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
Thurgood Marshall Federal Judiciary Bldg.
One Columbus Circle, N.E., suite 4-170
Washington, DC 20002

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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