ADVISORY COMMITTEE
ON
CRIMINAL RULES

Brooklyn, NY
April 16-17, 2007

AGENDA
CRIMINAL RULES COMMITTEE MEETING
APRIL 16-17, 2007
BROOKLYN, N.Y.

I. PRELIMINARY MATTERS

A. Chair's Remarks, Introductions, and Administrative Announcements

B. Review and Approval of Minutes of October 2006 Meeting in Amelia Island, Florida

C. Status of Criminal Rules: Report of the Rules Committee Support Office

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by Standing Committee and Judicial Conference and Pending Before the Supreme Court (No Memo)

1. Rule 11. Pleas. Proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by eliminating the court's requirement to advise a defendant during plea colloquy that it must apply the Sentencing Guidelines

2. Rule 32. Sentencing and Judgment. Proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by clarifying that the court can instruct the probation office to include in the presentence report information relevant to factors set forth in 18 U.S.C. § 3553(a).

3. Rule 35. Correcting or Reducing a Sentence. Proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by deleting subparagraph (B), which is consistent with the *Booker* holding that the sentencing guidelines are advisory, rather than mandatory

4. Rule 45. Computing and Extending Time. Proposed amendment clarifies the computation of an additional three days when service is made by mail, leaving with the clerk of court, or electronic means under Civil Rule 5(b)(2)(B), (C), or (D))

B. Proposed Amendments Related to Crime Victim Rights Act Published for Public Comment (Memo)

1. Rule 1. Scope; Definitions. Proposed amendment defining "victim."

2. Rule 12.1. Notice of Alibi Defense. Proposed amendment provides that victim's

address and telephone number should not be automatically provided to the defense.

3. Rule 17. Subpoena. Proposed amendment requires judicial approval before service of a post indictment subpoena seeking personal or confidential information about a victim from a third party and provides a mechanism for providing notice to victims.

4. Rule 18. Place of Trial. Proposed amendment requires court to consider the convenience of victims in setting the place for trial within the district.

5. Rule 32. Sentencing and Judgment. Proposed amendment deletes definitions of victim and crime of violence to conform to other amendments, clarifies when presentence report should include information about restitution, clarifies standard for inclusion of victim impact information in presentence report, and provides that victims have a right "to be reasonably heard" in judicial proceedings regarding sentencing.

6. Rule 60. Victim's Rights. Proposed new rule provides for notice to victims, attendance at proceedings, the victim's right to be heard, and limitations on relief.

7. Rule 61. Conforming Title.

C. Other Proposed Amendments Published for Public Comment (Memos)

1. Rule 29. Motion for Judgment of Acquittal. Proposed amendment concerning deferral of rulings.

2. Rule 41. Search and Seizure. Proposed amendment authorizing magistrate judge to issue warrants for property outside of the United States.

III. REPORTS OF SUBCOMMITTEES

A. Rule 45, Time Computation Amendment and Related Rules Changes (Memo)

B. Rule 49.1; Redaction of Arrest and Search Warrants (Memo)

C. Forfeiture Rules (Memo)

D. Proposed Amendments to Rule 11 of the Rules Governing 2254 and 2255 Proceedings; Proposed New Rule 37 (Memo)

E. Proposed Amendment to Rule 41, Warrants for Electronically Stored Evidence (Memo) and Department of Justice Presentation

IV. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES.

A. Rule 12(b) Challenges for Failure to State an Offense; Rule 34 (Memo)

B. Rules 15, 32(h), 32.1 and 46 (Memo)

C. Rule 32(i)(1)(A) (Letter from Judge Torres)

D. Indicative Rulings (Memo)

V. RULES AND PROJECTS PENDING BEFORE CONGRESS, STANDING COMMITTEE, JUDICIAL CONFERENCE, AND OTHER ADVISORY COMMITTEES.

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure.

B. Other Matters

V. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

A. Fall Meeting

B. Other

ADVISORY COMMITTEE ON CRIMINAL RULES

Chair:

Honorable Susan C. Bucklew
United States District Judge
United States District Court
United States Courthouse
801 North Florida Avenue, Suite 1430
Tampa, FL 33602

Members:

Honorable Richard C. Tallman
United States Circuit Judge
United States Court of Appeals
Park Place Building, 21st floor
1200 Sixth Avenue
Seattle, WA 98101

Honorable Harvey Bartle III
Chief Judge
United States District Court
16614 James A. Byrne United States Courthouse
601 Market Street
Philadelphia, PA 19106-1714

Judge Mark L. Wolf
Chief Judge
United States District Court
5110 John Joseph Moakley United States Courthouse
One Courthouse Way
Boston, MA 02210

Honorable James P. Jones
Chief Judge
United States District Court
180 West Main Street
Abingdon, VA 24210

Honorable David G. Trager
United States District Judge
United States District Court
225 Cadman Plaza, East
Room 224
Brooklyn, NY 11201

Honorable Anthony J. Battaglia
United States Magistrate Judge
United States District Court
1145 Edward J. Schwartz United States Courthouse
940 Front Street
San Diego, CA 92101-8927

Honorable Robert H. Edmunds, Jr.
Associate Justice of the Supreme Court of North Carolina
P.O. Box 1841
Raleigh, NC 27602

Professor Nancy J. King
Vanderbilt University Law School
131 21st Avenue South, Room 248
Nashville, TN 37203-1181

Leo P. Cunningham, Esquire
Wilson Sonsini Goodrich & Rosati, P.C.
650 Page Mill Road
Palo Alto, CA 04304-1050

Rachel Brill, Esquire
Mercantil Plaza Building, Suite 1113
2 Ponce de Leon Avenue
San Juan, PR 00918

Thomas P. McNamara
Federal Public Defender
United States District Court
First Union Cap Center, Suite 450
150 Fayetteville Street Mall
Raleigh, NC 27601

ADVISORY COMMITTEE ON CRIMINAL RULES (CONTD.)

Assistant Attorney General
Criminal Division (ex officio)
Honorable Alice S. Fisher
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 2107
Washington, DC 20530-0001

Benton J. Campbell
Counselor to Assistant Attorney General
Criminal Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 2218
Washington, DC 20530-0001

Reporter:

Professor Sara Sun Beale
Duke University School of Law
Science Drive and Towerview Road
Box 90360
Durham, NC 27708-0360

Liaison Member:

Honorable Mark R. Kravitz
United States District Judge
United States District Court
Richard C. Lee United States Courthouse
141 Church Street
New Haven, CT 06510

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

ADVISORY COMMITTEE ON CRIMINAL RULES

SUBCOMMITTEES

Subcommittee on Booker
Judge David G. Trager, Chair
Professor Nancy J. King
Thomas P. McNamara
Justice Robert H. Edmunds, Jr.
Rachel Brill, Esquire
DOJ Representative

Subcommittee on CVRA
Judge James P. Jones, Chair
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Justice Robert H. Edmunds, Jr.
Professor Nancy J. King
Leo P. Cunningham, Esquire
DOJ Representative

Subcommittee on E-Government
Judge Harvey Bartle III, Chair
Thomas P. McNamara
Rachel Brill, Esquire
DOJ Representative

Subcommittee on Electronically Stored Information
Judge Anthony J. Battaglia, Chair
Judge Robert H. Edmunds, Jr.
Professor Nancy J. King
DOJ Representative

Subcommittee on Forfeiture
Judge Mark L. Wolf, Chair
Judge James P. Jones
Professor Nancy J. King
Thomas P. McNamara
Rachel Brill, Esquire
DOJ Representative
David Smith (NACDL) ad hoc

Subcommittee on Rule 16 (Brady)
Professor Nancy J. King
Judge Richard C. Tallman
Judge Mark L. Wolf
Thomas P. McNamara
DOJ Representative

Subcommittee on Rule 29
Judge Richard C. Tallman, Chair
Judge David G. Trager
Judge Mark L. Wolf
Professor Nancy J. King
Thomas P. McNamara
DOJ Representative

Subcommittee on Time Computation
Leo P. Cunningham, Esquire, Chair
Judge Harvey Bartle III
Judge Anthony J. Battaglia
DOJ Representative

Subcommittee on Writ
Professor Nancy J. King, Chair
Judge David G. Trager
Thomas P. McNamara
DOJ Representative

ADVISORY COMMITTEE ON CRIMINAL RULES

			Start Date	End Date
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Harvey Bartle III	D	Pennsylvania (Eastern)	2001	2007
Anthony J. Battaglia	M	California (Southern)	2003	2009
Rachel Brill	ESQ	Puerto Rico	2006	2009
Leo P. Cunningham	ESQ	California	2006	2009
Robert H. Edmunds, Jr.	JUST	North Carolina	2004	2007
Alice S. Fisher*	DOJ	Washington, DC	----	Open
James Parker Jones	D	Virginia (Western)	2003	2009
Nancy J. King	ACAD	Tennessee	2001	2007
Thomas P. McNamara	FPD	North Carolina	2005	2008
Richard C. Tallman	C	Ninth Circuit	2004	2007
David G. Trager	D	New York (Eastern)	2000	2007
Mark L. Wolf	D	Massachusetts	2005	2008
Sara Sun Beale Reporter	ACAD	North Carolina	2005	Open

Principal Staff: John K. Rabiej (202) 502-1820

* Ex-officio

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs

Honorable David F. Levi
Chief Judge, United States District Court
United States Courthouse
501 I Street, 14th Floor
Sacramento, CA 95814

Honorable Carl E. Stewart
United States Circuit Judge
United States Court of Appeals
2299 United States Court House
300 Fannin Street
Shreveport, LA 71101-3074

Honorable Thomas S. Zilly
United States District Judge
United States District Court
United States Courthouse
700 Stewart Street, Suite 15229
Seattle, WA 98101

Honorable Lee H. Rosenthal
United States District Judge
United States District Court
11535 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, TX 77002-2600

Honorable Susan C. Bucklew
United States District Judge
United States District Court
United States Courthouse
801 North Florida Avenue, Suite 1430
Tampa, FL 33602

Honorable Jerry E. Smith
United States Circuit Judge
United States Court of Appeals
12621 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, TX 77002-2698

Reporters

Professor Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159

Professor Catherine T. Struve
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104

Professor Jeffrey W. Morris
University of Dayton School of Law
300 College Park
Dayton, OH 45469-2772

Professor Edward H. Cooper
University of Michigan Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Professor Sara Sun Beale
Duke University School of Law
Science Drive and Towerview Road
Box 90360
Durham, NC 27708-0360

Professor Daniel J. Capra
Fordham University School of Law
140 West 62nd Street
New York, NY 10023

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Staff:

John K. Rabiej
Chief, Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

James N. Ishida
Attorney-Advisor
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

Jeffrey N. Barr
Attorney-Advisor
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

Timothy K. Dole
Attorney-Advisor
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

Judith W. Krivit
Administrative Specialist
Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

James H. Wannamaker III
Senior Attorney
Bankruptcy Judges Division
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988

FEDERAL JUDICIAL CENTER

Staff:

Joe Cecil (Committee on Rules of Practice and Procedure)
Senior Research Associate
Research Division
One Columbus Circle, N.E.
Washington, DC 20002-8003
Phone 202-502-4084
Fax 202-502-4199
<jcecil@fjc.gov>

Marie Leary (Appellate Rules Committee)
Research Associate
Research Division
One Columbus Circle, N.E.
Washington, DC 20002-8003
Phone 202-502-4069
Fax 202-502-4199
<mleary@fjc.gov>

Robert J. Niemic (Bankruptcy Rules Committee)
Senior Research Associate
Research Division
One Columbus Circle, N.E.
Washington, DC 20002-8003
Phone 202-502-4074
Fax 202-502-4199
<bniemic@fjc.gov>

Thomas E. Willging (Civil Rules Committee)
Senior Research Associate
Research Division
One Columbus Circle, N.E.
Washington, DC 20002-8003
Phone 202-502-4049
Phone 202-502-4199
<twillgin@fjc.gov>

Laural L. Hooper (Criminal Rules Committee)
Senior Research Associate
Research Division
One Columbus Circle, N.E.
Washington, DC 20002-8003
Phone 202-502-4093
Phone 202-502-4199
<lhooper@fjc.gov>

Tim Reagan (Evidence Rules Committee)
Senior Research Associate
Research Division
One Columbus Circle, N.E.
Washington, DC 20002-8003
Phone 202-502-4097
Phone 202-502-4199
<treagan@fjc.gov>

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

October 26-27, 2006
Amelia Island, Florida

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on the Rules of Criminal Procedure (the "committee") met in Amelia Island, Florida, on October 26-27, 2006. All members were present:

Judge Susan C. Bucklew, Chair
Judge Richard C. Tallman
Judge David G. Trager
Judge Harvey Bartle, III
Judge James P. Jones
Judge Mark L. Wolf
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King
Leo P. Cunningham, Esquire
Rachel Brill, Esquire
Thomas P. McNamara, Esquire
Benton J. Campbell, Acting Chief of Staff and Principal Deputy Assistant Attorney General (ex officio)
Professor Sara Sun Beale, Reporter

Also participating for some or all of the meeting were:

Judge David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
Judge Mark R. Kravitz, Standing Committee Liaison to the Criminal Rules Committee (by telephone)
Judge Harvey E. Schlesinger, Chair of the District Court Forms Working Group
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Peter G. McCabe, Rules Committee Secretary and Administrative Office Assistant Director
John K. Rabiej, Chief of the Rules Committee Support Office at the Administrative Office
Jonathan J. Wroblewski, Counsel, United States Department of Justice
James N. Ishida, Senior Attorney at the Administrative Office
Timothy K. Dole, Attorney Advisor at the Administrative Office

A. Chair's Opening Remarks

Judge Bucklew welcomed the committee to her district, the Middle District of Florida, particularly its two newest members, attorneys Leo P. Cunningham and Rachel Brill. They had been appointed to succeed attorneys Donald Goldberg and Robert Fiske, whose terms had expired. Judge Bucklew reported that Mr. Cunningham had graduated from Stanford University and Harvard Law School, clerked for Judge Eugene Lynch of the Northern District of California, served as an assistant U.S. attorney in the Northern District of California, and is now in private practice in Palo Alto, California, with Wilson Sonsini Goodrich & Rosati. Judge Bucklew reported that Ms. Brill had graduated from the University of Pennsylvania and Harvard Law School, clerked for Judge José Fusté and for Judge Frank Kaufman, served as an assistant federal public defender, and is now in private practice in San Juan, Puerto Rico.

Judge Bucklew noted that Judge Trager's term had been extended and that Judge Jones and Judge Battaglia had been reappointed for another term. Judge Bucklew then introduced her colleague, Judge Harvey Schlesinger, of Jacksonville, Florida, who was invited to attend in his capacity as chair of the District Court Forms Working Group.

B. Review and Approval of Minutes

After certain administrative matters were addressed, a motion was made to approve the minutes of the April 2006 meeting in Washington, D.C. Mr. Campbell requested, without objection, that the phrase "topless guidelines" on page 15 of the draft minutes — a reference to the Department's legislative proposal to reinstate a mandatory sentencing scheme in response to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), and *Blakely v. Washington*, 542 U.S. 296 (2004) — be changed to "mandatory minimum guidelines."

The committee approved the minutes of the April 2006 meeting.

A motion was made to approve the minutes of the September 2006 teleconference. A typographical error on page 7 of the draft minutes was identified for correction.

The committee approved the minutes of the September 2006 teleconference.

C. Information on Forms Implementing the Criminal Rules

Judge Bucklew invited Judge Schlesinger to describe the work of the District Court Forms Working Group. Judge Schlesinger noted that he had chaired the group since 1983. It meets once a year and includes, in addition to himself, five magistrate judges and six clerks of court. Before each meeting, the Administrative Office (AO) requests input from judges and clerks of court on correcting and improving the forms. At its last meeting, the group had asked the AO to review the national forms to determine whether they were consistent with the federal rules of procedure on privacy, set to take effect next year. Judge Schlesinger said that the group would welcome any assistance or suggestions from the rules committees.

Mr. McCabe said that most of the national forms, including those implementing the criminal rules, were not currently reviewed or formally approved by any committee of the Judicial Conference. Judge Levi noted that other rules committees issued official forms pursuant to the Rules Enabling Act and suggested that there was potential for jurisdictional confusion. Mr. McCabe agreed, noting that this was one of the problems that he hoped to bring to the attention of the new director of the AO.

D. Report of the Rules Committee Support Office

Mr. Rabiej reported that the Rules Committee Support Office was carefully reviewing and proofreading the rules approved by the Judicial Conference in September 2006 for transmittal to the Supreme Court. He said that he would advise the committee once that was accomplished. Judge Bucklew asked whether there were any new developments involving the sentencing guidelines in the wake of *Booker*. Mr. Wroblewski reported that Rep. F. James Sensenbrenner, Jr., chair of the House Committee on the Judiciary, had introduced a "*Booker* fix" bill, but the legislation had little prospect of passage by this Congress, and its fate thereafter would depend on the outcome of the November elections.

II. CRIMINAL RULE CHANGES UNDER CONSIDERATION

A. Proposed Amendments Approved by Standing Committee and Judicial Conference for Transmittal to the Supreme Court

Judge Bucklew noted that the Standing Committee and the Judicial Conference had approved three *Booker*-related amendments, the new criminal privacy rule required by the E-Government Act of 2002, and the Rule 45 amendment:

1. Rule 11. Pleas. The proposed amendment conforms the rule to *Booker* by eliminating the requirement that the court advise a defendant during plea colloquy that it must apply the Sentencing Guidelines.

2. Rule 32. Sentencing and Judgment. The proposed amendment conforms the rule to *Booker* by clarifying that the court can instruct the probation office to include in the presentence report information relevant to factors set forth in 18 U.S.C. § 3553(a).

3. Rule 35. Correcting or Reducing a Sentence. The proposed amendment conforms the rule to *Booker* by deleting subparagraph (B), consistent with *Booker*'s holding that the Sentencing Guidelines are advisory rather than mandatory.

4. Rule 45. Computing and Extending Time. The proposed amendment clarifies how to compute the additional three days that a party is given to respond when

service is made by mail, leaving it with the clerk of court, or by electronic means under Civil Rule 5(b)(2)(B), (C), or (D).

5. Rule 49.1. Privacy Protection For Filings Made with the Court. The proposed new rule implements section 205(c)(3) of the E-Government Act of 2002, which requires the judiciary to promulgate federal rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically."

Judge Bucklew reported two areas where the Standing Committee had differed with the recommendations of the advisory committee.

First, the Standing Committee omitted the reference to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), in the committee note accompanying Rule 11. Judge Bucklew noted that the advisory committee had decided to add the reference at the April 2006 meeting simply to make clear that the rule change was not intended to conflict with decisions such as *Crosby* recognizing rare instances when calculating the guidelines would be a futile exercise because of a mandatory minimum or other statutory requirement. Judge Bucklew said that concern had been raised at the Standing Committee that, in some circuits, calculating the guidelines is required in *every* case.

Second, the Standing Committee raised concerns regarding the proposed amendment of Rule 32(h), sending it back to the advisory committee. The proposed change would require the court, in the wake of *Booker*, to notify the parties of an intent to consider any non-guidelines factors not previously identified. The proposed amendment had elicited significant concern during the public comment period among judges who worried that it would force them to continue sentencing hearings. The Standing Committee shared those concerns and, in addition, suggested that this was an evolving area of law not yet ripe for codification in a rule.

Judge Levi suggested that the two committees had focused on somewhat different factual paradigms. The advisory committee focused on a sentencing hearing where the judge decides in advance to rely on a factor not previously identified. In that case, it made abundant sense that the judge provide the parties with prior notice so that everyone could address the factor. By contrast, he said, certain district court judges on the Standing Committee focused on a scenario where victims, the defense, and the government were raising new points during a complex sentencing proceeding. Their concern, Judge Levi explained, was that the proposed amendment might require postponing a sentencing under those circumstances. The Standing Committee, therefore, asked the advisory committee to reexamine the proposed amendment of Rule 32(h), particularly in light of recent case law. Judge Jones agreed, noting that if the post-*Booker* case law ultimately permits downward variances on a wide variety of grounds, it would be nearly impossible for judges to give parties advance notice of every ground that they might ultimately deem relevant in imposing a particular sentence.

Mr. McNamara noted that the federal defenders had just written to Mr. McCabe, asking that the committee reconsider this proposed Rule 32(h) amendment, a position shared by the

Department of Justice ("the Department"). Judge Tallman suggested that Rule 32(h) made sense only when the sentencing guidelines were mandatory. Now that judges are free to consider a range of factors and to impose any sentence within the relevant statutory range, he added, the provision should be abrogated entirely. Judge Bartle agreed, noting that, although judges sometimes have a notion beforehand of what sentence they will impose, he often finds himself changing his mind in the middle of a sentencing hearing based on what the defendant or the government or the victims may say at the hearing. Requiring judges to postpone a sentencing hearing mid-proceeding is difficult, he said, particularly when family members have made special efforts to attend. Judge Wolf said that, although fairness might occasionally require postponing a sentencing hearing, if the judge at the start of the hearing identifies any factor not already raised, that would ordinarily constitute sufficient notice, affording the parties an opportunity to address that factor during the hearing.

Professor Beale suggested that the committee needed to consider three issues raised at the Standing Committee meeting: (1) recent cases holding that due process does not require the advance notice; (2) the circuit split on how the guidelines relate to other sentencing factors; and (3) the case law on what notice is required. Mr. McNamara suggested that the committee needed additional time to study this issue. Judge Wolf pointed out that the committee note accompanying the 2002 amendments to Rule 32 states that "Rule 32(h) is a new provision that reflects *Burns v. United States*, 501 U.S. 129, 138-39 (1991)." Since Rule 32(h) essentially codifies a Supreme Court decision whose logic arguably extended to variances, he warned against abrogating Rule 32(h), which seemed to be working quite well even after *Booker*. Judge Bartle reported strong opposition in his circuit to both Rule 32(h) and the proposed amendment.

Following further discussion, Mr. McNamara made a motion that the committee take another look at the proposed amendment of Rule 32(h). Judge Trager said that he considered it premature to amend the rule. Instead, he recommended tabling the proposal for reconsideration in another year or two once the relevant case law has become more settled.

The committee voted 7-4 to reexamine the proposed amendment of Rule 32(h).

B. Proposed Amendments Approved by Standing Committee for Publication

Judge Bucklew noted that the following rule amendments had been approved for publication by the Standing Committee and published for public comment:

1. Rule 1. Scope; Definitions. The proposed amendment, designed to implement the Crime Victims' Rights Act (CVRA), defines a "victim."

2. Rule 12.1. Notice of Alibi Defense. The proposed CVRA-related amendment provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised. If a defendant can show a need for the information, the proposed amendment allows the court either

to order its disclosure or to fashion an alternative means of providing the information needed while protecting the victim's interests.

3. Rule 17. Subpoena. The proposed CVRA-related amendment requires judicial approval before service of a post-indictment subpoena seeking personal or confidential victim information from a third party and provides a mechanism for victim notification.

4. Rule 18. Place of Trial. The proposed CVRA-related amendment requires the court to consider the convenience of victims — in addition to the convenience of the defendant and witnesses — in setting the place for trial within the district.

5. Rule 29. Motion for Judgment of Acquittal. The proposed amendment prohibits a judge from entering a judgment of acquittal before verdict, unless the defendant waives his Double Jeopardy rights.

6. Rule 32. Sentencing and Judgment. The proposed CVRA-related amendment deletes definitions of victim and crime of violence to conform to other amendments, clarifies when a presentence report should include restitution-related information, clarifies the standard for inclusion of victim impact information in a presentence report, and provides that victims have a right "to be reasonably heard" in certain proceedings.

7. Rule 41. Search and Seizure. The proposed amendment authorizes magistrate judges to issue warrants for property outside of the United States.

8. Rule 60. Victim's Rights. The proposed new CVRA-related rule provides a victim the right to be notified, to attend public proceedings, and to be heard, and sets limits on relief.

9. Rule 61. Conforming Title. The proposed amendment simply renumbers the existing Rule 60.

Only two changes to these amendments were made at the Standing Committee meeting, Judge Bucklew reported. First, a question was raised whether the note accompanying Rule 29 was correct to suggest that the rule also applied to bench trials. Concluding that it was not, Judge Bucklew withdrew that language on behalf of the advisory committee. Second, she reported, the Standing Committee decided to bracket "American Samoa" in the proposed amendment of Rule 41(b)(4) to draw attention to, and invite comment on, whether to exclude American Samoa from the provision.

Judge Bucklew informed the committee that Judge Paul Cassell, chair of the Judicial Conference Committee on Criminal Law, had made a formal request to testify at the committee's scheduled public hearing on January 26, 2007, in Washington. A second hearing was scheduled

to take place on February 2, 2007, in San Francisco. Mr. Rabiej noted that a request to testify must be submitted at least 30 days before the scheduled hearing date. In the event of insufficient public interest, hearings can be canceled, he explained, but there are several ways that requests to testify can be accommodated, including by teleconference. Judge Bucklew noted that, given Judge Cassell's request to testify, the January 26 hearing was likely to take place. Judge Bucklew encouraged any members able to attend to do so. Judge Levi agreed, noting that these hearings typically provided a perspective that one could not obtain from reading the transcript.

Judge Tallman gave a brief report of his conversation with Judge J. Clifford Wallace, chair of the Pacific Islands Committee of the Ninth Circuit, on the proposed Rule 41 amendment. Under current law, only territorial judges in American Samoa can issue search warrants and only territorial officers can execute them. But the issue is politically very sensitive, Judge Tallman reported. There is significant opposition to the notion of a magistrate judge in Washington, D.C., authorizing a search in American Samoa. Giving that power to a magistrate judge in the District of Hawaii or the District of Guam could be a less objectionable option, he suggested.

IV. SUBCOMMITTEE REPORTS

A. Amendments to Rule 11 of the Rules Governing Section 2254 and 2255 Proceedings; Proposed New Rule 37 — Professor Nancy King, Subcommittee Chair

Judge Bucklew invited discussion of the activities of the several subcommittees, starting with the "Writs Subcommittee," which was studying the Department's proposal to abolish most writs. Professor King, chair of the subcommittee, discussed the group's work and explained its recommendations. The two Rule 11 proposals, she said, would restrict efforts to revisit district judge decisions in cases brought pursuant to 28 U.S.C. § 2254 and § 2255, other than moving for reconsideration under subdivision (b). She explained that certain materials had been bracketed to reflect differences between the subcommittee and the Style Subcommittee.

Professor King noted that the Writs Subcommittee had produced two alternative versions of proposed new Rule 37 for the committee's consideration. The first, favored by a majority of the subcommittee, was a scaled-back version of the Department's original proposal to abolish nearly all writs, she said. It would preserve the writ of coram nobis, unlike the Department's original proposal, but restrict the circumstances under which relief could be granted. Its most controversial feature, she said, was the statute of limitations imposed in subdivision (b)(2). The alternative amendment proposal, favored by a minority of the subcommittee, would impose restrictions on coram nobis relief other than a statute of limitations, she noted.

Subdivision (c) of proposed new Rule 37, which purported to abolish all other writs, including the writ of audita querela, also generated some controversy, Professor King reported. Although everyone agreed that the writ of audita querela is not widely understood, infrequently sought, and rarely, if ever, granted, there were differences of opinion over whether these facts supported the writ's preservation or its abolition. Mr. McNamara expressed concern that, unless

Rule 34 and 28 U.S.C. § 2241 were itemized in the "Exclusive Remedy" list in proposed Rule 37(a), the new rule might be misunderstood to bar relief from a judgment under those two provisions. Judge Jones suggested also adding a reference to Rule 58(g)(2), which governs appeals from a magistrate judge's order or judgment.

Justice Edmunds asked whether an ancient writ could be abolished in a rule. Professor Coquillette said that this was also a major concern of his. He said that the prerogative writs were incorporated shortly after the Constitution to give the judiciary flexible ways to curtail executive discretion. Abolishing this arsenal of judicial powers therefore raised serious concerns of substantively shifting the balance of powers between two branches of government, he warned. He recommended further research on whether this proposal was merely procedural or whether it altered important substantial remedies. Professor Beale noted that Civil Rule 60(b) had abolished these same writs, which would suggest that doing so is appropriate under the Rules Enabling Act, 28 U.S.C. § 2071 et seq. Mr. McNamara said that, unlike the Department's current proposal, Civil Rule 60(b) does not implicate fundamental due process rights. Professor Coquillette said that he and Civil Rules Committee reporter Professor Edward H. Cooper are researching this question and would report their findings.

The committee discussed whether writs that are poorly understood and rarely used warrant preservation. Professor King reported being unable to find a single instance where a writ of audita querela had been granted in a criminal case. Mr. McNamara said that preserving the writ of coram nobis was his greatest concern. Judge Tallman asked for an explanation of what a writ of audita querela would do that could not be accomplished by means of a writ of habeas corpus. Mr. Wroblewski said that his understanding was that the former involved efforts to address the *manner* in which a sentence is executed rather than its *substance*. Professor Coquillette agreed. Mr. Wroblewski explained that he thought that Congress had made clear in the Antiterrorism and Effective Death Penalty Act of 1996 that it wanted post-convictions procedures codified and regularized. Although the legislation dealt exclusively with writs of habeas corpus, he said, writs of coram nobis differ only insofar as they grant relief *after* a sentence has been served and the petitioner is out of custody. Mr. McNamara said that he did not think that responding to writs of coram nobis imposed a significant burden on the Department. Mr. Wroblewski said that a Westlaw search reported 284 coram nobis federal cases filed in 2005.

Following an extended discussion of the subcommittee's proposed coram nobis restrictions, Mr. McNamara moved to permanently table the proposal to amend Rule 11 of the Rules Governing Section 2254 and 2255 Proceedings and add a new Rule 37. Initially, the committee voted 8-4 in favor of Mr. McNamara's motion. But Judge Trager then expressed a concern that, by rejecting the proposal outright, the committee was leaving the Department no choice but to go to Congress, which could produce a far worse result. Judge Bartle agreed, but suggested that the proposal to abolish ancient writs exceeded the rules committees' authority.

Judge Wolf, who had voted in favor of Mr. McNamara's motion, moved that the committee reconsider the proposal at its next meeting, following further research of the Rules

Enabling Act concerns and the proposal's possible effect in other factual contexts, including perhaps the detention of suspected terrorists at Guantanamo Bay or elsewhere. Judge Battaglia, who had also supported Mr. McNamara's motion, seconded Judge Wolf's motion, suggesting that further research might be helpful. Judge Jones opposed this "motion for reconsideration" of Mr. McNamara's proposal because, he said, writs of coram nobis have not been shown to be a problem and because amending these rules could result in unintended consequences, including a potential increase in the number of pro se filings. Professor King suggested that amending the rules as the subcommittee had proposed was both within the committee's power and a good idea, but that she could research these issues further for discussion at the April 2007 meeting.

The committee voted 8-4 to have the subcommittee study the Department's proposal further for reconsideration by the full committee at the April 2007 meeting.

B. Rule 41, Warrants for Electronically Stored Information (ESI) — Judge Anthony Battaglia, Subcommittee Chair

The committee discussed the pending proposal to amend Rule 41 to reflect the two distinct stages of executing search warrants involving electronically stored information: the initial search and seizure of an electronic storage device followed, often much later, by the search of the electronic data stored on the device. Judge Battaglia reported that members of the subcommittee had participated in a full-day tutorial held by the Department as a way to improve their understanding of related technical issues. Judge Bucklew praised the presentation as extremely helpful, he said. Mr. Campbell commented that the Department considered preparing a shorter, two-hour presentation for dissemination to a broader audience. Mr. McCabe said that he had spoken with the Federal Judicial Center concerning the potential inclusion of a similar presentation in future judge seminars. Judge Battaglia said that he was particularly impressed by how long it took to image the hard drive of an average computer and by the volatility of certain types of data. He noted that the subcommittee would meet briefly following the committee's meeting to discuss further how Rule 41 could be amended to standardize how warrants for electronically stored data are processed nationwide.

C. Rules 7 and 32.2, Criminal Forfeitures — Judge Mark Wolf, Subcommittee Chair

Judge Wolf provided an update on the work of the Criminal Forfeiture Subcommittee. He noted that the Department had characterized its proposed amendments of Rules 7 and 32.2 as "clarifications." The subcommittee soon realized that they implicated several esoteric legal and procedural issues. Consequently, the subcommittee invited David Smith, a forfeiture law expert representing the National Association of Criminal Defense Lawyers, to participate in the discussions.

Judge Wolf noted that the subcommittee planned first to focus on proposed clarifying changes, then to explore whether consensus can be reached on any substantive policy-level changes. Judge Wolf described a few of the issues with which the subcommittee was wrestling,

including whether the rule should address when a Bill of Particulars is presumptively required, the applicability of the Rules of Evidence to forfeiture proceedings, the question of third-party participation, and the extent, if any, that a jury should be involved in adjudicating forfeiture matters. The committee then discussed some of these issues. Professor Beale mentioned that the subcommittee hoped to have a bifurcated list of proposals for the committee's review at the next meeting, which would distinguish clarifications from policy-level changes.

V. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES

A. Rule 16. Proposed Amendment Regarding Disclosure of Exculpatory and Impeaching Information

For the benefit of the committee's two new members, Judge Bucklew briefly recounted the history of the effort to amend Rule 16. In 2003, the American College of Trial Lawyers first proposed requiring disclosure of exculpatory and impeaching evidence without regard to its materiality. The Department had consistently opposed the proposed rule amendment. At its April 2006 meeting, the committee had initially voted to table consideration of the proposed amendment until the next meeting in light of the Department's proposal to amend the U.S. Attorneys' Manual ("Manual") to address a prosecutor's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In response to concerns that the terms of two committee members who had worked hard on the proposal were set to expire on September 30, 2006, though, the committee had decided to convene a special session before then to review the final version of the Manual and to determine whether to proceed with the proposed Rule 16 amendment. In a September 5, 2006 teleconference, the committee voted to send the Rule 16 amendment proposal to the Standing Committee with a recommendation that it be published for public comment.

Mr. Wroblewski reported that Deputy Attorney General Paul J. McNulty had signed the bluesheet approving the Manual amendment on October 19, 2006, and that the amendment had been posted on the internet and sent to all U.S. attorneys, assistant U.S. attorneys, and litigation divisions. Although the new Manual provision did not go as far as the proposed Rule 16 amendment, it did require greater disclosure of material and exculpatory evidence than constitutionally required, he said. Mr. Wroblewski reported receiving numerous phone calls from the field with questions concerning the Manual's new directive, including what was meant by "substantial doubt" and "information . . . that establishes a recognized affirmative defense." Judge Bucklew praised the Department for having followed through with the Manual amendment independent of the committee's decision to amend Rule 16. Mr. Campbell noted that it was unprecedented for the Department to seek input from the Criminal Rules Committee in drafting a new provision for the U.S. Attorneys' Manual, but he said that he thought that the discussions had been very helpful to the Department. Judge Wolf stressed that the committee and the Department had a common interest in the fairness and finality of proceedings, and he encouraged the Department to go beyond formally publishing the new policy and to actively help law enforcement agencies internalize the policy and incorporate it into their practices.

The committee discussed whether the committee note accompanying the proposed Rule 16 amendment should address the provision's effect on direct appeals or collateral motions. Judge Bucklew said that it probably would shift the burden in direct appeals in some circuits, but have no effect on collateral motions. The question, though, was whether a statement to this effect should be added to the committee note. Professor Beale said that the circuit split made it difficult to sum up the amendment's impact on direct appeals. Professor King said that she opposed adding the proposed language on the amendment's impact on collateral proceedings, because § 2255 proceedings do occasionally consider non-constitutional issues such as fundamental statutory provisions. Judge Bucklew commented that, unless there was a desire to change the note, it would be sent to the Standing Committee in its current form.

Judge Trager objected to the reference to "fundamental fairness" in the first line of the committee note, but noted that he had been on the losing side of the vote approving the proposed amendment. Judge Wolf asked, as a procedural matter, whether the committee should be revisiting its September 5 decision to approve the proposed Rule 16 amendment, given that Mr. Fiske and Mr. Goldberg were no longer present. Judge Bucklew agreed that the only issue pending was whether to add language to the note to clarify the amendment's effect on direct appeals or collateral motions. Judge Wolf said that he would consider it a positive development if the amendment made it more difficult at the appellate level for the government to defend inadvertent and intentional prosecutorial violations of their disclosure obligations in district court, because fear of causing a guilty person to go free would foster compliance among prosecutors far more effectively than a provision in the U.S. Attorneys' Manual.

B. Rule 49.1. Redaction of the Grand Jury Foreperson's Name on the Indictment; Redaction of Arrest and Search Warrants

The committee discussed the new criminal privacy rule. Judge Bucklew noted that, during the public comment period, the Judicial Conference Committee on Court Administration and Case Management (CACM) had recommended that proposed Rule 49.1 require redaction of grand jury forepersons' names from case filings. Judge Bucklew said that CACM's suggestion was complicated by the Rule 7 requirement that indictments be returned in open court and by the Rule 10 requirement that the defendant be given a copy. The committee decided not to hold up Rule 49.1, but rather to consider these other issues separately, at a later time.

Since then, Judge Bucklew noted, the Department had reviewed its statistical database and surveyed U.S. attorneys' offices and U.S. marshals offices to ascertain whether public disclosure of jury foreperson signatures was a significant problem. Professor Beale said that the Department's data indicated that threats to jurors' security were not a national problem either in severity or frequency. Specifically, Mr. Wroblewski noted, the U.S. Marshals Service, which has responsibility for juror security, knew of only 18 reports of juror-related "threats or inappropriate contacts" in the entire country in FY 2006, 16 of which were in a single case in Nevada. Moreover, the Marshals knew of only one incident nationwide in FY 2003, two in FY 2004, and none in FY 2005. Judge Jones noted that the main source of threats to jurors was the defendant, whose knowledge of the jury foreperson's identity was in no way enhanced by

posting of the foreperson's signature on the internet. Judge Wolf moved that the committee take no further action.

The committee voted, with one dissent, not to amend the criminal privacy rule to require redaction of jury foreperson signatures.

The committee discussed CACM's recommendation that proposed Rule 49.1 not exempt arrest and search warrants from the redaction requirement. Judge Battaglia reported that warrants in his district are immediately filed under seal, then unsealed when returned. Mr. Campbell said that personal information in a search warrant, such as the full address of the specific home to be searched, was essential to the instrument. Judge Wolf suggested that the fact that a particular place was searched should be public information. Judge Bucklew noted that redaction could be required on a case-by-case basis, as needed, by means of a protective order. Mr. Campbell agreed, adding that there is a general interest in public awareness of government activity, including who was arrested and what locations were searched. Judge Levi said that, at least at one point, the Department had indicated in a letter that it might be amenable to redacting search warrants following execution, but not arrest warrants.

Following additional discussion, Judge Bucklew identified two main questions for the committee: first, whether requiring redaction of search warrants would impose too heavy a burden on the Department, and second, whether there were independent reasons for the public to have access to personal identifiers in search warrants. Mr. Campbell warned of practical difficulties in requiring the redaction of all executed search warrants. He noted that, although *unexecuted* warrants are filed under seal by prosecutors, *executed* warrants are often returned directly to the court by law enforcement agents for filing without prosecutorial involvement. Ms. Brill said that it was often critical for defense attorneys to have ready access to unredacted search warrants. Judge Jones raised concern that, even if the reference to search warrants were removed from the exemption in paragraph (b)(8) of the proposed criminal privacy rule, they might still remain exempted under paragraph (b)(7), which covers any "court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge[.]" Judge Tallman said that he thought knowing the exact subject of an arrest warrant could be important. Ms. Brill agreed, telling of a recent case where a Social Security number mix-up had resulted in the false arrest of the wrong "Juan Perez" in Puerto Rico. The committee decided that the issue warranted further research for consideration at its next meeting.

C. Time Computation Template

The committee turned its attention to the work of the Standing Committee's Time Computation Subcommittee, chaired by Judge Kravitz. Joining the meeting telephonically, Judge Kravitz reported that the subcommittee continued working on the basic time computation template to improve its clarity and to address a few remaining issues, including whether to define "inaccessibility" in the rules. The subcommittee hoped to have a final draft template for consideration by the Standing Committee at its January 2007 meeting. Judge Kravitz reported that the Civil Rules Committee had raised concern that the wording not have the effect of

encouraging lawyers to track down judges in their bathrobes at home at 11:59 p.m. to avoid missing a deadline. A question was also raised regarding whether the rules should address judge-set deadlines that unintentionally fall on a holiday or weekend. The subcommittee was also debating how to handle computation of statutory deadlines and was compiling a list of deadlines that Congress might be asked to amend, he said. Based on the non-reaction his question received at a recent gathering of 100 lawyers in New York, though, he said that this was evidently not an issue of passionate concern to the bar.

Judge Kravitz noted that, in the meantime, each advisory committee was in the process of reviewing the deadlines in each set of rules and, in most but not all cases, converting time periods of less than four weeks under the old system to the next highest multiple of seven under the new framework. He noted that the goal was for all the advisory rules committees to have their work completed for approval at their Spring 2007 meetings. Mr. Wroblewski reported that the Department had initiated an extensive review of statutory deadlines and expected to have the results of that review in another month or two. Judge Battaglia recommended careful scrutiny of the three- and five-day continuance rules in the Bail Reform Act in 18 U.S.C. 3142.[1]

The committee discussed whether seven-day periods under the current system should remain undisturbed or be changed to 10-day or 14-day periods. Professor Beale noted that unless the committee extended the seven-day periods, it would effectively be shortening them under the new "days are days" computation framework. Also, she noted that the subcommittee seemed to have embraced Judge Kravitz's strong recommendation that shorter periods presumptively move to multiples of seven absent a compelling reason not to. Mr. Wroblewski said that the Department had concerns regarding the extension of certain seven-day periods that had already been subject to historical enlargement. For instance, he said, the defendant's seven-day post-trial period under Rule 29(c)(1) to "move for a judgment of acquittal, or renew such a motion" was at one time effectively a five-day period, since it included weekends. The time computation rules later changed that to seven actual days, he added, then the rules changed again, and the seven days became nine actual days, and now there was talk of further increasing the period to 14 days. In other words, Mr. Wroblewski said, these time periods were growing. Judge Wolf asked why this was a problem. Mr. Wroblewski cited concerns regarding finality.

Judge Kravitz noted that, unlike the civil rules, the criminal rules authorize judges to extend deadlines where appropriate. He said that he had long thought that the current deadline for filing a post-trial motion for judgment as a matter of law was too short, because following an intense trial, defense attorneys are often busy addressing the numerous other matters that were placed on hold while they were in trial, because the trial transcript may not yet be available, and because, at least in his district, briefs in support of a motion under Rule 29(c)(1) are often filed

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[1] "Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday)." 18 U.S.C. 3142(f).

later. Giving defense counsel two weeks following a trial to file these motions therefore did not appear unreasonable, he said. Judge Bartle agreed, noting that many criminal defendants, at least in his district, were represented by sole practitioners, not 500-lawyer firms.

Judge Bucklew noted that certain deadlines worked in tandem. The seven-day presentence deadline in Rule 32(g), for instance, needed to be analyzed in conjunction with the 14-day and 35-day deadlines in subdivisions (e) and (f), respectively. Judge Wolf agreed, adding that, although he generally favored giving parties extra time, the seven-day presentencing period in Rule 32(g) should not be increased to 14 days, because doing so would further delay sentencing.

Professor King inquired whether anyone had a thought concerning how the time periods in Rule 41(e)(2)(A) and Rule 46(h)(2) should be handled, as these rules protect interests other than finality. Judge Battaglia said that search warrants were often returned the day after he signed them, suggesting that 10 days was ample time to execute them. Professor Beale and Judge Kravitz noted that the 10-day periods in the cited rules were actually closer to 14 days under present time computation rules. Additional discussion of the topic followed.

D. Rule 12, Challenges to Facial Validity of Indictment, Department of Justice Proposal

Judge Bucklew noted that the Department had requested further postponement of the committee's consideration of the proposed amendment of Rule 12(b), pending the Supreme Court's resolution of *United States v. Resendiz-Ponce*, Docket No. 05-998. The Department's proposal, first discussed in April 2006, would require defendants to raise before trial any claims that the indictment failed to state an offense. The Department noted that, although the case was not directly on point, it could address whether a failure to include an element of an offense in an indictment could ever be excused as "harmless error." The proposal was deferred until the April 2007 meeting.

E. Procedures for Sealed Cases

As an informational matter, Judge Bucklew noted that Judge Levi had received a letter from Seventh Circuit Chief Judge Joel M. Flaum, reporting a vote by that circuit's judicial council to recommend that the Standing Rules Committee study the captioning and docketing of sealed cases and determine whether national guidelines would be appropriate. Judge Levi had referred the matter to the Judicial Conference Committee on Court Administration and Case Management, she said, since it involved matters traditionally within its jurisdiction.

F. Rule 32.1 and Rule 46, Revoking Probation or Supervised Release and Revoking Pretrial Release

The committee discussed Judge Battaglia's recommendation that the rules establish a procedure for issuing warrants when a defendant violates a condition of pretrial release. Judge

Bucklew noted an apparent gap in Rule 32.1, which covers probation and supervised release, and in Rule 46, which deals with pretrial release, in that neither addresses the procedure for issuing a summons due to the violation of a court-imposed condition. Judge Battaglia reported frustration by members of the Federal Magistrate Judges Board with respect to submissions by probation officers in support of a warrant. He said that he had also consulted with the Ninth Circuit Magistrate Judge Executive Board, which recommended that the rules be amended to require probable cause and a sworn statement, thereby incorporating the change in practice prompted by a recent Ninth Circuit ruling. Judge Bucklew noted that the Ninth Circuit decision had also changed the practice in her district, as it did, she believed, around the country. Judge Battaglia said that the Board had also suggested amending the rule to reflect the fact that applications for warrants resulting from pretrial release violations are often submitted by the probation and pretrial services officers rather than by attorneys for the government.

Judge Wolf noted that the statute requires only probable cause. He said that requiring a sworn statement was not the practice in his district. Rather, typically, applications for a warrant are made by a probation officer. Clarifying what is required might therefore be useful, he said. He recommended against restricting affiants to attorneys for the government and probation or pretrial services officers, though, because affidavits occasionally come from law enforcement officials. Judge Battaglia said that the proposed rule was intended not to limit current practices, but to reflect them.

Judge Tallman noted that the statute requires the filing of a "motion," but he added that perhaps the filing of an affidavit could be considered a "motion" under the statute. Judge Jones said that in his district, a combined "Application and Declaration" is filed. Judge Tallman said that the Ninth Circuit had required only a declaration of probable cause — sworn or unsworn — as a way of ending the practice of probation officers whispering in the judge's ear. Judge Wolf questioned whether probable cause is required for defendants under supervised release who are already under the authority of the court. Judge Battaglia noted that he had used the term "may" to safeguard the court's discretion in this area. The term "affidavit," he said, simply tracks the terminology used elsewhere, and, as noted in the footnote, includes *unsworn* declarations.

Judge Levi suggested adding "or other information" following the phrase "affidavit from an attorney for the government, a probation officer or a pretrial services officer," tracking the language on search warrants in Rule 40. He also suggested consulting with chief probation officers regarding this proposed rule amendment. Mr. Wroblewski noted that a warrant is not necessarily required. Professor King suggested importing some of Rule 41's flexibility. Following further discussion, Judge Bucklew requested and received confirmation that the committee wanted work on this amendment proposal to continue.

G. Rule 15, Permitting Deposition of a Witness Without Defendant's Physical Presence, Department of Justice Proposal

The committee discussed the Department's proposal to amend Rule 15 to permit deposition of a witness outside the defendant's *physical* presence under limited circumstances.

Because the proposed amendment had come in relatively late, Judge Bucklew explained, it was only being brought to the committee's attention for informational purposes. She said that John Rabiej had noted that the committee had worked for several years on a similar proposal that would have allowed the court to authorize video testimony from a different location under certain circumstances. That proposed Rule 26 amendment had been approved by the Standing Committee and the Judicial Conference, but rejected by the Supreme Court in 2002. In an opinion criticizing the proposal, Justice Scalia had quipped, "Virtual confrontation might be sufficient to protect virtual constitutional rights." Judge Bucklew advised the committee to bear these concerns in mind as it weighed this new proposed amendment.

Mr. Wroblewski said that the proposed Rule 15 amendment was somewhat different than the early proposal in that it was tailored to address those situations where it is infeasible or inappropriate for a criminal defendant to leave the United States and where an overseas witness is outside the subpoena power of the court, making it impossible for both people to share the same physical space. The Department hoped to address the Supreme Court's concerns as articulated by Justice Scalia, he said, by restricting application of the rule amendment to narrow circumstances based on case-specific findings. Judge Bucklew noted that, in some cases in her district involving boats interdicted in international waters, the defendant has had witnesses present live deposition and even trial testimony from Columbia by video teleconference, but the government has been unable to do so because of the defendant's objection. Mr. Wroblewski said that the Department had sought to draft the proposed amendment narrowly to respect a defendant's confrontation right, but that the Department was open to suggestions on how the proposal could be even further narrowed to avoid any constitutional defect.

Justice Edmunds asked whether the phrase "meaningfully participate" was a term of art in federal law. Mr. Wroblewski said no and explained that, although the proposed rule mentions "video teleconferencing" as the model, it was designed to include "other reasonable means" as long as the court found that they would "permit the defendant to meaningfully participate in the deposition." Ms. Brill suggested that Justice Scalia might consider video teleconferencing more "meaningful participation" than participation via older technologies, such as telephone or facsimile. Professor King noted that the case law on the right to counsel indicated that the defendant had to be afforded the means to communicate confidentially with counsel when physically separated from his or her attorney during these types of proceedings.

The committee discussed why the Supreme Court may have rejected the proposed Rule 26 amendment and whether and how this proposed amendment of Rule 15 might be sufficiently distinguished. Professor Coquillette noted that Justice Scalia believed that the Court should review a proposed rule's constitutionality as part of the rulemaking process. Justice Breyer, by contrast, felt that the Court should conduct this review later, in the context of an actual case or controversy. Mr. Wroblewski noted that, in *Maryland v. Craig*, 497 U.S. 836 (1990), a child witness case, the Supreme Court had acknowledged that, given a strong enough public policy reason to do so, the Constitution would allow an exception to face-to-face confrontation.

Judge Levi suggested that perhaps Justice Scalia was concerned about preserving the often powerful, *mano a mano* quality of testimony delivered in the presence of others within a shared physical space. He suggested that the Department might want to provide a clearer picture of the nature, scope, and frequency of the problem that its proposed amendment seeks to address. Mr. Campbell said that certain countries, like France, do not allow their citizens to be questioned by foreign courts. Judge Bucklew suggested that the Department needed to provide the committee with more detailed information regarding the actual problems that this rule change was intended to address and to explain more clearly how this proposal differs from the proposed rule amendment that the Supreme Court rejected four years ago.

VII. ANNOUNCEMENT OF NEXT MEETING

Before adjourning the meeting, Judge Bucklew reminded committee members that the next meeting was scheduled for April 16 and 17, 2007, at a location to be determined.

Respectfully submitted,

Timothy K. Dole
Attorney Advisor
Administrative Office of the United States Courts

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 11-12, 2007
Phoenix, Arizona
Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona on Thursday and Friday, January 11 and 12, 2007. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Sidney A. Fitzwater
Chief Justice Ronald M. George
Judge Harris L Hartz
John G. Kester, Esquire
Judge Mark R. Kravitz
William J. Maledon, Esquire
Professor Daniel J. Meltzer
Judge James A. Teilborg
Judge Thomas W. Thrash, Jr.

Joan E. Meyer, Senior Counsel to the Deputy Attorney General, participated in the meeting on behalf of Deputy Attorney General Patrick J. McNulty, *ex officio* member of the committee. The Department of Justice was also represented at the meeting by Elizabeth U. Shapiro of the Criminal Division.

Also in attendance were Justice Charles Talley Wells, Judge J. Garvan Murtha, and Dean Mary Kay Kane (former members of the committee); Judge Patrick E. Higginbotham (former chair of the Advisory Committee on Civil Rules); Justice Andrew D. Hurwitz (member of the Advisory Committee on Evidence Rules); Patricia Lee Refo, Esquire (former member of the Advisory Committee on Evidence Rules); and Professor Stephen C. Yeazell.

Providing support to the committee were: Professor Daniel R. Coquillette, the committee's reporter; Peter G. McCabe, the committee's secretary; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida and Jeffrey N. Barr, attorneys in the Office of Judges Programs of the Administrative Office; Joe Cecil of the Research Division of the Federal Judicial Center; Matthew Hall, law clerk to Judge Levi; and Joseph F. Spaniol, Jr., Professor Geoffrey C. Hazard, Jr., and Professor R. Joseph Kimble, consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Thomas S. Zilly, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Susan C. Bucklew, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Levi welcomed Chief Justice George, Judge Teilborg, and Professor Meltzer as new members of the committee. He noted that Chief Justice George had served at every level of the California state courts, been a very successful prosecutor, and served on the Judicial Conference's Federal-State Jurisdiction Committee. He explained that Judge Teilborg had built and led a great Arizona law firm and now sits as a U.S. district judge in Phoenix. He pointed out that Professor Meltzer teaches at the Harvard Law School, is a truly gifted legal scholar, authors the Hart and Wechsler text book, and serves on the council of the American Law Institute.

Judge Levi expressed regret that the terms of three outstanding members of the committee had expired on October 1, 2006 – Justice Wells, Judge Murtha, and Dean Kane. He presented them with plaques for their service signed by the Chief Justice. He praised Justice Wells for his great wisdom and for the unique perspective that he brought to the committee on issues affecting federalism and the state courts. He thanked Judge Murtha for his enormous contributions to the civil rules restyling project over the last several years, for chairing the committee's style subcommittee, and for his work as advisory committee liaison. He honored Dean Kane for her indefatigable work over several years on the civil rules restyling project and for her outstanding scholarship and uncanny problem-solving ability.

Judge Levi announced that he would be leaving the federal bench on July 1, 2007, to accept the position of dean of Duke Law School. He said that he would sorely miss the challenging work of the federal judiciary. But he would miss even more the people with whom he has worked. He said that the federal judiciary is comprised of the most astonishing group of men and women in the country. He added that he was excited about his new job, but would like to continue to be of assistance to the federal judiciary in the future.

Judge Levi reported that the September 2006 meeting of the Judicial Conference had been uneventful in that all the rule amendments recommended by the committee had been approved on the Conference's consent calendar without discussion. The approved rules included the complete package of restyled civil rules and the amendments to the civil, criminal, bankruptcy, and appellate rules to protect privacy and security interests under the E-Government Act of 2002. Judge Levi also reported that the controversial FED. R. APP. P. 32.1, allowing citation of unpublished opinions in all the circuits, had gone into effect on December 1, 2006.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee by voice vote voted without objection to approve the minutes of the last meeting, held on June 22-23, 2006.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported on two legislative matters of interest to the committee. First, he said, Representative F. James Sensenbrenner, Jr., former chairman of the House Judiciary Committee, had asked the Judicial Conference to initiate rulemaking to address certain issues arising from the waiver of evidentiary privileges through disclosure. He reported that the Advisory Committee on Evidence Rules had drafted a proposed new FED. R. EVID. 502 that would explicitly address waivers of attorney-client privilege and work product protection. But, he explained, the Rules Enabling Act specifies that any rule amendment affecting an evidentiary privilege requires the affirmative legislative approval of Congress. Mr. Rabiej added that with the recent change in control of Congress from the Republicans to the Democrats, it will be necessary for representatives of the judiciary to discuss the proposed Rule 502 with the new leadership of the judiciary committees.

Second, Mr. Rabiej reported that on December 6, 2006, the Senate Judiciary Committee had conducted an oversight hearing on implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He said that the judiciary had not sent a witness to testify at the hearing, but had submitted a statement from Judge Zilly, chair of the Advisory Committee on Bankruptcy Rules. The statement reported on the actions of the advisory committee in developing rules and forms to implement the Act, and it included extensive attachments documenting the enormous efforts made by the judiciary to implement the new statute.

Mr. Rabiej added that Senator Grassley had made a remark at the hearing complaining that the advisory committee had not faithfully carried out the intent of the law in drafting the new means test form for consumer bankruptcy cases. He said that Judge Zilly sent a letter to the senator explaining in detail that the advisory committee had faithfully executed the plain language of the statute in drafting the form. The committee will consider his letter at its April 2007 meeting, along with other suggestions submitted during the public comment period.

Mr. Rabiej reported that the proposed rule amendments approved by the Judicial Conference had been hand-carried to the Supreme Court in December 2006. He added that all the proposed rules, as well as public comments and other committee documents, have been posted on the judiciary's web site. He said that the Administrative Office is

working with the committees' reporters to give them direct access to all the documents in the rules office's electronic document management system.

Mr. McCabe added that all the records of the rules committees since 1992 are in the electronic document management system and fully searchable. In addition, all committee reports and minutes since 1992 have been posted on the judiciary's public web site, and all committee agenda books back to 1992 will soon be posted. In addition, he said, a majority of committee reports and minutes before 1992 have been located, converted to electronic form, and posted on the web site. But, he said, many rules records before 1992 are not available in the files of the Administrative Office. The staff has been searching the archives of law schools and the papers of former reporters and members to locate the missing documents. The ultimate goal of the rules office, he said, is to find and post on the web site all the key rules documents from the beginning of the rules system to the present and to make them readily searchable with a good search engine.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of pending activities of the Federal Judicial Center. He directed the committee's attention to three research projects.

First, he said, judges have a great personal interest in how their courtrooms are being used. He reported that the Center was working with the Court Administration and Case Management Committee of the Judicial Conference on a comprehensive courtroom usage study in response to a specific request from Congress. Among other things, he said, members of Congress have noticed that the number of trials in the district courts has been declining steadily, and they question whether courtrooms are being used fully and effectively.

Second, Mr. Cecil said, the Center is developing educational materials for judges on special case management challenges posed by terrorism cases, based on lessons learned by judges who have already handled terrorism cases.

Third, he reported that the Center is continuing to gather information for the Advisory Committee on Civil Rules regarding summary judgment practices in the district courts. He added that Center researchers are examining summary judgment motions filed in 2006, how they were handled by the district courts, and what their outcomes were.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of December 6, 2006 (Agenda Item 5).

Informational Items

Judge Stewart reported that the advisory committee had met in November 2006 and had decided to approve in principle amendments to two rules.

First, a proposed amendment to FED. R. APP. P. 4(a)(4)(B)(ii) (effect of a motion on a notice of appeal) would eliminate an ambiguity created in the 1998 restyling of the appellate rules. The current rule might be read to require an appellant to amend its notice of appeal in any case in which the district court amends the judgment after the notice of appeal has been filed. Judge Stewart said that the advisory committee believed that the problem could be cured by fine tuning the language of the rule. He said that the committee would take another look at the exact language at its next meeting.

Second, Judge Stewart reported that the advisory committee had received a suggestion to amend FED. R. APP. P. 29 (brief of an amicus curiae). Modeled after Supreme Court Rule 37, the amended appellate rule would require the filer of an amicus brief to disclose whether the brief is authorized or funded by a party in the case. He said that the advisory committee had decided that a uniform national rule was preferable in this area to a variety of local circuit rules. He reiterated that the committee had approved the Rule 29 amendment in principle, subject to further refinements. One member suggested, though, that the Supreme Court rule may not be particularly helpful and is not strictly enforced.

Judge Stewart noted that the advisory committee had been busy with the time-computation project. He pointed out that Professor Struve, the advisory committee's reporter, was also serving as the reporter for the overall time-computation project and had compiled a huge amount of valuable information. He added that a special Deadlines Subcommittee, chaired by Judge Jeffrey S. Sutton (6th Circuit), had reviewed each time limit in the appellate rules, especially the short periods that would be affected by the change in time-computation approach under the proposed new uniform rule.

Judge Stewart said that the advisory committee had also looked into whether it would be useful for the new time-computation rule to include a provision addressing dates certain, as opposed to dates that require computation, and it had concluded that such a provision was not necessary. He added that some members of the committee had

misgivings about the very need for the time-computation project, particularly with regard to its impact on deadlines set forth in statutes. Nevertheless, he said, the committee would proceed with the project at its April 2007 meeting.

Judge Stewart reported that the advisory committee was continuing to consider whether too many briefing requirements are set forth in the local rules of the courts of appeals. He said that the Federal Judicial Center had completed an excellent study identifying and analyzing all the briefing requirements of the circuits, and he had written a letter to the chief judges of the circuits expressing the advisory committee's concern over local requirements and whether all were necessary. He said that the letter to the chief judges referred to the work of the Federal Judicial Center and emphasized the need to make all local procedural requirements readily accessible to practitioners. He added that the chief judges of six of the circuits had responded to his letter, and the advisory committee would consider the responses at its April 2007 meeting. Professor Capra added that, in the course of reporting the results of the district court local rules project, the chief district judges had been very positive in responding to the letters from the Standing Committee identifying local rules that appeared to be inconsistent with the national rules.

One member pointed out that some local rules are of substantial benefit to the circuit courts, and there will be a great deal of opposition to eliminating them. But, he said, some of the beneficial provisions now contained in local rules might well be incorporated into the national rules. Judge Stewart responded, though, that there are a great many variations among the circuits in their local rules, and it would be very difficult to reach agreement on the contents of the national rules. A member observed that circuit courts do not hear many complaints from the bar about their local rules because attorneys who practice regularly before a particular court get used to the local requirements. Courts, he added, rarely hear from attorneys who have a national practice.

Another member noted that he finds it increasingly difficult as a practitioner to know how to prepare briefs because of the proliferation of local rules. Many local requirements, he said, are little more than busy work and create potential traps for the bar. Moreover, the staff of the clerks' offices waste time kicking the papers back to lawyers for noncompliance with the local rules. He encouraged the advisory committee to continue its work in the area. But he concluded that local briefing requirements, while annoying, do not rise to the level of importance in the overall scheme of the advisory committee's work, for example, as the new FED. R. APP. P. 32.1, which has overridden local circuit rules that had barred lawyers from citing unpublished opinions.

Judge Levi pointed out that the rules committees should continue to be concerned about local rules. He noted that some local rules affect substance, and many increase costs and create confusion for the bar. Professor Coquillette added that Congress, too,

has expressed concerns regarding local court rules – as opposed to the national rules – because local rules do not go through the Rules Enabling Act process, which affords Congress an opportunity to review and reject the rules.

Judge Stewart reported that the advisory committee had on its study agenda a proposal from the Virginia State Solicitor General to amend FED. R. APP. P. 4 (notice of appeal – when taken) and FED. R. APP. P. 40 (petition for panel rehearing) to treat state-government litigants the same as federal-government litigants for the purpose of giving them additional time to take an appeal or to seek rehearing. He mentioned that members of the advisory committee had questioned the need for the changes, as well as the scope of the proposed amendments. He said that the committee would study the proposal further.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Zilly and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of November 30, 2006 (Agenda Item 8).

Amendments for Publication

FED. R. BANK. P. 7052, 7058, and 9021

Judge Zilly reported that the advisory committee was seeking authority to publish amendments to FED. R. BANK. P. 7052 (findings by the court) and FED. R. BANK. P. 9021 (entry of judgment) and a proposed new FED. R. BANK. P. 7058 (entry of judgment). The package of three rules would address the requirement of FED. R. CIV. P. 58(a) that every judgment be set forth on a "separate document" and coordinate the bankruptcy rules with recent revisions to the civil rules.

He explained that when a court fails to enter a judgment on a separate document, revised FED. R. CIV. P. 58 provides a default 150-day appeal period, rather than the normal 30-day appeal period in the civil rules. Bankruptcy matters, he said, usually require prompt finality, and the bankruptcy rules provide for a shorter 10-day appeal period generally. The key questions for the advisory committee, thus, are: (1) whether the bankruptcy rules should continue to contain the separate document requirement; and (2) whether the bankruptcy system can live with the default 150-day appeal period of the civil rules. He explained that the advisory committee had decided to retain the separate document requirement for adversary proceedings because they are similar to civil cases. But the more difficult question is whether to retain the separate document requirement for contested matters.

Judge Zilly noted that the advisory committee had a heated discussion on the matter. Half the members favored enforcing the separate document requirement for all judgments in bankruptcy cases, including judgments in contested matters, because it provides certainty to the litigation process. The other half argued, though, that many bankruptcy courts simply do not comply with the present rule, finding it administratively difficult to enter separate judgments on every matter when bankruptcy judges commonly dispose of large numbers of contested matters on a single calendar. Judge Zilly reported that the committee had decided ultimately, on his tie-breaking vote, that contested matters should no longer be subject to the separate document rule. Thus, in contested matters, the docket entry of the judge's decision will be sufficient to start running the appeal period.

As a matter of drafting, Professor Morris explained that Part VII of the Bankruptcy Rules applies the Federal Rules of Civil Procedure to adversary proceedings. There is, however, no counterpart to FED. R. CIV. P. 58 in Part VII. Instead Civil Rule 58 is made applicable to both adversary proceedings and contested matters through FED. R. BANKR. P. 9021. The advisory committee's proposal would confine the separate document requirement of Rule 58 to adversary proceedings by: (1) creating a new FED. R. BANKR. P. 7058 just for adversary proceedings; and (2) eliminating the reference to Civil Rule 58 in FED. R. BANKR. P. 9021.

Several committee members suggested changes in the language of the proposed amendments, and Judge Zilly agreed that the advisory committee would address the suggestions at its March 2007 meeting.

Judge Hartz moved to approve the proposed amendments in principle, with the understanding that the advisory committee would consider additional changes in language. The committee by voice vote unanimously approved the motion.

Informational Items

Judge Zilly reported that the advisory committee had published a large package of rules amendments and forms in August 2006 designed to implement the massive Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Most of the rules, he said, were derived from the interim rules used in the bankruptcy courts since October 2005. He noted that the public hearing on the amendments had been cancelled because no witnesses had asked to appear. The committee, he said, would consider all the written public comments at its March 2007 meeting and return to the Standing Committee in June 2007 for final approval of the package.

Judge Zilly reported that the advisory committee had created a subcommittee to apply the proposed new time-computation proposals to the bankruptcy rules. He noted that the subcommittee already had identified more than a hundred time limits in the

bankruptcy rules that would be affected by the proposals. He noted, moreover, that the bankruptcy rules currently differ from the other federal rules because they exclude weekends and holidays in computing time periods of fewer than 8 days, rather than periods of fewer than 11 days.

Judge Zilly explained that the advisory committee would be prepared to present appropriate amendments dealing with time limits for approval at the June 2007 Standing Committee meeting. But, he said, members of the committee had expressed concern over going forward with more changes to the bankruptcy rules so soon after having published a large package of proposed amendments in August 2006. Moreover, many of the time-limit changes arise in rules already being amended for other reasons.

Judge Zilly noted that the advisory committee had also identified a modest number of provisions in the Bankruptcy Code that impose time limits of fewer than 8 days. He said that legislation to amend the Code should be pursued because the new time-computation rules will effectively shorten these short statutory periods even further by including weekends and holidays in the count.

Judge Zilly reported that the advisory committee was considering potential changes in the bankruptcy rules to implement section 319 of the 2005 bankruptcy legislation. Section 319 would enhance the obligations of debtors' attorneys (and pro se debtors) regarding the papers they file with the court and with trustees. It states that it is the sense of Congress that FED. R. CIV. P. 9011 (sanctions) should be modified to require that all documents, including schedules, submitted on behalf of a debtor under all chapters of the Code contain a verification that the debtor's attorney (or a pro se debtor) has "made reasonable inquiry to verify that the information contained in [the] documents" is well grounded in fact and warranted by existing law or a good faith argument to extend, modify, or reverse the law. He noted that the language of the statute is different from that of the current Rule 9011.

Judge Zilly pointed out that a separate section of the new law, now codified at 11 U.S.C. § 707(b)(4)(C) and (D), made similar, but not identical, changes affecting the obligations of attorneys in Chapter 7 cases only. Section 707(b)(4)(C) provides that a debtor's attorney's signature on a Chapter 7 petition, pleading, or written motion constitutes a certification that the attorney has "performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion" to determine that the document is well grounded. Section 707(b)(4)(D) provides that an attorney's signature on a Chapter 7 petition constitutes a "certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect."

Judge Zilly explained that the advisory committee had decided originally not to propose an amendment to FED. R. CIV. P. 9011 (signing of papers, representations to the court, and sanctions) to mirror the statute because the statute itself is so specific regarding the obligations of debtors' attorneys. But, he said, the committee had agreed to change the official petition form to include a warning alerting attorneys to the new obligations imposed on them by the 2005 legislation.

Judge Zilly added that letters had been received from Senators Grassley and Sessions urging the advisory committee to amend the bankruptcy rules to reinforce the statutory provision. Judge Zilly pointed out that the advisory committee was continuing to study the issue and might change its original position. He noted that because the statute was designed by Congress to push more debtors from Chapter 7 into Chapter 13, the committee might recommend that the same debtor-attorney verification now applicable in Chapter 7 cases by statute be extended by rule to filings under all chapters of the Code.

Judge Zilly reported that a Senate Judiciary Committee subcommittee had held an oversight hearing in December 2006 to review implementation of the 2005 bankruptcy legislation. He noted that he had been invited to speak, but had been tied up in a criminal trial and could not attend. He did, however, submit a written report documenting the enormous efforts of the judiciary to implement all the requirements of the legislation.

At the hearing, he noted, Senator Grassley had submitted written comments criticizing the advisory committee for including an entry on the new means-testing form that allows a debtor to claim certain expenses that the debtor may not have actually incurred. Judge Zilly pointed out, though, that the committee had scrupulously followed the language of the statute in drafting the form. He added that he had sent a response to Senator Grassley explaining that the plain language of the statute compelled the language adopted by the advisory committee. Moreover, he added, the form in question was part of a package of rules and forms still out for public comment.

Judge Levi pointed out that the advisory committee had faithfully complied with its obligation to implement the statute as written. He congratulated Judge Zilly, Professor Morris, and the entire advisory committee for a monumental achievement in producing a comprehensive package of rules and forms to implement the 2005 legislation.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachments of December 12, 2006 (Agenda Item 9).

Judge Rosenthal pointed out that most of the items in the advisory committee's report had been brought to the Standing Committee's attention previously, some of them in connection with the project to restyle the civil rules. She noted that the advisory committee had delayed moving on the proposals until it had completed its work on the restyling and electronic discovery projects.

Amendments for Final Approval

SUPPLEMENTAL RULE C(6)(a)

Judge Rosenthal reported that the proposed changes to Supplemental Rule C(6)(a) (statement of interest) were purely technical and did not have to be published. They would correct a drafting omission occurring during the course of adopting Supplemental Rule G, which took effect on December 1, 2006. The new Rule G abrogated portions of other supplemental rules and gathered in one place the various provisions of the supplemental rules dealing with civil forfeiture actions in rem.

In amending Rule C, though, the committee forgot to capitalize the first word of subparagraph (6)(a)(i). Judge Rosenthal explained that the omission could be cured simply by inserting the capital letter, but the advisory committee had decided to make some additional minor changes to improve the way the rule reads and to make it parallel with other subdivisions of the rule.

The committee without objection by voice vote agreed to send the proposed amendment to the Judicial Conference for final approval.

Amendments for Publication

FED. R. CIV. P. 13(f)

Judge Rosenthal reported that the advisory committee was recommending deletion of Rule 13(f) (omitted counterclaim). The committee, she added, had considered eliminating the rule as part of the restyling process, but had decided that the change was substantive in nature.

Rule 13(f) allows a court to permit a party to amend its pleading to add a counterclaim if justice so requires. She explained that it is largely redundant of Rule 15(a) (amended and supplemental pleadings) and is potentially misleading. She noted that the standards in the two rules for permitting amendments to pleadings sound different, but they are administered identically by the courts. Deletion of Rule 13(f), she said, will bring all pleading amendments within Rule 15 and ensure that the same amendment standards apply to all pleading amendments.

The committee without objection by voice vote approved deletion of Rule 13(f) for publication.

FED. R. CIV. P. 15 (a)

Judge Rosenthal reported that the advisory committee was proposing a change in Rule 15(a) (amendments to pleadings before trial) that would give a party 21 days after service to make one pleading amendment as a matter of course. The change, she said, would make the process of amending pleadings less cumbersome for the parties and the court. She noted that the committee had also considered making changes to Rule 15(c), dealing with the relation back of amendments to pleadings, but had decided not to do so because the subject matter is enormously complicated and the textual problems in the current Rule 15(c) do not seem to have caused significant difficulties in practice.

Judge Rosenthal pointed out that the proposed revision in Rule 15(a) would set a definite time period within which a party may amend a pleading as a matter of right. Under the current rule, serving a responsive pleading terminates the other party's right to amend as a matter of course. On the other hand, serving a motion attacking the pleading delays the time to file a responsive pleading and thus extends the time within which a party may amend a pleading as a matter of right. The rule causes problems because the party filing a motion attacking the complaint – and the judge – may invest a good deal of work on the motion only to have the pleader amend its pleading as a matter of right. In many cases, he noted, after an opponent points out an error in a pleading, the pleader will simply admit the error and amend the pleading.

Judge Rosenthal said that the advisory committee had decided that there was no reason to continue that distinction. Accordingly, the proposed amendment gives a party the right to amend its pleading within 21 days after service of either a responsive pleading or a motion under Rule 12(b), (e), or (f). She added that the amendment recognizes the current reality that courts readily give pleaders at least one opportunity to amend.

In addition, Judge Rosenthal explained that the advisory committee had extended a party's response time from 20 days to 21 days in light of the general preference of the time-computation project to fix time limits in 7-day intervals. The amended rule also

eliminates the current reference to a "trial calendar" because few courts today maintain a central trial calendar. Finally, she noted, a party may also continue to seek leave to amend under Rule 15(a)(2) or Rule 15(b).

Professor Cooper mentioned that the advisory committee for several years had been looking at recommendations to reconsider notice pleading as one of the basic features of the civil rules. But, he said, it had always decided that the time was not right to make such a change. Allowing the parties great flexibility to amend pleadings reflects the spirit of the current notice-pleading system. Since the courts freely allow parties to amend pleadings, the advisory committee decided that it would make considerable sense to give a pleader 21 days to amend as a matter of course.

Professor Cooper said that the proposed rule would take something away from plaintiffs by cutting off their automatic right to amend after 21 days in all cases. It would also take something away from defendants by eliminating their right to cut off the plaintiffs' automatic right to amend through the filing of an answer. The advisory committee, he said, had concluded that the current distinction may make some sense, but on balance it is not needed. In most cases when a motion to dismiss is filed, it is filed before an answer is filed. The proposed rule, therefore, would only make a difference in the rare case where a motion to dismiss follows, rather than precedes, an answer.

Judge Rosenthal reported that, following the advisory committee meeting, a Standing Committee member had submitted thoughtful comments questioning the wisdom of the proposed amendment. She pointed out that his comments, together with a response from the advisory committee's Rule 15(a) Subcommittee, had been included in the agenda book for the information of the Standing Committee.

The member asserted that it is important for defendants to have the ability, by filing an answer, to cut off a plaintiff's right to amend a complaint without leave of court. He said that the proposed rule takes this right away from defendants, and in so doing alters the current balance between plaintiffs and defendants. He acknowledged that in the normal case, a defendant will challenge a defective pleading by filing a motion to dismiss, rather than an answer. But in the infrequent case where the defendant believes that it has a complete defense on the law, it will file an answer first and only then file a motion to dismiss.

By removing this possibility, the proposed rule would do more than restrict the defendant's options in those infrequent cases where the defendant would file an answer first. The proposed rule would have broader negatives consequences in a wide range of other cases.

He explained that some commercial litigation is initiated by badly drafted, badly conceived complaints, often in complete ignorance of the law. The first motion filed by the defendant is often a treatise in the form of a motion to dismiss, requiring the plaintiff to file a whole new complaint. By this tactic, the plaintiff manages to impose on the defendant the cost of educating the plaintiff about the applicable law. Then the defendant has to incur the further expense of filing a second motion to dismiss the new complaint.

The current Rule 15, however, gives plaintiffs cause to pause before filing their complaint, because if the defendant files an answer instead of a motion to dismiss, the plaintiff needs leave of court to amend the complaint, and the plaintiff cannot be certain that leave will be granted. Plaintiffs have to take into account the possibility that the defendant can cut off their right to amend their defective complaint by filing an answer first, followed by a motion to dismiss. This, he said, makes some plaintiffs more careful in preparing the complaint. It is a benefit that accrues to the system in a wide range of cases, not only to the particular defendants in those few cases where an answer actually is filed first. The impact is hard to quantify, he said, but it is real. The rules should encourage plaintiffs to put formality and forethought into their filings, and the proposed change would undercut that.

Under the proposed rule, he said, there will be no means by which the defendant can cut off the plaintiff's right to amend, and plaintiffs will know that. The proposed rule will have the effect of requiring defendants, even if they have a strong legal defense, to incur the costs of filing two motions to dismiss without any corresponding burdens on the plaintiff.

Another member pointed out that the problem raises the more fundamental issue of reconsidering the whole concept of notice pleading. Judge Levi responded that the issue was on the long-term agenda of the advisory committee. But, he said, the committee was not inclined to address the matter as a global issue. Rather, he said, it is was looking at modifying the practice of notice pleading in specific situations.

Judge Rosenthal added that the advisory committee had looked at notice pleading when it drafted the 2000 amendments to the discovery rules, tying discovery to the pleadings and encouraging more specific pleadings. She added that the committee was also considering whether motions for a more definite statement under FED. R. CIV. P. 12(e) could be made more vigorous. She said that a motion for a more definite statement is rarely granted today because the standard for granting them is so high. The committee might want to make it more readily available. That way, she said, the committee would address the impact of notice pleading in specific situations without having to rebuild the whole structure.

One member reported that by local rule in his district, discovery does not begin until the defendant files an answer. As a result, defendants simply do not file answers. Instead, they always file motions to dismiss, which leads to a good deal of unnecessary effort on the part of the judges. They are often faced with starting all over again when the plaintiffs exercise their right to file an amended pleading. Thus, he said, the proposed amendments to Rule 15 are enormously attractive to him because they will avoid judges having to waste efforts on motions to dismiss. Second, he complimented the advisory committee for the brevity of the committee note. He said that it was a model of what a note should be – identifying the changes in the rule and succinctly explaining the reasons for the changes.

Judge Rosenthal responded that these anecdotes highlight the incentives and tactics of modern civil litigation and the shifting of costs. It is rare, she said, that both a motion and an answer are filed. She said that the advisory committee would like the Standing Committee to authorize publication of the proposal, and the particular problems raised in the discussion could be highlighted in the publication with an invitation for the public to comment on them. She added that the proposed amendments to Rule 15 do not represent major changes, given the fact that circuit law across the country liberally gives, or requires, one amendment as a matter of right.

Some members agreed with the suggestion to publish the proposals for public comment and said that it could produce valuable information. One shared the concern that the change in Rule 15 might cause a burden to defendants, but only in very rare cases. He concluded that it is probably not a significant issue, but it would be helpful to get more information during the public comment period.

The committee with one objection voted by voice vote to approve the proposed amendments for publication.

FED. R. CIV. P. 48

Judge Rosenthal reported that the proposed new Rule 48(c) (polling) would provide a procedure for polling jurors in civil cases. It is modeled after FED. R. CRIM. P. 31(d), but also includes a provision referring to the ability of the parties in a civil case to stipulate to less than a unanimous verdict.

The committee without objection by voice vote approved the proposed amendment for publication.

FED. R. CIV. P. 62.1

Judge Rosenthal reported that the proposed new Rule 62.1 (indicative rulings) had its origin in a suggestion several years ago to the Advisory Committee on Appellate Rules from the Solicitor General. Since the basic question addressed by the proposed rule involves the authority of a district judge to act when an appeal is pending, the appellate rules committee concluded that the rule would be better included in the Federal Rules of Civil Procedure.

The proposed rule adopts the practice that most courts follow when a party makes a motion under FED. R. CIV. P. 60(b) (relief from judgment or order) to vacate a judgment that is pending on appeal. The rule, though, goes beyond Rule 60(b) and would apply to all orders that the district court lacks authority to revise because of a pending appeal. It would give a district judge authority to "indicate" that he or she "might" or "would" grant the motion if the appellate court were to remand for that purpose. Judge Rosenthal added that the procedure is well established by case law, but it is not explicit in the current rules and is often overlooked by lawyers. Moreover, some district judges are unaware of its existence.

Judge Rosenthal pointed out that the advisory committee would publish the proposed rule with alternative language in brackets. The choice for public comment would be between having the district court indicate that it "might" grant relief or indicate that it "would" grant relief. She said that good arguments can be made for either formulation. The advantage of the "might" language, she pointed out, is that it would likely preserve judicial resources because the trial judge would not have to do all the work to resolve the motion in advance of remand.

Judge Rosenthal noted that members of the Standing Committee had raised a couple of questions about the proposed rule at the June 2006 meeting. The first was whether the location of the rule as new Rule 62.1 was appropriate. The advisory committee, she said, had considered the location anew and had concluded that Rule 62.1 made the most sense. She noted that it belonged in Part VII of the rules, dealing with judgments, but because of its broad scope, it did not fit in with the other judgment rules – Rules 54, 59, 60, 61, or 62. Moreover, Rule 63 shifts to another topic.

The second concern expressed was whether the title "indicative ruling" was appropriate. She said that it had been selected because it is a term of art familiar to appellate practitioners and embedded in the case law, although it may not be recognized by lawyers whose practice is not centered on appeals. The advisory committee, she noted, had reached no firm conclusion on an alternative caption. One suggestion, she said, was to expand the caption of the rule to "Indicative Ruling on Motion for Relief Barred by Pending Appeal."

Judge Rosenthal noted that the Advisory Committee on Appellate Rules had suggested that it might want to make a cross-reference to the new rule in the appellate rules. She said that this would be very helpful. Judge Stewart said that his committee had discussed the matter and would add a cross-reference. He added that the committee had not expressed a preference between "might" and "would." He noted that the court of appeals would be more likely to remand a case back to the district court if the trial judge were to indicate that he or she "would" grant the relief than if the judge merely indicated that he or she "might" grant it. But, he said, his committee recognized the additional burden that would be imposed on the district judge in the former case.

One member supported the rule and said that it would provide helpful clarification in a difficult area. But he expressed concern that it might provide district judges with open-ended authority once a matter is pending on appeal and could give lawyers an opportunity to amend the record.

Professor Cooper responded that the key point is that the court of appeals remains in control. He noted that the advisory committee had been very cautious in expanding the authority from its basis in Rule 60(b) to other kinds of relief. The district court, he said, should be allowed to deny a motion that does not have merit and get it over with. Judge Rosenthal emphasized that the rule permits better coordination between the two courts.

One participant pointed out that there are a number of limited remands in his court. He asked whether it might be better for the rule to state that the only options for the court of appeals are either to deny the remand or order a limited remand. This would institutionalize the concept of a limited remand, under which the court of appeals keeps the case, but remands solely for the purpose of deciding one issue. He suggested that the language of Rule 62.1(c) might be amended to track the language of the committee note on this point. Professor Cooper agreed that the advisory committee might want to consider adjusting the language.

Judge Levi pointed out that the Standing Committee did not have to approve the rule for publication at the current meeting. Moreover, since the rule involves two advisory committees and some helpful language suggestions had been made, the advisory committee could work further on the language and come back for authority to publish in June 2007.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew and Professor Beale presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of December 18, 2006 (Agenda Item 6).

Informational Items

Judge Bucklew reported that the advisory committee had held its regular autumn meeting in October 2006. It also had held a teleconference meeting in September 2006 specifically to address the proposed amendments to FED. R. CRIM. P. 16 (discovery and inspection).

FED. R. CRIM. P. 32(h)

Judge Bucklew reported that the Standing Committee in June 2006 had returned a proposed amendment to FED. R. CRIM. P. 32(h) (sentencing – notice of possible departure) to the advisory committee for reconsideration in light of specific comments offered by Standing Committee members. The proposal, she said, was part of a package of amendments designed to conform the criminal rules to the Supreme Court's decision in *United States v. Booker,* 543 U.S. 220 (2005). The current Rule 32(h) requires a court to give reasonable notice to the parties that it is considering imposing a non-guidelines sentence based on factors not identified in the presentence report or raised in pre-hearing submissions. The proposed amendment would also require reasonable notice when the court is considering imposing a non-guideline sentence based on a factor in 18 U.S.C. § 3553(a).

She explained that the Standing Committee had asked for further consideration for a number of reasons. Some members, she said, had pointed to a difference in case law among the circuits, counseling that it would be premature to attempt to codify a rule. Others expressed concerns that the proposed rule might interfere with orderly case management by causing unnecessary continuances and adjournments. Other members suggested that since the sentencing guidelines are now advisory, there should be no expectation of a guideline sentence. Therefore, there is no reason for the court to give notice. Judge Bucklew reported that the advisory committee had taken all these arguments into consideration, and it had specifically considered correspondence from the federal defenders urging the committee to proceed with the proposed amendment. In conclusion, she said, the advisory committee was continuing to review the case law and consider a proposed amendment. Professor Beale added that the Supreme Court had recently granted certiorari in two sentencing cases that might shed some light on the wisdom of proceeding with the amendment.

FED. R. CRIM. P. 49.1

Judge Bucklew reported that the Standing Committee had approved new Rule 49.1 (privacy protections for filings made with the court), but it had asked the advisory committee to give further consideration to two concerns raised by the Court Administration and Case Management Committee. First, that committee had suggested that the new criminal rule require redaction of the grand jury foreperson's name from indictments filed with the court. Second, it had suggested that personal information be redacted from search and arrest warrants filed with the court.

Judge Bucklew said that the advisory committee had decided not to require redaction of the grand jury foreperson's name because the indictment is the formal charging document that initiates the prosecution, and other rules require that it be signed by the foreperson, be returned in open court, and be given to the defendant. Moreover, she pointed out, a recent survey of U.S. attorneys' offices and the U.S. Marshals Service had demonstrated that disclosure of the names of jurors has not created security difficulties. Professor Beale added that the survey had revealed no more than two instances of juror-related threats or inappropriate contacts in any recent year. Fear of juror intimidation, moreover, is most likely to center on the defendant himself or herself – who is entitled to a copy of the indictment in any event – and not from persons discovering a juror's name through an electronic posting by the court.

Judge Bucklew said that the advisory committee was continuing to study whether personal information should be redacted from warrants. She noted that there was strong sentiment among committee members to retain the information in the public file because the public has a right to be aware of government activities and to know who has been arrested and what property has been searched. She added that warrants are not generally filed until they are executed, and the committee was considering the feasibility of redaction once a warrant has been executed. In any event, there may be no need to require redaction in the rule because relief is always available on a case-by-case basis.

FED. R. CRIM. P. 16

Judge Bucklew reported that the advisory committee had met by teleconference on September 5, 2006, to continue work on a proposed amendment to Rule 16 (discovery and inspection) that would require the government, on request, to turn over exculpatory and impeachment evidence favorable to the defendant. The proposal, she noted, had come from the American College of Trial Lawyers in 2003, had been drafted by an ad hoc subcommittee of the advisory committee, and had been discussed at every recent meeting of the advisory committee. She pointed out that the Department of Justice was strongly opposed to the proposal, but had been very helpful in drafting changes to the U.S. Attorneys' Manual to elaborate on the government's disclosure obligations. It had been

suggested, she said, that the manual revisions might serve as an alternative to an amendment to FED. R. CRIM. P. 16.

Judge Bucklew explained that the advisory committee had before it at the teleconference a nearly final revision of the U.S. Attorneys' Manual, as well as a nearly final version of the proposed amendment to Rule 16 and an accompanying committee note. The key question for the committee, therefore, was whether to proceed with the proposed rule or accept the revised text of the manual as a substitute. In the end, she said, the committee voted to go forward with the rule, partly because the revised text of the manual continued to give prosecutors discretion and was not a complete substitute for the proposed rule and also because advice in the manual is entirely internal to the Department of Justice and not judicially enforceable.

Judge Bucklew and Professor Beale said that the revisions to the U.S. Attorneys' Manual were a major achievement, and the Department of Justice deserved a great deal of credit for its efforts. Judge Bucklew added that the advisory committee would likely return to the Standing Committee in June 2007 with a proposed amendment to Rule 16, and the Department of Justice would likely offer its strong objections to the rule.

One member suggested that it was important for the advisory committee to develop sound empirical information to support its proposal. He suggested that the Standing Committee needs to know how serious and widespread the problems of nondisclosure may be in order to justify the rule. Judge Bucklew responded that members of the defense bar can describe individual examples of improper withholding of information, but hard empirical data is very difficult to compile.

Professor Beale added that there is no way to quantify all the cases in which disclosure is not made. The obligations of prosecutors are subjective and depend on the particular facts of a case. Individual acts of nondisclosure are difficult to document because the defense usually has no knowledge of the exculpatory information, which is in the hands solely of the government. The few cases that are litigated are brought after conviction. She explained that the proposed rule goes beyond simply codifying existing *Brady* obligations, and the advisory committee will compare it to the rules of the state courts, the standards of the American Bar Association, and the rules of local federal district courts.

One member pointed out that there are great variations among the rules of the district courts, especially as to the timing of disclosures. He said that one good argument for the proposed rule is the need for national uniformity in the face of the current cacophony in local rules. Another suggested that although the revisions in the U.S. Attorneys' Manual are not judicially enforceable, they are being noticed by the defense bar, as well as by prosecutors, and more issues related to disclosure will be raised.

Judge Levi urged caution. He noted that with an issue as highly contentious as this, the committee's work will be placed under a microscope. The stakes in the matter, he said, are very high, and any proposed rule presented to the Judicial Conference needs to be fail-proof. He pointed out that the proposed rule raises issues that will have to be decided by case law, such as what constitutes impeachment information and how the rule affects the burden of proof on appeal. It is predictable, he said, that some members of the committee, and the Judicial Conference, will see the proposal as a policy shift that needs to be justified clearly. He suggested that the committee might want to monitor experience with the revisions in the U.S. Attorneys' Manual before going forward with the rule.

FED. R. CRIM. P. 37

Judge Bucklew reported that the advisory committee was considering proposals by the Department of Justice for a new FED. R. CRIM. P. 37 (review of the judgment) to restrict the use of ancient writs, and changes in the §§ 2254 and 2255 rules to prescribe deadlines for filing motions for reconsideration. She noted that the committee had appointed a Writs Subcommittee, chaired by Professor Nancy King, that is considering whether it is advisable – or even possible under the Rules Enabling Act – to propose a rule, modeled on FED. R. CIV. P. 60(b), that would abolish all the ancient writs other than coram nobis.

Some participants urged caution and questioned whether there was authority to abolish the writs through the rules process. They also suggested that the writs may have Article III constitutional dimensions. Members also discussed the extent to which the ancient writs, especially coram nobis, are still used in federal and state courts.

FED. R. CRIM. P. 32.2

Judge Bucklew reported that the advisory committee was considering amendments to Rule 32.2 (criminal forfeiture), with the help of a subcommittee chaired by Judge Mark Wolf. She noted that the subcommittee was considering the advice of the Department of Justice, the federal defenders, and the National Association of Criminal Defense Lawyers in this very difficult area.

FED. R. CRIM. P. 41

Judge Bucklew reported that the advisory committee was considering proposed amendments to Rule 41 (search and seizure) to deal with search warrants for information in electronic form. She noted that the members of the committee had attended a full-day tutorial presented by the Department of Justice walking them through the mechanics of how electronic materials may be stored, copied, and searched.

Judge Bucklew noted that the advisory committee was working on implementing the proposed new time-computation rule and considering proposals by the Department of Justice to permit the examination of a witness outside the presence of the court and by the Federal Magistrate Judges Association for a rule to cover warrants for violation of supervised release or probation. Finally, she noted that the committee would be conducting a public hearing in Washington on January 26, 2007, at which five witnesses had signed up to testify on the proposed amendments to the criminal rules published in August 2006.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachments of December 1, 2006 (Agenda Item 7).

Informational Items

FED. R. EVID. 502

Judge Smith reported that the advisory committee had been devoting most of its time to the proposed new Rule 502 (attorney-client privilege and work product; limits on production), published for public comment in August 2006. He pointed out that a substantial number of witnesses had signed up to testify at the committee's two scheduled public hearings – one in Phoenix immediately following the Standing Committee meeting and the other in New York on January 29, 2007.

Judge Smith explained that the advisory committee was proceeding in accordance with the limitation of the Rules Enabling Act that any "rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." 28 U.S.C. § 2074(b). He pointed out that proposed Rule 502 had been drafted in response to a request from former Chairman Sensenbrenner of the House Judiciary Committee asking the committee to initiate rulemaking to address issues arising from disclosure of matters subject to attorney-client privilege or work product protection. He said that the new Democratic leadership of the Congress had not yet been consulted on the proposal.

Judge Smith highlighted four preliminary actions taken by the advisory committee at its November 2006 meeting in response to public comments on the rule. First, he said, the committee had voted to retain the words "should have known" in the proposed language of Rule 502(b). It would condition protection against inadvertent waiver on whether the holder of the privilege took reasonably prompt measures "once the holder

knew or should have known of the disclosure." He said that a comment had been made that the language might give rise to litigation over exactly when the producing party should have known about a mistaken disclosure. But, he said, it was the sense of the committee that the language had substantial merit and should be retained.

Second, Judge Smith pointed out that proposed Rule 502(b) would provide protection from waiver against third parties when a disclosure is "inadvertent" and made "in connection with federal litigation or federal administrative proceedings." Proposed Rule 502(c) would provide protection when the disclosure is "made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority." He said that a comment had recommended that the language of the two provisions be made identical by extending the protection for mistaken disclosures occurring during proceedings to those occurring during investigations.

Judge Smith said that a majority of the advisory committee was of the view that the difference between the language of the two subdivisions was justified. The committee, thus, decided that the protections of Rule 502(b) should continue be limited to mistaken disclosures made during court and administrative proceedings.

Third, Judge Smith said that the advisory committee had not decided whether to approve the "selective waiver" provision set forth in proposed Rule 502(c). It specifies that disclosure of privileged information to a government regulator does not constitute a waiver in favor of third parties. He explained that the committee had published this provision in brackets in order to emphasize that it was undecided about the matter and was seeking the views of the public as to the merits of including it in proposed Rule 502. He noted that the selective waiver provision had attracted strong opposition from lawyers and bar association representatives.

One participant noted that several public comments had opposed the selective waiver proposal on the grounds that it would erode the attorney-client privilege. A number of comments also referred to an alleged "culture of coercion" under which the Department of Justice considers a corporation's cooperation, including waiver of the attorney-client privilege and work product protection, as a factor in deciding whether to prosecute and on which criminal charges.

Judge Smith noted, too, that concern had been expressed by state judges that a federal selective waiver provision would subsume state waiver rules. He pointed out that Justice Hurwitz, a member of the Advisory Committee on Evidence Rules, had attended the most recent meeting of the Federal-State Jurisdiction Committee of the Judicial Conference and had had an opportunity to discuss with fellow state Supreme Court Justices the proposed rule and pertinent federal-state issues.

Fourth, Judge Smith reported that the advisory committee was in general agreement that arbitration proceedings should be covered by the protection of Rule 502 only if they are court-ordered or court-annexed arbitrations.

Judge Smith pointed out that these issues – and others listed in the agenda book and raised in the public comments and hearings – would be taken up again at the advisory committee's April 2007 meeting.

ADAM WALSH CHILD PROTECTION ACT

Judge Smith reported that the Adam Walsh Child Protection Act of 2006 had directed the advisory committee and the Standing Committee to "study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against 1) a child of either spouse; or 2) a child under the custody or control of either spouse."

The statutory provision, he said, appears to have been motivated by one aberrant circuit court decision allowing a criminal defendant's wife to refuse to testify even though the defendant had been charged with harming a child in the household. He said that the advisory committee had concluded that the case was of questionable authority and was even contrary to the precedent of its own circuit. Therefore, the Federal Rules of Evidence need not be amended to take account of it. Almost all other reported opinions, he said, have held that the protections provided by the marital privileges do not apply in cases where the defendant is charged with harm to a child.

Professor Capra noted that he had reached out to advocates for battered women for their views on whether it is good policy to have an exception to the privileges in a case where there may be harm to a child. He awaits responses from them.

Professor Capra added that the advisory committee would prepare a report for the Standing Committee to send to Congress. The report, he said, would include appropriate draft language of a rule amendment in case Congress disagrees with the conclusion that no rule change is necessary.

RESTYLING THE EVIDENCE RULES

Judge Smith reported that Chief Justice Rehnquist had expressed opposition to restyling the rules of evidence. Nevertheless, in light of the success in restyling the other federal rules and the presence of awkward language in the evidence rules, the advisory committee was taking a second look at the advisability of proceeding with a restyling effort. He noted that a couple of evidence rules had been restyled as samples for the

advisory committee's review, and it was the general sense of the members that the committee should continue with the effort at a modest pace, as long as the new chief justice agrees. Professor Capra added that an important argument in favor of restyling is that the evidence rules are strongly geared to the use of paper. Judge Levi asked whether it would be possible at the next Standing Committee meeting for the advisory committee to bring forward a couple of examples of restyled evidence rules. Judge Smith agreed to do so.

Judge Smith said that the advisory committee was doubtful that there was any need for changes in the evidence rules to take account of the new time-computation rules. He suggested that a reference to the evidence rules might better be included in the other rules. He also reported that the advisory committee was continuing to monitor the case law in the wake of *Crawford v. Washington,* 541 U.S. 36 (2004), dealing with testimonial hearsay. He observed that the courts are addressing the issues in a very professional manner, and it is far too early for the advisory committee to act.

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Struve presented the report of the subcommittee, as set forth in Judge Kravitz's memorandum of December 14, 2006 (Agenda Item 11).

Judge Kravitz reported that a great deal of work had been undertaken on the time-computation project by the subcommittee, the advisory committees, and the committee reporters. He pointed to the text of the proposed template rule in the agenda book and said that it would be adopted in essentially identical form for the civil, criminal, appellate, and bankruptcy rules. Its central focus is to simplify counting for the bench and bar by eliminating the current two-tier system of computing time deadlines, under which weekends and holidays are excluded in calculating time periods of fewer than 11 days (8 days in bankruptcy), but included in calculating periods of 11 (or 8) days or more. Under the new template rule, all days will be counted as days. Only the last day of a time period will be excluded if it happens to falls on a weekend or holiday.

Judge Kravitz noted that the template rule provides a method for counting both forward and backward and a method for counting time periods expressed in hours. The rule defines the "last day" for filing as: (1) midnight, in the case of electronic filing; and (2) the time the clerk's office is scheduled to close, in the case of filing by other means.

He also noted that there are some issues that the new rule does not address. For example, the rule applies only when a time period must be computed. It does not apply when a court fixes a specific time to act. It also does not change the "three-day rule," under which a party served by mail or certain other forms of service is given three extra

days to respond. Moreover, it does not address explicitly whether litigants can file papers at a judge's home or a clerk's home after hours in light of 28 U.S.C. § 452, which states that courts "shall be deemed always open for the purpose of filing proper papers." He pointed out that Professor Struve had prepared an excellent memorandum on that particular issue in the agenda book.

The proposed rule, he said, also does not attempt to define the "inaccessibility" of a clerk's office for filing, although it does eliminate language that limits "inaccessibility" to weather conditions. He reported that the Standing Committee had asked the subcommittee to consider defining the term, but the subcommittee's memorandum to the Standing Committee contained a lengthy explanation as to why additional time and experience are needed in the electronic filing world before this issue can be addressed properly. He noted that most courts have adopted a local rule specifying what lawyers should do when there is a technical failure of the court's computers. The local rules vary greatly, but most require affidavits by lawyers and permission by the court on a case-by-case basis. They do not give parties an automatic extension for filing.

Finally, Judge Kravitz reported that the subcommittee had decided to continue to include state holidays in the rule, but he noted that it had seriously considered eliminating them because federal courts tend to remain open on state holidays. A member of the Standing Committee repeated his earlier view that state holidays should not be included in the definition of a "legal holiday." Judge Levi suggested that the subcommittee's decision to retain state holidays as an exception in the rule might be highlighted in the publication as a means of soliciting the views of the public on the issue. Other members suggested that the committee note also include a reference to national days of mourning.

Judge Kravitz added that additional suggestions for improvement in the language of the proposed rule had been offered recently by Professor Kimble, the committee's style consultant. He noted that the advisory committees were using the template and revising the specific time limits in their respective rules to make sure that the ultimate net effect of the new rule would be neutral to attorneys. Thus, the advisory committees will likely increase the 10-day time limits in their rules to 14 days because a 10-day deadline in the current rule normally gives a party 14 days to act because of intervening weekends. Judge Kravitz pointed out that the advisory committees were also attempting to express rules deadlines in multiples of 7 days, for all deadlines of fewer than 30 days.

He pointed out that some reservations had been expressed as to the wisdom of proceeding further with the time-computation project. He noted, in particular, that some members of the appellate rules committee had suggested that the current system for counting time is not broken, the proposed changes are not needed, and problems are created with regard to deadlines expressed in statutes. Nevertheless, even though some members believe that the project is unnecessary, the appellate advisory committee was

proceeding to make appropriate changes in the appellate rules in light of the proposed template rule.

Judge Kravitz reported that the Federal Rules of Bankruptcy Procedure pose a number of additional complications. First, he said, there are many more short deadlines in bankruptcy. Second, bankruptcy is heavily impacted by statutory deadlines, including the many deadlines set forth in the Bankruptcy Code and state statutes. Third, he explained, the bankruptcy advisory committee had been extremely active recently in publishing a large number of rules changes and making wholesale revisions in the bankruptcy forms in order to implement the omnibus 2005 bankruptcy legislation. In light of all the proposed changes already underway, he said, more rule changes at this point would impose an additional burden both on the advisory committee and on the bankruptcy bench and bar.

Judge Kravitz suggested the possibility of proceeding with the time-computation changes in the civil, criminal, and appellate rules at this point, but delaying any changes to the bankruptcy rules. This approach would not be ideal, though, since it would make the bankruptcy rules inconsistent with the other rules for a while. Nonetheless, it might be the most practical approach in light of the sheer volume of rule changes being presented to the bankruptcy community.

Judge Kravitz noted that a good deal of angst had been expressed at the last Standing Committee meeting over the issue of changing the method of counting time limits fixed in statutes. He noted that, except for the criminal rules, the federal rules specify that the method of counting time applies to national rules, local court rules, and statutes. In addition, he said, case law in bankruptcy holds that the counting method prescribed by the bankruptcy rules applies when counting deadlines set forth in statutes. Professor Morris noted the additional complexity that the Rules Enabling Act does not extend its supersession authority to the bankruptcy rules.

Judge Kravitz noted that the feedback received from the bar – other than the bankruptcy bar – is that lawyers generally do not rely on the counting method specified in the federal rules when calculating statutory deadlines – unless they miss a deadline and have to argue to a court for additional time. Therefore, although statutory deadlines are a concern to the rules committees, a large body of the bar does not in fact rely on the two-tiered rules method for counting statutory deadlines. He added that the subcommittee was considering preparing a list of the most common short statutory deadlines that actually arise in court proceedings and then drafting a package of legislative amendments for Congress to consider. He noted that the chair had raised the issue of potential statutory amendments, on a preliminary basis, with leadership of the former Congress and had received a good reception.

Judge Kravitz noted another complication flowing from the text of the current rule. FED. R. CIV. P. 6(a) specifies a method for computing time for both rules and statutes. The next subdivision of the rule, FED. R. CIV. P. 6(b), gives a court authority to extend deadlines for cause, but it applies on its face only to rules, not statutes. He said that the committee might want to give a court explicit authority for good cause shown to extend a deadline set forth in a statute.

Judge Kravitz concluded that the committee needed to make three decisions: (1) whether to keep moving forward and present a package of amendments to the Standing Committee in June 2007 for publication; (2) whether to include the bankruptcy rules in that package or defer them for publication at a later date; and (3) whether to amend the rules to give a court explicit authority to grant extensions of statutory deadlines for good cause shown.

Judge Zilly reported that the Advisory Committee on Bankruptcy Rules had not yet decided whether to make all the time-computation changes at its March 2007 meeting. The committee, he said, had been very much concerned about further publication of rule changes and possible confusion in light of the proposed changes to 40 rules just published in August 2006. Moreover, he said, more than 100 changes in about 75 rules would be impacted by the time-computation changes – many of them the same rules that had just been published. He added, though, that it would be relatively easy for the advisory committee to make all the changes, adding that it would make the changes in the revised rules out for publication, rather than in the existing rules. The advisory committee, he said, would not ask for an extension of time, and it could have the changes ready for the June 2007 Standing Committee meeting. But, he explained, the key decision was whether to risk creating confusion by publishing another large package of bankruptcy rule changes on the heels of a comprehensive package of changes approved by the Judicial Conference in September 2006 to implement the 2005 legislation.

As for statutory deadlines, Judge Zilly reported, the advisory committee had identified 10 statutes imposing short time limits in bankruptcy cases, most of them deadlines of 5 days. One approach, he said, would be to specify in the bankruptcy rules that the existing counting method will continue to be used for those specific code sections. An alternative would be to ask Congress to change all the 5-day deadlines to 7 days in order to reflect the new counting method, because 5 days actually means 7 days under current bankruptcy case law. He said that some additional confusion had been added in the 2005 bankruptcy legislation because Congress had used the term "business days" in a couple of sections, but not in other places.

Judge Levi suggested that the bankruptcy advisory committee should discuss all these matters further at its March 2007 meeting. He saw no problem with delaying the

changes in the bankruptcy rules for a year or two in light of the practical difficulties and confusion that might result from publishing additional bankruptcy changes now.

One member pointed out that proposed template FED. R. CIV. P. 6(a) mandates that all time periods be computed according to Rule 6. Thus, the rule would trump any other time period specified in the federal rules, any statute, local rule, or court order. Thus, he questioned the purpose of proposed Rule 6(a)(4), defining the end of the last day of a time period "unless a different time is set by statute, local rule, or court order." Judge Kravitz and Professor Struve responded that the provision takes account of 28 U.S.C. § 452, which states that all federal courts "shall be deemed always open for the purpose of filing proper papers . . . . " Some court decisions, they noted, have held that section 452 and FED. R. CIV. P. 77(a) (district courts always open) permit a paper to be filed after hours by handing it to a judge or clerk at their home. In addition, Judge Kravitz noted that some courts maintain a box at the courthouse for lawyers to drop pleadings after hours. He explained that Rule 6(a)(4) was designed to deal with the ordinary course of events, and it does not address explicitly a court's authority to permit after-hours filings under the statute. The language "unless a different time is set by statute, local rule, or court order" was intended to leave room for particular courts to treat issues of after-hours filing as they see fit.

One member suggested that the last sentence of the first paragraph of the committee note was not needed. It specifies that a local rule of court may not direct that a deadline be computed in a manner inconsistent with Rule 6(a). He said that this might imply that other local rules can conflict with the national rules, given that the same limitation on local authority is not repeated in every other committee note. Judge Kravitz responded that the subcommittee simply wanted to emphasize the importance of national uniformity and to make it clear that local rules cannot alter the time-computation method specified in the new rule. But, he said, if the sentence causes any confusion, it could be eliminated. Another member suggested substitute language for the committee note that would reiterate the general principle that local rules may not conflict with national rules, but point out that a court may specify a time for the end of the last day.

Another member said that the proposed rule does not work in counting backwards when the last day of a time period is one in which the clerk's office is inaccessible. Under the proposed rule, one must continue to count backwards. This produces the impossible result that if the office is not accessible, the filing is due yesterday. As a matter of logic, one should count forward to the next accessible day, rather than continue to count backwards. Professor Struve responded that the subcommittee had struggled with that situation and would be open to suggestions for better language. Judge Kravitz cautioned, however, that it would be difficult for the rule to deal with every conceivable situation.

Professor Capra pointed out that there are no time-computation provisions and no relevant time deadlines in the Federal Rules of Evidence. Thus, he asserted, there was no need for the proposed time-computation template rule to be added to the evidence rules. He added that, nevertheless, the evidence advisory committee could draft a variation of the template rule and include it as FED. R. EVID. 1104. But, he said, time computation issues do not arise in evidence, and there is no need for any provision in the evidence rules.

Judge Levi suggested that it would be helpful to have the sense of the Standing Committee that the time-computation project is beneficial before asking the advisory committees to proceed with proposing specific amendments.

The committee without objection by voice vote agreed to encourage the advisory committees to proceed with the project.

PANEL DISCUSSION ON THE DECLINE IN THE NUMBER OF CIVIL TRIALS

The committee participated in a panel discussion on the decline in the number of civil trials and whether anything can, or should, be done to amend the federal rules to address the phenomenon. The panel was moderated by Patricia Lee Refo, Esquire of Snell & Wilmer in Phoenix – a prominent member of the Arizona bar and the American Bar Association and a former member of the Advisory Committee on Evidence Rules. The other panelists were: Judge Patrick E. Higginbotham of the U.S. Court of Appeals for the Fifth Circuit, former chair of the Advisory Committee on Civil Rules; Professor Stephen C. Yeazell of the University of California at Los Angeles Law School; and Justice Andrew D. Hurwitz of the Supreme Court of Arizona, a member of the Advisory Committee on Evidence Rules.

Ms. Refo distributed a series of tables and charts documenting the "vanishing trial." She showed that from 1962 to 2005, the number of civil cases disposed of by the federal district courts increased more than five-fold, but the number of civil trials actually decreased by a third. Bench trials have declined by 45% since 1985, and consent civil trials by magistrate judges have decreased by nearly 50% since 1996. As a result, the percentage of civil cases resolved by a trial has dropped from 11.5% in 1962 to the current rate of 1.4%.

She showed tables breaking out cases by nature of suit. Civil rights cases are the most likely category of civil cases to go to trial in the federal courts, counting for 33% of all civil trials in 2002. Nevertheless, only 3.8% of civil rights cases were decided after a trial. Tort cases accounted for 23% of all civil trials in 2002, although only 2% of tort cases went to trial. And in 2005, she said, almost no contract cases went to trial.

She noted that fewer cases are being terminated during the course of a trial, and the data strongly suggest that trials are not increasing in length. She noted, too, that the decline in trials has also occurred in criminal cases, though for different reasons. She pointed out that during the same time period that trials have declined, the country has experienced substantial population growth and increases in gross domestic product, the number of lawyers, the number of pages in federal court opinions, and the number of pages in the Federal Register. Finally, she showed a table demonstrating that civil trials have also declined noticeably in the state courts.

Judge Higginbotham reported that in the early 1970s, federal district judges were conducting over 30 trials per judge each year, many more than today. Even so, the time for filing to trial was shorter than it is now. Although there has been a decline in both bench and jury trials, he noted, there has been a reversal in the proportions between the two. Bench trials used to predominate by 2-1, but jury trials now outnumber bench trials by 2-1. In criminal cases, he said, the number of guilty pleas has increased substantially, as a direct result of the additional power given to prosecutors over charging decisions by the federal sentencing guidelines.

Judge Higginbotham attributed the decline in trials to the growth of the "administrative model" of decision-making – a set of administrative alternatives to the traditional civil trial. He traced this trend to enactment of the Administrative Procedure Act in 1946, regularizing administrative decision-making in the executive branch, leading to great growth in administrative law judges and an administrative, bureaucratized approach to case-by-case decision-making. He said that the trend began to spread to the federal judiciary in the 1970s with the growth of the federal magistrate judges system. Since then, the court system itself has been moving more and more to this kind of administrative, bureaucratized decision-making, as part of which judges have adopted a series of procedures designed to avoid trials. In this sense, trials are not "vanishing," but moving – from the traditional approach to an administrative model. He noted that most observers account for this phenomenon, including the decline of trials, by pointing to the high costs of civil litigation in the federal courts, the fear of juries, and the indeterminacy of the judicial process.

He warned that this trend has dangerous effects. Lawyers and judges, he said, used to focus on fact questions and present them to the jury at trial. Outcomes, therefore, tended to depend very closely on the applicable normative standards of law. But now, the system has abandoned trials in order to focus on settlements, which are strongly affected by factors other than normative standards. The system, thus, has distanced itself from normative standards of law.

He complained that courts have become hostile to the trial of cases. He referred to two seminars for judges in which the faculty had expressed the attitude that a trial

represents a "failure" of the system. The judges were instructed by the faculty to work hard at obtaining settlements. An agreed-upon settlement is seen as better than a trial. In addition, there is now a much greater focus on alternative dispute resolution. He acknowledged that a settlement in the face of an impending trial may be perfectly acceptable – because it will be strongly influenced by normative standards of law – but not a settlement that occurs in the absence of any likelihood that there will ever be a trial.

Judge Higginbotham pointed out that the federal court system has been a great success because of its fairness, independence, and transparency. But, he said, there is a fundamental lack of transparency in both settlements and arbitration. Discovery materials, moreover, are not filed. Ms. Refo added that many cases that used to be disposed of with bench trials have now migrated to arbitration for largely this reason, because the parties do not have to reveal information to the public. Judge Higginbotham lamented that the courts have validated and embraced arbitration.

Professor Yeazell said that most of what would need to be done to produce a substantially increased rate of trials probably lies beyond the power of the rules process to affect. He strongly endorsed Judge Higginbotham's comments regarding the lack of transparency in settlements and the resulting diminishment of the integrity and legitimacy of the legal system. He noted, though, that it might be possible to address the transparency problem to some extent through rules.

He emphasized two points based on the empirical data presented by Ms. Refo. First, he said, the rate of trials has also been dropping in the state courts. But the rate of trials in state courts is still several times higher than in the federal courts, including the 35 states that use the federal rules as their procedural code. That, he said, leads one to believe that the principal causes of the decline lie in something beyond the federal rules and what rule changes might accomplish.

Second, he noted that the federal sentencing guidelines, with all their perceived defects, are superior to civil settlement practices as far as transparency is concerned. A criminal defendant, he said, may not think that his sentence is fair, but he knows that it will be probably the same sentence that the defendant in the next courtroom receives for the same offense.

That consistency, however, is simply not the case with civil settlements. There are enormous differences from case to case. The results may well be acceptable in individual cases because they are based on the consent of the parties. But for the legal system as a whole, the lack of uniformity and norms is very troubling. He pointed out that a great deal of research has been undertaken in this area. In these studies, a standard set of facts is given to experienced judges, lawyers, and insurance representatives, and they are asked what the case should settle for. They all believe that they know from

experience the value of a case. But the settlement figures they produce are in fact very different from each other. And the differences among similar cases are compounded by the lack of transparency, as no one really knows what other similar cases have settled for.

Professor Yeazell said that this is one problem that the rules process might be able to address in some manner. The justice system ought to be able to provide some notion of what similar cases have settled for. The federal rules might provide that settling parties must register, in some form, the outcome of a settlement in order to provide some notion to third parties regarding the range of settlement outcomes. This would bring about a greatly needed increase in transparency, and it may be something that could properly be done within the ambit of the Rules Enabling Act. The philosophy would be that however much some parties may want to keep outcomes private, this level of transparency would be the price – and an appropriate price – of entering the civil justice system.

Ms. Refo pointed out that there are now certain categories of cases in which trials never take place. Accordingly, a civil litigator has no benchmarks to determine what a case is worth or what the risks of trial may be. As a result, settlements are uninformed, and the uncertainty is a factor in the decline of civil trials.

Judge Hurwitz suggested that trying to pinpoint the causes for the decline in trials is akin to distinguishing between the chicken and the egg. The most important factor in the decline of trials, he said, is cost. He noted that when he and his colleagues used to try cases 30 years ago, they routinely tried small cases at low cost. Today, he said, the cost of litigation is so high that lawyers no longer try any small cases. They have become non-trial lawyers. As a result, a trial is scary to them because they have no experience in trying cases. So it is hard to tell whether uncertainty is the cause or the other factors that have led to the uncertainty. All have been combined to create a culture that avoids trials and views them as a failure. He noted from his personal experience in Arizona that many distinguished candidates applying for state judgeships have had many years of legal experience, but no trials.

Justice Hurwitz noted that trials in state courts are also decreasing, but they are declining at a lesser rate than in the federal courts. He suggested that the perceived unfriendliness of the federal forum is responsible in part for chasing cases from the federal courts into the state courts. He said that a civil case can normally be tried in the Arizona state courts in one year – a much shorter time than in the federal court. So, when plaintiffs have a choice of forum, they will normally choose the state court. Many of the cases, moreover, will remain in the state courts and not be removed to the federal court. He explained that when a case is filed in the federal court, it is randomly assigned to one of 13 very busy district judges, some of whom do not come from a civil background. On the other hand, in Maricopa County, a complex civil case in state court will be assigned to

a judge with substantial civil trial experience. That special procedure of guaranteeing experienced judges for complex cases also offers an attractive choice for plaintiffs.

Judge Higginbotham observed that there is a clear relationship between the decline in the number of trials and the increase in the amount of time it takes to get a case to trial. He noted the example of a federal district judge in Texas who receives an unusually large number of patent cases because he is able to bring them to trial very quickly. The attraction for the bar is the certainty that the judge will give them a firm trial date and a good trial.

Justice Hurwitz raised the fundamental question of whether the decline in civil trials is really a bad thing at all. Surely, he said, fewer lawyers today are able to try a civil case, but maybe all those small civil cases that used to be tried in the past would have been better resolved through settlement. In the past, moreover, lawyers almost never asked for summary judgment in small cases. He said that the legal culture had changed fundamentally, and it may be that not much can be done to change it through the rules process. He suggested that judges and lawyers may be overly nostalgic. Just because they liked the good old days does not mean that the system should return to them.

Ms. Refo pointed out that it was very difficult to conduct empirical research in this area, but her sense was that corporate America has lost confidence in jury results. She said that jury trials cost too much, and the results are too uncertain. She said that consideration might be given to two possible rules changes. First, the pretrial rules might be amended to move the parties to trial faster and more efficiently. Second, something might be done through rules changes to improve the fact finding at trials.

Judge Higginbotham said that the emphasis today is on summary judgment, rather than trial. He said that the traditional way of running a docket is the most effective. The judge makes key decisions early in the case after asking the lawyers when the case will be ready for trial. The judge sets a real trial date, and the parties concentrate on moving forward towards it. If the case is complex, the judge and the parties focus on the specific questions that are going to be asked in front of the jury, rather than on the details of the discovery process. The lawyers and the judge focus on the trial as the end target and work backwards from there. He recognized that most civil cases will settle in any event, but the whole process, he said, should be refocused from discovery to the trial.

As for juries, he said, all the literature proves that a 12-person jury is much more reliable than a smaller jury. He noted that the Standing Committee had approved an amendment to the civil rules that would have mandated a return to 12-person juries in civil cases, but it was not approved by the Judicial Conference. Ms. Refo added that the American Bar Association had issued jury principles in 2005 that urge a return to 12-person juries, and it is actively encouraging the states to return to 12-person juries.

Judge Higginbotham also pointed out that substantive developments have had an impact on the decline in trials, particularly punitive damages. The uncertainty of a jury result has been intensified by the very real fear of substantial punitive damages. He noted that court decisions have been cutting back on punitive damages, but the risk of them continues to deter corporations from opting for a jury trial. Corporate officers, he concluded, generally do what they are told to do by their lawyers, most of whom have not tried any cases themselves.

He suggested that the federal district courts are losing their distinctiveness and are becoming part of a bureaucratic enterprise. The phenomenon presents a serious challenge to Article III of the Constitution and to judicial independence. Increasingly, he said, trial judges are becoming processors of paper, and the court system has become more of an administrative process than a trial process. The bureaucratization, moreover, feeds on itself. He noted that the federal sentencing guidelines in criminal cases have contributed to uniformity in sentencing, but they have created a large bureaucracy in Washington that produces a large volume of manuals and statistics. He noted that the sentencing guidelines have led to substantially more appeals in federal criminal cases, but he pointed out that the Supreme Court's decision in *Apprendi v. New Jersey,* 530 U.S. 466 (2000) was very helpful because the Supreme Court has helped to put the focus back on the jury.

Ms. Refo asked the panelists to compare state court rules with the federal rules to see whether any differences might be of help in revitalizing trials in the federal courts. For one thing, she noted, Arizona requires much broader disclosure in civil cases. And it has different rules on how trials are conducted, including a provision allowing juries to ask questions.

Justice Hurwitz said that the Arizona state rules were basically similar to the federal rules, but a number of innovations in Arizona might help the federal courts, at least at the margin. The size of the jury, he said, is a factor, but most plaintiffs do not want a 12-person jury. He noted that in the state court, unlike the federal court, the parties can pick the judge. Guaranteeing federal lawyers that they will get an experienced judge would be a very helpful improvement, but he noted that there is a price to pay for it in terms of judicial independence.

One of the members echoed the observation that there is a culture of hostility to trying cases – both in the federal courts and the state courts. He noted that substantial pressure had been placed on him by judges to settle, even in cases that have deserved to go to trial. He also noted that it takes much too long to reach trial in the federal court, and cases go to trial much more quickly in the state courts. Clients, he said, are resistant to waiting so long and facing uncertainty.

He noted that Arizona had organized a specialized civil court division for complex civil cases – as in New York, Delaware, North Carolina, and California – staffed by very experienced, highly regarded judges. The state bar, he said, has made the decision not to remove cases to federal court because they are pleased to have them stay in the complex civil division of the state courts. He noted that the judges in the special court conduct an early pretrial conference to lock in all dates. They also impose limits on disclosure and discovery that would otherwise apply in normal civil cases. The bar believes that the system works, at least in complex civil cases, both for plaintiffs and defendants. He noted that a similar system works very well in California.

Another member suggested that lawyers on both sides see state courts as much more lawyer-friendly places than federal courts. Federal courts are seen as very formal, and the lawyers do not have an opportunity to see the judge in person until late in the process. Another difference between the state and federal courts is that the lawyers get to select the jury in state courts, a matter of great importance to them.

Judge Rosenthal observed that the Advisory Committee on Civil Rules had drafted a set of simplified procedural rules to expedite smaller federal cases and provide prompt, economical trials. Under the proposal, parties opting into the simplified rules would be guaranteed a prompt trial, less discovery, fewer motions, and fewer expert witnesses. But, she said, when the advisory committee floated the idea, it encountered resistance from virtually every quarter. She said that the draft rules had substantial merit, and the advisory committee might wish to revisit them. She noted, too, that specialized rules are becoming more common in certain kinds of cases, such as patent cases.

One member suggested that the courts lose a great deal if complex civil cases vanish from the judicial system. He noted that California, Arizona, and New York make special provision for complex civil cases, including special courtrooms and training for the judges. One of the dangers of settlements, he said, that there is no development of stare decisis and no transparency in the system. Large cases simply are diverted to alternative dispute resolution, and small cases remain in the courts, creating a dual system of justice. Corporations, he said, need to see themselves as stakeholders in the court system. Because of the special efforts now being made in some states, lawyers and corporations are preferring to keep complex civil cases in the state courts, rather than removing them to the federal courts or turning to arbitration or other alternative dispute resolution.

Another member echoed the theme that it is bad for the country when litigants believe that the court system is more of a dispute resolution mechanism than a justice system. It is also wrong, he said, when lawyers and clients believe that a judge will punish them for not settling a case and when corporations choose private litigation over the court system. The net result, he said, is that the judicial system is losing social

capital. One of the foundations of the American judicial system, he emphasized, is that the public participates in it. But that participation has been declining, as courts have reduced the number of jurors used in civil cases and have reduced the number of trials. He suggested that there may be problems in the future when the courts need public support.

Ms. Refo noted that, as a practical matter, lawyers today almost never try a case. Associates, moreover, never get fired for taking depositions or serving interrogatories. They can only get in trouble for not taking depositions or serving interrogatories. In effect, the culture encourages too much discovery. She added that the system as a whole has lost a great deal through the growth of private litigation. Among other things, she said, great strides have been made to diversify the federal bench. The same development, however, has not occurred in private litigation, as only white males seem to preside. That, she said, is another hidden cost to the system.

Judge Higginbotham added that the privacy implications of discovery are a serious problem. He said that there is a value in openness and important social benefits in trials. Cases, he said, do not belong solely to the litigants. Even in private litigation, he said, the parties want discovery. What they want to avoid is public disclosure of their records and activities.

One participant noted that his court is moving towards allowing fewer matters to be filed under seal. On the one hand, he said, disclosure of documents and depositions may encourage parties to leave the court system for private litigation. But on the other hand, there is also a fundamental value in openness and public records.

One member said that his clients increasingly are resisting arbitration. The arbitration alternative, he said, was sold to parties on the basis of its being cheaper and faster. But, he said, it is neither. Moreover, decisions in arbitration usually involve the arbitrator splitting the baby, and there is no appeal from the decision. As one suggestion for change, he said that the committee might want to consider amending 28 U.S.C. § 1292(b) to allow more decisions to be brought to the courts of appeals.

NEXT COMMITTEE MEETING

The next meeting of the committee will be held in Washington, D.C. on June 11-12, 2007.

Respectfully submitted,

Peter G. McCabe,
Secretary

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas

* * * * *

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

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

* * * * *

(M) in determining a sentence, the court's obligation to calculate the applicable

sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and

* * * * *

Rule 32. Sentence and Judgment

* * * * *

(d) Presentence Report.

(1) ***Applying the Advisory Sentencing Guidelines.*** The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) ***Additional Information.*** The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and

(F) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

* * * * *

Rule 35. Correcting or Reducing a Sentence

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(b) Reducing a Sentence for Substantial Assistance.

(1) ***In General.*** Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.

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Rule 45. Computing and Extending Time

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(c) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a specified period after service and service is made in the manner provided under Federal Rule of Civil

Procedure 5(b)(2)(B), (C), or (D), 3 days are added after the period would otherwise expire under subdivision (a).

Rule 49.1. Privacy Protection For Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials;

(4) the last four digits of the financial-account number; and

(5) the city and state of the home address.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 49.1(d);

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255;

(7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;

(8) an arrest or search warrant; and

(9) a charging document and an affidavit filed in support of any charging document.

(c) Immigration Cases. A filing in an action brought under 28 U.S.C. § 2241 that relates to the petitioner's immigration rights is governed by Federal Rule of Civil Procedure 5.2.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the

person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be

amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 49.1(a) as to the person's own information by filing it without redaction and not under seal.

[Model Form for Use in 28 U.S.C. § 2254 Cases Involving a Rule 9 Issue under Section 2254 of Title 28, United States Code]

(Abrogated.)

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: The Crime Victims' Rights Act (CVRA) Amendments
Rules 1, 12.1, 17, 18, 32, and 60

DATE: March 25, 2007

This memorandum reports on the work and recommendations of the CVRA subcommittee. Judge Jones chairs the subcommittee, which also includes Judge Battaglia, Justice Edmunds, Leo Cunningham, Professor King, and representatives from the Department of Justice. I am personally grateful to each member of the subcommittee, which has had an especially heavy workload.

I. The Process to Date

The subcommittee began in the spring of 2005. It was greatly aided in developing its initial proposals by a detailed article by Judge Paul Cassell, which set forth a detailed proposal for amendments to implement the CVRA. The subcommittee's proposals were refined at the October 2005 meeting of the Criminal Rules Committee and approved, with modifications, at the January 2006 meeting of the Standing Committee. Following approval by the Judicial Conference, they were published for public comment in August 2006. Many public comments were received. Of particular note were letters from Senator Kyl, one of the sponsors of the CVRA, and Representatives Poe and Costa, co-chairs of the Congressional Victims' Rights Caucus. A public hearing was held in January 2007, in which several speakers commented on the CVRA amendments.

Following the public hearing in January, the subcommittee met several times by teleconference. The proposed amendments had generated a large number of written comments (as well as testimony at the hearing) including both criticisms that the proposed rules went too far, tipping the adversarial balance and depriving the defense of critical rights, and criticism that the proposed rules did not go far enough to implement the specific provisions of the CVRA and the fundamental policies that it reflects. This included a second article by Judge Cassell, which provided the basis for his testimony. Some comments urged that the Committee begin the drafting process anew, rather than moving forward with the proposed amendments.

The public comments are summarized after each rule, and additionally all of the comments are provided infra.

II. The Subcommittee's Recommendations in Response to the Public Comments

A. In general

Subcommittee members very carefully reviewed the comments on each of the proposed CVRA rules. After discussing the written comments and the hearings, the subcommittee voted unanimously to recommend that the Committee proceed with the proposed rules, with the modifications discussed below. The proposed rules implement key requirements of the CVRA, and it is the subcommittee's view that they are an appropriate step forward. One advantage of proceeding in this fashion is that the proposed rules (if approved by the Standing Committee, Judicial Conference, and Supreme Court) can go into effect December 2008, putting in place core provisions. The alternative would delay initial implementation of the CVRA by two years or more. Further amendments may also be desirable, but that need not delay the adoption of these rules. The Criminal Rules Committee can treat the question of victim rights as a continuing agenda item, allowing for consideration of amendments to other rules (or revisions, as needed in light of experience, to the rules that would be amended by our proposal). Several additional amendments were suggested in the public comment period by Senator Kyl, Representatives Poe and Costa, Judge Cassell, and the Federal Public and Community Defenders, among others. Additional proposals may come to the Committee's attention as a result of developments in judicial decisions.

The subcommittee reaffirmed two key decisions that guided its approach in drafting the proposed rules. First, it is desirable to bring together in Rule 60 several provisions that could have been dispersed throughout the rules. This gives the CVRA amendments prominence and makes it easy for victims--who are generally not lawyers--as well as the court and counsel to find most of the key provisions that govern victims. In this respect, the rule follows the pattern of Rule 49.1, which implemented the E-Government Act in a single rule.

Second, it is appropriate to proceed on step-by-step basis, beginning with rules that implement the clear requirements imposed by the statute, leaving many other issues that are less clear for additional development by judicial decisions that will make clear the factual situations in which the issues arise, and give us the benefit of thoughtful treatment by the judges who confront these issues. As noted above, the Committee can consider additional amendments over time.

We emphasize that this will not prevent the immediate implementation of the CVRA. The courts are already bound to follow the statute. But where the statute's dictates are not clear, or its directives may be accommodated in more than one way, it may be best to allow some judicial development of the issues which will guide the rulemaking process. (The same process being followed, for example, with the forfeiture rules that will also be presented at the April meeting.)

B. Recommended Changes to the Proposed Amendments

The subcommittee considered carefully each of the amendments that had been published for public comment. The proposed rules and accompanying committee notes, as well as the summaries of the relevant comments and a description of the changes in each rule, are provided at the end of this report. The subcommittee recommends the following significant changes in the rules as they were published:

- Language that stated that "a person accused of an offense is not a victim of that offense" has been deleted from the definition in Rule 1, and portions of the note referring to the persons who may represent minors and other victims who are incompetent, incapacitated or deceased have been transferred to Rule 60.

- Rule 60 has also been amended to state that the "victim's legal representative" may raise the victim's rights, as specified by the CVRA. The Committee Note has been revised to state the Committee's understanding that counsel may present the views of the victim or the victim's lawful representative.

- Rule 60 was also revised to state that a victim's rights can be raised by "any other person as authorized by 18 U.S.C. § 3771(d) and (e)." This incorporates the statutory provisions regarding victims who are minors and other victims who are incompetent, incapacitated or deceased, and it also recognizes the statutory limitations on a defendant's assertion of rights as a victim, which are found in 18 U.S.C. § 3771(d)(1) and (e).

- Language was added to the Committee Note accompanying Rule 1 indicating that the court can do any necessary fact-finding and make any legal rulings necessary to determine who is a victim for purposes of the rules. Although several of the comments strongly urged that the rules should create a procedure for determining who is entitled to be treated as a victim, the subcommittee felt that this should be left to judicial development. Moreover, any change of this nature would have required republication.

- Rule 17 has been amended to omit the provision authorizing the court to approve the issuance of subpoenas to third parties for personal or confidential information about the victim, and to state that unless there are exceptional circumstances a victim must be given notice so that he or she may move to quash or modify the subpoena before its issuance. The Committee Note has been amended to provide a few examples of personal or confidential information, and to state that the refinement of these terms is left to case development.

- Language has been added to the Committee Note accompanying Rule 18 to recognize that the court must have substantial discretion to resolve conflicts among the competing interests and preferences for the place of trial. This language addresses concerns that the conflicting perspectives would be unmanageable and that the proposal might require the trial to be held in a location that would be inconvenient for the court, prosecution, defense, and all witnesses.

- Language has been added to the Committee Note accompanying Rule 32 stating that absent unusual circumstances any victim who is in the courtroom during sentencing should be allowed a reasonable opportunity to speak directly to the judge. This clarifies the meaning of the

statutory phrase "right to be reasonably heard," which is incorporated in Rule 32.

C. Changes That Are Not Recommended

The subcommittee discussed at length, and ultimately decided that it did not support, several other possible changes recommended by one or more of the comments.

• No change is recommended in Rule 12.1. At the suggestion of the Standing Committee, we requested comments on the question whether the rule should assume that a defendant must demonstrate need to get the name and contact information for a victim who will testify to rebut his alibi defense, or should instead require a case-by-case showing of the need to withhold this information. Several comments urged that the published rule struck the wrong balance, and that the proposed amendment to Rule 12.1 tips the adversarial balance too far as a policy or constitutional matter by requiring a showing of need for the name and contact information of any victim who will be called to rebut an alibi defense. Many other comments argued that the proposed rule does not go far enough. They argued it gives too little weight to victim interests in providing--upon a showing of need–for either disclosure of this information to the defense or some other reasonable procedure to allow the preparation of the defense as well as the protection of the victim's interests. The subcommittee concluded that the rule, as published, strikes an appropriate balance. It withholds information initially unless there is a showing of need, but provides that if such a showing is made the court can provide the information or, if necessary, fashion another remedy to protect the victim but allow defense preparation. The rule fairly puts the burden, in the first instance, on the defendant. In a normal case, the victim is not likely to be in a position to raise a timely objection or establish a basis for non disclosure, and the government may not be privy to all of the relevant facts. If the defendant establishes a "need" for this information, the government and or the victim will have time to weigh in before disclosure can occur. The "need" threshold is an appropriate basis to trigger the court's consideration of all aspects of the need and risk analysis. Moreover, there is ample authority to protect the victim, since the court has the authority under Rule 12.1(d) for good cause to grant relief from any of the requirements in the rule.

• Several comments expressed concern about the amendment to Rule 32(d)(2)(B) eliminating the requirement that information in the PSR regarding victim impact must be "verified" and "stated in a nonargumentative style." This language was added by the Sentencing Reform Act, part of the Comprehensive Crime Control Act of 1984. In 1994 Congress enacted legislation that provided a different process for death penalty cases, removing the special considerations related from those cases from the province of Rule 32. The subcommittee concluded that the special verification and style language is no longer needed. All information in the PSR should meet these requirements.

• Finally, there were proposals for additional amendments to Rules 1, 32, and 60, as well proposals to amend several other rules. These proposals introduce new issues going significantly beyond the proposed amendments upon which public comments have been sought. They would require publication or republication, and are beyond the scope of this report.

This item is on the agenda for the April meeting in Brooklyn.

Rule 1. Scope; Definitions

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

* * * *

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

* * * * *

COMMITTEE NOTE

Subdivision (b)(11). This amendment incorporates the definition of the term "crime victim" found in the Crime Victims' Rights Act, codified as 18 U.S.C. § 3771(e). It provides that ". . . the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."

Upon occasion, disputes may arise over the question whether a particular person is a victim. Although the rule makes no special provision for such cases, the courts have the authority to do any necessary fact finding and make any necessary legal rulings.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The Committee revised the text of Rule 1(b)(11) in response to public comments by transferring portions of the subdivision relating to who may assert the rights of a victim to Rule 60(b)(2). The Committee Note was revised to reflect that change and to indicate that the court has the power to decide any dispute as to who is a victim.

SUMMARY OF PUBLIC COMMENTS

Judge Paul Cassell (06-CR-002) expressed concern that the definition of victim did not also refer to the victim's representative.

Thomas Hillier, for the Federal Public and Community Defenders (06-CR-003) expressed several concerns: (1) the definition should apply only to listed rules to avoid unintended consequences, including the possibility that persons who claim to be victims of crimes not yet charged could assert rights under the rules, (2) the rule provides no procedure for determining whether an individual claiming to be a victim is entitled to assert the victim's rights, and (3) the language deeming the accused not to be a victim is not an appropriate way to implement the statutory directive that a person accused of a crime cannot obtain any relief under the Crime

Victims' Rights Act.

Peter Goldberger, on behalf of the National Association of Criminal Defense Lawyers (06-CR-010) suggests that the reference to representatives for minors, deceased, and incapacitated victims should be moved to Rule 60, where it could be added to the provisions regarding "who may assert" the rights of victims. He opposes the second sentence of the rule, since an accused may in some circumstances be a victim, and he suggests that addition of language stating that a government agency may not be a victim for this purpose. He also supports the Federal Defenders' proposal for new procedures determining how and by whom victims' rights may be asserted.

The **Federal Magistrate Judges Association (06-CR-015)** supports the proposed amendment, noting that incorporating the statutory definition by reference means that any statutory changes will become effective immediately without the necessity of amending the rule.

Barbara Adkins, on behalf of the Jordan Center for Criminal Justice and Penal Reform (06-CR-019) opposes the amendment because it "would equate 'crime victim' under the CVRA with 'victim' under the Rules, present and future, independent of the CVRA." She fears that this would affect rights and privileges under other statutes, such as the Victim and Witness Protection Act and the Victim's Restitution Act. In her view, this rule exceeds the authority conferred by the Rules Enabling Act. She also objects to the proposed language stating that the defendant was not a victim of the crime, noting that co-defendants may each claim to be the other's victim. She urges that a procedure is necessary to determine who is a victim for this purpose.

The State Bar of California Committee on Federal Courts [hereinafter State Bar of California] (06-CR-023) opposes the second sentence of the draft rule, which provides that a person accused of an offense is not a victim, since in cases such as alien smuggling a person who has some degree of culpability may also be a victim, and the usual labeling of defendant and victim may not be applicable.

Rule 12.1. Notice of an Alibi Defense.

* * * *

(b) Disclosing Government Witnesses.

(1) ***Disclosure.***

(A) *In general.* If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney:

(I) ~~(A)~~ 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 establish that the defendant was present at the scene of the alleged offense, and

(ii) ~~(B)~~ each government rebuttal witness to the defendant's alibi defense.

(B) *Victim's Address and Telephone Number.* If the government intends to rely on a victim's testimony to establish that the defendant was present at the scene of the alleged offense 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 preparation of the defense and also protects the victim's interests.

(2)*Time to Disclose.* Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

(c) 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 each additional witness-- and the address; and telephone number of each additional witness other than a victim – if:

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

(2) the witness should have been disclosed under Rule 12.1(a) or (b) 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 (b)(1)(B).

COMMITTEE NOTE

Subdivisions (b) and (c). 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 an alibi 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 an alibi claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (c).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The Committee made very minor changes in the text at the suggestion of the Style Consultant. The Committee revised the Note in response to public comments, omitting the suggestion that the court might upon occasion have the defendant and victim meet.

SUMMARY OF PUBLIC COMMENTS

Judge Paul Cassell (06-CR-002) opposes the amendment as drafted, arguing that the rule should be revised to eliminate any requirement that the government provide the defense with the name and contact information for a victim whom it expects to call to rebut an alibi defense. The proposed rule is inadequate, in his view, on several grounds: (1) it requires only a showing of "need" to overcome the blanket protection for this information, (2) if a showing of need is made, the rule does not adequately protect victims because it does not clearly require the court to give priority to the victim's safety concerns, and it does not expressly provide that the court may decline to turn over this information if necessary to protect the victim, and (3) it does not provide that the victim has a right to be heard on the question whether this information will be provided to the defense. Although

the language "the court may" gives the court discretion, it is troublesome that the rule authorizes disclosure to the defendant as well as defense counsel. Moreover, it is inappropriate to suggest in the notes that the court could order a face to face meeting rather than providing the defense with the victim-witness's name and contact information.

Thomas Hillier, for the Federal Public and Community Defenders (06-CR-003) opposes the amendment on the ground that it upsets the constitutional balance between prosecution. The present rule properly presumes that the defendant who presents an alibi defense needs to locate, interview, and investigate a witness who will place him at the scene of an crime, and requires disclosure of those witnesses' names and contact information to facilitate that process. The Supreme Court has recognized the witnesses may be asked their names and addresses, because they are necessary in order to open various avenues of cross examination as well as out of court investigation. Yet the proposed amendment would force the defendant to provide the names and contact information for his alibi witnesses, on pain of having them excluded at trial, though he would not be given the name and contact information for a victim whose testimony would place him at the scene of the crime unless he could make a showing of his need for the information. This violates due process, which prohibits notice of alibi rules that are not reciprocal. It also rule sets a dangerous precedent by giving an interpretation to the statutory rights under the CVRA that abridges defendants' constitutional rights. There is no need for such a procedure, since the victim's right to be reasonably protected from the accused and to be treated with fairness and dignity can be accommodated adequately under current Rule 12(d), which provides for exceptions from disclosure for good cause. If necessary, Rule 12(d) could be amended to provide expressly for situations when disclosure of this information would violate the victim's right to be reasonably protected from the accused.

Peter Goldberger, on behalf of the National Association of Criminal Defense Lawyers (06-CR-010) opposes the amendment on the grounds that it is not reasonable to restrict the opportunity of all defendants to investigate and prepare their cases on the assumption that all victims needs this protection, rather than requiring a showing of a special need for secrecy. The proposed rule goes too far in creating a burdensome procedure for victims that is not available even for confidential informants or cooperating co-defendants. It is unhelpful to suggest that the court might authorize the defendant and his counsel to meet with the victim rather than providing the victim's contact information. The fact that a witness is also a victim does not, by itself, justify protecting that person from being approached, in a lawful manner, for purposes of pretrial investigation and preparation.

The Federal Magistrate Judges Association (06-CR-015) supports the amendment.

Barbara Adkins, on behalf of the Jordan Center for Criminal Justice and Penal Reform (06-CR-019) opposes the amendment because (1) it is not required by the CVRA, (2) it will operate unfairly, denying defendants necessary information, and (3) it is not reciprocal. Nondisclosure should be the exception, not the rule, and must be justified on a case-by-case basis by clear and convincing evidence.

Monika Johnson Hostler on behalf of the National Alliance to End Sexual Violence (06-CR-021) opposes the amendment on the ground that it provides only a "negligible" standard for

releasing the name and contact information of a victim who would be called to rebut the defendant's alibi defense. Moreover, it does not provide for the victim to be heard on the question whether this information should be released.

The State Bar of California (06-CR-023) indicates that its membership was divided on the wisdom of this amendment. Some felt that requiring the defendant to show need to get this information was not necessitated by the CVRA, would impose undue burdens on the courts, and would improperly accelerate the required disclosure of defense strategies. Thus the rule should continue to assume defendants need this information, and provide that it should be limited only when there is a showing of a special need to do so. Others, however, support the amendment, noting that defendants may be able to make the required showing of need ex parte. They also suggested that some prosecutors have already adopted similar practices.

Mary Lou Leary on behalf of the National Center for Victims of Crime (06-CR-024) emphasizes the seriousness of the problem of intimidation, and supports the proposal's requirement that a defendant show a need for the name and contact information of a victim who will be called to rebut an alibi defense.

Rule 17. Subpoena

* * *

(c) Producing Documents and Objects

* * *

(3) Subpoena for Personal or Confidential Information About a Victim. After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require that notice be given to the victim so that the victim can move to quash or modify the subpoena.

COMMITTEE NOTE

Subdivision (c)(3). This amendment implements the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(a)(8), which states that victims have a right to respect for their "dignity and privacy." The rule provides a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. Third party subpoenas raise special concerns because a third party may not assert the victim's interests, and the victim may be unaware of the subpoena. Accordingly, the amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party. The phrase "personal or confidential information," which may include such things as medical or school records, is left to case development.

The amendment provides a mechanism for notifying the victim, and makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2) on the grounds that it is unreasonable or oppressive. The rule recognizes, however, that there may be exceptional circumstances in which this procedure may not be appropriate. Such exceptional circumstances might include evidence that might be lost or destroyed if the subpoena were delayed, or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy.

The amendment applies only to subpoenas served after a complaint, indictment, or information has been filed. It has no application to grand jury subpoenas. When the grand jury seeks the production of personal or confidential information, grand jury secrecy affords substantial protection for the victim's privacy and dignity interests.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The proposed amendment omits the language providing for ex parte issuance of a court order authorizing a subpoena to a third party for private or confidential information about a victim. The

last sentence of the amendment was revised to provide that unless there are exceptional circumstances the court must give the victim notice before a subpoena seeking the victim's personal or confidential information can be served upon a third party.

SUMMARY OF PUBLIC COMMENTS

Judge Paul Cassell (06-CR-002) opposes the amendment as drafted, on the ground that it gives too much discretion to the trial court, and he objects to allowing the court to grant a motion permitting such a subpoena ex parte. A victim whose personal or confidential information is being sought should be given notice and be heard in every case before the court permits the subpoena to be served. The published rule does not, in his view, reliably protect defense strategy, and alternative approaches would treat both prosecution and defense interests equitably. Judge Cassell also favors more detailed language that would clarify the standards as well as the procedures for authorizing the service of subpoenas for private or confidential information about the victim. In his view, the amendment could be read to expand the scope of a defendant's power to subpoena information about a victim.

Thomas Hillier, for the Federal Public and Community Defenders (06-CR-003) states that no amendment is needed, and that the published amendment will result in wasteful litigation, and undermine effective cross examination at trial, prematurely disclose defense strategy to the government, and give the government (whose grand jury subpoenas are not subject to this rule) an unfair advantage.

Russell Butler, on behalf of the Maryland Crime Victims' Resource Center, Inc. (06-CR-006) states that the proposed amendment does not adequately protect the victim's rights to privacy and fairness. Victims are entitled to notice of such subpoenas.

Peter Goldberger, on behalf of the National Association of Criminal Defense Lawyers (06-CR-010) opposes the amendment on the grounds that is unnecessary, and that it trenches on the defendant's Sixth Amendment rights to confront and cross examine witnesses, to have compulsory process, and to have the effective assistance of counsel in preparing and presenting a defense. The information sought in subpoenas of this nature is used to impeach credibility, and privacy is not a legitimate basis to restrict cross examination or impeachment of character. Such cross examination requires an element of surprise which would be defeated by notice and judicial prescreening.

Professor Wendy J. Murphy (06-CR-011) advocates preventing pre-trial discovery of privileged third party information.

The Federal Magistrate Judges Association (06-CR-015) supports the amendment but urges that the terms "personal" and "confidential" be defined.

Barbara Adkins, on behalf of the Jordan Center for Criminal Justice and Penal Reform (06-CR-019) concurs with the Federal Public and Community Defenders that the amendment is unnecessary and unwise.

Monika Johnson Hostler on behalf of the National Alliance to End Sexual Violence (06-CR-021) opposes the provision allowing ex parte approval of subpoenas because "victims should be informed and have the opportunity to oppose such intrusions into their confidentiality."

Mothers Against Drunk Driving (06-CR-022) support notification of victims when their private records are subpoenaed.

The State Bar of California (06-CR-023) indicates that its membership was divided on this amendment. Some opposed it because it adds one more onerous burden, impinging on the ability of the defense to challenge the veracity of victim-witnesses, particularly in the absence of a definition of the broad terms personal and confidential. Others believe "the benefit of avoiding unjustified harassment of victims outweighs the burden on the court and the defendant."

Mary Lou Leary on behalf of the National Center for Victims of Crime (06-CR-024) opposes "permitting the defense to obtain personal information about the victim in an ex parte manner." The rule should require that the victim be notified and have the right to be heard in every case when the subpoena is requested.

Robert Johnson on behalf of the American Bar Association (06-CR-028) expresses concern that the rule, as published, violates several ABA Standards by permitting attorneys to obtain evidence by means that violate the rights of third parties, by not allowing the victim or the victim's attorney to be heard, and by permitting ex parte contact with the court.

Rule 18. Place of Prosecution and Trial

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

COMMITTEE NOTE

By requiring the court to consider the convenience of victims – as well as the defendant and witnesses – in setting the place for trial within the district, this amendment implements the victim's right to attend proceedings under the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(b). If the convenience of non-party witnesses is to be considered, the convenience of victims who will not testify should also be considered.

The Committee recognizes that the court must have substantial discretion to balance the competing interests.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

There were no changes in the text of the rule. The Committee note was amended to draw attention to the court's discretion to balance the competing interests, which may be more important as the court must consider a new set of interests.

SUMMARY OF PUBLIC COMMENTS

Comments Supporting the Amendment

Judge Cassell (06-CR-002) (p. 59) supports the amendment, which was, as he notes, based upon his original submission to the Committee. He notes that the Committee Note grounds the amendment on the right to be treated with fairness under the CVRA and questions why the same analysis was not adopted in the case of other amendments he proposed.

The Federal Magistrate Judges Association (06-CR-016) (p.4) supports the amendment "because it implements the victim's right to attend proceedings under the CVRA."

Amy Sousa for the National Organization for Victim Assistance (06-CR-025) generally supports Judge Cassell's comments.

Comments Opposing the Amendment

Peter Goldberger for the NACDL (06-CR-010) (p. 9) argues that the amendment does not, as stated in the Committee Note, implement the victim's right to attend proceedings under 18 U.S.C. § 3771(b). In calling upon courts to make every effort to permit the fullest attendance of victims, he argues, subsection (b) merely implements18 U.S.C. § 3771(a), which he describes as a right not to be excluded, rather than a right to attend judicial proceedings. Thus the proposed amendment actually creates a new substantive right, which exceeds the scope of the authority granted by the Rules Enabling Act. Moreover, the provision is unwise because it allows a non-testifying victim "to press, under threat of a mandamus action, for a place of trial that may be hundreds of miles from the courthouse that is convenient to the judge, testifying witnesses and the defendant."

Thomas Hillier of the Federal Public and Community Defenders (06-CR-003)(p. 23) agrees with NACDL that 18 U.S.C. § 3771 precludes exclusion but does not create a right to attend judicial proceedings and thus does not provide a basis for the amendment, which would create a new substantive right to decide where the trial is to be held–enforceable by mandamus–that may cause hardship and expense for the defendant, witnesses, court, and prosecution.

Barbara Adkins and Mark Jordan of the Jordan Center for Criminal Justice and Penal Reform (06-CR-019)(p. 4-5) concur with the comments of the Federal Public and Community Defenders; the proposed amendment could cause "judicial inefficiency and potential chaos in cases involving numerous self-proclaimed victims advocating different venues." The qualified right of victims to attend proceedings does not require the courts to "bring such proceedings to their living rooms."

The **State Bar of California (06-CR-023)** (p.5) argues that the amendment is an "overbroad reaction" to 18 U.S.C. § 3771(b). It would be difficult to implement in complex cases and cases involving many non-testifying victims, such as those involving Ponzi schemes. The amendment might lead to burdensome and unnecessary litigation.

Rule 32. Sentencing and Judgment

(a) [Reserved.] ~~Definitions.~~ ~~The following definitions apply under this rule:~~

~~(1) "Crime of violence or sexual abuse" means:~~

~~(A) a crime that involves the use, attempted use, or threatened use of physical force against another's person or property; or~~

~~(B) a crime under 18 U.S.C. §§ 2241–2248 or §§ 2251–2257.~~

~~(2) "Victim" means an individual against whom the defendant committed an offense for which the court will impose sentence.~~

* * *

(c) Presentence Investigation.

(1) ***Required Investigation.***

* * *

(B) *Restitution.* If the law ~~requires~~ permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

* * *

(d) Presentence Report.

* * *

(2) ***Additional Information.*** The presentence report must also contain the following ~~information~~:

(A) the defendant's history and characteristics, including:

(I) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) ~~verified~~ information~~, stated in a nonargumentative style,~~ that assesses ~~the~~ any financial, social, psychological, and medical impact on any victim ~~individual against whom the offense has been committed~~;

* * *

35 **(i) Sentencing.**

* * *

(4) ***Opportunity to Speak.***

(A) *By a Party*. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) *By a Victim*. Before imposing sentence, the court must address any victim of ~~a~~ the crime ~~of violence or sexual abuse~~ who is present at sentencing and must permit the victim to be reasonably heard ~~speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:~~

~~(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or~~

~~(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated~~.

COMMITTEE NOTE

Subdivision (a). The Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(e), adopted a new definition of the term "crime victim." The new statutory definition has been incorporated in an amendment to Rule 1, which supersedes the provisions that have been deleted here.

Subdivision (c)(1). This amendment implements the victim's statutory right under the Crime Victims' Rights Act to "full and timely restitution as provided by law." *See* 18 U.S.C. § 3771(a)(6). Whenever the law permits restitution, the presentence investigation report should contain information permitting the court to determine whether restitution is appropriate.

Subdivision (d)(2)(B). This amendment implements the Crime Victims' Rights Act, codified as 18 U.S.C. § 3771. The amendment employs the term "victim," which is now defined in Rule 1. The amendment also makes it clear that victim impact information should be treated in the same way as other information contained in the presentence report. It deletes language requiring victim

impact information to be "verified" and "stated in a nonargumentative style" because that language does not appear in the other subdivisions of Rule 32(d)(2).

Subdivision (i)(4). The deleted language, referring only to victims of crimes of violence or sexual abuse, has been superseded by the Crime Victims' Rights Act, 18 U.S.C. § 3771(e). The act defines the term "crime victim" without limiting it to certain crimes, and provides that crime victims, so defined, have a right to be reasonably heard at all public court proceedings regarding sentencing. A companion amendment to Rule 1(b) adopts the statutory definition as the definition of the term "victim" for purposes of the Federal Rules of Criminal Procedure, and explains who may raise the rights of a victim, so the language in this subdivision is no longer needed.

Subdivision (i)(4) has also been amended to incorporate the statutory language of the Crime Victims' Rights Act, which provides that victims have the right "to be reasonably heard" in judicial proceedings regarding sentencing. *See* 18 U.S.C. § 3771(a)(4). The amended rule provides that the judge must speak to any victim present in the courtroom at sentencing. Absent unusual circumstances, any victim who is present should be allowed a reasonable opportunity to speak directly to the judge.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the text of the rule. In response to public comments, the Committee Note was amended to make it clear that absent unusual circumstances any victim who is in the courtroom should have a reasonable opportunity to speak directly to the judge.

SUMMARY OF PUBLIC COMMENTS

Judge Paul Cassell (06-CR-002) (pp. 66-78) opposes the amendment because the government should be required to disclose "relevant" portions of the presentence report (PSR) to victims, and victims should be able to object on disputed issues therein. This argument proceeds in several steps. First, the right to be "reasonably heard" encompass not only the right to provide information regarding the impact of the crime upon the victim, but also the right to make sentencing recommendations. Second, since the guideline calculation will likely be a significant factor in the ultimate sentence, the right to make sentencing recommendations should be interpreted to include the right to be heard on relevant guideline issues. This, in turn, requires access to relevant portions of the report. Judge Cassell bases these arguments on Senator Kyl's statement in the legislative

history describing the right to be reasonably heard on the sentence as including the right to make sentencing recommendations, as well as the victim's statutory right to be treated with fairness. He distinguishes *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006), which affirmed the district court's refusal to provide a victim with the PSR, on the ground that it involved a request for the whole report, not merely the relevant portions. He rejects as inadequate the notion that the prosecutor should have discretion to determine what information from the PSR should be provided to the victim, on the ground that the CVRA gives the victim an independent statutory right to the information in question.

Judge Cassell also takes issue with the Committee's position that courts should gradually define the contours of the right to be reasonably heard, reasoning that Congress intended a paradigmatic shift expanding and defining victim rights, including the right to dispute sentencing issues.

Judge Cassell couples these objections with suggestions that would increase procedural protections for defendants. For instance, he suggests requiring notice be given to the defendant when an upward departure might rest on information provided by the victim, an issue upon which there is currently a split in the circuits.

Finally, Judge Cassell opposes section (i)(4) for changing the victim's right to "speak or submit any information" to the right to be "reasonably heard" at sentencing. He argues that this section should directly state that victims have the right to speak at sentencing, as suggested by the legislative history and "as the only courts to have reached the issue have held."

Thomas Hillier of the Federal Public and Community Defenders (06-CR-003) (pp. 24-26) opposes the revision of (c)(1)(B) for requiring the Probation Officer to conduct an investigation and submit a report on restitution merely if the law "permits restitution," as opposed to if the law "requires restitution."

He opposes the revision of (d)(2)(B) for deleting the requirement that information regarding the impact on the victim to be "verified" and "stated in a nonargumentative style." Indeed, he argues these requirements should apply to all information in the presentence report, which should be added as (d)(4).

He opposes the revision of (i)(4)(B) for requiring the court to address any victim at sentencing, and for implying (with the word "address") that the victim has the right to "speak" at sentencing. He believes the rule should specifically reference Rule 60(a)(3). He also suggests that the title of (i)(4) should be changed from "Opportunity to Speak" to "Opportunity to be Heard" to avoid confusion.

Russell P. Butler on behalf of Maryland Crime Victims' Resource Center (06-CR-006) (pp. 4-8) opposes the amendment because victims should have the right to speak, rather than to be "reasonably heard," regarding sentencing. He believes that the court should have an affirmative obligation to ask the victim if he wishes to speak at sentencing and, where the victim is absent, to ask the government if the victim has been notified. Also, he believes that the presentence report should be required to identify victims, the victim's representative should be able to assert the victim's rights, and the victim's standing should be incorporated under sections (f)-(I).

Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers (06-CR-010) (pp. 11-14) opposes section (c)(1)(B) for making a presentence report mandatory, even when the interests of justice dictate otherwise. He believes restitution should not be addressed at all in the rule, and should be left to the distinct statutory scheme. He also opposes (d)(2)(B) for eliminating the requirement that victim impact information be verified and stated in a nonargumentative style. He also argues that section (i)(4)(B) should make clear that the trial judge has broad discretion and that the section should note that the right to be "heard" does not grant the right to "speak."

Federal Magistrate Judges Association (06-CR-015) (p.3) broadly supports the amendment.

Barbara Adkins on behalf of the Jordan Center for Criminal Justice and Penal Reform (06-CR-019) (p. 6) opposes the deletion of the requirements that information in the presentence report be verified and stated in a nonargumentative style (otherwise, she suggests eliminating reliance on presentence reports altogether). She also objects to section (i)(4)(B) for failing to require that notice of a victim's evidence be given to the defendant. She believes that courts should not be required to address victims (as some may prefer not to be addressed), and should retain broad discretion over courtroom decorum and protocol. She notes that these changes would be more appropriately incorporated into a new Rule 60.

The State Bar of California Committee on Federal Courts (06-CR-023) (pp. 5-6) opposes the amendment for deleting the requirements that presentence report information be verified and stated in a nonargumentative style. It also opposes the (i)(4)(B) changes, preferring that victim statements be submitted as part of the written presentence report.

Senator Jon Kyl (06-CR-026) protests that the revisions do not go far enough to advance the purposes of the CVRA and poses this question: "Does Rule 32 treat victims fairly in failing to guarantee victims a chance to review the presentence report and the Sentencing Guidelines calculation that will control the sentence and provide an opportunity to speak directly to the judge, rights criminal defendants already enjoy? He suggests that the answer is "no."

Rule 60. Victim's Rights

(a) In General.

(1) ***Notice of a Proceeding.*** The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime.

(2) ***Attending the Proceeding.*** The court must not exclude a victim from a public court proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at that proceeding. The court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.

(3) ***Right to Be Heard.*** The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime.

(b) Enforcement and Limitations.

(1) ***Time for Deciding a Motion.*** The court must promptly decide any motion asserting a victim's rights under these rules.

(2) ***Who May Assert the Rights.*** A victim's rights under these rules may be asserted by the victim, the victim's lawful representative, the attorney for the government, or any other person as authorized by 18 U.S.C. § 3771(d) and (e).

(3) ***Multiple Victims.*** If the court finds that the number of victims makes it impracticable to accord all of them their rights described in subsection (a), the court must fashion a reasonable procedure that gives effect to these rights without unduly complicating or prolonging the proceedings.

(4) ***Where Rights May Be Asserted.*** The rights described in subsection (a) must be asserted in the district in which a defendant is being prosecuted for the crime.

(5) ***Limitations on relief.*** A victim may move to reopen a plea or sentence only if:

(A) the victim has asked to be heard before or during the proceeding at issue, and the request was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 10 days after the denial, and the writ is granted; and

(C) in the case of a plea, the accused has not pleaded to the highest offense charged.

(6) ***No New Trial.*** A failure to afford a victim any right under these rules is not grounds for a new trial.

COMMITTEE NOTE

This rule implements several provisions of the Crime Victims' Rights Act, codified as 18 U.S.C. § 3771, in judicial proceedings in the federal courts.

Subdivision (a)(1). This subdivision incorporates 18 U.S.C. § 3771(a)(2), which provides that a victim has a "right to reasonable, accurate, and timely notice of any public court proceedings. . . ." The enactment of 18 U.S.C. § 3771(a)(2) supplemented an existing statutory requirement that all federal departments and agencies engaged in the detection, investigation, and prosecution of crime identify victims at the earliest possible time and inform those victims of various rights, including the right to notice of the status of the investigation, the arrest of a suspect, the filing of charges against a suspect, and the scheduling of judicial proceedings. *See* 42 U.S.C. § 10607(b) & (c)(3)(A)-(D).

Subdivision (a)(2). This subdivision incorporates 18 U.S.C. § 3771(a)(3), which provides that the victim shall not be excluded from public court proceedings unless the court finds by clear and convincing evidence that the victim's testimony would be materially altered by attending and hearing other testimony at the proceeding, and 18 U.S.C. § 3771(b), which provides that the court shall make every effort to permit the fullest possible attendance by the victim.

Rule 615 of the Federal Rules of Evidence addresses the sequestration of witnesses. Although Rule 615 requires the court upon the request of a party to order the witnesses to be excluded so they cannot hear the testimony of other witnesses, it contains an exception for "a person authorized by statute to be present." Accordingly, there is no conflict between Rule 615 and this rule, which implements the provisions of the Crime Victims' Rights Act.

Subdivision (a)(3). This subdivision incorporates 18 U.S.C. § 3771(a)(4), which provides that a victim has the "right to be reasonably heard at any public proceeding in the district court involving release, plea, [or] sentencing...."

Subsection (b). This subdivision incorporates the provisions of 18 U.S.C. § 3771(d)(1), (2), (3), and (5). The statute provides that the victim, the victim's lawful representative, and the attorney for

the government, and any other person as authorized by 18 U.S.C. § 3771(d) and (e) may assert the victim's rights. In referring to the victim and the victim's lawful representative, the committee intends to include counsel. 18 U.S.C. § 3771(e) makes provision for the rights of victims who are incompetent, incapacitated , or deceased, and it also provides that "[a] person accused of a crime may not obtain any form of relief under the Crime Victims' Rights Act." Similarly, 18 U.S.C. § 3771(d)(1) provides that "[a] person accused of a crime may not obtain any form of relief under this chapter."

The statute provides that those rights are to be asserted in the district court where the defendant is being prosecuted (or if no prosecution is underway, in the district where the crime occurred). Where there are too many victims to accord each the rights provided by the statute, the district court is given the authority to fashion a reasonable procedure to give effect to the rights without unduly complicating or prolonging the proceedings.

Finally, the statute and the rule make it clear that failure to provide relief under the rule never provides a basis for a new trial. Failure to afford the rights provided by the statute and implementing rules may provide a basis for re-opening a plea or a sentence, but only if the victim can establish all of the following: the victim asserted the right before or during the proceeding, the right was denied, the victim petitioned for mandamus within 10 days as provided by 18 U.S.C. § 3771 (d)(3), and – in the case of a plea – the defendant did not plead guilty to the highest offense charged.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

Subsection (b)(2) was revised to respond to concerns that the amendments did not clearly state that the victim's lawful representative could assert the victim's rights. The Committee Note makes it clear that a victim or the lawful representative of a victim may generally participate through counsel, and provides that any other person authorized by 18 U.S.C. § 3771(d) and (e) may assert the victim's rights, such as persons authorized to raise the rights of victims who are minors or are incompetent. Other minor changes were made at the suggestion of the Style Consultant to improve clarity.

SUMMARY OF PUBLIC COMMENTS

Judge Paul Cassell (06-CR-002) (pp. 86-99) recommends that some of the issues dealt with in Rule 60 would be better treated in other sections. He also specifically opposes the following subsections:

> (a)(1) because the rule should also require that victims be notified of their rights at proceedings, specifically the right to make a statement, rather than being notified merely of the existence of proceedings. Additionally, he states that the rule should include a section

detailing how courts should proceed when victims lack notice of a hearing.

(a)(3) because victims should have the right to heard at any proceeding affecting their rights, not just at bail, plea, and sentencing hearings (as the amendment suggests).

(b)(1) because the proposed rule uses the term "promptly" rather than the statutory term "forthwith."

(b)(2) because the proposed rule does not state that the victim's lawful representative can assert the victim's rights.

(b)(4) (where rights may be asserted) because it omits key language from 18 U.S.C. § 3771(d)(3) providing venue, if no prosecution is underway, in the district in which the crime occurred.

(b)(5)(a-c) because these provisions should be qualified, following the CVRA, to note that they do not affect a victim's right to restitution.

Judge Cassell supports subsection (a)(2). He opposes the NACDL's proposal for a full evidentiary hearing to determine victim status, which is not in the published rule.

Thomas Hillier of the Federal Public and Community Defenders (06-CR-003) (pp. 26-41) opposes restating the statutory right to not be excluded in the rules, arguing that the proper role of the rules is to provide a procedure for implementing that right, and to clarify which "determination described in subsection (a)(3)" is being referenced. He also argues that the court should be required to state its rationale for denials of exclusion.

Hillier criticizes (a)(3) because it should do more than merely restate the victim's statutory right to be "reasonably heard," and should, instead, clarify the breadth of the district court's discretion to restrict victim input. The rule should also afford the defendant adequate notice of a victim's statement and sufficient opportunity to respond.

Hillier also opposes subdivision (b) because it should require victims to assert rights by motions and should specify where, when, and by whom rights may be asserted – including a procedure for determining victim status. He argues that a court should be required to state, on the record, the reasons for any CVRA decision, not just those denying relief. The rule should direct readers to the applicable Federal Rules of Appellate Procedure, should properly implement the "motion to re-open a plea or sentence" rule, and should make clear that relief afforded a victim under the statute should not violate others' constitutional rights.

Hillier supports (a)(1).

Russell P. Butler on behalf of Maryland Crime Victims' Resource Center (06-CR-006) (pp. 12-15) opposes the proposed rule on the grounds that it does not safeguard, with sufficient clarity, the court's obligations to victims. For example, he asserts that courts should inquire about

the presence of and notice given to victims at every proceeding, and should inform victims of their rights whenever those rights are implicated. Also, he argues that the rules should provide for appointment of counsel for victims in appropriate circumstances. Additionally, he proposes that the right to be reasonably heard should apply in any proceeding and that the victim's attorney should be able to assert the victim's rights.

Professor Douglas E. Beloof, of Lewis & Clark Law School (06-CR-009) (pp. 1-3) generally supports Judge Cassell's rule proposals and argues that the CVRA should be integrated into the rules more thoroughly.

Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers (06-CR-010) (pp. 4-9) opposes the amendment because a fact-finding determination of victim status would be the only way to safeguard the defendant's due process rights. He argues that such a finding would have to involve a determination that (1) a federal crime had occurred and (2) that the crime directly and proximately harmed the putative victim. He also proposes changing the amendment to refer to the "rights under § 3771(a)" and not the "rights under these rules."

Goldberger agrees that it should be the government's responsibility to notify victims under (a)(1).

He opposes (a)(2), arguing that it largely restates substantive rights that do not belong in the Rules of Procedure, except for a requirement that the court articulate its reasons for deciding a motion. He agrees with the Federal Public and Community Defenders that this section should include a procedural framework for how to exclude a victim from the proceedings.

He similarly opposes much of (a)(3) as improperly restating substantive law. He argues that this subsection should clarify and expand the district court's discretion to manage its caseload, permitting it to hear the victim only in writing, to hear the victim before public proceedings, and to control the victim's oral statement within reason (including discretion to allow the defendant's counsel to question the victim).

He opposes section (b) because it does not currently specify that the victim's rights must be asserted by motion, as if the victim were a party, allowing the defendant to participate.

Federal Magistrate Judges Association (06-CR-015) (p.3) supports the proposed amendment.

Barbara Adkins on behalf of the Jordan Center for Criminal Justice and Penal Reform (06-CR-019) (pp. 4, 6-8) generally concurs with the analyses of the Federal Public and Community Defenders and the NACDL, though not necessarily with their recommended alternatives. She states that Rule 60 should be re-titled "Rights of Crime Victims" or "Rights of Victims and Crime Victims" to distinguish the CVRA's use of the word "victim" from other uses in the United States Code and Federal Rules. She also argues that the breadth of the victim's right to attend proceedings under (a)(2) is unconstitutional, violating the separation of powers and due process.

She opposes (b)(2) for permitting the government to assert the victim's rights because the government often has conflicting interests. She also opposes the reopening of pleas or sentences, especially when the defendant lacks the right to thereafter withdraw the plea. Finally, she argues for the addition of a provision stating that no assertion of rights by a victim may prejudice the rights of the accused or be contrary to the interests of justice.

Mothers Against Drunk Driving (MADD) (06-CR-022) (p.1) broadly supports Judge Cassell's rule proposals.

The State Bar of California Committee on Federal Courts (06-CR-023) (pp. 7-8) generally opposes this proposed rule as a restatement of the CVRA that both expands and limits the provisions of § 3771. However, the Committee believes that alterations to certain sections can remedy the problem by bringing the Rule into accord with the precise statutory language.

The Committee believes that (b)(1) should clarify the time limits placed on motion rulings and stays of proceeding, that (b)(2) should allow the victim's lawful representative to assert the victim's rights, that (b)(4) should include statutory language on where the victim's rights may be asserted, and that (b)(5)(B) should not include the language "of the denial and the writ is granted."

The Committee notes that sections (a)(2), (a)(3), (b)(3), and (b)(6) are generally consistent with the statute, but that they "seem[] redundant."

Amy C. Sousa on behalf of the National Organization for Victim Assistance (06-CR-025) (p. 1) advocates for the wholesale adoption of the CVRA according to Judge Cassell's rule proposals.

Senator Jon Kyl (06-CR-026) (pp. 2-3) concludes that many of the amendments are inconsistent with the CVRA. He criticizes (b)(2) for preventing the victim's representative from asserting the victim's rights. He opposes (a)(3) for confining the matters on which victims may be heard to release, plea, and sentencing proceedings, as opposed to all matters relevant to crime victims. This seems to provide no mechanism for a victim to raise other rights under the CVRA, such as the right to proceedings free from unreasonable delay. The Senator stressed that the CVRA enjoyed bipartisan support and that legislative intent, as present in the Congressional Record, demands full implementation of the "sweeping" changes of the CVRA. He also endorses Judge Cassell's approach.

Representatives Poe and Costa, co-chairs of the Congressional Victim's Rights Caucus (06-CR-027) (p. 1) endorse a "meaningful incorporation of the CVRA rights into the federal rules."

Rule 61~~60~~. Title

These rules may be known and cited as the Federal Rules of Criminal Procedure.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made.

SUMMARY OF PUBLIC COMMENTS

No comments were received.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 29

DATE: March 26, 2007

The proposed amendment to Rule 29 is the product of four years of work by the Criminal Rules Committee. The amendment was published in August 2006, and many written comments were received. Additionally, at the public hearing in January 2007 several speakers addressed the proposed amendment at length.

The proposed amendment to Rule 29 generated substantial opposition from both the bench and the bar (though there were some positive comments). The main themes in the statements opposing the amendment were the following:

- The amendment subverts the defendant's immediate interest in finality, which is protected by both Due Process and the Double Jeopardy clause;

- The amendment intrudes upon judicial independence and unduly restricts the historic powers of the trial court.

- The amendment exceeds the authority granted by the Rules Enabling Act.

- The amendment's waiver provision imposes an unconstitutional condition.

- The data provided by the government do not show the need for an amendment, because the statistical information failed to isolate pre-trial acquittals, which are quite rare.

- A close examination of the records in the individual cases upon which the department relied demonstrates that the court in each case acted properly.

The Rule 29 subcommittee has held one teleconference to discuss the public comments, and it has scheduled an additional call that will take place before the Committee's April meeting in Brooklyn. At the first teleconference, the discussion focused on three questions: (1) whether the proposed amendment violated the Double Jeopardy Clause or imposed an unconstitutional condition,

(2) whether there was a need for some change in the rule, and (3) whether a different approach could more effectively achieve the purpose of the proposed amendment. At the conclusion of this call, the subcommittee voted to table the proposed amendment.

The proposed amendment, as published, and a summary of the public comments are provided below. Further materials may be distributed following the Rule 29 subcommittee's second teleconference.

This item is on the agenda for the April meeting in Brooklyn.

Rule 29. Motion for a Judgment of Acquittal

(a) Time for a Motion.

(1) ***Before Submission to the Jury.*** After the government closes its evidence or after the close of all the evidence, ~~the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.~~ a defendant may move for a judgment of

acquittal on any offense. The court may invite the motion.

(2) After a Guilty Verdict or a Jury's Discharge. A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later. A defendant may make the motion even without having made it before the court submitted the case to the jury.

(b) Ruling on a Motion Made Before Verdict. If a defendant moves for a judgment of acquittal before the jury reaches a verdict (or after the court discharges the jury before verdict), the following procedures apply:

(1) ***Denying Motion or Reserving Decision.*** The court may deny the motion or may reserve

decision on the motion until after a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved. The court must set aside a guilty verdict and enter a judgment of acquittal on any offense for which the evidence is insufficient to sustain a conviction.

(2) ***Granting Motion; Waiver.*** The court may not grant the motion before the jury returns a verdict (or before the verdict in any retrial in the case of discharge) unless:

(A) the court informs the defendant personally in open court and determines that the defendant understands that:

(i) the court can grant the motion before the verdict only if the defendant agrees

that the government can appeal that ruling; and

(ii) if that ruling is reversed, the defendant could be retried; and

(B) the defendant in open court personally waives the right to prevent the government from appealing a judgment of acquittal (and retrying the defendant on the offense) for any offense for which the court grants a judgment of acquittal before the verdict.

(c) Ruling on a Motion Made After Verdict. If a defendant moves for a judgment of acquittal after the jury has returned a guilty verdict, the court must set aside the verdict and enter a judgment of acquittal on

any offense for which the evidence is insufficient to sustain a conviction.

~~(b) **Reserving Decision.** The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.~~

~~(c) After Jury Verdict or Discharge.~~

~~(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later.~~

~~**(2) Ruling on the Motion.** If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.~~

~~**(3) No Prior Motion Required.** A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.~~

Committee Note

Subdivisions (a), (b), and (c) The purpose of the amendment is to allow the government to seek appellate review of any judgment of acquittal. At present, the rule permits the court to grant acquittals under circumstances where Double Jeopardy will preclude appellate review. If the court grants a Rule 29 acquittal before the jury returns a verdict, appellate review is not permitted because Double Jeopardy would prohibit a retrial. If, however, the court defers its ruling until the jury has reached a verdict, and then grants a motion for judgment of acquittal, appellate review is available, because the jury's verdict can be reinstated if the acquittal is reversed on appeal.

The amendment permits preverdict acquittals, but only when accompanied by a waiver by the defendant that permits the government to appeal and – if the appeal is successful – on remand to try its case against the defendant. Recognizing that Rule 29 issues frequently arise in cases involving multiple counts and or multiple defendants, the amendment permits any defendant to move for a judgment of acquittal on any count (or counts). Following the usage in other rules, the amendment uses the terms "offense" and "offenses," rather than count or counts.

The amended rule protects both a defendant's interest in holding the government to its burden of proof and the government's interest in appealing erroneous judgments of acquittal, while ensuring that the court will only have to consider the motion once. Although the change has required some reorganization of the subdivisions, no substantive change is intended other than the limitation on preverdict rulings and the new waiver provision.

Subdivision (a). Amended Rule 29(a), which states the times at which a motion for judgment of acquittal may be made, combines provisions formerly in subdivisions (a) and (c)(1). No change is intended except that the court may not grant the motion before verdict without a waiver by the defendant.

The amended rule omits the statement in Rule 29(a) that: "If the defendant moves for judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so." The Committee concluded that this language was no longer necessary. It referred to a practice in some courts, no longer followed, of requiring a defendant to "reserve" the right to present a defense when making a Rule 29

motion. There is no reason to require such a reservation under the amended rule.

Subdivision (b). Amended Rule 29(b) sets forth the procedures for motions for a judgment of acquittal made before the jury reaches a verdict or is discharged without reaching a verdict. (There is, of course, no need to rule if a not guilty verdict is returned.) Prior to verdict, the Rule authorizes the court to deny the motion or reserve decision, but the court may not grant the motion absent a defendant's waiver of Double Jeopardy rights. *See Carlisle v. United States*, 517 U.S. 416, 420-33 (1996) (holding that trial court did not have authority to grant an untimely motion for judgment of acquittal under Rule 29).

Accordingly, if the defendant moves for a judgment of acquittal at the close of the government's evidence or the close of all the evidence, in the absence of a waiver the court has two options: it may deny the motion or proceed with trial, submit the case to the jury, and reserve its decision until after a guilty verdict is returned. As under the prior Rule, if the defendant made the motion at the close of the government's evidence, the court must grant the motion if the evidence presented in the government's case is insufficient, *see Jackson v. Virginia*, 443 U.S. 307 (1979), even if evidence in the whole trial is sufficient. If the government successfully appeals, the guilty verdict can be reinstated. *Cf. United States v. Morrison*, 429 U.S. 1 (1976) (holding that Double Jeopardy does not preclude appeal from judgment of acquittal entered after guilty verdict in bench trial, because verdict can be reinstated upon remand).

Similarly, if the defendant moves for a judgment of acquittal after the jury is discharged and the government wishes to retry the case,

absent a waiver the court has two options. It may deny the motion, or it may reserve decision, proceed with the retrial, submit the case to the new jury, and rule on the reserved motion if there is a guilty verdict after the retrial. *See Richardson v. United States*, 468 U.S. 317, 324 (1984) ("a retrial following a 'hung jury' does not violate the Double Jeopardy Clause"). After the second trial, the court must grant the motion if the evidence presented at the first trial was insufficient when the motion was made, even if the evidence in the retrial was sufficient. This procedure permits the government to appeal, because the verdict at the second trial can be reinstated if the appellate court rules that the judgment of acquittal was erroneous.

The court may grant a Rule 29 motion for acquittal before verdict only as provided in subdivision (b)(2), the waiver provision. Under amended Rule 29(b)(2), the court may rule on the motion for judgment of acquittal before the verdict with regard to some or all of the counts, after first advising the defendant in open court of the requirement of the Rule and the protections of the Double Jeopardy Clause, and after the defendant waives those protections on the record. Although the focus of the rule is on the waiver of the defendant's Double Jeopardy rights, the rule does not refer explicitly to Double Jeopardy. Instead, it puts the waiver in terms a lay defendant can most readily understand: the defendant's waiver allows the government to appeal a judgment of acquittal, and to retry him if that appeal is successful.

As with any constitutional right, the waiver of Double Jeopardy rights must be knowing, intelligent, and voluntary. *See generally Johnson v. Zerbst,* 304 U.S. 458, 464 (1938); *United States v. Morgan*, 51 F.3d 1105, 1110 (2d Cir. 1995) ("the act of waiver must be shown to have been done with awareness of its consequences").

Although there are cases holding that a defendant's action or inaction can waive Double Jeopardy, the Committee believed that it was appropriate for the Rule to require waiver both under the rule and explicitly on the record. *See United States v. Hudson*, 14 F.3d 536, 539 (10th Cir. 1994) (when consent order did not specifically waive Double Jeopardy rights, no waiver occurred); *Morgan*, 51 F.3d at 1110 (civil settlement with government did not waive Double Jeopardy defense when settlement agreement was not explicit, even if individual was aware of ongoing criminal investigation). For a case holding that a defendant may waive his Double Jeopardy rights to allow the government to appeal, see *United States v. Kington*, 801 F.2d 733 (5th Cir. 1986), *appeal after remand*, *United States v. Kington*, 835 F.2d 106 (5th Cir. 1988).

Before the court may accept a waiver, it must address the defendant in open court, as required by subdivision (b)(2). A general model for this procedure is found in Rule 11(b), which provides for a plea colloquy that is intended to insure that the defendant is knowingly, voluntarily, and intelligently waiving a number of constitutional rights.

Subdivision (c). The amended subdivision applies to cases in which the court rules on a motion made after a guilty verdict. This was covered by subdivision (c)(2) prior to the amendment. The amended rule restates the applicable standard, using the same terminology as former subdivision (a)(1). No change is intended.

SUMMARY OF PUBLIC COMMENTS

Comments Supporting the Amendment

Federal Magistrate Judges Association (06-CR-015) supports the amendment because it alleviates the impact of otherwise unreviewable and erroneous acquittals and because it contains sufficient guarantees that any waiver is determined, on the record, to be knowing, intelligent, and voluntary.

Jeanne M. Kempthorne (06-CR-017) supports the amendment because permitting district judges unreviewable power to make the ultimate decision on a case is both undemocratic and an invitation for abuse. She argues such judicial power also "treads on the toes" of the jury and undermines the grand jury's function. She concludes that good- and bad-faith errors are certain to occur, and that both real abuse and the potential for abuse can be remedied by adopting the amendment.

Comments Opposing the Amendment

Thomas W. Hillier II, Federal Public and Community Defenders (06-CR-003) (pp. 3-14 & Exhibit B) opposes the amendment on the grounds that (1) it interferes with the trial court's common law and constitutional power to terminate a case for failure of proof rather than submitting it to the jury, (2) subverts the defendant's immediate interest in finality, which is protected by both Due Process and the Double Jeopardy clause, (3) restricts the exercise of a constitutional right in a manner that may exceed the authority granted by the Rules Enabling Act, and (4) imposes an unconstitutional condition on the defendant's rights under the Double Jeopardy Clause. Additionally, he challenges the data presented by the Department of Justice in support of the amendment as "incomplete, misleading, and

unreliable." He takes issue with DOJ's statistical evidence because it combines pre-verdict acquittals with post-verdict acquittals and acquittals in bench trials. Reversals of post trial acquittals are not a good measure of pre-verdict acquittals, since judges by definition reserve ruling in closer cases. Finally, he provides a detailed analysis in Exhibit B of the representative cases, explaining the basis of the court's ruling and arguing that in each case the court acted properly. In summary, he argues that the amendment turns its back on the traditional principle that "it is far worse to convict an innocent man than to let a guilty man go free."

William N. Clark (06-CR-004) urges elimination of the amendment out of concern for ongoing erosion of Fifth Amendment rights.

Brendan V. Sullivan, Jr. on behalf of Williams & Connolly LLP (06-CR-007) opposes the amendment because the Fifth Amendment was designed to avoid the "embarrassment, expense and ordeal" suffered by defendants subjected to double-jeopardy prosecution. He notes the amendment could also cause lengthy and costly retrials, thus compelling innocent defendants to live in a state of "anxiety and insecurity." Additionally, he argues that the trial court is the appropriate bulwark against irrational or unsupported jury verdicts, and that there is no evidence of widespread errors in granting pre-verdict acquittals. Finally, he suggests that the amendment may run afoul of the Rules Enabling Act's proscription on modification of substantive rights.

Hon. James F. Holderman (06-CR-008) disputes the DOJ's statistics because they do not spell out either the absolute number of pre-verdict acquittals, nor do they identify the number where the

court's ruling was agreed to by the government. In any event, he states that the reversal of post-verdict acquittals is relatively rare, suggesting that DOJ has exaggerated the problem. He states that judges are extraordinarily careful in considering motions for pre-verdict acquittal.

Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers (06-CR-010) (pp. 15-23) argues that "allowing the government to put an accused in jeopardy twice poses a greater danger than allowing an 'erroneous' acquittal to go uncorrected." First, he argues the amendment does not do justice to important constitutional protections. Second, he disputes the reliability of the DOJ's statistics, as well as their conclusion that the number of erroneous acquittals is significant. Third, he argues the amendment would effectively end all mid-trial acquittals. Fourth, he contends the amendment would unconstitutionally require a defendant to waive one right to exercise another. Finally, he argues that the Rules Committee lacks the authority to implement the amendment, since the Criminal Appeals Act only allows review of dismissals (not acquittals) and the Rules Enabling Act prohibits expansion of the government's right to appeal.

Douglas Young on behalf of the Committee on Federal Criminal Procedure, American College of Trial Lawyers (06-CR-012) opposes the amendment because pre-verdict acquittals are rare and part of the inherent powers reserved to trial courts. Also, he argues that the amendment does not serve the interest in finality underscoring both the Due Process and Double Jeopardy Clauses.

Terence P. Noonan, Esq. (06-CR-013) opposes the amendment because it would undermine "the sanctity of the judges as the sole

arbiters of the law." He proposes that if that is to happen, and the amendment is to be adopted, jury nullification should simultaneously be revived to restore the jury's place as legal arbiter.

Nanci Clarence on behalf of the Bar Association of San Francisco (06-CR-014) opposes the amendment because it intrudes on judicial independence in a realm where the standards for granting pre-verdict acquittal are already quite high.

Robert M. A. Johnson on behalf of the American Bar Association (06-CR-016) (pp. 1-7) opposes the amendment as unwarranted given the relatively small number of pre-verdict acquittals and the trial courts' need for this tool in lengthy and complex trials. Also, he argues that the "Catch-22" of placing in opposition the rights to due process and to contest the sufficiency of the government's evidence would prevent any waiver from being truly voluntary. Finally, he notes that the court's power to grant pre-verdict acquittals is one of the few checks on otherwise-unfettered prosecutorial discretion.

Hon. Paul L. Friedman (06-CR-018) opposes the amendment because the current rule strikes an appropriate balance between the interests of the government and the defendant, and serves the interests of judicial economy and discretion. He is also concerned that the change is not needed given the small number of pre-verdict acquittals and would improperly force a waiver on defendants.

Paul B. Bergman on behalf of the New York Council of Defense Lawyers (NYCDL) (06-CR-20) opposes the amendment as "unnecessary, inappropriate and unconstitutional." He argues that the amendment would not further the rationales of the Federal Rules of

Criminal Procedure, including the just, swift, and effective resolution of cases. He also contends that the amendment would violate a number of constitutional provisions, including due process, double jeopardy, and the separation of powers.

Comments Supporting and Opposing the Amendment

The State Bar of California Committee on Federal Courts (06-CR-23) (p. 8) is split on the amendment, with some members opposing it based on the opinions set forward above and others supporting it on the grounds that erroneous acquittals should be able to be remedied and that defendants who do not wish to waive their double jeopardy rights may simply wait for the ruling until after the jury verdict.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Search Warrants for Property Outside of United States**

DATE: **March 25, 2007**

The proposed amendment to Rule 41(b) adds a new paragraph authorizing magistrate judges to issue warrants for property that is within the jurisdiction of the United States, but outside of any judicial district. It responds to a problem that the Department has encountered when federal prosecutors work with the State Department Bureau of Diplomatic Security to investigate and prosecute cases involving corruption in United States embassies and consulates around the world. Many cases involved allegations that corrupt consular officials and/or foreign service nationals are selling U.S. visas to foreign individuals who may or may not qualify for a U.S. visa. These crimes take place overseas, and often the most important evidence is located in the offices or residences associated with the consulate or embassy. These problems have arisen in cases involving embassies and consulates in many countries and in American Samoa, a United States territory that is administered by the Department of the Interior but has no federal district court. Although these locations are within U.S. control, they are not located within any State or U.S. judicial district.

As currently written, Rule 41(b) does not provide magistrate judges with the authority to issue warrants for such locations. *See, e.g., United States v. Wharton*, 153 F. Supp. 2d 878, 882 (W.D. La. 2001) ("clearly, Rule 41 did not empower any United States District Court to issue a search warrant for the defendant's property when it was located at the United States Embassy in Port-au-Prince, Haiti.") Although the USA PATRIOT Act amended Rule 41(b) to provide magistrate judges with the authority to issue warrants outside the magistrate's district, this authority is applicable only in cases involving certain terrorism offenses. *See* Rule 41(b)(3).

The language of the proposed amendment was based upon Rule 41(b)(3), which was added by the USA PATRIOT Act, and upon the definition of the special maritime and territorial jurisdiction

of the United States contained in 18 U.S.C. § 7(9), which includes U.S. consulates and embassies. The proposed amendment provides for jurisdiction in any district in which activities related to the crime under investigation may have occurred, or in the District of Columbia, which is the default jurisdiction for venue under 18 U.S.C. § 3238.

A similar but broader amendment was approved in 1990 by the United States Judicial Conference, which recommended that the Supreme Court adopt the new rule. The Supreme Court declined to adopt the rule at that time, concluding that the matter required "further consideration." The 1990 proposal was broadly worded: it applied to property "lawfully subject to search and seizure by the United States." In contrast, the current proposal, as published, was limited to property within any of the following:

(1) a territory, possession, or commonwealth of the United States;

(2) the premises of a United States diplomatic or consular mission in a foreign state, and the buildings, parts of buildings, and land appurtenant or ancillary thereto, used for purposes of the mission, irrespective of ownership; or

(3) residences, and the land appurtenant or ancillary thereto, owned or leased by the United States, and used by United States personnel assigned to United States diplomatic or consular missions in foreign states.

These are all locations in which the United States has a legally cognizable interest or in which it exerts lawful authority and control.

The Committee was advised by the Department of Justice that the proposed amendment had been subject to extensive review by agencies such as the Department of State and the Office of Management and Budget. Its scope was deliberately kept narrow to avoid any thorny international issues. It addresses search warrants, not arrest warrants, since the latter may raise issues under extradition treaties.

I. Application to American Samoa

At the request of the Standing Committee a reference to American Samoa was added to the rule and placed in brackets, and comment was sought on whether American Samoa presented a special case. The Pacific Islands Committee of the Judicial Council of the Ninth Circuit (whose comments are summarized below and reprinted in full infra) opposes the application of the rule to American Samoa, suggesting that the matter requires further study, and that a different amendment that would treat the High Court of Samoa as the equivalent of a state court would be preferable to the current proposal.

The Department of Justice continues to support the rule, and believes it should apply to American Samoa. A gap in the Government's ability to enforce the law is plainly present in American Samoa. The Department is presently conducting investigations involving possible federal criminal activity in American Samoa, and the Federal Bureau of Investigation has now established a Resident Agency in American Samoa to address criminal activity in the territory.
Because American Samoa is not located within any federal judicial district, violations of Title 18 that occur in American Samoa must be prosecuted in districts outside of American Samoa, consistent with the venue provisions of 18 U.S.C. § 3238. The proposed amendment of Rule 41(b) would simply provide United States magistrate judges located in those other federal districts with the authority to issue search warrants to gather evidence that pertains to those federal criminal violations. In the Department's view the suggestion of the Pacific Islands Committee for a different amendment to Rule 41 addresses distinct issues of comity that are beyond the focus of the current proposal which should not delay the implementation of the current proposal. The Department's letter is reprinted below.

II. Clarifying Changes in the Rule

Joe Kimball, our Style Consultant, noted a number of ambiguities in the language of the subsections (b)(5)(B) and (C) as published, and urged rephrasing to clarify and simplify the rule, despite the fact that it tracks the statutory provisions. For example, it is unclear what if any difference there is between "appurtenant" and "ancillary" lands or buildings. Nor is it clear what the phrase "irrespective of ownership" modifies in (b)(5)(B).

I have provided below a revision intended to simplify and clarify this language. In an effort to prevent any arguments that the change in language modifies the scope of the authority granted by the rule, I have added language to the Committee Note stating that the revision in language was

intended to clarify the rule and bring it into conformity with the style conventions of the rules, but that the authority granted to the magistrate judge was intended to be coextensive with that granted by the statute, 18 U.S.C. § 7(9).

This matter is on the agenda for the Committee's meeting in Brooklyn.

Rule 41. Search and Seizure

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

* * * * *

(5) a magistrate judge having authority in any district where activities related to the crime may have occurred, or in the District of Columbia, may issue a warrant for property that is located outside the jurisdiction of any state or district, but within any of the following:

(A) a United States territory, possession, or commonwealth[,except American Samoa];

(B) the premises–no matter who owns them--of a United States diplomatic or consular mission in

a foreign state, including any appurtenant buildings, parts of buildings, and land used for the mission's purposes; or

(C) residences and any appurtenant land owned or leased by the United States and used by United States personnel assigned to United States diplomatic or consular missions in foreign states.

COMMITTEE NOTE

Subdivision (b)(5). Rule 41(b)(5) authorizes a magistrate judge to issue a search warrant for property located within certain delineated parts of United States jurisdiction that are outside of any State or any federal judicial district. The locations covered by the rule include United States territories, possessions, and commonwealths not within a federal judicial district as well as certain premises associated with United States diplomatic and consular missions. These are locations in which the United States has a legally cognizable interest or in which it exerts lawful authority and control. The rule is intended to authorize a magistrate to issue a search warrant in any of the locations for which 18 U.S.C. § 7(9) provides jurisdiction. The difference between the language in this rule and the statute reflect the style conventions used in these rules, rather than any intention to alter

the scope of the legal authority conferred. Under the rule, a warrant may be issued by a magistrate judge in any district in which activities related to the crime under investigation may have occurred, or in the District of Columbia, which serves as the default district for venue under 18 U.S.C. § 3238.

Rule 41(b)(5) provides the authority to issue warrants for the seizure of property in the designated locations when law enforcement officials are required or find it desirable to obtain such warrants. The Committee takes no position on the question whether the Constitution requires a warrant for searches covered by the rule, or whether any international agreements, treaties, or laws of a foreign nation might be applicable. The rule does not address warrants for persons, which could be viewed as inconsistent with extradition requirements.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

With the assistance of the Style Consultant the Committee revised (b)(5)(B) and (C) for greater clarity and compliance with the style conventions governing these rules. Because the language no longer tracks precisely the statute, the Committee Note was revised to state that the proposed rule is intended to have the same scope as the jurisdictional provision upon which it was based, 18 U.S.C. § 7(9).

SUMMARY OF PUBLIC COMMENTS

The **Pacific Islands Committee of the Judicial Council of the Ninth Circuit (06-CR-001)** opposes the application of the rule to

American Samoa. If an amendment permitting a federal magistrate judge to issue a warrant in American Samoa is to be adopted, the proposal should be reviewed first by the judiciary of American Samoa and have the support of the Chief Justice of the High Court of American Samoa. Additionally, because American Samoa's representative to Congress has requested that the GAO conduct a study of the judiciary system in American Samoa, the committee suggests that the Advisory Committee should await such a report before taking a position on the proposed amendment. Instead of authorizing a federal magistrate to issue warrants, the committee states that Rule 41(b)(1) should be amended to allow issuance by a High Court Justice in American Samoa, which would put that court on the same footing as state courts in the United States.

Peter Goldberger, on behalf of the National Association of Criminal Defense Lawyers (06-CR-101) opposes proposed subsection 41(b)(5)(A) as unnecessary, on the ground that there has been no showing of a gap that needs filling, and no need to grant the authority to issue warrants to a magistrate far from the scene of the proposed search.

The **Federal Magistrate Judges Association (06-CR-015)** supports the amendment and states that it is aware of no reason why it should not apply in American Samoa.

The **California State Bar Association (06-CR-023)** has no objection to the proposed amendment.

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

March 7, 2007

The Honorable Susan C. Bucklew
Chair, Advisory Committee
on the Criminal Rules
United States District Court
109 United States Courthouse
611 North Florida Avenue
Tampa, FL 33602

Dear Judge Bucklew:

On April 3, 2006, the Advisory Committee on the Criminal Rules voted overwhelmingly to recommend that a proposed amendment to Rule 41(b), addressing search warrants for certain overseas property of the United States, be published for public comment. The proposed amendment would provide magistrate judges with the authority to issue search warrants for premises that are under U.S. control, but which are not located within any judicial district. The amendment was originally suggested by the Department of Justice to address problems in gathering evidence of criminal violations in locations, such as U.S. consulates and embassies overseas, and in U.S. territories, such as American Samoa.

The proposal was published for public comment in August 2006, and no objections were filed to the proposed amendment. However, the Pacific Islands Committee of the Ninth Circuit's Judicial Council did file a comment, recommending that the proposed amendment not apply to American Samoa. For the reasons discussed below, we believe the amendment should apply to all United States territories, including American Samoa.

The proposed amendment is designed to fill a troubling gap in the Government's ability to enforce federal criminal law. While the federal criminal code clearly applies to many locations that are outside of judicial districts, there is currently no mechanism set out in the Federal Rules of Criminal Procedure for the issuance and execution of search warrants to gather critical evidence in these locations. As Rule 41(b) of the Criminal Rules now stands, if a federal crime has been committed in a United States territory such as American Samoa, and if there is critical evidence of that crime located in American Samoa, no United States magistrate judge has

the explicit authority to issue a search warrant for that evidence. This gap is unwarranted and should be remedied.

The circumstances in American Samoa are precisely those that create the need for this amendment, and an exception for American Samoa as suggested by the Pacific Islands Committee, we believe, is misguided for several reasons. First, the law is clear that the substantive criminal offenses in Title 18 of the United States Code apply to conduct occurring in American Samoa, and that American Samoan courts do not have jurisdiction over those offenses. *See United States v. Lee*, 472 F.3d 638, 642-43 (9th Cir. 2006); *United States v. Gurr*, 471 F.3d 144, 154 (D.C. Cir. 2006). Second, as the Report of the Pacific Islands Committee acknowledges, Rule 41(b) currently does not authorize the issuance of federal search warrants for property that is located in American Samoa, other than in the exceptional circumstances set forth in Rule 41(b)(2) and (3). Thus, the gap in the Government's ability to enforce the law is plainly present in American Samoa. Third, this gap in Rule 41(b) coverage is not merely an academic issue in American Samoa: the Department of Justice is conducting investigations involving possible federal criminal activity in American Samoa, and the Federal Bureau of Investigation has now established a Resident Agency in American Samoa to address criminal activity in the territory.

Because American Samoa is not located within any federal judicial district, violations of Title 18 that occur in American Samoa must be prosecuted in districts outside of American Samoa, consistent with the venue provisions of 18 U.S.C. § 3238. The proposed amendment of Rule 41(b) would simply provide United States magistrate judges located in those other federal districts with the authority to issue search warrants to gather evidence that pertains to those federal criminal violations. We urge the adoption of this straightforward amendment to Rule 41(b), and we see no basis for excluding American Samoa from its application.

We note that the Report of the Pacific Islands Committee suggests another potential amendment to Rule 41(b)(1), which would place the High Court of American Samoa on the same footing as courts in the 50 States for purposes of issuing search warrants. This suggestion would address distinct issues of comity that are beyond the focus of the current proposal, and we understand that this new suggestion will be docketed and handled separately. We do not believe that this new suggestion should impact the current proposal, which addresses only the authority of United States magistrate judges. We also note that the High Court of American Samoa has now had an opportunity to review the proposed amendment – as per the suggestion of the Pacific Islands Committee – and has not objected to it.

We strongly urge the Committee to adopt the published amendment and not exclude American Samoa from its coverage.

We appreciate your assistance with the proposed amendment and look forward to continuing our work with you and the Committee to improve the federal criminal justice system.

Sincerely,

William A. Burck
Counselor to the
Assistant Attorney General

cc: Professor Sara Sun Beale
Mr. John Rabiej

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 45, Time Computation Amendment and Related Rules Changes

DATE: March 25, 2007

The time computation subcommittee, chaired by Leo Cunningham, has reviewed (1) the revised template developed by Judge Kravitz's committee, (2) the Criminal Rules that would be affected by the proposed time computation rules, and (3) the statutes governing time periods that may need adjustment if the new template is adopted.

The subcommittee recommends a revision of Rule 45(a) based upon the template developed by Judge Kravitz's committee and amendments to the Criminal Rules adapting the rules to the new computation methodology. This memorandum discusses the rationale for these recommendations; the text of the proposed amendments is provided at the end of the memorandum. The last portion of the memorandum discusses the problem posed by statutory time periods, and includes a list of statutes that may need amendment if the time counting project moves forward as anticipated.

I. Rule 45(a)

The subcommittee recommends that Rule 45(a) be amended to track the time computation template developed by the Kravitz committee. Only minor changes (such as the substitution of references to criminal rather than civil rules in the Committee note) were needed to adapt the template to the Criminal Rules.

Only one aspect of the proposed rule deserves special mention. Following the template, proposed Rule 45(a) applies to statutory time periods as well as to periods stated in the rules, with the exception of statutes that provide for a different time counting rule (such as "business days" or "excluding Saturdays, Sundays, and holidays"). As noted at the October meeting, application of a single computation method to all time periods is very desirable. This can be accomplished if Congress is willing to pass the necessary legislation. At present, however, it is not clear that Rule 45(a) has any application to statutory time periods. Unlike the comparable provisions in the other rules (such as Civil Rule 6(a)), Rule 45(a) currently contains no reference to statutory time periods, nor did it retain the general language "any time period" used prior to restyling. Accordingly, the proposed committee note recognizes that the new language may broaden the applicability of Rule 45.

Given the uncertainty of legislative relief, an alternative approach would be to delete the reference to the statutory time periods from Rule 45(a), leaving matters where they stand now. That issue is highlighted by the brackets in Rule 45(a). This course, however, poses its own difficulties, since in several cases statutory time periods underlie the time periods specified in the rules. For example, the time periods specified in Rule 5.1(c) for preliminary hearings are based upon the requirements of 18 U.S.C. § 3500(b). If the "new days are days" time computation rule is not applicable to the statutory periods, it leaves open the argument that actions that would be timely under the rules would not meet the statutory requirements.

The subject of legislative relief is discussed further in the last section of this memorandum.

II. Corresponding Changes to Other Criminal Rules

The most significant change in the template is the change from excluding weekends and holidays from the calculation of time periods of 11 days or less under the current rule to the new "days are days" approach that counts all such days (except that it extends a period that would otherwise end on a weekend or holiday to the next business day). It is this change that set in motion the process of reviewing our rules. Our goal was to offset the change in the manner of counting by an adjustment of days so that the new counting rules do not increase or decrease the effective times available to the court or the parties.

As discussed in October, the subcommittee has adopted the presumption (suggested by Judge Kravitz's umbrella committee) that periods of time of 30 days or less should be converted to multiples of 7, and the chart that follows reflects conversions consistent therewith. Thus 10 days were generally increased to 14 days, which provides the court and counsel with approximately the same time as 10 days excluding weekends and holidays. We generally converted periods of 7 days (now the practical equivalent of at least 9 days because of the exclusion of weekends and holidays) to 14 days. Our discussion focused on the following rules.

Rule 5.1(c)

The rule requires a preliminary hearing to be held within 10 days after a defendant's initial appearance if the defendant is in custody or 20 days if the defendant is not in custody. The subcommittee favored extending these periods to 14 and 21 days, but noted that these periods are based upon 18 U.S.C. § 3060(b). If the statute can be amended, conversion to 14 and 21 days would be the rough equivalent of the times under the current rule, which excludes weekends and holidays. See below for a discussion of the statutory issue.

Rules 29(c)(1), 33(b)(2) and 34.

The rules on motions for post-verdict acquittal (Rules 29(c)(1)), new trial (Rule 33(b)(2)), and arrest of judgment (34) require these motions to be filed within 7 days. The subcommittee recommends increasing the time in each of these rules to 14 days. The subcommittee concluded that there was something to be gained from what is, in practical terms, allowing a slightly longer period

for filing these motions, and little or no disadvantage to doing so. At present, excluding weekends and holidays from the 7 day period means that the defense has at least 9 days for such motions. Requests for continuances are frequent, and often the motions are filed in a bare bones fashion requiring later supplementation. Rather than increasing the need for continuances, it would be preferable to set the general time at 14 days (a multiple of 7).

While not opposing the change, the Department of Justice expressed doubt that the longer period was justified, noting that the original time periods for these motions was much shorter than it is in the present rules: 5 days for post-verdict motions for acquittal and arrest of judgment, and 3 days for motions for a new trial.

Rule 32(g)

The rule presently requires that the presentence report be submitted to the court at least 7 days prior to sentencing. The subcommittee recommends that this period be left unchanged, despite the fact that the inclusion of weekends and holidays will effectively shorten the period to 5 days (or less if there is a holiday). The subcommittee was concerned that a change might require other changes in the time periods provided in the sentencing rules, since they interrelate, and it felt that the parties would not be prejudiced by the effective shortening of the time before the sentencing hearing because they would already have reviewed the report and submitted their objections.

Rule 35(a)

The present rule allows the court to correct a sentence for arithmetic, technical, or other clear error within 7 days after sentencing (which is, in practical terms, approximately 9 days under the current counting rules). The subcommittee recommends increasing this to 14. Subcommittee members noted that extending this period is desirable because sentencing is now so complex that minor technical errors are not uncommon. Extension of the period to 14 days will not cause any jurisdictional problems if an appeal has been filed because FRAP 4(b)(5) expressly provides that the filing of a notice of appeal does not divest the district court of jurisdiction to correct a sentence under Rule 35(a). (There was some sentiment on the committee for a rule that would allow the court to correct such errors at any time, but this falls beyond the scope of the current computation project.)

Rule 41(e)(2)(A)(i)

The rule now states that a warrant must command that it be executed within a specified time no longer than 10 days (which can be up to 14 days under the current time computation rules). The subcommittee recommends that the period be extended to 14 days, although it noted that the considerations here are significantly different than those pertinent to many of the other rules. First, warrants can and often are executed on nights and weekends. Second, there is a real concern that the warrant not be executed on the basis of stale evidence. For that reason, the courts often set a time for execution that is shorter than 10 days. On the other hand, there are situations in which more time may be needed for the proper execution of a highly complex warrant. After weighing these various considerations, the subcommittee concluded that designating a 14 day period was appropriate because it was the rough equivalent of the present period, followed the multiples of 7

rule of thumb, and still left the court with discretion to set a shorter time period in individual cases, as is frequently done at present.

Rule 46(h)(2)

This rule provides that after a material witness has been held for more than 10 days pending indictment, arraignment, or trial, the government must begin providing biweekly reports to the court. The question is whether this period, like the 10 day period in Rule 41(e)(2)(A)(i), should be extended to 14 days. Because the rule is based on a statute, the subcommittee was not sure if weekends and holidays were being excluded from the 10 day period as the rule is being employed. We were subsequently informed that this is the case, but that this interpretation has been derived from the underlying statute.

The detention of material witnesses is generally governed by 18 U.S.C. § 3144, which states that detained material witnesses shall be treated "in accordance with the provisions of section 3142 of this title." Section 3142(d) explicitly excludes Saturdays, Sundays, and holidays for purposes of determining the maximum detention period, in connection with temporary detention, to permit revocation of conditional release, deportation, or exclusion. For this reason, it appears that the prevailing practice, at present, is to exclude weekends and holidays from the calculation of the 10 day period under Rule 46(h), and that at least some of the actors involved construe 18 U.S.C. §§ 3142 and 3144 to require that result.

Since the revised template now provides expressly that it does not apply to statutory time periods where other time counting rules apply, it appears that the 10 day period under Rule 46(h) would be counted according to 18 U.S.C. §§ 3142 (d), and would exclude weekends and holidays.

III. Statutory Time Periods

The subcommittee's final assignment was to begin the process of identifying the statutory time periods that would be the highest priority for legislative action if the template's "days are days" approach were to be adopted. These would, in general, be statutes setting time periods of less than 11 days, which as noted above are presently being calculated by excluding weekends and holidays. If possible, the goal is to apply the template's counting rules to all time periods, both statutory and rule periods, and to have Congress make adjustments to the statutory periods needed to provide counsel and the courts with the same effective periods for critical tasks.

The subcommittee has begun, but not completed, the process of compiling its priority list. The attached letter from the Department of Justice provides a listing of a number of statutes. Other subcommittee members identified the following statutes:

18 U.S.C. § 3142(d)
18 U.S.C. § 4244(a)
18 U.S.C. § 3060(b)
18 U.S.C. § 3161(h)

18 U.S.C. § 3432
18 U.S.C. § 3552.

As stated in its letter, the Department of Justice has expressed concern that the new counting rules in Rule 45 should be made applicable to statutes if and only if the problems with key statutory terms are addressed at the same time. Additionally, the Department urges that the Standing Committee set up a mechanism for revising local rules in accordance with the proposed changes.

This item is on the agenda for the April meeting in Brooklyn.

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules or in any in any local rule or court order, or in any statute that does not specify a time-computation method.

(1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period Stated in Hours.*** When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, then continue the period until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Inaccessibility of Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day of a filing period computed under Rule 6(a)(1), then the time for filing is extended to the first day when the clerk's office is accessible that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour of a filing period computed under Rule 6(a)(2), then the time for filing is extended to the same time on the first day when the clerk's office is accessible that is not a Saturday, Sunday, or legal holiday.

(4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or order in the case, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Criminal Procedure, [a statute,] a local rule, or a court order. In accordance with Rule 57(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). [In making these time computation rules applicable to statutory time periods, subdivision (a) is consistent with Civil Rule 6(a). It is also consistent with the language of Rule 45 prior to restyling, when the rule applied to "computing any period of time." Although the restyled Rule 45(a) referred only to time periods "specified in these rules, any local rule, or any court order," some courts nonetheless applied the restyled Rule 45(a) when computing various statutory periods.]

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of a date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. *See, e.g.*, Rule 35(b)(1).

Under former Rule 45(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 45(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and, not infrequently, the 10-day period actually ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: if the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, the new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change the meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.*, Rules 29(c)(1), 33(b)(2), 34, and 35(a).

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Criminal Procedure, but some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under new subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept of inaccessibility will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases), while many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule CR49.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply to the computation of periods stated in hours under subdivision (a)(2). Subdivision (a)(4)'s definition does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may provide, for example, that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the court's authority to permit such a filing under the statute; instead, the rule is designed to deal with the ordinary course of events.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Criminal Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.*, Rule 59(b) (stating that a court may correct an arithmetic or technical error in a sentence "[w]ithin 7 days after sentencing"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 47(c) (stating that a party must serve a written motion "at least 5 days before the hearing date"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Criminal Procedure, including the time-computation provisions of subdivisions (a)(1) and (a)(2).

Rule	Summary of Current Rule	Proposed Change	Comment
1	No time provision		
2	No time provision		
3	No time provision		
4	No time provision		
5	No time provision		
5.1(c) 5.1(c)	Preliminary hearing for defendant in custody within a reasonable time but not later than 10 days after initial appearance. Preliminary hearing for defendant not in custody within a reasonable time but not later than 20 days after initial appearance.	The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than ~~10~~ 14 days after the initial appearance if the defendant is in custody and no later than ~~20~~ 21 days if not in custody.	Time period derives from 18 U.S.C. § 3060(b); if statute does not change, no change recommended
6(g)	Grand jury tenure – Until discharged by court but more than 18 months only if court determines that an extension is in the public interest. Extensions may be granted for no more than 6 months except as otherwise provided by statute.	No change	
7(f)	Motion for bill of particulars before arraignment or within 10 days after arraignment or at such later time as court may permit.	The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within ~~10~~ 14 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.	
8	No time provision		

9	No time provision		
10	No time provision		
11	No time provision		
12	No time provision		
12.1(a)(2) 12.1(b)(2)	Notice by defense of alibi – Defendant to serve within 10 days of written request from government, or at some other time the court sets. R. 12.1(a). Exceptions for good cause. Disclosure by government - Within 10 days after defendant serves notice of alibi, unless the court directs otherwise, government to disclose witnesses government intends to rely upon to establish defendant's presence at scene of offense and rebuttal witnesses to the alibi defense. Disclosure must be made no later than 10 days before trial. R. 12.1(b). Exceptions for good cause.	Within ~~10~~ 14 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state: Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within ~~10~~ 14 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than ~~10~~ 14 days before trial.	
12.2	No time provision		

12.3(a)(3)	Response to notice of public-authority defense – Government attorney must serve response within 10 days after receiving notice, but no later than 20 days before trial.	An attorney for the government must serve a written response on the defendant or the defendant's attorney within ~~10~~ 14 days after receiving the defendant's notice, but no later than ~~20~~ 21 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.	
12.3(a)(4)(A)	Government attorney, no later than 20 days before trial, may request statement of names, etc. of witnesses relied upon to establish public-authority defense.	An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than ~~20~~ 21 days before trial.	
12.3(a)(4)(B)	Within **7 days** after request, defendant must serve statement disclosing witnesses establishing public-authority defense.	No change	
12.3(a)(4)(C)	Within **7 days** after receiving defendant's statement, government attorney must serve statement of witnesses upon which the government intends to rely.	No change	
12.4	No time provision		
13	No time provision		
14	No time provision		

15	No time provision		
16	No time provision		
17	No time provision		
17.1	No time provision		
18	No time provision		
20	No time provision		
21	No time provision		
23	No time provision		
24	No time provision		
25	No time provision		
26	No time provision		
26.1	No time provision		
26.2	No time provision		
26.3	No time provision		
27	No time provision		
28	No time provision		
29(c)(1)	Motion for judgment of acquittal – Motion may be made or renewed within **7 days** after guilty verdict or after court discharges jury, whichever is later	No change	
29.1	No time provision		
30	No time provision		

31	No time provision		
32(e)(2)	Notice of presentence report at least 35 days before sentencing hearing, unless the defendant waives this minimum period, probation officer must give report to defendant, defendant's counsel, and an attorney for the Government.	No change	
32(f)(1)	Objections to presentence reports within 14 days after receiving report, parties must state in writing any objections, and provide a copy of objections to opposing party and probation officer.	No change	
32(g)	Submission to court of presentence report at least **7 days** before sentencing, probation officer must submit to court and parties report and addendum containing unresolved objections, grounds for those objections, and officer's comments on objections.	No change	
32.1	No time provision		
32.2	No time provision		
33(b)(1)	Newly discovered evidence – Only within three years after the verdict or finding of guilty. If appeal is pending, court may not grant motion until appellate court remands case.	No change	
33(b)(2)	Motion for new trial for any reason other than newly discovered evidence must be filed within 7 days after verdict or finding of guilt.	No change	

34	Defendant must move for arrest of judgment within 7 days after verdict or finding of guilty, or after plea of guilty or nolo contendere.	No change	
35(a) 35(b)	Within 7 days after sentencing, court may correct sentence resulting from arithmetical, technical, or other clear error. Assistance to government. Upon government motion made within one year of sentencing, if defendant after sentencing provided substantial assistance in investigating or prosecuting another person, and reduction accords with sentencing guidelines. If motion made more than one year after sentencing, if assistance involved information not known to defendant or not useful to government until one year or more after imposition, or was promptly provided to government after its usefulness was reasonably apparent to defendant.	No change No change	
36	No time provision		
38	No time provision		
40	No time provision		

41(e)(2)(A)	Search warrant must command officer to execute it within a specified time no longer than 10 days.	The warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to: **(A)** execute the warrant within a specified time no longer than ~~10~~ 14 days;	
42	No time provision		
43	No time provision		
44	No time provision		
45(a)(2) 45(c)	Intermediate Saturdays, Sundays, and legal holidays are excluded if the period is less than 11 days. When a party is required or permitted to act within a prescribed period after service of a notice or a paper upon that party, three calendar days are added to the prescribed period.	*** See Standing Sub-Committee Template Addressing Time Computation ***	
46(h)(2)	Attorney for government must report biweekly to court, listing witnesses held in excess of 10 days; shall state why each witness should not be released with or without a deposition being taken.	No change	Time period derives from 18 U.S.C. §§ 3142 & 3144, which provide their own time counting rules, therefore no change recommended

47(c) 47(d)	Service of written motions (other than motions court may hear ex parte) with supporting affidavits, and any hearing notice: at least 5 days before hearing date, unless rule or court order sets a different period. For good cause, court may set a different period upon ex parte application. Responding party must serve opposing affidavits to motion at least one day before hearing, unless court permits later service.	A party must serve a written motion--other than one that the court may hear ex parte--and any hearing notice at least ~~5~~ 7 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application. No change	
48	No time provision		
49	No time provision		
50	No time provision		
51	No time provision		
52	No time provision		
53	No time provision		
55	No time provision		
56	No time provision		
57	No time provision		

58(g)(2)(A)	Appeal from magistrate judge's order or judgment – Interlocutory appeal to district judge within 10 days after entry of order or judgment.	Either party may appeal an order of a magistrate judge to a district judge within ~~10~~ 14 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a notice with the clerk specifying the order being appealed and must serve a copy on the adverse party.	
58(g)(2)(B)	Appeal from magistrate judge's order or judgment – Appeal from conviction or sentence to district judge within 10 days after entry of order or judgment.	A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within ~~10~~ 14 days of its entry. To appeal, the defendant must file a notice with the clerk specifying the judgment being appealed and must serve a copy on an attorney for the government.	

59(a)	A party may file objections to a magistrate judge's order on a non-dispositive matter within 10 days after being served with the written order or after the oral order is stated on the record, or at some other time that the court sets	A district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may serve and file objections to the order within ~~10~~ 14 days after being served with a copy of a written order or after the oral order is stated on the record, or at some other time the court sets. The district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous. Failure to object in accordance with this rule waives a party's right to review.	
59(b)(2)	Within 10 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may file specific written objections to the magistrate judge's proposed findings and recommendations regarding a dispositive matter.	Within ~~10~~ 14 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may serve and file specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.	

60	No time provision		

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 5.1. Preliminary Hearing

* * * * *

(c) Scheduling. The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than ~~10~~ 14 days after the initial appearance if the defendant is in custody and no later than ~~20~~ 21 days if not in custody.

* * * * *

Rule 7. The Indictment and the Information

* * * * *

(f) Bill of Particulars. The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within ~~10~~ 14 days after arraignment or at a later time if the court

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

permits. The government may amend a bill of particulars subject to such conditions as justice requires.

Rule 12.1. Notice of an Alibi Defense

(a) Government's Request for Notice and Defendant's Response.

* * * * *

(2) Defendant's Response. Within ~~10~~ 14 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state:

(A) each specific place where the defendant claims to have been at the time of the alleged offense; and

(B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.

(b) Disclosing Government Witnesses.

* * * * *

(2) Time to Disclose. Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within ~~10~~ 14 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than ~~10~~ 14 days before trial.

* * * * *

Rule 12.3. Notice of a Public-Authority Defense

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

* * * * *

(3) Response to the Notice. An attorney for the government must serve a written response on the defendant or the defendant's attorney within ~~10~~ 14 days after receiving the defendant's notice, but no later than ~~20~~ 21 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

(4) Disclosing Witnesses.

(A) *Government's Request.* An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the

defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than ~~20~~ 21 days before trial.

(B) *Defendant's Response.* Within ~~7~~ 14 days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name, address, and telephone number of each witness.

(C) *Government's Reply.* Within ~~7~~ 14 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 the government intends to rely on to oppose the defendant's public-authority defense.

* * * * *

Rule 29. Motion for a Judgment of Acquittal

* * * * *

(c) After Jury Verdict or Discharge.

(1) ***Time for a Motion***. A defendant may move for a judgment of acquittal, or renew such a motion, within ~~7~~ 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

* * * * *

Rule 32. Sentencing and Judgment

* * * * *

(g) Submitting the Report. At least ~~7~~ 14 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the

grounds for those objections, and the probation officer's comments on them.

* * * * *

Rule 33. New Trial

* * * * *

(b) Time to File.

* * * * *

(2) ***Other Grounds.*** Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within ~~7~~ 14 days after the verdict or finding of guilty.

Rule 34. Arresting Judgment

* * * * *

(b) Time to File. The defendant must move to arrest judgment within ~~7~~ 14 days after the court accepts a

verdict or finding of guilty, or after a plea of guilty or nolo contendere.

Rule 35. Correcting or Reducing a Sentence

(a) Correcting Clear Error. Within ~~7~~ 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

* * * * *

Rule 41. Search and Seizure

* * * * *

(e) Issuing the Warrant.

* * * * *

(2) ***Contents of the Warrant.***

(A) *Warrant to Search for and Seize a Person or Property.* Except for a tracking device warrant, the warrant must identify the person

or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(i) execute the warrant within a specified time no longer than ~~10~~ 14 days;

* * * * *

~~**Rule 45. Computing and Extending Time**~~

~~**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules, any local rule, or any court order.~~

~~(1) ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period.~~

~~(2) ***Exclusion from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.~~

~~(3) ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.~~

~~(4) ***"Legal Holiday" Defined.*** As used in this rule, "legal holiday" means:~~

~~(A) the day set aside by statute for observing:~~

~~(i) New Year's Day;~~

~~(ii) Martin Luther King, Jr.'s Birthday;~~

~~(iii) Washington's Birthday;~~

~~(iv) Memorial Day;~~

~~(v) Independence Day;~~

~~(vi) Labor Day;~~

~~(vii) Columbus Day;~~

~~(viii) Veterans' Day;~~

~~(ix) Thanksgiving Day;~~

~~(x) Christmas Day; and~~

~~(B) any other day declared a holiday by the President, the Congress, or the state where the district court is held.~~

~~**(b) Extending Time.**~~

~~**(1)** ***In General.*** When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made:

~~(A) before the originally prescribed or previously extended time expires; or~~

~~(B) after the time expires if the party failed to act because of excusable neglect.~~

~~**(2) *Exception.*** The court may not extend the time to take any action under Rule 35, except as stated in that rule.~~

~~**(c) Additional Time After Service.** When these rules permit or require a party to act within a specified period after a notice or a paper has been served on that party, 3 days are added to the period if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D).~~

Rule 46. Release from Custody; Supervising Detention

* * * * *

(h) Supervising Detention Pending Trial.

* * * * *

(2) ***Reports***. An attorney for the government must report biweekly to the court, listing each material witness held in custody for more than ~~10~~ 14 days pending indictment, arraignment, or trial. For each material witness listed in the report, an attorney for the government must state why the witness should not be released with or without a deposition being taken under Rule 15(a).

* * * * *

Rule 47. Motions and Supporting Affidavits

* * * * *

(c) Timing of a Motion. A party must serve a written motion—other than one that the court may hear ex parte—and any hearing notice at least ~~5~~ 7 days before the hearing date, unless a rule or court order sets a

different period. For good cause, the court may set a different period upon ex parte application.

* * * * *

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(g) Appeal.

* * * * *

(2) ***From a Magistrate Judge's Order or Judgment.***

(A) *Interlocutory Appeal.* Either party may appeal an order of a magistrate judge to a district judge within ~~10~~ 14 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a notice with the clerk specifying the order

being appealed and must serve a copy on the adverse party.

(B) *Appeal from a Conviction or Sentence.* A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within ~~10~~ 14 days of its entry. To appeal, the defendant must file a notice with the clerk specifying the judgment being appealed and must serve a copy on an attorney for the government.

* * * * *

Rule 59. Matters Before a Magistrate Judge

(a) Nondispositive Matters. A district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings

and, when appropriate, enter on the record an oral or written order stating the determination. A party may serve and file objections to the order within ~~10~~ 14 days after being served with a copy of a written order or after the oral order is stated on the record, or at some other time the court sets. The district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous. Failure to object in accordance with this rule waives a party's right to review.

(b) Dispositive Matters.

* * * * *

(2) Objections to Findings and Recommendations. Within ~~10~~ 14 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may serve and file specific written objections to the proposed findings

and recommendations. Unless the district judge directs otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

* * * * *

MEMORANDUM

DATE: March 13, 2007

TO: Time Computation Subcommittee
Committee Reporters

FROM: Judge Mark R. Kravitz
Catherine T. Struve

CC: Judge David F. Levi
John K. Rabiej

RE: Two additional template issues

Since circulating the template draft last week, we have become aware of two issues that we would like to bring to your attention in advance of the Advisory Committee meetings this spring. At least one of those issues will require a change to the language of the proposed time-counting Rule.

The first issue concerns the template's effect on statutory provisions that both set a time period for use in litigation and provide explicit instructions on how the period should be computed. The second issue relates to the application of the "legal holidays" definition to litigation that takes place in the Territories, the District of Columbia or Puerto Rico. These issues are addressed in parts I and II below.

I. Statutory periods expressed in "business days" or similar language

Our subcommittee's master list of short statutory time periods omits periods that explicitly instruct that weekends and holidays not be counted. Those periods were omitted based on the assumption that since the statute specifies the manner of counting, no court would apply a contrary time-counting Rule. But it occurred to us recently that this assumption might have been hasty.

Most statutes that set time periods relating to litigation fail to specify how the periods should be counted. Some other statutes set periods in "calendar days";* those provisions are omitted from our master list on the assumption that they will continue to be counted the same way under the Rules' new days-are-days approach. And – of greatest relevance to this memo – a few statutes specify a time-counting method that is different from the one that will apply under the proposed template's approach; those provisions (13 statutes and one regulation) are listed in the enclosed spreadsheet.

As you know, the template states that its "rules apply in computing any time period specified in ... any statute...." And subdivision (a)(1) instructs that "[w]hen the period is stated in days or a longer unit of time" one must "count every day, including intermediate Saturdays, Sundays, and legal holidays." For all sets of Rules other than the Bankruptcy Rules, the supersession authority granted to the rulemakers means that once the template is adopted as part of the Rules, all statutory provisions to the contrary will be of no force and effect. So the question is whether any court would interpret the Rules' days-are-days time-counting directive to supersede an explicit statutory directive to use a non-days-are-days approach. As a policy matter, we believe it would be undesirable for the Rules to trump such directives. Those directives may have arisen, for example, from a legislative desire to set a short period but to avoid imposing hardship in the event that the period includes a weekend or holiday.

It is informative to consider the rationales that courts have used when applying existing or prior versions of the time-counting Rules to compute statutory periods. Some courts have applied those Rules as gap-filling measures in the absence of any contrary indication from Congress.** In some instances, courts have applied a time-counting Rule "by analogy," or as a reasonable estimation of congressional intent in enacting the relevant statutory scheme, rather than indicating

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* See, e.g., 12 U.S.C. § 3410(b) ("All such proceedings shall be completed and the motion or application decided within seven calendar days of the filing of the Government's response.").

** For example, the Third Circuit reasoned as follows in a Federal Tort Claims Act case: "Section 2401(b) does not contain a time computation rule. It does not say whether the day of the liability causing event is included or excluded. It says nothing about weekends or holidays at the end of the two year period. Both with its beginning and with its end interpretation is required. Aside from the government's rule of interpretation that the claimant ought always to lose, no more satisfactory rule has been called to our attention than that, approved by Congress, and announced in Rule 6(a)." Frey v. Woodard, 748 F.2d 173, 175 (3d Cir. 1984). See also United Mine Workers of America, Intern. Union v. Dole, 870 F.2d 662, 665 (D.C. Cir. 1989) ("The [Mine Safety and Health Act of 1977] ... makes no separate provision for the computation of time and was enacted subsequent to the adoption of Rule 26(a); we conclude therefore that Congress intended its time periods to be computed in accordance with the federal rule.").

that the Rule controls of its own force.*** In other cases, courts have applied a time-counting Rule to compute a statutory period without giving much or any explanation for that application. But courts confronted with a specific statutory counting method have refused to apply a contrary directive in the relevant time-counting Rule.****

Clearly, courts applying a time-counting Rule as a gap-filling measure will not apply the Rule when the statute specifies a contrary time-counting method, for in that event there is no gap to be filled. Likewise, courts that look to congressional intent would infer from the statute's specification of a time-counting method that Congress did not intend them to use the time-counting Rule's contrary method. And courts that already reject the time-counting Rule when faced with a statutorily-specified time-counting method would continue to do so.

Nonetheless, a technical argument could be made that says that, as to statutes that predate the adoption of the template in the time-counting Rules, the later-adopted Rule trumps the previously-adopted statutory time-counting provision.***** It would arguably rise to the level of absurdity to apply a days-are-days time-counting Rule to calculate a period explicitly set in "business days" or "working days." If such applications are absurd, it seems a small step to

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*** *See, e.g.*, Tribue v. U.S., 826 F.2d 633, 635 (7th Cir. 1987) (reasoning in Federal Torts Claims Act case that "if we found § 2401(b) ambiguous regarding whether to exclude the mailing date, we would exclude the mailing date by analogy to Rule 6(a)"); Pearson v. Furnco Const. Co., 563 F.2d 815, 819 (7th Cir. 1977) (holding "that in the light of the purposes intended to be served by Title VII, it is a sound interpretation of congressional intent" to apply Civil Rule 6(a)'s approach to the computation of the limitations period). Likewise, in an early decision interpreting the time limit for petitions for certiorari under 28 U.S.C. § 2101, the Supreme Court drew upon the approach stated in Civil Rule 6(a): "Since [Rule 6(a)] had the concurrence of Congress, and since no contrary policy is expressed in the statute governing this review, we think that the considerations of liberality and leniency which find expression in Rule 6(a) are equally applicable to 28 U.S.C. s 2101(c)." Union Nat. Bank of Wichita, Kan. v. Lamb, 337 U.S. 38, 41 (1949).

**** See F.D.I.C. v. Enventure V, 77 F.3d 123, 126 (5th Cir. 1996) ("In § 1821(d)(14)(A), Congress provided that the limitations period began 'on the date the claim accrues.' The use of the word 'on' is clear and creates a more specific rule which overrides the application of Rule 6(a)."); Slinger Drainage, Inc. v. E.P.A., 237 F.3d 681, 683 (D.C. Cir. 2001) (refusing to apply Rule 26(a) to determine the period's start date because "the statute currently before us clearly establishes a separate provision for the computation of time: a person may obtain review by filing 'within the 30-day period *beginning on the date the civil penalty issued*.' 33 U.S.C. § 1319(g)(8)(B) (emphasis added)").

***** This argument assumes that the time-counting Rules' application to the relevant time period is valid under the Rules Enabling Act's scope limitation. That assumption may not always hold true. For example, 18 U.S.C. § 3142(d)'s time limit on detention may implicate substantive rights.

conclude that it would likewise be absurd to apply the time-counting Rules' days-are-days approach when the statute explicitly directs one to exclude weekends and holidays. But even if this line of reasoning ultimately leads courts to reject the notion that the new time-counting Rules supersede explicit statutory directives concerning the method of computation, it would be best if we could draft the Rules to preempt litigation on this point.

We therefore suggest amending the first sentence in the template Rule as follows:

> The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute[, local ru...urt order.] that does not specify a time-computation method.

We also favor adding a sentence to the Note to observe that state-court interpretations of state statutes count as specifying a statutory method.

II. Legal holidays in the Territories, the District of Columbia or Puerto Rico

As you know, the Rules apply not only to district court proceedings held within states, but also to district court proceedings held within the District of Columbia and Puerto Rico. Moreover, the Rules apply in proceedings in various territorial courts.****** The template rule defines "legal holiday" to include the listed holidays plus "any other day declared a holiday by the President, Congress, or the state where the district court is located." This provision may require amendment in order to ensure that the "legal holiday" definition functions appropriately in proceedings within the Territories, the District of Columbia, or Puerto Rico.*******

The background definitional principles vary. Civil Rule 81(e) provides that "When the word 'state' is used, it includes, if appropriate, the District of Columbia." Our understanding is that the Civil Rules Committee may be considering whether this definition should be expanded to include more than the District of Columbia. Criminal Rule 1(b)(9) could provide a model for such expansion; that Rule provides that "'State' includes the District of Columbia, and any

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****** See, e.g., Criminal Rule 1(a)(1) (subject to certain exceptions, Criminal Rules govern criminal proceedings in district courts in Guam, Northern Mariana Islands, and Virgin Islands); Am. Jur. Federal Courts § 2585 ("[W]hile the District Courts of Guam, the Northern Mariana Islands, and the Virgin Islands are constituted by the respective Organic Acts for such territories, rather than by Chapter 5 of the Judicial Code, it is expressly provided in such acts that the Federal Rules of Civil Procedure apply in such courts.").

******* Admittedly, courts may decide to interpret the existing language to include more than just states. Cf. Reyes-Cardona v. J. C. Penney Co., Inc., 690 F.2d 1, 1 (1st Cir. 1982) ("But that day was a legal holiday in Puerto Rico honoring Eugenio Maria de Hostos. See 1 L.P.R.A. s 75. As such it is not counted in the computation of time. Rule 6(a) F.R.Civ.P...."). But it seems advisable to clarify the matter in rule text.

commonwealth, territory, or possession of the United States." The Appellate Rules contain no such definitional provision, and the Bankruptcy Rules appear to contain no relevant definition either.

We therefore would ask the Advisory Committees (other than the Criminal Rules Committee)******** to consider whether they wish to adopt a general definition such as that in Criminal Rule 1(b)(9). If each set of Rules is amended to contain such a definition, then no change to the template's definition of "legal holiday" would be required. If such a definition is not adopted, however, then seems advisable to add the following at the end of the template's subdivision (a)(6)(B):

> The word 'state,' as used in this Rule, includes the Territories, the District of Columbia and the Commonwealth of Puerto Rico.

* * *

We regret that these changes did not surface before we circulated the official version of the template last week for use in the Advisory Committee meetings this spring. Generally, our plan is to hold any smaller suggestions for change (such as small changes to Note wording) until later, so that the Advisory Committees and Reporters do not have to work with a moving target for purposes of their spring meetings. But these two changes seemed to us to warrant an exception to that policy, and we wanted to place these issues before the Advisory Committees for discussion at the spring meetings.

Thank you for your work on this project.

Encl.

******** Obviously, this request is relevant to the Evidence Rules Committee only if it decides to recommend adopting a time-computation provision in the Evidence Rules.

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

March 1, 2007

Mr. Leo P. Cunningham, Esquire
Wilson, Sonsini, Goodrich & Rosati, P.C.
650 Page Mill Road
Palo Alto, CA 04304-1050

Dear Mr. Cunningham:

In 2005, the Committee on Rules of Practice and Procedure ("Standing Committee") created a Time Computation Subcommittee and charged it with examining the time computation provisions found in the Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules. The Subcommittee in turn drafted a template and recommended that the template be used by all the Rules Committees to craft amendments to create uniform and simplified rules under which deadlines would be computed under the rules.

Our Committee has taken the template and is now crafting a proposed amendment to Rule 45 of the Federal Rules of Criminal Procedure. The proposed Rule 45 amendment would bring about two major changes. First, it would explicitly apply the time computation rules to statutory time periods, and second, it would no longer exclude weekends and holidays from time periods of less than 11 days, but would rather take a "days-are-days" approach, counting all days the same. To compensate for the latter change, the Committee is also considering lengthening many of the time periods contained in the Criminal Rules.

While we support the Committee in tackling this project, we are concerned about the interplay of the proposed amendment with both existing statutory time periods and local rules. We think it would be inappropriate for the proposed amendment to go forward without ensuring that coordinated and compensating changes are made to existing statutory and local rule time periods of less than 11 days. Just as our Committee is preparing to lengthen many time periods of less than 11 days to compensate for the proposed change in the time computation rule, so similar changes ought to be considered in relevant statutory and local rule provisions before the new time computation rule is made applicable to these provisions.

As to the local rules, we think there is adequate time to alert the lower courts around the country of the new time computation rule under consideration and to ask those courts to begin considering changes to existing time periods. We think our Committee, the Standing Committee, and the Judicial Conference should notify the lower courts, create a timetable for changes to be

made, and develop a management plan to ensure that all local rules are fully examined and appropriately amended before the new time computation rule goes into effect.

As to statutory time periods, however, it will be far more difficult to ensure appropriate changes to these time periods to compensate for the proposed time computation rule. The legislative process is unpredictable in the best of circumstance; seeing that a whole host of statutes – including many that touch on controversial subjects – are changed on a particular timeline will be extremely challenging. As such, it is important that detailed discussions begin with the appropriate congressional committees on this subject as soon as possible. Moreover, we do not think the Committee should proceed with an amendment applying the new time computation rules to statutory time periods until legislation is passed that will make the necessary compensating changes to these periods. Such legislation could include special authority to the Judiciary to amend the rules outside the normal Rules Enabling Act process so that all the changes – in the statutes and the rules – could be coordinated.

As we have discussed before, there are many statutes that implicate time periods of less than 11 days. Professor Struve has identified most in her spreadsheet circulated to the Time Computation Subcommittee. All of these statutes should be carefully studied by the appropriate Rules Committee to determine whether compensating changes are necessary. Here are just some of the statutes that are implicated:

- Under 18 U.S.C. § 2518(5), an order authorizing interception of wire, oral, or electronic communications begins "on the earlier of the day on which investigating or law enforcement officer first begins to conduct an interception under the order, or **ten days** after the order is entered."

- Under 18 U.S.C. § 3142(d), a court may temporarily detain a person in certain circumstance "for a period of not more than **ten days, excluding Saturdays, Sundays, and holidays** . . . "

- Under 18 U.S.C. § 3142(f), continuances from detention hearings "may not exceed **five days (not including any intermediate Saturday, Sunday, or legal holiday)**, and a continuance on motion of the attorney for the Government may not exceed **three days (not including any intermediate Saturday, Sunday, or legal holiday).**"

- Under 18 U.S.C. § 1467(c)(2), a temporary restraining order in a criminal forfeiture matter "shall expire not more than **10 days** after the date on which it is entered . . ." Similarly, 18 U.S.C. §§ 983(j) and 1963(d)(2) and 21 U.S.C. § 853(e)(2) contain similar provisions.

- Under 18 U.S.C. App. 3 § 7 (the Classified Information Procedures Act), an interlocutory appeal may be taken from certain rulings "within **ten days** after the decision or order appealed from . . ."

- Rule 12 of the Rules for the Alien Terrorist Removal Court of the United States permits the issuance of subpoenas but requires that they be made "at least **10 days** prior to the date of the removal hearing."

- Under 18 U.S.C. § 1514, a court may issue a temporary restraining order to restrain harassment of a victim or witness "not to exceed **10 days** from issuance . . ." Also, 18 U.S.C. § 1514(E) permits adverse parties to move to dissolve the order "on **two days** notice to the attorney for the Government."

- 18 U.S.C. § 2704(a) sets out certain requirements relating to the acquisition of stored electronic communications, including that notice "to the subscriber or customer shall be made by the governmental entity within **three days** after receipt of . . ."

- 18 U.S.C. § 3060 requires that preliminary examinations occur in certain circumstances not later than "the **tenth day** following the date of the initial appearance . . . "

- 18 U.S.C. § 3552(d) requires disclosure of presentence reports "at least **ten days** prior to the date set for sentencing . . ."

Each of these provisions warrant close examination to determine whether the time periods should be lengthened. There are other provisions as well, addressing restitution, judicial emergencies, victims rights, prisoner transfers, defendants with mental disorders, and more, that contain time periods of less than 11 days. All of these deserve the Committee's attention before moving forward with an amendment applying the new time computation rules to all statutes.

We look forward to discussing this with you and the Committee. Please feel free to contact me at any time.

Sincerely,

William A. Burck
Counselor to the
Assistant Attorney General

cc: Judge Susan C. Bucklew
Professor Sara Sun Beale
Mr. John Rabiej

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 49.1; Redaction of Arrest and Search Warrants

DATE: March 9, 2007

Background

When it approved Rule 49.1 (which is now pending before the Supreme Court) the Standing Committee asked the Rules Committee to revisit the rule's treatment of arrest and search warrants. We discussed this issue briefly at our October meeting, but decided that it required further study. Judge Bucklew has asked the E-Government Subcommittee, chaired by Judge Bartle, to discuss the issue and make a recommendation to the Rules Committee at our April meeting.

Rule 49.1 provides for the redaction of certain personal and sensitive information that would otherwise become generally available over the Internet when documents are filed with the district court. Rule 49.1(b)(8) exempts from the general redaction requirements "an arrest or search warrant." In addition, arrest and search warrants may also be exempted under Rule 49.1(b)(7)'s exemption of "a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case." The question before our Subcommittee (and then the full committee) is whether arrest and search warrants should remain exempt from the redaction requirements, with the result that the personal information in such warrants will be available absent a protective order in a particular case.

Discussion

The Department of Justice originally suggested the exemption of the material eventually covered in (b)(7) and (8), and it supports their continued exemption. I have attempted below to set forth the reasons favoring this exemption. These should be weighed against the general policy, reflected in Rule 49.1(a) of protecting certain categories of personal information by requiring redaction. Since search and arrest warrants may pose different issues, I have analyzed

them separately.

(1) Search Warrants. A search warrant must identify the person or property to be searched, and in some circumstances this requires the inclusion of information that would ordinarily be redacted, particularly a financial-account number or an individual's home address. At one point the Department thought it might be possible to redacting this information from the documents before they are returned and filed with the court, but it has concluded that this would require a major change in current procedures. In many districts, search warrants are executed and then returned without any involvement of the U.S. Attorney's Office. There is thus no prosecutorial screening of these documents before filing, and it would be burdensome to require such screening in order to redact the documents. In addition, there was support at the Advisory Committee meeting for the view that the public has an interest in some of this information, such as the locations that were searched.

(2) Arrest Warrants. In addition to the practical difficulty of requiring the redaction of arrest warrants (which, like search warrants, may be returned without the involvement of the U.S. Attorney's Office), the Department of Justice has also identified several additional reasons not to require redaction of arrest warrants. Personal information in arrest warrants, much like the account information in forfeiture proceedings documents, is generally included for the purpose of identifying the individual to be arrested. The identifying information contained in the body of the warrant may play an important role in several later stages in the criminal process, and it would interfere with those later stages to redact the information in question. For example, if a defendant is arrested in a judicial district other than where the crime occurred, he or she will be removed to the charging district pursuant to the provisions of Rule 40. As part of that procedure, the defendant is entitled to a removal hearing at which identity is a key issue, and such hearings can take place well after arrest and long after the original issuance of an arrest warrant. Redaction of the identifying information would be disruptive to that process, as well as to the overall interest in ensuring that the right person is arrested.

In some cases, the Social Security Number will be the critical information to determine whether the person arrested is the same person named in the warrant. With tens of thousands of federal arrests annually, a significant number of cases will involve defendants with common names. In such cases, the defendant's name, city and state of residence, and even date of birth may simply not provide sufficient information to conclusively identify the defendant. In these cases, the full Social Security Number may be necessary to ensure proper identification. To the extent that including Social Security Numbers or other confidential identifying information in arrest warrants raises concerns in a specific case, a court is explicitly authorized to issue a protective order to limit the distribution of the arrest warrant (for example, ordering that warrant not be accessible over the Internet).

Similarly, arrest warrants can play a vital role in identifying defendants who have jumped bail or fled after arrest; in many cases, agents, Deputy Marshals or police officers in other jurisdictions obtain copies of the warrants directly from the courthouse. Unlike arrest warrants,

bench warrants issued by the Court are often deficient in identifying information. Moreover, there is a strong societal interest in learning the identity of those charged and arrested with criminal activity, and such information is routinely published in newspapers or through the media. Once again, there is compelling need to make sure that the identifying information is as accurate as possible so that the correct people are reported as being arrested. Finally, the identifying information on arrest warrants is less sensitive than that in other court documents because it pertains solely to the defendant who has been charged, and does not include any innocent third party information.

Rule 32.2(a)

(a) Notice to the Defendant. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information. The indictment or information need not identify the property subject to forfeiture or to specify the amount of any money judgment that the government intends to seek as part of an order of forfeiture.

Committee Note

Subdivision (a). The amendment responds to some uncertainty regarding the form of the required notice that the government will seek forfeiture as part of the sentence, making it clear that the notice should not be designated as a separate count in an indictment or information. The amendment also makes it clear that the indictment or information need only provide general notice that the government is seeking forfeiture, without identifying the specific property being sought. This is consistent with the 2000 Committee Note, as well as many lower court decisions.

The court may direct the government to file a bill of particulars to inform the defendant of the identity of the property that the government is seeking to forfeit or the amount of any money judgment sought [if necessary] to enable the defendant to prepare a defense [or to avoid unfair surprise]. *See, e.g.*, *United States v. Moffitt, Zwerdling, & Kemler, P.C.*, 83 F.3d 660, 665 (4th Cir. 1996) (holding that government need not list each asset subject to forfeiture in the indictment because notice can be provided in a bill of particulars); *United States v. Vasquez-Ruiz*, 136 F. Supp.2d 941, 944 (N.D. Ill. 2001) (directing government to identify in a bill of particulars, at least 30 days before trial, the specific items of property, including substitute assets, that it claims are subject to forfeiture); *United States v. Best*, 657 F. Supp. 1179, 1182 (N.D. Ill. 1987) (directing the government to provide a bill of particulars apprising the defendants as to the time periods during which they obtained the specified classes of property through their alleged racketeering activity and the interest in each of these properties that was allegedly obtained unlawfully).

Rule 32.2(b)(1)

(b) Entering a Preliminary Order of Forfeiture

(1) ~~In General.~~ ***Forfeiture Phase of the Trial.***

(A) As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.

(B) The court's determination may be based on evidence already in the record, including any written plea agreement, ~~or~~ and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If ~~if~~ the forfeiture is contested, on the request of either party the court must conduct a hearing ~~on evidence or information presented by the parties at a hearing~~ after the verdict or finding of guilt.

Committee Note

Subdivision (b)(1). Rule 32.2(b)(1) sets forth the procedure for determining if property is subject to forfeiture. Subparagraph (A) is carried forward from the current Rule without change.

Subparagraph (B) clarifies that the parties may submit additional evidence relating to the forfeiture in the forfeiture phase of the trial, which may be necessary even if the forfeiture is not contested. Subsection (B) makes it clear that in determining what evidence or information should be accepted, the court should consider relevance and reliability. Finally, subsection (B) requires the court to hold a hearing when forfeiture is contested. The Committee foresees that in some instances live testimony will be needed to determine the reliability of proffered information. [Cf. Rule 32.1(b)(1)(B)(iii) (providing the defendant in a proceeding for revocation of forfeiture or supervised release with the opportunity, upon request, to question any adverse witness unless the judge determines this is not in the interest of justice).]

Rule 32.2(b)(2)

(2) *Preliminary Order.*

(A) If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, and directing the forfeiture of [any] substitute assets if the government has met the statutory criteria, without regard to any third party's interest in all or part of ~~it~~ the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(B) Unless it is not practical to do so, the court must enter the preliminary order of forfeiture sufficiently in advance of sentencing to allow the parties the opportunity to suggest revisions or modifications to the order before it becomes final as to the defendant pursuant to subdivision (b)(4).[1]

(C) If the court is not able to identify all of the specific property subject to forfeiture or to calculate the total amount of the money judgment prior to sentencing, the court must

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[1]The cross reference would be to subdivision (b)(3) as Rule 32.2 as it now exists, but we propose the addition of subdivision (b)(4) below.

[may][2] enter an order describing the property to be forfeited in generic terms, listing any identified forfeitable property, and stating that the order will be amended pursuant to subdivision (e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

Committee Note

Subdivision (b)(2)(A). Current Rule 32.2(b) provides the procedure for issuing a preliminary order of forfeiture once the court finds that the government has established the nexus between the property and the offense (or the amount of the money judgment). The amendment makes clear that the preliminary order may include substitute assets if the government has met the statutory criteria.

Subdivision (b)(2)(B). This new subparagraph focuses on the timing of the preliminary forfeiture order, stating that the court should issue the order "sufficiently in advance of sentencing to allow the parties the opportunity to suggest revisions or modifications to the order before it becomes final." Many courts have delayed entry of the preliminary order until the time of sentencing. This is undesirable because the parties have no opportunity to advise the court of omissions or errors in the order before it becomes final as to the defendant (which occurs upon oral announcement of the sentence and the entry of the criminal judgment). Once the sentence has been announced, the rules give the sentencing court only very limited authority to correct errors or omissions in the preliminary forfeiture order. Pursuant to Rule 35(a), the district court may correct a sentence, including an incorporated order of forfeiture, within seven days after oral announcement of the sentence. During the seven day period, corrections are limited to those necessary to correct "arithmetical, technical, or other clear error." *See United States v. King*, 368 F. Supp. 2d 509, 512-13 (D. S.C. 2005). Corrections of clerical errors may also be made pursuant to Rule 36. If the order contains errors or omissions that do not fall within Rules 35(a) or 36, and the court delays entry of the preliminary forfeiture order until the time of sentencing, the parties may be left with no alternative to an appeal, which is a waste of judicial resources. The amendment requires the court to enter the preliminary order in advance of sentencing to permit time for corrections, unless "it is not practical to do so" in an individual case.

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[2]The subcommittee did not resolve the question whether "must" or "may" was preferable. There was concern that "must" would be inconsistent with the view, expressed in the committee note, that generic forfeiture should be the exception rather than the rule. On the other hand, it was suggested that "must" would be appropriate in the limited circumstances specified in this subsection, where the court is not able to identify the property with more specificity at the time that it must enter the forfeiture order as part of the sentence.

Subdivision (b)(2)(C). The amendment explains how the court is to reconcile the requirement that it make the order of forfeiture part of the sentence with the fact that in some cases the government will not have completed its post-conviction investigation to locate the forfeitable property by the time of sentencing. In that case the court is authorized to issue an order of forfeiture describing the property in "generic" terms, which order may be amended pursuant to Rule 32.2(e)(1) when additional specific property is identified.

The authority to issue a generic forfeiture order should be used only in unusual circumstances and not as a matter of course. For cases in which a generic order was properly employed, see *United States v. BCCI Holdings (Loxembourg)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (ordering forfeiture of all of a large, complex corporation's assets in the United States, permitting the government to continue discovery necessary to identify those assets); *United States v. Saccoccia*, 898 F. Supp. 53 (D.R.I. 1995) (ordering forfeiture of up to a specified amount of laundered drug proceeds so that the government could continue investigation which lead to the discovery and forfeiture of gold bars buried by the defendant in his mother's back yard).

Rule 32.2(b)(3) & (4)

(3) Seizing Property. The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third party rights. ~~At sentencing – or at any time before sentencing if the defendant consents – the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and be included in the judgment.~~ The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(4) ***Sentence and Judgment.***[3]

(A) At sentencing – or at any time before sentencing if the defendant consents – the preliminary order of forfeiture becomes final as to the defendant. If the order directs the defendant to forfeit specific assets, it remains preliminary as to third parties until the ancillary proceeding is concluded pursuant to Rule 32.2 (c).

(B) The district court must include the forfeiture in the oral announcement of the sentence or otherwise ensure that the defendant is aware of the forfeiture at time of

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[3] If this provision is adopted, present Rule 32.2(b)(4) would be redesignated as Rule 32.2(b)(5).

sentencing. The court must also include the order of forfeiture, directly or by reference, in the judgment. The court's failure to include the order in the judgment may be corrected at any time pursuant to Rule 36.

(C) The time for a party to file an appeal from the order of forfeiture, or from the district court's failure to enter an order, begins to run when judgment is entered. If after entry of judgment the court amends or declines to amend an order of forfeiture to include an additional asset pursuant to subdivision (e), a party may file an appeal with respect to that asset pursuant to Appellate Rule 4(b). The time to appeal will run from the date when the order granting or denying the amendment becomes final.

Committee Note

Subdivisions (b)(3) and (4). The amendment moves the language explaining when the order of forfeiture becomes final as to the defendant to new subparagraph (b)(4)(A), where it is coupled with new language explaining that the order is not final as to third parties until the completion of the ancillary proceedings provided for in Rule 32.2(c).

New subparagraphs (B) and (C) are intended to clarify what the district court is required to do at sentencing, and to respond to conflicting decisions in the courts regarding the application of Rule 36 to correct clerical errors. The new subparagraphs add considerable detail regarding the oral announcement of the forfeiture at sentencing, the reference to the order of forfeiture in the judgment and commitment order, the availability of Rule 36 to correct the failure to include the order of forfeiture in the judgment and commitment order, and the time to appeal.

Rule 32.2(b)(5)

(~~4~~ 5) ***Jury Determination.***[1] (A) ~~In any case that is tried to a jury, the coUpon a party's request in a case in which a jury returns a verdict of guilty, the jury must~~ In any case tried before a jury in which the indictment or information states that the government is seeking forfeiture, the court shall determine before the jury begins its deliberations whether either party requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict.

(B) If a timely request to have the jury determine the forfeiture is made, the government must submit a proposed Special Verdict Form as to each asset subject to forfeiture, asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

Committee Note

Subparagraph (b)(5)(A). The amendment clarifies the procedure for requesting a jury determination of forfeiture. The goal is to avoid an inadvertent waiver of the right to a jury determination, while also providing timely notice to the court and to the jurors themselves if they will be asked to make the forfeiture determination. The amendment requires that the court determine whether either party requests a jury determination of forfeiture in cases where the government has given notice that it is seeking forfeiture and a jury has been empaneled to determine guilt or innocence. The rule requires the court to make this determination before the jury retires. Jurors who know that they may face an additional task after they return their verdict will be more accepting of the additional responsibility in the forfeiture proceeding, and the court will be better able to plan as well.

Although the rule permits a party to make this request just before the jury retires, it is

[1]The renumbering of this provision will be required if the proposed amendment discussed on pages 5-6 *supra* is adopted.

desirable, when possible, to make the request earlier, at the time when the jury is empaneled. This allows the court to plan, and also allows the court to tell potential jurors what to expect in terms of their service.

Subparagraph (b)(5)(B) explains that "the Government must submit a proposed Special Verdict Form as to each asset subject to forfeiture." Use of such a form is desirable, and the government is in the best position to draft the form.

Rule 32.2(b)(6) and (7)

(6) Notice of the Order of Forfeiture.

(A) If the court issues an order directing the forfeiture of specific property, the government must publish notice of the order and send such notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture of the property in the ancillary proceeding.

(B) The notice must describe the forfeited property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and [the] name [and the contact information for] the government attorney to be served with the petition.

(C) Publication must take place as described in Supplemental Rule G(4)(a)(iii) of the Federal Rules of Civil Procedure, and may be by any of the means described in Supplemental Rule G(4)(a)(iv). No publication of the notice is necessary if any of the exceptions in Supplemental Rule G(4)(a)(i) apply.

(D) Notice sent to potential claimants may be sent in accordance with Supplemental Rules G(4)(b)(iii)-(v) of the Federal Rules of Civil Procedure.

(7) Interlocutory Sale.

At any time before entry of a final order of forfeiture, the court may order the interlocutory sale of property alleged to be forfeitable in accordance with Supplemental Rule G(7) of the Federal Rules of Civil Procedure.

Committee Note

These provisions are based upon the civil forfeiture provisions in Supplemental Rule G of the Federal Rules of Civil Procedure, which are also incorporated by cross reference. The amendment governs such mechanical and technical issues as the manner of publishing notice of forfeiture to third parties and the interlocutory sale of property, bringing practice under the Criminal Rules into conformity with the Civil Rules.

The committee's proposed Booker amendment to Rule 32(d)(2)(F) – shown as a single underline below -- has been approved by the Judicial Conference for transfer to the Supreme Court. The Department has proposed a further amendment to the rule, which is shown below as a double underline.

Rule 32. Sentence and Judgment

(d) Presentence Report.

* * * * *

(2) Additional Information. The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and

(F) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a); and.

(G) specify whether the Government seeks forfeiture pursuant to Rule 32.2 and any other provision of law.

Committee Note

Subdivision (d)(2)(G). Rule 32.2 (a) requires that the indictment or information provide notice to the defendant of the government's intent to seek forfeiture as part of the sentence. The amendment provides that the same notice be provided as part of the presentence report to the court. This will ensure timely consideration of the issues concerning forfeiture as part of the sentencing process.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**
Professor Nancy King

RE: **Proposed Amendments to Rule 11 of the Rules Governing 2254 and 2255 Proceedings; Proposed New Rule 37**

DATE: **March 25, 2007**

In January of 2006, the Department of Justice proposed a series of amendments intended abolishing the writs of coram nobis, coram vobis, audita querela, and bill of review and bills in the nature of bills of review, and proposing amendments that take the place of these writs. Judge Bucklew appointed a subcommittee to review the Department's proposals. The committee is chaired by Professor King, and includes Judge Bucklew, Judge Trager, Mr. McNamara, and the Justice Department's representative. The subcommittee reviewed the proposal and draft amendments were discussed at the Committee's October meeting.

The Rule 11 proposals

The amendments to Rule 11 of the Rules governing 2254 proceedings, and to Rule 11 of the Rules governing 2255 proceedings were tentatively approved by the Committee at the October meeting. They are intended to provide, for the first time, a well-defined mechanism by which litigants can seek reconsideration of a district court's ruling on a motion under these rules. The efforts by litigants to work around the current procedural gap – particularly by using Federal Rule of Procedure 60(b) – have generated a good deal of confusion.

Outstanding issues for Committee consideration:

On March 15, the Reporter of the Appellate Rules Committee, Professor Struve, submitted to Professors King and Beale a set of comments suggesting changes to the proposed Rules. Her suggestion to add language retaining the judge's duty to state "why a certificate should not issue" is included in brackets. She also inquires how the proposal would affect motions under Rule 52 or 59. Professor Struve's memo is also attached. Because of the timing of her comments, the subcommittee did not have the opportunity to consider her queries.

Proposed Rule 37

The original proposal for a new Rule 37 would have (1) subjected coram nobis actions to timing, successive petition, and other limitations similar to those applicable to 2255 actions, and (2) abolished all of the other ancient writs. The Committee discussed this proposal as well as alternative language for Rule 37 proposed by Mr. McNamara at the October meeting. The alternative version would provide no set statute of limitations but allow for dismissal in some circumstances upon a showing of prejudice to the government as a result of delay, and would not have abolished the writs so that they would continue to serve as a kind of insurance policy to provide needed flexibility in the future. The Committee asked the subcommittee to continue working, raising a number of concerns about the proposed new rule.

The subcommittee considered submissions on these questions from both the Department of Justice and Mr. McNamara (see the two memos dated January 5, 2007 to Professor King). The revised version of the proposed Rule 37 approved by a majority of the subcommittee and submitted for Committee consideration here includes one substantive change from the version considered by the Committee in October. Instead of purporting to "abolish" writs, the proposed rule states only that the specified writs "may not be used to seek relief from a criminal judgment." Two non substantive changes made to the language of the rule: (1) the language limiting the use of the writs formerly constituting subdivision (c) of the rule is moved to be part of subsection (a); and (2) the references to statutes and rules in subsection (a) have been reordered and reorganized.

The proposed Committee Note to accompany Rule 37 is a shorter version of the Note that appeared in the October agenda book. In response to the concerns voiced by several members of the Committee in October, it adds references to existing law governing coram nobis actions to make it clear that the proposed rule is not intended to change these aspects of the existing coram nobis remedy. The changes in brackets in paragraph 5 of the Note were added to respond to the concern voiced by members of the subcommittee that the Note did not contain specific examples of loss of employment as "serious adverse consequences." These particular changes in the text of the Note have not been considered by the subcommittee.

Outstanding issues for Committee consideration:

(1) Mr. McNamara opposes the proposed rule and favors tabling the proposal entirely. If the Committee decides to go ahead with a new rule on this topic, he suggests an Alternate Version, which is included here immediately after the Proposed Rule 37 and accompanying Note.

(2) Style changes to the text of the rule have been proposed, but not yet considered by the subcommittee. The style suggestions for the text of the rule are attached at the end of this section.

(3) Professor Cooper has suggested, in particular, that the phrase "or by appeal as authorized by federal statute" be substituted for the enumerated list of appellate provisions in subdivision (a) of the proposed rule, so as not to eliminate either parties' existing ability to employ mandamus and

prohibition, or cut off other existing interlocutory appellate review of orders (bail, wiretaps, forfeiture orders) that might be considered "judgments." This was received after the subcommittee completed its deliberations.

(4) Reporters from other Committees have expressed serious reservations about proposed Rule 37. Input from the other reporters was solicited after the subcommittee had completed its deliberations, so was not considered by the subcommittee.

At the January meeting of the Standing Committee, following Judge Bucklew's description of our work on Rule 37, the reporters expressed serious reservations about the wisdom of going forward with the proposed amendment to Rule 37 at this time. I attempt here to outline these comments. Professor Coquillette may wish to expand upon them at the meeting.

One ground of concern was that any attempt to restrict the ancient writs would be viewed with alarm by Congress and the public, becoming conflated with attempts to restrict judicial review of various kinds of cases, such as the detention of persons as enemy combatants or otherwise who have not been charged with a crime. The subcommittee attempted to address this concern by eliminating the language that "abolished" the ancient writs. The current draft provides, instead, only that the ancient writs "may not be used to seek relief from a criminal judgment." Although this would clearly have no application to cases where terrorists, enemy combatants, or others are held without being charged with a crime, the reporters expressed concern that this distinction would be lost to the public, Congress, and pundits.

Several reporters also expressed, in the strongest terms, an even more fundamental concern. They advised against seeking to codify entirely the ancient writs. It would not matter, in their view, if the text of the rule coincided exactly with the Supreme Court's previous decisions defining the scope of coram nobis. Since the writs are always subject to further judicial development and application to new circumstances, codification thus necessarily loses something – though we might not know exactly what – if it seeks preclude judicial relief that does not fall within the statutory boundary. This is unwise, and possibly beyond the scope of the authority granted by the Rules Enabling Act, since it may modify a substantive right.

There has been some discussion among the reporters about the question whether Civil Rule 60(b) establishes a precedent for the proposed criminal rule. Rule 60(b) was amended in 1948 to abolish the "ancient writs." The Committee Note explains that the writs had continued in use after Rule 60(b) was adopted as part of the original 1938 Rules, "although the precise relief obtained in a particular case by use of these ancillary remedies is shrouded in ancient lore and mystery." The amendment was designed as "a clarification of this situation." After "ascertain[ing] all the remedies and types of relief heretofore available by" the ancient writs, the Committee "endeavored * * * to amend the rules to permit, either by motion or by independent action, the granting of various kinds of relief * * *." If the Committee succeeded in its purpose, "the federal rules will deal with the practice in every sort of case in which relief from final judgments is asked, and prescribe the practice." Rule 60(b) and the ongoing independent action were intended to provide a more modern

procedure to provide for all relief that could be granted under any of the more mysterious ancient writs. At a minimum, anything done in the Criminal Rules should do the same: ensure that the available grounds of relief are not diminished. Some reporters, however, would take the position that in abolishing the ancient writs, Rule 60(b) runs afoul of the advice described above, which would leave open the possibility of further development of the writs, as opposed to the independent statutory actions.

Finally, the reporters noted that it might be wise, before proceeding, to determine if the proposed rule is needed to address a real problem in practice. At the moment, there is no reliable study of the use of the ancient writs. The Federal Judicial Center could undertake such a study.

PART A. RULE 11 ELEMENTS OF THE PROPOSED AMENDMENTS TO COLLATERAL RELIEF PROCEDURES

(1) Rule 11 of the Rules Governing Section 2255 Proceedings shall be amended to read as follows:

Rule 11. Certificate of Appealability; Motion for Reconsideration; Appeal

(a) Certificate of Appealabilty. At the same time the judge enters a final order adverse to the [moving party] applicant, the judge must either issue or deny a certificate of appealability. If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). [If the judge denies a certificate, the judge must state why a certificate should not issue.]

(b) Motion for Reconsideration. The only procedure for obtaining relief in the district court from a final order is through a motion for reconsideration. The motion must be filed within 30 days after the order is entered. The motion may not raise new claims of error in the movant's conviction or sentence, or attack the district court's previous resolution of such a claim on the merits, but may only raise a defect in the integrity of the § 2255 proceedings. Federal Rule of Civil Procedure 60(b) may not be used in § 2255 proceedings.

(c) Time for Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. These rules do not extend the time to appeal the original judgment of conviction.

Advisory Committee Notes

As provided in 28 U.S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 unless a judge issues a certificate of appealability, which must specify the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2255 Proceedings in the District Courts. Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

The Rules Governing Section 2255 Proceedings have not previously provided a mechanism by which a litigant can seek reconsideration of the District Court's ruling on a motion under 28 U.S.C. § 2255. Because no procedure was specifically provided by these Rules, some litigants have resorted to Civil Rule 60(b) to provide such relief. Invocation of that civil rule, however, has "has generated confusion among the federal courts." Abdur'Rahman v. Bell, 537 U.S. 88, 89 (2002) (Stevens, J.,

dissenting from the dismissal of certiorari as improvidently granted); In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004), *vacated*, 125 S. Ct. 2991 (2005); Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir. 2004); *see also* Pitchess v. Davis, 421 U.S. 482, 490 (1975). Convicted defendants have invoked Rule 60(b) to evade statutory provisions added by AEDPA in 1996, including a one-year time period for filing, the certificates of appealability requirement, and the limitations on second and successive applications. *See* Gonzalez v. Crosby, 125 S. Ct. 2641, 2646-48 (2005) ("Using Rule 60(b) to present new claims for relief," to present "new evidence in support of a claim already litigated," or to raise "a purported change in the substantive law," "circumvents AEDPA's requirement"). The Supreme Court in Gonzalez attempted a "harmonization" of Rule 60(b) and the AEDPA requirements for state prisoners by holding that Rule 60(b) motions can be treated as successive habeas petitions if they "assert, or reassert, claims of error in the movant's state conviction," but can proceed if they attack "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." 125 S. Ct. at 2648, 2651.

Rule 11 is amended to end this confusion and abuse by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings. Under the amendment, the sole method of seeking reconsideration by the district court of a § 2255 order is the procedure provided by Rule 11 of the Rules Governing § 2255 Proceedings, and not any other provision of law, including Rule 60(b). The amended Rule 11 provides disappointed § 2255 litigants with an appropriate opportunity to seek reconsideration in the district court based on a "defect in the integrity of the federal habeas proceeding," Gonzalez, 125 S. Ct. at 2648-49 & n.5, but within an appropriate and definitive time period, and with an express prohibition on raising new claims that "assert, or reassert, claims of error in the movant's" conviction or sentence, or "attack[] the federal court's previous resolution of a claim *on the merits*," id. at 2648 & nn.4-5, 2651 (emphasis by Court). Defects subject to motion under Rule 11 include purely ministerial or clerical errors in the order of the district court. Rule 11 will thus provide clear and quick relief in the district court, while safeguarding the requirements of § 2255 and the finality of criminal judgments.

(2) Rule 11 of the Rules Governing Section 2254 Proceedings shall be renumbered Rule 12, and a new Rule 11 shall be enacted to read as follows:

Rule 11. Certificate of Appealability; Motion for Reconsideration

(a) Certificate of Appealabilty. At the same time the judge enters a final order adverse to the [moving party] petitioner, the judge must either issue or deny a certificate of appealability. If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). [If the judge denies a certificate, the judge must state why a certificate should not issue.]

(b) Motion for Reconsideration. The only procedure for obtaining relief in the district court from a final order is through a motion for reconsideration. The motion must be filed within 30 days after the order is entered. The motion may not raise new claims of error in the [movant's] petitioner's conviction or sentence, or attack the district court's previous resolution of such a claim on the merits, but may raise only a defect in the integrity of the § 2254 proceedings.Federal Rule of Civil Procedure 60(b) may not be used in § 2254 proceedings.

Advisory Committee Notes

As provided in 28 U.S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 unless a judge issues a certificate of appealability, which must specify the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2255 Proceedings in the District Courts. Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

The Rules Governing Section 2254 Proceedings have not previously provided a mechanism by which a litigant can seek reconsideration of the District Court's ruling on a motion under 28 U.S.C. § 2255. Because no procedure was specifically provided by these Rules, some litigants have resorted to Civil Rule 60(b) to provide such relief. Invocation of that civil rule, however, has "has generated confusion among the federal courts." Abdur'Rahman v. Bell, 537 U.S. 88, 89 (2002) (Stevens, J., dissenting from the dismissal of certiorari as improvidently granted); In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004), *vacated*, 125 S. Ct. 2991 (2005); Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir. 2004); *see also* Pitchess v. Davis, 421 U.S. 482, 490 (1975). Convicted defendants have invoked Rule 60(b) to evade statutory provisions added by AEDPA in 1996, including a one-year time period for filing, the certificates of appealability requirement, and the limitations on second and successive

applications. *See* Gonzalez v. Crosby, 125 S. Ct. 2641, 2646-48 (2005) ("Using Rule 60(b) to present new claims for relief," to present "new evidence in support of a claim already litigated," or to raise "a purported change in the substantive law," "circumvents AEDPA's requirement"). The Supreme Court in Gonzalez attempted a "harmonization" of Rule 60(b) and the AEDPA requirements for state prisoners by holding that Rule 60(b) motions can be treated as successive habeas petitions if they "assert, or reassert, claims of error in the movant's state conviction," but can proceed if they attack "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." 125 S. Ct. at 2648, 2651.

Rule 11 is amended to end this confusion and abuse by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings. Under the amendment, the sole method of seeking reconsideration by the district court of a § 2254 order is the procedure provided by Rule 11 of the Rules Governing § 2254 Proceedings, and not any other provision of law, including Rule 60(b). The amended Rule 11 provides disappointed § 2254 litigants with an appropriate opportunity to seek reconsideration in the district court based on a "defect in the integrity of the federal habeas proceeding," Gonzalez, 125 S. Ct. at 2648-49 & n.5, but within an appropriate and definitive time period, and with an express prohibition on raising new claims that "assert, or reassert, claims of error in the movant's" conviction or sentence, or "attack[] the federal court's previous resolution of a claim *on the merits*," id. at 2648 & nn.4-5, 2651 (emphasis by Court). Defects subject to motion under Rule 11 include purely ministerial or clerical errors in the order of the district court. Rule 11 will thus provide clear and quick relief in the district court, while safeguarding the requirements of §§ 2254 and 2255 and the finality of criminal judgments.

PART B. PROPOSED NEW RULE 37**

Rule 37. Review of the Judgment.

(a) Exclusive Remedies. The sole procedures for seeking relief from a judgment in a criminal case are by motion as authorized by 18 U.S.C. §§ 3582 and 3600, 28 U.S.C. § 2255, Rules 33, 35, and 37(b), or by appeal as authorized by 18 U.S.C. § 3742, 28 U.S.C. §§ 1291 and 2253, and the Federal Rules of Appellate Procedure. Writs of error coram vobis, audita querela, bills of review, and bills in the nature of a bill of review may not be used to seek relief from a criminal judgment.

(b) Writ of Error Coram Nobis.

(1) Requirements. A motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case must meet all the requirements applicable to a motion under 28 U.S.C. § 2255, except that

(A) at the time of filing of the motion, the moving party must not be in custody, within the meaning of 28 U.S.C. § 2255, as a result of the judgment for which relief is being sought; and

(B) the moving party must demonstrate that he is subject to a continuing and serious adverse consequence from the judgment.

(2) Exception to period of limitation. A motion that does not meet the 1-year period of limitation in § 2255 may be considered if it is filed within one year of the date when the continuing and serious adverse consequence from the judgment could have been discovered through the exercise of due diligence. A motion filed under this paragraph must be dismissed if the government has been prejudiced by delay in filing the motion. There is a rebuttable presumption of prejudice if the motion was filed more than five years after date of conviction.

(3) Second or successive motion. If a motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case is filed after the filing of a prior such motion, or a motion under 28 U.S.C. § 2255, seeking relief from that judgment, the motion shall be regarded as a second or successive motion and shall be subject to the requirements for second or successive motions under 28 U.S.C. § 2255.

Advisory Committee Notes to Rule 37

This Rule is designed to regularize the collateral review of federal criminal judgments. Rule 37(a) recognizes that, with the exception of coram nobis, the common law writs of error subsumed in the All Writs Act of 1791, 28 U.S.C. § 1651, namely coram vobis, audita querela, bills of review, and bills in the nature of a bill of review, have been effectively superseded by

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**The language supported by Mr. McNamara is reprinted following the committee note.

statutes and the Federal Rules of Criminal Procedure. The rule makes clear that it is improper to resort to these writs to challenge a criminal judgment.

Subdivision (a) lists the appropriate avenues of relief from a criminal judgment. Under the current Criminal Rules, defendants can seek post-judgment relief as provided in Rule 33(b)(1) (new trial for newly discovered evidence) and Rule 35(a) (correcting clear error in the sentence). Rule 34, though entitled "Arresting Judgment," requires that the motion be filed within 7 days of the verdict or plea, and thus is not truly a post-judgment remedy. Defendants can also seek post-judgment relief as provided in 18 U.S.C. § 3582(c)(2) (modification of an imposed term of imprisonment based on certain amendments to the sentencing guidelines), 18 U.S.C. § 3600(g) (motion for a new trial or re-sentencing after exculpatory DNA testing), and 28 U.S.C. § 2255. Section 2255 in turn authorizes resort to the writ of habeas corpus under 28 U.S.C. § 2241 if a § 2255 motion is "inadequate or ineffective." Courts have held § 2255 motions inadequate and ineffective when a defendant wishes to file a successive motion on the grounds that his statutory offense has been reinterpreted to render the defendant's conduct non-criminal. See e.g., Christopher v. Miles, 342 F.3d 378, 382 (5th Cir. 2003). The Government can seek post-judgment relief under Rule 35(a) and (b) and under 18 U.S.C. § 3582(c)(2), and by appeal under 18 U.S.C. § 3731. Finally, defendants and the Government can both seek post-judgment relief by appeal where authorized by 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2253, and the Federal Rules of Appellate Procedure. Subdivision (a) does not alter the requirements of these other rules and statutory sections in any way. It also does not affect the alteration or termination of probation, supervised release, fines, restitution, or criminal forfeiture as elsewhere provided by these Rules or by statute. See, e.g.,18 U.S.C. §§ 3563, 3572, 3583, 3664.

Subdivision (b) recognizes that the writ of coram nobis retains the limited role of providing an avenue for collateral relief to defendants who are not "in custody" within the meaning of § 2255. These include defendants who did not receive a custodial sentence, or whose custodial sentence is insufficiently long to permit a resort to both an appeal and collateral review. Godoski v. United States, 304 F.3d 761, 762 (7th Cir. 2002); United States v. Monreal, 301 F.3d 1127, 1132 (9th Cir. 2002). Under subdivision (b) a motion seeking coram nobis relief must meet all the requirements applicable to a motion under § 2255 other than the "in custody" requirement, which is replaced by a requirement that the defendant demonstrate that he is subject to a continuing and serious adverse consequence from the judgment. The Committee concluded that making the § 2255 requirements equally and uniformly applicable to writs of error coram nobis is most consistent with, and best embodies, congressional intent as it relates to collateral review of criminal convictions.

A defendant's motion in the district court seeking either § 2255 or coram nobis relief must show either a constitutional error or an error "of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid" and "inherently results in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185-87 (1979); Reed v. Farley, 512 U.S. 339, 353 (1994); Morgan, 346 U.S. at 504 (denial of counsel). The decision whether that error may be a factual error "material to the validity and regularity of the legal proceeding itself,"Carlisle, 517 U.S. at 429, or "a fundamental error of law," United States v. Sawyer, 239 F.3d 31, 38 (1st Cir. 2001), is determined under the law applicable to § 2255 motions.

Subdivision (b)(1)(B), which requires that the defendant show that he is subject to a continuing and serious adverse consequence from the judgment, reflects present case law holding that a person seeking coram nobis relief must show a concrete threat of serious harm arising from the judgment. E.g., Morgan, 346 U.S. at 503-04 (conviction used to enhance subsequent sentence); Fleming v. United States, 146 F.3d 88, 90-91 (2d Cir. 1998) [(collecting decisions finding consequences that would support the writ, including deprivation of the right to vote, sentencing enhancement); United States v. Esogbue, 357 F.3d 532, 534 (5th Cir. 2004) (deportation)]; Howard v. United States, 962 F.2d 651, 654 (7th Cir. 1992);[Dean v. United States, 436 F. Supp. 2d 485 (E.D.N.Y. 2006) (employment terminated because of conviction)]. This assures that the defendant is actually being seriously harmed by his conviction; speculative harms, harms to reputation, and harms not directly arising from his conviction are insufficient. Nothing in this Rule is intended to change the scope of "continuing and serious adverse consequences," which the [lower] courts[~~of appeals~~] have found support the issuance of writs of error coram nobis.

Under subdivision (b)(1), a motion for coram nobis relief generally must be filed within one year of the triggering events specified in § 2255 ¶ 6. Although at common law, coram nobis was "allowed without limitation of time," defendants were required to show "sound reasons for failure to seek earlier relief." Morgan, 346 U.S. at 507; Foont v. United States, 93 F.3d 76, 80 (2d Cir. 1996). Similar admonitions against delay were at first applied to motions under § 2255, but Congress ultimately decided that requiring that § 2255 motions be made within one year of specified triggering events was a clearer and better method to prevent abuses and promote the finality of judgments. Just as defendants subject to ongoing imprisonment are required to file within those one-year periods, the Committee believes defendants who are subject to collateral consequences generally should also have to file within those one-year periods.

The only exception, embodied in subdivision (b)(2), is if the defendant demonstrates that the motion was filed within one year of the date when the continuing and serious adverse consequence from the judgment could have been discovered through the exercise of due diligence. This exception is similar to § 2255 ¶ 5(4) and to former Rule 9(a) of the Rules Governing § 2255 proceedings. Elaborating on former Rule 9(a), subdivision (b)(2) provides such a motion must be dismissed if the delay in filing the motion has prejudiced the government, either in responding to the motion, in retrying the case, or otherwise, and provides that prejudice is presumed if the motion is filed more than five years after the date of conviction. The concepts of "due diligence" and "prejudice" are drawn as well from present case law, and nothing in this Rule is intended to change the meaning of these terms as defined by the courts of appeals.

Subdivision (b)(3) provides that if a motion for coram nobis relief is filed after an earlier coram nobis motion or a motion under § 2255 has been filed seeking relief from that judgment, the motion is regarded as a second or successive motion and must meet the requirements of § 2255 ¶ 8. See 28 U.S.C. § 2244(b), United States v. Noske, 235 F.3d 405, 406 (8th Cir. 2000); United States v. Swindall, 107 F.3d 831, 836 n.7 (11th Cir. 1997). Rule 37(b)(3) would allow to

the same extent as § 2255 a successive motion on the basis that the defendant's statutory offense has been reinterpreted to render the his conduct non-criminal.

Under subdivision (b), a defendant may not appeal from the denial of a motion for coram nobis relief unless the district judge or a circuit justice or judge issues a certificate of appealability, as required in § 2255 cases. 28 U.S.C. § 2253(b); Fed. R. App. P. 22(b).

Because a motion for a writ of error coram nobis "is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding," Morgan, 346 U.S. at 506 n.4, the motion and all proceedings upon it should be docketed in the criminal case in which the challenged judgment was entered. Nonetheless, because this Rule subjects such motions to the same requirements that are applied to motions under § 2255, the Rules Governing Section 2255 Proceedings for the United States District Courts are equally applicable to motions for writs of error coram nobis.

ALTERNATIVE VERSION OF PROPOSED RULE 37(b)

Rule 37. **Review of the Judgment.**

. . .

(b) Writ of Error Coram Nobis.

(1) Requirements. A motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case must meet all the requirements applicable to a motion under 28 U.S.C. § 2255, except that

(a) at the time of filing of the motion, the defendant must *not* be in custody within the meaning of 28 U.S.C. § 2255;

(b) the defendant must demonstrate that he is subject to a continuing and serious adverse consequence from the judgment; and

(c) there is no statute of limitations for filing. A motion may be dismissed if the government has been prejudiced by delay in filing the motion, unless the movant shows that the motion is based on grounds he could not have had learned by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(2) Second or successive motion. If a motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case is filed after the filing of a prior such motion, or a motion under 28 U.S.C. § 2255, seeking relief from that judgment, the motion shall be regarded as a second or successive motion and shall be subject to the requirements of 28 U.S.C. § 2255, paragraph 8.

Style suggestions - Rule 37

Rule 37. Review of the Judgment.

(a) Exclusive Remedies. The sole procedures for seeking relief from a judgment in a criminal case are by motion as authorized by 18 U.S.C. §§ 3582 and 3600, 28 U.S.C. § 2255, ~~Rule~~ **Rules** 33, 35, and 37(b) ~~of these Rules~~, or by appeal as authorized by 18 U.S.C. § 3742, 28 U.S.C. §§ 1291 and 2253, and the Federal Rules of Appellate Procedure. Writs of error coram vobis, audita querela, bills of review, and bills in the nature of a bill of review may not be used to seek relief from a criminal judgment.

(b) Writ of Error Coram Nobis.

(1) Requirements. A motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case must meet all the requirements applicable to a motion under 28 U.S.C. § 2255, except that

> (A) at the time of filing of the motion, the moving party must not be in custody, within the meaning of 28 U.S.C. § 2255, as a result of the judgment for which relief is being sought; and
>
> (B) the moving party must demonstrate that ~~he~~ **it** is subject to a continuing and serious adverse consequence from the judgment.

(2) Exception to period of limitation. ~~A~~ **A court may consider a** motion ~~that does not meet~~ **filed after** the 1-year period of limitation in § 2255 ~~may be considered~~ **only** if it is filed within one year of the date when the continuing and serious adverse consequence from the judgment could have been discovered through the exercise of due diligence**, unless** ~~. A motion filed under this paragraph must be dismissed if~~ the government has been prejudiced by delay in filing the motion. There is a rebuttable presumption of prejudice if the motion was filed more than five years after date of conviction.

(3) Second or successive motion. If a motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case is filed after the filing of a prior such motion, or a motion under 28 U.S.C. § 2255, seeking relief from that judgment, the motion ~~shall be regarded as~~ **is** a second or successive motion ~~and shall be~~ subject to the requirements for second or successive motions under 28 U.S.C. § 2255.

MEMORANDUM

DATE: March 14, 2007

TO: Sara Beale
Nancy King

FROM: Cathie Struve

RE: Amendments relating to Rules 11 of the Rules governing 2254 and 2255 proceedings

Thank you for sharing the proposed amendments to these Rules with me. I have a few questions concerning these amendments – and the conforming amendments to the Appellate Rules – and I wanted to run them by you. I have not yet run these thoughts by anyone from the Appellate Rules Committee, and I haven't yet run the language past Joe Kimble for style review; I hope you don't mind my inflicting my very preliminary ideas on you! I look forward to your guidance on these issues.

I. Certificates of appealability

Appellate Rule 22(b)(1) currently provides:

> In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

The proposed amendments to 2254/2255 Rules 11 would add a new Rule 11(a) that provides:

> At the same time the judge enters a final order adverse to the [moving party] applicant, the judge must either issue or deny a certificate of appealability. If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).

Aside from the issue of timing, the proposed Rule 11(a) differs from existing Appellate Rule 22(b)(1) in that Rule 11(a) would not require the district court, if it denies the certificate, to "state why." Rule 22(b)'s requirement of a statement of reasons for the denial is of long standing. The requirement dates as far back as the time – pre-AEDPA – when the required certificate was a "certificate of probable cause." The pre-AEDPA Rule 22 provided: "If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue." The original 1967 Committee Note to Appellate Rule 22 explained the requirement of an explanation for the denial of the certificate as follows: "In the interest of insuring that the matter of the certificate will not be overlooked and that, if the certificate is denied, the reasons for denial in the first instance will be available on any subsequent application, the proposed rule requires the district judge to issue the certificate or to state reasons for its denial." When Congress re-wrote Rule 22 as part of AEDPA, it added a requirement that the district court explain *grants* of the certificate, but it did not delete the requirement that the district court also explain *denials*. The rewritten rule read in part: "If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court." 110 Stat. 1214, 1218. Although the Rule has been amended since then, the substance of this requirement remains.

I therefore think it would be a significant change if Rule 11(a) were to require explanations only for grants and not for denials of the certificate. Failing to require explanation of denials would deprive the Court of Appeals of information relevant to the Court of Appeals' consideration of any request for a certificate of appealability. And deleting the requirement for explanation of denials would delete a requirement that Congress itself retained when it rewrote Appellate Rule 22 as part of AEDPA.

For this reason, I would suggest that the following sentence be added to the end of each proposed Rule 11(a): "If the judge denies a certificate, the judge must state why a certificate should not issue."

I would then recommend to the Appellate Rules Committee that it consider the following conforming amendment to Appellate Rule 22(b)(1):

Rule 22. Habeas Corpus and Section 2255 Proceedings

* * * * *

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). ~~If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue.~~ The district clerk must send the certificate ~~or~~ , if any, and the statement described in Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

* * * * *

Committee Note

Subdivision (b)(1). The requirement that the district judge who rendered the judgment either issue a certificate of appealability or state why a certificate should not issue has been

moved from subdivision (b)(1) to Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255. Subdivision (b)(1) continues to require that the district clerk send the certificate, if any, and the statement of reasons for grant or denial of the certificate to the court of appeals along with the notice of appeal and the file of the district-court proceedings.

II. Extending the time to file a notice of appeal

The amendment to Appellate Rule 4(a)(4)(A) seems quite straightforward; the way that I would propose to implement it is shown below. I welcome your comments on it.

If you will forgive me for intruding into questions that do not concern appellate procedure, I wanted to ask a question about the way in which proposed new Rule 11(b) will work. The draft states that a motion for reconsideration under Rule 11(b) is the *only* way to obtain relief from a final order, and also states that such a motion may raise *only* a defect in the integrity of the proceedings.

I can see from the Note that the goal here is – following *Gonzalez v. Crosby* – to foreclose the use of Rule 60(b) as an end-run around AEDPA's limitations. My question is what effect Rule 11(b) will have on postjudgment motions under Rules 52(b) or 59(b). Such motions occur after judgment, and thus it seems possible that Rule 11(b) could be read to bar them. Of course, as you know, these motions have long been available in habeas proceedings, *see Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 271 (1978). And though I am not sure what the parameters of the *Gonzalez* Court's "integrity of the proceedings" limit are, I would assume that it would exclude a number of grounds that currently can provide a basis for a motion under Rules 52 or 59. The *Gonzalez* Court did not discuss whether its reasoning would apply with equal force to Rule 52 or 59 motions. And since the Committee Note doesn't explicitly discuss Rule 11(b)'s effect on either of those motions, I just wondered about it.

In any event, thank you for your patience with this inquiry; I realize that it's outside the ambit of the Appellate Rules. If Rule 11(b) is adopted, then I would propose that the Appellate Rules Committee consider the following amendment to Appellate Rule 4(a)(4)(A):

Rule 4. Appeal as of Right--When Taken

(a) Appeal in a Civil Case.

* * * * *

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure or the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b) [of the Federal Rules of Civil Procedure];

(ii) to amend or make additional factual findings under Rule 52(b) [of the Federal Rules of Civil Procedure], whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 [of the Federal Rules of Civil Procedure] if the district court extends the time to appeal under Rule 58 [of the Federal Rules of Civil Procedure];

(iv) to alter or amend the judgment under Rule 59 [of the Federal Rules of Civil Procedure];

(v) for a new trial under Rule 59 [of the Federal Rules of Civil Procedure]; ~~or~~

(vi) for relief under Rule 60 [of the Federal Rules of Civil Procedure] if the motion is filed no later than 10 days[3] after the judgment is entered; or

(vii) for reconsideration under Rule 11(b) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255.

* * * * *

Committee Note

Subdivision (a)(4)(A). New Rule 11(b) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 concerns motions for reconsideration in Section 2254 and 2255 proceedings. New subdivision (a)(4)(A)(vii) provides that a timely motion under Rule 11(b) has the same effect on the time to file an appeal as the other postjudgment motions listed in subdivision (a)(4)(A).

[3] NB: Changes stemming from the Time-Computation Project make it likely that this 10-day limit will be changed to 30 days.

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

January 5, 2007

MEMORANDUM

TO: Professor Nancy J. King
Chair, Subcommittee on
Extraordinary Writs

FROM: Benton J. Campbell
Acting Chief of Staff

SUBJECT: Questions Following the October Meeting of the Full Advisory Committee

This memorandum addresses the questions on extraordinary writs – including questions about the Committee's authority to regulate their use – posed during the relevant discussion at the Committee's October meeting and in your email of November 3, 2006. We look forward to discussing all of this further during our next conference call.

1. Authority of the Committee to Regulate the Use of Extraordinary Writs

Several members of the Committee voiced concern that promulgating the proposed new Rule 37 would go beyond the authority of the Rules Committees. These Committee members expressed concern that the proposed rule would affect substantive rights.

As you know, the Rules Enabling Act explicitly prohibits the promulgation of any rule that would "abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). The proposed new Rule 37 does not affect substantive rights, but rather merely attempts to further regularize the procedures by which criminal judgments are collaterally attacked. The best support for this is the consideration and promulgation of Rule 60(b) of the Federal Rules of Civil Procedure, which *abolished* the writ of error *coram nobis* and other extraordinary writs under the Rules Enabling Act process. Rule 60(b) did not impact substantive rights, and the Committees that promulgated the rule so recognized (as did, implicitly, the Judicial Conference and the Supreme Court that approved the rule, and the Congress that passed on it). The Advisory Committee Note that accompanied the rule explicitly and quite clearly lays out that the goal of the rule is to regularize and codify the procedures by which final judgments can be attacked. Fed. R. Civ. P. 60(b), Advisory Committee Note to the 1946 Amendment. The Note states unequivocally that the rule does not "define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief." *Id.*

Reviewing courts have also recognized the promulgation of Rule 60(b) as a permissible exercise of the authority granted under the Act to regularize civil procedure. In *Neely v. United States*, 546 F.2d 1059, 1065 (3d Cir. 1976), the Third Circuit found that the abolition of *coram nobis* in Rule 60(b) was part of the usual rules enabling work of regulating the process of civil litigation and did not impact substantive rights. The court stated that "[i]n abolishing *coram nobis*, as well as several other ancient procedural devices, Rule 60(b) did not, and indeed could not, 'abridge, enlarge or modify any substantive right,'" (*quoting* 28 U.S.C. § 2072). The Rules Enabling Act provides "the power to prescribe general rules of practice and procedure," and the *Neely* court, as well as the Committees that promulgated Rule 60(b), found that the writs under consideration were a procedure for raising "substantive rights," not substantive rights in and of themselves. If abolishing these writs was permissible under the Act, than surely limiting *coram nobis* and abolishing those same other writs in Rule 37 would not violate the Act. "'The test must be whether a rule really regulates procedure – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.'" *Hanna v. Plumer*, 380 U.S. 460, 464 (1965), *quoting Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). By contrast, a rule that impermissibly alters substantive rights is one that modifies "the rules of decision by which [a] court [resolves disputes]." *Hanna*, 380 U.S. at 464-65.

The proposed Rule 37 does not alter the rules of decision for any claim, but only the procedures for bringing the claim. The writs regulated by the proposed rule are not the exclusive procedures for bringing these substantive claims. The proposed Rule 37 expressly lists other procedures for bringing such claims, just as Rule 60(b) does in the civil context. *See Neely*, 546 F.2d at 1065. The proposed Rule 37 eliminates no substantive right, but at most incidentally affects them. And as the Supreme Court has stated "'[r]ules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of

that system of rules.'" *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 552 (1991), *quoting Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 5 (1987).

The procedures by which criminal judgments are attacked collaterally are the province of this Committee. Just as the Advisory Committee to the Civil Rules recognized in 1946 that "[i]t is obvious that the rules should be complete . . . and define the practices with respect to any existing rights or remedies to obtain relief from final judgments," so we believe this Committee has the authority – and ought – to regularize the procedures by which final judgments in criminal cases are challenged. There is considerable and increasing confusion as to availability of these extraordinary writs, and we believe this Committee should provide a clear set of rules for the consideration of collateral attack upon final judgments.

2: Questions from Your Email of November 3, 2006

A. What is the meaning of "continuing" in the term "continuing and serious adverse consequence" . . . would a one-time problem count (i.e., inability to obtain particular employment)?

B. What is the meaning of "serious" adverse consequence? Would job loss count? Reputational injury? Is there settled case law out there defining this term or will this cut back on the present availability of *coram nobis* relief?

The requirement of continuing and serious adverse consequences is drawn from *Morgan* and the *coram nobis* case law. *E.g.*, *Fleming v. United States*, 146 F.3d 88, 90-91 (2d Cir. 1998); *Hager v. United States*, 993 F.2d 4, 5 (1st Cir. 1993); *United States v. Craig*, 907 F.2d 653, 657-60 (7th Cir. 1990);*United States v. Bruno*, 903 F.2d 393, 396 (5th Cir. 1990); *United States v. Osser*, 864 F.2d 1056, 1059 (3d Cir. 1988). Under this case law, "continuing" means existing in the present day. *Fleming*, 146 F.3d at 90. Legal inability to obtain particular employment would count if it was not speculative. Id.; Howard *v. United States*, 962 F.2d 651, 654 (7th Cir. 1992). Mere reputational loss (which exists for every conviction) would not be sufficient to make a conviction reviewable. *Fleming*, 146 F.3d at 90; *United States v. Keane*, 852 F.2d 199, 202-04 (7th Cir. 1988). This case law will help define the terms, so the proposed rule will not cut back on what would have been available under this case law (although it may in the Ninth and Fourth Circuits, which have not yet adopted that case law, *Fleming*, 146 F.3d at n.3).

C. Who has the burden of proof on the question of prejudice to the government under the proposed rule? What do existing *coram nobis* cases say about this?

The burden of proof on prejudice is on the government, except that after five years there is a presumption of prejudice that the defendant could rebut, if he so chose. This presumption was drawn from former Rule 9(a) of the Rules Governing § 2255 and § 2254 Proceedings. *E.g.*, § 2254 Rule 9, 1976 Advisory Committee Notes ("If the delay is more than five years after the judgment of conviction, prejudice is presumed, although this presumption is rebuttable by the petitioner. Otherwise, the state has the burden of showing such prejudice."). All § 2254 and § 2255 petitioners must now meet those statutes' one-year period of limitations (since the prejudice language here appears in subsection (b)(1)(C), which applies only if the defendant cannot meet § 2255's various one-year periods of limitations, it is appropriate and necessary). The *coram nobis* case law on this issue is scant. *See Telink, Inc. v. United States*, 24 F.3d 42, 48 (9th Cir. 1994) (noting that the District Court put the *prima facie* burden on the government).

D. What counts as prejudice to the government, prejudice in defending *coram nobis* action, prejudice in reprosecuting the petitioner, etc? Is this a change from present law?

The rule counts both prejudice in responding to the petition and prejudice in reprosecuting the petitioner. Former Rule 9(a) counted the former, and *coram nobis* cases have counted both. *E.g.*, *United States v. Dyer*, 136 F.3d 417, 428 (5th Cir. 1998); *Telink, Inc. v. United States*, 24 F.3d 42, 48 (9th Cir. 1994); *Osser*, 864 F.2d at 1061. Considering the latter type of prejudice is particularly appropriate to petitions under subsection (b)(1)(C), which are brought outside of § 2255's various one-year periods, and indeed after custody is over, when records and evidence often must be destroyed due to storage constraints.

E. How will prejudice be established, will this mean more evidentiary hearings?

Prejudice could be shown by proffer by the prosecutor, testimony of a law enforcement agent, or by other evidence. It should not require any more than the single evidentiary hearing that may be necessary for the petitioner to establish the other requirements for *coram nobis*.

F. What counts as "delay in filing the motion" - is passage of time enough, or must there be some negligence or fault on the part of the petitioner? When is a filing "delayed"?

The "delay in filing the motion" mean simply the passage of time; no negligence or fault is required. This is because this language appears as part of the prejudice provision in subsection (b)(1)(C), which only applies where the petitions are brought outside of § 2255's various one-year periods, and which generously allows the petitioner to file within one year after the collateral consequences could have been discovered with due diligence. This provision appropriately counterbalances that generosity by considering the prejudice to the government.

G. Is the five year presumption of prejudice too short? Too long? Why five years?

See the answer to question C above. Five years is an appropriate period, given the degradation and loss of evidence, memory, witnesses, and prosecutorial personnel that will occur over five years.

H. How will this proposed rule limit access to DNA testing and potential exonerations? How does it interact with Rule 33 motions for newly discovered evidence?

18 U.S.C. § 3600 will continue to provide for DNA testing and motions for exoneration. Rule 33 will continue to allow new trial motions for newly discovered evidence. Neither is impeded by the proposal.

I. Will the proposal change the ability or incentive of a defendant to challenge a prior conviction in a subsequent proceeding (i.e., arguing at sentencing or in a § 2255 application that a prior conviction lacked counsel)?

Defendants will have the ability to raise such challenges to the extent current law allows them. The proposal would change their incentive only if they have already voided a conviction using *coram nobis*, which removes the need to challenge it again.

J. Should the list of available remedies surviving the rule include not just § 2241, but also Rules 34 and 59(b)?

Section 2241 is only available pursuant to § 2255 ¶ 5, and the proposal preserves § 2255 as a remedy, so listing § 2241 is unnecessary, confusing, and likely to generate a lot of improper § 2241 motions by defendants who ought to be filing § 2255 motions. Rule 34 motions have to be filed "within 7 days after the court accepts a verdict or ... plea of guilty," Fed. R. Crim. P. 34(b), and thus are not are not a method of challenging a criminal judgment (despite the rules use of the archaic term "arresting judgment"). Rule 59(b) addresses magistrate's recommendations, which are not final judgments.

Phone: (919) 856-4236
Fax: (919) 856-4477

Office of the Federal Public Defender
150 Fayetteville Street Mall, Suite 450
Raleigh, North Carolina 27601

Thomas P. McNamara
Federal Public Defender

January 5, 2007

MEMORANDUM

TO: PROFESSOR NANCY J. KING
Chair, Subcommittee on Extraordinary Writs

FROM: THOMAS P. McNAMARA
Federal Public Defender

VIDALIA V. PATTERSON
Research and Writing Attorney

RE: PROPOSED RULE 37: ADDRESSING QUESTIONS RAISED DURING ADVISORY COMMITTEE MEETING

Whether Proposed Rule 37 Oversteps the Authority of the Rules Committee

Providing little guidance, the Rules Enabling Act generally states that the "rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072. However, the Judicial Conference of the United States (JCUS) has provided further explanation, stating that the basic

charge to the Rules Advisory Committees is "[t]o study the rules of practice and procedure" in each committee's respective field. JCUS- Jurisdiction of committees, Feb. 2006 at 15. We would submit that, although *coram nobis* and other writs may be remedial in nature, by modifying and abolishing existing rights conferred by the writs, proposed Rule 37 affects substantive rights and thus lies outside the authority of the advisory committee as contemplated by both the Rules Enabling Act and the JCUS. Moreover, we were unable to find cases in which the Advisory Rules Committee drafted a rule in which both an act of Congress and Supreme Court precedent were overturned. Such an action appears better left to the legislative branch than by the committee.

The Requirement of Adverse Consequence

Each *coram nobis* case that has examined the requirement of adverse consequences has been factually different.[4] For example, in *United States v. Morgan*, the adverse consequence identified by the Supreme Court involved the possibility of a harsher sentence for the petitioner based on his prior conviction's making him a "second offender." 346 U.S. 502, 504 (1954). Presently, this equates to how the U.S. Sentencing Guidelines accounts for criminal history in the sentence calculation in every case and at times is used to justify an upward departure from that sentence. This is clearly an adverse consequence and was acknowledged as such by the *Morgan* court.

Another example is found in *Hirabayashi v. United States,* 828 F.2d 591, 606-07 (9th Cir. 1987). There, the Ninth Circuit rejected the government's argument that Hirabayashi suffered no continuing adverse consequence from his misdemeanor conviction for failing to comply with a curfew imposed on Japanese aliens and American citizens of Japanese ancestry during WWII. Rather than discussing "continuous and serious" adverse consequences, the court noted that it had "repeatedly reaffirmed the presumption that *collateral consequences* flow from any criminal conviction" and that "[a]ny judgment of misconduct has consequences for which one may be legally or professionally accountable." *Id.* at 606-07 (emphasis added).

The *Hirabayashi* court further referenced two Supreme Court cases, *Sibron v. New York*, 392 U.S. 40 (1968) and *Pollard v. United States*, 352 U.S. 354 (1957). The *Sibron* court held that "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." 392 U.S. at 57. In so holding, the *Sibron* court referred to its previous holding in *Pollard* where the court made a presumption of collateral consequences. *Id.* (Citing *Pollard,* 352 U.S. at 358. ("The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits.")).

---

[1] A thorough search of case law fails to identify opinions that specifically require a *coram nobis* petitioner to demonstrate "continuing and serious" adverse consequences.

It is our position that these collateral consequences include, but are not limited to: affecting the ability to seek employment, damage to reputation, being subject to impeachment on cross-examination, restraint of civil liberties including the right to possess firearms, the prior conviction's serving as a predicate offense for such offenses as felon in possession, characterization as an Armed Career Criminal or Career Offender, and being subject to a higher sentence based on criminal history both at the state and federal levels. All of these are serious and continuing adverse consequences. Moreover, we propose that the term "collateral consequence" more aptly captures what prior courts have found to satisfy the *coram nobis* requirements.

Burden of Proof for Demonstrating Prejudice and Delay Defined in *Coram Nobis*

"It has been held or recognized that the writ of error *coram nobis* is available, without limitation of time, under 28 U.S.C. 1651 as a remedy in order to vacate a judgment of conviction the sentence for which has been served, and that the laches or delay in applying for the writ is not a bar to relief." Romualdo P. Eclavea, Annotation, *Availability, under 28 U.S.C.A. § 1651, of writ of error coram nobis to vacate federal conviction where sentence has been served,* 38 A.L.R. Fed. 617 (2006). As such, we contend that the burden of proof to demonstrate prejudice from delay in applying for the writ would be on the government.

The controlling precedent in this arena is *United States v. Morgan*, 346 U.S. 502 (1954). *Morgan,* which dealt with a denial of counsel, allowed a complainant to bring an action for writ of error *coram nobis* more than twelve years after the date of conviction. In *Morgan*, the Court observed "the writ of *coram nobis* was available at common law to correct errors of fact. It was allowed without limitation of time for facts that affect the 'validity and regularity' of the judgment." *Id.* at 507. The Court found this principle to still be important because, "although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected. As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to attempt to show that this conviction was invalid." *Id.* at 512-513.

The court, however, did place a minimal burden on the party bringing the action if there was a delay. The Court stated in its ruling that "no other remedy being then available and sound reasons existing for failure to seek appropriate earlier relief, this motion in the nature of the extraordinary writ of *coram nobis* must be heard by the federal trial court." *Id.* at 512. Courts have interpreted this to mean that when delay seems to exist, the defendant must show sound reasons for failure to adjudicate the matter in a timely fashion. There has not been a bright line rule established for what is acceptable and what is not.

The general rule—or lack thereof—relating to delay is best summed up by the excerpt below from the American Law Reports: *Delay as affecting right to* coram nobis *attacking criminal conviction*:

> "In most states the questions whether delay, and what delay, will bar relief by *coram nobis* from a conviction of crime cannot be answered wholly independently of the nature of the grounds of the application, nor of the character of the

judgment as being void or merely voidable, assuming the truth of the matters relied upon to set it aside. The most important consideration bearing on the effect of delay is the distinction between a judgment which is void and one which is merely voidable, invalid, erroneous, or affected by some irregularity.

In reason, a void judgment can gain no validity from the passage of time, and to uphold one, particularly in a criminal case, merely because of delay in attacking it, even supposing the guilt of the accused, must amount to an abandonment of the law. A court cannot well say to a defendant: The trial and the supposed judgment against you are utter nullities, but you may be guilty, and you have been for so long a time wrongfully imprisoned without having corrected the error or oversight occurring at your expense, and without having made legally articulate objections, it is now too late to free you or to clear your name but the courts must leave you where you are precisely as though you had been lawfully committed.

So in numerous cases in which the convictions were evidently void, assuming the truth of the allegations made and the affidavits submitted, the view taken was that prolonged delay, even in some cases delay of many years, is not a bar to relief by *coram nobis*. And, in void judgment cases, it has been repeatedly held that delay does not constitute a bar though continued until after the sentence has been fully served. But in other comparable cases the doctrine adhered to was that great delay, or "unreasonable" delay, or lack of "diligence," may in itself justify a denial of the writ or dismissal of the petition.

In cases in which the judgments are not void a variety of considerations may influence the result, according to whether the particular attack is made on grounds of fundamental mistake or oversight resulting in gross injustice or on grounds of error or irregularity concerning matters of a character which when known and dealt with at the trial are ordinarily made grounds of a motion for a new trial or an appeal; and the reasonableness of applying a strict rule of diligence no doubt varies accordingly, and has had an influence on the rulings.

In many cases in which the truth of the matters alleged would presumably not render the judgment void, the proposition laid down in regard to time has in substance been that the applicant for the writ is to be held to a rule of reasonable diligence. In one case, wherein the conviction was not void, the trial court was held to be without authority to set the judgment aside after the great delay that had occurred.

There is very little dissent from the proposition that failure to apply for the writ until after the term at which the conviction was had has expired is not a bar. And, especially when the judgment would be established as void on proof of the matters alleged, the writ need not be applied for within the time allowed for a motion for a

> new trial; but a different rule has been laid down regarding complaints of irregularities occurring at or affecting the trial and which could have been made the ground of a motion for a new trial.
>
> In Florida it has been said that the writ of *coram nobis* must be applied for within such time, if any, as may have been prescribed for the taking out of writs of error generally; but after writs of error were abolished in Florida and review by appeal substituted, it was declared that an application for *coram nobis* must be made within the time prescribed for an appeal, "unless good cause is shown for a longer delay."
>
> An Indiana statute providing that no court shall have jurisdiction to entertain a *coram nobis* proceeding after the lapse of 5 years from the judgment of conviction was applied in certain cases but was later held to contravene the Fourteenth Federal Amendment. Thereafter the Indiana court held that a void judgment may be attacked by *coram nobis* at any time.
>
> A Kansas statute has been construed to remove all objections to delay in applying for *coram nobis* during the time that the "disability" of imprisonment continues.
>
> Not time but a species of failure of the judicial process is of the essence of *coram nobis*. The writ is conceived as an essential safeguard enabling a court in certain extraordinary cases to reach beyond obstructions and intervals in avoidance of insupportable results. It is a sort of birthright not to be exchanged for notions of symmetry or shortsighted convenience; and it must be counted a misfortune when any penchant for rulemaking shall have disabled a court by a proper use of this instrument to deal reasonably and humanely with meritorious cases when and as they are presented. Sufficient unto the day is the decision thereof."

W. W. Allen, Annotation, *Delay as affecting right to* coram nobis *attacking criminal conviction*, 62 A.L.R.2d 432 (2006).

These examples demonstrate that the standard should be "good cause" rather than a bright-line 5 year presumption of prejudice.

Newly Discovered Evidence and *Coram Nobis*

Though never expressly forbidden by the Supreme Court, as a general rule, newly discovered evidence does not on its own furnish a basis for *coram nobis* relief, *Moody v. United States*, 874 F.2d 1575 (11th Cir. 1989); *United States v. Carter*, 319 F. Supp. 702 (M.D. Ga. 1969), judgment aff'd, 437 F.2d 444 (5th Cir. 1971), at least where such evidence is relevant only

to the guilt or innocence of the petitioner. *Moody* at 1577. This rule has been said to apply even in the case of another's confession of guilt. *Clark v. United States*, 370 F. Supp. 92 (W.D. Pa. 1974), aff'd, 506 F.2d 1050 (3d Cir. 1974).

"In some situations, however, newly discovered evidence may be a proper ground for granting relief. For example, if counsel can demonstrate that the newly discovered evidence was of such a nature that the verdict of the trial court would not have been rendered if the evidence had been presented, *coram nobis* relief may be granted. In such a case, however, the attorney advocating for *coram nobis* relief must demonstrate that the new evidence was not known to the defendant or his counsel at the time of the trial and also that it could not have been discovered by either of them in the exercise of reasonable diligence." 18 AM. JUR. *Trials* §1 (2006).

This is likely the rule because of the requirement that *coram nobis* relief may only be secured if no other remedy is available to the applicant. If another remedy is available, such as Rule 33, then that remedy must be utilized. Therefore, the exceptional nature of the writ will allow it to be used in only a few limited circumstances. It is interesting, however, that in *United States v. Morgan, supra* the court states that "the writ of *coram nobis* was available at common law to correct errors of fact." *Morgan* at 507.

Whether the List of Remedies Surviving the Rules Should Include Rules 34 & 59(b)

We see no reason why Fed. R. Crim. P. 34, Arresting Judgment or rule 59(b), Dispositive Matters (before a magistrate judge) should not survive Proposed Rule 37. As the ancient writ of *coram nobis* is a post-sentence, last resort remedy, these should function independently and should not be affected by the new rule.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Proposed Amendment to Rule 41, Warrants for Electronically Stored Information**

DATE: **March 26, 2007**

The attached report from Judge Battaglia, chair of the subcommittee for electronically stored information, proposes two amendments to Rule 41. The other members of the subcommittee are Justice Edmunds, Professor King, and representatives of the Department of Justice.

This item is on the agenda for the April meeting in Brooklyn. In preparation for the discussion of this item we will have a presentation on the underlying technology.

United States District Court

Southern District Of California
U.S. Courts Building
940 Front Street
Room 1145
San Diego, California 92101-8927

Anthony J. Battaglia
United States Magistrate Judge

Phone: (619) 557-3446
Fax: (619) 702-9988

MEMORANDUM

TO: Judge Bucklew

CC: Sara Sun Beale

FROM: Judge Battaglia

RE: Proposed Rule 41 Amendments: searches for electronic stored information

DATE: March 13, 2007

In April, 2006, the Committee supported the creation of a subcommittee for potential amendments to Rule 41 concerning searches for electronically stored information (ESI). Since that time, the subcommittee has been active in studying the Rule and its relationship to the issues associated with searches for ESI. The study has included an August, 2006 full day tutorial at the Department of Justice, where demonstrations on the various aspects of the search process, the various technologies, and the practical problems associated with imaging and searching the data, respectively, were presented. A condensed version of the tutorial will be presented to the full Committee at the upcoming April, 2007 meeting.

Since the tutorial, further work has led to identifying several areas of the Rule that warrant amendment. These address the particularity requirement of Rule 41(e) in terms of the two stage process associated with ESI; the issue of whether the 10 day period under Rule 41(e) relates to execution of an on-site search, as distinguished from the later off-site search for ESI; and clarification as to what the inventory under Rule 41(f)(1) should include vis a vis ESI.

The proposed amendments are as follows:

Rule 41(e)(2):

Contents of the Warrant.

* * *

Redesignate paragraph (B) as paragraph (C);

New paragraph (B):

(B) Warrant to Search for Electronically Stored Information. A warrant issued pursuant to paragraph (A) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, such warrant authorizes subsequent review of the media or electronically stored information consistent with the warrant. The time for the execution of the warrant in Rule 41(e) and (f) refers to the seizing or on-site copying of the media or electronically stored information, and not to any subsequent review of the media or electronically stored information.

Advisory Committee Note:

Computers and other electronic storage media commonly contain such large amounts of information that it is often impractical for law enforcement to review all of the information during execution of the warrant. This rule acknowledges the need for a two-step process: officers may seize or copy the entire storage medium and review it later to determine what information falls within the scope of the warrant.

In addition to addressing the "2-step process" inherent in searches for electronically stored information, the Rule limits the 10 day execution period to the actual execution of the warrant and the on-site activity. While consideration was given to a presumptive time period within which any subsequent offsite review of the media or ESI would take place, the practical reality is that there is no basis for a "one size fits all" presumptive period. A substantial amount of time can be involved in the forensic imaging and review of information. This is due to the sheer size, encryption, booby traps, and the sheer load of projects on computer labs. Local technical offices that handle the forensic work vary in their capability, and backlog of media awaiting imaging and review. While in some major metropolitan areas, a sixty day time period might be generally feasible, it can be many months in other areas. To arbitrarily set a presumptive time period would do little more than require frequent petitions to the Court for additional time in most instances. It was not the intent to leave the property owner without expectation of the timing for return of the property or a remedy. Rather, current Rule 41(g) already provides a process for the "person aggrieved" to seek an order from the Court for a return of the property under reasonable circumstances.

The rule does not prevent a judge from imposing a deadline for the return of the property at the time the warrant is issued. Therefore, where "the person aggrieved" requires earlier access to the media or the ESI than anticipated by law enforcement or ordered by the court, the Court on a case by case basis can fashion an appropriate remedy taking into account the various issues associated with timing and the case.

* * *

Rule 41(f)(1):

~~(2)~~**(B) Inventory**. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. *In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to a description of the physical storage media seized or copied. The officer may maintain a copy of the electronically stored data seized or copied.*

Advisory Committee Note

Current Rule 41(f)(1) does not address the question of whether the inventory should include, in all instances, a description of the electronically stored information (ESI) contained in the media seized. This is consistent with practice in the "paper world." In circumstances where filing cabinets full of documents are seized, routine practice is to list the storage devises, i.e. the cabinets, as opposed to a document by document list of the contents. This option is provided here where it is impractical to record a description of the electronically stored information at the scene. Recording a description at the seen is likely the exception, and not the rule, given the large amounts of information contained on electronic storage media, and the typical impracticality for law enforcement to image and review all of the information during the execution of the warrant.

The subcommittee can expand in greater detail at the on the issues presented at the April meeting. The subcommittee is also prepared to discuss a variety of issues that are not addressed by amendment at this time. It is felt that those issues are better left to case law development given the fact that they are more substantive than purely procedural.

Respectfully submitted,

Anthony J. Battaglia
United States Magistrate Judge

AJB/kmw

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 12(b) Challenges for Failure to State an Offense; Rule 34

DATE: March 20, 2007

As described in the attached memorandum, the Department of Justice recommends that Rule 12(b)(3)(B) be amended to require the defense to raise before trial any claim that the indictment or information fails to state an offense. The Department argues that the defendant should not be permitted to raise claims of failure to state an offense belatedly, when the government's opportunity to amend the indictment or information has passed. As a practical matter, this concern dovetails with the concerns underlying the Department's support of an amendment to Rule 29, since some of the mid-trial dismissals occur in cases in which the defendant belatedly raises an issue of this nature.

This proposal was initially discussed at the Committee's April meeting in 2006. Mr. Campbell emphasized that the amendment would not affect challenges to the court's jurisdiction, but would merely defendants to file pretrial motions alleging failure to state an offense in a more timely fashion–before trial. Several members of the Committee questioned how the proposal would work in various situations, and they suggested that it would be useful to have additional information. The proposal was tabled until the October 2006 meeting, and then deferred again pending the Supreme Court's decision in United States v. Resendiz-Ponce. The decision in Resendiz-Ponce clears the way for resuming consideration of the proposed amendment.

The following background to the present rule may be helpful. The original 1944 version of the Rule provided that the "failure of the indictment or information to charge an offense shall always be noted by the court whenever and however brought to its attention." The 1944 explanation states:

> The provision that "lack of jurisdiction or the failure of the indictment or information to charge an offense shall always be noted by the court," is not in entire accord with the present practice in providing that an objection to lack of jurisdiction of the court may be presented at any time, since lack of jurisdiction of the court over the person is waived under present practice if the objection is not presented before any plea to the indictment or information.

Thus the 1944 Advisory Committee recognized that personal jurisdiction, unlike subject matter jurisdiction, is waivable. As a matter of policy, however, it provided that a lack of personal jurisdiction – as well as the failure of the indictment to state a claim – may nonetheless be raised at any time.

There appears to be no constitutional impediment to the proposal in light of the Supreme Court's decision in United States v. Cotton, 122 S.Ct. 1781 (2002). Defects in an indictment, Cotton held, do *not* deprive a court of jurisdiction. In Cotton, the indictment omitted drug quantity, a fact that had to be submitted to the jury and proven beyond a doubt after Apprendi. Insofar as Ex parte Bain, 121 U.S. 1 (1887) held that such an error was jurisdictional, Cotton expressly overruled Bain. 122 S.Ct. at 1785. Freed from the erroneous view that indictment omissions deprive a court of jurisdiction, Cotton applied a plain-error analysis because of the defendant's failure to raise the claim in a timely fashion. The unanimous Court upheld the conviction concluding that the error, though plain, had not affected the defendant's substantial rights in light of the overwhelming and essentially uncontroverted evidence of drug quantity at the trial. The Court brushed aside the defendant's argument that the Fifth Amendment grand jury right serves a vital function in checking prosecutorial power. It noted that the grand jury's role is no more important than that of the trial jury, which can be forfeited by failure to make a timely assertion of the right. Id. at 1787.

The proposed amendment would treat assertions that the indictment fails to state a claim like any other defect in an indictment or information: (1) requiring them to be raised by pretrial motion, and (2) treating failure to make a timely motion as a waiver under Rule 12(f) unless the court grants relief from the waiver after a showing of good cause. A defendant who failed to raise this issue in a timely fashion would have to show plain error.

The Department's memorandum contains draft amendments to Rules 12 and 34, with accompanying committee notes.

This issue is on the agenda for the April meeting in Brooklyn.

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D C. 20530*

February 22, 2007

The Honorable Susan C. Bucklew
Chair, Advisory Committee
on the Criminal Rules
United States District Court
109 United States Courthouse
611 North Florida Avenue
Tampa, FL 33602

Dear Judge Bucklew:

On January 3, 2006, the Department of Justice recommended that the Federal Rules of Criminal Procedure be amended to remove an anomaly in the Criminal Rules that allows defendants freely to challenge whether an indictment or information states a criminal offense for the first time during – and even after – trial.

Subsequently, on April 17, 2006, the Supreme Court granted the government's petition for a writ of certiorari in *United States v. Resendiz-Ponce,* No. 05-998), to decide whether the omission of an offense element from a federal indictment can constitute harmless error, under Fed. R. Crim. P. 52(a). We did not believe *Resendiz-Ponce* would directly affect the merits of our proposal to amend the rules concerning when a challenge to the indictment must be raised. We nevertheless thought it advisable for the Committee to defer its consideration of the proposal until after the Court ruled in *Resendiz-Ponce*, in order to determine whether the Court's decision provided guidance about the nature of an indictment error and the proper standard of appellate review.

On January 9, 2007, the Court decided *Resendiz-Ponce* without deciding whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error. Instead, relying in part on the non-technical pleading requirements expressed in Fed. R. Crim. P. 7, the Court ruled that the allegations of the indictment in the case were not defective in the first place. *United States v. Resendiz Ponce*, 549 U.S. ___, 2007 WL 43827 (2007). The Court reversed the lower court decision on that ground without reaching the harmless error issue. *Id.*

As *Resendiz-Ponce* confirms, under longstanding constitutional doctrine, federal indictments must set forth every element of the charged offense. No change to the Rules is required to meet that requirement. But we continue to believe that a defendant should be required to raise a claim that the indictment fails to allege an essential element or that it fails to

allege "the essential facts constituting the offense charged" (Fed. R. Crim. P. 7(c)(1)) before trial – when the government can seek a superseding indictment – rather than for the first time during or after a trial or guilty plea, or on appeal, after significant resources have already been expended and when correcting any error may be impossible.

Although Rule 12(b) generally requires defendants to raise "before trial" any allegation of a defect in the indictment or information, by its terms, the Rule creates an anomaly that permits defendants to claim "at any time" that the indictment or information fails to state an offense. Relying on that language, courts have allowed defendants to raise such a claim for the first time even after they have been convicted at trial, have pleaded guilty, or are on appeal – long after the government's opportunity to supersede the indictment or amend the information has passed. *See also* Fed. R. Crim. P. 34 (Arrest of Judgment).

Our proposal would require defendants to raise this claim in a timely manner before trial or a plea of guilty. Defendants who fail to raise such a claim in a timely fashion could still raise a claim later but would need to satisfy the requirements of plain error. We have attached a proposed amendment to Rule 12, and a conforming amendment to Rule 34, along with proposed Committee Notes that more fully explain the basis for the amendments. The proposed Notes also explain the reasons why Rules 12 and 34 were first drafted in the manner they were and why Supreme Court decisions have rendered those reasons no longer valid.

Courts have "urged the Judicial Conference Advisory Committee on Criminal Rules to consider amending" the rule along the lines we are suggesting. *United States v. Hedaithy*, 392 F.3d 580, 586-89 & n.7 (3d Cir. 2004). While post-trial Rule 12 motions for failure to charge an offense are infrequent, judges have recognized that allowing such motions at any time "reduces criminal defendants' incentives to raise defenses in a timely fashion in district court," "has led to strategic decisions by defendants to delay raising the defense," "undermines judicial economy and finality," fails to "respect[] the proper relationship between trial and appellate courts," causes "the waste of judicial resources," and "mak[es] it more difficult for defendants and prosecutors to enter plea agreements that benefit both the parties and society as a whole." *United States v. Panarella*, 277 F.3d 678, 686-88 (3d Cir. 2002).

We think this proposal is now ripe for consideration by the Committee, and we hope the Committee will approve the proposal for public comment at its April 2007 meeting. We appreciate your assistance with the proposal and look forward to continuing our work with you and the Committee to improve the federal criminal justice system.

Sincerely,

Benton J. Campbell
Acting Chief of Staff

cc: Professor Sara Sun Beale
Mr. John Rabiej

Rule 12. Pleadings and Pretrial Motions

(a) Pleadings. The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

(b) Pretrial Motions.

(1) In General. Rule 47 applies to a pretrial motion.

(2) Motions That May Be Made Before Trial. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.

(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 that it fails to state an offense – but at any time while the case is pending, the court may hear a claim that the district court lacks ~~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.

(4) Notice of the Government's Intent to Use Evidence.

(A) At the Government's Discretion. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) At the Defendant's Request. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) Motion Deadline. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(e) Waiver of a Defense, Objection, or Request. 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. For good cause, the court may grant relief from the waiver.

(f) Recording the Proceedings. All proceedings at a motion hearing, including any findings of fact and conclusions of law made orally by the court, must be recorded by a court reporter or a suitable recording device.

(g) Defendant's Continued Custody or Release Status. If the court grants a motion to dismiss based on a defect in instituting the prosecution, in the indictment, or in the information, it may order the defendant to be released or detained under 18 U.S.C. § 3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.

(h) Producing Statements at a Suppression Hearing. Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). At a suppression hearing, a law enforcement officer is considered a government witness.

Advisory Committee Note

When enacted in 1944, Rule 12(b) provided that a motion alleging a defect in the indictment or information had to be raised before trial, except that at any time while the case is pending, the court could hear a claim that the indictment or information fails to invoke the court's jurisdiction or "to charge an offense." The latter exception, rephrased "to state an offense," is now found in Rule 12(b)(3)(B). This exception has been interpreted to allow defendants to raise an indictment's alleged failure to state an offense for the first time during or after trial, after a plea of guilty, or on direct appeal. *E.g.*, *United States v. Rosa-Ortiz*, 348 F.3d 33, 36 (1st Cir. 2003); *United States v. Panarella*, 277 F.3d 678, 682-86 (3d Cir. 2002).

This exception is inconsistent with Rule 12's general goal to require defendants to raise challenges to an indictment or information before trial, when the defect might be fixed, and before effort is expended in trials, pleas, sentencings and other proceedings based on an invalid indictment:

> Rule 12 sharply restricts the defense tactic of "sandbagging" that was available in many jurisdictions under common law pleading. Recognizing that there was a defect in the pleading, counsel would often forego raising that defect before trial, when a successful objection would merely result in an amendment of the

> pleading. If the trial ended in a conviction, he could then raise the defect on a motion in arrest of judgment and obtain a new trial. Federal Rule 12 eliminated this tactic as to all objections except the failure to show jurisdiction or to charge an offense.

United States v. Ramirez, 324 F.3d 1225, 1228 (11th Cir. 2003).

The Supreme Court removed the justification and the need for the exception to the general rule requiring challenges to an indictment before trial for failure to state an offense in *United States v. Cotton*, 535 U.S. 625 (2002). The Court rejected the assertion that the failure of an indictment to state an offense "was a 'jurisdictional' defect" which could be raised without regard to the rules for preservation of claims of error. Id. at 629. The Court explained that the source of this view, *Ex parte Bain*, 121 U.S. 1 (1887), was "a product of an era" in which "this Court could examine constitutional errors in a criminal trial only on a writ of habeas corpus, and only then if it deemed the error 'jurisdictional'", which "led to a somewhat expansive notion of 'jurisdiction' which was 'more a fiction than anything else.'" Cotton, 535 U.S. at 629-30 (citations omitted). The Court ruled that, given the subsequent authorization of review by direct appeal and the subsequent expansion of collateral review, "*Bain*'s elastic concept of jurisdiction" was neither needed nor valid, and the Court overruled *Bain* "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction." *Cotton*, 535 U.S. at 630-31. The Court held that a claim that an indictment which failed to allege an offense had to be timely raised, or it would be forfeited and would have to meet "the plain-error test of Federal Rule of Criminal Procedure 52(b)." *Cotton*, 535 U.S. at 631.

Courts, however, have considered themselves bound by the language of Rule 12(b)(3)(B), and have "urged the Judicial Conference Advisory Committee on Criminal Rules to consider amending" the rule. *United States v. Hedaithy*, 392 F.3d 580, 586-89 & n.7 (3d Cir. 2004). Judges have recognized that the exception in the existing rule for failure to charge an offense, "reduces criminal defendants' incentives to raise defenses in a timely fashion in district court," "has led to strategic decisions by defendants to delay raising the defense," "undermines judicial economy and finality," fails to "respect[] the proper relationship between trial and appellate courts," causes "the waste of judicial resources," and "mak[es] it more difficult for defendants and prosecutors to enter plea agreements that benefit both the parties and society as a whole." *Panarella*, 277 F.3d at 686-88.

Accordingly, Rule 12(b)(3)(B) has been amended to remove this exception. The amended rule requires that claims that an indictment fails to state an offense be raised before trial as provided in Rule 12(b)(3), (c) and (e). A defendant who fails thus to raise such a claim forfeits it, and can obtain relief only by meeting Rule 52(b)'s plain-error test, or the "cause and prejudice" test if the claim is first raised under 28 U.S.C. § 2255. *United States v. Ratigan*, 351 F.3d 957, 964 (9th Cir. 2003).

The Supreme Court in *Cotton* did reiterate that defects in subject-matter jurisdiction -- "'the courts' statutory or constitutional power to adjudicate the case' . . . can never be forfeited or

waived," and can be corrected "regardless of whether the error was raised in district court." 535 U.S. at 630. The jurisdictional exception is therefore retained in Rule 12(b)(3)(B), and permits the district court's subject-matter jurisdiction to be challenged at any time while the proceedings initiated by the indictment or information are pending in the district court or on direct appeal. *United States v. Wolff*, 241 F.3d 1055, 1057 (8th Cir. 2001).

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if:

~~(1) the indictment or information does not charge an offense; or~~

~~(2)~~ the court does not have jurisdiction of the charged offense.

(b) Time to File. The defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere.

Advisory 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 in the indictment or information be raised before trial, when the defect might be fixed, and before effort is expended in trials, pleas, sentencings and other proceedings based on an invalid indictment or information. *See United States v. Panarella*, 277 F.3d 678, 682-86 (3d Cir. 2002). In amending Rule 12, the Committee noted that the Supreme Court removed the justification and the need for the exception for failure to state an offense in *United States v. Cotton*, 535 U.S. 625 (2002), when the Court rejected the assertion that the failure of an indictment to state an offense "was a 'jurisdictional' defect" which could be raised without regard to the rules for preservation of claims of error. *Id.* at 629.

Rule 34 is similarly being amended to prevent defendants from waiting until after the court accepts a verdict of guilty or a plea of guilty or nolo contendere to claim that an indictment or information does not correctly charge the offense. Waiting to raise such a claim may prevent the defect from being fixed and waste the efforts expended in trials and pleas based on flawed indictments or informations. Because the Supreme Court made clear in *Cotton* that the failure of an indictment or information to correctly charge an offense is not a jurisdictional defect, a defendant seeking to raise such a claim after trial must show plain error. *United States v. Bieganowski*, 313 F.3d 264, 286 (5th Cir. 2002). Because a guilty plea precludes all claims, except claims that challenge the court's subject-matter jurisdiction, that is, "the court's statutory or constitutional power to adjudicate the case," and failure to charge an offense is not such a claim, *Cotton*, 535 U.S. at 630, a defendant who pleads guilty cannot raise a claim that the indictment or information failed to correctly charge the offense; instead, any remedy must be by withdrawal of the plea under Rule 11(d), or challenge to the plea as permitted by Rule 11(e), *e.g.*, a motion under 28 U.S.C. § 2255 claiming the plea was the result of ineffective assistance of counsel. *United States v. Broce*, 488 U.S. 563, 568-76 (1989); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *United States v. Cothran*, 302 F.3d 279, 283 (5th Cir. 2002).

The Supreme Court has made clear that defects in subject-matter jurisdiction – "the courts' statutory or constitutional power to adjudicate the case" – can be raised after trial. *Cotton*, 535 U.S. at 630; *Broce*, 488 U.S. at 574-76. Accordingly, Rule 34's provision for raising jurisdiction is left intact, and provides a clear avenue to challenge the district court's subject-matter jurisdiction within 7 days after the court accepts the verdict of guilty or plea of guilty or nolo contendere.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Update on Previously Proposed Amendments to Rules 15, 32(h), 32.1, and 46**

DATE: **March 26, 2007**

Several amendments previously discussed by the Committee are not on the April agenda. This memorandum provides a brief report on each.

1. Rule 15

At the October 2006 meeting the Committee discussed a proposal by the Department of Justice to amend Rule 15 to permit the deposition of a prospective witness without the physical presence of the defendant when the trial court makes certain specific findings. The proposal was intended to provide a mechanism to secure the testimony of witnesses beyond the court's subpoena power when the witness is unable or unwilling to travel to the court, and the secure transportation of the defendant to the witness's location cannot be arranged or the country in which the witness is located will not permit the defendant to attend the deposition.

The Department has withdrawn its proposal to permit further study.

2. Rule 32(h)

An amendment to Rule 32(h) was proposed as part of the Booker package of amendments. Following the public comment period the Criminal Rules Committee revised the language of the amendment and recommended that it be approved. The Standing Committee, however, raised

concerns and asked the Rules Committee to study the matter further. After discussion, the Rules Committee voted 7 to 4 at its October 2006 meeting to reexamine the proposed amendment. That reexamination was intended to take account of a number of issues, including the relationship between the Guidelines and other sentencing factors. After the meeting, the Supreme Court granted review in two cases that may resolve some of the issues. For that reason, further consideration of Rule 32(h) will be deferred pending the Supreme Court's decision in these cases.

3. Rules 32.1 and 46

At its October 2006 meeting the Committee had an initial discussion of Judge Battaglia's suggestion that it would be desirable for the rules to provide a procedure for issuing warrants when a defendant violates the conditions of pretrial release. There is an apparent gap in Rule 32.1, which covers probation and supervised release, and Rule 46, which deals with pretrial release, neither of which address the procedure for issuing a summons due to violation of a court-imposed condition. The Committee indicated that it wished work to proceed on developing a proposal to fill this gap.

With Judge Battaglia's concurrence work, this proposal has been deferred until the October meeting.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Proposed Amendment to Rule 32(i)(1)(A)**

DATE: **March 26, 2007**

As discussed more fully in his letter, which is attached, Judge Ernest Torres has suggested that an amendment to Rule 32(i)(1)(A) may be desirable in order to prevent an impasse at the sentencing stage if a defendant declines to read the presentence report.

This item is on the agenda for the April meeting in Brooklyn.

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND
UNITED STATES COURTHOUSE
ONE EXCHANGE TERRACE
PROVIDENCE, RHODE ISLAND 02903

ERNEST C. TORRES
CHIEF JUDGE

October 23, 2006

Honorable Susan C. Bucklew
United States District Court
1430 Sam M. Gibbons
United States Courthouse
801 North Florida Avenue
Tampa, FL 33602

Dear Susan:

Until 1995, the Federal Rules of Criminal Procedure provided that, at the time of sentencing, the Court was required to "determine that the defendant and defendant's counsel have had the opportunity to read and discuss the Presentence Investigation Report." [emphasis added]. However, in 1995, that language was changed and, what is now Rule 32(i)(1)(A) requires that the Court "must verify that the defendant and the defendant's attorney have read and discussed the Presentence Report."

I am unable to find any indication in the Committee notes indicating the reason for that change. To the extent that the current language indicates that a defendant cannot be sentenced unless he actually has read the report and discussed it with counsel, I suspect that the change in wording may have unintended consequences. As presently worded, the rule may be construed in a way that would permit a defendant to prevent sentencing by unilaterally refusing to read the report or discuss it with counsel. That, of course, was not the case under the prior version which required, only, that the defendant be afforded an opportunity to do so.

I would like to suggest that the Committee review the rule and consider restoring the original language in order to avoid any confusion.

Thank you for your consideration.

Sincerely yours,

Ernie Torres

Ernest C. Torres
Chief Judge

ECT:dms
cc: Hon. Mark Wolf

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Indicative Rulings**

DATE: **March 26, 2007**

The Civil Rules Committee is proposing a rule establishing procedures for district judges to transmit advisory opinions on post-trial motions filed after an appeal has been docketed and jurisdiction transferred to the appellate courts. This "indicative rulings" project is being coordinated with the Appellate Rules Committee.

Professor Struve plans to draft an Appellate Rule that is general, i.e., one that would not limit the existing authority for indicative rulings in any case -- civil, criminal, or bankruptcy. She found one Supreme Court case that recognized indicative rulings in a criminal case, and notes that the local rules of the D.C. and 7th Circuits provide procedures for indicative rulings, at least one of them applying the rule to criminal cases.

The question arises whether the Criminal Rules should be amended to parallel the Civil Rules amendment. We try to be consistent throughout the rules if dealing with the same issue. In the original submission, Seth Waxman proposed an indicative-ruling Appellate Rules amendment applicable only to civil cases, explicitly excluding criminal cases. During its consideration of Waxman's proposal, the Appellate Rules Committee discussed at some length excluding habeas corpus cases, but little was said about extending it to or excluding criminal cases. The Appellate Rules Committee ultimately asked the Civil Rules Committee to take the lead because most of these actions are initiated in civil cases.

Judges Rosenthal and Stewart wish to advise the Criminal Rules Committee of their plans to proceed with amendments to their rules and to invite our committee to look into the issue whether a specific amendment to the Criminal Rules makes sense. Also, the question of indicative rulings in habeas corpus cases, although civil in nature, should probably be addressed by the Criminal Rules Committee.

This item is on the agenda for the April meeting in Brooklyn, though it is not necessary for the Committee to make a firm decision at that time whether it wishes to pursue an indicative ruling amendment. John Rabiej has indicated that he sees no problem in publishing a Criminal Rules amendment at a later time (if the committee decides to take this approach), since the Appellate Rule will not change existing authority.

JAMES C. DUFF
Director

JILL C. SAYENGA
Deputy Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

March 26, 2007

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Agenda Item on Proposed New Rule 62 on Indicative Rulings*

The text of proposed new Rule 62.1 on Indicative Rulings immediately follows this memorandum. The material behind Tab B includes a report to the Advisory Committee on Appellate Rules on proposed new Appellate Rule 12.1, which conforms to proposed new Civil Rule 62.1. The report provides background information on the origin and purpose of the proposal and the rules committees' actions on it, beginning in 2000 when the Solicitor General first recommended that the Appellate Rules be amended to recognize indicative rulings.

John K. Rabiej

Indicative Rulings: Civil Rule 62.1

A year ago the Advisory Committee recommended approval for publication of a new Civil Rule 62.1 on "indicative rulings." The recommendation was to defer publication to August 2007 as part of a larger package of Civil Rules proposals. The recommendation was discussed at the June 2006 and January 2007 Standing Committee meetings. The Appellate Rules Committee became convinced that it should consider a parallel provision in the Appellate Rules. The attached Appellate Rules Committee materials and draft Appellate Rule 12.1 provide the background not only for the Appellate Rules Committee's work but also for earlier work on Civil Rule 62.1.

Some changes have been made in the version that was approved last year. They respond both to discussion in the Standing Committee and to the new opportunity to integrate Rule 62.1 with Appellate Rule 12.1. The Rule title was settled. There was rather extensive discussion of the question whether the court of appeals should be asked to consider remand if the district court indicates only that it "might" grant the motion for relief. The discussion is summarized in footnote 1. The outcome is a recommendation to publish with "might or" in brackets. The letter transmitting the proposal for publication will invite comment on the question whether the rule should require that the district court state that it "would" grant relief, or should give the choice to state whether the court "might" grant relief without a firm commitment.

The second footnote flags a question raised by the circuit clerks consulted by the Appellate Rules Advisory Committee. The alternatives indicated in the draft are the same as the alternatives to be presented to the Appellate Rules Committee.

The third footnote indicates the revisions made to seize the new opportunity to integrate with an Appellate Rule. Discussion in the Standing Committee highlighted the difficulties that may arise if the parties and the court of appeals do not think carefully about the terms of a remand. It is better that Rule 62.1 not anticipate these problems so long as there is to be an Appellate Rule addressing this question.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 62.1 Indicative Ruling on Motion for Relief That Is Barred by a Pending Appeal

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because ~~of~~[1] an appeal ~~that~~ has been docketed and is pending, the court may:

(1) defer consideration[2] of the motion;

(2) deny the motion; or

(3) ~~indicate~~ state that it [might or][3] would grant the

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[1] "of" and "that" were removed at the suggestion of the style consultant. Should they be restored to give a more direct statement that we are addressing only the beginning and end of the district court's authority to act on the motion, not any other question that might arise during the limbo between the time a notice of appeal is filed and docketing and remand?

[2] The style consultant prefers "defers considering the motion."

[3] The drafting choice was discussed at the Standing Committee

meeting in January, and has been developed by the Appellate Rules Committee.

The argument that notice should be given only if the district court states that it would grant relief if the appellate court remands includes at least two elements. One looks to disposition by the court of appeals. The court may prefer to remand, disrupting the appeal, only if presented with a fully considered determination that the case for relief has been made and that decision of the appeal on the original judgment and record would be unwise. The other element looks to the burden on the circuit clerks. Charles R. Fulbruge III, the Fifth Circuit Clerk, surveyed the circuit clerks for the Appellate Rules Committee. Two responded. "The consensus is that we do not want to know if the district court 'might' grant a motion. * * * Letting the parties advise us that they have filed a motion and then the judges advise us that they would deny the motion creates more work from an appellate clerk's office standpoint."

The argument for providing notice that the district court "might" grant the motion is familiar. The motion may raise difficult issues that can be resolved only after burdensome proceedings. The district court may have no idea how far the appeal has advanced, particularly if it has been submitted for decision. Nor may the district court have any idea whether the court of appeals thinks it better to resolve the issues presented by the appeal — if the court of appeals has at least an inkling of the likely disposition, it will be better able than the district court to know whether the motion will even remain relevant and whether the questions raised by the motion will be changed by the decision. The district court may believe that the burden of actually deciding the motion is justified only if the appeal is stayed.

Recognizing the district court's authority to temporize by

motion if the ~~appellate~~ court of appeals ~~should~~ remands for that purpose.

(b) Notice to ~~Appellate~~ the Court of Appeals. The movant must notify the circuit clerk ~~of the appellate court~~ under Federal Rule of Appellate Procedure [12.1] [when the motion is filed and when the district court acts on it ~~the motion~~][if the district court ~~indicates~~ states that it {might or} would grant the motion[4]].

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stating that it "might" grant the motion does not diminish the court of appeals' full control of the decision whether to remand. The court of appeals can consider the district court's statement — which should include the reasons for preferring to defer full consideration of the motion until it knows whether the action will be remanded — and act in its own best discretion. And it can, if it sees fit, decide not to remand without undertaking any lengthy review of the district court's statement.

[4] This alternative reflects the preference of the three circuit clerks in the report described in note 1 above. They prefer not to be afflicted with notice whenever a motion is filed, noting that many of these motions are filed in pro se cases.

No doubt a burden would be imposed by requiring notice of

ill-founded motions that will soon be denied by the district court. The extent of the burden, however, may not be great. The Fifth Circuit clerk estimates that the court may encounter 30 of these motions a year.

A more important question is whether it is important to the court of appeals to know that a motion has been filed so it can decide whether to defer work on the appeal. There are likely to be some cases in which a motion raises issues that obviously are important. The prospect that the judgment may be vacated may appear sufficiently substantial on the face of the motion that the court of appeals would prefer to await the outcome before deciding issues that may be mooted or significantly changed. Experience with post-judgment motions under Rule 60(b), moreover, may not help much in anticipating other motions also covered by the rule. For one example, at least some courts rule that a district court cannot modify a preliminary injunction that is pending on interlocutory appeal. A motion to vacate or modify the injunction may raise issues that are better addressed by the district court. The court of appeals cannot consider the question unless it is told of the motion. (To be sure, this illustration can be seen in a different light. A district court does retain jurisdiction to dismiss the action pending appeal from the interlocutory injunction; the rule does not provide for notice. No one has proposed adoption of a rule that would require notice to the court of appeals of matters that remain in the district court's jurisdiction notwithstanding a pending appeal.)

The second alternative formulation is suitable if the rule applies only when the district court indicates that it "would" grant the motion. Some further drafting may be appropriate if notice is to be given when the district court indicates it "might" grant the motion. A complete provision would address what happens when the district

(c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.[5] ~~If the district court states that it [might or] would grant the motion, the appellate court may remand for further proceedings in the district court[, and if it remands may retain jurisdiction of the appeal]~~.

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court translates "might" to "denied." It could be: "The movant must notify * * * when the district court indicates that it might or would grant the motion and when the district court grants or denies the motion."

[5] Work on Appellate Rule 12.1 has progressed to a point that justifies revision of subdivision (c). The new version is underlined. The earlier version, as modified to reflect Standing Committee discussion, is overlined. Earlier drafts spoke to action by the court of appeals on the assumption that no other rule would apply. It is better that the Appellate Rules address the court of appeals decision whether to remand and on what terms. Still, it may be useful to complement the Appellate Rule by confirming the district court's authority on remand.

Committee Note

This new rule adopts and generalizes the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot on its own reclaim the case to grant a Rule 60(b) motion. But it can entertain the motion and ~~either~~ deny it, defer consideration, or indicate that it might or would grant the motion if the action is remanded. Experienced appeal lawyers often refer to the suggestion for remand as an "indicative ruling."

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules, as they are or as they develop, deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the "indicative ruling" procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the clerk of the appellate court under Federal Rule of Appellate Procedure [12.1] [when the motion is filed in the district court and again when the district court rules on the motion][when the district court states that

it {might or} would grant the motion {and when the district court grants or denies the motion}.][6] Remand is in the appellate court's discretion under Appellate Rule [12.1]. The appellate court may remand all proceedings, terminating the initial appeal. The appellate court may instead choose to ~~or may~~ remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules if any party wishes to proceed after the district court rules on the motion.[7]

Often it will be wise for the district court to determine whether it in fact would grant the motion if the case is remanded for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state the reasons why it might grant the motion and why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after ~~indicating~~ stating that it might do so; further proceedings on remand may show that the motion ought not be

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6 The bracketed alternatives reflect the choice described at note 2 above.

7 The shaded material should be deleted if Appellate Rule 12.1 is recommended for publication.

granted.[8]

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[8] This final paragraph is appropriate only if the rule allows the district court to state that it "might" grant the motion.

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

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EVIDENCE RULES

MEMORANDUM

DATE: March 27, 2007

TO: Advisory Committee on Appellate Rules

CC: Reporters and Advisory Committee Chairs

FROM: Catherine T. Struve

RE: Item No. 07-AP-B: Proposed Appellate Rule on indicative rulings

This memo considers possible options for a proposed Appellate Rule 12.1 that would reflect the procedure to be followed when a district court is asked for relief that it lacks authority to grant due to a pending appeal. If the Appellate Rules Committee approves the proposed Rule, the goal would be to seek permission to publish the proposed Rule for comment this summer, along with proposed Civil Rule 62.1.

I. History of the proposal

In March 2000, the Solicitor General proposed that the Appellate Rules Committee consider adopting a new Appellate Rule 4.1 to address the practice of indicative rulings.[1] The Department of Justice argued that a FRAP rule on this topic would promote awareness of the possibility of indicative rulings; would ensure that the possibility was available in all circuits; and would render the relevant procedures uniform throughout the circuits.[2] The Appellate Rules Committee discussed the proposal at its April 2000 meeting and retained the matter on its study agenda. At the April 2001 meeting, the Committee concluded that the DOJ's proposal should be referred to the Civil Rules Committee, on the ground that any such rule would more appropriately be placed in the Civil Rules.[3]

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[1] *See* Minutes of the Advisory Committee on Appellate Rules, April 13, 2000.

[2] *See id.*

[3] *See* Minutes of the Advisory Committee on Appellate Rules, April 11, 2001.

At its May 2006 meeting, the Civil Rules Committee approved a recommendation to publish for comment a new Civil Rule 62.1 concerning indicative rulings. Though the Committee decided not to request publication in summer 2006, it reported on the proposal at the Standing Committee's June 2006 meeting; at that meeting, there was some discussion of the placement and caption of the proposed Civil Rule. Further discussion of the proposed Civil Rule took place at the Standing Committee's January 2007 meeting, and the Standing Committee has asked the Appellate Rules Committee to consider adopting an Appellate Rules provision that recognizes the Civil Rule 62.1 procedure. The Standing Committee has asked the Civil and Appellate Rules Committees to coordinate so that the provisions concerning indicative rulings will dovetail and will be published for comment simultaneously. A copy of the current draft of proposed Civil Rule 62.1 is enclosed.

In February 2007, we asked Fritz Fulbruge for his input (and that of his fellow circuit clerks) on the indicative-ruling proposal. His memo – which reports his thoughts and those of the D.C. Circuit and Third Circuit clerks – is attached. Fritz reports that overall the clerks do not seem enthusiastic about the proposed rule, in part because "the appellate courts are satisfied with leaving the issue at rest because of locally developed procedures." Mark Langer, the D.C. Circuit clerk, states: "I prefer not to have any rule. We handle things pretty well here without a rule." Despite their doubts about the necessity of a national rule, however, Fritz and the two other clerks who commented on the proposal have provided very helpful insights, which I have attempted to incorporate into this memo and the proposed Rule and Note.

II. Current circuit practices concerning indicative rulings

Ordinarily, "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance--it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).[4] Thus, in civil cases the pendency of an appeal limits the district court's possible dispositions of a motion for relief from the judgment under

[4] *See also In re Jones*, 768 F.2d 923, 931 (7th Cir. 1985) (Posner, J., concurring) ("The purpose of the rule is to keep the district court and the court of appeals out of each other's hair....").

Rule 60(b).[5] The court has three options: (1) deny the motion,[6] (2) defer consideration of the

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[5] By pendency of an appeal, I mean to refer to instances when the notice of appeal has become effective. A Civil Rule 60(b) motion that is filed no later than 10 days after entry of judgment tolls the time for taking an appeal, and a notice of appeal filed before the disposition of such a motion does not "become[] effective" until the entry of the order disposing of the motion. Appellate Rule 4(a)(4)(B)(i).

[6] *See Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (**1st Cir.** 1979) ("[W]hen an appeal is pending from a final judgment, parties may file Rule 60(b) motions directly in the district court without seeking prior leave from us. The district court is directed to review any such motions expeditiously, within a few days of their filing, and quickly deny those which appear to be without merit...."); *Hyle v. Doctor's Assocs., Inc.*, 198 F.3d 368, 372 n.2 (**2d Cir.** 1999) ("Like most circuits ... , we have recently recognized the power of a district court to *deny* a Rule 60(b) motion after the filing of a notice of appeal from the judgment sought to be modified, *see, e.g., Selletti v. Carey*, 173 F.3d 104, 109 (2d Cir. 1999); *Toliver v. County of Sullivan*, 957 F.2d 47, 49 (2d Cir. 1992), notwithstanding an earlier contrary authority, *see Weiss v. Hunna*, 312 F.2d 711, 713 (2d Cir. 1963), which had previously been cited with apparent approval, *see New York State National Organization for Women*, 886 F.2d 1339, 1349-50 (2d Cir. 1989); *Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981)."); *United States v. Contents of Accounts Numbers 3034504504 and 144-07143 at Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 971 F.2d 974, 988 (**3d Cir.** 1992); *Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891 (**4th Cir.** 1999) ("[W]hen a Rule 60(b) motion is filed while a judgment is on appeal, the district court has jurisdiction to entertain the motion, and should do so promptly. If the district court determines that the motion is meritless, as experience demonstrates is often the case, the court should deny the motion forthwith; any appeal from the denial can be consolidated with the appeal from the underlying order."); *Karaha Bodas Co. v. Perusahaan Perambangan Minyak Dan Gas Bumi Negara*, No. 02-20042, 2003 WL 21027134, at *4 (**5th Cir.** 2003) (unpublished per curiam opinion) ("Under the Fifth Circuit's procedure, the appellate court asks the district court to indicate, in writing, its inclination to grant or deny the Rule 60(b) motion. If the district court determines that the motion is meritless, the appeal from the denial is consolidated with the appeal from the underlying order."); *Kusay v. United States*, 62 F.3d 192, 195 (**7th Cir.** 1995) ("Many cases, including *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984), say that a district court may deny, but not grant, a post-judgment motion while an appeal is pending. *Cronic* involved a motion for a new trial under Fed.R.Crim.P. 33, but the principle is general."); *Hunter v. Underwood*, 362 F.3d 468, 475 (**8th Cir.** 2004) ("Our case law ... permits the district court to consider a Rule 60(b) motion on the merits and deny it even if an appeal is already pending in this court ...."); *Mahone v. Ray*, 326 F.3d 1176, 1180 (**11th Cir.** 2003) ("[D]istrict courts retain jurisdiction after the filing of a notice of appeal to entertain and deny a Rule 60(b) motion.").

The Supreme Court has stated in passing that "the pendency of an appeal does not affect the district court's power to grant Rule 60 relief." *Stone v. I.N.S.*, 514 U.S. 386, 401 (1995). But

motion,[7] or (3) indicate its inclination to grant the motion and await a remand from the Court of Appeals for that purpose.[8] The district court's options are further limited within the Ninth

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a number of courts "have explicitly recognized that the statement in *Stone* is dicta and thus have not modified their similar Rule 60(b) approach." *Shepherd v. Int'l Paper Co.*, 372 F.3d 326, 331 (5th Cir. 2004) (adopting this view).

[7] *Cf. LSJ Inv. Co. v. O.L.D., Inc.*, 167 F.3d 320, 324 (6th Cir. 1999) (holding that although Sixth Circuit "cases allow the court to entertain a motion for relief even while an appeal is pending, they do not require the court to do so. Once the defendants appealed, it was not erroneous for the district court to let the appeal take its course.").

Some circuits, however, have suggested that deferral is generally inappropriate. *See, e.g.*, *Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (**1st Cir.** 1979) ("[W]hen an appeal is pending from a final judgment, parties may file Rule 60(b) motions directly in the district court without seeking prior leave from us. The district court is directed to review any such motions expeditiously, within a few days of their filing, and quickly deny those which appear to be without merit....").

[8] *See Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891 (**4th Cir.** 1999) ("If the district court is inclined to grant the motion, it should issue a short memorandum so stating. The movant can then request a limited remand from this court for that purpose."); *Karaha Bodas Co., L.L.C. v. Perusahaan Perambangan Minyak Dan Gas Bumi Negara*, No. 02-20042, 2003 WL 21027134, at *4 (**5th Cir.** 2003) (unpublished per curiam opinion) ("If the district court is inclined to grant the motion, it should issue a short memorandum so stating. Appellant may then move this court for a limited remand so that the district court can grant the Rule 60(b) relief. After the Rule 60(b) motion is granted and the record reopened, the parties may then appeal to this court from any subsequent final order."); *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 364 (**6th Cir.** 2001) ("Where a party seeks to make a motion under Fed.R.Civ.P. 60(b) to vacate the judgment of a district court, after notice of appeal has been filed, the proper procedure is for that party to file the motion in the district court. . . . If the district judge was inclined to grant the motion, he or she could enter an order so indicating; and, the party could then file a motion in the Court of Appeals to remand."); *Kusay v. United States* , 62 F.3d 192, 195 (**7th Cir.** 1995) ("A district judge disposed to alter the judgment from which an appeal has been taken must alert the court of appeals, which may elect to remand the case for that purpose."); *Pioneer Ins. Co. v. Gelt*, 558 F.2d 1303, 1312 (**8th Cir.** 1977) ("If, on the other hand, the district court decides that the motion should be granted, counsel for the movant should request the court of appeals to remand the case so that a proper order can be entered."); *Mahone v. Ray*, 326 F.3d 1176, 1180 (**11th Cir.** 2003) ("[A] district court presented with a Rule 60(b) motion after a notice of appeal has been filed should consider the motion and assess its merits. It may then deny the motion or indicate its belief that the arguments raised are meritorious. If the district court selects the latter course, the movant may then petition the court of appeals to remand the matter so as to confer jurisdiction on the district court to grant the motion."); *Hoai v. Vo*, 935 F.2d 308, 312 (**D.C. Cir.** 1991)

Circuit, because that circuit takes the view that the district court lacks power to deny a Rule 60(b) motion while an appeal is pending.[9] Though the Ninth Circuit thus diverges from other circuits on the question of whether a district court can deny such a motion without a remand, its indicative-ruling procedure seems fairly similar, in other respects, to that in other circuits.[10]

Local rules or practices addressing the practice of indicative rulings currently exist in the Sixth,[11] Seventh[12] and D.C.[13] Circuits. I was unable to find local rules or handbook provisions

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("[W]hen both a Rule 60(b) motion and an appeal are pending simultaneously . . . . the District Court may consider the 60(b) motion and, if the District Court indicates that it will grant relief, the appellant may move the appellate court for a remand in order that relief may be granted.").

[9] *See Smith v. Lujan*, 588 F.2d 1304, 1307 (**9th Cir.** 1979).

That the Sixth Circuit might take this view is suggested by its statement that the pendency of an appeal deprived the district court of jurisdiction to decide a Rule 60(b) motion. *See S.E.C. v. Johnston*, 143 F.3d 260, 263 (6th Cir. 1998), *abrogated on other grounds by Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 16 (2004).

[10] *See, e.g., Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004).

[11] Sixth Circuit Rule 45 provides in relevant part:

> Duties of Clerks--Procedural Orders
> (a) Orders That May be Entered by Clerk. The clerk may prepare, sign and enter orders or otherwise dispose of the following matters without submission to this Court or a judge, unless otherwise directed:
> ...
> (7) Orders granting remands and limited remands for the purpose of allowing the district court to grant a particular relief requested by a party and to which no other party has objected, or where the parties have moved jointly, where such motion is accompanied by the certification of the district court pursuant to *First National Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343 (6th Cir. 1976).

The procedure set by *First National Bank* is as follows: "[T]he party seeking to file a Rule 60(b) motion ... should ... file[] that motion in the district court. If the district judge is disposed to grant the motion, he may enter an order so indicating and the party may then file a motion to remand in this court." *First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343, 346 (6th Cir. 1976).

[12] Seventh Circuit Rule 57 provides:

> Circuit Rule 57. Remands for Revision of Judgment
> A party who during the pendency of an appeal has filed a motion under

concerning indicative rulings in the other Circuits. The reason may be that, as Fritz reports, the indicative-ruling procedure is not often used; Fritz estimates that in the Fifth Circuit such requests surface only about 30 times per year.

III. Questions to be addressed

It is fairly straightforward to draft a rule that parallels the proposed Civil Rule 62.1. However, a number of questions suggest themselves. This section considers those questions.

Parts III.A. and III.B. observe that the indicative-ruling procedure is also employed in the criminal context and (at least occasionally) in the bankruptcy context. Accordingly, I have

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Fed. R. Civ. P. 60(a) or 60(b), Fed. R. Crim. P. 35(b), or any other rule that permits the modification of a final judgment, should request the district court to indicate whether it is inclined to grant the motion. If the district court so indicates, this court will remand the case for the purpose of modifying the judgment. Any party dissatisfied with the judgment as modified must file a fresh notice of appeal.

[13] D.C. Circuit Handbook of Practice and Internal Procedures VIII.E. provides:

E. Motions for Remand
(*See* D.C. Cir. Rule 41(b).)

Parties may file a motion to remand either the case or the record for a number of reasons, including to have the district court or agency reconsider a matter, to adduce additional evidence, to clarify a ruling, or to obtain a statement of reasons. The Court also may remand a case or the record on its own motion.

If the *case* is remanded, this Court does not retain jurisdiction, and a new notice of appeal or petition for review will be necessary if a party seeks review of the proceedings conducted upon remand. *See* D.C. Cir. Rule 41(b). In general, a remand of the case occurs where district court or agency reconsideration is necessary. *See, e.g., Raton Gas Transmission Co. v. FERC*, 852 F.2d 612 (D.C. Cir. 1988); *Siegel v. Mazda Motor Co.*, 835 F.2d 1475 (D.C. Cir. 1987). By contrast, if only the record is remanded, such as where additional fact-finding is necessary, this Court retains jurisdiction over the case. *See* D.C. Cir. Rule 41(b).

It is important to note that where an appellant, either in a criminal or a civil case, seeks a new trial on the ground of newly discovered evidence while his or her appeal is pending, or where other relief is sought in the district court, the appellant must file the motion seeking the requested relief in the district court. *See Smith v. Pollin*, 194 F.2d 349, 350 (D.C. Cir. 1952); Fed. R. Crim. P. 33; Fed. R. Civ. P. 60. If that court indicates that it will grant the motion, the appellant should move this Court to remand the case to enable the district court to act. *See Smith v. Pollin*, 194 F.2d at 350.

drafted the proposed Rule to encompass contexts other than those implicated by proposed Civil Rule 62.1.

Part III.C. discusses the dangers that would arise from an unconditional remand; in particular, such a remand creates the risk that the district court will deny the motion for postjudgment relief and the movant will have lost the opportunity to challenge the underlying judgment. For this reason, I have added language to the Note urging that a limited remand will often be the preferable course. Part III.C. also considers the choice between requiring an indication that the district court "might" grant the motion and requiring a statement that it "would" grant the motion in the event of a remand.

Part III.D. notes that it may be useful to alert practitioners to the need for a new notice of appeal to challenge any denial of a motion for postjudgment relief; this observation is included in the draft Note. Part III.E. considers the Rule's reference to an appeal that "has been docketed and is pending," and discusses whether docketing is the appropriate point of demarcation in this context. Part III.F. discusses which events should trigger a duty to notify the court of appeals, and also considers whether the Rule or Note should address the logistics of communications by the parties and the district court to the court of appeals. Part III.G. lists alternative numbering possibilities for the draft Rule.

A. Should the Appellate Rule encompass remands in criminal cases?

The indicative-ruling process on the criminal side appears to be roughly similar to that envisioned in proposed Civil Rule 62.1. When a new trial motion under Criminal Rule 33[14] is made during the pendency of an appeal, "[t]he District Court ha[s] jurisdiction to entertain the motion and either deny the motion on its merits, or certify its intention to grant the motion to the Court of Appeals, which [can] then entertain a motion to remand the case." *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984).[15]

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[14] Criminal Rule 33(b)(1) explicitly notes the need for a remand before the district court can grant a motion for a new trial: "If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case."

[15] *See U.S. v. Graciani*, 61 F.3d 70, 77 (**1st Cir.** 1995) (adopting this procedure); *U.S. v. Camacho*, 302 F.3d 35, 36-37 (**2d Cir.** 2002) (citing *Cronic* and stating that "the district court retains jurisdiction to deny a Rule 33 motion during the pendency of an appeal, even though it may not grant such motion unless the Court of Appeals first remands the case to the district court"); *U.S. v. Fuentes-Lozano*, 580 F.2d 724, 726 (**5th Cir.** 1978) (per curiam) ("A motion for a new trial may be presented directly to the district court while the appeal is pending; that court may not grant the motion but may deny it, or it may advise us that it would be disposed to grant the motion if the case were remanded. Alternatively, as here, to avoid delay, the appellant may seek a remand for the purpose of permitting the district court fully to entertain the motion."); *U.S.*

Under the current rules,[16] a pending appeal affects motions under Criminal Rule 35(a) differently than motions under Rule 35(b). It appears that the district court lacks jurisdiction to

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v. Phillips, 558 F.2d 363, 363-64 (**6th Cir.** 1977) (per curiam) ("[T]he proper procedure for a party wishing to make a motion for a new trial while appeal is pending is to first file the motion in the district court. If that court is inclined to grant the motion, it may then so certify, and the appellant should then make a motion in the court of appeals for a remand of the case to allow the district court to so act."); *U.S. v. Frame*, 454 F.2d 1136, 1138 (**9th Cir.** 1972) (per curiam) ("By necessary implication, Rule 33 permits a district court to entertain and deny a motion for a new trial based upon newly discovered evidence without the necessity of a remand. Only after the district court has heard the motion and decided to grant it is it necessary to request a remand from the appellate court."); *Garcia v. Regents of Univ. of Ca.*, 737 F.2d 889, 890 (**10th Cir.** 1984) (per curiam) ("It is settled that under Rule 33 of the Federal Rules of Criminal Procedure a district court may entertain a motion for new trial during the pendency of an appeal, although the motion may not be granted until a remand request has been granted by the appellate court.").

[16] The caselaw concerning motions under Criminal Rule 35 is complicated because of courts' readings of a previous version of the Rule. Prior to the enactment of the Sentencing Reform Act of 1984, Rule 35(a) stated that "[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." Applying that Rule, the Ninth Circuit held that "the trial court retains jurisdiction to correct [a] sentence under Rule 35(a) while [an] appeal is pending." *Doyle v. U.S.*, 721 F.2d 1195, 1198 (9th Cir. 1983). Congress's amendment to Rule 35(a), however, led the Ninth Circuit to change its approach and hold that the district court lacked jurisdiction to grant Rule 35(a) relief during an appeal, because the amended Rule 35 provided "that district courts are to 'correct a sentence that is determined on appeal ... to have been imposed in violation of law, ... upon remand of the case to the court.'" *U.S. v. Ortega-Lopez*, 988 F.2d 70, 72 (9th Cir. 1993).

modify a final judgment under Rule 35(b)[17] while an appeal from that judgment is pending.[18] Appellate Rule 4(b), however, explicitly provides that the district court may correct a sentence under Rule 35(a) despite the pendency of an appeal.[19]

Two of the three circuits that have provisions addressing indicative rulings address them in the criminal as well as civil context: The Seventh Circuit's rule addresses motions to reduce a sentence under Criminal Rule 35(b), while the D.C. Circuit's Handbook addresses motions for a new trial based on newly discovered evidence under Criminal Rule 33. As noted above, the current draft Rule is drafted so as to encompass the criminal context; and the Note refers to the procedure described in *Cronic*.

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[17] *See, e.g., U.S. v. Campbell*, 40 Fed.Appx. 663, 664 (**3d Cir.** 2002) (nonprecedential opinion) ("After the filing of the original notice of appeal, this Court assumed exclusive jurisdiction over the subject matter of the appeal . . . , and the District Court lost jurisdiction to consider a Rule 35 motion. . . . It was for that reason that the parties . . . sought a summary remand to the District Court to permit disposition of the government's motion."); *U.S. v. Bingham*, 10 F.3d 404, 405 (**7th Cir.** 1993) (per curiam) ("Where a party moves for sentence reduction under Rule 35(b) during the pendency of an appeal, it must request that the district court certify its inclination to grant the motion. If the district court is inclined to resentence the defendant, it shall certify its intention to do so in writing. The government (or the parties jointly) may then request that we remand by way of a motion that includes a copy of the district court's certification order.").

[18] This approach accords with the view expressed by the Supreme Court prior to the adoption of the Criminal Rules. *See Berman v. U.S.*, 302 U.S. 211, 214 (1937) ("As the first sentence was a final judgment and appeal therefrom was properly taken, the District Court was without jurisdiction during the pendency of that appeal to modify its judgment by resentencing the prisoner.").

[19] Rule 35(a) provides that "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Rule 4(b)(5) provides in part: "The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion." The brevity of Rule 35(a)'s 7-day deadline helps to avoid scenarios in which the district court and court of appeals are both acting with respect to the same judgment. *Cf.* 1991 Advisory Committee Note to Rule 35 ("The Committee believed that the time for correcting such errors should be narrowed within the time for appealing the sentence to reduce the likelihood of jurisdictional questions in the event of an appeal and to provide the parties with an opportunity to address the court's correction of the sentence, or lack thereof, in any appeal of the sentence.").

B. Should the Appellate Rule encompass remands in bankruptcy cases?

Ordinarily, appeals from bankruptcy court decisions are taken to the district court,[20] or to a bankruptcy appellate panel where such a panel exists.[21] Such appeals are governed by Part VIII of the Bankruptcy Rules.[22] Final decisions on such appeals are appealable, in turn, to the Court of Appeals,[23] and the Appellate Rules apply to the proceedings in the Court of Appeals.[24] The intermediate step may be bypassed – and an appeal taken directly the Court of Appeals from a bankruptcy court decision – if the requirements of 28 U.S.C. § 158(d)(2) are met.[25] Under the temporary procedures that currently govern such direct appeals, the Appellate Rules would

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[20] See 28 U.S.C. § 158(a).

[21] *See* 28 U.S.C. § 158(b).

[22] *See* Bankruptcy Rule 8001 et seq.; *see also* Bankruptcy Rule 8018(a)(1) ("Circuit councils which have authorized bankruptcy appellate panels pursuant to 28 U.S.C. § 158(b) and the district courts may, acting by a majority of the judges of the council or district court, make and amend rules governing practice and procedure for appeals from orders or judgments of bankruptcy judges to the respective bankruptcy appellate panel or district court consistent with--but not duplicative of--Acts of Congress and the rules of this Part VIII.").

[23] *See* 28 U.S.C. § 158(d)(1).

[24] *See* 1983 Advisory Committee Note to Bankruptcy Rule 8001.

[25] Section 158(d)(2) provides in part:

> (2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that--
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> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
>
> (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
>
> (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;
>
> and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

generally apply.[26]

At least one Bankruptcy Appellate Panel has indicated that the indicative-ruling process followed in the Civil Rule 60(b) context applies equally when Rule 60(b) relief is sought from a bankruptcy court after an appeal has been taken to the district court from the bankruptcy court's decision. *In re Lafata*, 344 B.R. 715, 722 (B.A.P. 1st Cir. 2006) ("Clearly, under the law of *Zoe Colocotroni*, the bankruptcy court had jurisdiction to consider a Rule 60(b) motion filed during the pendency of an appeal of the December 8th orders."). But in *Lafata*, because the district court had decided the appeal, a request for Rule 60(b) relief in the bankruptcy court was improper. *See id.* at 723 ("Eastern cannot attempt to avoid the decision of the District Court through the use of a Rule 60(b) motion in the bankruptcy court, and a subsequent appeal to the Panel.").

From skimming through the cases on the indicative-ruling procedure, I get the impression that it may not be quite as widely used in the bankruptcy context. None of the three extant circuit provisions addresses its use in bankruptcy litigation. Accordingly, though the draft Rule should be broad enough to encompass such uses, the Note does not specifically refer to them.

C. "Might" versus "would" and the nature of the remand

As demonstrated by the recent discussions concerning proposed Civil Rule 62.1, arguments can be made for both the position that an indicative ruling must indicate that the district court "would" grant the relevant motion, and the position that the ruling can indicate either that the court "would" grant it or that the court "might" grant it. District courts may prefer the option of saying "might," since it means the district court need not fully analyze the motion unless and until the court of appeals remands; courts of appeals, by contrast, may prefer not to be asked to remand unless the district court has taken the trouble to determine whether it actually would grant the motion.[27] The Civil Rules Committee has discussed the choice between "might"

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[26] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, Title XII, § 1233(b), Apr. 20, 2005, 119 Stat. 203 (2005).

[27] One case from the Second Circuit suggests that the court is unwilling to remand unless the district court states its *intent to grant* the motion. Thus, writing of Criminal Rule 33 motions, the court explained: "If the district court decides to grant the Rule 33 motion, the district court may then signal its intention to this Court. . . . Only when presented with evidence of the district court's willingness to grant a Rule 33 motion will we remand the case." *U.S. v. Camacho*, 302 F.3d 35, 36-37 (2d Cir. 2002).

Sixth Circuit Rule 45 refers to the *First National Bank* case, which provides for remands after the district judge enters an order indicating that he or she "is disposed to grant the motion." *First National Bank*, 535 F.2d at 346. The D.C. Circuit Handbook refers to remands after the

and "would" at length, and is considering the possibility of using "might or would" in the version of proposed Rule 62.1 that is published for comment, in order to solicit comment on the choice.

The three circuit clerks who reviewed the proposed rule varied in their responses on this question. Marcie Waldron, the Third Circuit clerk, initially suggested: "[I]t is better to say 'might' than 'would.' Sometimes it's just that the 60(b) motion is substantial enough that the judge wants to have briefing." Her later email also seems to come out in favor of "might"; she points out that when a case has been calendared or argued, the appellate judges would rather get earlier notice "that there was a possibility of a change in the district court's decision."[28]

By contrast, Mark Langer, the D.C. Circuit clerk, objects to the choice of "might" because it "would really change the way we do business here. Our district judges, or the parties, only ask for this kind of remand when the district judge 'would' grant the post-judgment relief." Fritz agrees that "would" is preferable to "might," since the latter would increase the burden on the appellate clerks.

Even if one is agnostic on this question, it underscores the need for care in dealing with a related issue: the scope of the remand. In a system where a remand can occur after the district court indicates merely that it "might" grant the requested postjudgment relief, an unconditional remand can be dangerous for the appellant.[29] Since the time to file a notice of appeal from the

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district court "indicates that it will grant the motion." Seventh Circuit Rule 57 concerns remands after the district court indicates that it is "inclined to grant the motion." The Seventh Circuit in *Boyko* suggested that a limited remand (for the purpose of further consideration of the motion) may be appropriate if the district judge thinks there is "some chance that he would grant the Rule 60(b) motion ...." *Boyko*, 185 F.3d at 675.

[28] The latter point might also be a reason for requiring the movant to notify the circuit clerk when the motion is made in the district court, but, as noted in Part III.F. below, Ms. Waldron does not support such a requirement.

[29] *Cf. U.S. v. Siviglia*, 686 F.2d 832, 837-38 (10th Cir. 1982) (en banc) (per curiam) ("We find nothing in Siviglia's motion to remand to indicate that he sought only a partial or limited remand in order to preserve the direct appeal of his conviction should the district court deny his motion for dismissal or new trial. On the contrary, Siviglia advised the Court in his motion to remand that should the district court deny his motion for dismissal or new trial, he intended to appeal "such denial," which he did. Accordingly, the motion for remand, in practical effect, constituted an abandonment of any appeal going to the merits of his conviction. In this connection, our examination of Siviglia's brief addressing the merits of his second conviction indicate quite clearly that his grounds for reversal are unsubstantial. So, the motion for remand indicates, to us, that Siviglia was staking all on his ability to convince the district court that the charges against him should either be dismissed, or that he should be granted a new trial thereon, or, absent that, a reversal on appeal of any such denial order.").

initial judgment will certainly have run by the time the district court (on remand) rules on the motion for postjudgment relief, the movant will have no opportunity to revive the appeal (by filing a new notice of appeal from the underlying judgment) in the event that the district court denies the postjudgment motion. Though the movant can appeal the denial of postjudgment relief, "an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." *Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 263 n.7 (1978).[30]

Such considerations may well explain why some circuits provide for a "limited remand" to enable the district court to rule on the motion in question. *See, e.g., Fobian*, 164 F.3d at 892 (discussing Fourth Circuit approach); *Karaha Bodas*, 2003 WL 21027134, at *4 (discussing Fifth Circuit approach); *U.S. v. Work Wear Corp.*, 602 F.2d 110, 114 (6th Cir. 1979) ("This Court granted a limited remand to the district court to allow presentation of the Rule 60(b)(6) motion."); *Chisholm v. Daniel*, No. 89-16430, 1992 WL 102562, at **2 n.1 (9th Cir. 1992) (unpublished opinion) ("This court granted Hwang a limited remand for the district court to decide the Rule 60(b) motion."); *Sierra Pac. Indus. v. Lyng*, 866 F.2d 1099, 1113 n.21 (9th Cir. 1989) ("The proper procedure in such a situation is to ask the district court for an indication that it is willing to entertain a Rule 60(b) motion. If the district court gives such an indication, then the party should make a motion in the Court of Appeals for a limited remand to allow the district court to rule on the motion."); *Rogers v. Fed. Bureau of Prisons*, 105 Fed.Appx. 980, *982 (10th Cir. 2004) (unpublished opinion) ("[W]e issued a limited remand so the District Court could consider the Rule 60(b) motion. We further noted our intention to remand the entire matter if the District Court decided to grant the Rule 60(b) motion ....").

Seventh Circuit Rule 57 purports to require that the court of appeals must remand all proceedings, rather than remanding for a limited purpose. Writing in the context of request for

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[30] Thus, the Seventh Circuit has observed that an "unlimited remand may not be a completely satisfactory solution" for litigants:

> Suppose that the district court, on remand, thinks better of it's inclination to grant the Rule 60(b) motion, and denies it; is the plaintiff remitted to the limited appellate review conventionally accorded rulings on such motions? And what about the defendant in a case in which the Rule 60(b) motion is granted before he has had a chance to argue to the appellate court that the original judgment was correct-- is he, too, remitted to the limited appellate review of such grants? Probably the answer to both questions is "no," the scope of review of Rule 60(b) orders is flexible and can be expanded where necessary to give each party a full review of the district court's original judgment.

Boyko v. Anderson, 185 F.3d 672, 674 (7th Cir. 1999). The *Boyko* court's suggestion that the scope of appellate review of the Rule 60(b) order can "probably" be extended to encompass a full review of the original judgment hardly seems like an unequivocal assurance that unconditional remands are safe for the would-be appellant.

relief under Civil Rule 60(b), the court explained that partial remands were inappropriate "because the grant of the Rule 60(b) motion operates to vacate the original judgment, leaving nothing for the appellate court to do with it – in fact mooting the appeal." *Boyko v. Anderson*, 185 F.3d 672, 673-74 (7th Cir. 1999). However, the Seventh Circuit does not actually bar the use of limited remands; in that circuit, a limited remand would be the appropriate device when the district court has indicated that it might (rather than would) grant the relevant motion:

> [I]f the judge thought there was some chance that he would grant the Rule 60(b) motion, but he needed to conduct an evidentiary hearing in order to be able to make a definitive ruling on the question, he should have indicated that this was how he wanted to proceed. Boyko would then have asked us to order a limited remand to enable the judge to conduct the hearing. If after the hearing the judge decided (as we know he would have, since he did) that he did want to grant the Rule 60(b) motion, he should have so indicated on the record and Boyko would then have asked us to remand the case to enable the judge to act on the motion and we would have done so.

Boyko, 185 F.3d at 675.

In a similar vein, the Tenth Circuit has observed that the court of appeals has three options when faced with a request to remand so that the district court can consider a request for Rule 60(b) relief:

> [T]his court, confronted with the motion to remand before the trial court has heard the motion for a new trial pursuant to Rule 60(b), has three alternatives: (1) it can remand unconditionally as was done in *Siviglia* but at great risk to the appellant; (2) it can partially remand for consideration of the motion for new trial, retaining jurisdiction over the original appeal and consolidating any subsequent appeal from action on the motion for new trial after the trial court has acted; or (3) it can deny the motion to remand without prejudice, permitting the parties to proceed before the trial court on the motion, and grant a renewed motion to remand after the trial court has indicated its intent to grant the motion for a new trial. If the trial court denies the motion for new trial, it can do so without a remand from this court and appeal may be taken therefrom and consolidated with the original appeal if still pending.

Garcia v. Regents of Univ. of Ca., 737 F.2d 889, 890 (10th Cir. 1984) (per curiam). The court of appeals held that the last of the three options was the appropriate choice "unless the appellant indicates a clear intent to abandon the original appeal." *Id.*

These considerations indicate that the better practice is to exercise caution in setting the terms of the remand. If the district court has stated merely that it "might" grant the relevant motion, then an unconditional remand would be perilous for the appellant; in such cases, the

court of appeals should not grant an unconditional remand unless the appellant has clearly stated its intent to abandon the appeal. By contrast, if the rule requires that the district court state that it "would" grant the motion, one could perhaps, in some cases, follow a simpler procedure: The court of appeals could then remand for the purpose of allowing the district court to grant the motion. Arguably – because the motion is to be granted – the remand could be a full rather than a limited remand. But it still seems prudent for the unlimited nature of the remand to be conditional upon the grant of the motion; otherwise, if the district court were to change its mind and deny the motion, the appellant might be left without an opportunity to revive her appeal from the original judgment. Moreover, in some instances the court of appeals might wish to limit the remand so that it can proceed with the initial appeal even after the district court has granted relief on remand; the Note acknowledges this possibility.

D. Should the rule address whether a dissatisfied party must file a fresh notice of appeal with respect to action taken by the district court?

It may be worthwhile to include in the Committee Note some observations concerning notices of appeal.[31] In a circuit that shares the majority view that a pending appeal does not prevent a district court from *denying* a Civil Rule 60(b) motion,[32] the movant must make sure to take an appeal from such a denial in order to preserve the right to challenge the denial on appeal.[33] Likewise, "where a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals." *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990).

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[31] Both the Seventh Circuit rule and the D.C. Circuit handbook provision address this issue.

[32] *See, e.g., Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 890 (4th Cir. 1999) ("If a Rule 60(b) motion is frivolous, a district court can promptly deny it without disturbing appellate jurisdiction over the underlying judgment. Swift denial of a Rule 60(b) motion permits an appeal from that denial to be consolidated with the underlying appeal.").

[33] *See Jordan v. Bowen*, 808 F.2d 733, 736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial).

E. Is docketing the right demarcation with respect to the transfer of jurisdiction from the district court to the court of appeals?

The draft Rule refers to motions the district court lacks authority to grant "because of an appeal that has been docketed and is pending." One question this suggests is how courts handle requests for postjudgment relief during the period between the filing of the notice of appeal and the docketing of the appeal.

Appeals as of right from the district court[34] are taken by filing a notice of appeal in the district court.[35] The district clerk "must promptly send a copy of the notice of appeal and of the docket entries ... to the clerk of the court of appeals."[36] Upon receiving these items, "the circuit clerk must docket the appeal."[37] Appeals by permission entail a petition for permission to appeal.[38] If permission is granted, no notice of appeal is necessary.[39] Once the district clerk notifies the circuit clerk that the petitioner has paid the required fees, "the circuit clerk must enter the appeal on the docket."[40]

The Fourth Circuit has held that in at least some circumstances the district court can grant relief from the judgment after the filing of the notice of appeal but prior to the docketing of the appeal.[41] Dictum in some other opinions suggests that docketing is the time when jurisdiction

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[34] The procedure appears generally similar, in pertinent respects, for appeals from district courts or bankruptcy appellate panels exercising appellate jurisdiction in bankruptcy cases. *See* Appellate Rule 6(b)(1).

[35] *See* Appellate Rule 3(a).

[36] *See* Appellate Rule 3(d)(1).

[37] *See* Appellate Rule 12(a).

[38] *See* Appellate Rule 5(a).

[39] *See* Appellate Rule 5(d)(2).

[40] *See* Appellate Rule 5(d)(3).

[41] *See Williams v. McKenzie*, 576 F.2d 566, 570 (4th Cir. 1978) ("We hold that on the facts of this particular case, and especially since the appeal was not docketed in this court at the time the district judge reopened the habeas hearing for the taking of additional testimony, that the entertainment of the F.R.C.P. 60(b)(2) motion was appropriate."); *see also Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891-92 (4th Cir. 1999) (citing *Williams* with approval).

passes to the court of appeals.[42] Additional support for this view might, arguably, be gleaned from the role that docketing of the appeal plays with respect to motions under Rule 60(a). The docketing of the appeal demarcates the time after which the court of appeals' permission is necessary in order for the district court to correct clerical errors under Rule 60(a). To the extent that the choice of docketing as the demarcation point reflects the view that a court of appeals is unlikely to expend effort on an appeal before it is docketed,[43] similar reasoning would support the use of docketing to demarcate the time after which a remand is necessary in order for the district court to grant relief under Rule 60(b).[44] However, a possible counter-argument is that 60(b) relief can have a more significantly disruptive effect on the appeal than 60(a) relief, and therefore that more caution is called for – perhaps weighing in favor of using the filing of the notice of appeal as the cutoff time. Marcie Waldron points out that Appellate Rule 42(a) – which permits the district court to dismiss an appeal before the appeal "has been docketed by the circuit clerk" – provides additional support for the notion that docketing is the relevant demarcation for the shift from district court to appellate court authority.

In contrast to the Fourth Circuit's approach, some other circuits have indicated that it is the filing of the notice of appeal (and thus presumably not the later docketing of the appeal) that demarcates when jurisdiction passes from the trial to the appellate court.[45] Some of these courts echo the *Griggs* Court's statement that "[t]he filing of a notice of appeal is an event of jurisdictional significance--it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs*, 459 U.S. at

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[42] *See Azzeem v. Scott*, No. 98-40347, 1999 WL 301363, at *1 (5th Cir. 1999) (unpublished opinion) ("A district court is divested of jurisdiction upon the docketing in this court of a timely filed notice of appeal.").

[43] *Cf., e.g., In re Modern Textile, Inc.*, 900 F.2d 1184, 1193 (8th Cir. 1990) ("The underlying purpose of this rule, we believe, is to protect the administrative integrity of the appeal, i.e., to ensure that the issues on appeal are not undermined or altered as a result of changes in the district court's judgment, unless such changes are made with the appellate court's knowledge and authorization.").

[44] Some courts have reasoned from this aspect of Rule 60(a) to conclude that the docketing of the appeal marks the passing of jurisdiction from the lower to the appellate court. *See, e.g., Radio Television Espanola S.A. v. New World Entm't, Ltd.*, 183 F.3d 922, 932 (9th Cir. 1999) ("When Television Espanola's appeal of the district court's decision was docketed with the Ninth Circuit on October 22, 1997, the district court lost jurisdiction to review its October 6 entry of judgment.").

[45] *See, e.g., Kusay v. U.S.*, 62 F.3d 192, 194 (7th Cir. 1995) ("Just as the notice of appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district court.").

58.[46] The view that filing the notice of appeal is the relevant time might also be supported by the fact that an appeal as of right is "taken" by filing the notice of appeal in the district court. Appellate Rule 3(a)(1).

Thus, my quick survey of the caselaw suggests that questions exist regarding the district court's power to grant relief from a judgment after the filing of the notice of appeal but before the docketing of the appeal in the court of appeals. One argument for using docketing as the point when jurisdiction passes from one court to another would presumably be that – at least in the case of appeals as of right – the court of appeals is unlikely to expend any time on an appeal before it is docketed. That may not be the case when it comes to appeals by permission, but there, too, the likelihood that the court of appeals would expend effort on the appeal between the grant of permission and the docketing of the appeal may be low.

The three circuit clerks who have commented on the proposed rule favor the use of docketing as the point of demarcation. Fritz has summarized their reasoning thus:

> Even after all the appellate courts convert to the appellate Case Management/Electronic Case Filing system, incarcerated pro se cases likely still will be processed with a lot of paper, so some of the benefits of electronic filing are lost. Even with electronic notice of the filing of an appeal at the district court there are issues. At present, some district courts require that notices be filed in paper; others merely "lodge" an electronic notice until a review is made and approval given by a district court clerk. When the notice of appeal is filed at the district court in electronic form there will still be delays before the appellate court actually enters the case on the appellate docket.

F. Issues regarding notification to the Court of Appeals

Proposed Civil Rule 62.1 requires the movant to notify the appellate clerk when the motion is filed and when the district court acts on the motion. The appellate clerks who reviewed the proposal, however, vigorously oppose the notion of requiring notification when requests are made or when the district court denies a request. As Marcie Waldron, the Third Circuit clerk, points out, "I don't want to be notified every time a 60(b) is filed. We only need to know if the district court wants to grant the motion." Fritz points out, moreover, that most indicative-ruling issues in the Fifth Circuit arise in cases involving pro se litigants, who "are not a dependable source of information." Accordingly, draft Rule 12.1(a) includes two bracketed options – one that requires notification when the motion is filed and when it is resolved, and another that

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[46] *See, e.g., Venen v. Sweet*, 758 F.2d 117, 120 (3d Cir. 1985) ("As a general rule, the timely filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction on a Court of Appeals and divesting a district court of its control over those aspects of the case involved in the appeal.").

requires notification only when the district court responds favorably to the motion. A parallel provision appears in proposed Civil Rule 62.1, and thus it will be important to coordinate with the Civil Rules Committee on this point.

Marcie Waldron does suggest, however, that notification would be useful, after a remand, when the district court has decided the motion:

> I think the proposed rule should state that the parties must notify the circuit clerk when the district court has decided the motion. Sometimes the district court resolution satisfies everyone and the appeal can go away, but no one bothers to let us know. (Some of our district courts are bad about sending supplemental records.) Or since we retain jurisdiction, if the 60b is denied, they don't always file a new Notice of Appeal and we never know to start the appeal up again.

(She notes, however, that "[t]his problem may evaporate with CM/ECF notifications.") Draft Rule 12.1(b) includes bracketed language that would implement this suggestion.

Another question concerns the mechanics of the procedure by which litigants and the district court communicate the required information to the court of appeals. The current draft Rule 12.1 does not specify the mechanics of those communications. Fritz notes that the circuit practices vary on this point, and suggests that it would be difficult to attain national uniformity with respect to these logistical details. Accordingly, the draft Rule does not specify the procedure for communicating the required information to the court of appeals, but the Note states that "[i]n accordance with Rule 47(a)(1), a local rule may prescribe the format for the notification[s] under subdivision[s] (a) [and (b)] and the district court's statement under subdivision (b)."

G. Placement and title of the proposed rule

The DOJ's original proposal was that the rule be numbered 4.1; a Rule 4.1 would, of course, fall between the rules governing appeals as of right and appeals by permission. I have tentatively numbered the draft Rule "12.1" because that would place it at the end of the FRAP title concerning appeals from district court judgments or orders. Another possibility in the same title would be 8.1 (following Rule 8, which concerns stays or injunctions pending appeal). Other options would be in Title VII, concerning general provisions: 33.1 (following Rule 33 on appeal conferences); 42.1 (following Rule 42 on voluntary dismissal); or 49 (at the end of the title).

Rule 12.1 [Remand After an] Indicative Ruling by the District Court [on a Motion for Relief That Is Barred by a Pending Appeal]

(a) Notice to the Court of Appeals. If a timely motion is made in the district court for relief that it lacks authority to grant because an appeal has been docketed and is pending, the movant must notify the circuit clerk [when the motion is filed and when the district court acts on it] [if the district court states that it [might or] would grant the motion].

(b) Remand After an Indicative Ruling. If the district court states that it [might or] would grant the motion, the court of appeals may remand for further proceedings [and, if it remands, may retain jurisdiction of the appeal] [but retains jurisdiction [of the appeal] unless it expressly dismisses the appeal]. [If the court of appeals remands but retains jurisdiction, the parties must notify the circuit clerk when the district court has decided the motion on remand.]

Committee Note

This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts and generalizes the practice that most courts follow when a party moves under Civil Rule 60(b) to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot on its own reclaim the case to grant relief under a rule such as Civil Rule 60(b). But it can entertain the motion and deny it, defer consideration, or indicate that it might or would grant the motion if the action is remanded. Experienced appeal lawyers often refer to the suggestion for remand as an "indicative ruling."

Appellate Rule 12.1 is not limited to the Civil Rule 62.1 context; Rule 12.1 may also be used, for example, in connection with motions under Criminal Rule 33. *See United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984). The procedure formalized by Rule 12.1 is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal.

Rule 12.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in face of a pending appeal. The rules that govern the

relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Appellate Rule 12.1 applies only when those rules, as they are or as they develop, deprive the district court of authority to grant relief without appellate permission.

To ensure proper coordination of proceedings in the district court and in the court of appeals, the movant must notify the circuit clerk [when the motion is filed in the district court and again when the district court rules on the motion] [if the district court states that it [might or] would grant the motion]. If the district court states that it [might or] would grant the motion, the movant may ask the court of appeals to remand the action so that the district court can make its final ruling on the motion. In accordance with Rule 47(a)(1), a local rule may prescribe the format for the notification[s] under subdivision[s] (a) [and (b)] and the district court's statement under subdivision (b).

Remand is in the court of appeals' discretion. The court of appeals may remand all proceedings, terminating the initial appeal. In the context of postjudgment motions, however, that procedure should be followed only when the appellant has stated clearly its intention to abandon the appeal. The danger is that if the initial appeal is terminated and the district court then denies the requested relief, the time for appealing the initial judgment will have run out and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion. The latter appeal may well not provide the appellant with the opportunity to raise all the challenges that could have been raised on appeal from the underlying judgment. *See, e.g.*, *Browder v. Dir., Dep't of Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978) ("[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review."). The Committee does not endorse the notion that a court of appeals should decide that the initial appeal was abandoned – despite the absence of any clear statement of intent to abandon the appeal – merely because an unlimited remand occurred, but the possibility that a court might take that troubling view underscores the need for caution in delimiting the scope of the remand.

The court of appeals may instead choose to remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules on the motion (if the appeal is not moot at that point and if any party wishes to proceed). This will often be the preferred course in the light of the concerns expressed above. It is also possible that the court of appeals may wish to proceed to hear the appeal even after the district court has granted relief on remand; thus, even when the district court indicates that it would grant relief, the court of appeals may in appropriate circumstances choose a limited rather than unlimited remand.

[If the court of appeals remands but retains jurisdiction, subdivision (b) requires the parties to notify the circuit clerk when the district court has decided the motion on remand. This is a joint obligation that is discharged when the required notice is given by any litigant involved in the motion in the district court.]

When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a separate notice of appeal will be necessary in order to challenge the district court's disposition of the motion. *See, e.g.*, *Jordan v. Bowen*, 808 F.2d 733,

736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) ("[W]here a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals.").

SUPPLEMENTAL RULE 29 MATERIALS

CHAMBERS OF U.S. CIRCUIT JUDGE
RICHARD C. TALLMAN **MEMORANDUM**

March 28, 2007

TO: Criminal Rules Advisory Committee

FROM: Judge Tallman, Rule 29 Subcommittee Chair

RE: Subcommittee's Recommendation on Proposed Rule Change

Since our Committee heard testimony on January 26, 2007, the Rule 29 Subcommittee has held two telephone meetings. We voted 3-2 (with DOJ abstaining) at our March 13 Subcommittee meeting to recommend that the Advisory Committee table action on the proposed change to Rule 29, which was previously published and addressed by witnesses at the Washington, D.C., public hearing.

The Department of Justice responded to the Subcommittee vote and the concerns expressed by representatives of the defense bar by circulating on March 21, 2007, the attached Revised Proposed Rule 29 Amendment. It attempts to address concerns about the constitutionality of the proposed waiver of Double Jeopardy rights and the need to provide a means of preserving appellate review of purely legal issues which may be the basis for a mid-trial Rule 29 motion but were not raised pre-trial in Rule 12 motions. New objections were received on March 27, 2007, from Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers and from Tom Hillier on behalf of Federal Public Defenders (also attached).

The Subcommittee convened again by telephone on March 28, 2007, and believes that further consideration should be given to the Revised Proposal, but we understand it may require a new round of notice and comment before any other version changing Rule 29 can be advanced to the Standing Committee on Rules. We also would like legal research to be performed on constitutional concerns and possible violations of the Rules Enabling Act, which commentators have raised surrounding any proposed change to Rule 29. Because it will be impossible to complete this work prior to the Advisory Committee's April 16 meeting in Brooklyn, New York, we are circulating the attached materials for information purposes only at this time.

"Sara Beale"
<sun@law.duke.edu>
03/27/2007 05:29 PM

To <Judge_Tallman@ca9.uscourts.gov>, <Thomas_McNamara@fd.org>, <Susan_Bucklew@flmd.uscourts.gov>, "Sara Beale"
cc <James_Ishida@ao.uscourts.gov>, <John_Rabiej@ao.uscourts.gov>, <William.Burck@usdoj.gov>
bcc
Subject Re: R.29 conference call

Federal Public Defender Thomas Hillier, who testified and presented a detailed written commentary regarding R. 29, sent Tom McNamara these comments on the new DOJ proposal and asked that they be circulated in connection with the conference call.

Sara Sun Beale
Charles L.B. Lowndes Professor
Duke University School of Law
Box 90360
Corner Science Drive and Towerview Road
Durham, N.C. 27701-0360
Ph: 919-613-7091
e-mail: sun@law.duke.edu

>>
Tom

Thank you for forwarding DOJ's latest proposal for amending Rule 29. To the extent that your subcommittee had hoped to find common ground for a compromise to the proposal currently under consideration by the full Committee, this latest tack by DOJ is disappointing. It is not a compromise and offers no common ground for addressing the serious deficiencies in and justification for the proposal currently before the Committee. The tendentious introductory paragraph and first sentence of the Advisory Notes evidence that the purpose of the proposal is to effectively bar pre-verdict judgments of acquital. A de facto bar to pre-verdict acquitals results form the proposal because it introduces to R. 29 a radical new concept: mid-trial judgments of acquital are prohibited "unless the government has presented no relevant evidence" on an element of an offense. What this new "standard" means is anyone's guess, but it is a certainty that it eviscerates the constitutional norm and current requirement of R. 29 that acquital is required when "the evidence is insufficient to sustain a conviction" or, in other words, the evidence is insufficent to

permit a rational trier of fact to find the element beyond a reasonable doubt.

Problems with the new proposal are many. First, it is a huge change to the proposal currently before the Committee and as such should, consistent with the requirements of R. 5 of the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, be subject to an additional period of public notice and comment. Of course, a more efficeint alternative would be to table all discussion of proposals to alter R. 29, an alternative Defenders favor.

Second, the new proposal fails to address any of the primary concerns expressed by the many opponents to the version that has undergone public comment. Comments made in opposition to that propsal included its intrusion on judicial independence, its interference with the just and efficient resolution of cases, the absence of any demonstrable need for change, the exaggerated and misleading claims by DOJ, the constitutional questions provoked, and others. This latest proposal DOJ carries all those problems forward.

Third, the new language "no relevant evidence" in new part (b) and the language in new section (c) which requires a judge to acquit after verdict "if the evidence is insufficient to sustain a conviction beyond a reasonable doubt" seems to create a double standard for judging the government's case--one before and one after trial. Should introduction of a speck of "relevant" evidence to support an otherwise clearly unproven charge prevent a judge from discharging his or her duty to acquit? If the proof is insufficent pre-trial, why isn't acquittal required? One answer seems to be that the government wants to be able to appeal all judgments of acquital, even those that should have been granted pre-trial thereby saving resources and preserving an accused's right against double jeopardy.

Fourth, the proposal does not address its purported purpose as expressed in the introduction--allowing a government appeal from an acquittal based on a strictly legal basis, a problem raised by Judge Tallman at the hearing in January. This concern should be addressed in R. 12, an idea that was presented to Justice and which we thought might lead to "common ground". This new proposal brushes aside that attempt to find common ground and presents an even more problematic idea for unnecessary change to R. 29. The elimination of the irksome double jeopardy waiver language in no way makes the proposal palatable.

I hope your subcommittee votes to table discussion of all these proposals. The rule making and changing process should be used when change is needed, not when change is desired by DOJ. Judges and practitioners alike should be confident that when learned rules work, they will remain in place and won't be fundamentally altered at the whim of a litigant. As is emphatically clear from the information before the Committee, the current rule works and both proposed changes would create confusion and unnecessary litigation. I will try to prepare a more thorough analysis of this proposal for the full Committe in the unfortunate event that should be necessary.
Meanwhile, feel free to share these preliminary observations with your subcommittee. Thank you again.

Tom Hillier

REVISED PROPOSED RULE 29 AMENDMENT

This revised amendment recognizes that the preferred procedure for resolving legal questions surrounding the legal sufficiency of allegations in an indictment is by pre-trial motion to dismiss under Rule 12 or by post-trial motion, and for addressing prejudicial joinder of defendants or confusion caused by excess counts is by pre-trial motion under Rule 14. As a result, the revised amendment requires deferral of mid-trial Rule 29 motions based on the legal sufficiency of the charges (rather than the legal sufficiency of the evidence). In other words, if there is a question about whether the charges in an indictment make out a federal crime, that question should be raised pre-trial or post-trial. The amendment continues to permit mid-trial acquittals where the government has presented no relevant evidence on an element of any count – where the evidence presented is clearly not legally sufficient – but otherwise requires courts to reserve ruling on a mid-trial Rule 29 motion until a verdict is returned or until the jury is discharged after it fails to reach a verdict.

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Rule 29. Motion for a Judgment of Acquittal

(a) Before Submission to the Jury.

(1) Time for a Motion. After the government closes its evidence or after the close of all the evidence, ~~the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so~~ a defendant may move for a judgment of acquittal on any offense. The court may invite the motion.

(b 2) Reserving Decision. The court ~~may~~ must reserve decision on the motion unless the government has presented no relevant evidence on an element of any offense alleged in the indictment. If the court reserves decision on the motion, it must proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion ~~either before the jury returns a verdict or~~ after ~~it~~ the jury returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c b) After Jury Verdict or Discharge.

(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within [7][14] days after a guilty verdict or after the court discharges the jury, whichever is later.

~~**(2) Ruling on the Motion.** If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.~~

(3 2) No Prior Motion Required. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(2 c) Ruling on the Motion. The court must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction beyond a reasonable doubt. If the jury has returned a guilty verdict, the court ~~may~~ must set aside the verdict and enter ~~an~~ a judgment of acquittal. If the jury has failed to return a verdict, the court ~~may~~ must enter a judgment of acquittal.

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ADVISORY COMMITTEE NOTES

Rule 29 currently permits orders disposing of entire prosecutions or counts without any possibility of appellate review. *See* Richard Sauber & Michael Waldman, Unlimited Power: Rule 29(a) and the Unreviewability of Directed Judgments of Acquittal, 44 Am. U. L. Rev. 433 (1994). Rule 29 was originally drafted in 1944, when the Government under the 1907 Criminal Appeals Act could not appeal a judgment of acquittal whether rendered before or after a guilty verdict. *See* United States v. Sisson, 399 U.S. 267 (1970). In 1971, however, Congress enacted a new Criminal Appeals Act permitting the Government to appeal from any judgment dismissing an indictment or any count thereof, including a judgment of acquittal under Rule 29, unless "the double jeopardy clause of the United States Constitution prohibits further prosecution." 18 U.S.C. § 3731; *see* United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977). In enacting § 3731, "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." United States v. Wilson, 420 U.S. 332, 337-38 (1978). Although "Congress was determined to avoid creating non-constitutional bars to the Government's right to appeal," id., Rule 29 has acted as a non-constitutional bar to the Government's right to appeal, by permitting district courts to enter judgments of acquittal at times (at the close of the Government's case and at the close of all the evidence) when the Double Jeopardy Clause prohibited appeal.

This anomaly was partially remedied by the1994 amendment, which permitted and encouraged district judges to reserve until after the guilty verdict its decision on a motion for judgment of acquittal, thus rendering its decision appealable. The current amendment builds on the 1994 amendment by requiring that Rule 29 motions based on legal issues be reserved. This amendment recognizes that the preferred procedure for resolving legal questions surrounding the sufficiency of allegations in an indictment is by motion to dismiss under Rule 12 or by post-trial motion and for addressing confusion caused by excess counts is by motion under Rule 14. The revised amendment permits mid-trial acquittals where there is no [significant/substantially probative] relevant evidence presented on an element of any count but otherwise requires courts to reserve ruling on a mid-trial Rule 29 motion until a verdict is returned or until the jury is discharged after it fails to reach a verdict. *See* Jackson v. Virginia, 443 U.S. 307 (1979).

Thus, the amendment precludes the granting of a mid-trial judgment of acquittal on purely legal grounds or if there is a significant question about the sufficiency of the government's proof before the jury returns a verdict or before the jury is discharged without having returned a verdict. *See* Carlisle v. United States, 517 U.S. 416 (1996). As a result, most judgments of acquittal will now be subject to appellate review. *See* United States v. Scott, 437 U.S. 82 (1978); United States v. Genova, 333 F.3d 750 (7th Cir. 2003). The amendment conforms Rule 29 to § 3731, secures the Government a greater ability to appeal adverse decisions, advances the public's interests in correcting erroneous judgments of acquittal, protects the public from defendants who would otherwise be mistakenly released, and prevents such erroneous rulings from irretrievably wasting the resources invested in the case by the prosecution, judge, and jury.

The amendment preserves the defendant's opportunity to make a motion for judgment of acquittal at three times: at the close of the Government's case-in-chief; at the close of all the evidence; and within the specified period after the verdict. In addition, the amendment protects the defendant's interests by providing that if a defendant moves for judgment of acquittal at the close of the Government's case, and the district court reserves its decision until after the verdict, its decision must be made solely on the basis of the evidence presented in the Government's case. Finally, the amendment safeguards defendant's constitutionally-protected interests in avoiding a second trial; if the district court grants a judgment of acquittal after a guilty verdict and the appellate court reverses, the guilty verdict is reinstated without putting defendant through a second trial.

The amendment removes any pressure on the district court to make an immediate unreviewable decision. Reservation also removes the need for the court to rule on the motion if the jury verdict on the challenged count(s) is not guilty. Further, the amendment preserves the power of the court to enter a judgment of acquittal on its own motion, and simply requires that any such *sua sponte* motion and ruling be made within the specified period after the guilty verdict, making such rulings subject to appellate review.

The amendment does not prevent the giving of an instruction seeking a verdict on a lesser included offense. Such an instruction may be given at the request of the defense or the

prosecution. *See* Schmuck v. United States, 489 U.S. 705 (1989); Fed. R. Crim. P. 31(c). Whether or not such an instruction is given, a court which is considering a reserved motion for judgment of acquittal, which finds the evidence insufficient to sustain a conviction on the greater offense, must consider whether the evidence would be sufficient to sustain a conviction on a lesser included offense. 2A Charles Alan Wright, Federal Practice and Procedure: Criminal 3d § 467 (3d ed. 2000).

The amended Rule applies equally to motions for judgments of acquittal made in bench trials. A defendant may make such a motion at the specified times before submission of the case to the judge, but only within the specified period after the judge's finding of guilt may the judge grant any motion for judgment of acquittal, which could then be appealed. *See* United States v. Morrison, 429 U.S. 1 (1976). Of course, even though decision is reserved on the judgment of acquittal, at the end of the trial the judge may enter a unappealable "not guilty" finding as the finder of fact (which, unlike a judge considering a judgment of acquittal, is allowed to discredit evidence of guilt and draw inferences unfavorable to a guilty verdict).

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

March 27, 2007
via e-mail

Advisory Committee on Criminal Rules
Judicial Conference of the United States
Subcommittee on Rule 29
c/o Prof. Sara Sun Beale
Duke Univ. School of Law

Re: Justice Department Post-Hearing Substitute Proposal Regarding Mid-Trial Motions for Judgment of Acquittal

Dear Professor Beale:

In August 2006 the Committee published for comment a proposed amendment to Fed.R.Crim.P. 29 which would condition the granting of any mid-trial motion for judgment of acquittal on a defendant's purported waiver of double jeopardy rights. In late January 2007, one of the undersigned co-chairs of the National Association of Criminal Defense Lawyers Committee on Rules of Procedure had the honor of testifying before the Advisory Committee and offering some commentary. Our final and formal comments were submitted on February 15, and incorporated our reaction to questions raised by other witnesses and by committee members at the hearing. After the hearing and the close of the comment period, it seemed apparent that the proposal as published would not advance. This must have been evident to the Department of Justice representatives as well, since it seems that an entirely new proposal is now on the table. We have had an opportunity to review the substitute language, in a version dated March 15, 2007, which we understand will be discussed by the subcommittee on Wednesday, March 28, 2007. We now offer some hastily drafted comments, which we believe demonstrate that the Committee should not accept the proposed revision.

The comments on the proposed amendment as published pointed out a number of reasons it should not be adopted, including that: (1) it was a solution in search of a problem (a point that was confirmed by an analysis of the statistical case information the Department of Justice submitted in its discredited effort to support its claim that there was a need for the amendment); (2) the proposal evidenced an unwarranted mistrust of the ability of federal judges to distinguish between clear-cut cases of insufficient evidence that should be terminated without expending further resources, and close cases of possible insufficiency that should be made reviewable by deferring a ruling on the motion until after the verdict. The published amendment would have protected against a risk of occasional judicial error by stripping judges of the power to grant any pre-verdict acquittals. (It thus conveyed a philosophy, at odds with our legal and constitutional history, that it is better to subject any number of innocent men to the burdens of a criminal trial and the risk of unjust conviction than to allow one

1150 18th Street, NW ◆ Suite 950 ◆ Washington, DC 20036
202-872-8600 Fax 202-872-8690 assist@nacdl.org www.nacdl.org

guilty person to go free every few years by mistake.) And worst of all, a serious question was presented whether the proposal, given the waiver provision, was unconstitutional under the Double Jeopardy Clause, a fundamental protection of liberty that it was at best designed to evade.

The initially proposed amendment having apparently failed, the government has hurried to submit a revised proposed amendment. The revision no longer seeks to overcome the double jeopardy protection the Constitution affords the accused by extracting a waiver from the defendant, but rather by preventing judges from granting pre-verdict acquittals nearly altogether. The revised amendment would do so by formulating an novel standard to govern the granting of pre-verdict acquittals, limiting them to cases where "the government has presented no relevant evidence on an element of any offense alleged in the indictment." Thus, as long as the government has presented *some* evidence "relevant" to each element of an offense, no matter what it is, a court would be barred from granting an acquittal at the close of the government's case no matter how firmly convinced the judge might be that no rational juror could properly find the defendant guilty beyond a reasonable doubt.

At most, the revised proposed amendment may cure the unconstitutionality of its predecessor. (It is still nevertheless overtly designed to maximize the government's opportunity to appeal, at the expense of the values protected by the Double Jeopardy Clause.) Of course, that the proposed amendment may no longer technically be unconstitutional is not at all a reason for its adoption.

The exposed absence of any need for the amendment remains. Indeed, the Department appears to have abandoned it discredited attempt to demonstrate either statistically or anecdotally the need for the amendment and instead has stooped to claiming it is necessary to "protect[] the public ...." (Prop. Adv. Comm. Note ¶3)

The disrespect for and mistrust of judges that was evident in the prior amendment, and the unwarranted curbing of judicial authority and duty it proposed as a remedy, are actually multiplied and codified by the revised amendment.

The revised proposed amendment not only fails to overcome these persuasive objections that applied to its predecessor, but its implementation and application would also create new problems. The term "relevant evidence" has a precise meaning under the Rules of Evidence. It means "evidence having any tendency to make the existence of [a] fact ... more probable or less probable ...." If the prosecution "has presented" any such evidence (including, in other words, evidence fatally undermining its own case) the motion must be denied under this draft. Moreover, evidence may be "relevant" and yet be inadmissible and excluded, as is the case with evidence which has been suppressed, or that is privileged, or is hearsay, or is barred under any of a dozen other evidence rules. Yet if the government has even "presented" such evidence, the court would be prohibited from granting a pre-verdict acquittal. Take for example a federal bank robbery case where the only evidence of FDIC insurance is the testimony of a customer, present in the bank during the robbery, that she saw a torn and faded sticker on the counter by the teller's station that she thinks may have said "FDIC insured." This hearsay evidence is *relevant* to the jurisdictional issue, but should not be admitted for its truth and in any event would be insufficient to satisfy any reasonable factfinder beyond a reasonable doubt. Similarly, take the gun possession case (discussed at the Committee hearing) where the only evidence of prior interstate transportation of the weapon is the

testimony of an ATF agent that he has never heard of a manufacturing facility in the state that produces such guns. Yet the motions for acquittal in such cases must be denied, according to this proposal.

Moreover, the proposal is so badly written that the "unless" clause is virtually unintelligible as applied to a multicount case. Arguably, the plain language frees the court to grant pre-verdict acquittals on other counts on any standard it chooses, whenever there exists one offense charged in the indictment as to which no evidence at all was offered on some element. While NACDL does not oppose that reading, it hardly advances the amendment's purpose and so is presumably incorrect. Yet what the true meaning of the clause might be, we cannot tell. Tellingly, all language directing the judge to enter a judgment of acquittal if the government's evidence fails is to be stricken out.

The confusion and difficulties that application of the poorly worded proposed revised amendment would needlessly create would be exacerbated by the government's explanation of the amendment in the Advisory Committee Note, which is partly disingenuous and partly tendentious (particularly in its opening quotations from Supreme Court cases on the government's right to appeal, which ignore the discussion in *Sanabria v. United States*, 437 U.S. 54, 65-68 (1978), limiting and explaining the quoted language from *Wilson*). For example, the Advisory Committee Note states that the revised proposed amendment "requir[es] that Rule 29 motions based on legal issues be reserved," and in fact seeks to equate the types of Rule 29 motions that would have to be deferred to motions to dismiss under Rule 12 that are based on "legal questions surrounding the sufficiency of the allegations in an indictment ...." The very next paragraph offers a contradictory explanation, by suggesting that the amendment requires a judge defer ruling on any Rule 29 motion which raises "a *significant* question about the sufficiency of the government's *proof* ..." (emphasis added).

In fact, despite the introductory "explanation" and the illogical reference to Rule 12, the proposal does nothing to address the only cases which the hearing revealed as potentially problematic -- those in which the district judge has a legally disputable view of what the charged statute requires the government to prove or of what sort of evidence is admissible to prove the contested element. NACDL's written comments of February 15, 2007, suggested an amendment to Rule 12 that would address that discrete issue. The instant DOJ proposal, despite language in the introduction and proposed Note, in fact does not address that issue at all. Far from being any sort of compromise with the critics of the published proposal, then, the current suggestion would virtually eliminate any acquittals at the time when the government rests, in even the most egregious cases of failed proof.

The ambiguities in the revised proposed amendment that presumably resulted from its hasty drafting are reason enough not to adopt it now. The government's attempt to have the revised amendment adopted without public comment by having it ride the coattails of one that was rejected should not be allowed. Indeed, given the substantial changes that the revised proposed amendment makes to the published proposed amendment (including the adoption of a newly formulated standard that controls and narrowly limits judicial authority to grant pre-verdict acquittals) it would violate 28 U.S.C. § 2071(b) for the revised proposed amendment to be adopted without its being published for comment. *See* Judicial Conference Rulemaking Procedures (http://www.uscourts.gov/rules/procedurejc.htm) ¶ 5(a), which provides that any "substantial" change from the original proposal ordinarily will be republished for a new round of public comment. This is not a mere edit; it is a new proposal.

We hope that the above criticisms of the revised proposed amendment are sufficient to show not only that it should not be fast-tracked now, but also that it is not deserving of the resources that would be expended by publishing it as a proposed amendment in the next cycle.

For all these reasons, the subcommittee should not recommend to the Advisory Committee any further action on this ill-advised proposal. We reserve the right to address this matter further, either in writing or by attending the next meeting of the Committee in Brooklyn, if it is placed on that agenda. Your consideration of our viewsfr is appreciated.

Very truly yours,

s/Peter Goldberger
William J. Genego
Santa Monica, CA
Peter Goldberger
Ardmore, PA
Co-Chairs, National Association
of Criminal Defense Lawyers
Committee on Rules of Procedure

Please reply to:
Peter Goldberger
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
peter.goldberger@verizon.net

Supplemental Materials

CHAMBERS OF U.S. CIRCUIT JUDGE
RICHARD C. TALLMAN **MEMORANDUM**

April 12, 2007

TO: Criminal Rules Advisory Committee

FROM: Judge Tallman, Rule 29 Subcommittee Chair

RE: The Rules Enabling Act Restriction on Proposed Changes

An issue was raised at the January public hearing as to whether proposed changes to Federal Rule of Criminal Procedure 29 might be substantive and therefore violate the Rules Enabling Act. *See* 28 U.S.C. § 2072. The same concern attends our consideration of proposed rules changes in conformance with the Crime Victims' Rights Act. This memorandum discusses the issue in light of further talks among members of the Rule 29 Subcommittee, which has stimulated our thinking on the scope of our authority as a JCUS committee.

As stated in my memorandum to the Criminal Rules Advisory Committee dated March 28, 2007, the Rule 29 Subcommittee voted 3-2 (with the Department of Justice abstaining) to recommend that the Advisory Committee table action on the proposed Rule 29 amendment.[1] During the two telephone meetings held by the

[1] I will refer to the previously published and commented on Rule 29 amendment as the "proposed Rule 29 amendment." I will refer to the revised amendment circulated by the Department of Justice on March 21, 2007, as the "revised proposed Rule 29 amendment."

Rule 29 Subcommittee since January to address the proposed amendment, Judge Wolf thoughtfully articulated his concerns over whether the Rules Enabling Act even authorizes such an amendment. I asked Judge Wolf to outline his thoughts in a letter that we would circulate to the full Advisory Committee for its consideration. I appreciate his work on the subject, which has stimulated my thinking as well. After reviewing his letter of April 10, 2007, I agree with him that the Double Jeopardy waiver requirement contained in the proposed Rule 29 amendment raises substantial concerns under the Rules Enabling Act. To stimulate the Committee's discussion in Brooklyn, and to provide a different point of view, I wanted to explain my belief that the revised proposed Rule 29 amendment now under consideration by the Subcommittee—in which the Double Jeopardy waiver by a defendant moving for judgment of acquittal has been removed—would not exceed the scope of our authority under the Rules Enabling Act.

The pivotal question we must decide is whether under federal common law there exists an inchoate right for immediate entry of a mid-trial judgment of acquittal. And whether this right would be modified or restricted in violation of

the Rules Enabling Act should we recommend amendment of Rule 29 to change the timing of a mid-trial ruling to require that it be deferred until after the jury has reached its verdict or announced its inability to return a verdict.

Under the Rules Enabling Act, a federal rule must not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). "The test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Hanna v. Plumer*, 380 U.S. 460, 464 (1965) (internal quotation marks omitted). However, "Rules which incidentally affect *litigants'* substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules." *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 (1987) (emphasis added). As the Supreme Court said in *Hanna*:

> Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights.

380 U.S. at 465. Therefore, the question under the Rules Enabling Act is whether

the revised proposed Rule 29 amendment will "operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights." *Id.*[2]

By requiring the trial court to defer decision on a Rule 29 motion until the jury returns a verdict, the revised proposed Rule 29 amendment will not change the "rules of decision" by which the trial court decides a Rule 29 motion. The substantive right at issue is a defendant's right to have the trial court rule on the sufficiency of the evidence. In *Ex parte United States*, 101 F.2d 870 (7th Cir.), the Seventh Circuit recognized that "[f]rom time immemorial, in the common law courts of England, it had been the function of the trial court to determine the legal sufficiency of the evidence." *Id.* at 876, *aff'd by an equally divided court sub nom. United States v. Stone*, 308 U.S. 519 (1939); *see also Carlisle v. United States*, 517 U.S. 416, 430, 433 (1996) (holding the trial court had no authority to grant an untimely post-verdict motion for judgment of acquittal, but suggesting,

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[2] In addition to the Rules Enabling Act, federal rules must also satisfy certain constitutional requirements. *Burlington N. R.R. Co.*, 480 U.S. at 5. The Constitution requires "reasonableness" and "[r]ules regulating matters 'which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either,' . . . satisfy this constitutional standard." *Id.* (quoting *Hanna*, 380 U.S. at 472). In my judgment the proposed revision (which does not require waiver of any attendant Double Jeopardy rights) falls within this grey area and may properly be regulated by rule.

without deciding, that "a district court . . . has the inherent authority to ensure that a legally innocent defendant is not wrongfully convicted"); *Fong Foo v. United States*, 369 U.S. 141, 141-43 (1962) (refusing to set aside a trial court's decision to issue a directed verdict and enter a formal judgment of acquittal—in the midst of testimony during the prosecution's case-in-chief—because it would infringe on rights afforded by the Double Jeopardy clause).

I commend to your reading the majority and dissenting opinion in *Carlisle*, 517 U.S. 416, for a thorough explanation of the history of motions for directed verdicts, judgments of acquittal, and the application of Rule 29. The Court there held that a failure to move to set aside the verdict within the seven-day time period in Rule 29(c)(1) deprived the district court of power to acquit the defendant. *Id.* at 433. The Court observed that even if the dissent was correct, and district courts have an "inherent authority to ensure that a legally innocent defendant is not wrongfully convicted,"

> there is *some* point at which the district court is rendered powerless to enter a judgment of acquittal, and the disagreement between [the majority] and the dissent comes down to nothing more cosmic than the question of timing–which [the majority found] answered by the text of Rule 29.

Id. at 430-31; *see also id.* at 435 (Ginsberg, J., concurring). Justice Stevens, in dissent, insists that the source must be "a power inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process." *Id.* at 437 (Stevens, J., dissenting) (internal quotation marks omitted). But nowhere in *Carlisle* can we discern the source of the inchoate power. Tellingly, the Court rejected the claim that the power stems from a defendant's due process rights:

> Petitioner has failed to proffer any historical, textual, or controlling precedential support for his argument that the inability of a district court to grant an untimely post-verdict motion for judgment of acquittal violates the Fifth Amendment, and we decline to fashion a new due process right out of thin air.

Id. at 429.

The Seventh Circuit noted that at English common law in criminal cases "the disposition of the case was by judicial recommendation for pardon rather than by judicial dismissal." *Ex parte United States*, 101 F.2d at 875; *see also Carlisle*, 517 U.S. at 440 n.4 (Stevens, J., dissenting) (noting the procedural difference in English common law). "In criminal cases . . . the judge naturally was reluctant to incur the disfavor of the king by discharging an innocent prisoner by judgment after the verdict

for the Crown." *Ex parte United States*, 101 F.2d at 876. Therefore, the proper action was judicial recommendation for a pardon, which the Crown usually granted as a matter of course. *Id.* at 875 & n.15; *see also Carlisle*, 517 U.S. at 440 n.4 (Stevens, J., dissenting). So if it did not exist at English common law, what is the genesis of the power to grant relief from prosecution which is certainly substantive?

In recognizing a substantive right to have the trial court rule on the sufficiency of the evidence, the Seventh Circuit did not go so far as to say that the defendant also has a right to an immediate mid-trial ruling from the district court on the issue. Instead, the Seventh Circuit held, in the context of a complex and lengthy criminal antitrust trial, that in the absence of prohibitive legislation trial courts have an inherent power to defer ruling on the sufficiency of the evidence until after the jury has returned a verdict. *Ex parte United States*, 101 F.2d at 878.

If we could find some source of law to conclude that a defendant has a substantive right to have the trial court rule on a motion for judgment of acquittal mid-trial, then arguably the Rules Enabling Act was violated when we adopted the current version of Rule 29, which allows the trial court to defer ruling until after it submits the case to the jury. *See* Fed. R. Crim. P. 29(b). However, such a result

would be contrary to Supreme Court authority citing the Rule 29 timing provisions with approval. In *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), the Supreme Court described Rule 29 as a mere replacement to the directed-verdict mechanism employed in *Fong Foo*. *Id.* at 573. By allowing the trial court to defer its judgment until after the jury returns a verdict, Rule 29 did not "weaken[] the trial court's binding authority for purposes of double jeopardy"; rather, it allowed the trial judge "greater flexibility in timing his judgment of acquittal." *Id*; *see also id.* at 574 ("[T]he differentiations in timing [in Rule 29] were intentionally incorporated into the Rule to afford a trial judge the maximum opportunity to consider with care a pending acquittal motion.").

In *Carlisle*, the Supreme Court held that trial courts do not have an "inherent supervisory power" to grant a post-verdict motion for judgment of acquittal filed one day outside the time limit prescribed by Rule 29©). 517 U.S. at 417-18, 425-26. Although the Court acknowledged that trial courts may have some "inherent power" to ensure that a legally innocent defendant is not wrongfully convicted, *id.* at 430; *see also id.* at 452 (Stevens, J., dissenting), it also alluded to the fact that a Federal Rule of Criminal Procedure, upon clear expression, can abrogate such a long established

power, *id.* at 426. *See also Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-32 (1962) (stating that in the absence of clear expression, the Court would assume that Federal Rule of Civil Procedure 41(b) was not intended to abrogate the "long . . . unquestioned" power of trial courts to dismiss *sua sponte* for failure to prosecute).

This raises a separate point. Under the Rules Enabling Act we are concerned with the "*litigants'* substantive rights," *Burlington N. R.R. Co.*, 480 U.S. at 5 (emphasis added), not the inherent power of a trial court to manage its docket. Therefore, so long as any amendment to Rule 29 does not substantially abridge or modify the defendant's right to have the trial court make a legal determination as to the sufficiency of the evidence, the proposed rule change as to the timing of the ruling would likely satisfy the Rules Enabling Act.

On this point, "to the extent that the judge's authority under Rule 29 is designed to provide additional protection to a defendant by filtering out deficient prosecutions, the defendant's interest in such protection is essentially identical both before the jury is allowed to come to a verdict and after they jury is unable to reach a

verdict."[3] *Martin Linen Supply Co.*, 430 U.S. at 574-75. Indeed, in *Smith v. Massachusetts*, the Court said that "States can and do craft procedural rules that allow trial judges the maximum opportunity to consider with care a pending acquittal motion, including the option of deferring consideration until after verdict." 543 U.S. 462, 474 (2005) (internal quotation marks and citation omitted). As an example, the Court cited to Nevada Revised Statute § 175.381(1) (2001), which precludes mid-trial acquittals by the trial court.

The revised proposed Rule 29 amendment would maintain a defendant's right to have the trial court rule on the sufficiency of the evidence, but would merely require the trial court to defer making such a ruling until after the jury returned its verdict. Any negative effect resulting from such a procedural change is "reasonably necessary"—as the Department of Justice argues—"to maintain the integrity" of a trial court's authority to grant judgments of acquittal. *See Burlington N. R.R. Co.*,

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[3] As it currently stands, if a trial court decides to defer ruling on a motion for judgment of acquittal until after the jury returns a verdict, Rule 29(b) "protects a defendant's right to make a motion for acquittal and to put on rebuttal evidence without risking that new evidence of guilt will emerge." *Carlisle*, 517 U.S. at 445 n.5 (Stevens, J., dissenting). That is because the court is directed to decide the motion on the state of the evidence as it existed when the motion was made. Fed. R. Crim. P. 29(b).

480 U.S. at 5. It would alleviate the Department's concern over possible abuses by trial courts, in addition to fulfilling Congress's intent to broaden the Government's appeal rights by enacting the Criminal Appeals Act, 18 U.S.C. § 3731.[4] *See United States v. Wilson*, 420 U.S. 332, 337 (1975).

As the Supreme Court stated in *Wilson*, by enacting § 3731 "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *Id.* It is well established that once the ruling is made the government cannot appeal a trial court's decision to grant a judgment of acquittal mid-trial. *See Foo Fong*, 369 U.S. at 141-43. However, the Double Jeopardy clause does not prohibit the government from appealing a trial court's decision to grant a judgment of acquittal after the jury has returned a verdict of guilty. *Wilson*, 420 U.S. at 351-53. The reason is that on appellate review an erroneous grant can be overturned, the verdict reinstated without retrial, and Double Jeopardy is not offended. *Id.*

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[4] 18 U.S.C. § 3731 authorizes the government to appeal "from a decision, judgment, or order of a district court dismissing an indictment or information . . . except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

The Department of Justice's revised proposed Rule 29 amendment would therefore preserve the government's right to appeal erroneous decisions without infringing on a defendant's Double Jeopardy rights. *See Carlisle*, 517 U.S. at 444-45 (Stevens, J., dissenting) (stating that Rule 29(b)—which allows the trial court to defer judgment—fully protects a defendant's interest by allowing an acquittal, while also protecting the government's right to appeal because the jury has already returned its verdict). If Justice Stevens is right that this balancing protects everyone's interests without offending Double Jeopardy protection, then, in light of the discussion above, I believe a federal rule amendment that changes the timing by which the trial court may issue a ruling on the sufficiency of the evidence would have only an incidental effect on that right, avoiding any constitutional infringement on Double Jeopardy rights and satisfying the Rules Enabling Act.

M E M O

April 12, 2007

TO: MEMBERS OF THE CRIMINAL RULES ADVISORY COMMITTEE

FROM: THOMAS P. McNAMARA, Federal Public Defender
THOMAS W. HILLIER, II, Federal Public Defender

RE: COMMENTS ON PROPOSAL TO AMEND RULE 29, CONSTITUTIONALITY AND RULES ENABLING ACT ISSUES

I. INTRODUCTION

In written testimony provided to the Committee on Criminal Rules prior to its public hearing on January 26, 2007, Federal Public Defenders detailed objections to the Justice Department's proposal to amend Rule 29 by limiting the availability of pre-verdict acquittals. In that submission, we countered the Justice Department's claim that judges improperly and too frequently enter pre-verdict judgments of acquittal. In addition, we provided argument supporting our view that the proposal to limit Rule 29 would improperly interfere with the inherent power of the judiciary and threaten core constitutional rights. In passing, we offered that it is not at all clear that the proposed change would be permissible under the Rules Enabling Act, 28 U.S.C. § 2702. This memorandum explores further problems associated with the proposal's conflict with the Rules Enabling Act and the likelihood of the proposal's unconstitutionality.

II. THE PROPOSAL EXCEEDS THE LIMITS OF THE RULES ENABLING ACT

The Rules Enabling Act authorizes the Supreme Court to prescribe rules of practice, procedure and evidence for cases in the United States courts. 28 U.S.C. § 2072. That power is limited by subsection (b), which reads:

> Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

The commentary to the rule observes that, while this subdivision is "terse," it is so because "no reminder is needed that neither a rule nor a statute can upset a constitutional requirement." *See Sibblach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941) (federal courts may make rules "not inconsistent with the statutes or Constitution of the United States"). The Justice Department's proposal infringes on two core constitutional rights and thus

exceeds the boundaries of the Rules Enabling Act. First, the proposal interferes with enforcement of the due process requirement in a criminal case that charges be supported by proof beyond a reasonable doubt. Second, the proposal, by design, limits protections afforded by the Double Jeopardy Clause of the Fifth Amendment.

A. A Defendant Has a Right to a Pre-Verdict Judgment of Acquittal When the Evidence is Legally Insufficient to Support a Finding of Guilt.

"It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." *Jackson v. Virginia*, 443 U.S. 307, 314 (1979). This constitutional axiom has been iterated throughout history. *See, e.g., Miles v. United States*, 103 U.S. 304, 312 (1881); *Davis v. United States*, 160 U.S. 469, 488 (1895); *Holt v. United States*, 218 U.S. 245, 253 (1910); *Wilson v. United States*, 232 U.S. 563, 569-570 (1914); *Brinegar v. United States*, 338 U.S. 160, 174 (1949); *Leland v. Oregon*, 343 U.S. 790, 795 (1952); *Holland v. United States*, 348 U.S. 121, 138 (1954); *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958). It was forcefully enshrined as a constitutional requirement by the Supreme Court in *In re Winship*, 397 U.S. 358 (1970). There the Court held:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In re Winship, 397 U.S. at 364.

Rule 29 requires enforcement of this right at the conclusion of the government's case if the evidence is such that "no rational trier of fact could have found the defendant guilty beyond a reasonable doubt." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003). Motions for judgment of acquittal at this juncture are not granted lightly and all inferences to be drawn from the evidence are construed in favor of the government. Moreover, the court may not make credibility determinations in ruling on judgments of acquittal, but must decide whether the evidence, as presented, is sufficient to persuade *any* rational trier of fact that a defendant is guilty beyond a reasonable doubt. Thus, the rule strikes an appropriate balance, assuring that the court does not substitute its judgment of what the verdict should be for that of the jury, but at the same time prohibiting jury speculation if the evidence is such that reasonable jurors must have a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. at 318-319; *United States v. Fearn*, 589 F.2d 1316, 1321 (7th Cir. 1978).

The very fact that Rule 29 *requires* a court to enter a judgment of acquittal when the government's proof is deficient speaks to the significance of the constitutional right the rule protects. Courts have universally found the "right to a judgment of acquittal" must be enforced when the government's proof is legally insufficient. *Burks v. United States*, 437 U.S. 1, 11 n.5, 17 (1978); *United States v. Davis*, 98 F.3d 906, 908 (6th Cir. 1992); *United States v. Frol*, 518 F.2d 1134, 1137 (8th Cir. 1975); *United States v. Reynolds*, 511 F.2d 603 (5th Cir. 1975); *United States v. Moler*, 460 F.2d 1273, 1274 (9th Cir. 1972).

The power of a court to enforce an accused's right to judgment of acquittal existed before enactment of Rule 29, since "from time immemorial." *Ex Parte United States*, 101 F.2d 870, 876 (9th Cir. 1939), *aff'd sub nom. United States v. Stone*, 308 U.S. 519 (1939). The learned discussion in *Ex Parte United States* references *Sparf v. United States*, 156 U.S. 51, 99-100 (1895), where more than a hundred years ago the Supreme Court observed: "[I]f there be some evidence bearing upon a particular issue in a cause, but it is so meager as not, in law, to justify a verdict in favor of the party producing it, the court is in the line of duty when it so declares to the jury."

While the authority of the courts to enter judgments of acquittal serves other important purposes, *see, e.g., United States v. Ubl*, 472 F. Supp. 1236, 1237-38 (N.D. Ohio 1979) ("[T]o continue the trial . . . would be a waste of everyone's time and extremely unfair to the defendant . . .."), and *United States v. Maryland Coop. Milk Producers, Inc.*, 145 F. Supp. 151, 152 (D. D.C. 1956) ("Such a course (entertaining a motion for judgment of acquittal) is in the interest of the efficiency and expedition of justice."), the core right Rule 29 protects is "application of the beyond-a-reasonable-doubt standard to the evidence." *Jackson v. Virginia*, 443 U.S. at 317. It is beyond argument that the government's proposal would limit judgments of acquittal despite constitutionally deficient proof. This infringement would violate the Rules Enabling Act.

B. By Design, the Proposal Places Limits on Protections Afforded by the Double Jeopardy Clause.

The government cannot appeal pre-verdict judgments of acquittal without offending the Double Jeopardy Clause. This principle was recently reaffirmed by the Supreme Court in *Smith v. Massachusetts*, 543 U.S. 462 (2005), where the Court held:

> We have long held that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits examination of an acquittal by jury verdict.

Smith, 543 U.S. at 567, *citing Richardson v. United States*, 460 U.S. 317 (1984); *Sanabria v. United States,* 437 U.S. 54 (1978); *United States v. Martin Linen Supply Company*, 430 U.S. 564 (1977); and *United States v. Sisson*, 399 U.S. 267 (1970).

The proposal's expressed purpose, to require waiver of double jeopardy protections in order to assert the right to a pre-verdict acquittal, restricts a constitutional right contrary to the direction of the Rules Enabling Act.

III. THE PROPOSED AMENDMENT IS CONSTITUTIONALLY SUSPECT

Separate and apart from the questions raised by the Rules Enabling Act, the proposal compels waiver of double jeopardy protections, a notion that raises a substantial constitutional issue.

Under the proposed rule, a defendant would be forced to waive his constitutional right to be free from double jeopardy in order to exercise his constitutional right to be free from continued prosecution where the government has failed to present sufficient evidence. This runs afoul of the well-established principle that a person cannot be forced to surrender one constitutional right in order to exercise another. *See Simmons v. United States*, 390 U.S. 377 (1968).

In *Simmons*, the Supreme Court considered whether a defendant's pretrial testimony offered to prove he had standing to make a Fourth Amendment suppression claim could be used against him at trial. The Court found that the defendant had been "obliged either to give up what he believed . . . to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." *Id.* at 394. The Court rejected this "Hobson's choice" and explained, "In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 391, 394.

The fundamental premise of *Simmons* -- that it is intolerable to premise the assertion of one constitutional right upon the surrender of another -- is not limited to the circumstances presented in that case. Rather, courts have consistently relied upon *Simmons* to ensure that criminal defendants are not forced to surrender one constitutional right in order to assert another. *See, e.g., Bittaker v. Woodford*, 331 F.3d 715, 723-24 (9th Cir. 2003) (habeas petitioner cannot be forced to waive attorney-client privilege in order to assert claim of ineffective assistance of counsel); *United States v. Pavelko*, 992 F.2d 32, 34 (3d Cir. 1993) (financial statements made by indigent defendant in effort to secure counsel cannot be used against defendant at trial); *United States v. Harris*, 707 F.2d 653, 662-63 (2d Cir. 1983) (same); *United States v. United States Currency*, 626 F.2d 11, 14-15 (6th Cir. 1980) (defendant cannot be forced to waive right against self-incrimination in order to exercise right to challenge forfeiture proceeding); *Pedrero v. Wainwright*, 590

F.2d 1383, 1388 n.3 (5th Cir. 1979) (defendant cannot be forced to waive right against self-incrimination in order to exercise right to raise incompetency or insanity claim at arraignment).

Moreover, even if the ability to obtain a judgment of acquittal at the close of the government's legally-deficient case was more properly characterized as a benefit rather than a constitutional right, a defendant cannot be forced to waive his right to be free from double jeopardy in order to obtain the benefit established by Rule 29. "[T]he government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Kathleen Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1988); *see also Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (recognizing doctrine of unconstitutional conditions as "well settled"); *United States v. Scott*, 450 F.3d 863, 866-67 (9th Cir. 2006) (relying upon doctrine of unconstitutional conditions to strike down condition of pretrial release requiring defendant to relinquish right to be free from unreasonable searches, even if defendant had no constitutional right to pretrial release).

In *Green v. United States*, 355 U.S. 184, 186 (1957), the Supreme Court reached a result consistent with the doctrine of unconstitutional conditions. Green's jury had convicted him of a lesser-included offense, second-degree murder, and made no finding as to the greater offense, first-degree murder. On appeal, Green's second-degree murder conviction was reversed, and he was subsequently retried and convicted of first-degree murder. *Id.* The Court held the first-degree murder conviction violated the prohibition against double jeopardy and rejected the government's claim that Green had waived his rights to a double jeopardy defense by appealing the conviction. The Court explained, "Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy." *Id.* at 193-94.

Although there is no constitutional right to appeal, *see McKane v. Durston*, 153 U.S. 684 (1894), the *Green* Court nonetheless recognized that a defendant could not be forced to "barter his constitutional protection against a second prosecution" in order to appeal from an erroneous conviction. *Green*, 355 U.S. at 193. Similarly, regardless of whether there is a constitutional right to a pre-verdict judgment of acquittal where the government presents a legally-deficient case, a defendant cannot be forced to trade his right to be free from double jeopardy in order to obtain a judgment of acquittal where the government's case is insufficient.

IV. CONCLUSION

The Justice Department's proposal is a radical intrusion on the "ancient" doctrine prohibiting double jeopardy. *Ex Parte United States*, 101 F.2d at 874 n. 12. The

justification offered for the proposal has been loudly and overwhelmingly disputed by those who provided comments to this Committee. As suggested above, it is controversial and, if adopted, would provoke substantial, unnecessary litigation. Because the current rule works well, the proposal should be defeated.[1]

[1]We are aware of an alternative proposal offered by DOJ. Because it substantially alters the current proposal, we assume there will be opportunity for public comment at a later date if it moves forward. The new proposal, we believe, is patently unconstitutional and at odds with Supreme Court precedent.

MEMORANDUM

To: Judge Jones, Chair, Crime Victims' Rights Act (CVRA) Subcommittee Rules
Cc: Judge Bucklew, Chair, Advisory Committee on Criminal Rules
Members, Criminal Rules Advisory Committee
From: Thomas P. McNamara
Thomas W. Hillier, II
Re: Rules 1, 12.1, 17, 18, 32 and 60
Date: April 11, 2007

Because the Crime Victims' Rights Act (CVRA) "reflects a careful Congressional balance between the rights of defendants, the discretion afforded the prosecution, and the new rights afforded victims," the Subcommittee resolved (1) to "incorporate, but not go beyond, the rights created by statute," (2) to adhere to the "specific rights" enumerated in the statute, and not use general language (such as the "right to be treated with fairness") to create rights not otherwise provided for in the statute, and (3) not to use the rules to resolve interpretive questions but to leave interpretation to the courts on a case-by-case basis.[1] Adherence to those principles would also ensure that the rules stayed within the bounds of the Rules Enabling Act. *See* 28 U.S.C. § 2072 ("The Supreme Court shall have the power to prescribe general rules of practice and procedure," which "shall not abridge, enlarge or modify any substantive right.").

Several of the rules recommended in the Subcommittee's March 25, 2007 memorandum would create rights for victims that do not exist in the statute, or that are based on the amorphous rights to "dignity and privacy," and, as written, would abridge, enlarge or modify substantive rights. Some should be withdrawn, but others could be helped with minor changes. At the same time, the proposed rules fail to provide "general rules of practice and procedure" in some respects where they are sorely needed by judges, lawyers and victims, or cut back on procedural protections currently in place.

I. Rules that Would Create New Rights for Victims and Abridge Defendants' Constitutional Rights

A. Rule 12.1: Non-Reciprocal Discovery of Address and Telephone Number of Alibi Rebuttal Witness

This rule should be withdrawn because it violates the Constitution, has no basis in the CVRA but instead creates a new right for victims and unfair advantage for the government, and therefore violates the Rules Enabling Act.

1. The proposed rule is unconstitutional.

[1] *See* Memorandum to Criminal Rules Advisory Committee from CVRA Subcommittee at 1-2 (Sept. 19, 2005); Memorandum to Standing Committee on Rules of Practice and Procedure from Criminal Rules Advisory Committee at 2 (Aug. 1, 2006).

The proposed rule would require the defendant, upon the government's request and on pain of not being permitted to present the defense, to disclose his alibi defense and alibi witnesses' names, addresses and telephone numbers. The defendant would then be required to make a showing of need for any victim rebuttal witness' address and telephone number. The current rule presumes that the defendant needs this information to locate and interview *all* alibi rebuttal witnesses. *See* Rule 12.1 & Note to 2002 Amendments. Thus, a judge may well conclude that a showing of an ordinary need to locate and interview an alibi rebuttal witness is not enough for a victim alibi rebuttal witness, and deny reciprocal discovery. If the court concludes that the defendant has made the requisite showing of need, it could either order the information disclosed, or allow the information to be withheld and fashion a "reasonable alternative procedure that allows preparation of the defense." In the latter case, again, the defendant would be denied reciprocal discovery. Once denied reciprocal discovery, the defendant could not retract his disclosure to the government. Reciprocal discovery would be denied, and the government given an unfair advantage, in the complete absence of a showing of any case-specific reason. Instead, the basis would be a presumption that all victims need protection from all defendants and that their dignity and privacy are threatened by a defendant's trial preparation, presumptions which are baseless and found nowhere in the CVRA.

The Supreme Court has held that this is unconstitutional:

> [W]e do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses. . . . Indeed, the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor. . . . It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.

Wardius v. Oregon, 412 U.S. 470, 475-76 & n. 9 (1973). It was no answer that the court *might* order reciprocal discovery after the defendant had disclosed his alibi information:

> [I]t is this very lack of predictability which ultimately defeats the State's argument. At the time petitioner was forced to decide whether or not to reveal his alibi defense to the prosecution, he had to deal with the statute as written with no way of knowing how it might subsequently be interpreted. Nor could he retract the information once provided should it turn out later that the hoped-for reciprocal discovery rights were not granted.

Id. at 477.

A presumption that all victims are in need of protection from all defendants, rather than a case-by-case showing, is not a "strong showing of state interests." *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608-09 (1982) (case-by-case showing was required to justify closure based on state interest in safeguarding psychological and physical well-being of testifying minors).

Even Judge Cassell acknowledges that it would be unconstitutional to require the defendant to disclose his alibi witness' address and telephone number while allowing the court to deny reciprocal discovery from the government. *See* 1/16/07 Testimony of Paul G. Cassell at 38. His solution of not requiring either side to disclose the address or telephone number of a victim, however, is not in fact reciprocal and so is equally unconstitutional.[2]

The proposed rule is also unconstitutional under the line of cases holding that witnesses are not entitled to a presumption that their whereabouts may be withheld at the expense of the defendant's rights to effectively investigate, to cross-examine, and to call witnesses in his own behalf. The law presumes the opposite. In *Smith v. Illinois*, 390 U.S. 129 (1968), the Supreme Court reversed a conviction where the trial court prohibited questions of a government witness regarding his real name and address, stating:

> When the credibility of a witness is in issue, the very starting point in exposing falsehood and bringing out the truth through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination *and out-of-court investigation.* To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.

Id. at 131 (internal quotation marks and citations omitted) (emphasis supplied). *See also Alford v. United States*, 282 U.S. 687, 693 (1931) ("The question, 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face without any declaration of purpose as was made by [defense] counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed."). Disclosure of a key witness's name and address before trial is often even more important than eliciting it in open court because it assures that the defendant can investigate the witness's background to discover avenues for impeachment. *Martin v. Tate*, 96 F.3d 1448 (Table), 1996 WL 506503 *6 (6th Cir. 1996).

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[2] Judge Cassell's solution could be "even-handed" only if the witness for both sides was a victim, a circumstance we doubt has ever occurred. Also most unlikely is a case where the alibi witness is a victim and the rebuttal witness is not. The only scenario realistically to be expected is that the alibi witness is not a victim, the rebuttal witness is a victim, the defendant discloses his witness' information, and the government does not.

In *Smith* and *Alford*, as in cases involving an alibi defense, the witness claimed to be a percipient witness to a key conversation or transaction with the defendant. These cases made clear that to require the defendant to establish that elicitation of the witness's identity and address would necessarily lead to discrediting the witness is itself "to deny a substantial right and to withdraw one of the safeguards essential to a fair trial." *Alford*, 282 U.S. at 692; *Smith*, 390 U.S. at 132 (same).

"*Alford* and *Smith* thus make it clear that a defendant is presumptively entitled to cross-examine a key government witness as to his address and place of employment." *United States v. Navarro*, 737 F.2d 625, 633 (7th Cir. 1984). To overcome that presumption, the government or the witness must make a specific showing that disclosure would endanger the witness' safety, or would *merely* harass, annoy, or humiliate the witness. *See Smith*, 390 U.S. at 133-34 (White, J., Marshall, J., concurring); *Alford*, 282 U.S. at 694; *see also, e.g., United States v. Hernandez*, 608 F.2d 741, 745 (9th Cir. 1974); *United States v. Dickens*, 417 F.2d 958, 961-62 (8th Cir. 1969); *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969); *United States v. Varelli*, 407 F.2d 735, 750-51 (7th Cir. 1969); *United States v. Barajas*, 2006 WL 35529 **7-9 (E.D. Cal. 2006); *United States v. Fenech*, 943 F. Supp. 480, 488-89 (E.D. Pa. 1996). The proposed rule would reverse these presumptions and upset the constitutional balance.

2. <u>The proposed rule has no basis in the CVRA</u>.

Nowhere in the CVRA does it say that alibi rebuttal witnesses who are victims should have their addresses and telephone numbers withheld unless the court finds that the defendant has made a showing of need for the information, and even then can avoid disclosure under an alternative "reasonable procedure," which burdens the defense but not the government. In contrast, Congress specified that victims have a right not to be excluded unless the court finds by clear and convincing evidence that their testimony would be altered and there is no reasonable alternative to exclusion. *See* 18 U.S.C. § 3771(a)(3), (b)(1). Thus, when Congress meant to confer a specific substantive right on victims that would upset the traditional balance of our adversary system, it did so explicitly. It did not expect that such a right would simply flow from undefined rights, such as the right to "dignity and privacy," or from the right "to be protected from the accused" without any showing that protection is needed.

The proposed Committee Note states that the amendment implements a victim's right to be reasonably protected from the accused, but the rule is *un*reasonable because there is no such need in the vast majority of cases, and Rule 12.1(d) already allows an exception if such a need is shown.

The Note says that the rule also implements the right to be "treated with respect for the victim's dignity and privacy." This is a dangerous path. All witnesses are treated with dignity and privacy within the constraints and demands of the adversary system. This rule unjustifiably presumes that they are not, and worse, would presumptively deny reciprocal discovery on that basis. Suppose a judge orders disclosure, and the victim petitions for mandamus, not because there is any need to be protected from the accused,

but because the victim feels it is an affront to her dignity and privacy. How is anyone to contest the point? How is a court of appeals to decide? One thing is sure, it will cause waste and disruption. Further, if such amorphous concepts are used to justify this rule, there is no logical stopping point. Respect for dignity would require allowing the victim to litigate the case as a third party/private prosecutor. Respect for privacy would require the trial to be closed to the public, or preclude cross-examination of the victim. The flexible nature of these terms (as well as "fairness") is revealed by the fact that they are invoked, as convenient, to claim that victims are the functional equivalent parties, or that they should be exempt from the obligations and inconveniences that defendants, prosecutors and other witnesses bear in the normal course.

Rule 12.1(d) should be withdrawn because the only constitutional procedure is already available under Rule 12.1(d). *If* the Committee must revise Rule 12.1, the following proposal makes explicit as to victims what is already available under Rule 12.1(d), and refers to Rule 60(b)(1)-(4) (manner, time, place and by whom a victim's right may be asserted), which would allow a victim to assert her right to be protected from the accused (and therefore respond to Judge Cassell's complaint on the issue), and ensure an orderly procedure for all concerned.

Rule 12.1. Notice of an Alibi Defense

(d) Exceptions.

(1) In General. For good cause, the court may grant an exception to any requirement of Rule 12.1(a)-(c).

(2) Victim's Address and Telephone Number. If on motion in accordance with Rule 60(b)(1)-(4), the court finds that disclosure to the defendant of the address or telephone number of a victim whom the government intends to rely on as a rebuttal witness to the defendant's alibi defense would violate the victim's right to be reasonably protected from the accused, the court shall fashion a reasonable alternative procedure that ensures effective preparation of the defense and also reasonable protection of the victim.

B. Rule 17: Notice of Subpoena

While we continue to object to this rule because the CVRA does not provide even a qualified right to notice, the new proposal is an improvement. However, it does not sufficiently protect against premature disclosure of defense strategy or loss or destruction of evidence because the language explicitly allowing the order to be issued *ex parte* has been removed, and the circumstances mentioned in the note are not "exceptional." This is particularly unfair because this proposal still creates an unfair advantage for the government by exempting grand jury subpoenas, which, as we have said before, the government uses to get the vast majority of its trial evidence, while defendants must rely on trial subpoenas.

We urge the Committee to replace "there are exceptional circumstances" in the Rule with "good cause is shown," and to re-write the second and third sentences of the second paragraph of the Committee Note as follows:

> The rule recognizes, however, that the defendant may show good cause that this procedure is not appropriate. Good cause may be shown, for example, if evidence might be lost or destroyed if the subpoena is delayed, or the defense would be unfairly prejudiced by premature disclosure of defense strategy.

C. Rules 18 and 60(a)(2): Right to "Every Effort to Permit the Fullest Attendance Possible"

Proposed Rule 18 should be withdrawn because there is no statutory authority for it, it would needlessly interfere with the court's ability to set the place of trial, and it would impose unwarranted hardship on the parties and witnesses. Proposed Rule 60(a)(2) should be revised to incorporate, but not go beyond, 18 U.S.C. § 3771(a)(3) and (b)(1), and to provide that reasons must be given for *any* decision under the rule.

1. There is no general right to have the court make "every effort to assure the fullest attendance possible."

Proposed Rules 18 and 60(a)(2) are both based on the incorrect premise that § 3771(b)(1) creates a general right to have the court make "every effort" to ensure the "fullest attendance possible," enforceable through mandamus. Rule 18's Committee Note states that proposed Rule 18 "implements the victim's right to attend proceedings under . . . 18 U.S.C. § 3771(b)." Likewise, Rule 60(a)(2)'s Committee Note states that it "incorporates . . . 18 U.S.C. § 3771(b), which provides that the court shall make every effort to permit the fullest attendance possible."

The "rights of crime victims" are set forth in subsection (a). The only "right" stated there is a "right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding." 18 U.S.C. § 3771(a)(3). Subsection (b)(1), which tells courts how to "afford" the rights in subsection (a), tells the court that before "making a determination described in subsection (a)(3)," that is, to exclude a testifying victim because her testimony would be materially altered, "the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding." 18 U.S.C. § 3771(b)(1).

Thus, victims have a right, like all members of the public, not to be excluded from public court proceedings involving the crime. This is a qualified right, as the court may order the proceedings closed if the defendant's superior right to a fair trial, the need to protect the safety of any person, or the need to protect sensitive information is shown to require exclusion. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-

07 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564, 581 (1980); *Estes v. Texas*, 381 U.S. 532 (1965); 28 C.F.R. § 50.9. The CVRA respects the qualified nature of this right as to victims by stating that victims have a "right not to be excluded from any such *public* proceeding." *See* 150 Cong. Rec. S10910 (Oct. 9, 2004) (CVRA is not intended to alter existing law under which court may close proceedings).

Testifying victims can be excluded from a "public" proceeding under the circumstances set forth in subsections (a)(3) and (b)(1). If the court has determined that a testifying victim's testimony would be materially altered, *then* the court must make every effort, by considering reasonable alternatives to complete exclusion, to permit the fullest attendance possible assuming the testifying victim so desires. The court might, for example, order that the victim witness testify before other witnesses who will testify on the same subject matter.

The court, however, has no general duty to "make every effort to permit the fullest attendance possible." Taken to its logical conclusion, courts would have to provide transportation to victims, reschedule proceedings based on non-testifying victims' vacation schedules, recess for their medical appointments, and whatever else "every effort to permit the fullest attendance possible" would require.

That this is not what Congress intended is not only clear in the plain statutory language, but in the floor statement of Senator Kyl:

> I would like to turn to (a)(3), which provides that the crime victim has the *right not to be excluded* from any public proceedings. *This language was drafted in a way to ensure that the government would not be responsible for paying for the victim's travel and lodging to a place where they could attend the proceedings.*
>
> In all other respects, this section is intended to grant victims the right to attend and be present throughout all public proceedings. This right is limited in two respects. First, the right is limited to public proceedings, thus grand jury proceedings are excluded from the right. Second, the government or the defendant can request, and the court can order, judicial proceedings to be closed under existing laws. This provision is *not intended to alter those laws or their procedures in any way*. . . . Despite these limitations, this bill *allows* crime victims, in the vast majority of cases, *to attend* the hearings and trial of the case involving their victimization. . . .

See 150 Cong. Rec. S10910 (Oct. 9, 2004). Senator Kyl also made clear that which is already clear in the statute: that the "fullest attendance possible" provision of subsection (b)(1) is not a generally applicable "right," but only a step the court must take before excluding a testifying victim pursuant to subsection (a)(3):

> The standards of "clear and convincing evidence" and "materially altered" are extremely high and intended to make exclusion of the victim quite rare, especially since (b) says that *"before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding."*

See 150 Cong. Rec. S10910-S10911 (Oct. 9, 2004).

2. <u>Rule 18 should be withdrawn</u>.

Because there is no support for Rule 18 in the statute, the proposed rule would create a new right for victims, contrary to the Rules Enabling Act. Non-testifying victims would be invited to use such a rule to enforce their "right" to decide where the trial would be held, and to do so -- unlike the defendant and actual witnesses -- under threat of mandamus. Non-testifying victims could thereby impose daily hardship and expense on the actual participants in what is already an arduous and costly process, though they have no such right by statute. The addition in the note of the sentence recognizing the court's "substantial discretion to balance *competing* interests" is not helpful, as it equates the convenience of non-testifying victims with that of the defendant and testifying witnesses in setting the place of trial.

3. <u>Rule 60(a)(2) should be revised</u>.

As written, Rule 60(a)(2) indicates that the law allowing closure may not apply to victims, and that victims have a general right to have courts undertake "every effort" to ensure their fullest possible attendance, enforceable through mandamus. The other problem with Rule 60(a)(2) is that it is unbalanced in requiring reasons to be stated on the record for exclusion but no reasons to be stated on the record for allowing a victim to attend and hear other testimony. A decision to allow the victim to remain -- which could result in tainted testimony being introduced against the defendant – must surely be reasoned. And there must be an adequate record of reasons not just for a victim's mandamus action, but for a defendant's appeal.

What is needed is a procedure for carefully determining whether a testifying witness should be excluded, as proposed in Mr. Hillier's testimony at 30-31. We recognize that this would probably require another round of public comment, and so propose the following minor changes, as underlined:

> **(2) Attending the Proceeding**. The court must not exclude a victim from a public court proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at that proceeding. <u>If the court determines that the victim's testimony would be materially altered</u>, the court must make every effort to permit the fullest attendance possible by the victim

and must consider reasonable alternatives to exclusion. The reasons for any decision under this rule must be clearly stated on the record.

COMMITTEE NOTE

Subdivision (a)(2). This subdivision incorporates 18 U.S.C. § 3771(a)(3), which provides that the victim shall not be excluded from public court proceedings unless the court finds by clear and convincing evidence that the victim's testimony would be materially altered by attending and hearing other testimony at the proceeding, and the second sentence of 18 U.S.C. § 3771(b)(1), which requires the court, once having determined that the victim's testimony would be materially altered, to make every effort to permit the fullest attendance possible by considering reasonable alternatives to exclusion. The right not to be excluded applies only in "public" court proceedings. It does not alter existing law under which the court may order a proceeding to be closed to protect interests superior to the qualified right of public access.

D. Rule 32(i)(4): Right to "Speak"/Rule 60(a)(3): Right to "Be Reasonably Heard"

Proposed Rule 32(i)(4) and its new Committee Note (1) would redefine the statutory right to "be reasonably heard" as a "right to speak directly to the judge . . . [a]bsent unusual circumstances," (2) would require the judge to "speak" to each victim individually, a requirement not found in the CVRA, (4) would discourage courts from responding flexibly on a case-by-case basis as the full Congress intended, and (4) makes no provision for notice or a fair opportunity to respond. As such, the rule goes beyond the plain language of the CVRA, is contrary to the Rules Enabling Act, and fails to provide needed rules of practice and procedure.

1. Rule 32(i)(4) is contrary to the plain statutory language.

The phrase "reasonably heard" is not ambiguous. Though Congress could very easily have enacted a right to be "addressed" and to "speak" directly from Fed. R. Crim. P. 32(i)(4)(B), it enacted a "right to be reasonably heard." "Reasonably heard" is a legal term of art meaning to bring one's position to the attention of the court, in person or in writing, as the court deems reasonable under the circumstances. *See O'Connor v. Pierson*, 426 F.3d 187, 198 (2d Cir. 2005); *Fernandez v. Leonard*, 963 F.3d 459, 463 (1st Cir. 1992); *Commodities Futures Trading Com. V. Premex, Inc.*, 655 F.2d 779, 783 n.2 (7th Cir. 1981); U.S.S.G. § 6A1.3, backg'd. comment. When Congress uses a legal term of art, it is presumed to intend its traditional meaning. *Morissette v. United States*, 342 U.S. 246, 263 (1952).

2. Congress intended that the courts would respond flexibly.

The full Congress did not enact a statute stating that victims have a right to "speak" to the court directly, though it could have, but rather a right to "be reasonably heard," and for good reason. A principal objection to the failed constitutional

amendment was its apparent creation of an absolute right to speak and prohibition on courts' ability to respond flexibly if, for example, there were multiple victims, the victim was involved in the criminal activity, the victim provoked the crime, or the victim's statement would violate the defendant's right to due process. *See* S. Rep. No. 108-191 at 76, 85, 106-107 & n.133 (Nov. 7, 2003) (minority views). The failed constitutional amendment stated that victim rights, including the right to be heard, "shall not be denied . . . and may be restricted only as provided in this article." S.J. Res. 1, § 1 (108th Cong.). The CVRA does not include that language and includes the modifier "reasonably." Thus, it is reasonable to assume that Congress intended for the courts to have the flexibility to permit victims to be "reasonably heard" under the variety of circumstances in which it will arise, and in a manner that does not infringe on the rights of the defendant or third parties, prosecutorial discretion, or the orderly administration of justice.

The Committee has been urged to look to the floor statements of the CVRA's sponsors (the disappointed sponsors of the failed constitutional amendment) rather than the statutory language to conclude that Congress, despite its enactment of a right to be "reasonably heard," really meant a "right to speak directly to the judge . . . [a]bsent unusual circumstances." The Committee should decline that invitation. As the Supreme Court has said:

> Floor statements from two Senators [who sponsored the bill] cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text.

Barnhart v. *Sigmon Coal Co., Inc.* 534 U.S. 438, 457 (2002). Floor statements, in fact, may "open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President," *Regan v. Wald*, 468 U.S. 222, 237 (1984), and this may be particularly true of a bill's sponsor disappointed in some respect with the final bill. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2766 n.10 (2006).

It has been said that these particular floor statements should be followed, however, because other legislators did not register disagreement. *Kenna*, 435 F.3d at 1015-16 (citing *A Man for All Seasons*). This is irrelevant for reasons well-stated by Justice Scalia:

> Of course this observation, even if true, makes no difference unless one indulges the fantasy that Senate floor speeches are attended (like the Philippics of Demosthenes) by throngs of eager listeners, instead of being delivered (like Demosthenes' practice sessions on the beach) alone into a vast emptiness. Whether the floor statements are spoken where no Senator hears, or written where no Senator reads, they represent at most the views of a single Senator.

Hamdan, 126 S. Ct. at 2815-16 (Scalia, J., dissenting). *See also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 390-91 (2000) ("the statements of individual Members of Congress (ordinarily addressed to a virtually empty floor) . . . [are not] a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before us. The *only* reliable indication of *that* intent-the only thing we know for sure can be attributed to *all* of them-is the words of the bill that they voted to make law.") (Scalia, J., concurring) (emphasis in original).

3. There is no settled caselaw to support a right to "speak," nor should there be, as the courts must be able to respond on a case-by-case basis.

Only one district court has reached the issue, in a case where it was actually in dispute and litigated, *cf.* footnote 4, *infra*, of whether the "right to be heard" really means a right to "speak." Judge Zagel concluded that the "statute clearly and unambiguously . . . does not mandate oral presentation of the victim's statement." *United States v. Marcello*, 370 F.Supp.2d 745, 748 (N.D. Ill. 2005). The statute gives victims a right to be "reasonably heard," the "ordinary legal and statutory meaning [of which] typically includes consideration of the papers alone." *Id.* The "statute, which contains both a reasonableness requirement and a legal term of art (the opportunity to be 'heard'), does not require the admission of oral statements in every situation, particularly one in which the victim's proposed statement was not material to the decision at hand." *Id.* at 745. Because the statutory language was clear, Judge Zagel declined to look to the floor sponsor's statements, and also observed that "[n]owhere [in these floor statements] does one find the debate or exchange of ideas that more frequently accompanies the art of law-crafting." *Id.* at 748-49.

Only one court of appeals has addressed the right "to be reasonably heard." In sweeping language, the Ninth Circuit said that victims "now have an indefeasible right to speak." *Kenna v. United States District Court,* 435 F.3d 1011, 1016 (9th Cir. 2006). In that case, the defendant was denied the right to brief the issue in the court of appeals, the government failed to brief it, *see* Hillier Testimony at 26-29, and one judge on the panel wrote separately to state that he doubted that the statute went that far. *Kenna*, 435 F.3d at 1018-19 (Friedman, J., dubitante). Further, because of the lack of clear rules of procedure, the court and the parties had no reasonable opportunity to develop an adequate factual or legal record in the district court.[3]

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[3] The victim advocates in that case, a clinic under the umbrella of Professor Beloof's State/Federal Clinics and Demonstration Project, did not make a "motion asserting" the victim's right to be heard as required by 18 U.S.C. § 3771(d)(3), nor did they give notice that they were about to file a mandamus action. If they had, the district court judge would have had an opportunity to hold a hearing to ascertain the content of Mr. Kenna's intended speech and to hear from the parties. Instead, the only record was Mr. Kenna's assertion that he wished to tell the court about impacts that had occurred since the co-defendant's sentencing hearing three months prior, though it later emerged that Kenna wished to present facts and argument under the sentencing guidelines. *See* Hillier Testimony at 28-29.

The Ninth Circuit, relying on a representation by Kenna that he only wished to "allocute" about victim impact and not to "present evidence," distinguished the case before it from one in which a victim wishes to "present evidence," in which case being heard in writing may be appropriate. *Id.* at 1014 n.2.

Without briefing from the parties, the Ninth Circuit did not hear most of the relevant legal arguments, and concluded, "as did *Degenhardt*, that both readings of the statute are plausible."[4] *Kenna*, 435 F.3d at 1015, citing *United States v. Degenhardt*, 405 F. Supp.2d 1341 (D. Utah 2005) (Cassell, J.). In concluding that the phrase "reasonably heard" was ambiguous, the Ninth Circuit gave equal weight to Kenna's dictionary definition of "hear" as "to perceive (sound) by the ear," *Kenna*, 435 F.3d at 1014, contrary to at least two rules of statutory construction. *See Buckhannon Bd. And Home Care, Inc. v. West Virginia Dept. of Health and Human* Services, 532 U.S. 598, 615 (2001) (Scalia and Thomas, JJ., concurring) (meaning of a legal term of art is followed over a dictionary definition); *Sullivan v. Stroop*, 496 U.S. 478, 483 (1990) ("where a phrase in a statute appears to have become a term of art . . . any attempt to break down the term into its constituent words is not apt to illuminate its meaning."). Further, the Ninth Circuit concluded that Congress' use of the word "public" made "the right to be 'heard' at a 'public proceeding' . . . synonymous with 'speak.'" *Kenna*, 435 F.3d at 1015. This too was wrong as the purpose of the word "public" in the CVRA was to limit the right to be "reasonably heard" to public, as opposed to closed, proceedings.[5]

Thus misled (in our view) to conclude that the language was ambiguous, the Ninth Circuit then turned to the floor statements of the bill's sponsors stating that the purpose of the section was to allow the victim to directly address the court in person. *Kenna.* at 1015, quoting 150 Cong. Rec. S4268 (April 22, 2004) (statements of Sen. Kyl and Sen. Feinstein); 150 Cong. Rec. S10911 (Oct. 9, 2004) (statement of Sen. Kyl).

A different court of appeals, with all of the relevant facts and law before it, may well reach a more moderate conclusion.

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[4] In *Degenhardt*, the government announced prior to sentencing in December 2005 that some of the victims wished to speak at the sentencing hearing. Defense counsel, Assistant Federal Defenders, did not object or litigate the issue, since the judge had accepted Mr. Degenhardt's guilty plea under Fed. R. Crim. P. 11(c)(1)(C) in May 2005. Mr. Degenhardt was sentenced on December 9, 2005, and judgment entered the same day. The *Degenhardt* opinion, issued thereafter on December 21, 2005, stated that "the court cannot agree with another district court's conclusion that in-court victim allocution at one defendant's sentencing eliminates the need to allow victim allocution when a co-defendant is sentenced," citing to Kenna's pending mandamus action before the Ninth Circuit. *See* 405 F. Supp.2d at 1348 n. 42. The opinion was submitted by the Crime Victim Legal Assistance Project to the Ninth Circuit under Fed. R. App. P. 28(j) the following day. *See* December 22, 2005, Letter of Steve Twist to Clerk, Ninth Circuit Court of Appeals, docketed December 23, 2005, *Kenna v. United States District Court*, No. 05-73467.

[5] *See* 150 Cong. Rec. S10910 (Oct. 9, 2004); 150 Cong. Rec. S4268 (April 22, 2004). *See also* S. Rep. No. 108-191 at 38 (Nov. 7, 2003).

Finally, no court has gleaned from the CVRA a right to be spoken to individually by the court as the Committee Note suggests. Many victims, we suspect, would rather not be spoken to individually, but the proposed note would seem to require it whether they like it or not. Further, this has the potential of unfairly converting a hearing whose purpose is the sentencing of a criminal defendant -- whose constitutional right to liberty is at stake -- into a series of individual conversations with victims who do not have constitutionally protected rights at stake.[6]

3. The rule should provide for notice and a fair opportunity to respond.

The courts must have an orderly means of determining whether a person is a victim with a right to address the court, and if so, whether that address should be regulated as to form or content. And, if the victim intends to make statements or arguments that threaten the rights or interests of the defendant, the government or third parties, the parties must be given the opportunity to be heard to assist the court in resolving the matter in a fair and reasonable manner.

The court and the parties should not be blindsided by a victim exercising his right to be heard, or made to guess as to the content of the victim's intended statement. *Marcello*, 370 F.Supp.2d at 747-48 (government's argument that the court must hear the victim's views orally without providing a written summary and even if those views would have no bearing on the decision before the court was "extraordinary."). If the putative victim in the *Sharp* case, instead of filing a motion to be heard with a description of her intended testimony, had simply stood up and begun speaking, the personal and professional reputation of a third party (who was not charged with any crime) would have been damaged with no opportunity to defend himself, the parties would have had no opportunity to be heard, and the court could not have easily or reliably determined, on the spot, whether the putative victim was a victim within the meaning of the CVRA at all. *See United States v. Sharp*, 463 F.Supp.2d 556 (E.D. Va. 2006). Similarly, the court and the parties should know if the victim intends to offer factual testimony, so that the court can require the facts to be stated in writing, or the victim to be placed under oath, and his statement in whatever form subjected to the usual rudiments of adversarial testing. *Cf. Kenna*, 435 F.3d at 1014 n.2 (distinguishing the situation where a person may be "heard" on the papers because "Kenna does not claim the right to present evidence or testify under oath. . . . the right to present evidence . . . is not at issue here."). If, in round two, Kenna had not moved for the presentence report (ironically, *ex parte*), the court would

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[6] *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 125 S. Ct. 2796, 2810 (2005) ("the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations."); *Pusey v. City of Youngstown*, 11 F.3d 652, 656 (6th Cir. 1994) (victim had no constitutionally protected liberty interest in statutory right to notice of plea hearing because statute "does not specify how the victim's statement must affect the hearing nor does it require a particular outcome based on what the victim has said."); *Dix v. County of Shasta*, 963 F.2d 1296, 1300 (9th Cir. 1992) (in providing that judge must consider victim statements in imposing sentence, state victim rights statute did not create a constitutionally protected liberty interest because it did not mandate a particular result based on a finding about the victim).

not have known that he intended to offer facts and argument about the sentencing guideline calculation, the parties would not have had an opportunity to be heard, and the problems of *Kenna I* would have recurred in *Kenna II*. *Cf. In re Kenna,* 453 F.3d 1136 (9th Cir. 2006) (upholding district court's denial of claimed right to presentence report based on the theory Kenna had a right to be heard on correct guideline sentence).

As to responding to the statement itself, defendants have a right under the Due Process Clause to notice and the opportunity to challenge facts and arguments that may be used to deprive them of life, liberty or property. *See Burns v. United States*, 501 U.S. 129, 137-38 (1991); *Gardner v. Florida,* 430 U.S. 349, 351, 358 (1977); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Curran*, 926 F.2d 59, 61, 63 (1st Cir. 1991). Rule 32 protects those rights, and the interests of the government as well, by providing notice in the presentence report; an opportunity to investigate, object and present contrary evidence and argument to the Probation Officer; an opportunity to file a sentencing memorandum with the court and to argue orally to the court; an opportunity for a hearing; the right to obtain witness' statements, to have witnesses placed under oath and to question witnesses at any such hearing; and a right to have the court resolve any disputed matter. *See* Rule 32(e)(2), (f), (g), (h), (i).

Unless whatever the victim has to say is included in the PSR (which it often will not be), those rules do not apply to the exercise of a victim's right to be "reasonably heard," which is particularly dangerous if the victim exercises an unannounced right to "speak." Unlike the government or any other witness, a victim could testify to factual evidence about herself or the defendant that could impact the sentencing decision without prior notice, any discovery of what she has said before or intends to say, or an adequate opportunity for the defendant to respond. A victim may also make damaging statements about third parties whose privacy is at stake, or reveal sensitive information about a pending investigation or a cooperating witness.

The absence of the basic procedural requirements of notice and an opportunity to respond would create an imbalance favoring victims over defendants. Even a defendant's right to allocute at sentencing is not absolute, and may be denied in certain situations, or limited as to duration and content. *United States v. Mack*, 200 F.3d 653 (9th Cir. 2000); *Ashe v. North Carolina*, 586 F.2d 334, 336-37 (4th Cir. 1978); *Marcello*, 370 F.Supp.2d at 750 & n.10. If the defendant wishes to *testify* as a witness, he is placed under oath, subjected to cross-examination, and limited to matters that are relevant and material and about which he is competent to testify. *Id.* at 750. The defendant may be precluded from testifying at all if he fails to comply with rules requiring notice, *Michigan v. Lucas*, 500 U.S. 145, 152-53 (1991); *Taylor v. Illinois*, 484 U.S. 400, 417 (1988); *Williams v. Florida*, 399 U.S. 78, 81-82 (1970), does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under the rules of evidence, *Taylor*, 484 U.S. at 410, may not "testify[] *falsely*," *Nix v. Whiteside*, 475 U.S. 157, 173 (1986) (emphasis in original), and has no right to introduce hearsay, *Chambers v. Mississippi*, 410 U.S. 484 (1973), or evidence that is otherwise unreliable. *United States v. Scheffer*, 523 U.S. 303, 309 (1998).

There seems to be no sound reason not to require notice and a fair opportunity to respond.

We urge the Committee to change the heading of Rule 32(i)(4) from "Opportunity to Speak" to "Opportunity to be Heard," to refer to Rule 60(a)(3) for the victim's right to be reasonable heard, and to amend Rule 60(a)(3) as follows:

Rule 32. Sentencing and Judgment

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(i) Sentencing.

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(4) Opportunity to be Heard.

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(B) By a Victim. A victim's right to be reasonably heard at sentencing is addressed in Rule 60(a)(3).

Rule 60. Victim's Rights

(a) In General

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(3) Right to be Reasonably Heard

At or before any public proceeding in the district court concerning release, plea, or sentencing, the court shall adopt appropriate procedures which afford any victim the right to be reasonably heard. Such procedures must afford the parties notice, including prompt disclosure of any statement of the victim in the possession of the court, the Probation Officer or either party, and a fair opportunity to respond.

III. General Rules of Practice and Procedure

A. Reliable Information in Presentence Reports, Rule 32(d)(2)(B)

We understand that the proposed rule seeks to treat information about victims the same as other information in the presentence report, and that the subcommittee believes that "[a]ll information in the PSR should meet these requirements." *See* March 25, 2007 Memorandum at 70. The Committee Note says the former, but not the latter.

The Committee should ensure both evenhandedness and that all information in the presentence report is verified and stated in a nonargumentative style by saying so in the Committee Note, or, better, by adding as subsection (d)(4):

> **(4) Reliable Information.** All information included in the presentence report must be verified and stated in a nonargumentative style.

In many districts, the unfortunate fact is that much of the information in presentence reports is unverified and often stated in a hostile or argumentative style. This has been identified as a serious problem by the Supreme Court, other courts and the Sentencing Commission.[7] It is especially troubling because in several circuits, the mere inclusion of factual allegations in a PSR transforms them to "evidence" which the judge may adopt without the government introducing any actual evidence to support them, unless the defendant rebuts the allegations with actual evidence.[8] The proposed rule as written would send the wrong message, in derogation of defendants' right to be sentenced on the basis of accurate information.[9]

B. Definition of "Victim," Rule 1(b)(11)

Proposed Rule 1(b)(11), which states that "'[v]ictim' means a 'crime victim' as defined in 18 U.S.C. § 3771(e)," remains problematic because (1) it would apply the CVRA's definition where the CVRA does not apply, and (2) it fails to state that the offense by which the victim was allegedly harmed is one for which a defendant has been charged and is being prosecuted or has been convicted in a federal district court.

It would be a simple matter, and prudent, for Rule 1(b)(11) to state that the definition applies to the particular rules that implement the CVRA. The definition of "crime victim" in 18 U.S.C. § 3771(e) is limited in its application to "this chapter," which consists of one statute, the CVRA. The proposed rule is unlimited, and any law in conflict with it would "be of no further force or effect." 18 U.S.C. § 2072(b). A rule that fails to specify that the CVRA's definition applies only to those rules that implement the

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[7] *See United States v. Booker*, 543 U.S. 220, 304 (2005) (Scalia, J., dissenting in part); *Blakely v. Washington*, 542 U.S. 296, 311-12 (2004); *United States v. Kandirakis*, 441 F. Supp. 2d 282, 303 (D. Mass. 2006); U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 50 (2004).

[8] *See United States v. Prochner*, 417 F.3d 54, 66 (1st Cir. 2005); *United States v. Huerta*, 182 F.3d 361, 364 (5th Cir. 1999); *United States v. Hall*, 109 F.3d 1227, 1233 (7th Cir. 1997); *United States v. Terry*, 916 F.2d 157, 160-62 (4th Cir. 1990).

[9] *See Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Tucker*, 404 U.S. 443, 447 (1972).

CVRA would lead to confusion, needless litigation, and the possible abridgement of defendants' rights.[10]

By incorporating 18 U.S.C. § 3771(e), proposed Rule 1(b)(11) would define "victim" for purposes of the Criminal Rules as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." Without more, this suggests that persons who believe they were harmed by an "offense" have standing to assert rights, and bring mandamus actions, though no one has been charged, or is being prosecuted or has been convicted, of the "offense," in federal court. Civil plaintiffs have invoked the CVRA to claim rights to restitution, damages, and non-public criminal discovery.[11] Putative victims have claimed rights in criminal proceedings as victims of persons who were not charged with any offense or who were acquitted of offenses with which they were charged.[12] A putative victim could attempt to claim rights as a result of an offense "committed" in the District of Columbia that is being prosecuted in the courts of the District of Columbia, or not being prosecuted anywhere. While the courts in reported cases have rejected such claims,[13] the fact remains that the language the proposed rule adopts, standing alone, has been read to permit them. The rules should put an end to this vexing and wasteful litigation. *See Moussaoui*, 2007 WL 755276 at *13-14 (citing waste of time, unfair burdens on criminal

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[10] A "crime victim" as defined in the CVRA could claim a right enforceable through mandamus to an order of notice under 18 U.S.C. § 3555, by virtue of Rule 38(e) and proposed Rule 1(b)(11), though there is no such right in the CVRA. Victims as defined in the CVRA may claim a right to restitution that is not provided by the restitution statutes. The definition would apply to an "organizational victim" under Rule 12.4(a)(2), which has nothing to do with the CVRA.

[11] *See United States v. Moussaoui*, __F.3d__, 2007 WL 755276 (4th Cir. Mar. 14, 2007) (district court was without power to grant motion of civil plaintiffs in a case in the Southern District of New York to intervene in criminal case in the Eastern District of Virginia for purpose of obtaining non-public discovery materials from the criminal case); *In re Searcy*, 202 Fed. Appx. 625 (4th Cir. Oct. 6, 2006) (rejecting petition for mandamus by civil RICO plaintiff claiming entitlement to restitution and damages under the).

[12] *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 564 (2d Cir. 2005) (rejecting petition for mandamus seeking to vacate settlement agreement approved by district court between United States and convicted, acquitted and uncharged persons); *United States v. Sharp*, 463 F.Supp.2d 556 (E.D. Va. 2006) (denying putative victim's *ex parte* motion to make impact statement at defendant's sentencing on the basis that her former boyfriend, who was not charged with any crime, physically, mentally and emotionally abused her, which she claimed may have been caused by his use of marijuana purchased from defendant).

[13] *See Moussaoui*, 2007 WL 755276 at *10 ("The rights codified by the CVRA . . . are limited to the criminal justice process."); *In re Searcy*, 202 Fed. Appx. 625 (CVRA has "no application . . . to these [civil] proceedings"); *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d at 564 ("the CVRA does not grant victims any rights against individuals who have not been convicted of a crime."); *Sharp*, 463 F.Supp.2d at 561 ("the CVRA only applies to [putative victim claiming right to be heard at sentencing] if she was 'directly and proximately harmed' as a result of the commission of the Defendant's federal offense.").

defendants, the government and the public, and slippery slope concerns as additional reasons not to permit victims to intrude upon criminal trials to obtain discovery for use in civil actions).

Doing so would be a correct interpretation of the statute Congress passed and an appropriate use of the Rules of Criminal Procedure. The CVRA directs the court to "ensure" that a victim is afforded the rights described in subsection (a) in "any court proceeding involving an offense against a crime victim." 18 U.S.C. § 3771(b)(1). Even if a putative "crime victim" could claim some right outside the parameters of a pending court proceeding, it would not be within the scope of the Rules of Criminal Procedure. *See* Rule 1(a).

The Senate Judiciary Committee, even when considering a constitutional amendment, "anticipate[d] that courts, in interpreting the amendment, will . . . focus[] on the criminal charges that have been filed in court." *See* S. Rep. No. 108-191 at 30 (Nov. 7, 2003). In enacting the Victim Witness Protection Act, Congress recognized that "[t]o order a defendant to make restitution to a victim of an offense for which the defendant was not convicted would be to deprive the defendant of due process of law." H.R. Rep. No. 99-334, p. 7 (1985) and H.R. Rep. No. 98-1017, p. 83, n. 43 (1984) (quoted in *Hughey v. United States*, 495 U.S. 411, 421 n.5 (1990)). The Supreme Court then interpreted the definition of "victim" in the Victim Witness Protection Act, 18 U.S.C. § 3663(a)(2), as authorizing restitution only for "loss caused by the conduct underlying the offense of conviction." *Hughey*, 495 U.S. at 420. Congress then passed the CVRA, defining "crime victim" in 18 U.S.C. § 3771(e) the same as "victim" is defined in 18 U.S.C. § 3663(a)(2) in relevant part. When Congress incorporates a term into a statute that the Supreme Court has previously interpreted, Congress is assumed to have incorporated that interpretation. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

We urge the Committee to adopt the following alternative:

> **(11)** "Victim" as that term is used in Rules 32 and 60 means a person directly and proximately harmed as a result of the commission of a Federal offense or the commission of an offense in the District of Columbia, with which a defendant has been charged and is being prosecuted or has been convicted, and which is the subject of a pending criminal proceeding in a United States district court or a territorial district court described in subdivision (a)(3) of this rule.

C. Enforcement and Limitations, Rule 60(b)

We have the following objections to Rule 60(b), with an alternative proposal that follows.

First, the rule mentions that "any motion asserting a victim's rights under these rules," but it is somewhat hidden under the heading of "Time for Deciding a Motion," and does not direct the victim's attention to how a motion is to be made. This is

inadequate for victims because it does not tell them how to assert their rights. It is inadequate for the court and the parties because it fails to ensure that they will receive adequate notice of a claim that may quickly become a mandamus action. We therefore propose a rule stating that victims must assert rights by motion in accordance with the procedures otherwise applicable to parties under Rules 47 and 49. This would allow the parties and the victim to be heard, would ensure that the court has the relevant facts and law before it, would create a record for the court of appeals, and would facilitate the parties' participation in any mandamus action before the 72-hour timetable begins.[14] The Committee Note could state that if a victim attempts to assert a right in a manner that does not comply with Rule 47 or Rule 49, the court should inform the victim of the proper procedure and allow the victim an opportunity to comply.

Second, the rule says nothing about when a victim must assert rights. A victim may attempt to assert rights after a proceeding has ended. This would not be helpful to the victim, the court, the defendant or the government. Consistent with 18 U.S.C. § 3771(d)(5)(A), the rule should state that victim rights must be asserted before or during the proceeding at issue.

Third, the CVRA provides for a stay or continuance of no more than five days for purposes of enforcing a victim's right, 18 U.S.C. § 3771(d)(3), but the rule says nothing about it. In *Kenna I*, the Ninth Circuit chided the district court for not postponing sentencing until the petition for writ of mandamus was resolved, six months after it was filed, though the CVRA required the decision to be made within 72 hours. *Kenna I*, 435 F.3d at 1018 n.5. Further, the district court had no notice that a petition for writ of mandamus would be filed. The rules can avoid such problems, in part, by stating the court's authority to grant a stay of up to five days, but only if the victim notifies the court of an intention to file a petition for a writ of mandamus.

Fourth, for clarity and convenience, especially for unrepresented victims and inexperienced counsel, the rule should direct attention to the Federal Rules of Appellate Procedure applicable to mandamus actions. This is especially necessary given the Ninth Circuit's failure to accord a defendant in a criminal case an opportunity to be heard in a mandamus action, and its inaccurate statement in *Kenna I* that a criminal defendant is not a party to a victim's mandamus action. *See* Fed. R. App. P. 21.

Fifth, in the subdivision applicable to a so-called motion to "reopen," the rule should use the term "asserted" because that is the term used in the statute, *see* 18 U.S.C. § 3771(d)(5)(A), the term "asked" is not used anywhere in the rules, has no legal meaning, gives no guidance to victims, and does not ensure notice to defendants whose plea or sentencing may be "reopened."

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[14] The need for such a rule is demonstrated by comparing the chaotic process in *Kenna I*, where no recognizable motion was made, with the more orderly and balanced process in *Kenna II*, where a motion was filed. *See* Hillier Testimony at 26-29.

Sixth, since the statute requires the motion to "reopen" to be made in the district court, the rule should state that there must be jurisdiction in the district court. Particularly if no stay has been imposed and/or the court of appeals exceeds the 72-hour limit, one or both parties may have to file a notice of appeal in order to protect their rights, in which case there may be no jurisdiction in the district court.

Seventh, the rule should require as a condition of a motion to "reopen" that the judgment has not become final. A judgment is not final until direct appeal is concluded and certiorari is denied or the 90-day period for filing a petition for certiorari has run. *See Clay v. United States*, 537 U.S. 522 (2003). The CVRA contemplates that the judgment will not be final, as it provides for a maximum of 21 days between denial of a motion asserting a victim's right and the court of appeals decision on a petition for mandamus, *i.e.*, 10 days to file the petition, any intermediate Saturdays, Sundays and holiday, no more than 5 days for stay or continuance, and 3 days for decision. However, as in *Kenna I*, the judgment may become final, through no fault of the defendant whatsoever, but because the court of appeals did not comply with the CVRA's timetable, which, creates a conflict between defendants' constitutional rights and victims' statutory rights, which the Ninth Circuit recognized but did not resolve. *See* 435 F.3d at 1017-18. Congress clearly did not intend for a defendant's plea or sentence to be "reopened" after the judgment has become final. Re-sentencing to a higher sentence or vacating a plea to a lesser offense at that point would, it seems, violate the Double Jeopardy Clause.[15] To avoid confusion and the threat to defendants' rights in the future, the rule should state that a motion to "reopen" may not be filed if the judgment has become final.

Eighth, the undefined germ, "highest offense," unfamiliar to judges and lawyers, should be defined.

Ninth, to maintain the careful balance Congress sought between victims' statutory rights on the one hand, and constitutional rights, prosecutorial discretion, and the continued functioning of the constitutional adversarial system on the other, the rule, in

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[15] A defendant has a right under the Double Jeopardy Clause not to be sentenced to a higher sentence once he has a legitimate expectation in the finality of his sentence, *see United States v. DiFrancesco*, 449 U.S. 117 (1980), which occurs, *inter alia*, when the judgment has become final. *See id.* at 136 (noting that a defendant can have no expectation of finality in a sentence "until the appeal is concluded or the time to appeal has expired"); *United States v. Earley*, 816 F.2d 1428, 1434 (10th Cir. 1987) (noting that a court's ability to modify a sentence has generally been recognized as "extending through the end of the direct appeals and retrial process," and holding that double jeopardy barred imposing enhanced sentence where defendant "took no appeal" and instead began serving his sentence). The defendant also has a double jeopardy right against having a plea to a lesser offense vacated and a greater charge re-instated. *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987). One of the objections to the failed constitutional amendment was that it could result in a sentence being vacated and the defendant being re-sentenced to a more severe sentence in violation of the Double Jeopardy Clause. *See* S. Rep. 108-191 at 103 (Nov. 7, 2003) (minority views). It was the understanding of opponents of the constitutional amendment that the CVRA did not permit that result. *See* 150 Cong. Rec. S4275 (April 22, 2004) (CVRA "addresses my concerns regarding the rights of the accused," including "the Fifth Amendment protection against double jeopardy") (statement of Sen. Durbin).

addition to prohibiting a new trial as relief, should state that in no case may the failure to afford a right under § 3771(a), or a claimed failure to afford such a right, result in the violation of any constitutional right. A defendant has due process rights to be accurately apprised of the consequences of a plea, *Mabry v. Johnson*, 467 U.S. 504, 509 (1984), and to specific enforcement of a promise made in a plea bargain, *Santobello v. New York*, 404 U.S. 257, 262 (1971), even if he pled guilty or agreed to plead guilty to a less serious offense than the most serious one charged. A victim may assert a right to be free from what she believes is unreasonable delay that would conflict with a defendant's due process right to prepare a defense. Because victims do not have constitutional rights, the rule should make clear that any relief granted to a victim under the statute may not violate the constitutional rights of others.

Tenth, the rule should clarify that the violation of any statutory right is prohibited unless the victim establishes a compelling need for the relief sought and that the ends of justice so require. For example, the defendant and the public have rights under the Speedy Trial Act. Anyone, including the defendant and other victims, has a statutory right to privacy in any records filed or testimony heard for purposes of issuing and enforcing an order of restitution. 18 U.S.C. § 3664(d)(4).

Finally, the rule should make clear that a victim, no less than a party, is subject to waiver of rights not asserted in a timely or otherwise regular manner. *See* Fed. R. Crim. P. 12(e).

(b) Enforcement and Limitations.

(1) Motion Asserting Rights. The assertion of a victim's rights under these rules shall be by motion in accordance with the procedures otherwise applicable to parties under Rules 47 and 49.

(2) When Rights Must Be Asserted. Any motion asserting a victim's rights under these rules must be made before or during the proceeding at issue.

(3) Where Rights Must Be Asserted. Rights under these rules must be asserted in the district court in which the defendant is being prosecuted for the crime charged.

(4) Who May Assert Rights. Rights under these rules may be asserted by the victim, the victim's lawful representative, the attorney for the government, or any other person authorized by 18 U.S.C. § 3771(d) and (e).

(5) Time for Decision. The court must promptly decide a motion asserting a victim's rights under these rules.

(6) Stay of Proceedings. If the court has denied a motion asserting a right under these rules, and the victim notifies the court of an intention to file a petition for writ of mandamus in the court of appeals under 18 U.S.C. § 3771(d)(3), the court

may stay the proceedings for a period not to exceed five days upon motion of the victim or either party.

(7) Writ of mandamus. The procedures governing a petition for a writ of mandamus under 18 U.S.C. § 3771(d)(3) are found in Rule 21 and other pertinent provisions of the Federal Rules of Appellate Procedure.

(8) Limitations on Relief. A victim may move to re-open a plea or sentencing hearing, in compliance with subsections (b)(1)-(3) of this rule, and only if:

(A) the victim asserted a right to be heard before or during a plea or sentencing proceeding in the district court in compliance with subsections (b)(1)-(3) of this rule and the district court denied the relief sought;

(B) the victim petitioned the court of appeals for a writ of mandamus within 10 days of such denial, and the writ is granted;

(C) jurisdiction over the case is in the district court;

(D) the judgment has not become final; and

(E) in the case of a plea, the accused did not plead nolo contendere or guilty to one or more counts carrying a cumulative statutory maximum sentence equal to or greater than the statutory maximum sentence for any other offense charged.

(9) Prohibition of Relief. In no case shall a failure to afford a victim any right under these rules, or a claimed failure to afford such a right, result in:

(A) a new trial;

(B) any violation of any constitutional right;

(C) any violation of any statutory right unless the victim establishes a compelling need for the relief sought and that the ends of justice so require.

(10) Waiver. A victim waives judicial enforcement of any right under under these rules which is not asserted in accordance with this rule. For good cause shown, the court may grant relief from the waiver.