ADVISORY COMMITTEE ON CRIMINAL RULES

MINUTES

April 3 & 4, 2006
Washington, D.C.

I. ATTENDANCE AND OPENING REMARKS

The Judicial Conference Advisory Committee on the Rules of Criminal Procedure (the "committee") met in Washington, D.C., on April 3-4, 2006. The following 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
Robert B. Fiske, Jr., Esquire
Donald J. Goldberg, Esquire
Thomas P. McNamara, Esquire
Assistant Attorney General Alice S. Fisher (ex officio)
Professor Sara Sun Beale, Reporter

Also participating in all or part 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
Judge Paul L. Friedman, Former Committee Member
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Paul J. McNulty, Deputy Attorney General
Benton J. Campbell, Counselor to the Assistant Attorney General
Jonathan J. Wroblewski, Counsel, United States Department of Justice
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
James N. Ishida, Senior Attorney at the Administrative Office
Jeffrey N. Barr, Senior Attorney at the Administrative Office

Timothy K. Dole, Attorney Advisor at the Administrative Office
Laural L. Hooper, Senior Research Associate at the Federal Judicial Center

Judge Bucklew noted that the terms of three committee members were expiring on September 30, 2006: Judge Trager, Mr. Goldberg, and Mr. Fiske. Also, she welcomed former committee member Judge Friedman, who chaired the *Booker* Subcommittee during his tenure.

II. APPROVAL OF MINUTES

Judge Tallman moved for approval of the draft minutes of the committee's October 24-25, 2005 meeting in Santa Rosa, California.

The committee without objection approved the minutes of the October 2005 meeting.

III. STATUS OF MATTERS PENDING BEFORE CONGRESS AND PROPOSED AMENDMENTS

A. Report From the Chief of the Rules Committee Support Office

Mr. Rabiej reported that the Supreme Court had approved all rule amendments submitted and that they would be physically delivered to Congress shortly. The criminal rule amendments include:

1. Rule 5. Initial Appearance. The amendment permits transmission of documents by reliable electronic means.

2. Rule 6. The Grand Jury. The amendment is technical and conforming.

3. Rule 32.1. Revoking or Modifying Probation or Supervised Release. The amendment permits transmission of documents by reliable electronic means.

4. Rule 40. Arrest for Failing to Appear in Another District. The amendment authorizes a magistrate judge in the district of arrest to set conditions of release for an arrestee who fails to appear or violates any other condition of release.

5. Rule 41. Search and Seizure. The amendment permits transmission of documents by reliable electronic means and sets forth procedures for issuing tracking-device warrants.

6. Rule 58. Petty Offenses and Other Misdemeanors. The amendment resolves a conflict with Rule 5.1 concerning a defendant's right to a preliminary hearing.

B. Proposed Crime Victims' Rights Act Amendments Approved by Standing Committee for Publication in 2006

Judge Bucklew reported that the Standing Committee had approved for publication the following rule amendments, designed to implement the Crime Victims' Rights Act (CVRA):

1. Rule 1. Scope; Definitions. The proposed amendment defines "victim."

2. Rule 12.1. Notice of Alibi Defense. The proposed amendment governs the circumstances under which a victim's address and telephone number is disclosed to the defense.

3. Rule 17. Subpoena. The proposed 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 amendment requires the court to consider victim convenience in setting the place for trial within the district.

5. Rule 32. Sentencing and Judgment. The proposed 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.

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

Judge Bucklew reported that the CVRA-related proposed rule amendments had been discussed at length at the Standing Committee's January meeting. Because proposed Rule 43.1 bears no relation to Rule 43, it was redesignated as Rule 60. Professor Beale noted that the Standing Committee's changes had been generally stylistic. One substantive issue raised in the discussion, however, was whether the presumption in Rule 12.1 should be reversed to require disclosure of a victim's address and phone number to the defense unless the court orders otherwise. The issue will be highlighted for public comment.

Judge Bucklew invited discussion of a suggestion by the Standing Committee that the committee consider adding the following provision to Rule 51, to reflect 18 U.S.C. § 3771(d)(4):

> (c) Government Assertion of Victim's Right. In any appeal in a criminal case, the government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

Professor Beale noted that this was part of the broader question of how much substantive statutory content should be imported into the rules. Judge Tallman questioned whether a procedural rule should include a provision whose remedy would presumably be substantive: having the judgment and conviction vacated and the case remanded. Mr. Campbell stated that the Department considered the addition unnecessary. Professor Beale noted that the provision primarily affected the government, which was well aware of its statutory rights. Judge Jones moved that the committee not recommend publishing the proposed Rule 51(c). Professor King said that she thought that the proposed rule should be an appellate rather than a criminal rule, because it involves assertion of error on appeal. Professor Beale suggested referring the rule to the Appellate Rules Committee.

The committee voted not to send proposed Rule 51(c) to the Standing Committee.

C. Proposed Amendments Published for Public Comment

Judge Bucklew noted that comments were received on the following proposed amendments:

1. Rule 11. Pleas. The proposed amendment would conform the rule to *United States v. Booker*, 543 U.S. 220 (2005), by revising the court's advice to a defendant during the plea colloquy to reflect the advisory nature of the Sentencing Guidelines.

2. Rule 32. Sentencing and Judgment. The proposed amendment would conform the rule to *Booker* by (1) 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); (2) requiring the court to notify parties that it is considering imposing a non-guideline sentence based on factors not previously identified; and (3) requiring the court to enter judgment on a special form prescribed by the Judicial Conference.

3. Rule 35. Correcting or Reducing a Sentence. The proposed amendment would conform the rule to *Booker* by deleting subparagraph (B) and specifying that the Sentencing Guidelines are advisory rather than mandatory.

4. Rule 45. Computing and Extending Time. The proposed amendment clarifies how to calculate the additional three days given a party 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."

The committee discussed the public comments received on the proposed amendment of Rule 11, which governs the court's advice to a defendant during a plea colloquy. Professor Beale noted that the United States Sentencing Commission had recommended replacing "calculate" with the phrase "determine and calculate" in subparagraph (b)(1)(M) to give defendants a clearer picture of the judge's role in sentencing. Other comments suggested that the proposed amendment accorded the Sentencing Guidelines greater prominence than warranted under *Booker* and insufficiently emphasized the remaining sentencing factors set forth in 18 U.S.C. § 3553(a). Professor Beale noted that she agreed with the suggestion of the Federal and Community Defenders that references to the Fifth Amendment requirement of proof beyond a reasonable doubt in the committee notes accompanying the CVRA-related proposed rule amendments should be deleted, because the Supreme Court rested its holding in *Booker* solely upon the Sixth Amendment.

Several committee members expressed concern that the proposed Rule 11 amendment appeared to require the judge to calculate the applicable sentencing-guidelines range even when doing so was unnecessary, such as when the range was clearly trumped by an applicable mandatory minimum. Judge Bartle suggested accommodating these situations by replacing "calculate" with the term "consider." But Ms. Fisher responded that "consider" would be too vague. Judge Trager suggested referring to "the court's obligation ordinarily to calculate the applicable sentencing-guideline range." Several members suggested that the qualifier "ordinarily" would be unhelpful and confusing to defendants. Following an extensive discussion and two initial votes, Ms. Fisher moved to send the proposed amendment to the Standing Committee as revised by Professor Beale (i.e., without the Fifth Amendment reference in the note), but retaining the phrase "the court's obligation to calculate," as originally published. Judge Wolf expressed concern that the proposed amendment might be misconstrued as undermining such post-*Booker* decisions as *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). Ms. Fisher said that the Department would not object to acknowledging *Crosby* in the note.

***The committee voted 9-3 to send the proposed Rule 11(b)(1)(M) amendment to the Standing Committee as published, except for two changes to the note: deletion of the reference to the Fifth Amendment and the addition of a reference to* Crosby.**

The committee discussed the proposed Rule 32(d)(1) amendment. Professor Beale suggested adding "Advisory" to the heading to reflect *Booker*: "Applying the Advisory Sentencing Guidelines."

The committee without objection approved the change to the proposed Rule 32(d)(1) amendment.

Professor Beale noted that the public comments received with respect to the published draft of the proposed Rule 32(h) amendment identified several ambiguities. She recommended adopting the changes proposed by the Sentencing Commission and revising the rule to read as follows:

> **Notice of Intent to Consider Other Sentencing Factors.** Before the court may rely on a ground not identified for departure or a non-guidelines sentence 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. The notice must specify any ground not earlier identified for departing or imposing a non-guideline sentence on which the court is contemplating imposing such a sentence.

Following a brief discussion of the purposes served by providing counsel with advance notice, Judge Trager moved to adopt the revisions recommended by Professor Beale.

The committee without objection approved the changes to the Rule 32(h) amendment.

Professor Beale noted that recent legislation requiring courts to use the judgment form prescribed by the Judicial Conference may have made the proposed amendment to Rule 32(k) unnecessary. Specifically, § 735 of the USA PATRIOT Improvement and Reauthorization Act amended 28 U.S. C. § 994(w) to require submission to the Sentencing Commission of "the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission." Mr. Rabiej reported that the amendment had been requested originally by the Criminal Law Committee, but given the new statute, that recommendation had been withdrawn. Professor King moved to withdraw the proposed amendment.

The committee without objection decided to withdraw the Rule 32(k) amendment.

Professor Beale recommended against adopting the changes to the Rule 35 amendment suggested by the Sentencing Commission and the National Association of Criminal Defense Lawyers (NACDL). The Commission suggested preserving the existing rule's explicit reference to the Sentencing Guidelines and questioned whether the *Booker* remedial opinion applied to post-sentencing proceedings. Meanwhile, NACDL wrote that, following *Booker*, the rule should no longer *require* a government motion, because even in its absence, a sincere effort at cooperation might constitute "powerful evidence of rehabilitation" under 18 U.S.C. § 3553(a).

The committee without objection approved the Rule 35 amendment without change.

Professor Beale noted that the only public comment received on the proposed Rule 45 amendment was from NACDL, which expressed appreciation to the committee for clarifying a rule that has "occasionally vexed and confused the most dedicated practitioner."

The committee without objection approved the Rule 45 amendment.

IV. SUBCOMMITTEE REPORTS

A. Rule 49.1. Proposed E-Government Rule

The committee discussed several changes to the proposed Rule 49.1 draft. Professor Capra, the lead reporter designated by the Standing Committee to coordinate the efforts of the advisory rules committees in developing a uniform E-Government rule, joined the meeting by telephone. Judge Bucklew noted that the E-Government Subcommittee, chaired by Judge Bartle, had met to consider the recently proposed changes, which fell into two categories: (1) changes affecting all E-Government rules; and (2) those affecting only Criminal Rule 49.1.

Professor Beale noted that changes of the first variety included, for instance, a request from the Bankruptcy Rules Committee that all references to "person" be changed to "individual" to distinguish from a different meaning of "person" as defined by a specific Bankruptcy Rule The reporters of the respective committees had additionally agreed to a few other minor style changes.

One proposed change affecting only Criminal Rule 49.1 was the suggestion of the Committee on Court Administration and Case Management (CACM) that subdivision (a) be amended to require redaction of the names of petit jury and grand jury forepersons on verdict forms and indictments, replacing them with their initials. Judge Levi raised concerns about how this proposal would work in practice, noting the legal importance of having an original, unredacted, signed version of these court documents. Judge Bucklew suggested that perhaps a foreperson could sign one form, which could be sealed, then initial a second, public form. Judge Battaglia expressed concern that the change might mean that, at arraignment, the court would no longer provide a defendant with an unredacted copy of the signed grand jury indictment. Judge Jones cautioned against creating an anonymous justice system, as exists in some foreign countries. Judge Wolf suggested that, absent specific findings, the public should be entitled to see any document filed in open court. Judge Bucklew asked whether the proposed change should be published first for public comment. Noting that this is a complicated issue being handled very differently in different districts, Judge Levi suggested that an empirical study might be beneficial to determine as a preliminary matter whether public disclosure of jury foreperson signatures has caused problems sufficient to justify a national rule requiring every court to redact them from every grand jury indictment and every petit jury verdict form.

The committee without objection decided that proposed Rule 49.1 should not require redaction of identifying juror information at this time, pending further study.

Professor Beale noted that the phrase "a party or non party making a filing" had been added to Rule 49.1(a) to make clear that the redaction obligation applies to all filers, not just parties. She also noted the Department of Justice's suggestion, agreed to by the other rules committee reporters, to move the phrase "in a forfeiture proceeding" to the end of paragraph (b)(1) to make clear that the redaction exemption also applies to forfeiture filings in related ancillary proceedings. The revised

rule would read as follows: "(1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;"

Responding to a concern by CACM that applies most directly to bankruptcy cases, Professor Beale said that all the committee reporters as well as the E-Government Subcommittee had agreed to modify the redaction exemption in paragraph (b)(4) as follows to keep the rules parallel: "the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed." Judge Jones asked whether this change obviated the need to exempt "the official record of a state-court proceeding" in paragraph (b)(3). Professor Capra acknowledged an overlap in the two rules. Professor Beale suggested, however, that this concern might not be worth pursuing at this late stage, given the need to coordinate all template changes across multiple committees.

Professor Beale noted that the words "pro se" had been added to the beginning of Rule 49.1(b)(6) and (b)(7) in the revised draft , thereby excluding from the redaction exemption all filings submitted by counsel in actions brought under 28 U.S. § 2254, § 2255, or § 2241. This change had been proposed by the E-Government Subcommittee chaired by Judge Bartle. Judge Tallman and Judge Jones recommended omitting both (b)(6) and (b)(7) entirely and requiring *all* litigants to redact their filings, as CACM had suggested in its comments, understanding that enforcement could be relaxed in pro se cases as appropriate. Judge Bartle and Professor King objected to this approach, citing potential legal consequences if a pro se petitioner's failure to redact sensitive information violated a rule. Professor Capra noted that the government could always seek a protective order if a pro se filing included unredacted information that raised security concerns.

Judge Bartle asked why the language of subdivision (d) could not parallel (c), thereby according judges greater discretion to determine when a protective order is appropriate. Subdivision (c) begins, "The court may order that a filing be made under seal without redaction." Subdivision (d) provides, "If necessary to protect private or sensitive information that is not otherwise protected under (a), the court may by order in a case . . . ." Professor Beale noted that subdivision (d) sets forth a standard for when protective orders are proper, a compromise between advocates of privacy and advocates of open government. By contrast, she said, the standard for sealing is already well established by case law. Judge Bartle moved that subdivision (d) be revised as follows to reflect the more flexible standard for issuance of protective orders set forth in Civil Rule 26(c):

> "**Protective Orders.** For good cause shown, the court may by order in a case: (1) require redaction of additional information; or (2) limit or prohibit a non party's remote electronic access to a document filed with the court."

Professor Capra said he would advise the other rules committees of this change and asked the committee to authorize its chair and reporter to work with the chairs and reporters of the other committees to resolve any last-minute wording issues. Professor Capra noted that the phrase "in a case" in subdivision (d) should be retained to make clear that any protective orders of this nature must be issued on a case-by-case basis, not as a standing order.

The committee without objection approved the change proposed by Judge Bartle and granted the chair and the reporter authority to work with the chairs and the reporters of the other rules committees to resolve any last-minute wording issues in the interest of uniformity.

Professor Beale noted that the committee had given early approval to the redaction exemptions in paragraphs (b)(8), (b)(9), and (b)(10), as requested by the Department of Justice. Mr. Campbell stressed the importance of particularity and identification in such documents as arrest or search warrants and said that the public has a right to know with some specificity who was arrested or charged with a crime and where a search was executed. Judge Bucklew noted that CACM had expressed concern with the breadth of the exemptions. Judge Jones moved to retain the exemptions.

The committee without objection decided to retain the exemptions in proposed Rule 49.1(b)(8), (9), and (10).

Judge Bartle moved that the committee approve the entire text of Rule 49.1 as revised.

The committee without objection approved the revised draft of Rule 49.1.

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

Deputy Attorney General Paul McNulty attended the meeting for the committee's discussion of the proposed Rule 16 amendment. Judge Bucklew noted that, since the committee's last meeting, the Department of Justice had circulated two drafts of a proposed revision to the United States Attorneys' Manual (USAM) as an alternative to amending Rule 16. Ms. Fisher explained that the proposal was designed to address some of the concerns prompting the effort to amend the rule. She said that the revision of the Manual would promote prosecutorial uniformity and regularity nationwide, would allow for early disclosure of exculpatory and impeaching evidence, and would encourage prosecutors in most cases to exceed the disclosure requirements mandated by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).

Mr. Fiske raised several concerns with the Department's proposed USAM revision and asked whether the USAM revision would require a disclosure regardless of materiality. Ms. Fisher noted that subsection B of the proposed revision to the Manual "encourages prosecutors to take an expansive view of its disclosure obligations and err on the side of broad disclosure without engaging in speculation as to whether the evidence will be material to guilt or the outcome of a trial." Mr. Goldberg pointed out, however, that the proposed revision is merely hortatory and includes broadly defined exceptions. Under the proposal, it would be impossible to determine in a given case whether the government's disclosure of exculpatory and impeaching information was broad or narrow. Mr. Goldberg asked whether the USAM proposal was simply an alternative to a Rule 16 amendment or would be implemented regardless of how the committee chose to proceed.

Ms. Fisher responded that the USAM revision was proposed as an alternative to a rule change. Under its proposed revision standard, prosecutors would continue to weigh materiality before disclosing exculpatory or impeaching evidence, but would be encouraged to construe materiality broadly. She added that exceptions were important to protect witnesses and the national security. Judge Wolf suggested that, where witness safety or national security considerations required an exception, the Department could simply request a protective order. Ms. Fisher replied that Judge Wolf's concerns could largely be addressed in a further revision of the USAM draft. Mr. Goldberg suggested that a judge rather than a prosecutor should determine whether non-disclosure of exculpatory or impeaching information is warranted in a particular case. He warned that, without the rule amendment, which the committee had been working on for nearly three years, conflicting local rules would emerge. Ms. Fisher suggested that the USAM revision would promote national uniformity and regularity of practice. Mr. McNamara replied that only a rule could accomplish that.

Because the committee voted at the Spring 2005 meeting to amend the rule in concept, Judge Bucklew said that the issue could be revisited only upon the motion of a member who had previously voted to approve the amendment. She noted that the Department had invested significant time in drafting a new USAM section to address some of the committee's concerns and that the Department had indicated that it would vigorously oppose the proposed Rule 16 amendment at the Standing Committee and beyond, if necessary. Judge Tallman recommended against approving a rule that might well be rejected later in the rulemaking process. Rather, he suggested that the committee welcome the proposed USAM addition as incremental progress and afford it some time to work, with the understanding that if it did not, Rule 16 could be amended at some later date.

Mr. Fiske announced that, if the Department were willing to make the two main changes urged by members of the committee — eliminating the materiality test and providing notice of which disclosure standard is being used in each case — he was prepared to support the USAM proposal. It was moved that the proposed rule amendment be tabled until the following meeting. The committee's initial vote was split 6 to 6. As committee chair, Judge Bucklew broke the tie by voting in favor of the motion to table the proposed amendment.

The committee voted 7-6 to table the proposed Rule 16 amendment until the next meeting.

Concern was raised that the terms of Mr. Fiske and Mr. Goldberg, two Rule 16 Subcommittee members who had worked hard on the proposed rule amendment, would expire before the next committee meeting. It was suggested that the committee reconvene again before the expiration of their terms, perhaps by teleconference, to determine (1) whether the Department had added a new U.S. Attorneys' Manual section on disclosure of exculpatory and impeaching information, and (2) whether its wording adequately addressed the main concerns raised by Mr. Fiske and others. Judge Bucklew suggested resolving any wording questions so that the only issue left for the teleconference would be whether to send the proposed rule amendment to the Standing Committee. Following discussion of the changes made to the Rule 16 amendment since the October

2005 meeting, Mr. Fiske moved to table consideration of the Rule 16 amendment proposal until a special session of the committee could be convened on or before September 30, 2006.

The committee without objection decided to table the proposed Rule 16 amendment until a special session of the committee could be convened on or before September 30, 2006.

Mr. Fiske was unable to attend the remainder of the meeting.

C. Rule 29. Proposed Amendment Regarding Motion for a Judgment of Acquittal

Professor Beale reported that the Rule 29 Subcommittee had addressed the concerns raised at the previous committee meeting. The changes clarified the defendant's waiver of double jeopardy rights, permitted courts either to deny or defer a mid-trial motion for a judgment of acquittal, and made the rule more user-friendly overall. Judge Bucklew noted that a majority of the committee had expressed support for the proposed amendment in a straw vote taken in a previous meeting.

Judge Friedman reported significant concern among judges with whom he had discussed the provision on the waiver of double jeopardy rights. Judge Tallman said that he welcomed the proposed amendment, which, in his view, would have positively altered the outcome of a recent Ninth Circuit *en banc* decision. Judge Jones said he opposed the proposal because erroneous preverdict judgments of acquittal were not a major problem, and the change would undermine the public policy underlying the double jeopardy clause. He predicted that it would also inadvertently create other problems, such as potentially depriving the district court of jurisdiction in an ongoing trial if, after the court granted a judgment of acquittal on fewer than all counts or to fewer than all co-defendants, the government appealed the ruling.

Mr. Campbell said that the Department had conducted an internal survey among U.S. attorney's offices nationwide to determine whether erroneous preverdict judgments of acquittal represented a major problem. The results, he said, showed that the problem is "more widespread than we thought," occurring in a significant number of cases. Mr. Campbell stressed the voluntary nature of the waiver of double jeopardy rights and predicted that Judge Jones's concerns about loss of jurisdiction during a partial appeal would not prove problematic in practice.

At Judge Trager's suggestion, the committee decided first to vote on the revised wording of the proposed amendment, then to vote as a policy matter whether to endorse the proposal for publication. Judge Trager moved to accept the current wording of the proposed amendment.

The committee without objection approved the wording of the Rule 29 amendment.

Judge Tallman moved to approve the amendment for publication. Judge Wolf expressed concern that the proposal took power away from judges. Judge Jones noted that many judges would

oppose the proposal. Mr. Wroblewski said that the proposed amendment would simply transfer power from a single trial-level judge to a panel of three appellate judges.

The committee voted 6-5 to send the proposed Rule 29 amendment to the Standing Committee with a recommendation that it be published for public comment.

V. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES

A. Time Computation Subcommittee

Judge Kravitz briefed the committee on the time computation template, which abolishes the "10-day rule" and adopts the "days are days" principle. If the Standing Committee at its June meeting approves the Time Computation Subcommittee's proposal, he said, each Advisory Rules Committee will be asked to review their deadlines and consider how best to translate those time units into the new time computation framework. Judge Kravitz recommended that a subcommittee be appointed to begin work immediately following the Standing Committee's June meeting.

Judge Kravitz noted that the subcommittee had resolved the question of how to calculate an hour-based deadline that falls on a weekend or holiday by extending the deadline to the *same* hour — not the *first* hour — of the following business day. There were two issues that the subcommittee discussed but left unresolved. First, the group debated whether a definition of court inaccessibility was needed, given that physical access to the courthouse did not always coincide with electronic access to a court's computer servers. The second unresolved issue was whether to eliminate the three-day rule for any means of service other than postal mail. Judge Bucklew and Professor King recommended allowing districts to interpret court inaccessibility differently. Judge Jones said he would oppose abolishing the three-day rule for electronic filing, given an increase he has noticed in Saturday morning e-filings, which opposing counsel often does not learn about until Monday morning. Judge Kravitz noted that the subcommittee's overriding concern was to try to prevent such gamesmanship. Also, the subcommittee recommended that each committee consider using multiples of seven in calculating specific deadlines, but had decided against including this as a template requirement. Following discussion, Justice Edmunds moved to approve the time computation template for eventual publication with each committee's specific deadline changes.

The committee without objection approved the template for eventual publication.

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

The committee discussed the Department's proposed amendment to Rule 12(b)(3)(B), which would prohibit defendants from challenging the facial validity of an indictment or information during or following trial. Mr. Campbell said that the proposed amendment would not affect challenges to

the court's jurisdiction, but would simply require defendants to file motions alleging a failure to state an offense in a more timely fashion, at the pre-trial stage.

Judge Wolf asked what a court should do if, mid-trial, an element of the offense is found to be missing from the indictment. Judge Jones asked whether constitutional issues would be raised if a defendant were convicted of being a felon in possession of a firearm, despite the fact that the interstate commerce nexus, though evidenced at trial, was never properly alleged. Judge Tallman said that, absent a due process notice problem, the case law indicated that the court had the inherent authority to continue the trial and allow a superseding indictment to be filed. The proposed amendment would simply set a procedural deadline for raising a facial attack, he said, and would not mean that failure to do so constitutes a waiver of constitutional objections. Mr. Goldberg said that the proposal was consistent with *United States v. Cotton*, 535 U.S. 625 (2002). Responding to a question by Mr. McNamara, Mr. Campbell said that he suspected that the situation addressed by the proposed amendment was actually "not that common." Judge Wolf moved to table the proposal until the October 2006 meeting. Judge Trager suggested that the committee needed a more detailed memorandum analyzing the Department's proposal before taking any action.

The committee voted 9-2 to table the proposed amendment until the October 2006 meeting.

C. Rule 41. Warrants for Digital Evidence

There was a discussion of the proposal to amend Rule 41 to address concerns raised by George Washington University Law Professor Orin S. Kerr in his article, *Search Warrants in an Era of Digital Evidence*, 75 MISS. L. J. 85 (2005). Judge Battaglia explained that search warrants for computerized data are regularly causing problems for magistrate judges across the country. Computers are initially seized and transported to labs, and only later are the data stored on the computers searched. Rather than simply adopting Professor Kerr's suggested rule amendments, Judge Battaglia recommended appointing a subcommittee to study the issue and to draft a rule amendment proposal. Mr. Wroblewski suggested that the committee wait until the Supreme Court had clarified how particular a search warrant for computerized data needs to be. Judge Bucklew appointed a subcommittee to examine this issue, to be chaired by Judge Battaglia.

The committee without objection decided to have a subcommittee study this issue further.

D. Rule 41. Authorizing Magistrate Judge to Issue Warrants for Property Outside of United States, Department of Justice Proposal

The committee discussed the Department's proposal to amend Rule 41(b) to authorize magistrate judges to issue warrants for property that lies within the jurisdiction of the United States but outside that of any state or federal judicial district. Mr. Campbell said that the proposed amendment would address, for instance, the Department's current inability to execute a search warrant in American Samoa, because the U.S. territory is not within the jurisdiction of any district

court. Judge Jones asked why the proposed rule did not cover United States military bases or other areas abroad controlled by the United States. Mr. Campbell said that the proposal had undergone extensive review by such agencies as the Department of State and the Office of Management and Budget and that its scope was deliberately kept narrow to avoid any thorny international issues. Judge Trager moved to send the proposal to the Standing Committee with a recommendation that it be published for public comment.

Judge Battaglia said that, although he supported solving the problem illustrated by the American Samoa situation, he thought that any jurisdictional change would require Congressional action. He also raised concern about the proposal's creation of a hierarchy among magistrate judges by conferring jurisdiction for foreign warrants on the three magistrate judges in the District of the District of Columbia. Mr. Wroblewski said that the Department had considered seeking legislation, but thought that only forum, not jurisdiction, was at issue, and that it might be more respectful to come to the rules committees first. He and Mr. Campbell noted that Congress has already invested the District of Columbia court with default jurisdiction over several categories of extraterritorial and international matters. Judge Battaglia suggested designating the District of Columbia as the default forum when no other court had jurisdiction rather than as an alternative forum in every instance. Mr. Campbell said that the Department would not oppose that change. Judge Trager, however, recommended publishing the proposed amendment as drafted by the Department.

The committee voted 10-1 to approve the Rule 41(b) amendment as drafted and send it to the Standing Committee with a recommendation that it be published for public comment.

Professor Beale advised that she would draft a committee note and circulate it for committee approval before sending the note to the Standing Committee.

E. Amending the Collateral Relief Procedures, Department of Justice Proposal

The committee discussed the Department's proposal to invalidate the writs of *coram nobis, coram vobis, audita querela,* bills of review, and bills in the nature of review by adding a new Rule 37 and amending the Rules Governing Section 2254 and Section 2255 Proceedings. Mr. Wroblewski said that the proposal was designed to provide "one-stop shopping" for these collateral relief procedures as part of a decade-long effort by Congress and the federal rules committees to regularize federal habeas practice. He cited *Gonzalez v. Crosby*, 545 U.S. __, 125 S. Ct. 2641 (2005), where the Supreme Court held that petitioners could challenge irregularities in a habeas proceeding with a Rule 60(b) motion, but not the substance of a previous court habeas decision on the merits. The Department's proposal would authorize motions for reconsideration in actions brought under 28 U.S.C. §§ 2254 and 2255, Mr. Wroblewski said, but would restrict Rule 60 motions in accordance with *Gonzalez* and would also require certificates of appealability. Following discussion, Judge Jones moved to table the proposal for preliminary consideration by a subcommittee. Judge Bucklew indicated that she would appoint a subcommittee.

The committee without objection decided to table the proposal until the next meeting.

F. Rules 7 and 32.2, Department of Justice Proposal

As an informational matter, Judge Bucklew reported that the Department's proposal to amend Rules 7 and 32.2 with respect to criminal forfeiture had been referred to a subcommittee chaired by Judge Wolf. The subcommittee had met twice and determined that additional work was necessary before it could make a recommendation. Judge Friedman, who recently issued an opinion denying the government a monetary judgment in a criminal forfeiture case, expressed concern about affording the government an independent source of authority for monetary judgments.

VI. REPORT ON STATUS OF RELEVANT LEGISLATION

There was a brief discussion of legislation enacted after Hurricane Katrina authorizing courts to sit outside their jurisdiction under certain circumstances as well as of the Department's legislative proposal to reinstate a mandatory sentencing scheme, through "mandatory minimum guidelines," in the wake of the Supreme Court's decisions in *Booker*, *supra*, and *Blakely v. Washington*, 542 U.S. 296 (2004).

VII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Before adjourning the meeting, Judge Bucklew reminded the members that the committee's next meeting is scheduled for October 26-27, 2006, in Amelia Island, Florida.

Respectfully submitted,

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