wake of the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), 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. The most difficult issue has been what standard the courts should apply when the defendant does not raise the failure-to-state-an-offense claims before trial.

This memorandum provides the history of the various proposals considered first by the Rule 12 Subcommittee and then by the full Advisory Committee, describes the action of the Standing Committee in January 2011, and concludes with the Subcommittee's recommendation. Judge Morrison England chairs the Subcommittee. Its members are Leo Cunningham, Andrew Leipold, and representatives of the Department of Justice.

Both the amendment now recommended by the Subcommittee and the version submitted to the Standing Committee in January 2011 are provided at the end of this memorandum.

2008 – "good cause" – rejected by the Criminal Rules Committee:

In 2008 the Rule 12 Subcommittee (then chaired by Chief Judge Mark Wolf) proposed an amendment that would have subjected untimely failure-to-state-an-offense claims to the standard already applied to all other untimely claims under Rule 12(e). The Committee rejected that draft and asked the Subcommittee to prepare an amendment that would not require a defendant to show "cause" in order to receive relief when the failure to state an offense prejudiced him.

2009 – "prejudice to the substantial rights of the defendant" -- approved by the Rules Committee but remanded by the Standing Committee:

In 2009, responding to the Committee's concern, the Subcommittee tried a different tack, bifurcating the standard for untimely claims and providing a more generous standard for failure-to-state-an-offense claims. The proposed amendment revised 12(e) to provide relief from the waiver "when a failure to state an offense in the indictment or information *has prejudiced a substantial right of the defendant.*" The existing "good cause" standard, applied to all other untimely claims,

remained unchanged. The amendment was approved by the Committee and sent on to the Standing Committee. The Standing Committee, however, remanded the proposal to the Committee in June 2009, indicating that additional consideration should be given to the concepts of "waiver" and "forfeiture" and how Rule 12 interacted with Rule 52.

2010 – "forfeiture" subject to "plain error" under Rule 52(b) -- approved by the Rules Committee

Responding to the Standing Committee's concerns, the Subcommittee redrafted the proposed amendment to Rule 12, this time attempting to clarify exactly which sorts of claims must be raised, and when a claim was considered "waived" under the rule.

To address the confusion in the courts over whether Rule 52(b) plain error review applied and when, the proposed amendment (1) expressly designated plain error review under Rule 52(b) as the standard for obtaining relief for three specific claims (failure to state an offense, double jeopardy, and statute of limitations) under a new subsection entitled "forfeiture," and (2) left in place the "good cause" standard already applied to all other untimely claims, changing the language to "cause and prejudice" to reflect the Supreme Court's interpretation of the "good cause" standard, and moving this into a separate subsection entitled "waiver."

The Committee approved this approach, but as described below the Standing Committee remanded the proposal for further consideration.

II. Issues Raised in the Standing Committee

At its January 2011 meeting, the Standing Committee expressed general approval of the Committee's approach of specifying the types of motions falling within the various categories of Rule 12(b)(3). But the proposal was remanded once again to allow the Committee to consider several concerns. First, the Rule continued to employ the term "waiver" to mean something other than deliberate and knowing relinquishment. Second, some members were concerned that requiring a defendant to show plain error under Rule 52 could be even more difficult than showing "cause and prejudice." If so, the proposed amendment would not create a more generous review standard for three favored claims. Concern was also expressed about the inclusion of the defense of "outrageous government conduct." Finally, the Reporters were urged to consider some reorganization.

A. Use of the terms "waiver" and "forfeiture"

The revised proposal, approved by the Subcommittee, no longer employs the terms "waiver" or "forfeiture." It defines the circumstances under which a court "may consider" untimely motions.

Numerous participants at the Standing Committee expressed concern that even as restructured, subdivision (e) ("Consequences of Not Making a Motion Before Trial as Required") still rested on the unsatisfactory terms "waiver" and "forfeiture." Because the ordinary meaning of waiver is a knowing and intentional relinquishment of a right, the non-standard use of that term in Rule 12 creates unnecessary confusion and difficulties. The Advisory Committee was urged to consider revising the rule to avoid using these terms.

After discussion in teleconference, the Subcommittee concluded that it would be feasible and desirable to revise the rule to avoid these terms. Although the elimination of these terms was not part of the purpose of the amendment as originally envisioned by the Advisory Committee, there was agreement that the use of the term "waiver" has been a source of considerable confusion. Redrafting to avoid the terms "waiver" and "forfeiture" can achieve clarity and avoid traps for the unwary.

The Subcommittee and the reporters received helpful advice and assistance from our style consultant Professor Kimble in making the revision to avoid reliance on these terms.

B. Placement of the provisions governing the consequences of failure to make a timely motion

The current proposal bifurcates subdivision (c) and places the redrafted provisions governing the consequences of failure to make a timely motion in new paragraph (c)(2).

Professor Kimble urged relocation of the consequences of failure to make a timely motion from subdivision (e) to subdivision (c). Currently subdivision (d) (ruling on the motion) comes between the timing provisions in (c) and the consequences of failing to meet the timing requirements in (e). Moving the provision on the consequences of failing to meet the deadline would solve this organizational problem.

Although the Subcommittee had initially intended to avoid renumbering (which generally makes research much more difficult), it concluded that in light of the other changes being made relocating this provision would be beneficial. The creation of a new paragraph within subdivision (c) would clearly signal to courts and litigants that this is not the same standard as the old Rule 12(e). Moreover, the reorganization affects only the provision concerning the effects of failure to meet the deadline for motions. Although the new proposal deletes current subdivision (e), it avoids renumbering the remainder of the rule by reserving subdivision (e).

C. The standard applicable to relief for failure-to-state-an-offense, double jeopardy, and statute of limitations claims

After considering the concerns raised in the Standing Committee, the Subcommittee recommends that the standard for reviewing (1) untimely claims that the indictment failed to state an offense and (2) untimely claims raising a violation of double jeopardy should be whether **"the error has affected the party's substantial rights."** All other claims (including statute of limitations) require a showing of cause and prejudice. Finally, the proposed rule expressly provides that Rule 52 does not apply.

The Subcommittee proposal provides:

(c) ~~Motion Deadline.~~ Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.

(1) Setting a Deadline. The court may, at the arraignment or as soon afterward as

practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.

(2) ***Consequences of an Untimely Motion under Rule 12(b)(3).*** If a party does not meet the deadline – or any extension the court provides – for raising a Rule 12(b)(3) defense, objection, or request, Rule 52 does not apply. The court may consider it only under these circumstances:

(A) the party shows cause and prejudice; or

(B) if the defense or objection is based on failure to state an offense or double jeopardy, the party shows the alleged error has affected the party's substantial rights.

1. The applicable standard

The Committee's 2010 proposal made untimely claims of failure to state an offense, double jeopardy, and statute of limitations subject to review as provided by Rule 52(b), which requires a showing of "plain error." The Advisory Committee intended to make review for these claims to be more readily available than for all other claims, which could be raised only upon a showing of "cause and prejudice." Several participants at the Standing Committee expressed concern that making the preferred claims subject to plain error analysis under Rule 52(b) might not always achieve the Committee's stated purpose. In some cases, it might be harder, rather than easier, for a defendant to show plain error than cause and prejudice. For example, members suggested, a defendant with one of the favored claims might be able to show cause in some cases but not be able to meet all four prongs of the plain-error test, established in *United States v. Olano*, 507 U.S. 725, 731-32 (1993), which requires both a showing that the error was "plain" and that it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." The Standing Committee remanded for further consideration of these concerns.

The remand from the Standing Committee required the Subcommittee to consider for the fourth time what standard should govern review of an untimely claim that the indictment failed to state an offense. To recap:

· The Criminal Rules Committee rejected use of the old "good cause" standard in 2008 on the ground that it was too demanding;

· The Standing Committee rejected language that would have provided relief from waiver if the error "*prejudiced a substantial right of the defendant*," at least in part because it was unclear how that standard was related to plain error review under Rule 52(b); and

· The Standing Committee most recently rejected proposed language that would have made such an error "subject to review under Rule 52(b)" in part because there were concerns that Rule 52(b) was too demanding.

The Subcommittee now recommends a return to the prejudice to "substantial rights" test with language expressly stating that Rule 52 does not apply. The new standard of review in (c)(2)(B) for late claims that an indictment failed to allege an essential element of the offense is different from,

and more generous than, either the plain-error test of Rule 52(b) or the "cause and prejudice" test which applies under (c)(2)(A) to other claims raised late under Rule 12. It is more generous than the plain-error test, because it does not require the objecting party to show, in addition to prejudice, that the error was "plain" or that "the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.' " *Olano*, 507 U.S. at 732. It is more generous than the test applied to other claims raised late under Rule 12, because it does not require the objecting party to demonstrate "cause," or the reason for failing to raise the claim earlier.

Recognizing that the standards specified in Rule 12(c) regulate consideration of late claims raised either in the trial court or on direct appeal, the Subcommittee concluded that relief should be available for a claim that the charge failed to state an offense whenever prejudice results from such an error. For example, the new standard would allow a judge to grant relief to a defendant who was prejudiced by a genuine misunderstanding of which charge he was facing, regardless of the defendant's reason for not recognizing the government's charging error before trial. *Cf. United States v. Hathaway*, 318 F.3d 1001 (10th Cir. 2003) (following a jury verdict but before sentencing, defendant learned he was being sentenced as though convicted of a felony assault on a federal employee when the indictment contained no language to suggest that a felony was charged; district court granted defendant's motion to dismiss to the extent that it prevented the defendant from being sentenced as a felon). The prejudice requirement, captured in the "substantial rights" language used elsewhere in the Federal Rules, is sufficient to address any "sandbagging" concern raised by the former Rule. *See, e.g, United States v. Panarella*, 277 F.3d 678, 686 (3d Cir. 2002) ("Requiring a defendant to raise this defense before pleading guilty respects the proper relationship between trial and appellate courts and prevents the waste of judicial resources caused when a defendant deliberately delays raising a defense that, if successful, requires reversal of the defendant's conviction and possibly reindictment."). A defendant who was aware that the indictment failed to state an offense but chose not to raise this issue in a timely fashion before trial will seldom, if ever, be able to show prejudice.

The Subcommittee recognized that in *United States v. Cotton*, 535 U.S. 625, 634 (2002), the Supreme Court applied Rule 52(b) plain error review to the indictment error in that case, the failure to include drug quantity, a fact required under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for defendant's enhanced sentences.[2] The Subcommittee concluded that *Cotton* created no obstacle to its proposal to designate prejudice to substantial rights — rather than plain error — as the standard for review of late claims alleging the failure to state an offense. In applying the default provisions of Rule 52, the Court in *Cotton* did not consider what standard of review should apply to claims of

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[2]The Court stated:
"Freed from the view that indictment omissions deprive a court of jurisdiction, we proceed to apply the plain-error test of Federal Rule of Criminal Procedure 52(b) to respondents' forfeited claim.*See United States v. Olano*, 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). "Under that test, before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.' "*Johnson v. United States*, 520 U.S. 461, 466-467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (*quoting Olano, supra*, at 732, 113 S.Ct. 1770). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." 520 U.S. at 467, 117 S.Ct. 1544 (internal quotation marks omitted) (*quoting Olano, supra*, at 732, 113 S.Ct. 1770)."

failure to state an offense if such claims were added to the list of those that must be raised prior to trial in Rule 12, nor did it mention Rule 12 at all. In light of the ongoing confusion over the relationship between Rule 12 and Rule 52 in the courts of appeals, the Subcommittee thought it was important to spell out in the amended rule exactly what standard of review would apply to this claim when raised late, and to make it clear that the default provisions of Rule 52 do not apply.

2. Explicit language noting inapplicability of plain error review under Rule 52(b)

The Subcommittee's proposed amendment states explicitly that Rule 52 does not apply, making it clear that the new standards in Rule 12 *substitute* for the default standards provided in Rule 52. Providing more clarity about the relationship between the two Rules is something the Standing Committee requested in 2009.

The Subcommittee wanted to foreclose any argument that by including the language drawn from 52(a), while being silent about plain error and Rule 52(b), the Rule would leave open the possibility of applying plain error. In *United States v. Vonn*, 535 U.S. 55 (2002), the Court held that plain error review under Rule 52(b) applies to untimely Rule 11 errors, despite the language in Rule 11(h), which provides: "A variance from the requirements of this rule is harmless error if it does not affect substantial rights." The Court concluded (with only Justice Stevens dissenting), that "there are good reasons to doubt that expressing a harmless-error standard in Rule 11(h) was meant to carry any implication beyond its terms. At the very least, there is no reason persuasive enough to think 11(h) was intended to repeal Rule 52(b) for every Rule 11 case." Although the present amendment could be distinguished from the provision interpreted in *Vonn*, the Subcommittee concluded that *Vonn* demonstrates the value of explicitly addressing the relationship between the proposed amendment and Rule 52.

The Subcommittee concluded that addressing this issue in the text of the rule is preferable than addressing it in the Committee Note. As a policy matter any substance should be addressed in the rules, rather than accompanying notes. Addressing the applicability of Rule 52(b) in the text of the rule is particularly appropriate because of the continuing confusion in the lower courts about what standard of review Rule 12 requires for untimely claims. A recent Tenth Circuit opinion applying Rule 12[3] exemplifies the disagreement in the courts of appeals about whether Rule 52(b) applies to errors under Rule 12. Adding language to the text of the Rule would eliminate uncertainty and resulting litigation costs.[4]

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[3] United States v. Burke, -- F.3d ----, 2011 WL 310520 (10th Cir. Feb. 2, 2011).

[4] We have found one partial parallel, in which the Supreme Court found statutory language sufficient to preclude the application of Rule 52. In *Zedner v. United States*, 547 U.S. 489, 507 (2006), the Court rejected the government's argument that Rule 52(a) applied to violations of the Speedy Trial Act:

> "Harmless-error review under Federal Rule of Criminal Procedure 52(a) presumptively applies to "all errors where a proper objection is made," Neder v. United States, 527 U.S. 1, 7, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), and we have required "strong support" to find an implied repeal of Rule 52, United States v. Vonn, 535 U.S. 55, 65, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002). We conclude, however, that the provisions of the Act provide such support here."

The Court went on to conclude that the mandatory terms of the Speedy Trial Act were unequivocal, and applying

3. Statute of limitations

The Subcommittee concluded that the more generous standard for relief should not be applicable to statute of limitations claims (which had been grouped with double jeopardy and failure to state an offense in the 2010 version of the proposed amendment). A statute of limitations violation is an affirmative defense, not a constitutional violation like failure to state an offense and double jeopardy. A defendant may find it advantageous to waive the statute of limitations as part of a plea bargain. Requiring review or relief for a statute of limitations objection that should have been raised prior to trial upon a showing of prejudice alone would be a significant departure from current case law. The courts of appeals treat such untimely claims as either waived,[5] or forfeited and subject to plain error review. Eliminating the special treatment of statute of limitations claims is consistent with the current case law.

Rule 52(b)'s harmless error analysis would be "hard to square with the Act's categorical terms." 547 U.S. at 508.

[5] U.S. v. Gallup, 812 F.2d 1271 (10th Cir. 1987); U.S. v. Ramirez, 324 F.3d 1225, 1228-29 (11th Cir. 2003) ("when a statute of limitations defense is clear on the face of the indictment and requires no further development of facts at trial, a defendant waives his right to raise that defense by failing to raise it in a pretrial motion"); U.S. v. Clark, 319 Fed.Appx. 46, 48-49(2d Cir. 2009) ("Clark waived this argument by not raising it below. . . But even if we assume that the plain error standard . . . is applicable to Clark's argument, we nonetheless find it to be without merit."); U.S. v. Kelly,147 F.3d 172, 177 (2d Cir.1998) ("Kelly contends for the first time on appeal that the Government's prosecution was barred by the statute of limitations. Because Kelly did not raise this claim in district court, we deem it waived. . . . Even if we assume that the plain error standard . . . is applicable to Kelly's limitation defense, we nonetheless hold the defense to be without merit.").

In the First and Fourth Circuits, an objection to the statute of limitations is waived by pleading guilty. Acevedo-Ramos v. U.S., 961 F.2d 305, 308 (1st Cir. 1992); U.S. v. Husband, 119 Fed. Appx. 475 (4th Cir. 2005), rev'd on other grounds. See also Rivera-Colon v. U.S., 2008 WL 4559684, *3 (D.P.R. 2008) (noting later unpublished First Circuit application of this same rule). But the First Circuit has also stated that the objection must be raised *at trial*, or else reviewed for plain error. U.S. v. Thurston, 358 F.3d 51 (1st Cir. 2004), rev'd on other grounds.

The Fifth Circuit appears to treat statute of limitations objections not raised prior to trial as waived as well. *See* U.S. v. Gaudet, 966 F.2d 959, 962 (5th Cir. 1992) ("Gaudet points out for the first time on appeal that Counts 1-14 were time-barred by the Statute of Limitations, . . . [but] did not argue to the district court that any of his offenses were time-barred. Thus, he did not give the district court a chance to confront this alleged inconsistency. We are restrained by the plain error standard which compels us to conclude that Gaudet waived this issue by failing to contemporaneously object to the district court's alleged inconsistent treatment of his offenses."). See also U.S. v. Barakett, 994 F.2d 1107 (5th Cir. 1993) (holding failure to raise this defense *at trial* is waiver, and precludes review); U.S. v. Arky, 938 F.2d 579 (5th Cir.1991) (same).

In U.S. v. Baldwin, 414 F.3d 791 (7th Cir. 2005), the Seventh Circuit has suggested waiver is appropriate, but noted that the government failed to make this argument so it applied plain error instead. The court found that because the sentence for the allegedly time barred charge was run concurrently to a non-barred sentence, and because the government missed the statute of limitations by only one day, that there was no plain error, relying on the fourth prong of the *Olano* test. The first, but not the second, basis for this conclusion was later overruled, when the court later held that it is not appropriate to deny relief under the plain-error test for a double jeopardy error leading to a barred sentence simply because it is served concurrently to another sentence. U.S. v. Parker, 508 F.3d 434 (7th Cir. 2007). The court has not revisited its argument in *Baldwin* that relief in the case was not appropriate because the statute was missed by one day, nor has it resolved whether waiver is a more appropriate standard of review than plain error for untimely statute of limitations claims.

4. Double jeopardy

The Subcommittee also considered whether the new "substantial rights" language should be applicable to double jeopardy claims. Many courts of appeals currently apply plain error review – rather than cause and prejudice – to double jeopardy challenges to the charge that were available, but not raised before trial.[6] Moreover, cases reviewing double jeopardy claims after a guilty plea have expressly recognized that a double jeopardy violation clear on the face of the indictment is not waived by the plea. In this situation, courts have reviewed the double jeopardy claims either de novo,[7] or using plain error.[8] Designating the plain error standard for untimely double jeopardy

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[6] *See* U.S. v. Mahdi, 598 F.3d 883 (D.C. Cir. 2010) ("We need not resolve the parties' waiver dispute. Because Mahdi did not object in the district court to the alleged multiplicity, we review his arguments for plain error."); U.S. v. Robertson, 606 F.3d 943 (8th Cir. 2010) (collecting authority); U.S. v. Mungro, 365 Fed.Appx. 494 (4th Cir. 2010) (holding that defendant did not move to dismiss the indictment or assert that his prosecution for the second conspiracy somehow contravened the Double Jeopardy Clause based on prior prosecution, challenge was "forfeited on appeal" and will be reviewed for plain error); U.S. v. Hansen, 434 F.3d 92 (1st Cir. 2006). But compare U.S. v. Whitfield, 590 F.3d 325 (5th Cir. 2009) (stating unraised double jeopardy objection is waived, but assuming arguendo that plain error and not waiver applies); U.S. v. Flint, 394 Fed.Appx. 273, 2010 WL 3521922 (6th Cir. 2010) (describing as waived and declining to reach merits of double jeopardy claim raised for the first time on appeal by defendant found guilty after trial).

[7] *See, e.g.*, U.S. v. Poole, 96 Fed.Appx. 897 (4th Cir. 2004) (rejecting the government's argument that under Rule 12(b) defendant's unraised double jeopardy error was waived, granting relief, despite defendant's guilty plea, reasoning: "Because on its face the superseding indictment exposed Poole to multiple sentences for a single offense, we conclude that Poole has not waived his claim of multiplicity on appeal").

U.S. v. Saldua, 120 Fed.Appx. 553 (5th Cir. 2005) (remanding to vacate one of defendant's convictions and noting that the government chose not to argue that appeal waiver barred relief).

U.S. v. Zalapa, 509 F.3d 1060 (9th Cir. 2007) ("we recognize the distinction between objections to multiplicity in the indictment, which can be waived, and objections to multiplicitous sentences and convictions, which cannot be waived. *See* U.S. v. Smith, 424 F.3d 992, 1000 & n. 4 (9th Cir. 2005) ("Multiplicity of sentences is unlike the issue of multiplicity of an indictment which can be waived if not raised below. This conclusion is consistent with our holding in Launius v. U.S., 575 F.2d 770 (9th Cir.1978). In that case, we held that a defendant's guilty plea to a multiplicitous indictment did not constitute a waiver of the right to raise a double jeopardy claim as to his multiplicitous convictions and sentences. Id. at 771-72. We also recognized that Rule 12 of the Federal Rules of Criminal Procedure, the rule relating to pretrial motions, " 'applies only to objections with regard to the error in the indictment itself.' " *Id.* at 772.")

U.S. v. Williams, 2011 WL 462156 (11th Cir. 2011) ("Williams's appeal is not waived because he does not seek to introduce evidence from outside of the plea hearing to demonstrate that the conduct at issue in the sentencing phase of the first trial and the conduct at issue in the indictment of the second trial were the same offense.")

U.S. v. Harper, 2010 WL 3860730 (11th Cir. 2010) (stating "Conversely, in Dermota v. U.S., 895 F.2d 1324, 1325 -26 (11th Cir.1990), the court has held that the defendant did waive his double jeopardy challenge by pleading guilty to 'an indictment that, on its face, described separate offenses.' We distinguished cases holding that the defendant did not waive a double jeopardy challenge on the basis that '[t]hose cases dealt with constitutionally infirm proceedings, in which the government had no power to prosecute a second charge at all.'").

In U.S. v. Moreno-Diaz, 257 Fed.Appx. 435 (2d Cir. 2007) the court stated:

claims, as in the version of the Rule that went to the Standing Committee in June, would have preserved this current treatment.

The Subcommittee considered but rejected as unduly complex a proposal to have three tiers of review:

- prejudice alone ("substantial rights") for failure to state an offense
- "plain error" for double jeopardy, and
- "cause and prejudice" for everything else (including statute of limitations).

The Subcommittee concluded that the standard of prejudice to substantial rights was appropriate for violations of the fundamental right not to be placed twice in jeopardy or punished more than once for the same offense. Allowing review for untimely-raised double jeopardy claims on the basis of prejudice alone would simplify the analysis without changing the *result* in most or all double jeopardy cases. The second and fourth prongs of the *Olano* test – which look to whether the error is "plain" and whether it "seriously affects the fairness, integrity, or public reputation of judicial proceedings" – have not made much difference when reviewing double jeopardy violations.[9]

"Generally, the rights afforded by the Double Jeopardy Clause are personal and can be waived by a defendant." United States v. Kurti, 427 F.3d 159, 162 (2d Cir .2005) (quoting United States v. Mortimer, 52 F.3d 429, 435 (2d Cir.1995), cert. denied, 516 U.S. 877, 116 S.Ct. 208, 133 L.Ed.2d 141 (1995)). Where "a defendant has validly entered a guilty plea, he essentially has admitted he committed the crime charged against him, and this fact results in a waiver of double jeopardy claims."Id. at 162. However, the Supreme Court has established an exception to this rule: A guilty plea does not waive a subsequent double jeopardy claim where "judged on its face-the charge is one which the [second prosecuting party] may not constitutionally prosecute." Menna v. New York, 423 U.S. 61, 62 n. 2, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (per curiam); see also United States v. Sykes, 697 F.2d 87, 89 (2d Cir.1983) (citing Menna for the proposition that a "double jeopardy claim may be asserted on appeal notwithstanding the plea of guilty"); United States v. Quinones, 906 F.2d 924, 927-29 (2d Cir.1990).

[8] There are several appellate decisions applying plain error review in this situation, including U.S. v. Kelly, 552 F.3d 824 (D.C. Cir. 2009); U.S. v. Cesare, 581 F.3d 206 (3d Cir. 2009) (finding plain error); U.S. v. Grober, 624 F.3d 592 (3d Cir. 2010) ("Even if this argument was not waived by his plea of guilty to all six counts in the superseding indictment, it surely cannot, under the circumstances of this case, survive plain error review") (citations omitted); U.S. v. Lebreux, 2009 WL 87505 (6th Cir. 2009) (considering under plain error but rejecting based on dual sovereignty double jeopardy claim raised after guilty plea); and U.S. v. Plenty Chief, 561 F.3d 846 (8th Cir. 2009) (court notes its review "is limited to plain error").

Other appellate decisions, however, state that in guilty plea cases the appropriate standard is waiver (rather than plain error). *See, e.g.*, U.S. v. Adams, 256 Fed.Appx. 796 (7th Cir. 2007) ("Adams entered unconditional guilty pleas and therefore waived his right to appeal the denial of any pretrial motions based on his indictment"); U.S. v. Moreno-Diaz, 257 Fed.Appx. 435 (2d Cir. 2007) (citing U.S. v. Kurti, 427 F.3d 159, 162 (2d Cir. 2005), for the proposition that where "a defendant has validly entered a guilty plea, he essentially has admitted he committed the crime charged against him, and this fact results in a waiver of double jeopardy claims.")

[9] *See, e.g.*, U.S. v. Robertson, 606 F.3d 943 (8th Cir. 2010):
"Failing to remedy [such] a clear violation of a core constitutional principle would be error 'so obvious that our failure to notice it would seriously affect the fairness, integrity, or public reputation of [the] judicial proceedings and result in a miscarriage of justice.' " *United States v. Ogba,* 526 F.3d 214, 238 (5th

Although double jeopardy claims arise in a number of different situations,[10] we have not been able to identify a case in which the second and fourth prongs would not be satisfied if a defendant has been (or could be) convicted for an offense that judging from the indictment before trial should have been barred by double jeopardy. If indeed plain error review is applied whenever a defendant objects during trial, or after conviction, to a double jeopardy error available and resolvable before trial that he failed to raise before trial or plea, it arguably makes some sense to dispense with the second and fourth prongs of the *Olano* test.

5. Outrageous government conduct

The Subcommittee deleted the defense of "outrageous government conduct" from the list of "defects in the institution of the prosecution" that must be raised by pretrial motion under (b)(3)(A).

At the Standing Committee one member raised the question whether "outrageous government conduct" should be included in the list of "defects in the institution of the prosecution" because at

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Cir.2008) (first alteration in original) (quoting *United States v. Fortenberry,* 914 F.2d 671, 673 (5th Cir.1990)) (reversing a conviction on plain error review after finding a double jeopardy violation in part because the defendant was subjected to multiple special assessments).

For a time, the Seventh Circuit held that a conviction and sentence imposed in violation of the double jeopardy clause need not be vacated for plain error if the sentence was imposed concurrently to another lawful sentence, but it has abandoned that rule. In U.S. v. Baldwin, 414 F.3d 791 (7th Cir.2005), the Seventh Circuit has suggested waiver is appropriate, but noted that the government failed to make this argument so it applied plain error instead. Because the sentence for the allegedly time barred charge was run concurrently to a non-barred sentence, and because the government missed the statute of limitations by only one day, the court found that there was no plain error, relying on the fourth prong of the *Olano* test. The first, but not the second, basis for this conclusion was later overruled, when the court later held that it is not appropriate to deny relief under the plain-error test for a double jeopardy error leading to a barred sentence simply because it is served concurrently to another sentence. U.S. v. Parker, 508 F.3d 434 (7th Cir. 2007). The court has not revisited its argument in Baldwin that relief in the case was not appropriate because the statute was missed by one day, nor has it resolved whether waiver is a more appropriate standard of review than plain error for untimely statute of limitations claims. See also U.S. v. Cesare, 581 F.3d 206 (3d Cir. 2009) (holding that the two separate special assessments in this case constitute impermissible double punishments and, as such, offend double jeopardy); U.S. v. Robertson, 606 F.3d 943 (8th Cir. 2010) ("In light of the double jeopardy violation, the additional $100 special assessment subjects Robertson to multiple punishments for the same offense.").

Olano's fourth prong has also been enlisted in denying relief in one case in which the problem was failure to challenge jury instructions at trial (as opposed to a problem clear before trial). U.S. v. Irving, 554 F.3d 64 (2d Cir. 2009) ("even if the first three *Olano* factors were met, we could not conclude that Irving's convictions on both counts 4 and 5 seriously affect the fairness, integrity, or public reputation of judicial proceedings. It was within Irving's power to request clarifying instructions or a special verdict to have the jury particularize the bases of its verdicts on those counts. It hardly serves the interests of fairness to overturn verdicts that his inaction allowed to be ambiguous and that may be substantively unflawed.)

[10] Double jeopardy bars a charge following an acquittal or conviction for the same offense, after an acquittal definitively rejecting a necessary element of the charged offense, or after an earlier mistrial lacking manifest necessity. It also bars a conviction on one count charging the same offense as another count of conviction.

least one circuit has held that the defense "does not exist." See *United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995). Identification of the defense on the list of "defects in the institution of the prosecution" might imply that the defense does exist, despite case law to the contrary.

Although the Seventh Circuit appears to be the only circuit that has flatly held that the defense of outrageous government conduct does not exist, other circuits have expressed doubt about the continued vitality of the defense or recognized but discouraged it. And there are few – if any – cases in which the courts have granted relief on this basis.[11]

Under these circumstances, the Subcommittee concluded it would be prudent to delete the defense from (b)(3)(A). Because the list is illustrative and not exhaustive, failure to list the defense would not take a position one way or the other on the continued viability of the defense. Inclusion, on the other hand, might generate opposition on the ground that it would imply the defense is viable.

[11]*See, e.g.*, U.S. v Luisi, 482 F.3d 43 (1st Cir. 2007) ("The outrageousness doctrine permits dismissal of criminal charges only in those very rare instances when the government's misconduct is so appalling and egregious as to violate due process by "shocking ... the universal sense of justice." While the doctrine is often invoked by criminal defendants, it has never yet been successful in this circuit.").

Rule 12. Pleadings and Pretrial Motions *

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(b) Pretrial Motions.

(1) ***In General.*** Rule 47 applies to a pretrial motion.

(2) ~~***Motions That May Be Made Before Trial.*** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.~~***Motion That May Be Made at Any Time.*** A motion that the court lacks jurisdiction may be made at any time while the case is pending.

(3) ***Motions That Must Be Made Before Trial.*** The following defenses, objections, and requests must be raised by motion before trial if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

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*New material is underlined; matter to be omitted is lined through.

(A) ~~a motion alleging~~ a defect in instituting the prosecution, including:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to a speedy trial;

(iv) double jeopardy;

(v) the statute of limitations;

(vi) selective or vindictive prosecution; and

(vii) an error in the grand-jury proceeding or preliminary hearing;

(B) ~~a motion alleging~~ a defect in the indictment or information, including:

(i) joining two or more offenses in the same count (duplicity);

(ii) charging the same offense in more than one count (multiplicity);

(iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense.

~~— but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense~~;

(C) ~~a motion to~~ suppression of evidence;

(D) ~~a Rule 14 motion to~~ severance of charges or defendants under Rule 14; and

(E) ~~a Rule 16 motion for~~ discovery under Rule 16.

(4) ***Notice of the Government's Intent to Use Evidence.***

(A) *At the Government's Discretion.* At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) *At the Defendant's Request.* At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) ~~**Motion Deadline.**~~ **Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.**

(1) *Setting a Deadline.* The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.

(2) *Consequences of an Untimely Motion under Rule 12(b)(3).* If a party does not meet the deadline – or any extension the court provides – for raising a Rule 12(b)(3) defense, objection, or request, Rule 52 does not apply. The court may consider it only under these circumstances:

(A) the party shows cause and prejudice; or

(B) if the defense or objection is based on failure to state an offense or

double jeopardy, the party shows the alleged error has affected the party's substantial rights.

(d) **Ruling on a Motion.** The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(e) **[Reserved]** ~~**Waiver of a Defense, Objection, or Request.** A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.~~

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Committee Note

Rule 12(b)(2). The amendment deletes the provision providing that "any defense, objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial. This language was added in 1944 to make sure that matters previously raised by demurrers, special pleas, and motions to quash

could be raised by pretrial motion. The Committee concluded that the use of pretrial motions is so well established that it no longer requires explicit authorization. Moreover, the Committee was concerned that the permissive language might be misleading, since Rule 12(b)(3) does not permit the parties to wait until after the trial begins to make certain motions that can be determined without a trial on the merits.

As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.

Rule 12(b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is "available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can – and should – be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. 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)(2). 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"). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue" that appeared in existing (now deleted) (b)(2). No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims

under each category to help ensure that such claims are not overlooked.

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned any jurisdictional justification for the exception in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction").

Rule 12(c). As revised, subdivision (c) governs both the deadline for making pretrial motions and the consequences of failing to meet the deadline for motions that must be made before trial under Rule 12(b)(3).

As amended, subdivision (c) contains two paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made. New paragraph (c)(2) governs review of untimely claims, which were previously addressed in Rule 12(e).

Rule 12(e) provided that a party "waives" a defense not raised within the time set under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee decided not to employ the term "waiver" in new paragraph (c)(2).

The standard for review of untimely claims under new subdivision 12(c)(2) depends on the nature of the defense, objection, or request. The general standard for claims that must be raised before trial under Rule 12(b)(3) is stated in (c)(2)(A), which requires that the

party seeking relief show "cause and prejudice" for failure to raise a claim by the deadline. Although former Rule 12(e) referred to "good cause," no change in meaning is intended. The Supreme Court and lower federal courts interpreted the "good cause" standard under Rule 12(e) to require both (1) "cause" for the failure to raise the claim on time, and (2) "prejudice" resulting from the error. *Davis v. United States,* 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963). Each concept – "cause" and "prejudice" – is well-developed in case law applying Rule 12. The amended rule reflects the judicial construction of Rule 12(e).

Subdivision (c)(2)(B) provides a different standard for three specific claims: failure of the charging document to state an offense, and violations of double jeopardy or the statute of limitations. The Committee concluded that judicial review of these claims, which go to adequacy of the notice afforded to the defendant, and the power of the state to bring a defendant to trial or to impose punishment, should be available without a showing of "cause." Accordingly, paragraph (c)(2)(B) does not require a party who raises one of these late claims to show "cause" for failure to raise the issue by a timely pretrial motion. Paragraph (c)(2) provides for review if the defendant can show that the failure to state an offense in the charging document or the violation of double jeopardy or statute of limitations affected the defendant's "substantial rights." That term is intended to carry the meaning it has acquired from its use elsewhere in the Criminal Rules. See Rule 52(a) and 7(e). Unlike plain error review under Rule 52(b), the new standard under Rule (12)(c)(2)(B) does not require a showing that the error was "plain" or that the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Nevertheless, it will not always be possible for a defendant to make the required showing. For example, in some cases in which the charging document omitted an element of the offense the defendant may have admitted the element as part of a guilty plea after having been afforded timely notice by other means.

Rule 12(e). The effect of failure to raise issues by a pretrial motion have been relocated from (e) to (c)(2).

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if the court does not have jurisdiction of the charged offense. ~~if:~~

~~(1) the indictment or information does not charge an offense; or~~

~~(2) the court does not have jurisdiction of the charged offense.~~

* * * * *

Advisory Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

AS SUBMITTED TO THE STANDING COMMITTEE JANUARY 2011

Rule 12. Pleadings and Pretrial Motions **

* * * * *

(b) Pretrial Motions.

(1) ***In General.*** Rule 47 applies to a pretrial motion.

(2) ~~***Motions That May Be Made Before Trial.*** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.~~***Motion That May Be Made at Any Time.*** A motion that the court lacks jurisdiction may be made at any time while the case is pending.

**New material is underlined; matter to be omitted is lined through.

(3) ***Motions That Must Be Made Before Trial.*** The following defenses, objections, and requests must be raised by motion before trial if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) ~~a motion alleging~~ a defect in instituting the prosecution, including:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to a speedy trial;

(iv) double jeopardy;

(v) the statute of limitations;

(vi) selective or vindictive prosecution;

(vii) outrageous government conduct; and

(viii) an error in the grand jury proceeding or preliminary hearing;

(B) ~~a motion alleging~~ a defect in the indictment or information, including:

(i) joining two or more offenses in the same count (duplicity);

(ii) charging the same offense in more than one count (multiplicity);

(iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense;

~~but at any time while the case is pending, the court may hear a claim that the indictment or~~

~~information fails to invoke the court's jurisdiction or to state an offense~~;

(C) ~~a motion to~~ suppression of evidence;

(D) ~~a Rule 14 motion to~~ severance of charges or defendants under Rule 14; and

(E) ~~a Rule 16 motion for~~ discovery under Rule 16.

(4) ***Notice of the Government's Intent to Use Evidence.***

(A) *At the Government's Discretion.* At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) *At the Defendant's Request.* At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) Motion Deadline. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer

ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(e) ~~**Waiver of a Defense, Objection, or Request.**~~ **Consequence of Not Making a Motion Before Trial as Required.**

(1) ***Waiver.*** A party waives any Rule 12(b)(3) defense, objection, or request – other than failure to state an offense , double jeopardy, or the statute of limitations – not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. ~~For good cause~~ Upon a showing of cause and prejudice, the court may grant relief from the waiver. Otherwise, a party may not raise the waived claim.

(2) ***Forfeiture.*** A party forfeits any claim based on the failure to state an offense, double jeopardy, or the statute of limitations, if the claim was not raised by the deadline the court sets under Rule

12(c) or by any extension the court provides. A forfeited claim is not waived. Rule 52(b) governs relief for forfeited claims.

Committee Note

Rule 12(b)(2). The amendment deletes the provision providing that "any defense, objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial. This language was added in 1944 to make sure that matters previously raised by demurrers, special pleas, and motions to quash could be raised by pretrial motion. The Committee concluded that the use of pretrial motions is so well established that it no longer requires explicit authorization. Moreover, the Committee was concerned that the permissive language might be misleading, since Rule 12(b)(3) does not permit the parties to wait until after the trial begins to make certain motions that can be determined without a trial on the merits.

As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.

Rule 12(b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is "available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can – and should – be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The "then reasonably available" language is intended to

ensure that the failure to raise a claim a party could not have raised on time is not deemed to be "waiver" or "forfeiture" under the Rule. 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"). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue" that appeared in existing (now deleted) (b)(2). No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims are not overlooked.

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned any jurisdictional justification for the exception in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction").

Rule 12(e). Rule 12(e) has also been amended to clarify when a court may grant relief for untimely claims that should have been raised prior to trial under Rule 12(b)(3). Rule 12(e) has been subdivided into two sections, each specifying a different standard of review for untimely claims of error.

Subdivision (e)(1) carries over the "waiver" standard of the existing rule, applying it to all untimely claims except for those that allege a violation of double jeopardy or the statute of limitations or that the charge fails to state an offense. The rule retains the language

that provides a party "waives" all other challenges by not raising them on time as required by Rule 12(b)(3), as well as the language that relief is available only if the defendant makes a certain showing, previously described as "good cause." "Good cause" for securing relief for an untimely claim "waived" under Rule 12 has been interpreted by the Supreme Court as well as most lower courts to require two showings: (1) "cause" for the failure to raise the claim on time, and (2) "prejudice" resulting from the error. *Davis v. United States,* 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963). Each concept – "cause" and "prejudice" – is well-developed in case law applying Rule 12. To clarify this standard, with no change in meaning intended, the words "for good cause" in the existing rule have been replaced by "upon a showing of cause and prejudice."

Subdivision (e)(2) provides a different standard for three specific claims, those that allege a violation of double jeopardy, a violation of the statute of limitations, or that the charge fails to state an offense. The Committee concluded that the "cause" showing required for excusing waiver of other sorts of claims is inappropriate for these claims. The new subdivision provides that a court may grant relief for such a claim whenever the error amounts to plain error under Rule 52(b). This new standard is also consistent with the Court's holding in *Cotton,* that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet "the plain-error test of Federal Rule of Criminal Procedure 52(b)." *Cotton*, 535 U.S. at 631.

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if the court does not have jurisdiction of the charged offense. ~~if:~~

~~(1) the indictment or information does not charge an offense; or~~

~~(2) the court does not have jurisdiction of the charged offense.~~

* * * * *

Advisory Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

TAB III. B

MEMO TO: **Criminal Rules Advisory Committee Members**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Rule 15**

DATE: **March 17, 2011**

In 2010 the Supreme Court remanded the proposed amendment to Rule 15 to the Advisory Committee for further consideration. At its September meeting the Advisory Committee discussed how best to proceed. One suggestion was to emphasize that the amendment does not predetermine whether depositions conducted outside the presence of the defendant will be admitted at any subsequent trial, but only provides assistance in pretrial discovery.

At the conclusion of the discussion, Judge Tallman recommitted the matter to the Rule 15 Subcommittee. The subcommittee chair is Judge John Keenan, and the other members of the subcommittee are Leo Cunningham, Andrew Leipold, and the representatives of the Department of Justice.

The Subcommittee met by teleconference, and the members agreed to recommend that the text of the proposed amendment be retained without change, but that the committee note be reorganized to emphasize the limited purpose of the amendment. The proposed amendment and committee note follow this memorandum.

As background reading, I have also included an article that analyzes and critiques the proposed amendment, Barry M. Sabin et al., *Proposed Changes to Federal Rule 15: Limitations, Technological Advances, and National Security Cases*, in CTR. ON LAW AND SEC., N.Y.U. SCH. OF LAW, TERRORIST TRIAL REPORT CARD at 35 (2010), *available at* http://www.lawandsecurity.org/publications/TTRCFinalJan14.pdf .

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 15. Depositions

* * * * *

(c) Defendant's Presence.

(1) ***Defendant in Custody.*** Except as authorized by Rule 15(c)(3), the ~~The~~ officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that

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***New material is underlined; matter to be omitted is lined through.

disruptive conduct will result in the defendant's exclusion.

(2) ***Defendant Not in Custody.*** Except as authorized by Rule 15(c)(3), a ~~A~~ defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant — absent good cause — waives both the right to appear and any objection to the taking and use of the deposition based on that right.

(3) ***Taking Depositions Outside the United States Without the Defendant's Presence.*** The deposition of a witness who is outside the United States may be taken without the defendant's

presence if the court makes case-specific findings of all the following:

(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

* * * * *

Committee Note

Subdivision (c)(3). This amendment provides a mechanism for taking depositions in cases in which important witnesses — government and defense witnesses both — live in, or have fled to, countries where they cannot be reached by the court's subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the Rule to date has not addressed instances

where an important witness is not in the United States, there is a substantial likelihood the witness's attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness's location for a deposition.

The Committee recognized that authorizing the taking of a deposition under new Rule15(c)(3) would not determine whether the resulting depositions will be admissible, in part or in whole, at trial. Questions of admissibility of the evidence taken by means of these depositions are left to resolution by the courts, on a case by case basis, applying the Federal Rules of Evidence and the Constitution.

Recognizing that important witness confrontation principles and vital law enforcement and other public interests are involved in these instances, the amended Rule authorizes a deposition outside a defendant's physical presence only in very limited circumstances where case-specific findings are made by the trial court. New Rule 15(c)(3) delineates these circumstances and the specific findings a trial court must make before permitting parties to depose a witness outside the defendant's presence.

The party requesting the deposition shoulders the burden of proof — by a preponderance of the evidence — as to the elements that must be shown. Courts have long held that when a criminal defendant raises a constitutional challenge to proffered evidence, the government must generally show, by a preponderance of the evidence, that the evidence is constitutionally admissible. *See, e.g.*, *Lego v. Twomey*, 404 U.S. 477, 489 (1972). Here too, the party requesting the deposition, whether it be the government or a defendant requesting a deposition outside the physical presence of a co-defendant, bears the burden of proof. Moreover, if the witness's presence for a deposition in the United States can be secured, thus allowing defendants to be physically present for the taking of the testimony, this would be the preferred course over taking the deposition overseas and requiring the defendants to participate in the deposition by other means.

This amendment does not supersede the relevant provisions of 18 U.S.C. § 3509, authorizing depositions outside the defendant's

physical presence in certain cases involving child victims and witnesses, or any other provision of law.

Proposed Changes to Federal Rule of Criminal Procedure 15:

Limitations, Technological Advances, and National Security Cases

By Barry M. Sabin,* Ryan C. Eney,** and Nabeel A. Yousef***

As branches of the United States government continue to struggle to define the contours of constitutional and practical considerations for bringing national security cases in Article III courts, one critical procedure that should be addressed is the manner, means, and use of foreign depositions in United States federal criminal proceedings. The continued reliance upon the federal criminal justice system for addressing alleged terrorism violations has been, and will continue to be, complicated by foreign evidence collection.[1] Foreign depositions have already been used in prominent post-9/11 counterterrorism cases by both the prosecution and the defense.[2] Regarding witness testimony, obstacles can prevent witnesses from traveling to the U.S. and can hinder in-custody defendants from traveling outside the U.S. to participate in-person at foreign witness depositions. Testimonial presence obstacles have occurred in matters ranging from organized crime cases to international fraud schemes, but these obstacles are more pronounced in national security cases. With twenty-first century technological advances, clear procedures that comport with constitutional safeguards would help practitioners understand how to appropriately and strategically prosecute and defend these high-profile cases, and would promote consistent judgments in them.

Presently, the plain language of Federal Rule of Criminal Procedure 15 ("Rule 15"), which addresses depositions generally, requires the presence of in-custody defendants.[3] In response to the increase in transnational crime, and to address inconsistent treatment in the courts, the Department of Justice recommended amending Rule 15. The Advisory Committee on Federal Rules of Criminal Procedure in turn proposed amendments to Rule 15 that under certain circumstances would allow depositions outside the U.S. in the defendant's absence.[4] Under the proposed amendments, the trial court would be required to make several case-specific findings, including that: (1) the witness's testimony could provide substantial proof of a material fact in a felony prosecution, (2) the witness's presence at trial or deposition in the United States cannot be obtained, (3) the defendant cannot be present for certain, specified reasons, and (4) the defendant can meaningfully participate in the deposition through reasonable means.[5] If the Supreme Court approves the

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[1] In an effort to ease foreign evidence collection, the United States and the European Union ("EU") have entered into a mutual assistance agreement to allow video conferencing for testimony between EU member states and the United States. *Agreement on Mutual Legal Assistance Between the European Union and the United States of America*, 2003 O.J. (L 181) 34.

[2] *See*, e.g., United States v. Abu Ali, 528 F.3d 210 (4th Cir. 2008) (permitting district court to conduct seven-day, live, two-way video link deposition of Saudi government officials in Saudi Arabia); United States v. Moussaoui, 365 F.3d 292, 297 (4th Cir. 2004) (allowing district court depositions of defense witnesses via remote video); United States v. Ahmed, 587 F. Supp. 2d 853 (N.D. Ohio 2008) (requiring two-way video testimony to implement the procedures approved by the Fourth Circuit in *Abu Ali*); United States v. Paracha, No. 03-1197, 2006 U.S. Dist. LEXIS 1, at *5 (S.D.N.Y. Jan. 3, 2006) (denying defendant's request to have witness held at Guantanamo Bay testify at trial because a videotaped deposition of witness from Guantanamo Bay was also available). Yong Ki Kwon, a cooperating witness in *United States v. Khan*, 309 F. Supp. 2d 789 (E.D. Va. 2004), later testified in the Australian terrorism prosecution of Faheem Lodhi in Australia court via videolink. Tracy Ong, *Terror Suspect 'Seen at Pakistani Training Camp,'* THE AUSTRALIAN, Mar. 12, 2007, *available at* http://www.theaustralian.news.com.au/story/0,25197,21367251-5006784,00.html. In 2008, in *United States v. Al Kassar*, the defendant, an alleged arms dealer who was ultimately convicted of conspiring to sell arms to the FARC, among other offenses, successfully moved prior to trial for the ability to take videotaped depositions of a Spanish official. 2008 U.S. Dist. LEXIS 87204 (S.D.N.Y. Oct. 10, 2008).

[3] FED. R. CRIM. P. 15(a)(1).

[4] Following the proposal of the rule by the Advisory Committee on Federal Rules of Criminal Procedure, the Committee on Rules of Practice and Procedure (hereinafter, collectively, the "Committee") recommended that the Judicial Conference approve the proposed amendment to Rule 15. Both committees are part of the Judicial Conference, which is part of the Judicial Branch, as authorized by Congress in the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, and which prescribes rules of practice, procedure, and evidence, subject to Congress. The Judicial Conference approved the proposed amendment on September 15, 2009, and transmitted it to the Supreme Court with the recommendation that it be adopted by the Court and transmitted to Congress. The Supreme Court must decide whether to transmit it to Congress by May 1, 2010.

[5] The central addition to Rule 15 proposed by the Advisory Committee on Federal Rules of Criminal Procedure is:

(3) Taking Depositions Outside the United States Without the Defendant's Presence. The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all the following:
(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;
(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;
(C) the witness's presence for a deposition in the United States cannot be obtained;
(D) the defendant cannot be present because:
(i) the country where the witness is located will not permit the defendant to attend the deposition;
(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or
(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and
(E) the defendant can meaningfully participate in the deposition through reasonable means.

Report from Richard C. Tallman, Chair, Advisory Comm. on Fed. Rules of Criminal Procedure, Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, to Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure, Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, at D-13 – D-14 (June 2009) (hereinafter "Committee Report"), *available at* http://www.uscourts.gov/rules/jc09-2009/2009-09-Appendix-D.pdf.

amendment, Congress must act before December 1, 2010, or it will take effect as a matter of law.

This article suggests that Congress should enact legislation to modify Rule 15 to satisfy constitutional and practical concerns.[6] This article's proposed alternate framework relies upon: (1) the Fourth Circuit's opinion in *United States v. Abu Ali*, (2) the development of and reliance upon sophisticated advances in technology, (3) limiting the rule to the national security context by restricting its application to national security cases involving certain enumerated offenses, (4) certifications by the Attorney General of the United States, and (5) required reporting by the Justice Department to the U.S. Congress regarding the frequency that Rule 15 is used and other relevant trends. This framework considers the risk to Sixth Amendment Confrontation Clause rights,[7] and should satisfy anticipated challenges related to the cross-examination of foreign witnesses. A modified Rule 15 would benefit both prosecutors and defendants, as it would create procedures for increased access to witnesses overseas for all parties.

Part I of this article examines the lessons that can be drawn from recent cases on two-way video testimony; Part II discusses recent advances in and inherent problems with video testimony technology; Part III discusses proposed limitations and safeguards for Rule 15; Part IV considers the needs and concerns of both prosecutors and defenders; Part V anticipates the Supreme Court's reaction to amending Rule 15; and the final Part contains our recommendations and conclusions.

Part I: Two-Way Video Testimony in the Courts

Although the Supreme Court has not directly addressed two-way video testimony, the Court has addressed related Confrontation Clause issues. In 1990, in *Maryland v. Craig*,[8] the Supreme Court allowed an alleged child sex abuse victim to testify via one-way closed-circuit television and applied a test similar to the one in *Ohio v. Roberts*. In *Roberts*, the Court ruled that a preliminary examination of an unavailable witness is admissible at trial on a showing that (1) the witness is unavailable and (2) the previous statement evidences adequate indicia of reliability.[9]

In 2004, in *Crawford v. Washington*, the Supreme Court rejected the use of an out-of-court statement by an unavailable witness.[10] In *Crawford*, the Court altered the second prong of the *Roberts* rule from indicia of reliability to a requirement of an opportunity to cross-examine the witness.[11] A 2009 Supreme Court case expanded the rule from *Crawford*. In *Melendez-Diaz v. Massachusetts*, the trial court admitted certificates concluding that a substance possessed by the defendant was cocaine without requiring the testimony of the forensic analyst who conducted the tests.[12] The Court held that to do so was a violation of the defendant's right to confrontation.[13]

In the lower federal courts, a number of cases have addressed the use of two-way video testimony in light of the Confrontation Clause of the Sixth Amendment.[14] Two notable appellate cases – the en banc decision of the Eleventh Circuit in *United States v. Yates* and the Fourth Circuit's decision in *United States v. Abu Ali* – have recently dealt with the use of two-way video testimony and have provided a framework that should be incorporated into the amended Rule 15. *Yates* adapted the standard for remote one-way video testimony from *Maryland v. Craig* and applied it to two-way video testimony; the *Abu Ali* court specified procedures under which courts can conduct two-way video deposition testimony that it concluded maintain the defendant's confrontation rights under the Sixth Amendment.

In *Yates*, two witnesses testified via live, two-way video conference from Australia in the defendant's trial for mail fraud and other offenses. The two witnesses were unwilling to travel to the United States and were outside the subpoena powers of the government. The court struck down the use of two-way video testimony at trial; however, it did not preclude the use of such testimony in the future. Instead, the court laid out a framework for the use of two-way video testimony based on the standard set forth in *Maryland v. Craig*. In *Craig*, the Supreme Court held that allowing one-way video testimony at trial did not violate the Confrontation Clause of the Sixth Amendment where the "denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony

[6] Congress has previously modified other proposed amendments transmitted by the Supreme Court. In 1994, Congress modified Federal Rule of Evidence 412 to extend certain evidentiary protections to civil sex offense cases. *See* FED. R. EVID. 412 advisory committee's note; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 40141, 108 Stat. 1796, 1918-19.

[7] The Confrontation Clause of the Sixth Amendment of the Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

[8] 497 U.S. 836 (1990).

[9] 448 U.S. 56 (1980).

[10] 541 U.S. 36 (2004)

[11] *Id.*

[12] 129 S. Ct. 2527 (2009).

[13] *Id.*

[14] *See, e.g.*, United States v. Bordeaux, 400 F.3d 548 (8th Cir. 2005) (applying the *Craig* standard and not allowing two-way video testimony); United States v. Gigante, 166 F.3d 75 (2d Cir. 1999) (allowing two-way video testimony based on analogy to depositions and a broad reading of "exceptional circumstances" in FRCP 15(a). The witness testifying via two-way video testimony was terminally ill and also participating in the witness protection program. The court also attempted to distinguish between one-way and two-way video testimony, but this approach has since been dismissed by Justice Scalia in his statement rejecting the proposed amendment to Federal Rule of Criminal Procedure 26(b)); United States v. Shabbazz, 52 M.J. 585 (N-M. Ct. Crim. App. 1999) (holding two-way video testimony inadmissible without guarantees of reliability).

is otherwise assured."[15] In *Yates*, the U.S. Court of Appeals for the Eleventh Circuit held that in order to allow video testimony, a court must (1) hold an evidentiary hearing and (2) find (a) that the video testimony is necessary to further an important public policy and (b) that the reliability of the testimony is otherwise assured.[16] The court decided that the video testimony at issue did not further an important public policy, holding that "the prosecutor's need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the Defendants' rights, to confront their accusers face-to-face."[17] Beginning with *Craig* and *Yates*, the courts have entangled the rules for depositions (originating in *Roberts*) and the admissibility of testimony by applying the Supreme Court standard for one-way video testimony to two-way live video testimony.

Although *Yates* discusses the standard for video testimony at trial, the decision speaks directly to the admissibility of video depositions. Similarly, Rule 15 applies to depositions only, but necessarily implicates the admissibility of testimony at a criminal trial. Although the ability to depose a witness and the admissibility of that witness testimony at trial are distinct, courts have tied the two procedures together. The Committee recognized the connection in its report when it wrote, "Members stressed that providing a procedure to take a deposition did not guarantee its later admission ... ."[18] On the other hand, the Committee should be concerned about providing a deposition procedure that is not sufficiently directed at admissibility. Further, a procedure that effectively says the decision on admissibility should be left to the courts is akin to having no rule at all because that is the status quo – which is an uncertain landscape in critical need of clarity.

In *Abu Ali*, the Fourth Circuit applied the *Craig/Yates* framework to the national security context. By their nature, national security cases are far more likely to involve transnational prosecutions with witnesses in foreign countries. In this case, Saudi counterterrorism officers living in Saudi Arabia were beyond the subpoena power of the district court and Saudi Arabia would not allow the officers to testify at trial in the United States. Saudi Arabia allowed the counterterrorism officers to be deposed in Saudi Arabia, but the U.S. government would not allow the defendant, Abu Ali, to travel to Saudi Arabia for a number of reasons, including potential security concerns. According to the Fourth Circuit, Abu Ali and the witnesses could see and hear each other contemporaneously at the week-long two-way video link deposition, and the jury later saw and heard both video feeds. The district court required that two of Abu Ali's defense attorneys attend the deposition in Saudi Arabia, while a third defense attorney remained with Abu Ali in the United States.

In *Abu Ali*, the appellate court upheld the district court's decision to allow Rule 15 depositions of counterterrorism officers in Saudi Arabia via live, two-way video link. These depositions were admitted into evidence at trial. The court distinguished the case from *Yates* on two grounds: (1) the government charged Abu Ali with national security-related offenses, which implicated a public policy of great importance, and (2) the district court in *Yates* failed to make case-specific findings as to why the witnesses and defendant could not be physically present in the same place.[19] The court found that, under the *Craig* standard, national security is an important public policy and that certain elements of confrontation from *Craig* ensured the reliability of the testimony – oath, cross-examination, and observation of the witness's demeanor.

Lessons to consider from *Abu Ali* include that national security, as a public policy of the utmost importance, could serve as a potential limiting factor for Rule 15; elements of confrontation (particularly cross-examination) are critical; and a workable procedural framework is possible, as other courts have since followed *Abu Ali*. Although the procedure from *Abu Ali* is fact-specific, six points from the case are instructive in developing a framework:[20] (1) upon defense counsel's request, the witness was sworn in using the oath of the Saudi criminal justice system, and the oath was largely similar to the one used in the U.S., (2) defense counsel cross-examined the witness extensively, (3) defense counsel was present in the U.S. with the defendant and abroad with the witness, (4) the defendant, judge, and jury were all able to observe the demeanor of the witness, (5) the jury watched a videotape that showed side-by-side footage of the witnesses testifying and the defendant's simultaneous reaction to the testimony, and (6) even though there was no contemporaneous phone link between the defendant and his counsel during the witness deposition, the deposition was lengthy and there were frequent breaks for the defendant and his counsel to converse.[21]

Although the Committee writes that the proposed amendment incorporates the requirements of the lower courts, the Committee also justifies the omission of specific procedures by saying that the courts will still need to make a determination on admissibility. Prosecutors and

[15] 497 U.S. at 850.
[16] United States v. Yates, 438 F.3d 1307 (11th Cir. 2006) (en banc).
[17] *Id.* at 1316.
[18] Committee Report, *supra* note 5, at D-11.
[19] United States v. Abu Ali, 528 F.3d 210, 242 (4th Cir. 2008)
[20] *Id.* at 240-242.
[21] Nevertheless, a better practice might include a contemporaneous phone link rather than breaks for the defendant and counsel to communicate

defenders both desire clarity in the proposed rule amendment and, based on Supreme Court precedent and lower courts cases, we submit that the rule on two-way video depositions should come from *Abu Ali*. At least one court has already relied upon the factors articulated in *Abu Ali* in a national security case. In *United States v. Ahmed*, the Northern District of Ohio granted the prosecutors leave to conduct a deposition that shall "occur in a manner that as fully as technologically possible preserves the defendants' right of confrontation," and instructed the parties to use the procedures approved in *Abu Ali*.[22] The Committee claims it is following the *Abu Ali* procedures, but the proposed rule, as presently drafted, effectively says the decision should be left to the courts.[23]

Part II: Video Testimony Technology

Technology to aid in discovery has progressed from telephonic depositions to two-way, live, in-court video testimony, but the issue we now face is whether the technology has developed to the point where it can effectively address the concerns of jurists and other critics. The U.S. Court of Appeals for the Fifth Circuit in 1992 aptly anticipated this concern when it wrote:

> No doubt, few defendants regard trial by deposition as an adequate substitute for confronting the witness in the presence of the jury. Only through live cross-examination can the jury fully appreciate the strength or weakness of the witness' testimony, by closely observing the witness' demeanor, expressions, and intonations. Videotaped deposition testimony, subject to all of the rigors of cross-examination, is as good a surrogate for live testimony as you will find, but it is still only a substitute.[24]

Or as Justice Scalia cogently stated, "Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones."[25] There is no doubt that virtual presence still lacks some of the elements of physical confrontation. The disadvantages of video testimony are real and they inform our discussion of further Rule 15 considerations. Although two-way video deposition testimony allows for more observation and interaction than possible by telephone or one-way video, even the prevalence of high-definition two-way video technology (known as "telepresence"), which makes remote testimony feel more like in-court testimony, is not an exact substitute for face-to-face confrontation with respect to all human senses.

The proposed amendment's section 15(c)(3)(E) states that a trial court must find that the defendant can "meaningfully participate in the deposition through reasonable means." Although case law intimates that this limiting principle targets two-way video testimony, the rule does not explicitly identify such testimony as its concern. Instead, in using general language such as "meaningfully participate" and "reasonable means," the Committee is trying to preserve courts' ability to react to evolving standards for depositions. Courts have allowed depositions via telephone, then one-way video, and now two-way video.[26]

The proposed amendment reflects trends abroad as well as at the state and local level.[27] In May 2008, California passed a law authorizing the use of two-way video testimony by alleged victims of elder abuse too sick or infirm to travel to the courtroom.[28] India, for example, has embarked on a nationwide project to connect jails and courts to a video conferencing system, which some call "tele-justice."[29] This trend began to spread after India's highest court determined that two-way video conferencing satisfies the requirement of a defendant's presence in criminal proceedings.[30] Even more permissive is the United Kingdom, which allows for testimony via live television link with minimal limitations – the rule applies to all criminal cases involving injury or threat of injury to another person when any witness, other than the defendant, is outside the United Kingdom.[31]

[22] Ahmed, 587 F. Supp. 2d at 854.
[23] Committee Report, *supra* note 5.
[24] Aguilar-Ayala v. Ruiz, 973 F.2d 411, 419 (5th Cir. 1992).
[25] Supreme Court on Court Rules, 207 F.R.D. 89, 94 (2002) (statement of Scalia, J.)
[26] *See*, e.g., United States v. Medjuck, 156 F.3d 916 (9th Cir. 1998) (admitting videotaped depositions of three Canadian witnesses, in which the defendant was able to witness the depositions live via video feed and communicate with his attorneys via a private telephone feed); United States v. McKeeve, 131 F.3d 1 (1st Cir. 1997) (upholding depositions of witnesses in the United Kingdom that the defendant monitored via a live telephone link); United States v. Gifford, 892 F.2d 263 (3d Cir. 1989) (upholding depositions of witnesses in Belgium where the defendant listened over an open telephone line, in which the defendant was also able to confer with his attorney in Belgium via a private telephone line); United States v. Salim, 855 F.2d 944 (2d Cir. 1988) (admitting a deposition conducted in France by a French magistrate without the defendant's presence, even though the French court would not set up an open telephone line for the defendant to observe the proceedings or allow the deposition to be videotaped). We do not address whether these cases violate *Crawford*, as some of the cases claim to interpret Rule 15 whereas others go through a Sixth Amendment analysis to conclude that the depositions were valid.
[27] In the federal civil context, video testimony technology is used and is governed by Federal Rule of Civil Procedure 43. "For good cause in compelling circumstances and with appropriate safeguards, the court may permit presentation of testimony in open court by contemporaneous transmission from a different location." FED. R. CIV. P. 43(a).
[28] CAL. PENAL CODE § 1340(b) (West Cumulative Supp. 2009); Cal. State Senate Republican Caucus, *Governor Signs Benoit Elder Abuse Legislation* (May 16, 2008), *available at* http://cssrc.us/web/37/news.aspx?id=5009.
[29] Swati Prasad, *Tele-Justice Bridges India's Courts and Jails*, BUSINESS WEEK, Feb. 22, 2008, *available at* http://www.businessweek.com/globalbiz/content/feb2008/gb20080222_899391.htm?chan=top+news_top+news+index_global+business.
[30] Maharashtra v. Desai, (2003) 4 S.C.C. 601 (India). While India lacks something identical to the Confrontation Clause, the Indian code of criminal procedure requires that "[e]xcept as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader." *Id.*
[31] Criminal Justice Act. 1988, §§ 32(1), 32(2)(a)-(d) (Eng.), *available at* http://www.opsi.gov.uk/ACTS/acts1988/ukpga_19880033_en_5#pt3-l1g31.

The major criticism of video testimony is that it does not allow human observation by all the senses and must by its nature omit some of the visual picture. As the U.S. Court of Appeals for the Fifth Circuit noted, "Even the advanced technology of our day cannot breathe life into a two-dimensional broadcast."[32] There is a deep-seated human discomfort with video testimony. To use an example from the film *12 Angry Men*, as noted by one federal district court, a juror in the film observed a witness's gait while walking to the witness stand to testify.[33] The juror used that observation to determine that the witness was not credible when he said that he ran over in time to see the defendant escaping. It was an observation that a juror would have missed if the only aspect of the witness that the jurors saw was his face.

Another significant concern is psychological: a witness may be more likely to lie to a camera and a jury may be more likely to believe what they see on a television monitor than what they hear from a live person. The U.S. Court of Appeals for the Eighth Circuit summarized this view in a recent case: "The virtual 'confrontations' offered by closed-circuit television systems fall short of the face-to-face standard because they do not provide the same truth-inducing effect."[34] A Massachusetts federal district court allowed two-way video testimony because both parties consented, but focused on the psychological difference between a television screen and a live person.[35] In doing so, the court noted that studies have suggested that video screens necessarily present sanitized versions of reality.

Advances in two-way video technology address at least some of these concerns. For example, telepresence is a relatively new technology capable of full-duplex, high-definition, immersive video conferencing.[36] The premise behind this new generation of video conferencing is that the experience should emulate as much as possible the experience of sitting across a table from the other party, to the point that some telepresence systems forego a mute button. The picture is 1080p full high-definition, there is little or no sound delay, and it includes the capability to show a document directly to the opposing side in real-time. Telepresence further reduces the distinction between virtual and in-person confrontation. Conversely, video testimony may actually improve other senses by, for example, zooming in on the witness's face or amplifying sounds. As telepresence becomes more accessible[37] and the technology continues to improve, the drawbacks of two-way video depositions decrease significantly.

Part III: National Security Limitations and Additional Safeguards

In national security cases, critical witnesses for either party may often reside overseas, beyond the United States' subpoena powers, or be unable or unwilling to travel for a variety of reasons. For example, particularly valuable witnesses are often held in foreign custody in countries unwilling to transport witnesses to the United States. As case law makes clear, national security is a sufficiently important public policy to justify two-way video testimony, but it is a high bar and other policies are likely to fail, as in *Yates*. To limit the rule to the national security context, the proposed amendment should limit its application to national security cases involving enumerated offenses. Enumerated predicate charges have proven workable, as in 18 U.S.C. 2232b(g)(5)(B)(i), which defines the "[f]ederal crime of terrorism" by listing predicate violations.

The current Rule 15 is effectively a decision-making rule that embodies the constitutional standard.[38] As recent cases illustrate, the Supreme Court has chosen to enforce the Confrontation Clause standard aggressively. Simultaneously, the lower federal courts have made clear that only the most important public policies will satisfy the Confrontation Clause requirements, and that national security meets the threshold. Other public policies have failed to do so. As such, the decision-making Confrontation Clause rule (i.e., Rule 15) should be limited to national security.

The rule could theoretically apply to other public policies, but such an expansion would require a judicial determination that the public policy meets the constitutional threshold. Alternatively, thorough congressional findings may also suffice, but the Supreme Court would likely hold such findings to a high standard.

As presently crafted, amended Rule 15 would permit foreign deposition testimony for all transnational crimes. Unless limitations are placed on this potentially sweeping category of federal crimes, the concerns articulated by the Yates court – a lack of specific factual findings and insufficiently important public policies – will be realized. National security has been established as a sufficiently important public policy, but the cases demonstrate that courts put the burden on the government to prove that other policies may satisfy the

[32] Aguilar-Ayala v. Ruiz, 973 F.2d 411, 419 (5th Cir. 1992).
[33] United States v. Nippon Paper Indus. Co., 17 F. Supp. 2d 38 (D. Mass. 1998).
[34] United States v. Bordeaux, 400 F. 3d 548, 554 (8th Cir. 2005).
[35] Nippon Paper, 17 F. Supp. 2d 38.
[36] Latham & Watkins LLP recently installed telepresence rooms in several offices in the United States and abroad. The authors have used the telepresence system to interact with foreign offices.
[37] In addition to other companies adopting telepresence technology, Marriott International and Starwood Hotels & Resorts Worldwide recently announced plans to install telepresence at select hotels internationally. Cisco and Tata Communications already have public telepresence rooms around the world. Michael B. Baker, *BTN Research: Rise In Remote Conferencing Prompts Marriott, Starwood*, HOSPITALITY DESIGN (July 28, 2009), *available at* http://www.hdmag.com/hospitalitydesign/content_display/industry-news/e3i64d7c42a898297d7d9ac3ab846677491.
[38] This article makes the distinction between the constitutional standard (the Sixth Amendment) that guides the philosophical underpinnings of confrontation, and the federal rule (derived from Rule 15 and the federal cases) that guides confrontation decisions in practice.

rule. The burden will likely be high, and at the very least fact-specific findings will be required. Thus, it is immediately practical to limit Rule 15 to national security. A narrower rule also mirrors recent use of two-way video testimony in the courts, primarily in national security cases. Other countries have already adopted the predicate offenses approach. For example, Australia, which does not provide a constitutional right to confrontation, recently adopted legislation allowing for the broad use of video testimony in terrorism trials but requires specific crimes to trigger the availability of video testimony.

Congress should consider two additional safeguards to reinforce this policy limitation: Attorney General certification and reporting requirements. These safeguards would address concerns such as the incentive for prosecutors to charge defendants with offenses only tangentially related to national security in order to use two-way video testimony. While the predicate offenses approach reduces this problem significantly, requiring that the Attorney General certify each deposition taken under the new provision would go even further in addressing these concerns. Rule 15 can follow the feasible and practical precedent of other statutes, such as the requirement in 18 U.S.C. 2332(d) that the Attorney General must certify prerequisite facts before prosecution for certain terrorism-related offenses. Requiring Attorney General authorization would decrease the number of video depositions to only those truly needed and would reinforce the requirement at the Department of Justice that the deposition be necessary to further national security, an important public policy. The Committee rejected this approach, however, citing separation of powers questions.[39] Legislation from Congress modifying Rule 15 should satisfy this trepidation.

The second safeguard that Congress should add is reporting requirements related to the proposed amendment to Rule 15. For example, these requirements might include reporting on the number of times the new Rule 15 is used, including how many times the depositions are admitted at trial. Furthermore, the federal defenders and the Department of Justice might be required to provide statistics that inform other transnational-related areas, such as how many times such cases arise, how often those cases use foreign witnesses, and how many times Rule 15 prevents foreign witness testimony. As mentioned above, such statistics may go towards a judicial or congressional determination that expanding Rule 15 would advance an important public policy. As for the use of Rule 15, a reporting requirement may further allay fears of the over-use of video depositions by prosecutors. Requiring regular reports from the Department of Justice is not novel. The Department of Justice already reports to Congress under FISA, FARA, and the PATRIOT ACT, among others.[40]

Part IV: Prosecutor and Defender Perspectives

At first glance, Rule 15 may seem to be more favorable to government equities. However, defensive use of two-way video testimony may create greater symmetry and provides a meaningful strategic option for defense presentation. Whether the use of two-way video testimony favors the prosecution or defense depends on the circumstances of the specific testimony. It is clear that practitioners prefer a more defined rule. Having a better idea of whether the court will allow video depositions *ex ante* may create efficiencies for prosecutors, perhaps even helping determine whether to bring charges in the first place, and defenders would be better positioned for strategic planning and perhaps plea bargaining.

Under the current Rule 15, federal prosecutors are facing increasing difficulties in obtaining witness testimony for transnational-related crimes. Some of the major issues prosecutors face when attempting to acquire prosecution testimony or interrogate defense testimony from witnesses overseas include:

Substantive Issues

* Witness testimony in U.S. proceedings from overseas may face fewer, if any, consequences for perjury than testimony given in-person in a U.S. court. However, cross-examination may address the decreased perjury consequences.[41]

Procedural Issues

* A witness in another country may not be willing to testify in the United States because the witness is concerned about becoming subject to U.S. civil and criminal lawsuits or simply does not want to travel.

* Prosecutors may not be able to secure the witness's transport to the United States because the witness is not subject to U.S. subpoena powers.

* The U.S. government may not allow the prosecutor (and defense counsel) to bring the witness into the country if the witness is considered a security risk.

* Political considerations may limit the ability of prosecutors to bring the witness to the United States. Obtaining the physical presence of a witness in another coun-

[39] The Committee received assurances from the Department of Justice that it would require Assistant Attorney General approval of subpoenas under the proposed Rule 15. Committee Report, *supra* note 5, at D-11.

[40] *See, e.g.*, Foreign Intelligence Surveillance Act, 50 U.S.C. § 1808; Foreign Agents Registration Act, 22 U.S.C. § 621; USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[41] As an international comparison, the United Kingdom applies its own perjury laws to statements made by witnesses outside the United Kingdom via two-way video. See Criminal Justice Act, 1988, §§ 32(1); 32(2)(a)-(d) (Eng.), *available* at http://www.opsi.gov.uk/ACTS/acts1988/ukpga_19880033_en_5#pt3-l1g31.

try may require coordinating or arranging with politically unsavory, or even unapproachable, governments and groups.

* A witness brought to the U.S. may refuse to return to the other country, for example by claiming asylum.

* Prosecutors may not be able to confirm the identity of defense witnesses testifying remotely.

* Government prosecutors must obtain extensive approvals before traveling abroad, which makes traveling to remote depositions difficult.

Technological Issues

* Attorneys are unable to see what is off-camera, so there are concerns about where the defense counsel should sit and whether the witness is being coached.

* Surprising a witness with a document may be impossible where the document must be prepared and sent before the deposition commences. A telepresence setup with a document viewer mitigates this problem.

In recent years, defenders have faced an increasing number of legislative and policy challenges, especially in the national security context. Nevertheless, two-way video testimony is an equally beneficial tool for defense attorneys. Video testimony has also proven itself to be a useful, cost-effective tool in contexts that do not implicate a defendant's Sixth Amendment confrontation rights.[42] For example, in *Moussaoui* the district court allowed depositions to be taken of defense witnesses via two-way video.[43] Although it did not help the defendant, in *Paracha*, the district court relied in part on the availability of a videotaped deposition of a defense witness held at Guantanamo Bay to deny the defendant's request to have the witness testify at trial.[44]

Some of the major concerns for defense attorneys include:

Substantive Issues

* The representative of the federal public defenders before the Committee on Rules of Practice and Procedure (the "representative") wrote that the proposed amendment is overbroad because it does not require a showing that the evidence sought is necessary to the government's case, only that it "could" provide proof of a material fact.[45]

* The representative wrote that the proposed amendment fails to require the witness's unavailability because it does not require the government to make good faith efforts to secure the witness's presence.[46]

* The proposed amendment limits itself only to felonies, which means it may contradict the *Yates* court decree that "the prosecutor's need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the Defendants' rights, to confront their accusers face-to-face."[47] Defense attorneys would argue that the proposed amendment's current restriction to felonies means that prosecutors would try to use Rule 15 video depositions in a wide range of applications that would violate the Sixth Amendment (e.g. offenses that do not implicate important public policies). Even with national security limits, defenders may be rightly concerned, as video depositions and testimony are enticing – a video deposition may be the only method to secure a witness, but it may also be an inordinately less expensive alternative to in-person confrontation.

* Concerns that defense counsel (and prosecutors) will discourage witnesses from appearing in court, so they can conduct a video deposition instead of in-court testimony, are self-limiting because prosecutors and defenders have a strong preference for in-court testimony.

Procedural Issues

* Defense attorneys may need real-time interaction with the defendant during the deposition. For example, in *Abu Ali* the defense attorney in the United States was able to speak with the defendant via cell phone during breaks. Ideally, these conversations could occur in real-time as they do at in-person depositions.

Technological Issues

* The representative argued that the proposed amendment would impair an effective defense because of technological problems. His letter provides the example of a case in Texas in which "the video feed was sporadic, the sound was abysmal, and the secure telephone line worked only intermittently."[48] Telepresence would mitigate this concern.

[42] Even though confrontation rights only apply to criminal defendants, defense attorneys must still consider whether the rules allow video depositions and whether the court will admit the deposition.
[43] United States v. Moussaoui, 365 F.3d 292, 297 (4th Cir. 2004). Video was also used for sentencing in *Moussaoui*. Matthew Barakat, *Moussaoui Jury Watches Video Testimony*, S.F. CHRON., Mar. 8, 2006, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2006/03/08/national/a090713S88.DTL.
[44] United States v. Paracha, No. 03-1197, 2006 U.S. Dist. LEXIS 1, at *5 (S.D.N.Y. Jan. 3, 2006).
[45] Letter from Richard A. Anderson, Fed. Pub. Defender for N.D. Tex., to Peter G. McCabe, Sec'y of the Comm. on Rules of Practice and Procedure, Admin. Office of the U.S. Courts (Feb. 17, 2009), *available at* http://www.uscourts.gov/rules/2008_Criminal_Rules_Comments_Chart.htm (follow "08-CR-007" hyperlink) (hereinafter "Letter from Richard A. Anderson").
[46] *Id.*
[47] United States v. Yates, 438 F.3d 1307, 1316 (11th Cir. 2006) (en banc).
[48] Letter from Richard A. Anderson.

Part V: The Supreme Court's Response to Remote Testimony

If Rule 15 is approved by the Judicial Committee, it will go before the Supreme Court for approval. Video testimony issues also arose in 2002 when the Court declined to transmit to Congress a proposed amendment to Rule 26(b) of the Federal Rules of Criminal Procedure. That amendment would have allowed two-way video testimony in open court for unavailable witnesses under exceptional circumstances, so long as there were appropriate safeguards. In the Supreme Court's discussion, Justice Scalia said that he would not subject two-way video testimony to a lower standard than that for one-way video testimony established by *Craig*.[49] He criticized the proposed amendment for, among other things, lacking case-specific findings necessary to further an important public policy, as required by *Craig*. Justice Scalia went even further in his opposition to video testimony, expressing doubt that "virtual confrontation" would protect "real" constitutional rights.[50] This article's proposed Rule 15 would differ from the proposed amendment to Rule 26(b) because it would incorporate a standard higher than *Craig* and would provide additional safeguards to defendants because depositions are one step further removed from live, in-court video testimony.

The constitutional landscape has changed since the proposed amendment to Rule 26(b). The main constitutional issue relevant to video testimony is whether a court may compel the admission of a video deposition at trial without violating a defendant's Sixth Amendment confrontation rights.[51] In 1990, in *Maryland v. Craig*,[52] the Supreme Court applied the test from *Ohio v. Roberts*, that a preliminary examination of an unavailable witness is admissible at trial on a showing that (1) the witness is unavailable and (2) the previous statement evidences adequate indicia of reliability, in allowing an alleged child sex abuse victim to testify via one-way closed-circuit television.[53] In 2004, in *Crawford v. Washington*, the Court altered the second prong of the *Roberts* rule from indicia of reliability to a requirement of an opportunity to cross-examine the witness.[54] It is unclear to what extent the *Crawford* decision supersedes *Craig*. *Craig* concerned the use of one-way video testimony, but it applied the rule from *Roberts*. Although *Crawford* clearly alters the rule from *Roberts*, *Crawford* did not specifically address video testimony. As such, it is unclear whether *Crawford* also applies to the rule in *Craig*. Of note, the majority in *Yates* distinguished between in-court testimony and pre-trial statements when it determined that *Craig*, not *Crawford*, was the proper standard to apply.[55] *Crawford* may be a concern for video testimony insofar as it increases the standard required for the admissibility of out-of-court statements and testimony. Notwithstanding *Crawford*, higher standards and safeguards in Rule15 satisfy constitutional scrutiny.

Conclusion

Two-way video testimony has been and will continue to be critical to prosecutors, defense counsel, and judges in national security cases. In light of recent technological advances – particularly the development of telepresence – two-way video testimony related to enumerated and certified national security offenses can satisfy Confrontation Clause concerns by following the procedure developed in *Abu Ali*. In addition to certification requirements, reporting requirements would act as a further safeguard. As the joint opinion in *Abu Ali* noted, "the criminal justice system is not without those attributes of adaptation that will permit it to function in the post-9/11 world. These adaptations, however, need not and must not come at the expense of the requirement that an accused receive a fundamentally fair trial."[56] Properly limited and buttressed to protect defendants' rights, two-way video deposition testimony in national security cases is just such an adaptation.

[49] Supreme Court on Court Rules, 207 F.R.D. 89, 94 (2002) (statement of Scalia, J.)
[50] *Id.*
[51] This article does not address potential constitutional and statutory issues concerning the scope of the proposed amendment as it relates to the Rules Enabling Act.
[52] 497 U.S. 836 (1990).
[53] 448 U.S. 56 (1980).
[54] 541 U.S. 36 (2004).
[55] Yates, 438 F.3d at 1314 n.4. Both dissenting opinions argued that *Crawford* was the appropriate standard to apply.
[56] United States v. Abu Ali, 528 F.3d 210, 221 (4th Cir. 2008).

TAB III. C

CHAMBERS OF U.S. CIRCUIT JUDGE
RICHARD C. TALLMAN **MEMORANDUM**

March 21, 2011

TO: Members, Criminal Rules Advisory Committee

FROM: Hon. Richard C. Tallman

RE: Rule 16

Since our fall meeting in Boston, I have held two telephone conference calls with the Rule 16 Subcommittee. In order to stimulate discussion during the most recent call, the reporters and I prepared (1) a draft amendment to Rule 16, and (2) a checklist that might be incorporated into the District Judges' Benchbook. The Subcommittee was unable to reach consensus on whether or not to recommend our draft amendment to the Committee of the Whole. Thus, I have placed the issue on the agenda for the Portland meeting without specific endorsement of any particular change. Indeed, as you will see from the recent March 18, 2011, letter to me from Assistant Attorney General Lanny Breuer, the Department remains opposed to any change in the rule. For purposes of our discussion, however, on pages 10-11 of this letter the Department has provided language that would, in its view, codify the existing *Brady/Giglio* case law.

To facilitate our Portland discussion, I have asked the Reporters to provide the entire Committee with the same material we gave the Subcommittee, supplemented by any comments from the Department and the defense community. This memorandum describes the discussion draft amendment to Rule 16. Both the proposed amendment and the checklist follow at the end of this memorandum.

Following our initial discussion in the teleconference of the Rule 16 Subcommittee, I asked the Department of Justice and Ms. Brill, as a representative of the defender community, to prepare comment materials for inclusion in the Agenda Book responding to the discussion draft and checklist. The submissions we have received follow the discussion draft and checklist.

During the Portland Advisory Committee meeting, I would like to focus the discussion on whether, in light of the Federal Judicial Center survey results, we should even proceed with a proposed change. I remain concerned that with the Department and the defense bar at polar opposites, and the judges in the middle, a consensus resolution by the Judicial Conference will be difficult to achieve. Nonetheless, I offer the attached language to stimulate our discussion.

The discussion draft imposes a new duty on the government to disclose "exculpatory" or "impeachment" information within its possession and known by the attorney for government to exist. Pretrial disclosure of this information is intended to facilitate defense preparation and enhance the fairness and efficiency of federal criminal trials.

The discussion draft provides a critical limitation on this new obligation: adopting a proposal endorsed by the Criminal Rules Committee in 1997, the government would have the unreviewable authority to withhold such disclosure before trial whenever it has a good faith belief that making the disclosure would jeopardize the safety of individuals or the public, or threaten either national security or obstruction of justice. Thus the government can provide assurances to prospective witnesses, foreign governments, and domestic intelligence agencies that it will not be required to make pretrial disclosures that would threaten the safety of any person or our national security interests. It can also unilaterally tailor pretrial disclosure when necessary to prevent obstruction of justice.

The discussion draft does not disturb or modify the existing regime under Rule 26.2 and 18 U.S.C. § 3500, which provides for post-testimony disclosure of prior written or recorded witness statements, but the discussion draft does require pretrial disclosure – subject to the government's unreviewable authority noted above – of a written summary of inconsistent statements by its witnesses.

The discussion draft has the following features:

(1) It separates exculpatory and impeachment information, and provides a definition of each.

Both exculpatory and impeachment information must be "within the government's possession, custody or control and known by the attorney for the government to exist."

- Exculpatory information is further defined as information "that is inconsistent with any element of the crime charged against the defendant or that establishes an affirmative defense, if that information is not defined as impeachment information."

- Impeachment information is then defined as information "that casts substantial doubt upon the accuracy of any witness testimony that the government intends to rely on to prove an element of any crime charged, including a [list further described below]."

The definition of each of these terms is one of the issues for Committee discussion.

(2) This bifurcated structure allows the time for disclosure to vary depending upon whether the information is exculpatory or impeaching.

During discussion of the amendment proposed in 2007 and in the Federal Judicial Center survey, particular concern was expressed regarding pretrial disclosure of the wide variety of information that might be defined as impeaching. The discussion draft allows the Committee to define different time limits for exculpatory and impeachment information. The discussion draft

requires earlier disclosure for exculpatory information (at least 14 days before trial) than for impeachment information (7 days before trial).

The Committee should consider the appropriate time periods to provide sufficient time for defense preparation, and – in light of other features of the discussion draft – also protect the interests the government has identified as ones of special concern, including the protection of witnesses, the prevention of obstruction of justice, and national security interests.

(3) The discussion draft provides an illustrative but non-exhaustive list of the common forms of impeachment information.

The provision of the illustrative list is intended to provide substantial guidance. The following items are included in the discussion draft:

(i) a written summary of any inconsistent oral or written statement by the witness regarding the alleged criminal conduct of the defendant;

(ii) any offer or promise made directly or indirectly to the witness by the government in exchange for cooperation or testimony;

(iii) any prior conviction or specific instance of conduct that could be used to impeach the witness under Federal Rule of Evidence 608 or 609;

(iv) any uncharged criminal conduct by the witness or release of civil liability that may provide an incentive to curry favor with a prosecutor;

(v) any pending criminal charge against the witness; and

(vi) any impairment that could affect the witness's ability to perceive and recall.

In seeking to enumerate the most common forms of impeachment information, the discussion draft follows the format of the Committee's proposed amendment to Rule 12. Discussion of whether to employ this format, which items to include, and the language of each proposed item, would be helpful. Item (i), dealing with prior inconsistent statements, is discussed below.

(4) The discussion draft requires pretrial disclosure of <u>a summary</u> of prior inconsistent statements by government witnesses

A special regime now exists for the disclosure of prior witness statements, which are provided to the opposing party after the witness has testified, rather than as a part of general pretrial

discovery. See Rule 26.2 and the Jencks Act, 18 U.S.C. § 3500.[1] Rule 16(a)(2) provides that the rule does not "authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500." Our thought was to avoid a direct collision with the statutory timetable Congress established when enacting the Jencks Act for the reasons we have previously discussed in Committee. It is Judicial Conference policy to avoid promulgating rules that directly conflict with existing statutes, thereby triggering an interbranch conflict. We are also attempting to avoid prompting Congress to hold hearings on potential legislation that might modify whatever rule change language is ultimately approved by the Conference and the Supreme Court.

Although Rule 26.2(d) and the Jencks Act, 18 U.S.C. § 3500(c) provide that the court may recess the trial to allow a party to analyze the prior statements, recessing imposes costs on the court, the jurors, witnesses, counsel, and the defendant. Defense participants at the Houston meeting and defense lawyers who responded to the Federal Judicial Center have strongly urged the need for pretrial provision for such information in order to investigate and make the most effective use of it.

The discussion draft seeks to accommodate the defense need for adequate time for pretrial preparation by providing for pretrial disclosure of only "a written summary of any inconsistent oral or written statement by the witness," not the statement itself. It retains the statement in Rule 16(a)(2) that the rule does not "authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500."

The proposed amendment contains a broader definition of prior statements than those found in Rule 26.2 and 18 U.S.C. § 3500, which are limited to written and contemporaneously recorded statements, as well as grand jury testimony. As noted, this definition in the discussion draft triggers the obligation to disclose a summary of any prior statement regarding the alleged criminal conduct of the defendant that is inconsistent with the witness's anticipated testimony, not the witness's full statement.

A key issue for Committee discussion is whether the requirement of pretrial disclosure of a summary of impeaching evidence is consistent with the Jencks Act and Rule 26.2.

(5) The discussion draft provides the government with unreviewable authority not to disclose information before trial.

The discussion draft provides an important escape valve for cases in which the government believes that pretrial disclosure would threaten the safety of witnesses, victims, or the public; jeopardize national security; or lead to obstruction of justice. New subdivision (J) provides the government with the option of filing – ex parte and under seal – an "unreviewable written

[1]See point 6 infra for a discussion of the relationship between Rule 26.2 and the Jencks Act.

explanation" of its good faith belief that the pretrial disclosure would threaten one of these interests. If the government makes this filing, pretrial disclosure "is not required."

The discussion draft thus balances the new obligation to provide pretrial disclosure of exculpatory and impeachment information with the certainty that the government can withhold such disclosure whenever it has a good faith belief that pretrial disclosure would jeopardize the safety of individuals or the public, jeopardize national security, or threaten obstruction of justice.

When disclosure of exculpatory or impeaching information is delayed under (J), the discussion draft provides in (d)(1) that the court shall ensure that the disclosure of the information is made "in sufficient time to permit the defendant to make effective use of that information at trial subject to the limitation in 18 U.S.C. § 3500."

The scope and effectiveness of this escape valve are other important issues for discussion.

(6) The discussion draft refers to the Jencks Act.

Rule 26.2 (which became effective December 1, 1980) and the Jencks Act cover much the same ground, raising the question whether the new provisions in the discussion draft should refer to the rule, the act, or both. As explained in the Committee note that accompanied Rule 26.2, the rule "place[s] in the criminal rules the substance of" the Jencks Act, and also imposes disclosure obligations on the defense that parallel the government's obligations. In 1983 Rule 16(a)(3) (as well as Rule 12) were amended to refer to Rule 26.2, rather than the Act. Without explanation, however, the reference to the Jencks Act was retained in Rule 16(a)(2).

I want to emphasize that the Chair is not committed or endorsing the proposed discussion draft. Instead, it was my belief that it was time to lay something on the table in order to better focus the Committee on the important question whether to amend Rule 16, and, if so, in what form. We have devoted substantial time, study, and resources to this issue. I believe we have done so in a careful, thoughtful, and deliberate manner. It is time to bring the question to a head. We have many other pressing proposals that also require our attention, and which we will also be discussing in Portland. I hope you find these materials useful in stimulating your thinking and our discussion.

I look forward to seeing all of you in April.

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) Information Subject to Disclosure.

*****

(H) **Exculpatory information.** At least [14] days before trial, the government must disclose any information within the government's possession, custody, or control and known by the attorney for the government to exist that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, if that information is not impeachment information as defined in (I).

(I) **Impeachment information.** Upon a defendant's request and at least [7] days before trial, the government must disclose any information within the government's possession, custody, or control and known by the attorney for the government to exist that casts substantial doubt upon the accuracy of any witness testimony that the government intends to rely on to prove an element of any crime charged, including the following:

(i) a written summary of any inconsistent oral or written statement by the witness regarding the alleged criminal conduct of the defendant;

(ii) any offer or promise made directly or indirectly to the witness by the government in exchange for cooperation or testimony;

(iii) any prior conviction or specific instance of conduct that could be used to

impeach the witness under Federal Rule of Evidence 608 or 609;

(iv) any uncharged criminal conduct by the witness or release of civil liability that may provide an incentive to curry favor with a prosecutor;

(v) any pending criminal charge against the witness; and

(vi) any impairment that could affect the witness's ability to perceive and recall.

(J) Exception to pretrial disclosure of exculpatory or impeachment information. Pretrial disclosure of exculpatory or impeachment information is not required if the government submits to the court, ex parte and under seal, an unreviewable written explanation stating why the government believes in good faith that pretrial disclosure of this information will threaten the safety of any crime victim, other person, or the public; jeopardize national security; or lead to an obstruction of justice.

(2) Information Not Subject to Disclosure. Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

(d) Regulating Discovery

(1) Protective and Modifying Orders. At any time the court may, for good cause, deny,

restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal. If pretrial disclosure of information under Rule 16(a)(1)(H) or (I) is delayed, the court shall insure that disclosure of the information is made in sufficient time to permit the defendant to make effective use of that information at trial subject to the limitation in 18 U.S.C. § 3500.

Draft to circulate to Subcommittee

Checklist for disclosure before trial

A. **Exculpatory information.** The government should certify that it has disclosed [or has complied with the procedure for withholding] all information that tends directly to negate the defendant's guilt of any crime charged, including

(1) the failure of any person who participated in an identification procedure to make a positive identification of the defendant, whether or not the government anticipates calling the person as a witness at trial; [adapted from D. Mass]

(2) information that is inconsistent with any element of any crime charged or that establishes a recognized affirmative defense [regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime]; [from USAM 9-5.001]

(3) information that casts a substantial doubt upon the accuracy of any evidence-- other than witness testimony -- that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of that evidence [regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime] [from USAM 9-5.001] [impeachment information considered separately, below]

(4) classified or otherwise sensitive national security material that tends directly to negate the defendant's guilt, which may require certain protective measures that may cause disclosure to be delayed or restricted [from USAM 9-5.001]

B. **Impeachment information.** The government should certify, for each witness it anticipates calling in its case-in-chief, that it has either disclosed [or has complied with the procedure for withholding] the following:

(1) the **name** of the witness

(2) any **statement**, or a description of such a statement, made orally or in writing by the witness, regarding the alleged criminal conduct of the defendant, that is inconsistent with other statements made by the witness, including material variances within the same interview and inconsistent attorney proffers;

(3) **offers or promises** made directly or indirectly to the witness by the government in exchange for cooperation or testimony including:
(a) dropped or reduced charges
(b) immunity
(c) expectations of downward departures or motions for reduction of sentence;
(d) assistance in a state or local criminal proceeding;
(e) considerations regarding forfeiture of assets, including the amount, or forbearance in seeking revocation of professional licenses or public benefits;
(f) stays of deportation or other immigration benefits;
(g) assistance in procuring visas;
(h) monetary benefits, paid or promised;
(i) nonprosecution agreements;
(j) letters to other law enforcement officials (e.g. state prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf;

(k) relocation assistance;
(l) consideration or benefits to culpable or at risk third parties;

(4) **Prior convictions** that could be used to impeach the witness under FRE 609;

(5) **Uncharged criminal conduct** by the witness or release of civil liability (e.g., waiver of tax liability or promises not to suspend or debar a government contractor) that may provide an incentive to curry favor with a prosecutor, known to the government;

(6) **Pending criminal charges** against the witness, known to the government;

(7) Prior **specific instances of conduct** by the witness known to the government that could be used to impeach the witness under FRE 608, including any finding of misconduct that reflects upon truthfulness;

(8) Substance abuse, mental health issues, physical or other impairments known to the government that could affect the witness's **ability to perceive and recall** events;

(9) Information known to the government that could affect the witness's **bias** such as:
a) Animosity toward defendant
b) Animosity toward a group of which the defendant is a member or with which the defendant is affiliated
c) Relationship with victim.

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

March 18, 2011

The Honorable Richard C. Tallman
Chair, Advisory Committee on the Criminal Rules
902 William Kenzo Nakamura Courthouse
1010 Fifth Avenue
Seattle, Washington 98104-1195

Dear Judge Tallman:

Per your request, this letter is a follow-up to the Rule 16 Subcommittee conference call held on February 25, 2011. At the outset, let me express our sincere appreciation for the leadership you have shown throughout your chairmanship of the Criminal Rules Committee. On all the issues the Committee has addressed, and especially those surrounding the Committee's consideration of prosecutorial disclosure and the proposed amendments to Rule 16 of the Federal Rules of Criminal Procedure, you have guided our Committee with great skill and with a focus on improving federal criminal justice. Our Committee has been looking into disclosure issues related to the Supreme Court's decisions in *Brady v. Maryland*, 373 U.S. 93 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), for more than seven years now, since the American College of Trial Lawyers first proposed an amendment to Rule 16 in 2003. We agree with you that the Committee has now fully explored the issues and that every effort should be made to resolve them in the coming months.

We also appreciate your memorandum of February 7, 2011, and the various options you set out in an effort to find common ground in the Committee around disclosure issues. We believe there is common ground, and as you requested, we lay out our thoughts on that in this letter. We also provide you our concerns about the proposed amendment set out in the February 7th memorandum. Finally, as you requested, we include here a proposed amendment to Rule 16 that would summarily codify existing constitutional disclosure requirements under *Brady* and *Giglio*. We very much look forward to discussing all of this with you and the other members of the Committee in Portland in April.

Common Ground

The Attorney General and I – and I am certain all the members of the Committee as well – are committed to ensuring that Department of Justice prosecutors are the most professional and ethical lawyers in the country and that they fulfill all of their disclosure obligations. We believe, and we think the experience of Committee members confirms, that

federal prosecutors are the very best at what they do. That is not meant in any way to minimize the reality that mistakes have been made by federal prosecutors from time to time in the past and will be made from time to time in the future; nor is it meant to indicate that Department prosecutors face no challenges in meeting our disclosure obligations. We do.

At the very beginning of his tenure, after discovery violations were uncovered in the *Stevens* case, the Attorney General took the extraordinary step of moving to set aside the guilty verdict in the case and to dismiss the indictment. This was not the easiest, nor the only possible course of action. But it was the right thing to do. Moreover, the Attorney General took another important step at that time. He asked the Deputy Attorney General to convene a working group to fully examine discovery and case management practices in the Department and to make recommendations for improving discovery and minimizing violations of discovery law and ethics. He made a commitment to address any and all challenges facing federal prosecutors – including the many challenges resulting from new and emerging technologies – and to ensure that to the extent humanly possible, every federal prosecutor meets his or her disclosure obligations.

I co-chaired that working group in 2009, along with Karen Immergut, then-U.S. Attorney in the District of Oregon and Chair of the Attorney General's Advisory Committee. The working group met regularly for several months, reviewed existing law and Department policies, candidly evaluated discovery practices, surveyed the U.S. Attorney community, and developed recommendations for reform and improvement.

I came to the Criminal Rules Committee meeting in the fall of 2009 and later in 2010 and pledged that the Department would take significant steps to improve disclosure policies and practices of federal prosecutors. I can now report that many of those steps have been completed and others are well underway. Under the leadership of Attorney General Holder, the Department of Justice has taken unprecedented measures to train prosecutors, investigators, paralegals, and support staff, develop policies that ensure consistent disclosure practices that meet all legal requirements, address new and emerging technologies that raise significant retention and disclosure issues and challenges, and develop greater cooperative relationships with the courts and defense bar to make disclosure practices work better. Moreover, we have committed ourselves to continuous improvement in our disclosure practice.

These are just some of the steps that we have taken to improve disclosure practice within the Department of Justice over the last few years:

- The Department amended the U.S. Attorneys' Manual and created a ground-breaking and transparent policy that requires our prosecutors to go beyond the legal disclosure requirements recognized by the Supreme Court wherever possible and generally to provide defendants with such discoverable information earlier than required by law.
- Then-Deputy Attorney General David Ogden issued three memoranda to all federal prosecutors that: (1) provided overarching guidance on gathering and reviewing discoverable information and making timely disclosure to defendants; and (2) directed each U.S. Attorney's Office and litigating division to develop more granular discovery

policies that account for controlling precedent, existing local practices, and judicial expectations.

- The Department appointed a full-time national coordinator for criminal discovery initiatives (and later a full-time deputy) to lead and oversee all Department efforts to improve disclosure policies and practices.

- The Attorney General put in place a requirement that all federal prosecutors undertake annual discovery training. This requirement has since been institutionalized through its codification in the U.S. Attorneys' Manual. The Department has held comprehensive "train-the-trainer" programs at the National Advocacy Center to facilitate live training programs in U.S. Attorneys' offices around the country and has also developed video programs available to all federal prosecutors at their desktops. The thousands of federal prosecutors across the country have now undergone the required training and will continue to do so annually.

- The Department initiated "New Prosecutor Boot Camp," the inaugural version of which was held in 2010. The course, designed for newly hired federal prosecutors, includes training on *Brady, Giglio*, electronically stored information (ESI), the scope of the prosecution team, the Jencks Act, and Rule 16. The training includes presentations by faculty; mock oral argument on discovery motions with students playing the roles of both prosecutor and defense attorney; and hands-on review of documents for issue identification.

- The Department has begun a program to train the thousands of federal law enforcement agents across the government in case management and disclosure policies and practices. We have held "train-the-trainer" programs at the National Advocacy Center and district-specific programs in states across the country, and we are now beginning a program of training 26,000 investigative agents employed in the Department's five investigative agencies, the Federal Bureau of Investigation (FBI), Drug Enforcement Administration, Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Marshals Service, and Bureau of Prisons. This training program includes 5,700 FBI agents and support personnel located in the Washington, D.C. area at FBI headquarters, Quantico, and the Washington Field Office. The Washington-based FBI trainings are taking place in 35 different four-hour sessions. The same effort is being executed across the country. When the training of Department agencies is completed, we will begin training thousands of agents employed by the Internal Revenue Service, Immigration and Customs Enforcement, the Postal Inspection Service, and other non-DOJ agencies.

- In September 2010, the Department held the initial Support Staff Criminal Discovery Training Program at the National Advocacy Center. In addition to covering *Brady, Giglio*, ESI, the Jencks Act, and Rule 16, the course placed particular emphasis on the use of software for managing cases and case documents electronically.

- The Department has now completed the drafting of a Discovery Blue Book that will soon be printed and distributed to every federal prosecutor. It comprehensively covers the law, policy and practice of prosecutors' disclosure obligations.

- Pursuant to the instructions of then-Deputy Attorney General Ogden, all U.S. Attorneys' offices and litigating components have created criminal discovery policies with more specific guidance than that issued by the Deputy Attorney General and that account for controlling precedent, existing local practices and local rules of court.

- The Department is in the final stages of developing a national e-communications policy to guide agents and prosecutors in the management, retention, and disclosure of emails, text messages, instant messages, and emerging technologies.

- In September 2010, the Department began collaborating with the Federal Judicial Center (FJC) on training for the courts on ESI in criminal cases. We will be participating in further such training in Portland in April (at the same time as our meeting) and in Atlanta in July, and our national discovery coordinator will provide additional training on historical cell site data at various workshops for United States Magistrate Judges.

- In order to improve disclosure practices, the Department's criminal prosecutors have been collaborating with their DOJ civil e-discovery counterparts, representatives of the Federal Public Defenders, and personnel from the FJC. We have made significant strides on a project with the Federal Public Defenders to create a best practices protocol for exchanging e-discovery in criminal cases. The goal of the project is to eliminate unnecessary discovery disputes and encourage more uniform practices nationwide to benefit prosecutors, defense lawyers, and the courts. Judge Barbara Rothstein, the head of the FJC, is a strong supporter of this project. The Department was invited to speak at the annual Federal Defender Conference in January regarding this project.

- The Department has created a case management pilot project to develop best practices in the collection, cataloguing, and disclosure of case information generally. The project is creating templates for integrating agents' and prosecutors' case information and work product.

- The Department has convened a computer forensics working group to develop best practices on the use of forensics for fast-changing technologies.

As is plain to see, what began with the American College of Trial Lawyers letter in 2003, continued with the thorough examination of disclosure practices by this Committee, and then followed with an historic commitment by this Attorney General and Department of Justice to improvements in practice and policy, has resulted in dramatic and positive change. The changes have taken place across the country both in discovery policies, practice, and perhaps most important, in the culture of discovery within the Department of Justice. Simply put, the last

several years have seen substantial improvements in criminal discovery in federal courts across the country. We think many of the steps ordered by Attorney General Holder were overdue, and while much has been achieved, our work is not done. Our national discovery coordinator and his deputy are hard at work, and their efforts and those of U.S. Attorneys' offices throughout the country and the Department's litigating divisions will continue into the future.

As I indicated when I first spoke with the Committee about this subject in 2009, we think the Department's comprehensive approach to improving discovery practices is the best way to ensure that prosecutors fulfill their disclosure obligations. And we believe this Committee can help to institutionalize the progress that has been made by publicly documenting what has already been done and by periodically asking the Department to report to the Committee about its disclosure training, policies, and practices. We think such a public report and/or public testimony will lay bare what we believe are emerging best practices in prosecutorial disclosure and will help minimize concerns that as administrations and senior Department leadership change over time, the Department's efforts will be abandoned.

Moreover, it is clear that changing technology will continue to expand what has already been an explosion in case-relevant information obtained by law enforcement in recent years. This expansion will require continuous change and improvement in case management practices and, we suspect, disclosure policies and practice. Technology will also likely change the way case information is stored and reviewed for discovery purposes over the coming years. A recent article in The New York Times documented how some of those changes are already taking place. *See*, John Markoff, *Armies of Lawyers Replaced by Software*, The New York Times, March 5, 2011. Discovery is an issue that will need considerable attention for some time to come.

In the meantime, we also believe the Committee might take up the suggestion in your February 7th memorandum and consider providing guidance to federal judges – whether through some sort of checklist or otherwise – of some of the information the FJC and the Committee have gathered along the way in considering these issues. Within the rules and the case law, trial judges have substantial latitude to control their courtrooms and the litigation that takes place within them. We think guidance may be appropriate, and we will gladly work with the Committee on what such guidance might look like. Candidly, we have some concerns about a formal "checklist" and certification, as suggested in your February 7th memorandum, but we do think some guidance to judges may be appropriate.

Our Views on Amendments to Rule 16

We continue to believe that expanding the scope of required prosecutorial disclosure, through an amendment to the Federal Rules of Criminal Procedure, is the wrong approach to ensuring that prosecutors meet their current disclosure obligations under *Brady/Giglio*. We disagree with the view of this issue offered by the American College of Trial Lawyers (ACTL). Their view is that the best way to avoid error is by taking the responsibility for determining what information is "material," and therefore subject to disclosure, out of the hands of prosecutors and instead require far broader disclosure than what is now mandated by law. They suggest this approach might reduce the risk of prosecutorial error, although that is not entirely clear. But we

know with certainty that such an approach would be inconsistent with multiple decisions of the Supreme Court, of this Committee, and of Congress over the last forty years. Those decisions embody a careful and delicate balance between securing a defendant his constitutional rights and, at the same time, safeguarding the equally important public interests in a criminal trial process that protect victims and witnesses from retaliation or intimidation, protect victims' and witnesses' privacy, protect on-going criminal investigations from unwarranted interference, and protect national security interests.

The proposed restructuring of Rule 16 would change this careful and delicate balance to the detriment of the public interests, all without a demonstrable improvement in either the fairness or reliability of criminal judgments. The Supreme Court, in *United States v. Bagley*, 473 U.S. 667 (1985), considered and rejected the expansion of *Brady* to reach nonmaterial, inadmissible information. The Court explained that the purpose of the *Brady* rule is not "to displace the adversary system," but to "ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675. For that reason, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. *Id.*

Many of our concerns over the ACTL approach are set out in the letter from then-Deputy Attorney General Paul McNulty to the Standing Committee, previously distributed to our Committee, and we will not recount those concerns here. But at bottom, we think the ACTL proposal is the wrong approach to the problem of prosecutorial misconduct and error, which is, by all measures, very small given the number of cases prosecuted every day in federal courts across the country.

We also find the results of the Federal Judicial Center survey instructive on the question of whether any amendment to the rules is necessary. The survey's findings include the following:

- 94% of judges expressed the view that federal prosecutors usually or always understand their disclosure obligations (interestingly, only 78% thought the same of defense attorneys);

- 88% of judges replied that federal prosecutors usually or always follow a consistent approach to disclosure;

- Judges reported high levels of satisfaction with the overall compliance by federal prosecutors with their disclosure obligations; and

- Judges were evenly split about whether there should be any amendment to Rule 16.

Our view is that any rule proposal that goes beyond codifying existing law would not measurably improve disclosure practices, but would rather simply impose a new layer of discovery litigation – and with it, substantial litigation costs, create tremendous uncertainty and

upheaval in criminal litigation for little or no benefit, and expose witnesses to greater intrusions into their safety and privacy.

We do not believe any amendment to Rule 16 should be pursued at this time. As we have recounted, we have implemented far-reaching policies and practices that require prosecutors to go beyond the requirements of *Brady/Giglio* and that will bring about greater consistency of practice and compliance with applicable law. We think these policies will accomplish our common goal: to see that prosecutors disclose what the law requires and that justice is done in all criminal cases.

During our conference call, we orally conveyed why the Department believes that the draft amendment to Rule 16 contained in your February 7th memorandum should not be pursued. At your request, we summarize our concerns again here.

Proposed Amendment to Rule 16 Contained in Your February 7th Memorandum

As indicated above, our overarching concern with the draft Rule 16 amendment contained in your February 7th memorandum is that, if promulgated, it would not measurably improve disclosure practices, but would rather simply superimpose a new framework of discovery law on top of the already existing law covering exculpatory and impeachment information. We believe this new legal framework would carry with it substantial litigation costs, tremendous uncertainty and upheaval in criminal litigation for little or no benefit, and exposure of witnesses to greater intrusions into their privacy and at times personal risk. All of the new standards, terms, and provisions contained in the draft amendment are the components of this new legal framework that would not replace the forty-plus years of *Brady/Giglio* case law, but rather be layered on top of it. Without a substantial benefit to the system for doing so, we think such an approach of layering new legal rules on top of existing legal rules is misguided.

By placing in the rules the new disclosure obligations, the proposal will likely open the floodgates to pretrial and post-conviction discovery motions addressing both what constitutes exculpatory or impeaching information as well as the government's methodology for identifying such information in the course of investigations. This new litigation would occur not just in relation to the new legal principles, but also in relation to the particular facts and investigations of each case. For example, if a prosecutor discloses email as part of discovery, defendants will now have a legal avenue to inquire as to whether the investigation captured – or should have captured – the metadata or other information that might cast doubt on the origins of the email. The new rules will open hundreds of such avenues for attacking the handling of an investigation. Motions will be crafted seeking testimony of agents, computer forensic analysts, paralegals, and litigation support specialists before trial to explain their electronic or other evidence collection and handling procedures with the intent of showing the court that the government is hiding exculpatory or impeaching information buried in the metadata, the computer forensic analysis, or the hard-drive's slack space. We are concerned that vast amounts of court time and government resources will be siphoned away from addressing the merits of cases and redirected to scrutinizing the history of the investigation and the government's management of the information collected. We think, over time, the proposal has the potential to make the practice of criminal

discovery much more like civil discovery, with endless opportunities for mini-trials on how the prosecutor is making discovery determinations.

In addition, if the Committee believes that going beyond the constitutional requirements of *Brady/Giglio* is a good idea, we believe it must follow the Committee's historical practice of imposing reciprocal discovery requirements on all parties. It is axiomatic that "[t]here is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). For decades, when the Committee has gone beyond constitutional disclosure requirements, it has generally done so in a reciprocal fashion for both prosecution and defense. The draft proposed amendment to Rule 16, however, does not do so, and we see no reason why, should the Committee decide that getting at the truth requires disclosure of impeachment information beyond the constitutional mandate of *Brady/Giglio*, such expanded disclosure should not be applied to all parties. Thus, if the Committee believes litigants need additional discovery to thoroughly investigate and cross-examine opposing witnesses, there is no reason not to require such discovery of all litigants. This is no different from the Committee's decision to require disclosure of expert witness reports by all parties. *See* Federal Rules of Criminal Procedure 16(a)(1)(G) and 16(b)(1)(C). There would also be every reason to provide greater enforceability for current discovery requirements of defendants that are often overlooked.

As to the specific provisions of the proposed rule amendment, we have several concerns, which we will briefly spell out here. We would be happy to discuss these further at our meeting in Portland.

1. **Timing of Disclosure of Exculpatory Information.** Under the proposed rule, the government, within "at least 14 days before trial," is required to disclose any exculpatory information. We think this provision is unnecessarily rigid and may at times be inconsistent with existing constitutional law, which requires disclosure of materially exculpatory information in sufficient time for the defense to make effective use of it. We think it will add confusion to the constitutional disclosure requirement. Further, the draft makes no provision for exculpatory information first discovered within the 14-day window.

2. **"Known By the Attorney for the Government to Exist."** The proposed rule requires disclosure of information "known by the attorney for the government to exist." We believe this limitation is at least partially inconsistent with existing constitutional case law. Current law carefully outlines prosecutors' affirmative but limited obligation to seek out exculpatory and impeachment information from law enforcement entities aligned with the prosecution team. Codifying the existing case law standards in this area will be difficult, and on the other hand, using the standard in the proposed rule will cause confusion and unnecessary litigation.

3. **Definition of Impeachment Information.** Proposed Rule 16(a)(1)(I) defines impeachment information as that which "casts substantial doubt upon the accuracy of any witness testimony that the government intends to rely upon to prove an element of the crimes charged." While this language was added to the Department's discovery policy to

encourage disclosure greater than that required by current law, if added to the Rules of Criminal Procedure, it will require decades of litigation to clarify what categories of impeachment information meet the new definition (just as it has taken decades to clarify the meaning of materiality).

4. **Written Summary of Inconsistent Statements.** Under the proposed rule, the government's disclosure obligations would be expanded to include, among other things, "a written summary of any inconsistent oral or written statement by the witness regarding the alleged criminal conduct of the defendant." This provision is extremely problematic for several reasons. First, because it requires prosecutors to summarize all inconsistent oral or written statements – no matter how small or immaterial the inconsistency – investigators and prosecutors will be forced to take detailed notes of every conversation with potential witnesses in order to ensure and document full compliance with the rule. Second, what a prosecutor thinks is an inconsistency and what a defense attorney thinks is an inconsistency will often be different. Under the provision, prosecutors will first provide a summary of inconsistencies to the defense and later the full statements or reports of statements. When it receives the underlying reports, grand jury transcripts, etc., the defense will likely often claim that the prosecutor failed to include certain parts of the statements in the summary that the defense sees as inconsistent. Third, the provision is in tension with the language of the Jencks Act (18 U.S.C. § 3500) and Rule 26.2, because it uses a significantly broader definition of "statement" than that Act or Rule. Moreover, inherent in presenting a summary of inconsistent statements is the disclosure of portions of the underlying statements.[1]

5. **The Illustrative List of Impeachment Information Set Out in Section (a)(1)(I).** The proposed rule includes an illustrative list of information that supposedly would meet the new definition of impeachment information. The list includes any offer or promise to the witness by the government in exchange for cooperation or testimony; any prior conviction "or specific instance of conduct" that

[1] We heard from many prosecutors about this provision. The comments of the lawyers from the Civil Rights Division were typical. These lawyers, who handle human trafficking and color-of-law cases, feel they will be especially vulnerable to disciplinary complaints based on this provision of the rule. Their cases typically require several interviews of key witnesses. In trafficking cases, for example, interviews cover victims' life history, educational background, employment history, and the culture of where they were raised, all of which bear on whether their wills were overborne by traffickers. These victims often cannot remember all such information during the first interview, but their memories are usually refreshed as interviews go on. Such inconsistencies, particularly about the details of life before they met the traffickers, no matter how immaterial, would have to be catalogued and summarized under this new rule, in addition to the interview report prepared by the case agent. Likewise, in color-of-law cases, multiple interviews (frequently involving polygraphers) typically are necessary before a police officer ultimately acknowledges witnessing another officer's wrongdoing. Certainly, false claims of ignorance must be, and are, disclosed. But the need for multiple interviews of each witness in Civil Rights Division cases increases the burden on its attorneys of cataloguing each inconsistency among all of the interviews, whether material or not, and whether or not a full report of the interviews will later be forthcoming as part of Jencks discovery.

could be used to impeach the witness under Rules 608 or 609 of the Federal Rules of Evidence; uncharged criminal conduct by the witness or release of civil liability "that may provide an incentive to curry favor with a prosecutor"; any pending criminal charges against the witness; and any impairment that could affect the witness's ability to perceive and recall." We note that the there is an inconsistency between the impeachment standard ("casts substantial doubt upon the accuracy of any witness testimony") and the illustrations. For example, the illustrative list calls for disclosure of "any inconsistent oral or written statement," but certainly there are some witness statement inconsistencies that do not cast "substantial doubt" on the witness' testimony. The same holds true for the example of "any . . . instance of conduct that could be used to impeach [under Rules 608 or 609]." There are no doubt instances of technically impeachable conduct (that the government may well disclose out of an abundance of caution) that do not rise to the level of creating "substantial doubt."

6. **Unreviewable Exception to the Disclosure Requirements of the Rule.** Proposed Rule 16(a)(1)(J) provides an exception to the government's pretrial disclosure obligations under the rules for both exculpatory and impeachment information. Disclosure is not required if the government submits to the court a sealed *ex parte* written explanation which states that it is the government's good faith belief that disclosure of information "will threaten the safety of any crime victim, other person, or the public; jeopardize national security; or lead to an obstruction of justice." The government's written explanation is by rule "unreviewable." The inclusion of a "good faith" requirement is inconsistent with the unreviewability of the exception. As we suggested on the conference call, we think the Committee should follow other examples in law that provide for unreviewable prosecutorial decision by requiring higher level approval of use of the exception but without the good faith provision. Finally, we believe the exception is too narrow and covers only extreme situations; it leaves no room for important reasons to change the timing of disclosure such as: protecting vulnerable witnesses (such as children); preventing harassment of witnesses that does not rise to the level of obstruction of justice; protecting ongoing investigations; and protecting the privacy interests of third parties.

Proposed Amendment to Rule 16 Codifying Existing Brady/Giglio Law

You also asked us to draft a proposed amendment to Rule 16 that would codify existing *Brady/Giglio* law. What follows is our best attempt to summarily codify an extensive and well-developed body of law. We continue to believe that the rules of constitutional disclosure under *Brady/Giglio* are better left to the case law developed in the various circuit courts and the Supreme Court.

- - -

RULE 16. DISCOVERY AND INSPECTION.

(a) Government's Disclosure.

(1) Information Subject to Disclosure.

* * *

(H) Exculpatory and Impeachment Information. The government must disclose to the defendant the substance of any information known to the attorney for the government or agents of law enforcement involved in the investigation or prosecution of the case that is materially exculpatory or materially impeaching as defined in *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1970), and their progeny.

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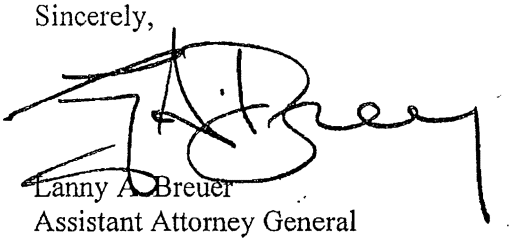
Conclusion

We think the Committee should know, without any hesitation, that this Attorney General is committed to fairness and justice; that he has taken the steps necessary to ensure that prosecutors comply with their ethical and legal obligations; that the changes he has brought about have become institutionalized discovery practices and not just temporary fixes; and that in all of this, we are doing what we believe is right for defendants, victims, witnesses, and the pursuit of justice.

We have said from the outset that we do not believe there is a widespread problem of federal prosecutors failing to meet discovery obligations. Indeed, as indicated above, when the Federal Judicial Center asked members of the judiciary about discovery practices, judges reported high levels of satisfaction with the overall compliance of federal prosecutors with their disclosure obligations. At the same time, we are clearly and directly facing the challenges of new technology, the staggering increasing scale of case information, and the accompanying complexity of its management. We are taking unprecedented steps to ensure that prosecutors meet their disclosure obligations. This approach, and not the creation of new legal rules layered on top of *Brady/Giglio* requirements, is the way to improve the delivery of justice.

We look forward to seeing you and the other Committee members in a few weeks. Please let us know if there is anything more we can do between now and then.

Sincerely,



Lanny A. Breuer
Assistant Attorney General

cc: Professor Sara Sun Beale
Professor Nancy J. King

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March 23, 2011

The Honorable Richard C. Tallman
Chair, Advisory Committee on the Criminal Rules
902 Wiliam Kenzo Nakamura Courthouse
1010 Fifth Avenue
Seattle, Washington 98104-1195

Dear Judge Tallman:

I write to set forth the defense position in support of a change to Rule 16, even one that codifies existing caselaw. After setting forth the several considerations that compel a change, I attach proposed language that should be considered by the Rule 16 Subcommittee and the Committee as a whole.

There is agreement in principle on a rule that codifies existing caselaw

In his March 18, 2011 letter to the Subcommittee, Assistant Attorney General Lanny Breuer echoed his statements during the February 25, 2011 telephone conference agreeing in principle to a rule change that codified existing caselaw. In fact, the Department drafted a version of such and amendment to Rule 16, found on page 11 of the March 18 letter.

Keeping in mind that no one defense attorney can speak for thousands of others, but also remembering that this proposal has been disclosed and discussed with several Federal Defenders, practicing attorneys, and law professors, it is submitted that a rule change codifying existing caselaw would be beneficial. The existence of this common ground should lay the groundwork for the less monumental task of solidifying such a rule.

The results of the FJC survey highlight the need for an amendment to Rule 16

Defense attorneys around the country are overwhelmingly and passionately in favor of amending Rule 16. Judges – as the Department aptly characterizes on page 6 of the March 18 letter – are "evenly split." That stunning amount of support from the judiciary is even more impressive considering that a much larger number – 94% – believe that prosecutors usually or always understand their disclosure obligations. This means that a significant number of judges who are satisfied with the performance of prosecutors in their district are nevertheless in favor of amending the rule to incorporate *Brady* and *Giglio* obligations.

However defined, an "even split" should not be seen as a mandate for the *status quo,* since taking no action would completely favor the faction that prefers no change. Instead, identifying and working with the common ground would be much a much more reflective and productive use of the survey responses.

The changes to the U.S. Attorney's Manual ("USAM") and the other measures undertaken by the Department are not sufficient.

Although *Brady* was decided in 1963, the Department did not amend the USAM to add a policy for disclosure of exculpatory information until more than 40 years later. Even with the additions to the manual, there have been numerous, recent, violations – some in high-profile matters like the *Stevens* case, and the *W.R. Grace* prosecution, and some less well-known, like the recent cases from the District of Columbia documented in a letter from the District of Colombia Public Defender Service to Judge Tallman as chair of the Subcommittee, or the host of others anecdotally mentioned by those who responded to the FJC survey. Everyone agrees that more than a manual change is needed.

The additional measures mentioned by the DOJ in the letter to the Subcommittee, while commendable, are also insufficient, mostly because they fail to carry the weight that a Rule change would. Administrations change, and priorities change within and between administrations. Codification in a rule would undoubtedly increase and enhance adherence to important constitutional principles. Those principles, by definition, are not subject to prosecutorial discretion, and deserve to be part of Rule 16.

The attached proposed amendment, while modest in its own right, is nevertheless intended to spark further discussion, debate, and, ultimately, agreement. The defense understands that it should impose no additional and unnecessary burden on those prosecutors already in compliance with their *Brady* and *Giglio* obligations, and that, because the suggested amendment sets out to define what should be disclosed a bit more clearly and with some more detail than the Department's version, it will ultimately generate less, not more, litigation.

I look forward to the response from the Subcommittee and the Committee to these thoughts and proposals.

Very truly yours,

Rachel Brill

Rachel Brill

c (with Attachment): Professor Sara Sun Beale
Professor Nancy J. King

3-21-11 Proposed Rule 16(a)(1)(H) - Annotated

Rule 16. Discovery and Inspection

(a) Government's Disclosure

(1) Information Subject to Disclosure

****

(H) Exculpatory information.[1] The government must [timely] identify any exculpatory information within the possession, custody or control of the government [**or** government, including but not limited to all federal, state and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case][2] and, promptly upon discovery[3], disclose all exculpatory information to the defense. Exculpatory information includes, but is not limited to, all information that is [material and] favorable to the defense because it tends to:

(I) Cast doubt on or mitigate defendant's guilt as to any essential element in any count in the indictment, information or establish a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant;[4]

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[1]This introductory language is generally drawn from USAM 9-5.001(C)(1) and D.Mass. Local Rule 116.2(A).

[2]This is the definition of "prosecution team" at USAM 9-5.001(B)(2).

[3]The USAM requires exculpatory information to be disclosed "reasonably promptly after it is discovered." USAM 9-5.001(D)(1). The word "reasonably" is awkward, unnecessary and would lead to needless litigation.

[4]This language merges both USAM 9-5.001(C)(1) and D.Mass. Local Rule 116.1(A)(1). The D. Mass. rule does not include a reference to affirmative defenses or the last clause starting with "regardless."

(ii) Cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, or that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable pursuant to 18 U.S.C. § 3731;[5]

(iii) Cast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief, regardless of whether it is likely to make the difference between conviction and acquittal of the defendant; or[6]

(iv) Diminish the degree of the defendant's culpability or decrease the defendant's sentencing exposure under either the United States Sentencing Guidelines or 18 U.S.C. § 3553(a).[7]

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[5]This language is verbatim D.Mass. Local Rule 116.1(A)(2) but paraphrases USAM 9-5.001(C)(2).

[6]This language merges D.Mass. Local Rule 116.1(A)(2) and USAM 9-5.001(C)(2). The USAM says "casts substantial doubt" and the D.Mass. rule drops "substantial." Note, the last clause starting with "regardless" differs slightly from the last clause of (i).

[7]This is based on D.Mass. Local Rule 116.1(A)(4). It is recognized as discoverable in USAM 9-5.001(D)(3).

TAB IV. A

Oral Report

TAB IV. B

MEMO TO: **Criminal Rules Advisory Committee Members**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Rule 45(c) and the "3 days added" rule**

DATE: **March 19, 2011**

Criminal Rule 45(c), which was modeled on Civil Rule 6(d), provides that timing periods that begin upon service are extended by 3 days when service is made in designated ways. It states:

> **(c) Additional Time After Certain Kinds of Service.** Whenever a party must or may act within a specified period after service and service is made in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under subdivision (a).

As explained in the attached memorandum RULE 6(D): "3 DAYS ARE ADDED": STYLE GLITCH AND SUBSTANCE, prepared by Professor Edward Cooper for the Civil Rules Advisory Committee, a change made in restyling Civil Rule 6(d)—and then carried into the Criminal Rules (as well as the Bankruptcy and Appellate Rules)—may have produced an unintended substantive change. Professor Cooper describes what he calls the possible "styling glitch" as follows:

> As the Committee Note says, the amendment was intended "to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served." That is all that was intended. Styling the language, however, chose words that can easily be read to change something more. Before the amendment, the 3 extra days were provided when a party had a right or was required to act within a prescribed period after service of a notice or other paper "upon the party" if the paper or notice "is served upon the party" by the designated means. "[A]fter service," and "service is made" were meant to convey the same thought — the purpose is to allow extra time to a party who has been served by a means that may not convey actual notice as quickly as personal service or leaving the paper at home or office. There was no thought to provide extra time to the person making service. Probably that was because no one paused to recall that a few rules provide time to act after making service, rather than after being served.

Despite the drafters' intent, Civil Rule 6(d) and Criminal Rule 45(c) might be read literally to allow the party who makes the service by one of the designated means to have an additional 3 days to act.

As Professor Cooper notes, the "3 days are added" provision in the Civil Rule 6(d) and the other rules that were based upon Rule 6(d) raise two questions: (1) whether the language should be amended to make it clear that only the party served has the additional 3 days, and (2) as a policy matter whether the rules should continue to provide additional time when service is made by the designated methods. Both problems are more significant in the Civil Rules, which have multiple provisions affected by Civil Rule 6(d).

In the Criminal Rules, most provisions are drafted in a manner that avoids the possible "glitch" described in the Cooper memo by setting time periods that start to run after a party has been "served" or "received" notice (see Criminal Rules 12.3(a)(3)&(4) and 59(a)&(b)(2); and Rule 8 of both the 2254 and 2255 Rules).

However, one Criminal Rule could be affected by the issues Professor Cooper raises. Rule 12.1(b)(2), which governs notice of alibi defenses, provides that unless the court directs otherwise the attorney for the government must provide the government's disclosure "within 14 days after the defendant serves notice of an intended alibi defense...." I have found no cases interpreting the timing aspects of the rule, and I believe any ambiguity generated by the "3 days added" provision is unlikely to cause a serious problem. Rule 12.1(b)(2) governs the second step of the reciprocal discovery process. If a 3 day delay occasionally occurred because of a prosecutor's interpretation of the rule, it would only slightly delay the defendant's receipt of information. In those cases in which such a delay might be crucial because the trial date is fast approaching, another part of the rule kicks in, requiring disclosure to be made at least 14 days before trial.

Accordingly, it seems prudent to allow the Civil Rules Committee, which has this issue on its spring agenda, to take the lead on this issue.

RULE 6(d): "3 DAYS ARE ADDED": STYLE GLITCH AND SUBSTANCE

Introduction

Two quite different questions are posed by Rule 6(d). One, the more fundamental, is whether the "3 days are added" provision encompasses too many different modes of service. That question has caused uncertainty in the past, and has been on the agenda for a while.

The other is a styling glitch that occurred in 2005, before the Style Project but at a time when amendments were drafted under Style Project protocols. The glitch is easily fixed. The harder question is whether the fix should be proposed immediately. Proper timing seems interdependent with two alternatives. If Rule 6(d) is to be changed in substance, it may be better to propose all changes at once. Even if not, it may make sense to delay for a while to see whether the Style Project has produced other missteps that can comfortably be accumulated for corrections in a single package.

I "[W]ithin a specified time after service"

A. THE PROBLEM AND THE FIX

Rule 6(d) now reads:

> (d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

As easy as it is to forget the details, the 2005 amendment of what then was Rule 6(e) was prompted by the emergence of four competing ways to calculate the 3 extra days. As the Committee Note says, the amendment was intended "to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served." That is all that was intended.

Styling the language, however, chose words that can easily be read to change something more. Before the amendment, the 3 extra days were provided when a party had a right or was required to act within a prescribed period after service of a notice or other paper "upon the party" if the paper or notice "is served upon the party" by the designated means. "[A]fter service," and "service is made" were meant to convey the same thought — the purpose is to allow extra time to a party who has been served by a means that may not convey actual notice as quickly as personal service or leaving the paper at home or office. There was no thought to provide extra time to the person making service. Probably that was because no one paused to recall that a few rules provide time to act after making service, rather than after being served.

Rule 14(a)(1) requires permission to serve a third-party complaint only if the third-party plaintiff files the complaint "more than 14 days after serving its original answer." Rule 15(a)(1)(A) allows a party to amend a pleading once as a matter of course "within * * * 21 days after serving it" if the pleading is not one to which a responsive pleading is required. Rule 38(b)(1) allows a party to demand a jury trial by "serving the other parties with a written demand * * * no later than 14 days after the last pleading directed to the issue is served."

Literally, to take one example, a defendant who wants to amend an answer could argue that if it mailed the answer it has 24 days to amend under Rule 15(a)(1)(A), because it "may act within a specified time after service." This literal reading may be resisted on the ground that it makes no sense to allow a party to expand its own time to act by choosing the means of service. The defendant knows when the answer was served, even if the mails do not carry it to the plaintiff for two, three, four, or perhaps even more days. Courts may come to read the rule that way. But the literal meaning also may prevail.

Not much is lost if the literal reading should prevail. None of the opportunities to deliberately generate an added 3 days is likely to create much difficulty. Allowing 17 days for the

two 14-day periods would do no more than might happen under the most extensive applications of the former 10-day periods that were measured without counting intervening Saturdays, Sundays, and legal holidays. Rule 15's 20 days were 20 days, but moving from 21 to 24 days at the pleading stage does not seem a big deal.

Neither is much lost if a literal reading awards 3 added days to an unwary litigant who discovers this reading in a moment of desperation, flailing about for a means to recover from an inadvertent failure to act within the basic time period.

But something could be lost if a party deliberately relies on the literal reading, only to be caught up short by a court that rejects this view in favor of the pre-2005 meaning. Our defendant who counted on a right to amend on the 24th day, and preferred to wait past the 21st day, might be required to ask leave to amend and be denied. Or permission must be sought to serve a third-party complaint, or to demand jury trial. It does not seem at all likely that a court would deny a worthy motion for any of these things, particularly if the party claimed deliberate reliance on the new rule language. Still, some risk is there.

This contretemps has been explored at length by Professor James J. Duane in *The Federal Rule of Civil Procedure That Was Changed By Accident: A lesson in the Perils Of Stylistic Revision*, 62 S.C.L. Rev. 41 (2010). There is no indication that the potential trap has been sprung on any litigant, but it may have happened out of sight, and could happen still.

It would be easy to fix the glitch, and probably it should be fixed:

> When a party may or must act within a specified time after ~~service~~ being served and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

B. TIMING

The fix is easy. Why not do it straightaway?

One snag is that similar provisions appear in other sets of rules. Appellate Rule 26(c) is "after service," but apparently there is no problem because no Appellate Rule sets a time to act after serving, rather than after being served. Criminal Rule 45(c) is nearly verbatim the same as Rule 6(d), but the Criminal Rules Committee Reporters have found no Criminal Rule that creates problems analogous to Civil Rules 14, 15, and 38. Bankruptcy Rule 9006(f), on the other hand, read as Rule 6(d) now reads for many years before 2005 — "within a prescribed period after service * * * and the notice or paper * * * is served by mail * * *." The Bankruptcy Rules, moreover, incorporate Civil Rules 14, 15, and 38 either for adversary proceedings or for all litigation. The Bankruptcy Rules Committee Reporter, however, has not been able to discover any case addressing the question whether the 3 added days are provided to a person who makes service by mail.

In keeping with recent tradition, it would be desirable to change all these sets of rules in tandem, even though the Appellate and Criminal Rules do not seem to present any occasion to measure time after making service. In addition to uniform wording of parallel provisions, it is possible that a future rule might measure time after making service, requiring a belated amendment of the 3-added-days rule.

Another reason for delay may extend beyond the time required to coordinate with the other advisory committees. There is no apparent urgent need to make the change. The problem has been identified in a law review article, not in developing case law. Unwitting victims who rely

unsuccessfully on a literal reading of the new language may be hard to find. Waiting to see what other drafting glitches may emerge from the Style Project itself may make sense. They could be presented as a package for correction in a few years, or earlier if some more important mistake is found. That would avoid a bothersome parade of technical amendments, perhaps some of them offered in years with no other occasion to crank up the public comment period.

Finally, and more specifically, this may be the time to renew the question whether the 3 days should be added following service by any means other than mail.

II Which Modes of Service?

Some questions turn on high theory. Some do not. Experience is likely to prove the best guide in returning to the familiar question whether Rule 6(d) should add 3 days after being served by leaving the paper with the court clerk, electronic means, or other means consented to in writing. Three days are not added if service is made under Rule 5(b)(2)(A) or (B) by handing the paper to the person, or by leaving it at the person's office or "dwelling or usual place of abode." Mail may well take more than a day. But what of the others? Three days are added if service is made under Rule 5(b)(2)(C), (D), (E), or (F) — mail, leaving the paper with the court clerk if the person has no known address, sending by electronic means, or delivering by any other means that the person consented to in writing.

As noted in part I, Criminal Rule 45(c) is an almost-verbatim duplicate of Civil Rule 6(d). Appellate Rule 26(c) is similar, but adds a wrinkle. Bankruptcy Rule 9006(f) is a variation. The parallels are no accident — these rules were revised in 2005 to achieve rough uniformity in time calculations. So now, any actual recommendations for change must be coordinated with the other advisory committees, perhaps directly and perhaps through a joint subcommittee or similar device.

The wisdom of the "3-days-are-added" provision has been explored repeatedly. In 1994 it was decided, in response to a question raised at a Standing Committee meeting, that there was no reason to extend the added time to 5 days.

The question next arose in conjunction with the 2001 amendments that added service by electronic means. Discussion focused on the question whether the nearly instantaneous transmission of most e-messages obviates the need for additional time. The decision to treat electronic service the same as postal mail rested in part on doubt whether e-mail is always transmitted immediately. The doubts were most important with respect to attachments — several participants commented that it may take two or three days to establish a mutually compatible system of transmitting attachments. Doubts of this sort are subject to reconsideration as technology marches on. Additional questions were raised about strategic calculations, resting on the perception that some lawyers will select whatever method of service is calculated to minimize the actual time available to respond. Again, questions of this sort are subject to reconsideration in light of changing circumstances, particularly the pressures that may make e-service virtually compulsory in many courts.

The Style Project considered whether this subject should be advanced for more-than-style revision, but nothing has happened yet.

The most recent occasion for discussion arose with the Time Computation Project. One of the potential virtues of the 7, 14, 21, and occasional 28-day periods widely adopted in the Rules is closing the count on the same day of the week as opened the count. Seven days from Monday is Monday, and so on. The added 3 days messes up this calculation, and, when the 3d day lands on a weekend or legal holiday, requires an extension to the end of the weekend-holiday period. Some of the public comments pointed out that Rule 6(d) defeats the desired simplicity.

The questions do not go away.

The case for adding 3 days when service is made by postal mail seems strong, unless we believe that most of the time periods provided by the rules are longer than needed. Mail often is delivered on the next day, but that ambitious goal is not always met. The problem of delivery time could be addressed by dropping the 3-day extension and also dropping the provision that service by mail is complete on mailing. But there are good reasons to avoid the likely alternative of making service complete on delivery.

Adding 3 days when service is made on the court clerk may be no more than a token gesture — if the person has no known address, an extra 3 days may not mean much in a busy clerk's office. Perhaps the best case for adding this time is the obvious analogy — if extra days are added for mail, surely they should be added here as well.

Service by e-mail continues to be the subject of most discussion. Practical judgment based on experience is called for. Experience, moreover, may indicate the need for considering three separate questions: How often is service still accomplished outside electronic communication? When service is electronic, how often is it accomplished through the court's facilities? How often is it accomplished by counsel to counsel?

Reliance on electronic service is probably pervasive in most courts. Some courts encourage it, and at least a few virtually mandate it. The most notable exceptions are for pro se litigants. The more nearly universal electronic service is, whether as a matter of preference or compulsion, the less reason there is to worry about the influence of denying 3 added days on strategic choices about the mode of service.

Is service through the court's electronic facilities so reliable and instantaneous that there is no plausible argument for adding 3 days to protect against delayed or garbled transmission?

Similarly, is e-mail addressed by counsel to counsel so regularly received soon after transmission, and received in such shape that it can be promptly opened, and tended to with the alacrity likely to be stimulated by personal delivery, that the 3 added days are no more than a windfall extension of time periods that generally do not deserve extension? Will strategic calculation be advanced, impeded, or merely different if 3 days are added for service by mail or leaving with the court clerk, but not otherwise?

One possible outcome of these questions would be to distinguish between e-service through the court's facilities and counsel-to-counsel service. Drafting would likely lead to some change in Rule 5(b)(3), which now describes service through the court's facilities as service "under 5(b)(2)(E)." That will surely provide an occasion for reopening the question whether Rule 5(b)(2)(E) should continue to require the party's consent to e-service, a question that likely will soon be ripe in any event.

Delivery by any other means consented to in writing does not stir obvious passions. A party concerned about adding 3 days under the present rule need not ask others to consent. A party asked to consent under an amended rule that does not add 3 days can refuse consent. But the analogy to mail may offer some support for retaining the 3-day extension, particularly under the Appellate Rule 25(c)(1)(C) provision for service "by third-party commercial carrier for delivery within 3 calendar days." Consent is not required under the Appellate Rule, and the speediest — and most expensive — mode of delivery also is not required.

One final observation. The notes following Rule 6 show that it has been amended in 1948, 1963, 1966, 1968, 1971, 1983, 1985, 1987, 1999, 2001, 2005, and 2007. The Time Computation Project amendments are almost upon us. The steady progression of changes may reflect a need for constant adjustments, large or small, to reflect changed circumstances or better understanding. The persistent fear of missed deadlines may stir lawyers' concerns and rulemaking sensitivity to those concerns. Whenever the Committee acts next, it will be optimistic to hope for long-term repose.

TAB V. A-B

September 2011						
S	M	T	W	T	F	S
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November 2011						
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December 2011						
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October 2011

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
						1
2	3	4	5	6	7	8
9	10 Columbus Day Thanksgiving (Canada)	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31 Halloween					U.S. Federal Holidays are in Red.

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October 2011						
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December 2011						
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January 2012						
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15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

November 2011

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
		1	2	3	4	5
6 Daylight Savings Ends Fall back 1 hour	7	8	9	10	11 Veteran's Day	12
13	14	15	16	17	18	19
20	21	22	23	24 Thanksgiving	25	26
27	28	29	30			
						U.S. Federal Holidays are in Red.

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March 2012						
S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

May 2012						
S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

June 2012						
S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

April 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1	2	3	4	5	6 Good Friday	7
8 Easter Sunday	9 Easter Monday	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					
						U.S. Federal Holidays are in Red.

March 2012 | Printfree.com Main Calendars Page | May 2012