COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

To: **Hon. Mark R. Kravitz, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Reena Raggi, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

Subject: **Report of the Advisory Committee on Criminal Rules**

Date: **May 17, 2012**

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on April 22-23, 2012, in San Francisco, California, and took action on a number of proposals. The Draft Minutes are attached.

This report presents two action items. The Committee recommends that:

(1) a proposed amendment to Rule 11 (advice regarding immigration consequences of guilty plea), previously published for public comment, be approved as amended and transmitted to the Judicial Conference, and

(2) proposed amendments to Rules 5(d) and 58 (advice regarding consular notification at initial appearance), previously transmitted to the Supreme Court and returned, be approved as amended.

The report also includes information items concerning the proposed amendments to Rules 12 and 34, which were published for public comment and are being studied further by the Committee, as well as proposed amendments to Rules 6 and 16, which the Committee has decided not to pursue.

II. Action Items

A. Rule 11 (advice re immigration consequences of guilty plea)

Following publication, the Advisory Committee decided to maintain the language of the proposed amendment to Rule 11 as drafted, but adopted several changes in the Committee Note that respond to issues raised in the public comments. The Advisory Committee now recommends that the Standing Committee approve the amendment to Rule 11 and transmit it to the Judicial Conference.

1. <u>The purpose of the proposed amendment</u>

In light of the Supreme Court's ineffective assistance of counsel decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Advisory Committee concluded that a judicial warning regarding possible immigration consequences should be required as a uniform practice at the plea allocution. *Padilla* 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 Court stated that in light of changes in immigration law "deportation is an integral part–indeed, sometimes the most important part–of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 130 S.Ct. at 1480 (footnote omitted). It also noted that "because of its close connection to the criminal process," deportation as a consequence of conviction is "uniquely difficult to classify as either a direct or a collateral consequence" of a plea. *Id*. at 1482. The Committee concluded that the Supreme Court's decision provides an appropriate basis for adding advice concerning immigration consequences to the required colloquy under Rule 11, leaving the question whether

to provide advice concerning other adverse collateral consequences to the discretion of the district courts.

In the Committee's initial deliberations, a minority of members opposed the amendment on the grounds that it was unwise and unnecessary to add further requirements to the already lengthy plea colloquy now required under Rule 11. *Padilla* was based solely on the constitutional duty of defense counsel, and it did not speak to the duty of judges. The list of matters that must be addressed in the plea colloquy is already lengthy, and these members expressed concern that adding immigration consequences would open the door to future amendments. This could eventually turn a plea colloquy into a minefield for a judge and expand litigation challenges to pleas despite the rule's harmless error provision.

A majority of the Committee concluded, however, that deportation is qualitatively different from the other collateral consequences that may follow from a guilty plea, and it therefore warrants inclusion on the list of matters that must be discussed during a plea colloquy. Although *Padilla* speaks only to the duty of defense counsel to warn a defendant about immigration consequences, the Supreme Court's recognition of the distinctive nature of such consequences also supports requiring a judicial warning. This would be consistent with the practice of the Department of Justice, which now advises prosecutors to include a discussion of those consequences in plea agreements. Thus, 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.

The proposed amendment mandates a generic warning rather than specific advice concerning the defendant's individual situation. 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. In drafting its proposal, the Committee was cognizant of the complexity of immigration law, which likely will be subject to legislative changes. Accordingly, the Committee's proposal uses non-technical language that is designed to be understood by lay persons and will avoid the need to amend the rule if there are legislative changes altering more specific terms of art.

2. <u>The public comments</u>

Six written comments were received. Only one comment disagreed with the decision to add advice concerning possible immigration consequences to the plea colloquy; it recommended that the amendment be withdrawn or at least substantially narrowed.

The remaining comments–which came from immigration specialists, a federal defender, and the National Association of Criminal Defense Lawyers–agreed with the concept of amending Rule 11 to add advice concerning immigration consequences. Two comments supported the amendment as published. Two other comments suggested modifications to the Committee Note. The final comment, from the National Association of Criminal Defense Lawyers, urged the Advisory Committee to withdraw the amendment and pursue a different strategy, placing the burden of providing warnings and advice at the plea colloquy upon the prosecution, rather than the court.

3. The Advisory Committee's recommendation

After publication, the Rule 11 Subcommittee and the Advisory Committee both reconsidered the foundational question whether Rule 11 should be amended to require advice concerning immigration consequences in all plea colloquies. Members considered prior concerns about lengthening the plea colloquy, as well as the argument that not all defendants are aliens and conscientious judges do not need a rule to require them to give warnings in appropriate cases. After hearing the report of the Rule 11 Subcommittee and full discussion, the Advisory Committee reiterated its support for adding immigration consequences to the plea colloquy. A majority of the Committee agreed that the immigration consequences covered by the proposed amendment–removal from the U.S. and denial of citizenship and reentry–are qualitatively different than other collateral consequences, and that they warrant inclusion in the plea colloquy. As the Supreme Court noted in *Padilla*, "deportation is an integral part–indeed, sometimes the most important part–of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 130 S.Ct. at 1480 (footnote omitted). Although the Supreme Court's decision does not require the proposed amendment, it does provide an appropriate basis for distinguishing advice concerning immigration consequences from other collateral consequences.

There was also support for the requirement that the court provide the general statement of possible immigration consequences in every case. Members emphasized that immigration consequences are an issue in nearly one half of all criminal cases. In fiscal year 2011, 48% of defendants for whom sentencing data were available were non-citizens.[1] Moreover, as

[1]U. S. Sentencing Commission, 2011 Sourcebook of Federal Sentencing Statistics, Table 9, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table09.pdf .

emphasized in several of the public comments, attempts to determine the immigration status of individual defendants could raise self-incrimination issues.

The Advisory Committee accepted the Rule 11 Subcommittee's recommendation to make several small modifications in the Committee Note to address concerns raised in the public comments. The changes emphasize that the court should provide only a general statement that there may be immigration consequences of conviction, and not seek to give specific advice concerning a defendant's individual situation. The National Immigration Project argued persuasively that it is neither appropriate nor feasible for judges to give individualized advice, and it provided examples of cases in which courts gave erroneous advice. See 11-CR-005 at 2 n.2. Moreover, attempts to elicit information that would provide the basis for individual advice could raise self-incrimination concerns.

The Committee Note as published and the changes recommended by the Subcommittee are shown below:

> **Subdivision (b)(1)(O).** The amendment requires the court to include a general statement ~~concerning the potential~~ that there may be 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~~ not 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.

By a vote of nine in favor and three opposed, the Advisory Committee agreed to adopt the proposed changes in the Committee Note, and to transmit the proposed amendment to the

Standing Committee with the recommendation that it be approved and sent to the Judicial Conference.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 11 be approved as amended and transmitted to the Judicial Conference.

1 **Rule 11. Pleas.**

2 * * * * *

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

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

13 * * * * *

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

20 (N) the terms of any plea-agreement
21 provision waiving the right to appeal or to
22 collaterally attack the sentence; and~~.~~
23 (O) that, if convicted, a defendant who is
24 not a United States citizen may be removed
25 from the United States, denied citizenship,
26 and denied admission to the United States in
27 the future.

Committee Note

Subdivision (b)(1)(O). The amendment requires the court to include a general statement that there may be 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, not 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 attempting to determine the defendant's citizenship.

CHANGES MADE AFTER PUBLICATION

The Committee Note was revised to make it clear that the court is to give a general statement that there may be immigration consequences, not specific advice concerning a defendant's individual situation.

PUBLIC COMMENTS

11-CR-001. Judge Hayden Head (SD TX). Judge Head opposed the amendment and suggested that it be withdrawn or narrowed. He emphasized that "Rule 11 has served well by wisely excluding collateral consequences." No amendment addressing immigration consequences in the plea colloquy is required because the Supreme Court's decision in *Padilla v. Kentucky*, 130 U.S. 1473 (2010), addressed the duty of counsel, not the courts. However, if the Committee does choose to proceed with the amendment, it should be revised to narrow its scope to the facts of *Padilla*, which concerned a person with a documented right to be in the United States.

11-CR-002. **Jack Schisler, Fayetteville Chief of the Arkansas Federal Defender Organization.** Mr. Schisler supported the proposed amendment. It is "good practice" to include this information, a practice that is now followed in the Western District of Arkansas. He saw no harm in the admonition being given to all defendants.

11-CR-004. The Federal Magistrate Judges Association. FMJA endorsed the proposed amendment.

11-CR-005. Sejal Zota and Dan Kesselbrenner of the National Immigration Project of the National Lawyers Guild. The National Immigration Project proposed changes to the Committee Note to clarify that the court should neither attempt to provide specific advice to individual defendants nor to determine their citizenship, as well as additional notes regarding the appointment of immigration counsel and the withdrawal of pleas if the defendant was not advised of immigration consequences.

Peter Goldberger of the National Association of Criminal Defense Lawyers (NACDL) (11-CR-009). NACDL suggested that the Committee withdraw the current proposal and develop an alternative proposal that would place the burden on the prosecutor to "make an affirmative and well informed representation as to what

immigration consequences will likely flow from conviction on the tendered plea" when the government's records indicate that the defendant is not a citizen.

11-CR-011. Alina Das, co-director of the Immigrant Rights Clinic at NYU School of Law. Ms. Das suggested that the Committee Note be amended to refer to or draw from two online reports co-authored by the Clinic and the Immigrant Defense Project.

B. Rule 5 (providing that non-citizen defendants in felony cases be advised at initial appearance regarding consular notification)

Rule 58 (providing that non-citizen defendants in petty offense and misdemeanor cases be advised at initial appearance regarding consular notification)

1. The purpose of the amendments

These parallel amendments were proposed by the Assistant Attorney General Lanny Breuer, who explained the relationship between the proposed rules and the treaty obligations of the United States. The Vienna Convention on Consular Relations is a multilateral treaty that sets forth basic obligations that a country has towards foreign nationals arrested within its jurisdiction. In order to facilitate the provision of consular assistance, Article 36 provides that detained foreign nationals must be advised of the opportunity to contact the consulate of their home country. Additionally, many bilateral agreements also require consular notification.

There has been substantial litigation over the manner in which Article 36 is to be implemented, whether the Vienna Convention creates rights that may be invoked by individuals in a judicial proceeding, and whether any possible remedy exists for defendants not appropriately notified of possible consular access at an early stage of a criminal prosecution. In *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), the Supreme Court rejected a claim that suppression of evidence was an appropriate remedy for failure to inform a non-citizen defendant of his ability to have the consulate from his country of nationality notified of his arrest and detention. The United States argued that the Vienna Convention does not create an enforceable individual right, but the Supreme Court did not rule on the preliminary question of whether the Vienna Convention creates an individual right, holding that regardless of the answer to that question, suppression of evidence is not an appropriate remedy for any violation.

General Breuer explained that notwithstanding the Justice Department's position that the Vienna Convention does not create an enforceable individual right, the executive has created policies and taken substantial measures to ensure that the United States fulfills its international obligations to other signatory states with regard to the Article 36 consular provisions. For example, the Justice Department has issued regulations that establish a uniform procedure for consular notification when non-citizens are arrested and detained by officers of the Department. See 28 CFR § 50.5. The Department of State has also undertaken multiple measures. It placed on a public website "Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them," which includes 24-hour contact telephone numbers that law enforcement officers can use to obtain advice and assistance. The Department of State published a Consular Notification and Access booklet, a Consular Notification Pocket Card for police use that has a model Vienna Convention consular notice, and a wall poster containing the consular notification in many languages that police can post in their facilities. The State Department regularly provides training about ensuring compliance. When a law enforcement authority fails to give notice to the consulate of a detained foreign national, the United States is committed to immediately informing the consulate, addressing the situation to the extent possible, and preventing a reoccurrence.

Assistant Attorney General Breuer urged that in addition to the measures already taken by the Departments of Justice and State, Rules 5 and 58 should be amended "to provide an additional assurance that the Vienna Convention obligations are satisfied." He characterized the proposed amendments as "responsible procedural means for further fulfilling the obligations of the United States under the Convention, without stepping into important questions of substantive rights that the Court has reserved for a later day."

2. The procedural history of the proposed amendments

At its meeting in April 2010, the Advisory Committee agreed to recommend to the Standing Committee that proposed amendments to Rules 5 and 58 be published for public comment.[2] The Standing Committee approved the amendments for publication in August 2010. After a review of the public comments at its April meeting in 2011, the Advisory Committee voted to forward the amendments to the Standing Committee without change with the recommendation that they be approved and transmitted to the Judicial Conference.

---

[2]The proposed amendments submitted to the Supreme Court included not only a change to Rule 5(d) providing for consular notice, but also a change to Rule 5(c) to clarify where an initial appearance should take place for persons who have been surrendered to the United States pursuant to an extradition treaty. The Supreme Court has transmitted the proposed amendment to Rule 5(c) to Congress.

The proposed amendments to Rules 5 and 58 were approved by the Standing Committee and the Judicial Conference in 2011, and subsequently transmitted to the Supreme Court.

In April 2012, the Supreme Court returned the Rule 5(d) and Rule 58 amendments to the Advisory Committee for further consideration.[3]

3. The Advisory Committee's recommendation

At its April 2012 meeting, the Advisory Committee discussed possible concerns that the proposed rules could be construed (1) to intrude on executive discretion in conducting foreign affairs both generally and specifically as it pertains to deciding how to carry out treaty obligations, and (2) to confer on persons other than the sovereign signatories to treaties, specifically, criminal defendants, rights to demand compliance with treaty provisions.

Representatives of the Department of Justice informed the Committee that they had conferred with counterparts at the Department of State, and the Departments jointly proposed some changes to the proposed rule amendments to alleviate these concerns.

After extended discussion, the Committee concluded that Rules 5(d) and 58 should be

---

[3]The proposed amendment to Rule 5(d) submitted to the Supreme Court and returned by it provided in pertinent part:

(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:

* * * * *

(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.

The proposed amendment to Rule 58(b)(2) contained parallel language. The Supreme Court did not return the proposed amendment to Rule 5(c), which it transmitted to Congress.

amended to address the questions of consular notification, but that the amendments should be redrafted. Revisions to the text were approved unanimously, on the understanding that the language would have to be reviewed by the Standing Committee's style consultant, and that the Reporters would review the Committee Notes to determine whether any changes should be made in light of the return by the Supreme Court and the revised language. The final language for both the rule and committee note would be circulated electronically for Committee approval.

Following the meeting, revised rules and committee notes were circulated electronically to all members of the Advisory Committee, and they received unanimous approval.

As now amended, the proposed rules require the court to inform non-citizen defendants at their initial appearance that (1) they may request that a consular officer from their country of nationality be notified of their arrest, and (2) in some cases international treaties and agreements require consular notification without a defendant's request. The proposed rule does not, however, address the question whether treaty provisions requiring consular notification may be invoked by individual defendants in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36 of the Vienna Convention. More particularly, the proposed rule does not itself create any such rights or remedies.

Although the changes in the text of the proposed rules and committee notes were intended to clarify but not alter the effect of the proposed amendments, members noted at the April meeting that given the return from the Supreme Court it might be appropriate to republish for additional public comment.

Recommendation–The Advisory Committee recommends that the proposed amendments to Rules 5 and 58 be approved as amended.

Rule 5. Initial Appearance

* * * * *

1

2 **(d) Procedure in a Felony Case.**

3 **(1)** ***Advice.*** If the defendant is charged with a

4 felony, the judge must inform the defendant of

5 the following:

6 * * * *

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

8 (E) the defendant's right not to make a

9 statement, and that any statement made

10 may be used against the defendant; and

11 (F) if the defendant is held in custody and is

12 not a United States citizen:

13 (i) that the defendant may request that an

14 attorney for the government or a

15 federal law enforcement official notify

16 a consular officer from the defendant's

17 country of nationality that the

18 defendant has been arrested; and

19 (ii) that even without the defendant's
20 request, consular notification may be
21 required by a treaty or other
22 international agreement.
23

* * * * *

Committee Note

Subdivision (d)(1)(F). Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice 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).

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that U.S. treaty obligations are fulfilled, and to create a judicial record of that action.

At the time of this amendment, many questions remain unresolved by the courts 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. More particularly, it does not create any such rights or remedies.

CHANGES MADE FOLLOWING PUBLICATION

Following the return of the proposed amendment by the Supreme Court, the rule and note were revised to clarify the advice to be provided and the limited purpose of the amendment. Note language was added referencing the regulations requiring arresting officers to provide consular notification without delay, and stating that the amendment does not create rights and remedies for any violation of the Vienna Convention.

PUBLIC COMMENTS CONCERNING RULE 5(d)

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL agreed with the amendment in principle, but suggested amendments to (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing.

10-CR-002. Federal Magistrate Judges Association. FMJA (1) expressed some reservations about imposing upon courts the executive function of giving consular notification, and (2) noted that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

1 **Rule 58. Petty Offenses and Other Misdemeanors**

2 * * * * *

3 **"(b) Pretrial Procedure.**

4 * * * * *

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

9 * * * * *

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

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

17 (H) if the defendant is held in custody
18 and is not a United States citizen:

19 (i) that the defendant may request that an
20 attorney for the government or a federal law

21 enforcement officer notify a consular officer

22 from the defendant's country of nationality that

23 the defendant has been arrested; and

24 (ii) that even without the defendant's request,

25 consular notification may be required by a

26 treaty or other international agreement.

COMMITTEE NOTE

Section (b)(2)(H) Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice 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).

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, and to create a judicial record of that action.

At the time of this amendment, many questions remain unresolved by the courts 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. More particularly, it does not create any such rights or remedies.

CHANGES MADE FOLLOWING PUBLICATION

Following the return of the proposed amendment by the Supreme Court, the rule and note were revised to clarify the advice to be provided and the limited purpose of the amendment. Note language was added referencing the regulations requiring arresting officers to provide consular notification without delay, and stating that the amendment does not create rights and remedies for any violation of the Vienna Convention.

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 suggested amendments to (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing.

10-CR-002. Federal Magistrate Judges Association. FMJA (1) expressed some reservations about imposing upon courts the executive function of giving consular notification, and (2) noted that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

III. Information Items

A. Rules 12 and 34

Proposed amendments to Rule 12 and conforming changes to Rule 34 were published for public comment in August 2011, and numerous submissions were received, including detailed objections and suggestions from defense bar organizations. The Reporters prepared an extensive memorandum, totaling more than 80 pages, analyzing the comments and discussing possible changes in the amendments as published.

The Rule 12 Subcommittee concluded that the concerns raised by the public comments should be considered at a face-to-face meeting, which was held in conjunction with the full Committee's April meeting in San Francisco.

The half-day meeting in San Francisco was very productive, and the Subcommittee expects to complete its work over the summer and present its recommendation at the Advisory Committee's October meeting.

B. Rule 6

The Advisory Committee decided not to proceed with Attorney General Eric Holder's proposal to amend Rule 6(e) to establish procedures for the disclosure of historically significant grand jury materials. The Attorney General proposed an amendment that would (1) allow district courts to permit disclosure, in appropriate circumstances and subject to required procedures, of archival grand jury materials of great historical significance, and (2) provide a temporal end point for the presumption of secrecy of grand jury materials that had become part of the National Archives.

A subcommittee, chaired by Judge John Keenan, held two lengthy teleconferences to discuss the Attorney General's proposal and reviewed written and oral comments from (1) Public Citizen Litigation Group (which litigated cases on behalf of historians seeking access to grand jury materials), (2) District Judge D. Lowell Jensen (former chair of the Advisory Committee on Criminal Rules), (3) former Attorney General and District Judge Michael Mukasey, and (4) former U.S. Attorneys for the Southern District of New York, Robert Fiske (a former member of the Advisory Committee) and Otto Obermaier. Further, the Reporters prepared a research memorandum exploring general principles governing the relationship between the court and the grand jury, precedents relating to inherent judicial authority to disclose grand jury material, and background materials regarding past amendments to Rule 6(e). At the close of the second teleconference, all members of the Subcommittee–other than those representing the Department of Justice–voted to recommend that the Committee not pursue the proposed amendment.

After a report from the Rule 6 Subcommittee, discussion among the full Committee revealed consensus that in the rare cases where disclosure of historically significant materials had been sought, district judges had reasonably resolved applications by reference to their inherent authority, and that it would be premature to set out standards for the release of historical grand jury materials in a national rule. Representatives of the Department of Justice thanked the Committee for its careful consideration of the Attorney General's suggestion.

C. Rule 16

The Committee discussed correspondence from Judge Christina Reiss of the District of Vermont suggesting that Rule 16(a) be amended to require pretrial disclosure of all of a defendant's prior statements. Discussion revealed a consensus among members that no serious problem exists warranting the proposed amendment, which could produce unintended, adverse consequences in cases involving long-term investigations into large-scale criminal organizations.

THIS PAGE INTENTIONALLY BLANK

TAB 6B

THIS PAGE INTENTIONALLY BLANK

ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
April 22-23, San Francisco, California

I. ATTENDANCE AND PRELIMINARY MATTERS

The Criminal Rules Advisory Committee ("Committee") met in San Francisco, California on April 22-23, 2012. The following persons were in attendance:

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

Judge Mark R. Kravitz, Chair of the Committee on Rules of Practice and Procedure (Standing Committee)
Judge Marilyn L. Huff, Standing Committee Liaison

The following persons were absent:

Assistant Attorney General Lanny A. Breuer

The following persons were present to support the Committee:

Andrea L. Kuperman, Esq. (by telephone)
Laural L. Hooper, Esq.
Peter G. McCabe, Esq.
Jonathan C. Rose, Esq.
Benjamin J. Robinson, Esq.

The following individuals were also present:

Andrew D. Goldsmith, Esq.
(on Tuesday, April 23, 2012, on behalf of the Department of Justice)

Peter Goldberger, Esq.
(on behalf of the National Association of Criminal Defense Lawyers)

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Raggi welcomed the members and, on behalf of the entire Committee, thanked Judge Richard C. Tallman, the Committee's previous Chair, for arranging the meeting at the James R. Browning United States Courthouse in San Francisco.

B. Review and Approval of Minutes of October 2011 Meeting

A motion to approve the minutes of the October 2011 Committee meeting in St. Louis, Missouri, having been moved and seconded,

The Committee unanimously approved the October 2011 meeting minutes by voice vote.

C. Other Opening Business

The members indicated their review of the Draft Minutes of the January 2012 Meeting of the Standing Committee and the Report of the September 2011 Proceedings of the Judicial Conference.

III. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Judicial Conference

Judge Raggi reported that the following proposed amendments, approved by the Judicial Conference, were likely also to be approved by the Supreme Court and transmitted to Congress before May 1, 2012, whereupon they would take effect on December 1, 2012, unless Congress acts to the contrary:

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.

2. Rule 15. Depositions. Proposed amendment authorizing deposition in foreign countries when the defendant is not physically present if the court makes case-specific findings regarding (1) the importance of the witness's testimony, (2) the likelihood that the witness's attendance at trial cannot be obtained, and (3) why it is not feasible to have face-to-face confrontation by either (a) bringing the witness

to the United States for a deposition at which the defendant can be present or (b) transporting the defendant to the deposition outside the United States.

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

Judge Raggi reported that the following proposed amendment was approved by the Judicial Conference at its March 2012 meeting, and would be transmitted to the Supreme Court for review this fall, as part of a larger package of proposed Rules amendments:

1. Rule 16. Proposed technical and conforming amendment clarifying protection of government work product.

B. Proposed Amendments Recommitted by the Supreme Court for Further Consideration

Judge Raggi informed members that two proposed rule amendments had been recommitted by the Supreme Court for further consideration:

1. Rule 5(d). Initial Appearance. Proposed amendment providing that in felony 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.

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.

At the meeting, Judge Raggi identified possible concerns that the proposed amended rules could be construed (1) to intrude on executive discretion in conducting foreign affairs both generally and specifically as it pertains to deciding how to carry out treaty obligations, and (2) to confer on persons other than the sovereign signatories to treaties, specifically, criminal defendants, rights to demand compliance with treaty provisions.

Ms. Felton and Mr. Wroblewski stated that, on behalf of the Justice Department, they had conferred with counterparts at the Department of State, and the departments now jointly proposed some changes to the proposed rule amendments to alleviate concerns such as those identified by Judge Raggi.

After extended discussions, the Committee agreed that Rules 5(d) and 58 should still be amended to address the questions of consular notification, but that the amendments should be redrafted as illustrated in the following version of Rule 5. Judge Raggi noted that, as redrafted, the amendments are a substantive departure from what was published and that it might be prudent to republish them. Judge Raggi further noted that this language would have to be

reviewed by the Standing Committee's style consultant, and that the Reporters would review the Committee Notes to determine whether any changes should be made in light of the return by the Supreme Court and the new language approved by the Committee. She stated that the Reporters would circulate the final language (with any style changes) as well as the accompanying Committee Notes for approval before submission to the Standing Committee.

Rule 5. Initial Appearance

* * * * *

(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:

* * * * *

(F) if the defendant is held in custody and is not a United States citizen:

(i) that the defendant may request that an attorney for the government or a federal law enforcement officer notify a consular officer from the defendant's country of nationality that the defendant has been arrested; and

(ii) that in the absence of a defendant's request, consular notification may nevertheless be required by treaty or other international agreement.

* * * * *

A motion being made and seconded,

With the proviso that final language after restyling and any accompanying changes to the Committee Notes would be circulated for final approval, the Committee unanimously decided by voice vote to adopt the proposed amendments to Rules 5(d) and 58 and to transmit the matter to the Standing Committee.

C. Proposed Amendments Approved by the Standing Committee for Publication in August 2011

Judge Raggi reported that the following proposed amendments had been published for notice and public comment with the approval of the Standing Committee:

1. Rule 11. Advice re Immigration Consequences of Guilty Plea.

Judge Raggi reported that the August 2011 publication of the Committee's proposal to amend Rule 11 had prompted six written comments. Judge Rice, Chair of the Rule 11 Subcommittee, stated that the subcommittee had reviewed and discussed these comments at

length. A majority continued to endorse the language of the proposed amendment as published. In discussion among the full Committee, some members voiced concern that the amendment shifts a burden that belongs to defense counsel onto the court, creates a "slippery slope" for expanding Rule 11 procedures in ways that distract from the key trial rights being waived, and is overbroad. A majority nevertheless remained of the view that deportation is qualitatively different from other collateral consequences that may follow from a guilty plea and, therefore, should be included on the list of matters that must be discussed during a plea colloquy. Mr. Wroblewski stated that the Department of Justice supported the proposed amendment as published and had already begun to instruct its prosecutors to include appropriate language in plea agreements concerning the collateral immigration consequences of a guilty plea.

Members agreed that the Committee Note should be modified to address certain concerns raised in the public comments. The Reporters were asked to add language emphasizing that courts should use general statements rather than targeted advice to inform defendants that there may be immigration consequences from conviction.

The full text of the proposed amendment and revisions to the Committee Note follow:

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 that there may be 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, not 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 attempting to determine the defendant's citizenship.

A motion being made and seconded,

The Committee decided, with nine votes in favor and three opposed, to amend Rule 11 by adopting the language published for public comment with the Reporters' suggested revisions to the Committee Note, and to transmit the matter to the Standing Committee with the recommendation that the proposed amendment be approved and sent to the Judicial Conference.

2. Rule 12(b). Clarifying Motions that Must Be Made Before Trial; Addresses Consequences of Motion; Provides Rule 52 Does Not Apply To Consideration Of Untimely Motion.

3. Rule 34, Arresting Judgment: Conforming Changes To Implement Amendment to Rule 12.

Judge Raggi reported that the proposed amendment to Rule 12 and the conforming changes to Rule 34 were published for public comment in August 2011, and that numerous submissions were received, including detailed objections and suggestions from defense bar organizations. Judge England, Chair of the Rule 12 Subcommittee, reported that, after a lengthy teleconference, subcommittee members unanimously determined that the concerns raised by the public comments should be considered at a face-to-face meeting, which would be held in conjunction with the full Committee's April meeting in San Francisco. To assist the subcommittee, Professors Beale and King prepared a comprehensive memorandum analyzing the history of the proposed amendment, the relevant law, and each comment received. Judge England and several members praised the Reporters' substantial research and thanked them for their analytical support.

Judge England informed members that the subcommittee would continue to work on the matter over the summer and expected to present its recommendation to the Committee at its fall meeting.

D. Proposed Amendment Referred for Review by Subcommittee

1. Rule 6. Grand Jury Secrecy.

Judge Keenan, Chair of the Rule 6 Subcommittee, reported on its review of Attorney General Eric Holder's October 18, 2011 proposal to amend Rule 6(e) to establish procedures for the disclosure of historically significant grand jury materials. The amendment (as proposed by the Department of Justice) would (1) allow district courts to permit disclosure, in appropriate circumstances, of archival grand jury materials of great historical significance, and (2) provide a temporal end point for grand jury materials that had become part of the National Archives.

Judge Keenan stated that the subcommittee had held two lengthy teleconferences to discuss the Attorney General's proposal. It also reviewed written and oral comments from (1) Public Citizen Litigation Group (PCLG) (which litigated *In re Kutler* and other cases on behalf of historians seeking access to grand jury materials), (2) District Judge D. Lowell Jensen (former chair of the Advisory Committee on Criminal Rules), (3) former Attorney General and District Judge Michael Mukasey, and (4) former U.S. Attorneys for the Southern District of New York, Robert Fiske (a former member of the Advisory Committee) and Otto Obermaier. Further, the Reporters prepared a research memorandum exploring general principles governing the relationship between the court and the grand jury, precedents relating to inherent judicial authority to disclose grand jury material, and background materials to the Committee's past amendments to Rule 6(e). Judge Keenan reported that, at the close of the second teleconference, all members of the subcommittee–other than those representing the Department of Justice–voted to recommend that the Committee not pursue the proposed amendment.

Discussion among the full Committee revealed consensus that, in the rare cases where disclosure of historically significant materials had been sought, district judges had reasonably resolved applications by reference to their inherent authority, and that it would be premature to set out standards for the release of historical grand jury materials in a national rule.

Judge Raggi summarized a telephone conversation she had with Counsel for the Archivist of the United States, the Chief Administrator for the National Archives and Records Administration (NARA), and a supporter of the proposed rule. She explained that a rule amendment providing for a presumption that grand jury materials would be disclosed after a specified number of years—seventy-five in the case of the proposal—would significantly recalibrate the balance that had long been applied to grand jury proceedings, which presumed that proceedings would forever remain secret absent an extraordinary showing in a particular case. Judge Raggi explained that the Committee might not be inclined to effect such a historic change by a procedural rule, particularly in the absence of a strong showing of need. Judge Keenan added that subcommittee members generally agreed that NARA should not become the gatekeeper for grand jury materials. Several members agreed that no real problem exists that presently warrants a rule amendment.

Mr. Wroblewski thanked Judge Keenan and the subcommittee members for the careful consideration given to the Attorney General's suggestion. He explained that the Department will continue to object to requests for disclosure based on Supreme Court precedent that the Department interprets as establishing a rule that rejects district judges' assertions of inherent authority to release historically significant grand jury materials. Mr. Wroblewski made clear, however, that the Department does think the prudent policy is to permit release under appropriate circumstances.

Judge Kravitz observed that Congress may weigh in on this issue, which also counsels against pursuing further action by rule.

A motion being made and seconded,

The Committee unanimously decided by voice vote to take no further action on the proposal and to remove it from the Committee's agenda.

IV. NEW PROPOSALS FOR DISCUSSION

A. Rule 16 (a)(1)(A)-(C), Pretrial Disclosure of Defendant's Statements

The Committee discussed correspondence from Judge Christina Reiss of the District of Vermont suggesting that Rule 16(a) be amended to require pretrial disclosure of a broader range of defendants' prior statements. Discussion revealed consensus among members that no serious problem exists warranting the proposed amendment, which could produce unintended, adverse consequences in cases involving long-term investigations into large-scale criminal organizations.

A motion being made and seconded,

The Committee unanimously decided by voice vote to take no further action on the proposal and to remove it from the Committee's agenda.

V. INFORMATION ITEMS

A. Report of the Rules Committee Support Office and Status Report on Legislation Affecting Criminal Rules

1. Mr. Robinson reported on recent congressional hearings concerning the prosecution of the late Alaska Senator Ted Stevens and the court-ordered investigation into possible prosecutorial misconduct. He advised that legislation introduced by Senator Murkowski would expand prosecutorial disclosure obligations.

2. Judge Raggi reported on the progress of the Federal Judicial Center's Benchbook Committee to identify "best practices" for judges in addressing *Brady*/*Giglio* issues, which would be included in a forthcoming draft of the Federal Judicial Center's *Benchbook for U.S. District Court Judges*.

3. Mr. Robinson reported further on the "Daniel Faulkner Law Enforcement Officers and Judges Protection Act," which would abrogate the application of Civil Rule 60(b)(6) in petitions brought under 28 U.S.C § 2254.

4. Mr. Wroblewski noted that the Justice Department planned to monitor an upcoming hearing on crime victims' rights before the House Judiciary Committee, and would report any issues pertaining to the work of the Committee following the hearing.

VI. ELECTRONIC DISCOVERY

At the Committee's October 2011 meeting, Mr. Wroblewski reported that the Justice Department was participating in a Joint Electronic Technology Working Group (JETWG) with Federal Defenders, the Administrative Office, and the Federal Judicial Center to develop a protocol for discovery of electronically stored information (ESI) in federal criminal cases. The Committee invited Andrew D. Goldsmith, National Criminal Discovery Coordinator for the Department of Justice and a co-chair of the JETWG, to attend its April 2012 meeting to discuss the protocol, which was released in February.

Mr. Goldsmith recounted the formation of the JETWG and development of the protocol, which is intended to encourage early discussion of electronic discovery issues, the exchange of data in industry standard or reasonably usable formats, notice to the court of potential discovery issues, and resolution of disputes without court involvement wherever possible. He reviewed with the Committee the four parts of the protocol: (1) an introductory section, which describes several basic discovery principles; (2) a set of recommendations for ESI discovery; (3) strategies and commentary on ESI discovery; and (4) an ESI discovery checklist. Following questions, observations, and suggestions from members, Judge Raggi thanked Mr. Goldsmith and noted that future discussion of the protocol may be warranted after it becomes widely deployed and implemented.

VII. FUTURE MEETINGS AND CLOSING BUSINESS

The Committee mourned the loss of former member Donald J. Goldberg, a well respected private attorney who had contributed significantly to the work of the Committee and became a good friend to many members. Professor Beale recalled with fondness Mr. Goldberg's leadership of the Rule 16 Subcommittee. Other members expressed their condolences.

Judge Raggi also expressed the Committee's deep appreciation for the many contributions of Rachel Brill and Leo P. Cunningham, two distinguished members whose terms will expire before the fall meeting. Members added their sincere thanks for the hard work performed by and friendships forged with Ms. Brill and Mr. Cunningham. Judge Raggi invited Ms. Brill and Mr. Cunningham to attend the fall meeting as guests of the Committee.

Judge Raggi announced that the Committee will next meet on Monday and Tuesday, October 29-30, 2012, at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

All business being concluded, Judge Raggi adjourned the meeting.