To: **Hon. Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Richard C. Tallman, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

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

Date: **May 11, 2009**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met on April 6-7, 2009 in Washington, D.C., and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are attached.

This report presents a number of action items:

(1) approval to transmit to the Judicial Conference published amendments to two rules pertaining to victims, Rules 12.3 and 21;

(2) approval to transmit to the Judicial Conference published amendments to Rules 15 and 32.1; and

(3) approval to publish a package of proposed amendments incorporating technology in Rules 1, 3, 4, 9, 32.1, 40, 41, 43, and 49;

(4) approval to publish proposed amendments to Rules 12 and 34.

II. Action Items—Recommendations to Forward Amendments to the Judicial Conference

A. Rules Pertaining to Victims

The first amendments the Committee recommends for transmission to the Judicial Conference pertain to victims. The Committee recommends that two of the three published amendments be transmitted to the Judicial Conference. It does not recommend transmittal of the proposed amendment to Rule 5.

The Committee received written comments and heard testimony from witnesses who opposed all of the amendments.

Some of the arguments were applicable to all of the amendments. The Committee was urged to remain consistent with its own policy of incorporating, but not going beyond, the requirements of the Crime Victims' Rights Act (CVRA) and leaving other issues to case-by-case development that may provide a basis for later rule making. The Committee's first victim-related rules have just gone into effect, and the Committee was urged by some groups to observe the experience under these rules before making further changes. Since the recent comprehensive review of the implementation of the CVRA by the Government Accountability Office (GAO) found no problems with the judicial implementation of the Act, opponents characterized the proposed amendments as premature. Although this argument applies to some degree to all three of the rules, it has the greatest bite in connection with the proposed amendment to Rule 12.3, which parallels an amendment to Rule 12.1 that went into effect December 1, 2008.

Some opponents of the amendments also expressed concern that the promulgation of rules not necessary to implement the CVRA might provide the basis for the proliferation of mandamus actions that would tie up the courts. Alternatively, the proposed rules might cause district courts to bend over backwards to avoid rulings that could generate mandamus actions, and by so doing prejudice the rights of defendants, the government, or witnesses in ways not amendable to appellate correction.

Comments pertaining to specific amendments are addressed below.

1. ACTION ITEM—Rule 12.3 (Notice of Public Authority Defense)

The proposed amendment parallels the amendment to Rule 12.1 (Notice of Alibi Defense) that went into effect on December 1, 2009. Both are intended to implement the CVRA, which states that victims have the right to be reasonably protected from the accused and to be treated with respect for their dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The proposed amendment provides that a victim's address and telephone number should not automatically be provided to the defense when a public authority defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense but also protects the victim's interests. The same procedures and standards

apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

Rule 12.3. Notice of a Public-Authority Defense

(a) Notice of the Defense and Disclosure of Witnesses.

* * * * *

(4) *Disclosing Witnesses*.

* * * * *

(C) *Government's Reply*. Within 7 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name~~, address, and telephone number~~ of each witness~~—~~and the address and telephone number of each witness other than a victim — that the government intends to rely on to oppose the defendant's public-authority defense.

(D) *Victim's Address and Telephone Number*. If the government intends to rely on a victim's testimony to oppose the defendant's public-authority defense and the defendant establishes a need for the

victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows for preparing the defense and also protects the victim's interests.

* * * * *

(b) Continuing Duty to Disclose.

(1) ***In General.*** Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of any additional witness — and the~~,~~ address, and telephone number of any additional witness other than a victim — if:

(~~1~~ A) the disclosing party learns of the witness before or during trial; and

(~~2~~ B) the witness should have been disclosed under Rule 12.3(a)(4)

if the disclosing party had known of the witness earlier.

(2) ***Address and Telephone Number of an Additional Victim-Witness.*** The address and telephone number of an additional victim-witness must not be disclosed except as provided in Rule 12.3(a)(4)(D).

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COMMITTEE NOTE

Subdivisions (a) and (b). The amendment implements the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when a public-authority defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests.

In the case of victims who will testify concerning a public-authority claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

The Federal Magistrate Judges Association endorsed the proposal, which was opposed by the Federal Defenders and the National Association of Criminal Defense Lawyers (NACDL). The comments of Federal Defenders and NACDL parallel the arguments made in opposition to the amendment to Rule 12.1. The central concern is that the amendment requires the defendant to disclose the names and addresses of the witnesses who will support his public authority defense without any guarantee of reciprocal discovery of all of the government's rebuttal witnesses. The opponents argue that the amendment would violate due process under *Wardius v. Oregon*, 412 U.S. 470 (1973), which requires discovery to be a two-way street. Moreover, they urge that amendment has the same constitutional defect as restrictions on cross examining a

government witness concerning his real name and address. Finally, they argue that the proposed amendment makes two unwarranted assumptions: that defendants generally pose a threat to victims who would testify concerning the defendant's claim of a public authority defense, and that defense counsel also pose a threat.

Although these arguments were presented very effectively in the written statements and testimony, they were, in effect, considered and rejected when Rule 12.1 was approved. One witness urged that Rule 12.3 is distinguishable from Rule 12.1 because victims would not be witnesses in cases raising a public authority defense. The Committee was not persuaded by this argument. Although there are not likely to be a large number of situations where the rule would apply, a Committee member provided an illustration of a case in which the proposed amendment would have been applicable.

Following the precedent of Rule 12.1, the Advisory Committee voted unanimously to recommend that Rule 12.3 be approved as published and forwarded to the Standing Committee.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 12.3 be approved as published and forwarded to the Judicial Conference.

2. ACTION ITEM—Rule 21

Rule 21

The proposed amendment as published provides:

Rule 21. Transfer for Trial

* * * * *

(b) For Convenience. Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.

* * * * *

COMMITTEE NOTE

> **Subdivision (b).** This amendment requires the court to consider the convenience of victims — as well as the convenience of the parties and witnesses and the interests of justice — in determining whether to transfer all or part of the proceeding to another district for trial. The Committee recognizes that the court has substantial discretion to balance any competing interests.

This amendment requires the court to consider the convenience of victims – as well as the convenience of the parties and witnesses and the interests of justice – in determining whether to transfer all or part of the proceeding to another district for trial under Rule 21(b). It does not apply to Rule 21(a), which governs transfers for prejudice.

Although the Federal Magistrate Judges Association endorses the proposal, the remaining comments by the Federal Defenders, the National Association of Criminal Defense Lawyers (NACDL), and Mr. Alex Zipperer oppose the amendment. The comments opposing the amendment correctly observe that nothing in the CVRA compels the adoption of the amendment. Although the CVRA restricts the court's authority to exclude victims who are otherwise able to attend proceedings, the Act neither gives non-testifying victims a right to have the proceedings held at a place convenient for them nor requires the government to transport victims to the place of the trial.

NACDL argued that the proposed amendment in effect creates such a substantive right, and in so doing exceeds the authority of the Rules Enabling Act as well as the policy judgment expressed in the enactment of the CVRA. Opponents of the amendment also expressed concern that the proposed amendment improperly equates the convenience of the non-testifying victims with the convenience of the defendant, the prosecution, and the witnesses. This could result in holding the trial in a location that requires substantial travel, or imposes other significant costs on the parties and witnesses who are required to attend. In order to avoid a time consuming mandamus challenge, the district court might actually give greater weight to the convenience of those who claim the status of non-testifying victims than to the interests of the defendant, the government, or the witnesses, because they do not have the ability to seek mandamus to enforce their preferences.

The Committee did not find these arguments persuasive. The rule comes into play if and only if a defendant moves to transfer the case. At that point the court "may" transfer the case, which makes the court's discretion clear. This point is further emphasized in the Committee Note, which states that "[t]he court has substantial discretion to balance any competing interests." This emphasis on the court's discretion was intended to allay any fear that mandamus would be a realistic concern. (Indeed, it was unclear how mandamus could be properly be employed to enforce a provision of the Federal Rules, when the statutory right to mandamus applies to the rights afforded by the Crime Victims' Rights Act. *See* 18 U.S.C. § 3771(d)(3).) Finally, Committee members noted that the rule already allows the court to consider "the interest of justice," which might in some cases be thought to include the interest of victims.

The Committee voted, with two dissents, to forward the proposed amendment to the Standing Committee.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 21 be approved as published and forwarded to the Judicial Conference.

After considering written comments and testimony opposing the proposed amendment to Rule 5, the Committee concluded that the amendment should be withdrawn. As published, the amendment provided:

Rule 5. Initial Appearance

* * * * *

(d) Procedure in a Felony Case.

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(3) ***Detention or Release*****.** The judge must detain or release the defendant as provided by statute or these rules. In making that decision, the judge must consider the right of any victim to be reasonably protected from the defendant.

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COMMITTEE NOTE

Subdivision (d)(3). This amendment draws attention to a factor that the courts are required to consider under both the Bail Reform Act and the Crime Victims' Rights Act. In determining whether a defendant can be released on personal recognizance, unsecured bond, or conditions, the Bail Reform Act requires the court to consider "the safety of any other person or the community." *See* 18 U.S.C. § 3142(b) & (c). In considering proposed conditions of release, 18 U.S.C. § 3142(g)(4), requires the court to consider "the nature and seriousness of the danger to any person in the community that would be posed by the person's release." In addition, the Crime Victims' Rights Act, 18 U.S.C.

> § 3771(a)(1), states that victims have the "right to be reasonably protected from the accused."

In general the public comments urged (1) the amendment is unnecessary and (2) it is undesirable to single out only one of the many factors that courts must consider under the Bail Reform Act. The comments also expressed concern that the amendment could be read to change the standard for detention or release, creating a conflict with the carefully circumscribed limits Congress placed on preventive detention in the Bail Reform Act. The Bail Reform Act allows preventive detention only when necessary to satisfy a compelling need to protect individuals or the community from a particularly dangerous class of defendants. The court must find that "no condition or combination of conditions . . . will reasonably assure the appearance of the person required and the safety of any other person and the community." 18 U.S.C. § 3143(e) & (f). The proposed amendment, however, does not reflect those limitations. If it were interpreted as changing the standard to be applied, it would create a new substantive right and thus run afoul of the Rules Enabling Act. It might also run afoul of the Eighth Amendment.

Members of the Committee discussed whether there was a need for the amendment and the constitutional and statutory arguments raised by opponents. The current text–which requires the decision to detain or release be made "as provided by statute or these rules"–clearly requires the courts to consider the requirements of the CVRA as well as the Bail Reform Act. Thus the proposed amendment is not necessary. There is, moreover, some force to the argument that in this context singling out the right of a victim to be protected from the defendant might be read as altering a constitutionally based substantive standard. This would exceed the authority conferred by the Rules Enabling Act.

The Committee voted not to forward the proposed amendment, rejecting by a vote of 9 to 3 a motion to resolve the issues raised in the comment period by adding a reference to the Bail Reform Act.

B. Other Published Rules

1. ACTION ITEM—Rule 15

The Committee voted with three dissents to approve and forward to the Standing Committee the proposed amendment Rule 15, which incorporates several changes made after publication.

The proposed amendment (reproduced below) provides for depositions at which the defendant is not physically present if the court finds that a series of stringent criteria are met. The amendment, which applies only to depositions taken outside the United States, addresses the growing frequency of cases in which important witnesses — both government and defense witnesses — 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 proposed amendment is intended to fill that gap by allowing such depositions to be taken in a small group of cases that meet stringent criteria.

Four comments were received in response to the publication of the proposed amendment, and one witness representing the Federal Defenders testified concerning the amendment. The Magistrate Judges Association endorses the proposal. The General Counsel of the Drug Enforcement Administration raised some issues concerning the drafting of the rule. The Federal Defenders and the National Association of Criminal Defense Lawyers opposed the rule and urged that it be withdrawn, or, at a minimum, substantially redrafted.

The principal arguments in the lengthy submissions from the Federal Defenders and NACDL concern the effect of the proposed amendment on the defendant's rights under the Confrontation Clause of the Sixth Amendment. They argue that *Crawford v. Washington*, 541 U.S. 36 (2004), interprets the Confrontation Clause as providing an unqualified right to face-to-face confrontation that would preclude the admission of testimony preserved by a deposition taken under the proposed rule. There is no indication that the Supreme Court will continue to allow any exception to the right of face-to-face confrontation even when this would serve an important public policy interest and there are guarantees of trustworthiness. Moreover, the proposed amendment may not be confined to a small number of exceptional cases. The amendment in its current form is not, in the opponents' view, limited to cases where an interest as significant as national security is at issue, nor does it guarantee the level of participation by the defendant that was provided in *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 2009 WL 425086 (Feb. 23, 2009) (two-way live video feed, one defense lawyer with defendant and another at the deposition, frequent opportunities for private conversations between defendant and counsel at the deposition, and split screen display at trial allowing jury to see reactions of both defendant and witness during deposition).

Specifically, as published the amendment (1) was not limited to transnational cases, (2) was not limited to felonies, (3) did not require a showing that the evidence sought is "necessary" to the government's case, and (4) imposed no obligation on the government to secure the witness's presence.

NACDL argues that the real significance of the amendment is not the taking of the depositions per se, but rather that it would enable the prosecution to present evidence at trial that has not been subject to confrontation. They argue that the amendment would in effect create a right to introduce the resulting deposition at trial, and as such exceed the authority of the Rules Enabling Act. It would also be a back door means of achieving the goals of the failed 2002 attempt to amend Rule 26. Rather than create inevitable constitutional challenges, they urge the Committee to await either legislation or further

clarification from the case law. They also urge that the safeguards and limits in the proposed amendment are insufficient to restrict its scope and to guarantee the defendant's participation. In their view, "meaningfully participate ... through reasonable means" creates only a vague and subjective test that offers little real protection. Similarly, the showing required would encompass every witness beyond the court's subpoena power. Finally, they note there is reason to doubt the credibility and reliability of the testimony of the potential witnesses who are willing to be deposed, but not travel to the United States to testify. These will include, for example, persons who have fled justice in this country and know that their oath taken abroad will have no practical significance.

The Committee also heard testimony stressing the frequency with which the technology is inadequate or fails, as well as other problems that defense attorneys experience in taking foreign depositions, such as the requirement in some countries that only local counsel can question witnesses.

The Committee adopted several amendments intended to address some of the issues raised during the comment period. It explicitly limited the amendment to felonies. After discussion, the Committee declined to adopt a requirement that the Attorney General or his designee certify or determine that the case serves an important public interest. Although there was support for a mechanism that would guarantee that requests under the new rule would be rigorously reviewed within DOJ and made only infrequently, members were concerned that adding a provision in the rules requiring the action by the Attorney General might raise separation of powers issues. Instead, the Committee added a provision requiring the attorney for the government to establish that the prosecution advances an important public interest. (This provision was placed at the end of the rule because, unlike the other requirements, it is applicable only to government witnesses.)

The Committee also incorporated several minor changes suggested during the comment period and by the style consultant to improve the clarity of the proposed amendment.

The Committee did not adopt three other suggestions. First, it declined to limit the rule to government witnesses, though it recognized that there will be only a small number of cases in which a defendant will wish to use this procedure.[1] Second, the Committee declined to require the government to show that the deposition would produce evidence "necessary" to its case, viewing that standard as unrealistic when the government is still assembling its case. Third, the

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[1]In cases involving a single defendant, Rule 15 would pose no difficulties if the defendant consented not to be present at the deposition of his witness, and there would be no Confrontation Clause barrier to the introduction of the deposition. However, in a case involving multiple defendants, one defendant might wish to depose a witness overseas, and another defendant who could not be present at the deposition might object to the admission of the evidence.

Committee declined to add a requirement that the government show it had made diligent efforts to secure the witness's testimony in the United States. In the Committee's view, this might actually water down the requirement in the rule as published that the witness's presence "cannot be obtained."

The Committee discussed the Confrontation Clause issues at length. Members emphasized that when that the government (or a codefendant) seeks to introduce deposition testimony, the court will rule on admissibility under the Rules of Evidence as well as the Sixth Amendment. Members stressed that providing a procedure to take a deposition did not guarantee its later admission, which could turn on a number of factors. For example, if the technology does not work well enough to allow the defendant to participate or to create a high quality recording, the deposition would likely not be admitted. Similarly, the situation might change so that it would be possible for the witness to testify at the trial. The decision to allow the taking of the deposition in no way forecloses a Confrontation Clause challenge to admission or one based on the Rules of Evidence. The Committee Note was amended to make this point clear.

Issues concerning the propriety of allowing depositions for witnesses outside the United States and the procedures under which such depositions may be taken have arisen, and will continue to arise, in the lower courts in cases such as *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 2009 WL 425086 (Feb. 23, 2009). In *Ali* the district court adopted procedures similar to those outlined in the proposed amendment, and the Fourth Circuit held that the Confrontation Clause did not prohibit the introduction of deposition testimony taken under those procedures. In the Committee's view, it is now appropriate to distill the analysis in cases such as *Ali* and use it to set forth a procedural framework in the Federal Rules of Criminal Procedure. The proposed amendment is intended to meet the criteria developed in the lower court decisions, as well as the Supreme Court's Confrontation Clause decisions. Although there will undoubtably be issues arising from the use of technology, members felt that the district courts have ample authority and experience to handle those issues on a case by case basis.

The Committee voted, with three dissents, to approve the proposed amendment to Rule 15, as revised, and to send it to the Standing Committee. As revised, the amendment provides:

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 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;

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

(F) for the deposition of a government witness, the attorney for the government has established that the prosecution advances an important public interest.

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Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 15 be approved as amended following publication and forwarded to the Judicial Conference.

2. ACTION ITEM—Rule 32.1

This amendment is designed to end confusion regarding the applicability of 18 U.S.C. § 3143(a)—to which the current Rule refers—to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion arose because several subsections of § 3143(a) are ill-suited to proceedings involving the revocation of probation or supervised release. *See United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

The current rule also provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger, but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence, which has been established by the case law.

The proposed amendment provides:

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

* * * * *

(6) ***Release or Detention*****.** The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a)(1) pending further proceedings. The burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community rests with the person.

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COMMITTEE NOTE

This amendment is designed to end confusion regarding the applicability of 18 U.S.C. § 3143(a) to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion regarding the applicability of § 3143(a) arose because several subsections of the statute are ill-suited to proceedings involving the revocation of probation or supervised release. *See United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

The current rule provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence, which has been established by the case law. *See, e.g.*, *United States v. Loya*, 23 F.3d 1529, 1530 (9th Cir. 1994); *United States v. Giannetta*, 695 F. Supp. 1254, 1256 (D. Me. 1988).

Four comments were received in response to the publication of the proposed amendment, and one witness representing the Federal Defenders testified concerning the amendment. The Magistrate Judges Association endorses the proposal, but the other three comments were critical. Although one comment criticized the standard of clear and convincing evidence as "impossibly high," this standard is mandated by statute. The current rule requires the court to follow 18 U.S.C. § 3143(a), subsection (1) of which requires detention unless "the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released ...."

The Federal Public Defenders (whose views were also endorsed by the National Association of Criminal Defense Lawyers) did not challenge the clear and convincing evidence standard, but they opposed the rule as drafted and sought two significant changes:

(1) a preliminary requirement that the court find probable cause before detaining an individual under this provision, and

(2) a requirement that the government bear the burden of proof in cases in which the Sentencing Commission's policy statements provide for modification of the term or conditions of supervised release (rather than imprisonment).

The Committee rejected the proposal to add a preliminary requirement that the court find probable cause. The present rule was intended to satisfy due process by requiring a finding of probable cause at a preliminary hearing which must be held "promptly," and Rule 32.1(a)(1)-(6) sets forth a procedure for an initial appearance that would occur before–and not duplicate the function of–the preliminary hearing. Rule 32.1 was amended in 2002 to add the provisions concerning the initial appearance. The 2002 Committee Note indicates the Committee's awareness that some districts were not conducting an initial appearance. The Note states that under the new language an initial appearance is required, although a court may combine the initial appearance with the preliminary hearing if that can be done within the accelerated time requirement of Rule 32(a)(1) ("without unnecessary delay"). The purpose of the initial appearance is to provide the defendant with the advice required in Rule 32.1(a)(3), and to make an initial decision on release or retention under Rule 32.1(a)(6). As noted below, under Rule 32.1(a)(6) the person has the burden of establishing that he is not a flight risk or a danger to any other person or the community. Unless an individual court chooses to combine the initial appearance with the preliminary hearing, they serve distinct purposes.

Additionally, 18 U.S.C. § 3606 provides another important safeguard that occurs even earlier in the process. This section provides the authority for the arrest of a probationer or person on supervised release if there is probable cause to believe that he or she has violated a condition of the probation or release. Where the arrest of a person on probation or supervised release is made pursuant to a warrant, a judicial officer will necessarily have made a finding of probable cause pursuant to § 3606 (and the Fourth Amendment) before the arrest is made.

The Committee also declined to add a provision to the amendment that would shirft the burden of proof in cases in which the applicable Guideline policy statement would not provide for imprisonment. The text of 18 U.S.C. § 3143(a)(1) places the burden of proof on the defendant except in cases when no imprisonment is provided for in the applicable "guideline" promulgated by the Sentencing Commission. The Commission has not promulgated any guidelines concerning supervised release, though it has promulgated policy statements. The Commission determined that policy statements rather than guidelines "provided greater flexibility to both the Commission and the courts." U.S.S.G. Ch. 7, Pt.A.3 (a). The court in *United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007), found that the language of § 3143(a)(1) was not applicable in the absence of a guideline.

In this context there is a significant difference between guidelines–to which 18 U.S.C. § 3143(a)(1) refers–and the policy statements concerning revocation. At least seven circuits have held that the Commission intended the policy statements of Chapter Seven to be only recommendations that are not binding on the courts. *See, e.g. United States v. O'Neill*, 11 F.3d

292, 301 n.11 (1st Cir. 1993) (noting that the policy statements of Chapter 7 "are prefaced by a special discussion making manifest their tentative nature" and "join[ing] six other circuits in recognizing Chapter 7 policy statements as advisory rather than mandatory"); *United States v. Hooker*, 993 F.2d 898, 901 (D.C. Cir. 1993) (stating "it seems contrary to the Commission's purpose to treat Chapter VII policy statements, which were adopted to preserve the courts' flexibility, as binding."). Courts have employed their discretion to order imprisonment for lower grade offenders even when the policy statements would provide only for lesser alternatives. *See, e.g., United States v. Redcap, 505* F.3d 1321 (10th Cir. 2007) (supervised release revoked for violation of drinking alcohol, and sentence imposed exceeded that recommended in the policy statement); *United States v. Moulden*, 478 F. 3d 652 (4th Cir. 2007) (probation revoked for defendant who argued that his violations were "technical" and "only" Grade C violations); *United States v. Crudup*, 461 F.3d 433 (4th Cir. 2006) (supervised release revoked and maximum sentence imposed for Grade C violations). Accordingly, the Committee determined that it would not be appropriate to rely upon the policy statement in Chapter 7 to define a class of cases in which the government would have to bear the burden of proving risk of flight or danger under Rule 32.1(a)(6).

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 32.1 be approved as published and forwarded to the Judicial Conference.

III. Action Items—Recommendations to Publish Amendments to the Rules

A. Technology Rules

The Committee is recommending a package of amendments following a comprehensive review of all of the Rules of Criminal Procedure to consider how and when to incorporate technological advances.[2]

The Committee is proposing one new rule (numbered 4.1) that (1) incorporates the portions of Rule 41 allowing a warrant to be issued on the basis of information submitted by reliable electronic means, and (2) makes those procedures applicable to complaints under Rule 3 and warrants or summonses issued under Rules 4 and 9. The new Rule 4.1 also contains an innovation that deals with the increasingly common situation where all supporting documentation is submitted by reliable electronic means, such as fax or email. The new rule requires a live conversation in which the person submitting the material is placed under oath, and

[2]During its April meeting, the Committee voted to forward all of the rules to the Standing Committee with the recommendation that they be published. In a subsequent vote taken by email, it approved the Committee Note to Rule 4.1 and the deletion of one amendment that was deemed to be duplicative.

also states that the judge may keep an abbreviated record of the oath, rather than transcribing verbatim the entire conversation and the material submitted electronically.

The remaining proposals amend existing rules, as follows:

- Rule 1: expanding the definition of telephone and telephonic to include cell phone technology and calls over the internet from computers

- Rules 3, 4, and 9: authorizing the consideration of complaints and issuance of arrest warrants and summonses based on information submitted by reliable electronic means as provided by new Rule 4.1

- Rules 4 and 41: authorizing the return of search warrants, arrest warrants, and warrants for tracking devices by reliable electronic means

- Rule 32.1: upon defendant's request, allowing the defendant to participate in proceedings concerning the revocation or modification of probation or supervised release by video teleconference

- Rule 40: with defendant's consent, allowing his appearance by video teleconference in proceeding on arrest for failure to appear in other district

- Rule 41: deleting portions now covered by new Rule 4.1

- Rule 43: conforming the rule to permit video teleconferencing as specified in other amendments; and–with defendant's written consent–allowing arraignment, trial, and sentencing of misdemeanor to occur by video teleconference.

- Rule 49: authorizing local rules permitting papers to be filed, signed, or verified by electronic means meeting standards of Judicial Conference.

With one exception, the proposed amendments were seen as uncontroversial and were approved unanimously be the Advisory Committee. Four members dissented on the amendment to Rule 32.1, which governs proceedings to revoke or modify probation or supervised release. The proposed amendment, as noted above, allows a defendant to request permission to participate by video teleconference. This amendment will be most useful when a defendant is alleged to have violated conditions of probation or supervised release while located in a district that lacks jurisdiction over the original sentence. Returning to the original district often involves substantial delays that work a significant hardship on defendants. The proposed amendment provides an option that could permit some defendants to remain in the district where the alleged violation occurred. While recognizing that in some instances being transported back to the

district where sentencing occurred may work a hardship, some members expressed concern that this amendment would become a slippery slope towards sentencing by video. There was also some concern that defendants might be pressured to appear by video teleconference in order to save the government the expense of transportation. The proposed amendment seeks to address this concern by limiting its application to cases where the defendant affirmatively requests this procedure.

The Standing Committee has already authorized, but not yet forwarded for publication, a related amendment to Rule 6(e), which provides for the taking of a grand jury return by video teleconference. In the Advisory Committee's view, it would be appropriate for that amendment to be published as part of an overall package of technology related amendments.

ACTION ITEMS—Rules 1, 3, 4, 9, 32.1, 40, 41, 43, 49, and new Rule 4.1

Recommendation—The Advisory Committee recommends that new Rule 4.1 and the proposed amendments to Rules 1, 3, 4, 9, 32.1, 40, 41, 43 and 49 be published for public comment.

B. ACTION ITEM—Rule 12

Under Rule 12, defects in the indictment or information–as well as improper joinder, the admission of illegally obtained evidence, and discovery violations–are "waived" if not raised prior to trial. Rule 12(e) provides that a "court may grant relief from the waiver" for "good cause." Rule 12(b)(3)(B) presently excludes two classes of claims from these requirements. Claims that an indictment or information fails to invoke the court's jurisdiction and claims that the indictment fails to state an offense may be heard "at any time while the case is pending." The proposed amendment eliminates the exemption for a claim that the charge fails to state an offense, so that like other defects in the indictment it would be "waived" under Rule 12(e) if not raised prior to trial. The amendment also adds a separate standard for relief from waiver for this particular defect. Instead of "good cause," relief for an untimely claim that the charge fails to charge an offense would require "prejudice" to a "substantial right of the defendant." The proposal also includes a conforming amendment to Rule 34.

There are two reasons for this proposal. First, the failure to state an offense had previously been considered fatal whenever raised, but the decision in *United States v. Cotton*, 535 U.S. 625 (2002), undercut this "jurisdictional" justification for granting relief for this defect at any time. *Cotton* arose in the wake of the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). On appeal the defendant in *Cotton* raised for the first time the objection that the indictment failed to specify drug weight that increased the maximum penalty under 21 U.S.C. § 841. Overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction," *Cotton* held that the omission of an essential element from the

defendant's indictment does not deprive a reviewing court of jurisdiction to review the conviction or sentence under Rule 52(b). 535 U.S. at 627-31. The second reason for the proposal is a recognition that exempting this particular challenge from the timing requirements of Rule 12 has significant costs, reducing the incentive of defendants to raise the objection before trial, wasting judicial resources, and undercutting the finality of criminal judgments. For these reasons, the Court of Appeals for the Third Circuit has urged the Committee to amend the Rule. *See United States v. Hedaithy*, 392 F.3d 580, 586-89 (3d Cir. 2004); *United States v. Panarella*, 277 F.3d 678, 686-88 (3d Cir. 2002).

The issues raised by the proposal fell into three categories: (1) whether this particular defect occurs with enough frequency to justify changing the rule, (2) whether the Fifth Amendment would limit the effectiveness of the amendment in cases in which the deficiency was raised for the first time mid-trial, and (3) under what conditions should relief be available for an untimely claim.

Magnitude of the problem. There is little information about exactly how often this type of error surfaces only after trial has started, or after conviction, or how often relief has been granted. The Department of Justice has stated that "a significant number of such motions" for relief on this basis are granted each year, and it provided more than a dozen case examples. Opponents contend that the problem does not warrant amendment, that the exception for "jurisdiction" would continue to require relief in many of these cases anyway, and that courts are already using plain error review and rejecting relief for this type of error when raised after trial. The Committee ultimately concluded that the costs of continuing to consider untimely claims under the current rule remain significant even if the problem arises infrequently.

Fifth Amendment issues. Under the existing rule, if a defendant waits until trial has begun to raise his claim that an indictment fails to state an offense, the trial judge must consider that claim and dismiss the charge if it indeed omits an essential element. This dismissal does not bar subsequent prosecution for the same offense. *See United States v. Scott*, 437 U.S. 82, 98-99 (1978); *Lee v. United States*, 432 U.S. 23, 30-34 (1977). The judge has no option other than dismissal at present because the defendant's Fifth Amendment right to grand jury review prevents the judge from either (1) allowing an amendment to the indictment to include the missing element, or (2) instructing the jury on an element not in the indictment (constructive amendment).

The Committee was divided over whether the proposed amendment to Rule 12 would expand options for trial judges should this type of defect surface mid-trial. Some members of the Committee believed that if under the amended Rule a defendant "waives" the claim that a charge fails to state an offense by delaying that objection until the trial has started, a trial judge would not have to dismiss the charge, but could proceed with the trial and instruct the jury on the missing element, granting a continuance if necessary. The defendant's failure to object to the missing element in the charge would also waive his right to claim that providing complete jury instructions is a constructive amendment of the indictment, these members concluded, as both the failure to include an element initially and the mid-trial addition of that element implicate the very same

constitutional guarantee–review of every element by the grand jury. Other members of the Committee anticipated that even under the proposed amendment, the Fifth Amendment would continue to bar a trial judge from constructively amending an incomplete indictment by instructing the jury on the missing element. A waiver of the right to object to the defective indictment, they argued, would not waive the future constitutional violation that would occur if the jury was instructed on an element that did not appear in the indictment. Because the current rule requires dismissal, there are no precedents on point. Thus courts have not confronted the implication of the Fifth Amendment in this context, and they will not do so as long as the rule requires dismissal in all cases.

The standards for relief. Courts have interpreted the "good cause" requirement in Rule 12(e) to bar relief for an untimely claim absent a showing of both prejudice from the error as well as cause for the failure to challenge the error on time. *See Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963); *United States v. Crowley*, 236 F.3d 104 (2d Cir. 2004). The Committee was opposed to an amendment that would require "cause" as well as prejudice before a court could grant relief for an incomplete charge that was not raised prior to trial. A charge that fails to state an offense may not give adequate notice of the offense charged, or may otherwise prejudice the ability of the defendant to prepare a defense. Requiring "cause" could bar relief for a defendant who was caught off-guard about what charge he was facing because his counsel failed to spot the error before trial. Accordingly the proposed amendment includes a specific standard for relief from waiver of this particular defect, Rule 12(e)(2)(B), which allows the judge to grant relief if the failure to state an offense "has prejudiced a substantial right of the defendant." The existing language of the Rule that permits a court to grant relief from the waiver of other claims for "good cause" is retained as Rule 12(e)(2)(A), and would apply to all other errors waived under Rule 12(e), such as motions to suppress evidence or obtain discovery.[3]

Although the proposed standard for relief in Rule 12(e)(2)(B)–"prejudiced a substantial right of the defendant"–eliminates the need to show cause for failing to challenge before trial a charge that fails to state an offense, the language does pose some risk of uncertainty in application. The Committee concluded that on balance the phrase will be easily understood by courts, both because the same phrase already exists in Rule 7(e) (permitting amendment of information unless a different offense is charged or "a substantial right of the defendant is prejudiced") and because "substantial

[3] The proposed amendment does not resolve the division in the courts of appeals over the interaction between plain error analysis under Rule 52(b) and "waiver" under Rule 12(e). Some courts have concluded that the failure to raise a claim in accordance with Rule 12(b) bars appellate review entirely absent a showing of "good cause" under Rule 12(e), while other courts have applied plain error review under Rule 52(b). The proposed amendment takes no position on the resolution of this debate for claims other than the failure of the charge to state an offense; it creates a different standard for relief expressly for failure-to-state-an-offense claims.

rights" is a concept already used under Rule 52. Nevertheless, the new standard leaves for case development what circumstances would meet the standard.

With four dissents, the Committee voted to recommend publication of the amendment. Those who favored the amendment concluded that it was unnecessary to resolve the uncertainty about the consequences of the proposed amendment for mid-trial objections, and that the proposal was warranted by the beneficial effects of encouraging timely objections. With two dissents, the Committee voted to recommend publication of the conforming amendment to Rule 34.

Recommendation—The Advisory Committee recommends that the amendment to Rules 12 and 34 be published for public comment.

IV. Information Items

A. Procedural Rules Governing Sentencing

A proposal to amend Rule 32(h) has been under consideration since the initial efforts to conform the rules to the Supreme Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005). At its April meeting, the Rules Committee had before it not only the proposal to amend Rule 32(h) to extend the notice requirement of that rule to variances as well as "departures," but also an American Bar Association proposal to amend other portions of Rule 32 to provide the parties with disclosure of the information provided to and relied upon by the probation officer writing the presentence report (PSR). After discussion, both issues were recommitted to the Sentencing Subcommittee, with a request that it prepare a draft amendment or other recommendation for presentation to the Committee at the meeting in October.

The Committee has not yet reached consensus on the proper approach to Rule 32(h). Some favor expanding the rule's disclosure obligation to variances, but others believe that under the advisory guidelines system disclosure should no longer be required even as to departures. Finally, some members favor leaving the rule as it is while the Supreme Court continues to refine the standards for post-*Booker* sentencing. Several members expressed concern about the difficulty of giving notice of variances, because the information upon which a judge relies may be continually supplemented right up to the time that sentence is pronounced. Therefore, it is hard to predict whether a variance from the guidelines may be imposed.

The new ABA proposal also raises a variety of issues, including not only the question whether the amendments are needed, but also concerns that they might work a fundamental change in the probation officers' role as well as a significant expansion of their workload. The Committee heard from the Chief of Criminal Law Policy and the Probation Administrator in the Administrative Office of the Courts, both of whom expressed a variety of concerns. The Committee was also informed that a study by the Federal Judicial Center on the views of probation officers was being prepared and

that the Sentencing Commission was holding regional meetings at which this issue might be discussed. Additionally, the Federal Defenders wished to bring forward an additional related proposal. Accordingly, these issues were recommitted to the Sentencing Subcommittee, so that more information could be collected to allow the Committee to become more fully informed before acting.

B. Rule 12.4

The Committee on Codes of Conduct had asked the Advisory Committee on Criminal Rules to look at whether the disclosure requirements under Rule 12.4 should be expanded so that judges would be able to decide more easily whether recusal is advisable. The rule, adopted in 2000, requires the government to promptly disclose the identity of any organizational victim, and, if the organizational victim is a corporation, any parent corporation and any publicly held corporation that owns 10% or more of its stock. There is no present obligation that the identity of individual victims be disclosed. Under current Code of Conduct interpretation, a judge must recuse in a criminal case if the judge's impartiality might reasonably be questioned because of a close relationship to the victim or if the judge has a financial interest that could be substantially affected by the outcome, e.g., a restitution claim by the victim.

Upon the report of our Subcommittee on Victims' Rights, the full Committee opted not to change Rule 12.4 to require disclosure of an individual victim's identity. Such disclosure may pose serious privacy concerns for the victim. Even if the disclosure were filed under seal, unsealing may be required under certain circumstances, e.g., in response to media requests. *See United States v. Robinson,* No. 08-103090MLW, 2009 WL 137319 (D. Mass. Jan. 20, 2009) (denying media request for order requiring government to publicly disclose identity of individual victim in extortion prosecution, on the ground that the identity of the victim had not been filed and thus the court was not required to consider the presumptive right to access documents used in criminal proceedings). Moreover, the Department of Justice pointed out that an obligation by it to disclose individual victims would cause difficulty in cases involving data breach, identity theft, or securities fraud, where such victims may number in the millions.

C. Outreach to Crime Victim Advocates

The Committee also received information about the Department of Justice's ongoing efforts to communicate with the victims' rights community. Department representatives have held biannual discussions with victims' groups. During these discussions, the Department has informed the groups of relevant work being done by the Committee and solicited their concerns, if any, about the Federal Rules of Criminal Procedure. The Department also plans to continue meeting periodically with other victims' groups to seek their views.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 12.3. Notice of a Public-Authority Defense

(a) Notice of the Defense and Disclosure of Witnesses.

*** * * * ***

(4) *Disclosing Witnesses*.

*** * * * ***

(C) *Government's Reply*. Within 7 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name~~, address, and telephone number~~ of each witness—and the address and telephone number of each witness other than a victim — that the government intends to rely on to oppose the defendant's public-authority defense.

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

(D) *Victim's Address and Telephone Number*. If the government intends to rely on a victim's testimony to oppose the defendant's public-authority defense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows for preparing the defense and also protects the victim's interests.

* * * * *

(b) Continuing Duty to Disclose.

(1) ***In General.*** Both an attorney for the government and the defendant must promptly disclose in writing to the other party the

name of any additional witness — and the~~,~~ address, and telephone number of any additional witness other than a victim — if:

(~~1~~ A) the disclosing party learns of the witness before or during trial; and

(~~2~~ B) the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had known of the witness earlier.

(2) ***Address and Telephone Number of an Additional Victim-Witness.*** The address and telephone number of an additional victim-witness must not be disclosed except as provided in Rule 12.3(a)(4)(D).

*** * * * ***

COMMITTEE NOTE

Subdivisions (a) and (b). The amendment implements the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when a public-authority defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests.

In the case of victims who will testify concerning a public-authority claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made after the amendment was released for public comment.

PUBLIC COMMENTS CONCERNING RULE 12.3

08-CR-003, Mr. Michael Nachmanoff, Federal Public Defender. Mr. Nachmanoff testified in opposition to the amendment (taking the place of Mr. Hillier). Based upon an unwarranted

assumption that every defendant poses a risk to prospective government witnesses, the amendment introduces uncertainty about whether the defendant will receive reciprocal discovery that is critical to pretrial preparation. Moreover, the amendment is unnecessary because it is so unlikely that the government will rely on a victim to rebut a public authority defense.

08-CR-005. Thomas W. Hillier, II, Federal Public Defender. Mr. Hillier opposes the amendment on several grounds: (1) it forces the defendant to provide the names and addresses of his witnesses without any guarantee of reciprocal discovery of the same information regarding the government's rebuttal witnesses; (2) it violates the defendant's right to due process and compromises the judge's neutrality; (3) any alternative to the provision of this information will be insufficient to satisfy due process; (4) when the defendant does not receive full reciprocal discovery he will be unable to retract his disclosures and the government will receive an unfair advantage; (5) the rule reverses the constitutionally required presumption that the defendant is entitled to investigate a witnesses background to discover avenues for impeachment. Since the amendment tracks the recent amendment to Rule 12.1, the Committee should defer this proposal until the constitutionality of Rule 12.1 has been litigated, particularly since there has been no showing of any need for the amendment.

08-CR-008, Federal Magistrate Judges Association. The Magistrate Judges Association endorses the proposal.

08-CR-009. Peter Goldberger and William J. Genego, National Association of Criminal Defense Lawyers. Mr. Goldberger and Mr. Genego oppose the amendment on several grounds: (1) the rule should reflect the reality that defendants will always have a need for this information and will seldom pose anythreat to the witnesses against him and should require a special

need for secrecy to justify withholding this information, (2) this information is critical not only to make it possible to contact the witnesses but also to conduct an investigation, and (3) even when the information may properly be withheld from the defendant, there is no justification for withholding it from counsel if disclosure to the defendant is prohibited.

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

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;

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

(F) for the deposition of a government witness, the attorney for the government has established that the prosecution advances an important public interest.

* * * * *

COMMITTEE NOTE

Subdivision (c). This amendment addresses the growing frequency of 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.

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) 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.

Finally, 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.

The Committee recognizes that authorizing a deposition under Rule15 (c)(3) does not determine the admissibility of the deposition itself, 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 applying the Federal Rules of Evidence and the Constitution.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The limiting phrase "in the United States" was deleted from Rule 15(c)(1) and (2) and replaced with the phrase **"**Except as authorized by Rule 15(c)(3)." The revised language makes clear that foreign depositions under the authority of (c)(3) are exceptions to the provisions requiring the defendant's presence, but other depositions outside the United States remain subject to the general requirements of (c)(1) and (2). For example, a defendant may waive his right to be present at a foreign deposition, and a defendant who attends a foreign deposition may be removed from such a deposition if he is disruptive.

In subdivision (c)(3)(D) the introductory phrase was revised to the simpler "because."

Two changes were made to restrict foreign depositions outside of the defendant's presence to situations where the deposition serves an important public interest. The limiting phrase "in a felony prosecution" was added to subdivision (c)(3)(A), and new subdivision (c)(3)(F) requires the court to find that the attorney for the government has established that the prosecution advances an important public interest.

The Committee Note was revised in several respects. In conformity with the style conventions governing the rules, citations to cases were deleted. Other changes were made to improve clarity.

PUBLIC COMMENTS ON RULE 15

08-CR-004, Wendy H. Goggin, Chief Counsel, DEA. Ms. Goggin questioned whether the rule (1) should be limited to cases where no reasonable conditions can assure the defendant's presence at trial or sentencing, and (2) should require both that there be no conditions that can assure the defendant's presence and that the defendant be able meaningfully to participate in the deposition.

08-CR-006, Richard Anderson, Federal Public Defender. Mr. Anderson testified in opposition to the amendment, stressing that overseas depositions are an inadequate substitute for live testimony because of problems with technology as well as restrictions imposed by local laws and procedures that hamper both direct and cross examination, and may offer inadequate opportunities to consult with the defendant. In any event, even the best video taped depositions are not the equivalent of live testimony. Finally, he urged that if the amendment went forward it should be more narrowly tailored and should set standards for the effective participation of the defendant.

08-CR-007, Richard Anderson, Federal Public Defender. Mr. Anderson's written statement urges that the amendment be withdrawn because it creates a process which "strikes at the core of the Confrontation Clause, by denying face-to-face confrontation" and "threatens . . . to significantly impair the defense function, which relies on the defendant's presence with counsel when confronting and cross-examining a witness." He also proposes several changes be

made if the amendment is not withdrawn, including requiring authorization of the Attorney General or his designee, heightening the standard to be made by the government, and requiring that the defendant be able to participate by the least restrictive means available.

08-CR-008, Federal Magistrate Judges Association. The Magistrate Judges Association "believes that this rule is reasonable and necessary in those few cases where a foreign deposition is necessary, and the defendant cannot be physically present."

08-CR-009. Peter Goldberger and William J. Genego, National Association of Criminal Defense Lawyers. Mr. Goldberger and Mr. Genego oppose the amendment on the grounds that (1) it exceeds the authority of the Rules Enabling Act, (2) it would effectively deprive the defendant of his constitutional right to confront the witnesses against him, thus achieving the purpose of the failed 2002 proposed amendment to Rule 26, (3) it is not limited to a narrow class of transnational crimes or critical witnesses, and (4) its safeguards are insufficient, and do not even guarantee that the defendant would be allowed to view and listen in real time and consult confidentially with counsel.

Rule 21. Transfer for Trial

* * * * *

(b) For Convenience. Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.

* * * * *

COMMITTEE NOTE

Subdivision (b). This amendment requires the court to consider the convenience of victims — as well as the convenience of the parties and witnesses and the interests of justice — in determining whether to transfer all or part of the proceeding to another district for trial. The Committee recognizes that the court has substantial discretion to balance any competing interests.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made after the amendment was released for public comment.

PUBLIC COMMENTS CONCERNING RULE 21.

08-CR-002. Alex L. Zipperer. Mr. Zipperer opposes the amendment to Rule 21 on the grounds that it would subordinate the convenience of parties and witnesses to those of non-witness victims, and it might even be construed to allow a transfer to accommodate voluntary public attendance despite imposing substantial costs on parties, witnesses, and government lawyers.

08-CR-003, Mr. Michael Nachmanoff, Federal Public Defender. Mr. Nachmanoff testified in opposition to the amendment (taking the place of Mr. Hillier). The convenience of those who are required to attend the trial–the defendant, government, and witnesses–should stand on a different footing than the preferences of those who regard themselves as victims. The CVRA gave victims a right not to be excluded from trial, not a right to attend. This rule goes beyond the CVRA and may cause practical problems, especially in cases with hundred or even thousands of victims, and may also generate time consuming mandamus actions.

08-CR-005. Thomas W. Hillier, II, Federal Public Defender. Mr. Hillier opposes the amendment on the grounds that (1) the CVRA does not give non-testifying victims a right to have the proceedings held at a place convenient for them, (2) the interests of the non-testifying victims should not be placed on an equal footing

with the convenience of the defendant, the prosecution, and the witnesses, and (3) the victim's ability to file a mandamus action might as a practical matter mean that the convenience of an alleged victim would be given greater weight than that of the parties and witnesses.

08-CR-008, Federal Magistrate Judges Association. The Magistrate Judges Association supports the amendment because the rule now specifically requires that the convenience of parties and witnesses must be considered, and "it is prudent to include victims' entitlement to the same consideration."

08-CR-009. Peter Goldberger and William J. Genego, National Association of Criminal Defense Lawyers. Mr. Goldberger and Mr. Genego argue that (1) the amendment exceeds the authority granted by the Rules Enabling Act because it necessarily creates a substantive right not included in the CVRA; (2) the amendment would allow the court to "allow the convenience of a would-be spectator to override the combined interests of the defendant, the government, all the witnesses, and the interests of justice;" and (3) the amendment is unnecessary, because the "interest of justice" already allows the courts to consider the interest of non-witness victims.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

* * * * *

(6) ***Release or Detention.*** The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a)(1) pending further proceedings. The burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community rests with the person.

* * * * *

COMMITTEE NOTE

Subdivision (a)(6). This amendment is designed to end confusion regarding the applicability of 18 U.S.C. § 3143(a) to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion regarding the applicability of § 3143(a) arose because several subsections of the statute are ill suited to proceedings involving the revocation of probation or supervised release. *See United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

The current rule provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence, which has been established by the case law.

See, e.g., *United States v. Loya*, 23 F.3d 1529, 1530 (9th Cir. 1994); *United States v. Giannetta*, 695 F. Supp. 1254, 1256 (D. Me. 1988).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made after the amendment was released for public comment.

PUBLIC COMMENTS ON RULE 32.1(a)(6)

08-CR-002. Alex L. Zipperer. Mr. Zipperer opposes the amendment on the ground that it requires the person seeking release to prove a negative and sets an impossibly high standard of proof by clear and convincing evidence, which will result in imprisonment for even the most minor infraction of release conditions.

08-CR-003, Mr. Michael Nachmanoff, Federal Public Defender. Mr. Nachmanoff testified in opposition to the amendment (taking the place of Mr. Hillier). He urged that the burden of proof should be placed on the defendant only in cases in which the applicable Sentencing Guidelines policy statement provides for imprisonment, and that burden of proving a risk of flight or danger should be shifted to the government in other cases.

08-CR-005. Thomas W. Hillier, II, Federal Public Defender. Mr. Hillier agrees that an amendment is needed, but argues that it should (1) require a preliminary finding of probable cause, and (2) place the burden of proof on the government when the applicable

policy statement would provide for a modification (rather than imprisonment) for the alleged violation.

08-CR-008, Federal Magistrate Judges Association. The Magistrate Judges Association endorses the proposal to clarify the burden of proof.

08-CR-009. Peter Goldberger and William J. Genego, National Association of Criminal Defense Lawyers. Mr. Goldberger and Mr. Genego endorse Mr. Hillier's comments in 08-CR-005.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[*]

Rule 1. Scope; Definitions

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

* * * * *

(11) "Telephone","telephonic" or "telephonically" mean any form of live electronic voice communication.

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

COMMITTEE NOTE

The added definition clarifies that the terms "telephone," "telephonic" or "telephonically" include 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, would be included, for example. The definition is limited to live communication in order to ensure contemporaneous communication and excludes voice recordings. Live voice communication should include services for the hearing impaired, or other contemporaneous translation, where necessary.

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

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 permit 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.

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.

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(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.

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 deciding whether to approve a complaint or 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) ***Recording Testimony.*** The judge must make a verbatim record of the testimony with a suitable recording device, if available; by a court reporter; or in writing. But a written summary or order suffices if the testimony is limited to attesting to

the contents of a written affidavit submitted by reliable electronic means.

(3) ***Certifying Testimony.*** The judge must have any verbatim 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. But the judge must simply sign and file with the clerk any written verbatim record or any written summary or order.

(4) ***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.

(5) ***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, that transmission may serve as the original.

(6) ***Modification.*** The judge may modify the complaint, warrant, or summons. The judge must transmit the modified version to the applicant by reliable electronic means or direct the applicant to modify the proposed duplicate original accordingly.

(7) ***Signing.*** If the judge decides to approve the complaint, or to issue the warrant or summons, the judge must immediately:

(A) sign the original;

(B) enter on its face the exact date and time it is approved or issued; and

(C) transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original.

(c) Suppression of Evidence 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 to apply for, approve, or issue warrants, summonses, and complaints. 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. Limited to "magistrate judges," 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 retains 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). Former Rule 41(d)(3)(ii) required the magistrate judge to make a verbatim record of the entire conversation with the applicant. New Rule 4.1 (b)(2) 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 the written documents, a verbatim record of the entire conversation is no longer required. Rather, the magistrate judge can simply prepare a written *summary* or order memorializing the affirmation of the oath. Rule 4.1 (b) (7) specifies that any written summary or order must be signed by the magistrate judge and filed with the clerk. This process will maintain the safeguard of documenting the warrant application process.

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

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(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.

Rule 12. Pleadings and Pretrial Motions

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(b) Pretrial Motions.

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(3) Motions That Must Be Made Before Trial. The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment or information, including 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 suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

* * * * *

(e) Waiver of a Defense, Objection, or Request.

(1) Generally. 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.

(2) Relief from Waiver. ~~For good cause, T~~the court may grant relief from the waiver:

(A) for good cause; or

(B) when a failure to state an offense in the indictment or information has prejudiced a substantial right of the defendant.

* * * * *

COMMITTEE NOTE

Rule 12(b)(3)(B) has 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

"jurisdictional," fatal whenever raised, and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned this 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"). The Court in *Cotton* held 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.

The amendment requires the failure to state an offense to be raised before trial, like any other deficiency in the charge. Under the amended rule, a defendant who fails to object before trial that the charge does not state an offense now "waives" that objection under Rule 12(e). However, Rule 12(e) has also been amended so that even when the objection is untimely, a court may grant relief whenever a failure to state an offense has prejudiced a substantial right of the defendant, such as when the faulty charge has denied the defendant an adequate opportunity to prepare a defense.

The amendment is not intended to affect existing law concerning when relief may be granted for other untimely challenges "waived" under Rule 12(e).

Rule 32.1. Revoking or Modifying Probation or Supervised Release

* * * * *

(f) On a defendant's request, the court may allow the defendant to participate in proceedings under this rule through video teleconferencing.

COMMITTEE NOTE

Subdivision (f). New subdivision (f) of Rule 32.1 allows a defendant to participate in revocation proceedings via video teleconferencing on the defendant's consent and the court's approval. This option may be especially useful in a case in which the defendant is arrested in one district and would otherwise have to be transported to another district where the original sentence was imposed. If this option is exercised, the court should preserve the defendant's opportunity to confer freely and privately with counsel. The amendment does not address whether victims, witnesses, or others may participate in any hearing under Rule 32.1 through video teleconferencing or other means. The same standards and procedures for the use of video teleconferencing that were suggested in the Committee Note accompanying the 2002 amendment to Rule 5 are applicable here.

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if ~~if: (1) the indictment or information does not charge an offense; or (2)~~ the court does not have jurisdiction of the charged offense.

*** * * * ***

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.

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

*** * * * ***

(d) Video teleconferencing. If the defendant consents, video teleconferencing may be used to conduct an appearance under this rule.

COMMITTEE NOTE

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

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.

*** * * * ***

~~**(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 either transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant. The magistrate judge retains the 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.

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 (f)(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.

Rule 43. Defendant's Presence

(a) When Required. Unless this rule, Rule 5, ~~or~~ Rule 10 or Rule 32.1 provides otherwise, the defendant must be at:

(1) the initial appearance, the initial arraignment, and the plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

(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.

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 of these rules.

14

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.