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09/20/2006 10:09 AM

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bcc
Subject Fw: Action by Judicial Council of the Ninth Circuit

Judge Bucklew and Professor Beale;

I am forwarding the report of the Ninth Circuit's Pacific Islands Committee, commenting on proposed amendments to Rule 41. It recommends that our proposal not apply to American Samoa. The report also recommends a new amendment to Rule 41 to address issues unique to Samoa. We will treat that part of the proposal as a suggestion and docket it accordingly.

John

----- Forwarded by John Rabiej/DCA/AO/USCOURTS on 09/20/2006 10:06 AM -----



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09/19/2006 01:05 PM

To Howard McKibben/NVD/09/USCOURTS@USCOURTS, John
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Subject Action by Judicial Council of the Ninth Circuit

Dear Judge McKibben and Mr. Rabiej:

We received today the final vote from the Ninth Circuit Judicial Council regarding the Pacific Islands Committee's *Report on the Proposed Rule Amendment Governing Searches of Property*. The Judicial Council has unanimously supported the recommendation that the Pacific Islands Committee's report be forwarded to both the Advisory Committee on Criminal Rules and the Committee on Federal-State Jurisdiction. Please find a copy of the report attached.

Sincerely,
Sally Pym
Staff to the Pacific Islands Committee



Final Am Samoa Report August 8.wpd

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Report on Proposed Rule Amendment Governing Searches of Property

The Advisory Committee on Criminal Rules of the Judicial Conference of the United States has considered amendments to the Federal Rule of Criminal Procedure 41(b) proposed by the Department of Justice. The proposed amendment authorizes a magistrate judge to issue a warrant for property that is within the jurisdiction of the United States, but outside any judicial district. The principal application of the proposed amendment is to cases in which the government seeks material located overseas in offices or residences associated with a U.S. Consulate or Embassy. This report deals only with the proposed amendment's separate application to American Samoa, a U.S. territory which has no federal district court (*i.e.*, no judicial district).

The proposal states that a warrant may issue for property that is outside the jurisdiction of a state or judicial district if the property is within "1. a territory, possession, or commonwealth of the U.S." The proposed amendment grants authority to issue such a warrant to a magistrate judge "in any district in which activities related to the crime under investigation may have occurred, *or in the District of Columbia.*" If adopted, a magistrate judge in the District of Columbia would have power to issue warrants for property in American Samoa.

The Advisory Committee on Criminal Rules requested, in a May 9, 2006 memorandum, that the Pacific Islands Committee of the Judicial Council of the Ninth Circuit comment on this proposed rule change. Subsequently, the Committee on Rules of Practice and Procedure approved publishing the proposed rule for public comment, but this version specifically excludes any application to American Samoa. Nonetheless, the accompanying report will invite comment on the American Samoa issue. As indicated, our report focuses only on the proposed amendment as it relates to American Samoa. The "related properties" is an issue outside the area of the Committee's jurisdiction. The Pacific Islands Committee has been requested to make a recommendation to the Advisory Committee on Criminal Rules in preparation for the Advisory Committee's October 26-27, 2006 meeting.

I. American Samoa and the Application of Federal Criminal Laws

American Samoa is an unincorporated territory of the United States. 48 U.S.C. § 1661; *United States v. Standard Oil Co. of Cal.*, 404 U.S. 558 (1972). It is clear that federal crimes committed in American Samoa are subject to

prosecution in United States federal courts. 18 U.S.C. § 5; *United States v. Lee*, 159 F. Supp. 2d 1241 (D. Haw. 2001).

Although federal courts have jurisdiction over crimes occurring in American Samoa, the appropriate venue for such prosecutions is far less clear. This problem arises because American Samoa has no federal district court, and is not part of any district court.¹ The prosecution of crimes is therefore governed by 18 U.S.C. § 3238, the extra-territorial venue statute, which provides:

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

The issue before us, however, does not deal with prosecution, but with the securing of warrants for property.

¹ Mr. Faleomavaega, American Samoa's delegate to Congress, introduced a bill in the 109th Congress, H.R. 4711, to create an Article I federal district court in American Samoa. In a March 16, 2006 press release, Mr. Faleomavaega announced that "as a result of recent Fono [the territorial legislature] Resolutions and opinions expressed by several traditional leaders opposing this legislation he will request the Chairman of the House Judiciary Committee not to conduct any hearings on H.R. 4711 at this time." See <http://www.asbar.org>. Mr. Faleomavaega also announced that he would request the GAO "to conduct a study of the judiciary system in American Samoa." *Id.* Consideration should be given by the Advisory Committee to await the GAO report before taking a position on this issue.

II. The Existing Law Regarding Authority to Issue Search Warrants

A. The Federal Rule

Federal Rule of Criminal Procedure 41(b) provides:

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district--or if none is reasonably available, a judge of a state court of record in the district--has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed; and

(3) a magistrate judge--in an investigation of domestic terrorism or international terrorism (as defined in 18 U.S.C. § 2331)--having authority in any district in which activities related to the terrorism may have occurred, may issue a warrant for a person or property within or outside that district.

Under the plain language of Rule 41(b)(1), the authority to issue a warrant is limited to “a person or property located within the district.” Two limited exceptions exist under (b)(2) and (b)(3).

If no magistrate judge is reasonably available, Rule 41(b)(1) does permit a law enforcement officer to obtain a warrant from a “state court of record in the district.” Federal Rule of Criminal Procedure 1(b)(9) defines “state” as including any territory of the United States. But Rule 41(b) requires that the state court judge be one “of record *in the district*.” Because American Samoa is not in a district, the rule would not permit federal authorities, using Federal Rule of Criminal Procedure 41(b), to obtain a search warrant from a local court in American Samoa. See *United States v. Chipps*, 410 F.3d 438, 446 (8th Cir. 2005)

("Interpreting 'district' to mean federal district throughout the rule ensures that state judges and federal magistrates have the same territorial reach under Rule 41(b)(1)").

Thus, it appears that the present version of Federal Rule of Criminal Procedure 41(b) does not authorize the issuance of a search warrant for property located in American Samoa other than in the two exceptions set forth in subsections (b)(2) and (b)(3). It is unclear if magistrate judges of the District of Hawaii or the District of Columbia have issued such warrants.

B. *The American Samoa Rule*

Rule 41 of the Rules of Criminal Procedure of American Samoa provides:

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a trial court judge or justice of the High Court upon request of an attorney for the government.

(b) Property or Persons Which May Be Seized With A Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) Issuance and Contents.

(1) Warrant upon Affidavit. A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the district court judge or justice of the High Court and establishing the grounds for issuing the warrant. If the judge or justice is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or persons to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in

whole or in part. Before ruling on a request for a warrant the judge or justice may require the affiant to appear personally and examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a marshal or police officer of American Samoa. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a judge or justice to whom it shall be returned.

This provision tracks, in large part, the requirements set forth in Federal Rule of Criminal Procedure 41(b). Two differences appear obvious: 1) while the federal rule permits a warrant to issue on the request of an attorney for the government *or* a federal law enforcement officer, the American Samoa rule permits a warrant to issue only on the request of an attorney for the government; and 2) the American Samoa rule states that the warrant "shall be directed to a marshal or police officer of American Samoa." To obtain a search warrant in American Samoa, federal law enforcement officials would need to secure the assistance of an attorney for the government and a local marshal or police officer. "Attorney for the government," as used in the American Samoa rule, probably means an attorney for the territorial government.

II. The Pacific Islands Committee Review and Recommendation

The issues are whether there should be the ability of federal law enforcement officers to seek and obtain a warrant for property in American Samoa upon probable cause and, if so, where the warrant should be issued.

The Pacific Islands Committee applauds the decision to exclude American Samoa from the proposed rule which will be circulated for comment. We believe that the proposed rule essentially addresses a different problem that is inapplicable to American Samoa. The Committee believes that it would be more appropriate to address separately the issuance of warrants for property in American Samoa. The need asserted by the government for the rule amendment is national security

concerns resulting from the selling of passports at overseas U.S. Embassies. There is no U.S. Embassy in American Samoa; and all passport applications from there are sent via the U.S. mail and processed in California.

The Pacific Islands Committee recognizes the need to clarify the authority to secure a warrant for property in American Samoa. Committee members have expressed concern over the perceived practice (although rare) of issuing warrants applicable to American Samoa in the District of Hawaii or elsewhere.

If a specific amendment to Rule 41 dealing with American Samoa alone is to be made, such an amendment should be reviewed first by the judiciary of American Samoa. This is consistent with a longstanding practice based on the original American Samoa-United States treaties. We suggest that any amendment affecting American Samoa should have the support of Chief Justice of the High Court of American Samoa. The Pacific Islands Committee would have difficulty supporting any rule change affecting American Samoa that is not supported by the American Samoa judiciary.

We recommend an amendment to Federal Rule of Criminal Procedure 41(b)(1) adding "or a High Court Justice in American Samoa" after the words "state court of record in the district," and add at the end "or in American Samoa for a warrant issued by the High Court." Thus, where there is no magistrate judge reasonably available (as in American Samoa), "a High Court Justice of American Samoa – has authority to issue a warrant" This amendment would put the High Court of American Samoa in the same position as state judges of all 50 states when a magistrate judge is not reasonably available. It would also provide the government with easy access to an authorized court to secure probable cause search warrants, and provide the defendants with the opportunity to challenge warrants within the Territory.

III. Recommendation

Our Committee recommends the change to Rule 41(b)(1) as outlined immediately above to provide authority to secure federal search warrants affecting search warrants for property in American Samoa. The issue should be revisited if congressional action is taken after the GAO study referred to in footnote one.

IV. Process

The Pacific Islands Committee, under a different name, was formerly a committee of the Judicial Conference of the United States. Its duties were subsequently transferred to the Ninth Circuit and it now functions as a standing committee of the Judicial Council of the Ninth Circuit, with an indefinite liaison responsibility to the Judicial Conference of the United States Committee on Federal-State Jurisdiction.

We request the Judicial Council of the Ninth Circuit to forward our recommendation to the Advisory Committee on Criminal Rules and the Committee on Federal-State Jurisdiction.