

ADVISORY COMMITTEE ON CRIMINAL RULES

MINUTES

October 26-27, 2006
Amelia Island, Florida

I. ATTENDANCE AND PRELIMINARY MATTERS

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

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

Also participating for some or all of the meeting were:

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

A. Chair's Opening Remarks

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

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

B. Review and Approval of Minutes

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

The committee approved the minutes of the April 2006 meeting.

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

The committee approved the minutes of the September 2006 teleconference.

C. Information on Forms Implementing the Criminal Rules

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

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

D. Report of the Rules Committee Support Office

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

II. CRIMINAL RULE CHANGES UNDER CONSIDERATION

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

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

1. Rule 11. Pleas. The proposed amendment conforms the rule to *Booker* by eliminating the requirement that the court advise a defendant during plea colloquy that it must apply the Sentencing Guidelines.
2. Rule 32. Sentencing and Judgment. The proposed amendment conforms the rule to *Booker* by clarifying that the court can instruct the probation office to include in the presentence report information relevant to factors set forth in 18 U.S.C. § 3553(a).
3. Rule 35. Correcting or Reducing a Sentence. The proposed amendment conforms the rule to *Booker* by deleting subparagraph (B), consistent with *Booker*'s holding that the Sentencing Guidelines are advisory rather than mandatory.
4. Rule 45. Computing and Extending Time. The proposed amendment clarifies how to compute the additional three days that a party is given to respond when

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

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

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

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

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

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

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

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

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

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

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

B. Proposed Amendments Approved by Standing Committee for Publication

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

1. Rule 1. Scope; Definitions. The proposed amendment, designed to implement the Crime Victims’ Rights Act (CVRA), defines a “victim.”
2. Rule 12.1. Notice of Alibi Defense. The proposed CVRA-related amendment provides that a victim’s address and telephone number should not automatically be provided to the defense when an alibi defense is raised. If a defendant can show a need for the information, the proposed amendment allows the court either

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

3. Rule 17. Subpoena. The proposed CVRA-related amendment requires judicial approval before service of a post-indictment subpoena seeking personal or confidential victim information from a third party and provides a mechanism for victim notification.
4. Rule 18. Place of Trial. The proposed CVRA-related amendment requires the court to consider the convenience of victims — in addition to the convenience of the defendant and witnesses — in setting the place for trial within the district.
5. Rule 29. Motion for Judgment of Acquittal. The proposed amendment prohibits a judge from entering a judgment of acquittal before verdict, unless the defendant waives his Double Jeopardy rights.
6. Rule 32. Sentencing and Judgment. The proposed CVRA-related amendment deletes definitions of victim and crime of violence to conform to other amendments, clarifies when a presentence report should include restitution-related information, clarifies the standard for inclusion of victim impact information in a presentence report, and provides that victims have a right “to be reasonably heard” in certain proceedings.
7. Rule 41. Search and Seizure. The proposed amendment authorizes magistrate judges to issue warrants for property outside of the United States.
8. Rule 60. Victim's Rights. The proposed new CVRA-related rule provides a victim the right to be notified, to attend public proceedings, and to be heard, and sets limits on relief.
9. Rule 61. Conforming Title. The proposed amendment simply renumbers the existing Rule 60.

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

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

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

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

IV. SUBCOMMITTEE REPORTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES

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

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

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

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

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

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

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

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

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

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

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

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

C. Time Computation Template

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

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

Judge Kravitz noted that, in the meantime, each advisory committee was in the process of reviewing the deadlines in each set of rules and, in most but not all cases, converting time periods of less than four weeks under the old system to the next highest multiple of seven under the new framework. He noted that the goal was for all the advisory rules committees to have their work completed for approval at their Spring 2007 meetings. Mr. Wroblewski reported that the Department had initiated an extensive review of statutory deadlines and expected to have the results of that review in another month or two. Judge Battaglia recommended careful scrutiny of the three- and five-day continuance rules in the Bail Reform Act in 18 U.S.C. 3142.¹

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

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

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

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

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

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

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

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

E. Procedures for Sealed Cases

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. ANNOUNCEMENT OF NEXT MEETING

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

Respectfully submitted,

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