COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D C. 20544

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To: **Hon. David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

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

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

Date: **May 17, 2005**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure met on April 4-5, 2005 in Charleston, South Carolina and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are included at Appendix P.

This report addresses a number of action items: approval of published Rules 5, 32.1, 40, 41, and 58 for transmission to the Judicial Conference; approval of technical and conforming amendments to Rule 6 for transmission to the Judicial Conference; and approval for publication and comment on proposed amendments to Rules 11, 32, 35, 45, and 49.1. In addition, the Advisory Committee has several information items to bring to the attention of the Standing Committee, most notably draft amendments to Rules 16 and 29.

II. Action Items – Overview

First, the Committee considered two public comments to the following rules:

- Rule 5, Initial Appearance, Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.
- Rule 32.1, Revoking or Modifying Probation or Supervised Release; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.
- Rule 40, Arrest for Failing to Appear in Another District; Proposed Amendment to Provide for Authority to Set Conditions for Release.

- Rule 41, Search and Seizure; Proposed Amendment Concerning Use of Electronic Means to Transmit Warrant.

- Rule 58, Petty Offenses and Misdemeanors; Proposed Amendment to Resolve Conflict with Rule 5 Concerning Right to Preliminary Hearing.

- Rule 41. Search and Seizure; Previously Approved Amendment Concerning Tracking Device Warrants.

As noted in the following discussion, the Advisory Committee proposes that those amendments be approved by the Committee and forwarded to the Judicial Conference without being published for comment.

Second, the Committee considered technical and conforming amendments to the following rule:

- Rule 6, The Grand Jury.

As noted in the following discussion, the Advisory Committee proposes that this amendment be forwarded to the Judicial Conference.

Third, the Committee considered and recommended amendments to the following rules, as well as one new rule, as follows:

- Rule 11, Pleas; Proposed Amendment Regarding Advice to Defendant Under Advisory Sentencing Guidelines.

- Rule 32(d)(2)(F), Sentencing and Judgment; Proposed Amendment Regarding Notice to Defendant Under Advisory Sentencing Guidelines.

- Rule 32(h), Sentencing and Judgment; Proposed Amendment Regarding Notice to Defendant Under Advisory Sentencing Guidelines.

- Rule 32(k), Sentencing and Judgment; Proposed Amendment Regarding Use of Judgment Form Prescribed by Judicial Conference.

- Rule 35, Correcting or Reducing Sentence; Proposed Amendment Regarding Elimination of Reference to Mandatory Sentencing Guidelines.

- Rule 45, Computing and Extending Time; Proposed Amendment Regarding Computation of Additional Time for Service.

- Rule 49.1, Privacy Protections for Filings Made with the Court; Proposed Rule to Implement E-Government Act.

The Advisory Committee recommends that these rules be published for public comment.

III. Action Items–Recommendations to Forward Amendments to the Judicial Conference

At its June 2004 meeting, the Standing Committee approved the publication of proposed amendments to Rules 5, 32.1, 40, 41, and 58. The comment period for the proposed amendments was closed on February 15, 2005. The Advisory Committee received two comments on the proposed amendments, and several suggestions from the Style Committee. The Committee made only minor changes as proposed by the Style Committee, and it recommends that all of the proposed amendments be forwarded to the Judicial Conference for approval and transmitted to the Supreme Court. The following discussion briefly summarizes the proposed amendments.

1. ACTION ITEM–Rule 5, Initial Appearance, Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.

The amendment to Rule 5 is intended to permit the magistrate judge to accept a warrant by reliable electronic means. At present, the rule requires the government to produce the original warrant, a certified copy of the warrant, or a facsimile copy of either of those documents. The amendment reflects the availability of improved technology, which makes the use of electronic media as reliable and efficient as using a facsimile. The term "electronic" is used to provide some flexibility, allowing for further technological advances in transmitting data. If electronic means are used, the rule requires that the means be "reliable," and leaves the definition of that term to a court or magistrate judge at the local level. The Advisory Committee received two comments on the published amendment. Federal Public Defender Frank Dunham wrote that the rule should make clear that "non-certified electronic copies" are not reliable electronic means. The Federal Magistrate Judges Association expressed its support for the rule as drafted.

Following consideration of the comments, the Committee unanimously approved the amendment, as published. A copy of the rule is at Appendix A.

Recommendation–The Advisory Committee recommends that the amendment to Rule 5 be approved and forwarded to the Judicial Conference.

2. ACTION ITEM–Rule 32.1, Revoking or Modifying Probation or Supervised Release; Proposed Amendment Regarding Use of Electronic

Means to Transmit Warrant.

This amendment to Rule 32.1 permits the magistrate judge to accept a judgment, warrant, and warrant application by reliable electronic means. It parallels similar changes to Rule 5, reflecting the same enhancements in technology. As in Rule 5, what constitutes "reliable" electronic means is left to a court or magistrate judge to determine as a local matter. The Committee received only one comment on the published amendment, in which the Federal Magistrate Judges Association expressed its support for the change.

Following consideration of the comment, the Committee unanimously approved the amendment, as published (with a minor change recommended by the Style Committee). A copy of the rule is at Appendix B.

Recommendation–The Advisory Committee recommends that the amendment to Rule 32.1 be approved and forwarded to the Judicial Conference.

3. ACTION ITEM–Rule 40, Arrest for Failing to Appear in Another District; Proposed Amendment to Provide for Authority to Set Conditions for Release.

This amendment to Rule 40 is intended to fill a perceived gap in the rule related to persons who are arrested for violating the conditions of release in another district. It authorizes the magistrate judge in the district where the arrest takes place to set conditions of release. The amendment makes it clear that the judge has this authority not only in cases where the arrest takes place because of failure to appear in another district, but also for violation of any other condition of release. The Committee received only one comment on the published amendment, in which the Federal Magistrate Judges Association expressed its support for the change.

Following consideration of the comment, the Committee unanimously approved the amendment, as published (with a minor change recommended by the Style Committee). A copy of the rule is at Appendix C.

Recommendation–The Advisory Committee recommends that the amendment to Rule 40 be approved and forwarded to the Judicial Conference.

4. ACTION ITEM–Rule 41, Search and Seizure; Proposed Amendment Concerning Use of Electronic Means to Transmit Warrant.

This amendment to Rule 41 authorizes magistrate judges to use reliable electronic means to issue warrants. This parallels similar changes to Rules 5 and 32.1(a)(5)(B)(i), allowing the use of improved technology, and leaving what constitutes "reliable" electronic means to a court or

magistrate judge to determine as a local matter. The Committee received only one comment on the published amendment, in which the Federal Magistrate Judges Association expressed its support for the change.

Following consideration of the comment, the Committee unanimously approved the amendment, as published. A copy of the rule is at Appendix D.

Recommendation–The Advisory Committee recommends that the amendment to Rule 41 be approved and forwarded to the Judicial Conference.

5. ACTION ITEM–Rule 58, Petty Offenses and Misdemeanors; Proposed Amendment to Resolve Conflict with Rule 5 Concerning Right to Preliminary Hearing.

Rule 58(b)(2) governs the advice to be given to defendants at an initial appearance on a misdemeanor charge. The amendment eliminates a conflict with Rule 5.1(a) concerning a defendant's entitlement to a preliminary hearing. Instead of attempting to define in this rule when a misdemeanor defendant may be entitled to a Rule 5.1 preliminary hearing, the rule is amended to direct the reader to Rule 5.1. The Committee received only one comment on the published amendment, in which the Federal Magistrate Judges Association expressed its support for the change.

Following consideration of the comment, the Committee unanimously approved the amendment, as published. A copy of the rule is at Appendix E.

Recommendation–The Advisory Committee recommends that the amendment to Rule 58 be approved and forwarded to the Judicial Conference.

6. ACTION ITEM–Rule 41. Search and Seizure; Previously Approved Amendment Concerning Tracking Device Warrants.

An amendment to Rule 41 which would provide procedures for tracking device warrants was recommended, published for public comment, reviewed by the Advisory Committee, and approved by the Standing Committee at its June 2003 meeting for submission to the Judicial Conference. However, subsequent to that meeting the Department of Justice requested additional time to review the proposal. At the April 2005 meeting of the Advisory Committee, Ms. Rhodes stated that the Department had completed its review of the amendment and had no further recommendations for changes to it. In light of the clarification of the Department's position, there is no longer any need

to defer submission to the Judicial Conference.

Appendix F contains the rule and committee note as approved by the Standing Committee at its June 2003 meeting, including changes proposed by the Style Committee.

Recommendation–The Advisory Committee recommends that the amendment to Rule 41 be approved and forwarded to the Judicial Conference.

7. ACTION ITEM–Rule 6. The Grand Jury; Technical and Conforming Amendments.

This amendment makes technical changes to the language added to Rule 6 by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub.L. 108-458, Title VI, § 6501(a), 118 Stat. 3760, in order to bring the new language into conformity with the conventions introduced in the general restyling of the Criminal Rules. No substantive change is intended.

The Advisory Committee unanimously approved the proposal as a technical and conforming amendment, for which no publication and comment period would be necessary. The Rule and Committee Note are at Appendix G.

Recommendation–The Advisory Committee recommends that the technical and conforming amendment to Rule 6 be approved and forwarded to the Judicial Conference.

IV. Action Items–Recommendations to Publish Amendments to the Rules

A. Summary and Recommendations

The Advisory Committee has considered amendments to a number of rules as well as a new rule to implement the E-Government Act, and it recommends that they be published for public comment. The rules are as follows:

1. ACTION ITEM–Rule 11. Pleas; Proposed Amendment Regarding Advice to Defendant Under Advisory Sentencing Guidelines.

This amendment is part of a package of proposals required to bring the rules into conformity with the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005). *Booker* held that the provisions of the federal sentencing statute that make the Guidelines mandatory violate the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a

reasonable doubt. With these provisions excised, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." 125 S.Ct. at 756. Rule 11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere. The Committee approved this amendment by a unanimous vote. The rule and the accompanying Committee Note are at Appendix H.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 11 be published for public comment.

2. ACTION ITEM–Rule 32(d)(2)(F), Sentencing and Judgment; Proposed Amendment Regarding Notice to Defendant Under Advisory Sentencing Guidelines.

This amendment adapts the rule governing presentence reports to *United States v. Booker*, 125 S.Ct. 738 (2005), which directs courts to consider not only information relevant to the Sentencing Guidelines, but also information relevant to the statutory factors listed in 18 U.S.C. § 3553(a). In light of the difficulty that the probation office may have in determining the scope of the information that would be relevant to the broad statutory criteria under § 3553(a), the proposed amendment requires that information relevant to the statutory criteria be included when required by the court. The Committee approved the amendment by a vote of 9 to 1. The rule and the accompanying Committee Note are at Appendix I.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 32(d)(2)(F) be published for public comment.

3. ACTION ITEM–Rule 32(h), Sentencing and Judgment; Proposed Amendment Regarding Notice to Defendant Under Advisory Sentencing Guidelines.

This amendment conforms Rule 32(h) to the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005). The purpose of Rule 32(h) is to avoid unfair surprise to the parties in the sentencing process. Currently, it requires notice that the court is considering departing from the guidelines on the basis of factors not identified in the presentence report or pleadings. The proposed amendment provides that the court must provide this notice when it is considering either a departure or a non-guideline sentence based upon the factors in 18 U.S.C. § 3553(a) on the basis of a ground not identified in the presentence report or pleadings. The amendment refers to departures and "non-guidelines" sentences. In the immediate aftermath of *Booker*, the lower courts have used different labels to refer to sentences based on considerations that would not have

constituted departures under the mandatory guideline regime, but are now permissible because the guidelines are advisory (including the terms "'non-Guidelines' sentence" and "variance"). As stated in the Committee Note, the amendment is intended to apply to such sentences, regardless of the terminology used by the sentencing court. After considerable discussion regarding the variations in terminology and the desirability of highlighting the distinction between departures and other non-Guidelines sentences, the Committee approved the amendment by a vote of 8 to 2. The rule and the accompanying Committee Note are at Appendix J.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 32(h) be published for public comment.

4. ACTION ITEM–Rule 32(k), Sentencing and Judgment; Proposed Amendment Regarding Use of Judgment Form Prescribed by Judicial Conference.

This amendment, which requires the court to enter judgment using the form prescribed by the Judicial Conference, is also a part of the package of rules responding to the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005). The Committee was advised that a proliferation of local forms is impeding the Sentencing Commission's efforts to collect accurate sentencing data and to assist Congress in understanding how the courts are responding to the *Booker* decision. The Judicial Conference Criminal Law Committee is presently developing a new judgment form that will facilitate the collection of useful and accurate sentencing data, and the adoption of this amendment would ensure that all courts use the prescribed form. The Committee approved the amendment by a unanimous vote. The rule and the accompanying Committee Note are at Appendix K.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 32(k) be published for public comment.

5. ACTION ITEM–Rule 35, Correcting or Reducing Sentence; Proposed Amendment Regarding Elimination of Reference to Mandatory Sentencing Guidelines.

This amendment conforms Rule 35(b)(1)(B) to the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005), holding that the guidelines are advisory, rather than mandatory. The rule currently states that the court may reduce a sentence if "reducing the sentence accords with the Sentencing Commission's guidelines and policy statements." Although the guidelines do not currently include provisions governing the correction of sentences under Rule 35,

the amendment removes the rule's language that seems, on its face, to be inconsistent with the ruling in *Booker*. The Committee approved the amendment by a vote of 9 to 1. The rule and the accompanying Committee Note are at Appendix L.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 35 be published for public comment.

6. ACTION ITEM–Rule 45, Computing and Extending Time; Proposed Amendment Regarding Computation of Additional Time for Service.

This amendment has its origins in an amendment to Civil Rule 6 that clarifies the computation of the additional time provided 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). The amendment of the Civil Rule has been approved by the Judicial Conference and is pending before the Supreme Court. The proposed amendment to Rule 45 tracks the language of the civil rule. The Committee approved the amendment by a unanimous vote. The rule and the accompanying Committee Note are at Appendix M.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 45 be published for public comment.

7. ACTION ITEM–Rule 49.1, Privacy Protections for Filings Made with the Court; Proposed Rule to Implement E-Government Act.

This new rule, which is based upon the common template developed by Professor Daniel Capra, implements the E-Government Act. It differs from the common provisions in several respects, including the partial redaction of an individual's home addresses (which reflects the special concerns of witnesses and victims in criminal cases) and an exemption from redaction for certain information needed for forfeitures. Rule 49.1 also deletes the template provisions relating to social security and immigration cases, which are exclusively civil. The proposed rule includes a provision regarding actions under 28 U.S.C. §§ 2254, 2255, and 2241. Although these actions are also technically civil, the Advisory Committee concluded it was appropriate to refer to them in Rule 49.1 because they are governed by procedural rules recently restyled by the Criminal Rules Committee. Rule 49.1 exempts actions under §§ 2254, 2255, and 2241 from the redaction requirements because, as a practical matter, the pro se plaintiffs who file such actions will not generally be aware of the redaction requirements. The Committee approved the new rule by a unanimous vote. The rule and the accompanying Committee Note are at Appendix N.

Recommendation–The Advisory Committee recommends that proposed Rule 49.1 be published for public comment.

V. Information Items

Three subjects discussed at the April 2005 meeting will be on the agenda of the Advisory Committee's October 2005 meeting, with a view towards bringing proposals to the Standing Committee in 2006.

1. Information Item–Consideration of an Amendment to Rule 29, Concerning Deferral of Rulings on Motions for Judgment of Acquittal.

This subject has a rather long history which this report will review very briefly before turning to recent developments. The Department of Justice supports an amendment to Rule 29 on the ground that it is anomalous and highly undesirable to insulate erroneous preverdict acquittals from any appeal. This issue has been discussed at numerous meetings of the Advisory Committee, and was brought by the Department directly to the Standing Committee at the January 2005 meeting.

After extensive discussion at several meetings, the Advisory Committee voted in May 2004 to leave the rule as it is because of concerns that the proposed amendment would be problematic in cases involving multiple defendants or multiple counts, as well as cases in which the jury is unable to reach a verdict. At that point, the Advisory Committee was under the impression there had been only a very small number of problematic preverdict acquittals under the present rule.

Subsequently, the Department of Justice developed additional information based upon a survey of all United States Attorneys. This information demonstrated the frequency of preverdict acquittals, and selected case studies showed the serious impact that erroneous and unreviewable preverdict acquittals have had on the administration of justice. Deputy Attorney General Christopher Wray presented the new information at the January 2005 meeting of the Standing Committee and strongly advocated the adoption of an amendment to Rule 29 that would provide the government with some means to appeal erroneous acquittals. He stated that the Department would support either a rule requiring that all judgments of acquittal be deferred until the jury has returned a verdict, or a rule that would defer such a ruling unless the defendant waives the Double Jeopardy rights that would normally bar the government from appealing.

On the basis of this presentation, the Standing Committee asked the Advisory Committee to draft an amendment to Rule 29 that would address the concerns raised by the Department of Justice, as well as those concerning hung juries and cases involving multiple counts and multiple

defendants, and to advise the Standing Committee on the desirability of adopting such an amendment.

At its April 2005 meeting the Advisory Committee once again considered the desirability and feasibility of amending Rule 29. The Committee was presented with the additional materials prepared by the Department of Justice for the Standing Committee, and Assistant Attorney General Christopher Wray presented the Department's position. After extensive discussion, the Committee voted 8 to 3 in favor of some change to Rule 29. However, many issues were raised regarding the rough draft under consideration (which allowed a defendant to consent to a preverdict ruling if he also waived his Double Jeopardy rights). Committee members felt that it would be necessary to substantially redraft several provisions, and expressed concern that there was little time before the Standing Committee meeting to perfect the language. There was a consensus that if a final version of the proposed rule was not yet available, a draft rule would be presented to the Standing Committee at its June 2005 meeting for informational purposes.

Appendix O contains a draft rule that takes account of the discussion at the April meeting of the Advisory Committee. The Department of Justice and other members of the Advisory Committee have not yet had a chance to comment on this version. The draft will be further refined by the subcommittee and presented at the Advisory Committee's October 2005 meeting.

2. Information Item–Consideration of an Amendment to Rule 16 Concerning Disclosure of Exculpatory Evidence

In October 2003, the American College of Trial Lawyers submitted a comprehensive proposal to codify and expand the Government's disclosure obligations regarding exculpatory and impeachment evidence favorable to the defense. The issue has been under consideration by the Advisory Committee since that time. It has been the subject of review at the subcommittee level and extensive discussions at meetings of the full committee. Additionally, the Department of Justice and the Federal Judicial Center prepared materials to assist the Committee. At the Advisory Committee's April 2005 meeting, the discussion culminated in a vote of 8 to 3 in favor of proceeding with an amendment to Rule 16. The Department of Justice opposed the proposal, believing it to be unnecessary, and expressing particular concern about pretrial disclosure of the identity of prosecution witnesses. Addressing this concern, proponents of the proposal noted that the Jencks Act, 18 U.S.C. § 3500 will continue to govern prior statements by prosecution witnesses, deferring disclosure until the witness has testified. It is anticipated that a draft amendment to Rule 16 will be presented at the Advisory Committee's October 2005 meeting.

3. Information Item–Consideration of Rules Affected by Crime Victims' Rights Act

In October 2004, Congress passed and the President signed into law the Crime Victims' Rights Act (CVRA), Pub. L. No. 108-405, 118 Stat. 2261 (codified as 18 U.S.C. § 3771). The CVRA guarantees crime victims notice of court hearings, the right to attend those hearings, and the opportunity to be heard at appropriate points in the process. After the passage of the CVRA, the amendment to Rule 32 that extended allocution rights to victims was withdrawn. A subcommittee has been appointed to begin the process of drafting amendments to the rules to implement the CVRA. The subcommittee will be aided in its work by a draft law review article by Judge Paul Cassell, which proposes specific amendments to the rules. The subcommittee will report to the Advisory Committee at its October meeting.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 5. Initial Appearance

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(c) Place of Initial Appearance; Transfer to Another District.

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(3) ***Procedures in a District Other Than Where the Offense Was Allegedly Committed.*** If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:

* * * * *

(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1 ~~or Rule 58(b)(2)(G)~~;

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

(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:

(i) the government produces the warrant, a certified copy of the warrant, ~~a facsimile of either,~~ or ~~other appropriate~~ a reliable electronic form of either; and

* * * * *

COMMITTEE NOTE

Subdivisions (c)(3)(C) and (D). The amendment to Rule 5(c)(3)(C) parallels an amendment to Rule 58(b)(2)(G), which in turn has been amended to remove a conflict between that rule and Rule 5.1(a), concerning the right to a preliminary hearing.

Rule 5(c)(3)(D) has been amended to permit the magistrate judge to accept a warrant by reliable electronic means. Currently, the rule requires the government to produce the original warrant, a certified copy of the warrant, or a facsimile copy of either of those documents. This amendment parallels similar changes to Rules 32.1(a)(5)(B)(i) and 41. The reference to a facsimile version of the warrant was removed because the Committee believed that the broader term "electronic form" includes facsimiles.

The amendment reflects a number of significant improvements in technology. First, more courts are now equipped to receive filings by electronic means, and indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings could be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using electronic media to transmit a document might be just as reliable and efficient as using a facsimile.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data.

The rule requires that if electronic means are to be used to transmit a warrant to the magistrate judge, that the means used be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

SUMMARY OF PUBLIC COMMENTS ON RULE 5.

The committee received only two written comments on Rule 5. One supported the amendment. The other stated that the rule should make clear that non-certified photocopies are not reliable electronic means.

Mr. Frank W. Dunham, Esq. (04-CR-001)
Federal Public Defender
Alexandria, VA
November 29, 2004

Mr. Dunham believes that the rule should make it clear that non-certified photocopies are not reliable electronic means.

Hon. Aaron E. Goodstein (04-CR-002)
United States Magistrate Judge
President, Federal Magistrate Judges Association
Milwaukee, IL
February 3, 2005

The FMJA supports the proposed amendment, which reflects the current advanced state of technology in the courts, and agrees that the term "reliable electronic form" includes facsimilies, which no longer need to be referred to in the rule.

GAP REPORT—Rule 5

The Committee made no changes in the Rule and Committee Note as published. It considered and rejected the suggestion that the rule should refer specifically to non-certified

photocopies, believing it preferable to allow the definition of reliability to be resolved at the local level. The Committee Note provides examples of the factors that would bear on reliability.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

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(5) ***Appearance in a District Lacking Jurisdiction.*** If the person is arrested or appears in a district that does not have jurisdiction to conduct a revocation hearing, the magistrate judge must:

* * * * *

(B) if the alleged violation did not occur in the district of arrest, transfer the person to the district that has jurisdiction if:

(i) the government produces certified copies of the judgment, warrant, and warrant application, or produces

copies of those certified documents by reliable electronic means; and

(ii) the judge finds that the person is the same person named in the warrant.

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COMMITTEE NOTE

Subdivision (a)(5)(B)(i). Rule 32.1(a)(5)(B)(i) has been amended to permit the magistrate judge to accept a judgment, warrant, and warrant application by reliable electronic means. Currently, the rule requires the government to produce certified copies of those documents. This amendment parallels similar changes to Rules 5 and 41.

The amendment reflects a number of significant improvements in technology. First, receiving documents by facsimile has become very commonplace and many courts are now equipped to receive filings by electronic means, and indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings could be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using electronic media to transmit a document might be just as reliable and efficient as using a facsimile.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data. The

Committee envisions that the term "electronic" would include use of facsimile transmissions.

The rule requires that if electronic means are to be used to transmit a warrant to the magistrate judge, the means used be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may wish to consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

SUMMARY OF PUBLIC COMMENTS ON RULE 32.1

The committee received only one written comment on Rule 32.1, which was supportive of the amendment.

Hon. Aaron E. Goodstein (04-CR-002)
United States Magistrate Judge
President, Federal Magistrate Judges Association
Milwaukee, IL
February 3, 2005

The FMJA supports the proposed amendment, which reflects the current advanced state of technology in terms of the acceptance of electronic filings.

€RIMINAL RULES REPORT -- APPENDIX B

The Committee made minor clarifying changes in the published rule at the suggestion of the Style Committee.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

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

~~**(a) In General.** If a person is arrested under a warrant issued in another district for failing to appear—as required by the terms of that person's release under 18 U.S.C. §§ 3141–3156 or by a subpoena—the person must be taken without unnecessary delay before a magistrate judge in the district of arrest.~~

(a) In General. A person must be taken without unnecessary delay before a magistrate judge in the district of arrest if the person has been arrested under a warrant issued in another district for:

(i) failing to appear as required by the terms of that

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

person's release under 18 U.S.C. §§ 3141-3156 or by a subpoena; or

(ii) violating conditions of release set in another district.

* * * * *

COMMITTEE NOTE

Subdivision (a). Rule 40 currently refers only to a person arrested for failing to appear in another district. The amendment is intended to fill a perceived gap in the rule that a magistrate judge in the district of arrest lacks authority to set release conditions for a person arrested only for violation of conditions of release. *See, e.g.*, *United States v. Zhu*, 215 F.R.D. 21, 26 (D. Mass. 2003). The Committee believes that it would be inconsistent for the magistrate judge to be empowered to release an arrestee who had failed to appear altogether, but not to release one who only violated conditions of release in a minor way. Rule 40(a) is amended to expressly cover not only failure to appear, but also violation of any other condition of release.

SUMMARY OF PUBLIC COMMENTS ON RULE 40

The committee received only one written comment on Rule 40, which was supportive of the amendment.

Hon. Aaron E. Goodstein (04-CR-002)
United States Magistrate Judge
President, Federal Magistrate Judges Association
Milwaukee, IL
February 3, 2005

The FMJA supports the proposed amendment, which reflects the current advanced state of technology in terms of the acceptance of electronic filings.

GAP REPORT—Rule 40

The Committee made minor clarifying changes in the published rule at the suggestion of the Style Committee.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 41. Search and Seizure

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(d) Obtaining a Warrant.

* * * * *

(3) ***Requesting a Warrant by Telephonic or Other Means.***

(A) *In General.* A magistrate judge may issue a warrant based on information communicated by telephone or other <u>reliable electronic means.</u> ~~appropriate means, including facsimile transmission.~~

(B) *Recording Testimony*. Upon learning that an applicant is requesting a warrant <u>under Rule 41(d)(3)(A)</u>, a magistrate judge must:

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

(i) place under oath the applicant and any person on whose testimony the application is based; and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

* * * * *

(e) Issuing the Warrant.

* * * * *

(3) ***Warrant by Telephonic or Other Means.*** If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:

(A) *Preparing a Proposed Duplicate Original Warrant.* The applicant must prepare a "proposed duplicate original warrant" and

must read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) *Preparing an Original Warrant.* If the applicant reads the contents of the proposed duplicate original warrant, the ~~The~~ magistrate judge must enter ~~the~~ those contents ~~of the proposed duplicate original warrant~~ into an original warrant. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original warrant.

(C) *Modification~~s~~.* The magistrate judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means under Rule 41(e)(3)(D) or direct the applicant to

modify the proposed duplicate original warrant accordingly. ~~In that case, the judge must also modify the original warrant.~~

(D) Signing the ~~Original Warrant and the Duplicate Original~~ Warrant. Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact date and time it is issued, and transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant.

* * * * *

COMMITTEE NOTE

Subsections (d) and (e). Rule 41(e) has been amended to permit magistrate judges to use reliable electronic means to issue warrants. Currently, the rule makes no provision for using such media. The amendment parallels similar changes to Rules 5 and 32.1(a)(5)(B)(i).

The amendment recognizes the significant improvements in technology. First, more counsel, courts, and magistrate judges now routinely use facsimile transmissions of documents. And many courts and magistrate judges are now equipped to receive filings by electronic means. Indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings may be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using facsimiles and electronic media to transmit a warrant can be both reliable and efficient use of judicial resources.

The term "electronic" is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data. Although facsimile transmissions are not specifically identified, the Committee envisions that facsimile transmissions would fall within the meaning of "electronic means."

While the rule does not impose any special requirements on use of facsimile transmissions, neither does it presume that those transmissions are reliable. The rule treats all electronic transmissions in a similar fashion. Whatever the mode, the means used must be "reliable." While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to

require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

SUMMARY OF PUBLIC COMMENTS ON RULE 41

The committee received only one written comment on Rule 41, which was supportive of the amendment.

Hon. Aaron E. Goodstein (04-CR-002)
United States Magistrate Judge
President, Federal Magistrate Judges Association
Milwaukee, IL
February 3, 2005

The FMJA supports the proposed amendment, which reflects the current advanced state of technology when it comes to the reliability of electronic transmission of information. This rule clarifies procedures and avoids unnecessary effort on the part of magistrate judges, who must, for example, currently enter the contents of a proposed duplicate original which has been read to them over the telephone.

GAP REPORT—Rule 41

The Committee made no changes in the Rule and Committee Note as published for comment.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(b) Pretrial Procedure.

* * * * *

(2) ***Initial Appearance.*** At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

* * * * *

(G) ~~if the defendant is held in custody and charged with a misdemeanor other than a petty offense, the~~ any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release.

* * * * *

COMMITTEE NOTE

Subdivision (b)(2)(G). Rule 58(b)(2)(G) sets out the advice to be given to defendants at an initial appearance on a misdemeanor charge, other than a petty offense. As currently written, the rule is restricted to those cases where the defendant is held in custody, thus creating a conflict and some confusion when compared to Rule 5.1(a) concerning the right to a preliminary hearing. Paragraph (G) is incomplete in its description of the circumstances requiring a preliminary hearing. In contrast, Rule 5.1(a) is a correct statement of the law concerning the defendant's entitlement to a preliminary hearing and is consistent with 18 U.S.C. § 3060 in this regard. Rather than attempting to define, or restate, in Rule 58 when a defendant may be entitled to a Rule 5.1 preliminary hearing, the rule is amended to direct the reader to Rule 5.1.

SUMMARY OF PUBLIC COMMENTS ON RULE 58

The committee received only one written comment on Rule 58, which was supportive of the amendment.

Hon. Aaron E. Goodstein (04-CR-002)
United States Magistrate Judge
President, Federal Magistrate Judges Association
Milwaukee, IL
February 3, 2005

The FMJA supports the proposed amendment.

GAP REPORT—Rule 58

The Committee no changes to the Rule or Committee note after publication.

Rule 41. Search and Seizure

(a) Scope and Definitions.

* * * * *

(2) ***Definitions.*** The following definitions apply under this rule:

* * * * *

(D) "Domestic terrorism" and "international terrorism" have the meanings set out in 18 U.S.C. § 2331.

(E) "Tracking device" has the meaning set out in 18 U.S.C. § 3117(b).

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

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

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is

issued but might move or be moved outside the district before the warrant is executed; ~~and~~

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

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both.

* * * * *

(d) Obtaining a Warrant.

(1) ***~~Probable Cause~~ In General.*** After receiving an affidavit or other information, a magistrate judge—or if authorized by Rule 41(b), ~~or~~ a judge of a state court of record—must issue the warrant if

there is probable cause to search for and seize a person or property or to install and use a tracking device ~~under Rule 41(c)~~.

* * * * *

(e) Issuing the Warrant.

(1) ***In General.*** The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.

(2) ***Contents of the Warrant.***

(A) *Warrant to Search for and Seize a Person or Property.* Except for a tracking-device warrant, ~~T~~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)~~(i) execute the warrant within a specified time no longer than 10 days;

~~(B)~~(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution

at another time; and

~~(C)~~(iii) return the warrant to the magistrate judge designated in the warrant.

(B) *Warrant for a Tracking Device.* A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 calendar days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause

expressly authorizes installation at another time; and

(iii) return the warrant to the ~~magistrate~~ judge designated in the warrant.

(3) ***Warrant by Telephonic or Other Means.***

* * * * *

(f) Executing and Returning the Warrant.

(1) Warrant to Search for and Seize a Person or Property.

~~(1)~~(A) *Noting the Time.* The officer executing the warrant must enter on ~~its face~~ it the exact date and time it is was executed.

~~(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.

~~(3)~~(C) *Receipt.* The officer executing the warrant must~~:~~ ~~(A)~~ give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken~~;~~ or ~~(B)~~ leave a copy of the warrant and receipt at the place where the officer took the property.

~~(4)~~(D) *Return.* The officer executing the warrant must promptly return it—together with the copy of the inventory —to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) *Warrant for a Tracking Device.*

(A) *Noting the Time.* The officer executing a tracking-device warrant must enter on it the date and time the device was

exact

installed and the period during which it was used.

(B) *Return.* Within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it to the ~~magistrate~~ judge designated in the warrant.

(C) *Service.* Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking -device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the ~~magistrate~~

judge may delay notice as provided in 41(f)(3).

(3) ***Delayed Notice.*** Upon request ~~of the government~~, a magistrate judge—or if authorized by Rule 41(b), a judge of a state court of record—may delay any notice required by this rule if the delay is authorized by statute.

* * * * *

COMMITTEE NOTE

The amendments to Rule 41 address two issues: first, procedures for issuing tracking device warrants and second, a provision for delaying any notice required by the rule.

Amended Rule 41(a)(2) includes two new definitional provisions. The first, in Rule 41(a)(2)(D), addresses the definitions of "domestic terrorism" and "international terrorism," terms used in Rule 41(b)(2). The second, in Rule 41(a)(2)(E), addresses the definition of "tracking device."

Amended Rule 41(b)(4) is a new provision, designed to address the use of tracking devices. Such searches are recognized both by statute, *see* 18 U.S.C. § 3117(b) and by caselaw, *see, e.g., United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983). Warrants may be required to monitor tracking devices when they are used to monitor persons or property in areas where there is a reasonable expectation of privacy. *See, e.g., United States v. Karo, supra* (although no probable cause was required to install beeper, officers' monitoring of its location in defendant's

home raised Fourth Amendment concerns). Nonetheless, there is no procedural guidance in current Rule 41 for those judicial officers who are asked to issue tracking device warrants. As with traditional search warrants for persons or property, tracking device warrants may implicate law enforcement interests in multiple districts.

The amendment provides that a magistrate judge may issue a warrant, if he or she has the authority to do so in the district, to install and use a tracking device, as that term is defined in 18 U.S.C. § 3117(b). The magistrate judge's authority under this rule includes the authority to permit entry into a area where there is a reasonable expectation of privacy, installation of the tracking device, and maintenance and removal of the device. The Committee did not intend by this amendment to expand or contract the definition of what might constitute a tracking device. The amendment is based on the understanding that the device will assist officers only in tracking the movements of a person or property. The warrant may authorize officers to track the person or property within the district of issuance, or outside the district.

Because the authorized tracking may involve more than one district or state, the Committee believes that only federal judicial officers should be authorized to issue this type of warrant. Even where officers have no reason to believe initially that a person or property will move outside the district of issuance, issuing a warrant to authorize tracking both inside and outside the district avoids the necessity of obtaining multiple warrants if the property or person later crosses district or state lines.

The amendment reflects the view that if the officers intend to install or use the device in a constitutionally protected area, they must obtain judicial approval to do so. If, on the other hand, the officers intend to install and use the device without implicating any Fourth Amendment rights, there is no need to obtain the warrant. *See, e.g. United States v. Knotts, supra*, where the officers' actions in installing and following tracking device did not amount to a search under the Fourth Amendment.

Amended Rule 41(d) includes new language on tracking devices. The tracking device statute, 18 U.S.C. § 3117, does not specify the standard an applicant must meet to install a tracking device. The Supreme Court has acknowledged that the standard for installation of a tracking device is unresolved, but has reserved ruling on the issue until it is squarely presented by the facts of a case. *See United States v. Karo*, 468 U.S. 705, 718 n. 5 (1984). The amendment to Rule 41 does not resolve this issue or hold that such warrants may issue only on a showing of probable cause. Instead, it simply provides that if probable cause is shown, the magistrate must issue the warrant. And the warrant is only needed if the device is installed (for example in the trunk of the defendant's car) or monitored (for example, while the car is in the defendant's garage) in an area in which the person being monitored has a reasonable expectation of privacy.

Amended Rule 41(e)(2)(B) is a new provision intended to address the contents of tracking device warrants. To avoid open-ended monitoring of tracking devices, the revised rule requires the magistrate judge to specify in the warrant the length of time for using the device. Although the initial time stated in the warrant may not exceed 45 days, extensions of time may be granted for good cause. The rule further specifies that any installation of a tracking device authorized by the warrant must be made within ten calendar days and, unless otherwise provided, that any installation occur during daylight hours.

Current Rule 41(f) has been completely revised to accommodate new provisions dealing with tracking device warrants. First, current Rule 41(f)(1) has been revised to address execution and delivery of warrants to search for and seize a person or property; no substantive change has been made to that provision. New Rule 41(f)(2) addresses execution and delivery of tracking device warrants. That provision generally tracks the structure of revised Rule 41(f)(1), with appropriate adjustments for the particular requirements of tracking device warrants. Under Rule 41(f)(2)(A) the officer must note on the warrant the time the device was installed and the period during which the device was used. And under new Rule 41(f)(2)(B), the officer must return the tracking device warrant to the magistrate designated in the warrant, within 10 calendar days after use of

the device has ended.

Amended Rule 41(f)(2)(C) addresses the particular problems of serving a copy of a tracking device warrant on the person who has been tracked, or whose property has been tracked. In the case of other warrants, current Rule 41 envisions that the subjects of the search typically know that they have been searched, usually within a short period of time after the search has taken place. Tracking device warrants, on the other hand, are by their nature covert intrusions and can be successfully used only when the person being investigated is unaware that a tracking device is being used. The amendment requires that the officer must serve a copy of the tracking device warrant on the person within 10 calendar days after the tracking has ended. That service may be accomplished by either personally serving the person or by leaving a copy at the person's residence or usual abode and by sending a copy by mail. The Rule also provides, however, that the officer may (for good cause) obtain the court's permission to delay further the delivery of the warrant. That might be appropriate, for example, where the owner of the tracked property is undetermined, or where the officer establishes that the investigation is ongoing and that disclosure of the warrant will compromise that investigation.

Use of a tracking device is to be distinguished from other continuous monitoring or observations that are governed by statutory provisions or caselaw. *See* Title III, Omnibus Crime Control and Safe Streets Act of 1968, *as amended* by Title I of the 1968 Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2520; *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986) (use of video camera); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984) (television surveillance).

Finally, amended Rule 41(f)(3) is a new provision that permits the government to request, and the magistrate judge to grant, a delay in any notice required in Rule 41. The amendment is co-extensive with 18 U.S.C. § 3103a(b). That new provision, added as part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, authorizes a court to

delay any notice required in conjunction with the issuance of any search warrants.

SUMMARY OF PUBLIC COMMENTS ON RULE 41.

The Committee received seven written comments on Rule 41. The commentators generally approved of the concept of including a reference to tracking-device warrants in the rule. Several commentators, however, offered suggested language that they believed would clarify several issues, including the definition of probable cause vis a vis tracking device warrants, and language that would more closely parallel provisions in Title III of the Omnibus Crime Control Act of 1968.

Mr. Jack E. Horsley, Esq. (02-CR-003)
Matoon, Illinois
October 25, 2002.

Mr. Horsley believes that the proposed amendments concerning tracking-device warrants should be adopted

Hon. Joel M. Feldman (02-CR-007)
United States District Court, N.D. Ga,
Atlanta, Georgia
December 2, 2002

Judge Feldman suggests that the Committee consider further amendments to Rule 41 regarding warrants used to obtain electronic records from providers of electronic communications services. He attaches a written inquiry from one of colleagues pointing out a number of questions that are likely to arise in such cases.

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judge's Association generally supports the proposed amendments to Rule 41. But the Association believes that either the rule itself or the committee note should be changed to clarify whether a separate warrant is needed to enter constitutionally protected property to install the device. The Association states that the current rule and note are not clear on that point, and believe that as written, unnecessary litigation will result.

Mr. Kent S. Hofmeister (02-CR-014)
President, Federal Bar Association
Dallas, Texas
February 14, 2003

The Federal Bar Association approves of the amendments to Rule 41, noting that they fill a void.

Mr. Saul Bercovitch (02-CR-015)
Staff Attorney
State Bar of California's Committee on Federal Courts
December 14, 2003

The Committee on Federal Courts for the State Bar of California generally approves of the proposed amendments to Rule 41. But it raises two points that it believes should be addressed. First, the amendments do not clarify what the probable cause finding must be made upon, or whether a showing less than probable cause will suffice.

Second, the rule does not address the consequences of failure to comply with the delayed notice provisions in Rule 41(f)(2).

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Jaso, on behalf of the Department of Justice, offers several suggested changes to the proposed amendments to Rule 41. First, the Department is concerned that the language in Rule 41(d) might be read to require that a warrant is required anytime a tracking-device is installed; he suggests alternative language. Second, he states that some members of the Appellate Chiefs Working Group recommend deletion of the requirement that the installation occur during daylight hours. And third, he recommends a change to Rule 41(f)(2)(C), which permits delayed notification following execution of a tracking device; he believes that it would be better to delete the "good cause shown" language, and simply cross reference Rule 41(f)(3), which is the general provision dealing with delayed notice.

Mr. William Genego & Mr. Peter Goldberger (02-CR-021)
National Association of Criminal Defense Lawyers
March 21, 2003

NADCL offers a number of suggestions on Rule 41. First, it urges the Committee to use two benchmarks in amending Rule 41: tradition and jurisprudence of issuing warrants and Title III of the Omnibus Crime Control Act of 1968. Second, it notes that there is a lack of parallelism in Rule 41(b)(3) and (b)(4) from (b)(1) and (b)(2); it notes that use of the words "may issue" in (b)(4) are ambiguous. Third, NADCL also suggests

that the rule contain some reference to the fact that a warrant may be issued by district judges as well as magistrate judges. Fourth, it offers suggested language that would require that the probable cause focus on the specific need for installing the tracking device and that the government first show that there is a genuine need for using a tracking device. Fifth, regarding Rule 41(e), NADCL again urges the Committee to follow Title III. And finally, with regard to Rule 41(f)(2), it states that the current language is open-ended and vague; it suggests new wording that it believes would require the magistrate judge to specify a particular period of time.

GAP REPORT--RULE 41

The Committee agreed with the NADCL proposal that the words "has authority" should be inserted in Rule 41(c)(3), and (4) to parallel similar language in Rule 41(c)(1) and (2). The Committee also considered, but rejected, a proposal from NADCL to completely redraft Rule 41(d) , regarding the finding of probable cause. The Committee also made minor clarifying changes in the Committee Note

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6. The Grand Jury

(e) Recording and Disclosing the Proceedings.

* * * * *

(3) Exceptions.

* * * * *

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand jury

matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal ~~Federal~~, state~~State~~, state~~State~~ subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the

unauthorized disclosure of such information. Any state~~State~~, state~~State~~ subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information ~~only consistent with such guidelines as the Attorney General and the Director of National Intelligence shall jointly issue information~~ only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence.

* * * * *

(7) Contempt. A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence

~~pursuant to~~ under Rule 6, may be punished as a contempt of court.

COMMITTEE NOTE

Subdivision (e)(3) and (7). This amendment makes technical changes to the language added to Rule 6 by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub.L. 108-458, Title VI, § 6501(a), 118 Stat. 3760, in order to bring the new language into conformity with the conventions introduced in the general restyling of the Criminal Rules. No substantive change in intended.

PROPOSED 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 ~~apply~~ ~~the~~

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

~~Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances~~ and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and

COMMITTEE NOTE

The amendment conforms Rule 11 to the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. Rule 11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.

PROPOSED AMENDMENTS FOR THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 32. Sentence and Judgment

* * * * *

(d) Presentence Report.

(1) Applying the 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

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

(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).

COMMITTEE NOTE

The amendment conforms Rule 32(d) to the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a

sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. Amended subsection (d)(2)(F) makes clear that the court can instruct the probation office to gather and include in the presentence report any information relevant to the factors articulated in § 3553(a). The rule contemplates that a request can be made either by the court as a whole requiring information affecting all cases or a class of cases, or by an individual judge in a particular case.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 32. Sentencing and Judgment

* * * * *

(h) Notice of Intent to Consider Other Sentencing Factors. Before the court may ~~depart from the applicable sentencing range~~ rely on a ground not identified ~~for departure~~ either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence ~~such a departure~~. The notice must specify any ground not earlier identified on which the court is contemplating a departure or a non-guideline sentence.

COMMITTEE NOTE

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

The amendment conforms Rule 32(h) to the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. The purpose of Rule 32(h) is to avoid unfair surprise to the parties in the sentencing process. Accordingly, the required notice that the court is considering factors not identified in the presentence report or in the submission of the parties that could yield a sentence outside the guideline range should identify factors that might lead to either a guideline departure or a sentence based on factors under 18 U.S.C. § 3553(a).

The amendment refers to a "non-guideline" sentence to designate a sentence not based exclusively on the guidelines. In the immediate aftermath of *Booker*, the lower courts have used different labels to refer to sentences based on considerations that would not have warranted departures under the mandatory guideline regime, but are now permissible because the guidelines are advisory. *Compare United States v. Crosby*, 397 F.3d 103, 111 n. 9 (2d Cir. 2005) (referring to "non-Guidelines" sentence), *with United States v. Wilson*, 350 F. Supp.2d 910, 911 (D. Utah 2005) (suggesting the term "variance"). This amendment is intended to apply to such sentences, regardless of the terminology used by the sentencing court.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 32. Sentencing and Judgment

* * * * *

(k) Judgment.

(1) In General. The court must use the judgment form prescribed by the Judicial Conference of the United States. In ~~the~~ a judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence, including the statement of reasons required by 18 U.S.C. § 3553(c). If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.

COMMITTEE NOTE

The amendment is intended to standardize the collection of data on federal sentences by requiring all courts to enter their judgments, including the statement of reasons, on the forms prescribed by the

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

Judicial Conference of the United States. The collection of standardized data will assist the United States Sentencing Commission and Congress in their evaluation of sentencing patterns following the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. The *Booker* opinion cast no doubt on the continuing validity of 18 U.S.C. § 3553(c), which requires the sentencing court to provide "the court's statement of reasons, together with the order of judgment and commitment" to the Sentencing Commission.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 35. Correcting or Reducing a Sentence.

* * * * *

(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. ~~:~~

~~(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and~~

~~(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.~~

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

COMMITTEE NOTE

The amendment conforms Rule 35(b)(1) to the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. Subsection (b)(1)(B) has been deleted because it treats the guidelines as mandatory.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 45. Computing and Extending Time

* * * * *

(c) Additional Time After Certain Kinds of Service. ~~When these rules permit or require~~ Whenever a party must or may ~~to~~ 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 ~~to~~ the period would otherwise expire under subdivision (a) ~~if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D)~~.

COMMITTEE NOTE

Rule 45(c) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. This amendment parallels the change in Federal Rule of Civil Procedure 6(e). Three days are added after the prescribed period otherwise expires under Rule 45(a). Intermediate

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Saturdays, Sundays, and legal holidays are included in counting these added three days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday. The effect of invoking the day that the rule would otherwise expire under Rule 45(a) can be illustrated by assuming that the thirtieth day of a thirty-day period is a Saturday. Under Rule 45(a) the period expires on the next day that is not a Sunday or legal holiday. If the following Monday is a legal holiday, under Rule 45(a) the period expires on Tuesday. Three days are then added – Wednesday, Thursday, and Friday as the third and final day to act unless that is a legal holiday. If the prescribed period ends on a Friday, the three added days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the third and final day to act.

Application of Rule 45(c) to a period that is less than eleven days can be illustrated by a paper that is served by mailing on a Friday. If ten days are allowed to respond, intermediate Saturdays, Sundays, and legal holidays are excluded in determining when the period expires under Rule 45(a). If there is no legal holiday, the period expires on the Friday two weeks after the paper was mailed. The three added Rule 45(c) days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the final day to act.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 49.1 Privacy Protection For Filings Made with the Court

(a) **Redacted Filings.** Unless the court orders otherwise, an electronic or paper filing made with the court that includes a social security number or an individual's tax identification number, a name of a person known to be a minor, a person's birth date, a financial account number or the home address of a person may include only

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

(2) the minor's initials;

(3) the year of birth;

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

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

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

(b) Exemptions from the Redaction Requirement. The redaction requirement of Rule 49.1 (a) does not apply to the following:

(1) in a civil or criminal forfeiture proceeding, a financial-account number or real property address that identifies the property alleged to be subject to forfeiture;

(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 whose decision is being reviewed, if that record was not subject to (a) when originally filed;

(5) a filing covered by (c)of this rule;

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

(7) a filing made in an action brought under 28 U.S.C. § 2241 that does not relate to the petitioner's immigration rights;

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

(9) an arrest or search warrant;

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

(c) 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.

(d) Protective Orders. If necessary to protect private or sensitive information that is not otherwise protected under subdivision (a), a court may by order in a case (1)

require redaction of additional information, or (2) limit or prohibit remote access by nonparties to a document filed with the court.

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

(f) Option for Filing a Reference List. A filing that contains information redacted under (a) 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 of redacted information listed. The reference list must be filed under seal and may be amended as of right. Any references in the case to an identifier in the reference list will be construed to refer to the corresponding item of information.

(g) Waiver of Protection of Identifiers. A party waives the protection of (a) as to the party's own information to the extent that the party files such information not under seal and without redaction.

Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such

as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, the party may seek protection under subdivision (d) or (e). Moreover, the Rule does not affect the protection available under other rules, such as Criminal Rule 16(d) and Civil Rules 16 and 26(c), or under other sources of protective authority.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

Subdivision (e) provides that the court can order in a particular case require more extensive redaction than otherwise required by the Rule, where necessary to protect against disclosure to non-parties of sensitive or private information. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a party who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. Subdivision (g) allows parties to file a register of redacted information. This

provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004.

In accordance with the E-Government Act, subdivision (g) of the rule refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a party to waive the protections of the rule as to its own personal information by filing it unsealed and in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits to privacy. If a party files an unredacted identifier by mistake, it may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 49.1 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" (March 2004). This document sets out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:

The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:

- unexecuted summonses or warrants of any kind (e.g.,

search warrants, arrest warrants);
- pretrial bail or presentence investigation reports;
- statements of reasons in the judgment of conviction;
- juvenile records;
- documents containing identifying information about jurors or potential jurors;
- financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
- ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
- sealed documents (e.g., motions for downward departure for substantial assistance, plea agreements indicating cooperation).

The privacy and law enforcement concerns implicated by the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (d).

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 29. Motion for a Judgment of Acquittal

(a) Motion Made Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the defendant may move for a judgment of acquittal of any offense. ~~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.

(b) Reserving Decision.

(1) In General. Except as provided in Rule 29(b)(2).

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

and (c)(2), the court must proceed with the trial, submit the case to the jury, and reserve its decision on the motion until after the jury returns a verdict. ~~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. The court must set aside the verdict and enter an acquittal if the evidence is insufficient to sustain the guilty verdict.

(2) ***Granting Motion Before Verdict.*** The court may grant the motion with regard to some or all

charges—or with regard to some or the defendants—before the jury returns a verdict, if:

(A) the court places the defendant under oath and informs the defendant personally in open court that a pre-verdict ruling granting the motion would normally deprive the government of the right to appeal that ruling on Double Jeopardy grounds, but that the defendant may waive that constitutional protection; and

(B) after being so informed, the defendant waives his Double Jeopardy rights--for this purpose only--on the record and in writing.

(c) Motions Made After Jury Verdict or Discharge.

(1) Time for a Motion. Within 7 days after a guilty verdict, or after the court discharges a jury because it cannot agree on a verdict, a defendant

may move for a judgment of acquittal, or renew such a motion, or the court may on its own motion consider a judgment of acquittal. ~~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, or within any other time the court sets during the 7-day period.~~

(2) Ruling on the Motion.

After the jury has returned a guilty verdict, the court must set aside the verdict and enter an acquittal, if the evidence is insufficient to sustain the guilty verdict. If the jury has been discharged because it cannot agree on a verdict with regard to some or all of the charges—or to some or all of the defendants--the court may enter an acquittal as to

some or all defendants or charges if the evidence is insufficient to sustain a conviction and:

(A) the court places the defendant under oath, and informs the defendant personally in open court that a ruling granting the motion after the jury has been unable to reach a verdict would normally deprive the government of the right to appeal that ruling on Double Jeopardy grounds, but that the defendant may nonetheless waive that constitutional protection; and

(B) after being so apprised, the defendant waives his Double Jeopardy rights—for this purpose only--on the record and in writing. 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.

(d) Conditional Ruling on a Motion for a New Trial.

(1) Motion for a New Trial. If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) Finality. The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) Appeal.

(A) *Grant of a Motion for a New Trial.* If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) *Denial of a Motion for a New Trial*. If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

COMMITTEE NOTE

Rule 29 provides that a court may acquit a criminal defendant on its own or on defendant's motion either before the jury returns a verdict, after a hung jury, or after the jury returns a guilty verdict. Although the government may appeal a Rule 29 acquittal in the latter case, it cannot appeal from a Rule 29 acquittal in the first two situations. *United States v. Ball*, 163 U.S. 662, 672 (1896); *Fong Foo v. United States*, 369 U.S. 141 (1962); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). The Double Jeopardy Clause prohibits such appeals because, unlike the case where a jury has returned a verdict and an acquittal is then granted by the court, a pre-verdict acquittal does not provide a readily available verdict to reinstate if the acquittal is overturned on appeal. Without this verdict, a defendant would have to stand trial once again. *See* Richard Sauber and Michael Waldman, *Unlimited Power: Rule 29(a) and the Unreviewable Ability of Directed Judgments of Acquittal*, 44 AM.U.L.REV. 433, 451 (1994); 18 U.S.C. § 3731.

As originally drafted, Rule 29 permitted an anomaly: orders disposing of entire prosecutions or counts without any possibility of appellate review. *See* Sauber & Waldman, *supra.* This anomaly arose because the Government had no statutory authority to appeal a judgment of acquittal--whether rendered before or after a guilty verdict—when Rule 29 was promulgated. *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., supra*. 430 U.S. at 568. 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 acted as a non-constitutional bar to Government appeals by permitting district courts to enter judgments of acquittal at times (at the close of the Government's case, at the close of all the evidence, after the jury is discharged without returning a verdict) when the Double Jeopardy Clause prohibited appeal.

This anomaly was partially remedied by the 1994 amendment to Rule 29, which permitted the court to reserve until after the guilty verdict its decision on a motion for judgment of acquittal, thus rendering its decision appealable. The current amendment completes the process begun by the 1994 amendment and makes the permitted practice the required practice.

Allowing for appeal of Rule 29 preverdict acquittals serves a number of important functions. It assists the search for the truth by allowing the correction of errors, helps assure uniformity, and strengthens the public perception that the system is fair and accountable. *See* Sauber and Waldman, *supra*, at 452-53. Moreover, the ability to appeal serves the public's interest in fully prosecuting persons who have committed crimes and may prevent the release of persons who pose a danger to the public. *See* Joshua Steinglass, *The Justice System in Jeopardy: The Prohibition on Government Appeals of Acquittals*, 31 IND.L.REV. 353, 370-71 (1998).

Rule 29(b). Originally, the Committee considered an amendment to Rule 29 that would have required the trial court to reserve ruling on the motion until after the verdict, in order to provide the government with the ability to appeal in all cases. That proposal, however, presented competing concerns. Granting a pre-

verdict acquittal would permit the court to relieve the defendant of unnecessary adjudication, including the burden and possible self-incrimination from presenting a defense, and yet provide a check on the government's power to bring unwarranted charges against a defendant. *See generally* Sauber and Waldman, *supra* at 458-60.

Rule 29(b)(1). That proposal, however, failed to address two key issues: (1) the appropriate procedure where there is a hung jury and the court determines an acquittal is proper and (2) the appropriate procedure where there are multiple defendants and/or counts and the court determines that certain of those defendants and/or counts should be eliminated.

The amendment attempts to resolve those issues using a "waiver." The amendment permits the court to rule on the motion before a verdict is returned, if the defendant, after being advised of the options, waives Double Jeopardy protections, as spelled out in Rule 29(b)(2) and Rule 29(c)(2).

Rule 29(b)(2). Under amended Rule 29(b)(2) the court may rule on the motion before the verdict with regard to some or all of the charges, or with regard to some or all of the defendants, if the defendant is first placed under oath and after being apprised in open court of the protections of the Double Jeopardy Clause, waives those protections on the record and in writing.

Rule 29(c)(2). Similarly, under amended Rule 29(c)(2), after a jury has returned a verdict of guilty, the court must enter a judgment of acquittal if the evidence is insufficient to support the verdict. If, however, the jury has not been able to reach a verdict as to some counts or some defendants, the court may enter a judgment of acquittal if the defendant is first placed under oath, and after being apprised in open court of his Double Jeopardy

rights, waives those rights on the record and in writing as to the charges in question.

Constitutional rights, including Double Jeopardy objections, can be waived by an accused. *United States v. Bascaro*, 742 F.2d 1335, 1365 (11th Cir. 1984) (absence of objection is waiver of Double Jeopardy defense). Although there are few cases on the question of expressly waiving Double Jeopardy protections, one case, *United States v. Kington*, 801 F.2d 733 (5th Cir. 1986); *United States v. Kington*, 835 F.2d 106 (5th Cir. 1988), is instructive. In *Kington I and II*, the defendants made a motion to suppress, but the court did not consider the motion until after the jury had been empaneled and sworn. *Kington II*, 835 F.2d at 107. The court granted the motion, but only after the defendants agreed to waive Double Jeopardy so that the government would be allowed to appeal. *Kington I*, 801 F.2d at 735-36. The government appealed the decision, and the Fifth Circuit found jurisdiction to review the appeal under § 3731 because defendants had waived their Double Jeopardy objections. Id. The court further stated that the hearing regarding the motion to suppress had been conducted without the jury in attendance and that the judge, not the government, had proposed that defendants waive their rights. Id. The Fifth Circuit reversed the district court judge's determination on the motion to suppress, and the defendants challenged the sufficiency of their waiver of Double Jeopardy rights in a second case. *Kington II*, 835 F.2d at 107. The court reviewed the trial transcript where the defendants had agreed to waive their rights, found the waiver to be effective, and rejected the defendants' contention that the terms of the waiver were not broad enough to authorize the retrial of the case. Id. at 108-09.

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."). Therefore, while there are cases holding that defendant's action or inaction can waive Double Jeopardy, the Committee believes that it was appropriate 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) (where consent order did not specifically state waiver of Double Jeopardy rights, no such waiver existed); *Morgan*, 51 F.3d at 1110 (civil settlement with the government not waiver of claim of Double Jeopardy defense where settlement agreement was not explicit, even if individual was aware of ongoing criminal investigation of his actions).

The Committee believes that placing the defendant under oath, conducting a colloquy in open court, and then reducing the defendant's waiver to writing will help ensure that the defendant will appreciate the significance of the waiver, and also provide a reviewing court with an evidentiary basis in the case of any later challenge to the waiver. Rules 11(b) and 23(a) served as models for the waiver procedures. Rule 11(b) provides that before accepting a plea of guilty, the court may place the defendant under oath and must conduct, in open court, a plea colloquy that is intended to ensure that the defendant is knowingly, voluntarily, and intelligently waiving a number of constitutional rights. Rule 23(a) requires that a defendant who wishes to waive the right to trial by jury must do so in writing. In addition, there is general agreement that the better practice to ensure that the defendant understands the implications of the waiver of a jury trial is to conduct an oral on-the-record colloquy. *See generally* 25 MOORE'S FEDERAL PRACTICE, §623.04[c][3] (3d ed. 1997); 2 CHARLES ALAN WRIGHT, NANCY KING, & SUSAN R. KLEIN, FEDERAL PRACTICE AND PROCEDURE, § 372 (3d ed. 2004).