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EXECUTIVE DIRECTOR

FEDERAL DEFENDER PROGRAM

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS**

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February 16, 2010

09-CR-009

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

Re: Proposed Amendment to Rule 32.1, Federal Rules of Criminal Procedure

Dear Mr. McCabe:

We, the Executive Director of the Federal Defender Program for the Northern District of Illinois and its Branch Chief, write in opposition to the proposed amendment to Rule 32.1 of the Federal Rules of Criminal Procedure. Specifically, we object to the proposal that would allow the court with the consent of the defendant to conduct a Rule 32.1 proceeding via video conferencing.

Our opposition is based upon several grounds. First, a Rule 32.1 proceeding is one in which the defendant's liberty is at stake. The defendant may have probation revoked or mandatory supervised release revoked resulting in a possible sentence of imprisonment. The imposition of a sentence of imprisonment is a most serious event, not only for the defendant, but also for the public. To allow a hearing of this magnitude to occur over a television screen, no matter how large, detracts from the solemnity of the procedure. Such a hearing should always occur with the defendant and the court being in the same physical location. It is our belief that defendants are more likely to believe that they are being treated fairly if they are physically before the court.

It is even more unlikely that a defendant in a Rule 32.1 proceeding will have had an adequate opportunity to meet with counsel prior to having to make a decision about teleconferencing, making it even more difficult to obtain a knowing consent. In addition, as time goes on, it has been our general experience that many people, especially those who have never appeared in front of a camera, are quite uncomfortable in that position. Thus, although they may believe that they will be fine, they may freeze up when the camera starts rolling. At that point, it will be too late.

Second, the proposed amendment does not provide any guidance in how the Rule 32.1 proceeding is to be conducted. May the witnesses be at a location accessible by video teleconferencing? If so, how is the judge to assess the credibility and demeanor of the witness? Where are the attorneys for the government and the defendant to be? Where is the court to be? Must the court be sitting in a courtroom within the jurisdiction of the offense or may it be at some other facility? What if the court wishes to do business while at a vacation home? Will a facility in that district be permissible? The proposed amendment fails to provide guidance and direction on too many issues for us to knowledgeably predict what the potential outcomes may be.

Third, as recently as 2005, Rule 32.1 was amended to recognize the importance of allocution and the defendant's ability to present mitigating evidence. *See* Rule 32.1 Fed. R. Crim. P., Advisory Committee Notes, 2005 Amendments. The right of allocution is the right to appear personally before the court and submit a statement in mitigation. The right to make a personal plea to the judge is not protected by the proposed amendment. Justice Frankfurter recognized the importance of the right of allocution when he said: "None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Green v. United States*, 365 U.S. 301, 304 (1961). Allocution is effectively denied where the defendant is not speaking directly to the court, but rather is speaking to a microphone.

Fourth, we have had experience in court proceedings being conducted over a video teleconferencing device. Those experiences have not been satisfactory. A video feed may not match with the audio feed. This leaves the impression of a badly dubbed foreign movie. There may be time delays which destroy and distort the spontaneity of the actual proceeding. Too much is left to the vagaries of the equipment employed. These "glitches" detract from the decorum and solemnity of the proceedings and may cause miscommunications and misunderstandings that are never revealed.

Peter G. McCabe, Secretary, February 16, 2010
Page Three

Finally, we understand that although Rules 5, 10 and 43 now permit video conferencing with a defendant's consent (amendments that we also objected to), video conferencing is rarely chosen by the defendant.

In summary, we believe that a Rule 32.1 hearing should not be conducted with the use of video teleconferencing. We do not know what pressures may be exerted to have a defendant consent but such pressures may be employed, even unknowingly. We fear that the proceedings will lose their solemnity and that the rights of the defendants to question witnesses, present evidence and make a statement in allocution will be placed in jeopardy. We further fear that it will be most difficult for the court to fulfill its obligation to assess the credibility of both the defendant and the witnesses based on their physical demeanor if they are in remote locations.

We appreciate the opportunity to offer our comments on the Standing Committee's proposal.

Very truly yours,

/s/Carol A. Brook

Carol A. Brook
Executive Director, Federal Defender Program
For the Northern District of Illinois

/s/Paul E. Gaziano

Paul E. Gaziano
Rockford Branch Chief, Federal Defender Program
For the Northern District of Illinois