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OF THE
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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: **December 18, 2006**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met by teleconference on September 5, 2006 and in person on October 26-27, 2006, on Amelia Island, Florida, and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Minutes of the September meeting and the Draft Minutes of the October meeting are attached.

This report does not present any action items. It brings to the Standing Committee's attention a number of information items, most notably the Committee's discussion on two matters referred to it by the Standing Committee: the Committee's proposed amendment to Rule 32(h) and Rule 49.1's exemptions from redaction. Also noted are the Committee's discussion of several proposed amendments that will likely come at a later time to the Standing Committee: (1) an amendment to Rule 16 requiring the prosecution to disclose exculpatory and impeachment information; (2) amendments to the rules governing §§ 2254 and 2255 cases and new Rule 37 to regularize collateral review; (3) amendments to the criminal forfeiture rules; and (4) amendments to Rule 41 to adapt it to searches and seizures of electronically stored information. Finally, the Committee heard from Judge Kravitz and from its subcommittee regarding the Time Computation project.

II. Information Items

A. Items Referred by the Standing Committee

At its June 2006 meeting, the Standing Committee referred two matters to the Criminal Rules Committee for additional discussion. The Rules Committee took up these issues at its October meeting.

1. Rule 32(h). Notice Regarding Non-Guideline Sentencing Factors

At its June meeting the Standing Committee voted to return the proposed amendment to Rule 32(h) to the Committee. The amendment was part of the package of rules designed to conform the Criminal Rules to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). Currently, Rule 32(h) requires notice that the court is considering departing from the Guidelines on the basis of factors not identified in the presentence report or prehearing submissions. The proposed amendment stated that the court must provide the same notice when considering a non-guideline sentence based upon a factor in 18 U.S.C. § 3553(a) that was not identified in the presentence report or prehearing submissions. The purpose of the proposed amendment was to avoid unfair surprise and give the parties an opportunity to be heard. Some members of the Standing Committee expressed the view that this was an evolving area of the law that was not yet ripe for codification in a rule. Others were concerned that the amendment would inappropriately limit judicial discretion, possibly requiring adjournments and delays in many cases. Finally, members questioned whether *Booker* had undermined the basis for the current notice requirement in Rule 32(h), because there should be no expectation of a guideline sentence absent notice that some other factor will be taken into account.

After extended discussion, the Committee voted 7 to 4 to reexamine the proposed amendment of Rule 32(h). The reexamination will take account of a number of issues. First, the Committee will review the cases defining the relationship between the Guidelines and other sentencing factors. Committee members noted that the circuits were not in accord on this issue, which provides the conceptual foundation for Rule 32's notice requirement. (After the meeting, the Supreme Court granted certiorari in two cases that may resolve some of the issues.) Second, the Committee will consider the lower court decisions on the related questions whether either due process or the current text of Rule 32(h) require notice to be given if the court is considering non guideline sentencing factors that have not already been identified. Although these decisions address the question of whether notice is already required – not whether the rule should be amended to add a notice requirement – their analysis may influence the Committee. Third, the Committee will address the question of what would constitute adequate notice. At both the Standing Committee and the Advisory Committee, concern was expressed that adding a notice requirement would unduly tie the court's hands and prolong sentencing, perhaps requiring many sentencing hearings to be adjourned. The Committee will canvass the cases applying the current notice requirement under Rule 32(h) to determine what has been deemed adequate notice, and under what circumstances sentencing must be adjourned to provide the parties more time to respond to issues raised by the

court. Finally, the Committee will review the cases brought to its attention by the Federal Defenders, who support the amendment to Rule 32(h) and wrote to the Committee asking that it be reconsidered.

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

When the Standing Committee approved Rule 49.1, which implements the E-Government Act of 2002, it noted two concerns that had been raised by the Court Administration and Case Management Committee (CACM). CACM suggested that the name of the grand jury foreperson should be redacted from indictments filed with the court and that identifying personal information should be redacted from search and arrest warrants filed with the court. The Standing Committee did not wish to delay the implementation of the privacy rules to consider the issues raised by CACM, but it requested that the Committee address these issues.

The Committee first discussed the question whether the grand jury foreperson's name should be redacted from indictments in order to comply with CACM's general policy of protecting jurors' safety and privacy by not disclosing their identities.

A redaction requirement would not fit easily within the current structure of the criminal rules; they provide affirmatively that the defendant has a right to see the indictment, which includes the foreperson's signature:

(1) Rule 6(c) requires that the grand jury foreperson sign each indictment;

(2) Rule 6(f) requires that the indictment be returned in open court; and

(3) Rule 10(a)(1) requires that the defendant be given a copy of the indictment.

The current rules reflect the indictment's character as the charging document that initiates the prosecution, and the grand jury's constitutional role as the charging body.

Given the indictment's special character and the interlocking rules that presently provide defendants with the indictment, including the grand jury foreperson's signature, the Committee sought to determine whether there was any indication that disclosure had resulted in problems for any forepersons. At the Committee's request, the Department of Justice reviewed its own records and surveyed the U.S. Attorneys' Offices and the U.S. Marshal's Service. The information garnered by the Department supports the view that the present rule of disclosure has not led to difficulties. The Marshal's Service, which is responsible for juror security, tracks reports of juror-related "threats or inappropriate contacts," without distinguishing between grand and petit jurors. The Marshal's Service reported only one incident nationwide in FY2003, two in FY 2004, and none in FY2005. There were 18 incidents reported in FY2006, but 16 of them concerned a single case in Nevada.

In light of the fact that it would be difficult to modify current practice to redact the foreperson's name from the indictment, the Advisory Committee voted, with one dissent, not to amend Rule 49.1 to require redaction of the grand jury foreperson's name. There was no indication of a problem under the current rule, and no information suggesting that electronic filing of the indictment would create problems. In general, the main source of threats to jurors is the defendant, who already has access to the foreperson's name under the current rule. In any case in which there is a special concern, Rule 49.1(e) authorizes the court to order redaction not otherwise required by the rule.

The Committee then turned to the question of arrest and search warrants, which are exempt from the redaction requirement under Rule 49.1(b)(8). These documents often contain information such as an individual's home address or a financial-account number that would otherwise be subject to redaction under Rule 49.1(a). CACM expressed the view that the exemption from redaction should be made only on a case-by-case basis by means of a protective order.

The Department of Justice took the position that the personal information in a search warrant is essential to the instrument, and other committee members expressed the view that there is a public interest in awareness of government activity, including who has been arrested and what locations have been searched. Discussion focused on the value of the unredacted information to the defense and the public, and the feasibility of redaction once a warrant has been executed. Additionally, the Committee noted that arrest and search warrants may also be exempt from redaction under another provision of Rule 49.1, subdivision (b)(7), which exempts "a court filing that is related to a criminal matter and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case."

The Committee decided that the issue warranted further research before its next meeting.

A. Other Information Items

1. Consideration of an Amendment to Rule 16 Concerning Disclosure of Exculpatory Evidence

On September 5 the Committee met by teleconference in a specially called meeting to continue its work on a proposal to codify and expand the Government's disclosure obligations regarding exculpatory and impeachment evidence favorable to the defense. It took the matter up in a teleconference in order to permit two members of the Committee who had taken a leading role in the work on the amendment, and whose terms were ending, to participate in the Advisory Committee's deliberations.

The proposal has a long history running back to 2003. It has been supported by outside groups, such as the American Academy of Trial Lawyers, but strongly opposed by the Department of Justice, which has consistently opposed the proposal, believing it to be unnecessary, and expressing particular concern about pretrial disclosure of the identity of prosecution witnesses.

While participating fully in efforts to draft the language of a proposed amendment, the Department also undertook efforts to develop a revision of the United States Attorneys' Manual (USAM) regarding the government's disclosure obligations that might serve as an alternative to an amendment to Rule 16. The Department presented a first draft of a proposed revision to the Rule 16 subcommittee in early 2006, received comments, and submitted revised drafts for discussion at the Committee's meetings in April and September 2006.

In September the Committee discussed at length the draft amendment to the USAM (which was in nearly final form) and the Department's proposal that it serve as an alternative to a rule change. Members applauded the Department for making substantial improvements in its draft policy, but ultimately concluded that the internal guideline was not a complete substitute for the proposed amendment to the Criminal Rules. Concern focused on the inclusion in the draft policy of subjective language limiting the obligation to disclose impeachment materials to information the prosecutor sees as "significant" or "substantial." There was also concern that the policy was limited to prosecutors, and did not alter or supercede the narrower *Giglio* policy applicable to investigators and other government agencies (though the Department suggested that it intended later to review that policy). Finally, there was a recognition that the USAM provides only internal guidance, and is not judicially enforceable. There was a suggestion that consideration of a rule should be deferred to see if the USAM amendment would be a sufficient prophylactic without any rule change. Supporters of the amendment emphasized that it is, by definition, difficult to identify cases in which the government did not disclose exculpatory or impeachment material. Since such cases ordinarily come to light only when the defense learns of the information by chance, supporters of a rule change felt it would not be possible to determine with any precision how effective the USAM by itself would be.

The Committee voted 8 to 4 during the teleconference to approve the amendment to Rule 16 and forward it to the Standing Committee. Discussion revealed, however, some concerns regarding the draft committee note. At its October meeting the Committee considered adding language to the note discussing the effect of the amendment on direct appeals or collateral motions, issues that had come up repeatedly in discussions of the proposed amendment. Ultimately, the Committee declined to adopt the proposed language.

The Committee plans to submit the proposed amendment to Rule 16 and the accompanying committee note at the June meeting of the Standing Committee, along with a detailed discussion of the history of the amendment's consideration, justifications for the amendment, a review of comparable state provisions and local rules, and other related material. It is anticipated that the Department of Justice will also submit additional material at that time.

2. Other Information Items.

The Committee now has under consideration several issues likely to yield proposals that will be brought to the Standing Committee.

A subcommittee has been reviewing proposals by the Department of Justice to amend the rules of criminal procedure to restrict the use of ancient writs, and to amend the rules governing actions under Sections 2254 and 2255 by prescribing the time for motions for reconsideration in those actions. At the October meeting the subcommittee presented a draft of new Rule 37 as well as parallel amendments to the rules governing actions under sections 2254 and 2255. Draft Rule 37 would (1) provide that the writ of coram nobis is available only to persons not in custody, (2) subject coram nobis to timing limitations similar to those applicable to habeas actions, and (3) abolish all of the other ancient writs (coram vobis, audita querela, bills of review, and bills in the nature of bills of review). Much of the discussion at the Advisory Committee's October meeting focused on the proposal, modeled on Civil Rule 60(b), to abolish the other ancient writs. In response to the question how the Civil or Criminal Rules could abolish the ancient writs, Professor Coquillette observed that this was a major concern of his, since it could shift the balance of powers between the executive and judiciary. Professor Coquillette advised that he and Professor Cooper were researching these issues and would report their findings. The Committee voted 8 to 4 to have the subcommittee continue work on these proposals for reconsideration at the April 2007 meeting. The Committee will coordinate this effort with Professors Coquillette and Cooper.

A subcommittee is reviewing the provisions of Rule 41 dealing with search warrants for electronically stored information. A full-day tutorial program developed by the Department of Justice for this subcommittee was held to enhance the members' understanding of the technical issues. The program was extremely helpful and is serving as the impetus for the development of a shorter program that will be made available to judges through the Federal Judicial Center.

A subcommittee is reviewing proposals from the Department of Justice for amendments to the rules governing criminal forfeiture. Some of the proposals are purely clarifications of the provisions, which were substantially overhauled in 2000; others raise policy issues.

Another subcommittee is working on matters relating to the time computation project, reviewing the deadlines in the Criminal Rules and determining which, if any, should be extended if the new template's "days are days" approach is adopted. These issues were discussed at the October meeting, in which Judge Kravitz participated by telephone.

Two other matters were brought before the Committee for initial discussion and will be on the agenda for future meetings. First, the Department of Justice is seeking to amend Rule 15 in order to permit the deposition of a witness outside the physical presence of the defendant under limited circumstances. Second, the Federal Magistrate Judges Board supports amending the rules to establish a procedure for issuing a warrant or a summons when a defendant violates a condition of probation or supervised release.