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

To: **Hon. Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

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

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

Date: **May 12, 2008**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met on April 27-28, 2008 in Washington, D.C , and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are attached.

This report addresses a number of action items

(1) approval for transmission to the Judicial Conference of published amendments to time computation Rule 45(a) and related amendments to Rules 5.1, 7, 12.1, 12 3, 29, 33, 34, 35, 41, 47, 58, 59, and Rule 8 of the Rules Governing §§ 2254 and 2255 Cases,

(2) approval for transmission to the Judicial Conference of published amendments to Rules 7, 32, 32.2, 41, and Rule 11 of the Rules Governing §§ 2254 and 2255 Cases, and

(3) approval for publication and comment of proposed amendments to Rules 6, 15, and 32 1

II. Action Items—Recommendations to Forward Amendments to the Judicial Conference

A. Time Computation Rules

The first group of amendments the Committee recommends for transmission to the Judicial Conference are part of the time computation project No comments specific to the Criminal Rules affected by the time computation project were received during the period for notice and public comment, and the Committee voted unanimously in favor of each of the proposed amendments described below.

1. ACTION ITEM—Rule 45(a)

The Advisory Committee voted unanimously to recommend that Rule 45(a) be amended as part of the time computation project. Only one aspect of the proposed rule deserves special mention Following the template, proposed Rule 45(a) applies to statutory time periods as well as to periods stated in the rules, with the exception of statutes that provide for a different time counting rule (such as "business days" or "excluding Saturdays, Sundays, and holidays") At present, it is not clear whether Rule 45(a) applies to statutory time periods. Unlike the comparable provisions in the other rules (such as Fed. R. Civ P. 6(a)), Rule 45(a) currently contains no reference to statutory time periods, nor did it retain the general language "any time period" used prior to restyling. Accordingly, the proposed Committee Note recognizes that the new language may broaden the applicability of Rule 45. It states that the general time computations do not apply to Rule 46(h), because that rule is based upon a statute that provides for a different time-counting method.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 45(a) be approved as published and forwarded to the Judicial Conference.

The Committee was also unanimous in recommending the following amendments to time periods that are intended to compensate for the change to a "days are days" method of counting time.

2. ACTION ITEM—Rule 5.1

Rule 5 1 requires a preliminary hearing to be held within 10 days after a defendant's initial appearance if the defendant is in custody or 20 days if the defendant is not in custody. The Committee recommends extending these periods to 14 and 21 days if proposed Rule 45(a) is adopted, but notes that the statutory periods are based upon 18 U S.C. § 3060(b) Because of the statutory basis of the time periods in the current rule, this proposal is contingent upon the adoption of a statutory amendment. If the statute can be amended, conversion to 14 and 21 days would be the rough equivalent of the times under the current rule.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 5.1 be approved as published and forwarded to the Judicial Conference.

3. ACTION ITEM—Rule 7

The Committee unanimously concluded that the time for motions for a bill of particulars should be increased from 10 to 14 days if proposed Rule 45(a) is adopted.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 7 be approved as published and forwarded to the Judicial Conference.

4. ACTION ITEM—Rule 12.1

Rule 12 1 (alibi defense) establishes time periods for responses and disclosure The Committee concluded that if proposed Rule 45(a) is adopted, the 10 day periods for the defendant's response and the government's disclosure under Rule 12.1(a)(2) and (b)(2) should be increased from 10 to 14 days.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 12.1 be approved as published and forwarded to the Judicial Conference.

5. ACTION ITEM—Rule 12.3

Rule 12.3 (public-authority defense) establishes time periods for responses, requests, and replies. The Committee concluded that if proposed Rule 45(a) is adopted, the 10 day periods in Rule 12.3 should be increased to 14 days, and the 20 day periods should be increased to 21 days

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 12.3 be approved as published and forwarded to the Judicial Conference.

6. ACTION ITEM—Rule 29

Rule 29(c)(1) requires motions for post-verdict acquittal to be filed within 7 days after a verdict or the discharge of the jury The Committee recommends increasing the time to 14 days if proposed Rule 45(a) is adopted. At present, excluding weekends and holidays from the 7 day period means that the defense has at least 9 days for such motions. Requests for continuances are frequent, and often the motions are filed in a bare bones fashion requiring later supplementation Rather than

increasing the need for continuances, it would be preferable to set the general time at 14 days (a multiple of 7).

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 29 be approved as published and forwarded to the Judicial Conference.

7. ACTION ITEM—Rule 33

The Committee concluded that the considerations that support extending Rule 29(c)(1)'s 7 day period to 14 days apply equally to motions for a new trial under Rule 33(b)(2).

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 33 be approved as published and forwarded to the Judicial Conference.

8. ACTION ITEM—Rule 34

The Committee concluded that the considerations that support extending Rule 29(c)(1)'s 7 day period to 14 days apply equally to motions for arrest of judgment under Rule 34.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 34 be approved as published and forwarded to the Judicial Conference.

9. ACTION ITEM—Rule 35

Rule 35(a) currently allows the court to correct a sentence for arithmetic, technical, or other clear error within 7 days after sentencing (which is, in practical terms, approximately 9 days under the current counting rules) The Committee concluded that this period should be increased to 14 days if proposed Rule 45(a) is adopted. Sentencing is now so complex that minor technical errors are not uncommon. Extension of the period to 14 days will not cause any jurisdictional problems if an appeal has been filed because Fed. R App. P 4(b)(5) expressly provides that the filing of a notice of appeal does not divest the district court of jurisdiction to correct a sentence under Rule 35(a).

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 35 be approved as published and forwarded to the Judicial Conference.

10. ACTION ITEM—Rule 41

Rule 41(e)(2)(A)(i) now states that a warrant must command that it be executed within a specified time no longer than 10 days (which can be up to 14 days under the current time computation rules). The Committee recommends that the period be increased to 14 days, although it notes that the considerations here are significantly different than those pertinent to many of the other rules. First, warrants can and often are executed on nights and weekends. Second, there is a real concern that warrants not be executed on the basis of stale evidence. For that reason, the courts often set a time for execution that is shorter than 10 days. On the other hand, there are situations in which more time may be needed for the proper execution of a highly complex warrant After weighing these various considerations, the Committee concluded that designating a 14 day period was appropriate because it was the rough equivalent of the present period, followed the multiples of 7 rule of thumb, and still left the court with discretion to set a shorter time period in individual cases, as is frequently done at present.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 41 be approved as published and forwarded to the Judicial Conference.

11. ACTION ITEM—Rule 47

The Committee recommends that the current requirement under Rule 47(c) that motions be served 5 days before the hearing date be increased to 7 days if proposed Rule 45(a) is adopted.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 47 be approved as published and forwarded to the Judicial Conference.

12. ACTION ITEM—Rule 58

Rule 58(g)(2) governs appeals from a magistrate judge's order or judgment in cases involving petty offenses and misdemeanors. The Committee recommends that the time under Rule 58(g)(2) for interlocutory appeals and appeals from a sentence or conviction of a misdemeanor be increased from 10 to 14 days if proposed Rule 45(a) is adopted

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 45(a) be approved as published and forwarded to the Judicial Conference.

13. ACTION ITEM—Rule 59

The Committee concluded that the 10 day period for objections to dispositive and nondispositive determinations, findings, and recommendations by a magistrate judge under Rule 59(a) and (b) should be increased to 14 days if proposed Rule 45(a) is adopted.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 59 be approved as published and forwarded to the Judicial Conference.

14. ACTION ITEM—Rule 8 of the Rules Governing § 2254 Proceedings

The Committee recommends that the 10 day period for filing objections under Rule 8(b) be increased to 14 days if proposed Rule 45(a) is adopted.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 8 of the Rules Governing § 2254 Proceedings be approved as published and forwarded to the Judicial Conference.

15. ACTION ITEM—Rule 8 of the Rules Governing § 2255 Proceedings

The Committee recommends that the 10 day period for filing objections under Rule 8(b) be increased to 14 days if proposed Rule 45(a) is adopted.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 8 of the Rules Governing § 2255 Proceedings be approved as published and forwarded to the Judicial Conference.

B. Forfeiture Rules

Three of the published amendments—Rule 7 (indictment and information), Rule 32 (sentencing), and Rule 32.2 (forfeiture)—concern criminal forfeiture. They were drafted with the assistance of specialists from both the Department of Justice and the private defense bar, and are intended to incorporate current practice as it has developed since the revision of the forfeiture rules in 2000 The Committee recommends approval of each of the rules as published

1. ACTION ITEM—Rule 7

The amendment removes a provision that duplicates the same language in Rule 32.2, which was intended to consolidate the forfeiture related provisions. No comments were received, and the Committee voted unanimously in favor of recommending the approval of the proposed amendment to Rule 7

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 7 be approved as published and forwarded to the Judicial Conference.

2. ACTION ITEM—Rule 32

The proposed amendment provides that the presentence report should state whether the government is seeking forfeiture This is intended to promote timely consideration of issues concerning forfeiture as part of the sentencing process.

No comments were received, and the Committee voted unanimously in favor of recommending the approval of the proposed amendment to Rule 32

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 32 be approved as published and forwarded to the Judicial Conference.

3. ACTION ITEM—Rule 32.2

Several changes to Rule 32.2 are proposed In subdivision (a) the Committee proposes new language to respond to uncertainty regarding the form of the required notice that the government is seeking forfeiture. The amendment states that the notice should not be designated as a count in an indictment or information, and that it need not identify the specific property or money judgment that is sought Where additional detail is needed, it is generally provided in a bill of particulars. After extensive consideration in the subcommittee of language that would provide more detail about the use of bills of particulars, the Committee determined that the better course at this point is to leave the matter to further judicial development guided by general comments in the Committee Note

In subdivision (b)(1) the Committee proposes to add language clarifying the point that the court's forfeiture determination may be based on additional evidence or information accepted by the court in the forfeiture phase of the trial. The amendment also states that the court must conduct a hearing when requested to do so by either party, and notes that in some instances live testimony will be needed The Committee noted that the present rule, which refers to "evidence or information," does not limit the court to considering evidence that would be admissible under the Rules of

Evidence (which themselves provide that they are not applicable to sentencing). Whether this is a good policy can be debated, but it reflects a decision made in 2000 and the Committee did not seek to reopen the matter.

Proposed subdivision (b)(2) makes two changes First, it requires the court to enter a preliminary order of forfeiture sufficiently in advance of sentencing to permit the parties to suggest modifications before the order becomes final as to the defendant. Second, it expressly authorizes the court to enter a forfeiture order that is general in nature in cases where it is not possible to identify all of the property subject to forfeiture at the time of sentencing. Recognizing the authority to issue a general order reconciles the requirement that the court make the forfeiture order part of the sentence with Rule 32.2(e)(1)(A), which allows the court on motion of the government to amend the forfeiture order to include property "located and identified" after the forfeiture order was entered. The Committee Note cautions that the authority to enter a general order should be used only in unusual circumstances, and not as a matter of course.

The proposed amendments to subdivisions (b)(3) and (4) clarify when the forfeiture order becomes final as to the defendant (as opposed to third parties whose interests may be affected), what the district court is required to do at sentencing, and how to deal with clerical errors

Proposed subdivision (b)(5) clarifies the procedure for requesting a jury determination of forfeiture, and requires the government to submit a special verdict form

Proposed subdivisions (b)(6) and (7) govern technical issues of notice, publication, and interlocutory sale. They are based upon the civil forfeiture provisions in Supplemental Rule G of the Federal Rules of Civil Procedure.

The only comment received concerned proposed subdivision (b)(2), which provides for the entry of a preliminary order of forfeiture in advance of sentencing Judge Lawrence Piersol expressed concern that this might delay sentencing because the necessary information may not be available in advance. The Committee concluded that the rule as published provided a mechanism for dealing with such cases, because it provides that a court must enter a preliminary order in advance of sentencing "[u]nless doing so is impractical." Accordingly, the Committee voted unanimously to recommend the approval of the proposed amendment to Rule 32.2.

Recommendation—The Advisory Committee recommends that the proposed amendments to Rule 32.2 be approved as published and forwarded to the Judicial Conference.

C. Other Rules

The Committee also recommends that two other rules which were published for public notice and comment be approved and forwarded to the Judicial Conference.

1. ACTION ITEM—Rule 41

The proposed amendment adapts federal warrant procedures to electronically stored information, which is an increasingly important part of criminal cases. The amendment makes two key changes First, it acknowledges that the very large volume of information which can be stored on computers and other electronic storage media generally requires a two-step process in which the government first seizes the storage medium and then reviews it to determine what information within it falls within the scope of the warrant. In light of the enormous quantities of information that are often involved, as well as the difficulties often encountered involving encryption and booby traps, it is impractical to set a definite time period during which the offsite review must be completed. The Committee Note emphasizes, however, that the court may impose a deadline for the return of the medium or access to the electronically stored information.

The second change relates to the inventory. The amendment provides that in a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to a description of the physical storage media seized or copied Similarly, when business papers or other documents are seized, the inventory will often refer to a file cabinet or file drawer, rather than seeking to list each document.

The Committee voted, with one member dissenting, to recommend that Rule 41 be approved as amended and forwarded to the Judicial Conference.

Recommendation—The Advisory Committee recommends that the proposed amendments to Rule 41 be approved as amended following publication and forwarded to the Judicial Conference.

2. ACTION ITEM—Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings

The parallel amendments to Rule 11 are intended to make the requirements concerning certificates of appealability more prominent by adding and consolidating them in the Rules Governing § 2254 and § 2255 Proceedings in the District Courts. The amendments also require the district judge to grant or deny the certificate at the time a final order is issued, as now required in the

Third Circuit, *see* 3d Cir. R. 22 2, 111.3, rather than after a notice of appeal is filed.[1] This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

Several public comments were received urging the Committee to consider bifurcating the issuance of the final order and the ruling on the certificate of appealability in order to permit a party requesting a certificate in the district court to respond to the specific reasons given in the final order as well as the specific standards for issuing a certificate. The Committee considered a proposed modification that would accomplish this, but rejected it after much deliberation. The Committee concluded that a single date for the ruling on the certificate and the final order is essential to simplify and expedite appellate review. Bifurcation also increases the risk of confusion among pro se petitioners. In courts where rulings on certificates are not issued at the time of the final order, some pro se petitioners reportedly delay filing a notice of appeal believing that the time period for filing that notice does not begin until the judge rules on the certificate or a motion for reconsideration of a denial of a certificate. Moreover, even without bifurcation in the district court, a petitioner has an opportunity to brief the question whether a certificate of appealability should issue when applying for a certificate in the court of appeals.

Although the Committee rejected bifurcation, it made several changes in the rules as published to respond to the concerns raised in the public comments. First, the Committee recognized that there are some complex cases, such as death penalty cases with numerous claims, in which the district court might benefit from briefing specifically directed to the issuance of a certificate, to assist in narrowing or focusing claims for appeal. The Committee addressed this point by adding a sentence stating that before entering the order the court may direct the parties to submit arguments on whether a certificate should be issued The Committee also added two sentences at the end of the new section to address points frequently misunderstood by pro se petitioners. The addition states that (1) the district court's denial of a certificate is not separately appealable, but a certificate may be sought in the court of appeals, and (2) a motion for reconsideration of a denial of a certificate does not extend the time to appeal.

During the Committee's deliberations, there was a great deal of discussion of the confusion among pro se petitioners regarding the relationship between the notice of appeal and the certificate of appealability. The Committee concluded that it would also be desirable to address this issue in the text of the rules with a statement that a notice of appeal must be filed even if the district court issues a certificate of appealability The Committee proposes to add this language to subdivision (b) of Rule 11 of the Rules Governing § 2255 Proceedings In the case of Rule 11 of the Rules

[1]Cases filed under § 2254 are governed by Fed. R. App. P 4(a)(1)(A)'s general 30 day period for filing a notice of appeal in civil cases, but the 60 day period under Fed R App P. 4(a)(1)(B) applies to actions under § 2255 because the United States is a party

Governing § 2254 Proceedings, there is currently no subdivision addressing appeals. The Committee, therefore, proposes adding a subdivision that mirrors subdivision (b) in the Rules Governing § 2255 Proceedings. In the Committee's view, it is desirable to address this point in the text where it is most likely to be seen by pro se petitioners. This specific point was not, however, included in the text published for public comment.

The Committee voted to recommend that the published amendments be approved as amended and forwarded to the Judicial Conference. Although a number of changes were made to address issues raised by the public comments and in further deliberations regarding these issues, the Committee did not believe these changes required republication of the proposed amendments.

When the Advisory Committee initially proposed these rules for publication, each rule included another subdivision creating an exclusive procedure for seeking reconsideration in the district court of a final order in §§ 2254 and 2255 cases. This aspect of the proposal was intended to replace motions under Fed. R. Civ. P. 60(b) and incorporate the distinction drawn in *Gonzalez v Crosby*, 545 U S 524 (2005), between Rule 60(b) motions that must be treated as second or successive habeas petitions subject to AEDPA's limitations on successive petitions, and Rule 60(b) motions that did not trigger AEDPA's limits At its June meeting in 2007, the Standing Committee approved publication of the proposed Rule 11 provisions related to certificates of appealability, but remanded the relief-from-final-order portions for further consideration by the Advisory Committee After extensive discussion, the Advisory Committee voted at its April meeting not to proceed with this aspect of its original proposal, leaving the issues for further development in the courts. Accordingly, the provisions dealing with the procedures for seeking reconsideration in §§ 2254 and 2255 proceedings are not part of the rules being recommended at this time.

Recommendation—The Advisory Committee recommends that the proposed amendments to Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings be approved as amended following publication and forwarded to the Judicial Conference.

III. Action Items—Recommendations to Publish Amendments to the Rules

A. ACTION ITEM—Rule 6

The proposed amendment to Rule 6(f) allows the court to receive the return of an indictment—which generally takes only a few minutes—by video teleconference in order to avoid unnecessary cost and delay.[2] In sparsely settled districts there may be no judicial officer present in

[2]Although the present rule on its face requires the return to be made to "a magistrate judge," any Article III or territorial judge may also receive the return. Rule 1(c) provides that

the courthouse where the grand jury meets. The problem is particularly acute in several districts (Eastern California, Northern West Virginia, Southern Iowa, Southern Florida, Alaska, and Arizona), where judicial officers must travel from 145 to 260 miles each way between courthouses. In some cases, weather conditions can make this travel especially difficult and hazardous. The proposed rule will conserve judicial resources and avoid the risks attendant to this travel. Avoiding delay is also a factor since the Speedy Trial Act, 18 U.S C. § 3161(b), requires that an indictment be returned within thirty days of an arrest of an individual to avoid a dismissal of the case.

The amendment retains the general requirement that the indictment be returned "in open court." Under the amendment, the grand jury (or the foreperson) would appear in the court in the United States courthouse where the grand jury sits. Utilizing video teleconference, the judge could participate by video from a remote location, convene court, and take the return. Indictments could be transmitted in advance to the judge for review by reliable electronic means. This process accommodates the Speedy Trial Act, 18 U S.C. § 3161(b), and preserves the judge's time and safety

There is of course no historical precedent for the use of video teleconferencing, but the Supreme Court has indicated that it does not regard the historical practice regarding the return of indictments at the time of the adoption of the Fifth Amendment as binding in all respects. When the grand jury clause was adopted, the entire grand jury was required to return the indictment in open court This provided an opportunity for the individual grand jurors to be polled to determine whether a sufficient number supported each indictment, and also created a record that the defendant had been indicted. By 1912, however, the Supreme Court indicated that Congress need not be bound by this historical practice, and thus might choose to modify the requirement that the grand jury appear as a body. *Breese v. United States*, 226 U.S. 1 (1912)[3] The present rules take advantage of this flexibility, allowing the grand jury foreperson or deputy foreperson to return the indictment. The Committee recommends that the rule be amended to authorize the use of modern technology of video teleconferencing when necessary to avoid excessive cost and delay The Committee Note provides, however, that having the judge in the same courtroom remains the preferred practice, because it promotes the public's confidence in the integrity and solemnity of federal criminal proceedings.

The Committee voted to recommend that the proposed amendment to Rule 6(f) be published for notice and public comment.

"When these rules authorize a magistrate judge to act, any other federal judge may also act." Under Rule 1(b)(3) the term "federal judge" includes a magistrate judge, article III judge, and territory judge

[3]The Court stated "The reasons for the requirement, if they ever were very strong, have disappeared, at least in part, and we have no doubt that Congress, like the state of North Carolina, could have done away with it, if it had seen fit to do so instead of remaining silent " *Breese*, 226 U.S at 10.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule6(f) be published for public comment.

B. ACTION ITEM—Rule 15

The Committee recommends publication for notice and comment of an amendment to Rule 15 permitting depositions, held outside the United States, at which the defendant cannot be present, provided a showing is made that the case meets a list of strict criteria. This proposal has been under study by the Committee since 2006 when the Department of Justice brought to the Committee's attention problems arising in the prosecution of transnational crimes. In recent years the Department has encountered many instances in which critical witnesses lived in, or had fled to, other countries. Witnesses who are outside the United States are beyond the subpoena power of the federal courts, and it is not always possible to secure their voluntary attendance in the United States for the trial or for a pretrial deposition In some cases, a witness agrees to be deposed outside the United States, and the defendant can be transported to the deposition. In other cases, however, a witness agrees to be deposed outside the United States, but it is not possible for the defendant to be present at the deposition. This may occur, for example, because the country in which the deposition will be held will not admit the defendant. In other cases, it is not possible to transport a defendant who is in custody to the place of the deposition in a secure fashion.

Although Rule 15 permits depositions of witnesses in certain circumstances, the current Rule does not specifically address cases in which an important witness is not in the United States and it would be impossible to securely transport the defendant to the witness's location for a deposition. Despite the absence of specific authority in Rule 15, several courts of appeals have authorized depositions of foreign witnesses without the defendant being present in limited circumstances. For example, in *United States v. Salim*, 855 F.2d 944, 947 (2d Cir. 1988), a witness held in custody in France was deposed while the defendant was in federal custody in the United States and could not be securely transported abroad. The deposition was completed through several rounds of submitting and translating questions and answers, pursuant to French law, while the defendant was accessible by phone in the United States. *Id.* at 947–48. The Second Circuit found that taking the deposition in this manner did not violate Rule 15 because the Rule is intended "to facilitate the preservation of testimony." *Id* at 949–50. The court suggested a dual approach to the application of Rule 15: "In cases involving depositions conducted within the United States—where it is within the power of the court to require the defendant's presence and within the power of the government to arrange it—a strict application of Rule 15(b) may be required." *Id* at 949 By contrast, "[i]n the context of the taking of a foreign deposition, we believe that so long as the prosecution makes diligent efforts, as it did in this case, to attempt to secure the defendant's presence, preferably in person, but if necessary via some form of live broadcast, the refusal of the host government to permit the defendant to be present should not preclude the district court from ordering that the witness' testimony be preserved anyway." *Id* at 950

Similarly, the Third Circuit approved a government requested deposition of two witnesses in Belgium who were unavailable for trial where the defendant had one telephone line that allowed him to listen to the live proceedings and another telephone line that allowed him to speak privately with his attorney, and the proceedings were videotaped *United States v Gifford*, 892 F.2d 263, 264 (3d Cir 1989), *cert. denied*, 497 U.S. 1006 (1990). The court held that an "absolute rule [requiring the defendant's presence] would transgress the general purpose of Rule 15, which is to preserve testimony 'whenever due to exceptional circumstances of the case it is in the interest of justice' to do so." *Id.* at 265 (quoting Fed. R. Crim. P. 15(a)).

Additionally, the Ninth Circuit held that "[w]hen the government is unable to secure a witness's presence at trial, Rule 15 is not violated by the admission of videotaped testimony so long as the government makes diligent efforts to secure the defendant's physical presence at the deposition and, failing this, employs procedures that are adequate to allow the defendant to take an active role in the deposition proceedings." *United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998) In that case, the court approved the deposition of Canadian witnesses without the defendant's presence, because the witnesses refused to voluntarily come to the United States to testify at trial and U.S. officials could not assure the secure transportation of the defendant to and from Canada for the deposition. *Id.*

The Committee concluded that Rule 15 should be amended to deal expressly with the issue raised in these cases. In considering this proposal, the Committee was mindful of the recent history of the 2002 proposal to amend Rule 26 to permit the taking of testimony "[i]n the interests of justice" by contemporaneous two-way video when the court finds there are "exceptional circumstances," "appropriate safeguards" are used, and the witness is unavailable within the meaning of Fed. R. Evid. 804(a)(4)–(5). The Supreme Court declined to transmit the proposed rule to Congress. Justice Scalia filed a statement in which he concurred Justice Breyer dissented in a statement joined by Justice O'Connor. These statements are included at the end of this report, along with the Committee's proposed rule.

Justice Scalia concluded that the Rule 26 proposal was contrary to *Maryland v Craig*, 497 U.S. 836 (1990), because it did not "limit the use of testimony via video transmission to instances where there has been a 'case specific finding' that it is 'necessary to further an important public policy.'" Statement of Justice Scalia, Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, at 1 (2002) He drew a sharp distinction between virtual confrontation and physical confrontation, commenting that "[v]irtual confrontation might be sufficient to protect virtual confrontation rights; I doubt whether it is sufficient to protect real ones " *Id* at 2 He also observed that "serious constitutional doubt" is an appropriate reason for the Court to decline to transmit a recommendation of the Judicial Conference *Id* at 1. In response to the argument that the proposed rule admitted video testimony only in cases in which the deposition of an unavailable witness could

be read into the record, Justice Scalia noted that Rule 15 gives a defendant the opportunity for face-to-face confrontation during a deposition.[4] *Id* at 2.

The Committee drafted the proposed rule to require "case specific findings" that the deposition is "necessary to further an important public policy." Specifically, the amendment—which is applicable only to depositions outside the United States—requires the court to find that all of the following criteria are met:

(1) the witness's testimony could provide substantial proof of a material fact;
(2) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;
(3) the witness's presence for a deposition in the United States cannot be obtained;
(4) the defendant cannot be present for one of the following reasons:
  (a) the country where the witness is located will not permit the defendant to attend the deposition;
  (b) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or
  (c) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and
(5) the defendant can meaningfully participate in the deposition through reasonable means

Although the Advisory Committee recognized that approval by the Supreme Court is by no means certain even with these limitations, the Committee strongly supports the proposal and voted unanimously in favor of recommending it for publication.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 15 be published for public comment.

C. ACTION ITEM—Rule 32.1

This amendment is designed to end confusion regarding the applicability of 18 U.S.C. § 3143(a)—to which the current Rule refers—to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion arose because several subsections of § 3143(a) are ill suited to proceedings involving the revocation of probation or supervised release *See United States v Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context

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[4]Justice Scalia also drew a distinction between the confrontation clause standards applicable to out-of-court statements and those applicable to live testimony, but that discussion predated the Court's decision in *Crawford v Washington*, 541 U.S. 36 (2004).

The current rule also provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger, but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence, which has been established by the case law.

The Committee voted, with one dissent, to recommend publication of the proposed amendment.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 32.1 be published for public comment.

IV. Information Items

A. Statutory Provisions Affected By Time Computation

As part of the time computation project, the Advisory Committee worked to evaluate statutes with short time periods that would be affected by the new time computation rules, in order to determine which statutes would be the highest priority for legislative amendment to offset the effect of the changes.

All members of the committee received a complete listing of the statutes identified by Professor Struve, and each member was asked to rate the importance of amending the statutes on a three point scale. The results of the balloting process were compiled and studied by the time computation subcommittee, which produced a draft list of 17 statutes that it recommended for inclusion on the list.

The Advisory Committee endorsed that list at its April meeting It recommends that most of these statutes be amended to provide for periods of 7 or 14 days There are, however, a group of statutes that presently provide for very short periods of 3 or 4 days for interlocutory appeals involving the Classified Information Procedure Act and the material support statute. Since those time periods reflected a precise policy-based calibration that might be disturbed by a change to 7 days, and the Committee recommends that legislation be sought that would exclude weekends and holidays from the calculation, this would leave the periods precisely as they are now. The Committee also recommends the same approach be applied to 18 U.S.C. § 3432, which provides that a person charged with treason or another capital offense shall be furnished with a list of veniremen and witnesses "at least three entire days" before trial

Subsequent to the Advisory Committee meeting, Professor Struve brought to the attention of the reporter and chair the fact that one statute similar to others proposed for amendment was not on the Committee's list. After determining that this had been an oversight, and that the justification

for amending the 10 day period to 14 days was the same as that for another closely related statute that was being recommended for legislative action, we requested this statute's inclusion on the list.

The list compiled by the Advisory Committee (including the statute noted above) is now being circulated to representatives of the appropriate committees of the American Bar and the National Association of Criminal Defense Lawyers.

B. Rule 32(h)

The Advisory Committee's initial package of *Booker* rules included a proposal to amend Rule 32(h). The current rule states that the court may not "depart from the applicable guideline range on a ground not identified for departure either in the presentence report or a party's prehearing submission" without first giving the parties "reasonable notice that it is contemplating such a departure." The Committee's proposed amendment, which was published for notice and comment, extended the notice requirement to cases in which the court was contemplating giving a sentence not in the advisory sentencing range on the basis of one of the statutory factors under 28 U.S.C. § 3553(a). (These are also called "variances" or *Booker* sentences.) The provision generated some controversy during the comment period, and after making revisions in the language to clarify the proposed amendment, the Advisory Committee recommended to the Standing Committee that it be submitted to the Judicial Conference.

The Standing Committee, noting that the circuits were divided on the closely related issue of the interpretation of current Rule 32(h), requested that the Advisory Committee give the matter further study

The Advisory Committee has deferred action because the Supreme Court granted certiorari, and has now heard argument, in *Irizarry v United States*, Docket No. 06-7517, to resolve the issue of the interpretation of Rule 32(h). A subcommittee has been appointed, and it will take up the issue after the decision is issued in *Irizarry*

C. Limiting Disclosure About Plea Agreements and Cooperating Defendants

The Advisory Committee is aware of the growing problem of disclosure of, and retaliation against, cooperating defendants and the efforts in various districts to limit the release of information about plea and cooperation agreements Although there is a consensus that no national solution has yet emerged, the Committee is following the issue closely

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE**

~~Rule 45. Computing and Extending Time~~

~~**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:~~

~~**(1) *Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period.~~

~~**(2) *Exclusion from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.~~

~~**(3) *Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is~~

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

~~not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.~~

~~(4) ***"Legal Holiday" Defined.*** As used in this rule, "legal holiday" means:~~

~~(A) the day set aside by statute for observing~~

~~(i) New Year's Day;~~

~~(ii) Martin Luther King, Jr.'s Birthday;~~

~~(iii) Washington's Birthday;~~

~~(iv) Memorial Day;~~

~~(v) Independence Day;~~

~~(vi) Labor Day;~~

~~(vii) Columbus Day;~~

~~(viii) Veterans' Day;~~

~~(ix) Thanksgiving Day;~~

~~(x) Christmas Day; and~~

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

~~**(b) Extending Time.**~~

~~**(1) *In General.*** When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made:~~

~~(A) before the originally prescribed or previously extended time expires; or~~

~~(B) after the time expires if the party failed to act because of excusable neglect.~~

~~**(2) *Exception.*** The court may not extend the time to take any action under Rule 35, except as stated in that rule.~~

~~**(c) Additional Time After Service.** When these rules permit or require a party to act within a specified period~~

~~after a notice or a paper has been served on that party, 3 days are added to the period if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D)~~

* * * * *

Rule 45. Computing and Extending Time

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

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

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

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

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

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

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

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

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

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

(A) on the last day for filing under Rule 45(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 45(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

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

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

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

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

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

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

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

Committee Note

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

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

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e g*, 18 U.S.C. § 3142(d) (excluding Saturdays, Sundays, and holidays from 10 day period). In addition, because the time period in Rule 46(h) is derived from 18 U.S.C. §§ 3142(d) and 3144, the Committee concluded that Rule 45(a) should not be applied to Rule 46(h).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years *See, e g*, Rule 35(b)(1). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

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

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

provided below in the discussion of subdivision (a)(5) Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible

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

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

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Criminal

Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires If, however, the time period expires at a specific time (say, 2.17 p m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

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

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

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise " In some circumstances, the court might not wish

a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension

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

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

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and

orders." A corresponding provision exists in Rule 56(a) Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Criminal Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.*, Rule 59(b) (stating that a court may correct an arithmetic or technical error in a sentence "[w]ithin 7 days after sentencing"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e g* , Rule 47(c) (stating that a party must serve a written motion "at least 5 days before the hearing date"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31. If the clerk's office is inaccessible on August 31, then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday, or legal holiday–no earlier than Tuesday, September 4.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Criminal Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are "declared a holiday by the President." For two cases that applied this provision to find a legal holiday on days when the President ordered the government closed for purposes of celebration or commemoration, see *Hart v Sheahan*, 396 F 3d 887, 891 (7th Cir. 2005) (President included December 26, 2003 within scope of executive order specifying pay for executive department and independent agency employees on legal holidays), and *Mashpee Wampanoag Tribal Council, Inc v. Norton*, 336 F 2d 1094, 1098 (D.C Cir. 2003) (executive order provided that "[a]ll executive branch departments and agencies of the Federal Government shall be closed and their employees excused from duty on Monday, December 24, 2001").

Rule 5.1. Preliminary Hearing

* * * * *

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

* * * * *

Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Committee Note to Rule 45(a).

Rule 7. The Indictment and the Information

* * * * *

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

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 12.1. Notice of an Alibi Defense

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

* * * * *

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

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

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

(b) Disclosing Government Witnesses.

* * * * *

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

* * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 12.3. Notice of a Public-Authority Defense

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

* * * * *

(3) ***Response to the Notice.*** An attorney for the government must serve a written response on the defendant or the defendant's attorney within ~~10~~ 14 days after receiving the defendant's notice, but no

later than ~~20~~ 21 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

(4) ***Disclosing Witnesses.***

(A) *Government's Request.* An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than ~~20~~ 21 days before trial.

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

(C) *Government's Reply.* Within ~~7~~ 14 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name, address, and telephone number of each witness the government intends to rely on to oppose the defendant's public-authority defense

* * * * *

Committee Note

The times set in the former rule at 7, 10, or 20 days have been revised to 14 or 21 days See the Committee Note to Rule 45(a).

Rule 29. Motion for a Judgment of Acquittal

* * * * *

(c) After Jury Verdict or Discharge.

(1) ***Time for a Motion*** A defendant may move for a judgment of acquittal, or renew such a motion, within ~~7~~ 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

* * * * *

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation The 14-day period—including intermediate Saturdays, Sundays, and legal

holidays as provided by Rule 45(a)—sets a more realistic time for the filing of these motions.

Rule 33. New Trial

* * * * *

(b) Time to File.

* * * * *

(2) ***Other Grounds*** Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within ~~7~~ 14 days after the verdict or finding of guilty.

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation The 14-day period—including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a)—sets a more realistic time for the filing of these motions.

Rule 34. Arresting Judgment

* * * * *

(b) Time to File. The defendant must move to arrest judgment within ~~7~~ 14 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere.

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period—including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a)—sets a more realistic time for the filing of these motions.

Rule 35. Correcting or Reducing a Sentence

(a) **Correcting Clear Error.** Within ~~7~~ 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

* * * * *

Committee Note

Former Rule 35 permitted the correction of arithmetic, technical, or clear errors within 7 days of sentencing. In light of the increased complexity of the sentencing process, the Committee concluded it would be beneficial to expand this period to 14 days, including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a). Extension of the period in this fashion will cause no jurisdictional problems if an appeal has been filed, because Federal Rule of Appellate Procedure 4(b)(5) expressly provides that the filing of a notice of appeal does not divest the district court of jurisdiction to correct a sentence under Rule 35(a).

Rule 41. Search and Seizure

* * * * *

(e) **Issuing the Warrant.**

* * * * *

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

(A) *Warrant to Search for and Seize a Person or Property.* Except for a tracking-device warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned The warrant must command the officer to:

(i) execute the warrant within a specified time no longer than ~~10~~ 14 days;

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Rule 45(a)

Rule 47. Motions and Supporting Affidavits

* * * * *

(c) **Timing of a Motion.** A party must serve a written motion — other than one that the court may hear ex parte — and any hearing notice at least ~~5~~ 7 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application.

* * * * *

Committee Note

The time set in the former rule at 5 days, which excluded intermediate Saturdays, Sundays, and legal holidays, has been expanded to 7 days. See the Committee Note to Rule 45(a).

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(g) **Appeal.**

* * * * *

(2) *From a Magistrate Judge's Order or Judgment.*

(A) *Interlocutory Appeal.* Either party may appeal an order of a magistrate judge to a district judge within ~~10~~ 14 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a notice with the clerk specifying the order being appealed and must serve a copy on the adverse party.

(B) *Appeal from a Conviction or Sentence.* A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within ~~10~~ 14 days of its entry. To appeal, the defendant must file a notice with the clerk specifying the judgment being appealed and must serve a copy on an attorney for the government.

* * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 59. Matters Before a Magistrate Judge

(a) Nondispositive Matters. A district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may serve and file objections to the order within ~~10~~ 14 days after being served with a copy of a written order or after the oral order is stated on the record, or at some other time the court sets. The district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous

Failure to object in accordance with this rule waives a party's right to review.

(b) Dispositive Matters.

* * * * *

(2) Objections to Findings and Recommendations. Within ~~10~~ 14 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may serve and file specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

* * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

PROPOSED AMENDMENT TO RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 8. Evidentiary Hearing

* * * * *

(b) Reference to a Magistrate Judge. A judge may, under 28 U S.C. § 636(b), refer the petition to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within ~~10~~ 14 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Federal Rules of Criminal Procedure 45(a).

PROPOSED AMENDMENT TO RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

Rule 8. Evidentiary Hearing

* * * * *

(b) Reference to a Magistrate Judge. A judge may, under 28 U.S.C. § 636(b), refer the motion to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within ~~10~~ 14 days after being served, a party may file objections as provided by local court rule The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Federal Rules of Criminal Procedure 45(a)

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 7. The Indictment and the Information

* * * * *

(c) Nature and Contents.

* * * * *

~~**(2) Criminal Forfeiture.** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.~~

~~(3)~~ (2) **Citation Error.** Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.

* * * * *

*New material is underlined, matter to be omitted is lined through

Committee Note

The provision regarding forfeiture is obsolete. In 2000 the same language was repeated in subdivision (a) of Rule 32.2, which was intended to consolidate the rules dealing with forfeiture.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the proposed amendment to Rule 7.

SUMMARY OF PUBLIC COMMENTS

No comments were received regarding this rule.

Rule 32. Sentence and Judgment

* * * * *

(d) Presentence Report.

* * * * *

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

(A) the defendant's history and characteristics,

including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

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

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

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

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

(E) if the court orders a study under 18 U.S.C

§ 3552(b), any resulting report and recommendation; and

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

(G) specify whether the government seeks forfeiture pursuant to Rule 32.2 and any other provision of law

* * * * *

Committee Note

Subdivision (d)(2)(G). Rule 32.2 (a) requires that the indictment or information provide notice to the defendant of the government's intent to seek forfeiture as part of the sentence. The amendment provides that the same notice be provided as part of the presentence report to the court. This will ensure timely consideration of the issues concerning forfeiture as part of the sentencing process.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the proposed amendment to Rule 32.

SUMMARY OF PUBLIC COMMENTS

No comments were received regarding this rule.

Rule 32.2. Criminal Forfeiture

(a) Notice to the Defendant A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information. The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.

(b) Entering a Preliminary Order of Forfeiture

(1) ~~***In General.***~~ ***Forfeiture Phase of the Trial.***

(A) *Forfeiture Determinations.* As soon as practical after a verdict or finding of guilty — or after a plea of guilty or nolo contendere is accepted — on any count in an indictment or information on which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.

(B) *Evidence and Hearing* The court's determination may be based on evidence

already in the record, including any written plea agreement, ~~or~~ and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If ~~if~~ the forfeiture is contested, on either party's request the court must conduct a hearing ~~on evidence or information presented by the parties at a hearing~~ after the verdict or finding of guilt.

(2) ***Preliminary Order***

(A) *Contents.* If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, ~~or~~ directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria. ~~without regard to any third~~

~~party's interest in all or part of it~~. The order must be entered without regard to any third party's interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(B) *Timing* Unless doing so is impractical, the court must enter the preliminary order of forfeiture sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4).

(C) *General Order* If, before sentencing, the court cannot identify all the specific property subject to forfeiture or calculate the total amount of the money judgment, the court

may enter a forfeiture order that.

(i) lists any identified property;

(ii) describes other property in general terms; and

(iii) states that the order will be amended under Rule 32.2(e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

(3) ***Seizing Property.*** The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third party rights ~~At sentencing or at~~

~~any time before sentencing if the defendant consents the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and be included in the judgment.~~ The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(4) ***Sentence and Judgment.***

(A) *When Final* At sentencing or at any time before sentencing if the defendant consents the preliminary order of forfeiture becomes final as to the defendant If the order directs the defendant to forfeit specific property, it remains preliminary as to third parties until the ancillary proceeding is concluded under Rule 32 2 (c).

(B) *Notice and Inclusion in the Judgment* The district court must include the forfeiture when

orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing. The court must also include the order of forfeiture, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36.

(C) *Time to Appeal* The time for a party to file an appeal from the order of forfeiture, or from the district court's failure to enter an order, begins to run when judgment is entered. If the court later amends or declines to amend an order of forfeiture to include additional property under Rule 32.2(e), a party may file an appeal regarding that property under Federal Rule of Appellate Procedure 4(b). The time for that appeal runs from the date when the order granting or

denying the amendment becomes final

(4 5) ***Jury Determination***

(A) *Retaining the Jury.* ~~Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must~~ In any case tried before a jury, if the indictment or information states that the government is seeking forfeiture, the court must determine before the jury begins deliberating whether either party requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict.

(B) *Special Verdict Form.* If a party timely requests to have the jury determine forfeiture, the government must submit a proposed Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has

established the requisite nexus between the property and the offense committed by the defendant.

(6) ***Notice of the Order of Forfeiture.***

(A) *Publishing and Sending Notice.* If the court orders the forfeiture of specific property, the government must publish notice of the order and send notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding.

(B) *Content of the Notice* The notice must describe the forfeited property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and state the name and contact information for the government attorney to be served with the petition.

(C) *Means of Publication.* Publication must take place as described in Supplemental Rule G(4)(a)(iii) of the Federal Rules of Civil Procedure, and may be by any means described in Supplemental Rule G(4)(a)(iv). Publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

(D) *Means of Sending the Notice.* The notice may be sent in accordance with Supplemental Rules G(4)(b)(iii)-(v) of the Federal Rules of Civil Procedure.

(7) ***Interlocutory Sale.*** At any time before entry of a final order of forfeiture, the court, in accordance with Supplemental Rule G(7) of the Federal Rules of Civil Procedure, may order the interlocutory sale of property alleged to be forfeitable.

* * * * *

Committee Note

Subdivision (a). The amendment responds to some uncertainty regarding the form of the required notice that the government will seek forfeiture as part of the sentence, making it clear that the notice should not be designated as a separate count in an indictment or information. The amendment also makes it clear that the indictment or information need only provide general notice that the government is seeking forfeiture, without identifying the specific property being sought. This is consistent with the 2000 Committee Note, as well as many lower court decisions

Although forfeitures are not charged as counts, the ECF system should note that forfeiture has been alleged so as to assist the parties and the court in tracking the subsequent status of forfeiture allegations.

The court may direct the government to file a bill of particulars to inform the defendant of the identity of the property that the government is seeking to forfeit or the amount of any money judgment sought if necessary to enable the defendant to prepare a defense or to avoid unfair surprise. *See, e g , United States v Moffitt, Zwerdling, & Kemler, P C ,* 83 F.3d 660, 665 (4th Cir. 1996) (holding that the government need not list each asset subject to forfeiture in the indictment because notice can be provided in a bill of particulars), *United States v Vasquez-Ruiz*, 136 F Supp.2d 941, 944 (N D Ill. 2001) (directing the government to identify in a bill of particulars, at least 30 days before trial, the specific items of property, including substitute assets, that it claims are subject to forfeiture); *United States v Best*, 657 F. Supp. 1179, 1182 (N.D Ill 1987) (directing the government to provide a bill of particulars apprising the defendants as to the time periods during which they obtained the specified classes of property through their alleged racketeering activity and the interest in each of these properties that was allegedly obtained unlawfully) *See also United States v Columbo*, 2006 WL 2012511

* 5 & n.13 (S.D. N.Y. 2006) (denying motion for bill of particulars and noting that government proposed sending letter detailing basis for forfeiture allegations).

Subdivision (b)(1). Rule 32.2(b)(1) sets forth the procedure for determining if property is subject to forfeiture. Subparagraph (A) is carried forward from the current Rule without change.

Subparagraph (B) clarifies that the parties may submit additional evidence relating to the forfeiture in the forfeiture phase of the trial, which may be necessary even if the forfeiture is not contested. Subparagraph (B) makes it clear that in determining what evidence or information should be accepted, the court should consider relevance and reliability. Finally, subparagraph (B) requires the court to hold a hearing when forfeiture is contested The Committee foresees that in some instances live testimony will be needed to determine the reliability of proffered information. Cf. Rule 32.1(b)(1)(B)(iii) (providing the defendant in a proceeding for revocation of probation or supervised release with the opportunity, upon request, to question any adverse witness unless the judge determines this is not in the interest of justice)

Subdivision (b)(2)(A). Current Rule 32 2(b) provides the procedure for issuing a preliminary order of forfeiture once the court finds that the government has established the nexus between the property and the offense (or the amount of the money judgment). The amendment makes clear that the preliminary order may include substitute assets if the government has met the statutory criteria.

Subdivision (b)(2)(B). This new subparagraph focuses on the timing of the preliminary forfeiture order, stating that the court should issue the order "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final " Many courts have delayed entry of the preliminary order until the time of sentencing This is undesirable because the parties have

no opportunity to advise the court of omissions or errors in the order before it becomes final as to the defendant (which occurs upon oral announcement of the sentence and the entry of the criminal judgment). Once the sentence has been announced, the rules give the sentencing court only very limited authority to correct errors or omissions in the preliminary forfeiture order. Pursuant to Rule 35(a), the district court may correct a sentence, including an incorporated order of forfeiture, within seven days after oral announcement of the sentence. During the seven-day period, corrections are limited to those necessary to correct "arithmetical, technical, or other clear error." *See United States v King*, 368 F. Supp. 2d 509, 512-13 (D. S C. 2005). Corrections of clerical errors may also be made pursuant to Rule 36. If the order contains errors or omissions that do not fall within Rules 35(a) or 36, and the court delays entry of the preliminary forfeiture order until the time of sentencing, the parties may be left with no alternative to an appeal, which is a waste of judicial resources. The amendment requires the court to enter the preliminary order in advance of sentencing to permit time for corrections, unless it is not practical to do so in an individual case

Subdivision (b)(2)(C). The amendment explains how the court is to reconcile the requirement that it make the order of forfeiture part of the sentence with the fact that in some cases the government will not have completed its post-conviction investigation to locate the forfeitable property by the time of sentencing. In that case the court is authorized to issue an order of forfeiture describing the property in "general" terms, which order may be amended pursuant to Rule 32.2(e)(1) when additional specific property is identified

The authority to issue a general forfeiture order should be used only in unusual circumstances and not as a matter of course For cases in which a general order was properly employed, see *United States v BCCI Holdings (Luxembourg)*, 69 F. Supp. 2d 36 (D.D C 1999) (ordering forfeiture of all of a large, complex corporation's assets in the United States, permitting the government to continue

discovery necessary to identify those assets); *United States v. Saccoccia*, 898 F. Supp. 53 (D.R.I. 1995) (ordering forfeiture of up to a specified amount of laundered drug proceeds so that the government could continue investigation which led to the discovery and forfeiture of gold bars buried by the defendant in his mother's back yard).

Subdivisions (b)(3) and (4). The amendment moves the language explaining when the order of forfeiture becomes final as to the defendant to new subparagraph (b)(4)(A), where it is coupled with new language explaining that the order is not final as to third parties until the completion of the ancillary proceedings provided for in Rule 32.2(c).

New subparagraphs (B) and (C) are intended to clarify what the district court is required to do at sentencing, and to respond to conflicting decisions in the courts regarding the application of Rule 36 to correct clerical errors. The new subparagraphs add considerable detail regarding the oral announcement of the forfeiture at sentencing, the reference to the order of forfeiture in the judgment and commitment order, the availability of Rule 36 to correct the failure to include the order of forfeiture in the judgment and commitment order, and the time to appeal

Subparagraph (b)(5)(A) The amendment clarifies the procedure for requesting a jury determination of forfeiture. The goal is to avoid an inadvertent waiver of the right to a jury determination, while also providing timely notice to the court and to the jurors themselves if they will be asked to make the forfeiture determination. The amendment requires that the court determine whether either party requests a jury determination of forfeiture in cases where the government has given notice that it is seeking forfeiture and a jury has been empaneled to determine guilt or innocence. The rule requires the court to make this determination before the jury retires. Jurors who know that they may face an additional task after they

return their verdict will be more accepting of the additional responsibility in the forfeiture proceeding, and the court will be better able to plan as well.

Although the rule permits a party to make this request just before the jury retires, it is desirable, when possible, to make the request earlier, at the time when the jury is empaneled. This allows the court to plan, and also allows the court to tell potential jurors what to expect in terms of their service.

Subparagraph (b)(5)(B) explains that "the government must submit a proposed Special Verdict Form listing each property subject to forfeiture." Use of such a form is desirable, and the government is in the best position to draft the form.

Subdivisions (b)(6) and (7). These provisions are based upon the civil forfeiture provisions in Supplemental Rule G of the Federal Rules of Civil Procedure, which are also incorporated by cross reference. The amendment governs such mechanical and technical issues as the manner of publishing notice of forfeiture to third parties and the interlocutory sale of property, bringing practice under the Criminal Rules into conformity with the Civil Rules.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The proposed amendment to Rule 32.2 was modified to use the term "property" throughout. As published, the proposed amendment used the terms property and asset(s) interchangeably No difference in meaning was intended, and in order to avoid confusion, a single term was used consistently throughout. Other small stylistic changes (such as the insertion of "the" in subpart titles) were also made to conform to the style conventions.

Additionally, two changes were made to the Committee Note. a reference to the use of the ECF system to aid the court and parties in tracking the status of forfeiture allegations, and an additional illustrative case.

SUMMARY OF PUBLIC COMMENTS

One comment was received concerning the proposed amendment to Rule 32.2

Judge Lawrence Piersol expressed concern about the requirement under Rule 32.2(b)(2)(B) that the court "enter a preliminary forfeiture order sufficiently in advance of sentencing to permit the parties to suggest modifications," because the presentence report may not contain all of the necessary information, and the court may need to take evidence at the time of sentencing. He suggested that this requirement might delay sentencing

Rule 41. Search and Seizure

* * * * *

(e) Issuing the Warrant.

* * * * *

(2) *Contents of the Warrant*

* * * * *

(B) *Warrant to Search for Electronically Stored Information.* A warrant may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(e) and (f) refers to the seizing or on-site copying of the media or information, and not to any later off-site copying or review.

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

* * * * *

(f) Executing and Returning the Warrant.

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

* * * * *

(B) *Inventory* An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to a description of the physical storage media that was seized or copied The officer may maintain a copy of the electronically stored information that was seized or copied.

50 * * * * *

Committee Note

Subdivision (e)(2). Computers and other electronic storage media commonly contain such large amounts of information that it is often impractical for law enforcement to review all of the information during execution of the warrant at the search location. This rule acknowledges the need for a two-step process: officers may seize or copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant.

The term "electronically stored information" is drawn from Rule 34(a) of the Federal Rules of Civil Procedure, which states that it includes "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained." The 2006 Advisory Committee Note to Rule 34(a) explains that the description is intended to cover all current types of computer-based information and to encompass future changes and developments. The same broad and flexible description is intended under Rule 41

In addition to addressing the two-step process inherent in searches for electronically stored information, the Rule limits the 10 [14]*** day execution period to the actual execution of the warrant and the on-site activity. While consideration was given to a presumptive national or uniform time period within which any subsequent off-site copying or review of the media or electronically stored information would take place, the practical reality is that there is no basis for a

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***The 10 day period under Rule 41(e) may change to 14 days under the current proposals associated with the time computation amendments to Rule 45

"one size fits all" presumptive period. A substantial amount of time can be involved in the forensic imaging and review of information. This is due to the sheer size of the storage capacity of media, difficulties created by encryption and booby traps, and the workload of the computer labs. The rule does not prevent a judge from imposing a deadline for the return of the storage media or access to the electronically stored information at the time the warrant is issued. However, to arbitrarily set a presumptive time period for the return could result in frequent petitions to the court for additional time.

It was not the intent of the amendment to leave the property owner without an expectation of the timing for return of the property, excluding contraband or instrumentalities of crime, or a remedy. Current Rule 41(g) already provides a process for the "person aggrieved" to seek an order from the court for a return of the property, including storage media or electronically stored information, under reasonable circumstances.

Where the "person aggrieved" requires access to the storage media or the electronically stored information earlier than anticipated by law enforcement or ordered by the court, the court on a case by case basis can fashion an appropriate remedy, taking into account the time needed to image and search the data and any prejudice to the aggrieved party.

The amended rule does not address the specificity of description that the Fourth Amendment may require in a warrant for electronically stored information, leaving the application of this and other constitutional standards concerning both the seizure and the search to ongoing case law development.

Subdivision (f)(1). Current Rule 41(f)(1) does not address the question of whether the inventory should include a description of

the electronically stored information contained in the media seized Where it is impractical to record a description of the electronically stored information at the scene, the inventory may list the physical storage media seized. Recording a description of the electronically stored information at the scene is likely to be the exception, and not the rule, given the large amounts of information contained on electronic storage media and the impracticality for law enforcement to image and review all of the information during the execution of the warrant. This is consistent with practice in the "paper world." In circumstances where filing cabinets of documents are seized, routine practice is to list the storage devices, i.e., the cabinets, on the inventory, as opposed to making a document by document list of the contents.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The words "copying or" were added to the last line of the proposed Rule 41(e)(2)(B) to clarify that copying as well as review may take place off-site.

The Committee Note was amended to reflect the change to the text and to clarify that the amended Rule does not speak to constitutional questions concerning warrants for electronic information Issues of particularity and search protocol are presently working their way through the courts. *Compare United States v Carey*, 172 F.3d 1268, 1272–73 (10th Cir. 1999) (finding that a warrant which only permitted the search of defendant's computer files for evidence pertaining to the sale and distribution of controlled substances did not extend to computer files which contained child pornography), *and United States v Fleet Management Ltd* , 521 F Supp. 2d 436, 447 (E.D. Pa 2007) (finding that a warrant was invalid

where it "did not even attempt to differentiate between data that there was probable cause to seize and data that was completely unrelated to any relevant criminal activity"), *with United States v. Comprehensive Drug Testing, Inc.*, 513 F 3d 1085, 1112 (9th Cir. 2008) (finding that "the government had no reason to confine its search to 'key words ' . . . 'Computer files are easy to disguise or rename, and were we to limit the warrant to such a specific search protocol, much evidence could escape discovery simply because of [the defendants'] labeling of the files '"), *and United States v. Brooks*, 427 F.3d 1246, 1251 (10th Cir. 2005) (rejecting requirement that warrant describe specific search methodology).

SUMMARY OF PUBLIC COMMENTS

One comment was received from the Jordan Center for Criminal Justice and Penal Reform. The Center opposed the amendment, arguing that in authorizing the seizure of electronic storage media rather than particular stored information, the proposed rule disregarded the particularity requirement of the Fourth Amendment, and that it would allow the seizure of electronic information despite a lack of probable cause as to that information. Second, the Center objected to the absence of controls preventing the government from using copied information for "general intelligence or other unauthorized or illicit purposes." Finally, the Center argued that the rule should include a set time period within which the government must return seized materials

PROPOSED AMENDMENTS TO RULES GOVERNING § 2254 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

Rule 11. Certificate of Appealability; Time to Appeal

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entry of the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U S C. § 2253(c)(2). A denial of the certificate by the district court may not be appealed, but a certificate may be sought from the court of appeals under Federal Rule of Appellate Procedure 22. A motion for reconsideration of a denial of a certificate does not extend the time to appeal

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered

under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Committee Note

Subdivision (a). As provided in 28 U S.C. § 2253(c), an applicant may not appeal to the court of appeals from a final order in a proceeding under § 2254 unless a judge issues a certificate of appealability (COA), identifying the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning COAs more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2254 Proceedings in the District Courts. Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued. *See* 3d Cir. R. 22.2, 111.3 This will ensure prompt decision making when the issues are fresh, rather than postponing consideration of the certificate until after a notice of appeal is filed. These changes will expedite proceedings, avoid unnecessary remands, and help inform the applicant's decision whether to file a notice of appeal

Subdivision (b). The new subdivision is designed to direct parties to the appropriate rule governing the timing of the notice of appeal and make it clear that the district court's grant of a COA does not eliminate the need to file a notice of appeal.

Rule 12 ~~11~~. Applicability of the Federal Rules of Civil Procedure

* * * * *

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

In response to public comments, a sentence was added stating that prior to the entry of the final order the district court may direct the parties to submit arguments on whether or not a certificate should issue. This allows a court in complex cases (such as death penalty cases with numerous claims) to solicit briefing that might narrow the issues for appeal For purposes of clarification, two sentences were added at the end of subdivision (a) stating that (1) although the district court's denial of a certificate is not appealable, a certificate may be sought in the court of appeals, and (2) a motion for reconsideration of a denial of a certificate does not extend the time to appeal.

Finally, a new subdivision (b) was added to mirror the information provided in subdivision (b) of Rule 11 of the Rules Governing § 2255 Proceedings, directing petitioners to Rule 4 of the appellate rules and indicating that notice of appeal must be filed even if a COA is issued.

Minor changes were also made to conform to style conventions

SUMMARY OF PUBLIC COMMENTS

Commonwealth of Massachusetts Office of the Attorney General urged the Committee to reject the amendments. First, it would be burdensome for district judges to rule on the COA in cases where the petitioner may never appeal. Second, judges making these rulings would do so without any opportunity for input from petitioners or their counsel, which often narrows the claims on which the court must consider a certificate.

Joseph Luby, Acting Executive Director of the Public Interest Litigation Clinic, argued that the proposed rule denies the petitioner an opportunity to be heard on why a COA should issue, to narrow the claims on which a COA is sought, to raise post-petition developments in the law or factual investigation, or to address the specific reasoning used by the court. These concerns could be addressed by setting a time limit after the final order for seeking a COA.

Gene Vorobyov, Attorney, argued that allowing the COA issue to be decided after the final order instead of at the same time would allow the judge to come at it with a fresh eye and permit additional research by the petitioner, the petitioner should not have to request a COA before the district judge has ruled, and the existing rule works just fine

Paul R. Bottei, Assistant Federal Public Defender, Middle District of Tennessee, argued that the proposed rule denies the petitioner the opportunity to meet his or her burden of showing entitlement to a COA because there is no opportunity to brief how the court's denial is wrong or debatable. He argued that this issue depended upon not only the precedent in that district but also the precedent from other districts and circuits, which may differ depending upon the ground for denial or dismissal. Providing the first opportunity to brief these points in the court of appeals is inefficient because the appellate court is less familiar with the case. He proposed an alternative rule providing the petitioner be allowed a time certain after the entry of a final order in which to ask for a certificate.

The Jordan Center for Criminal Justice and Penal Reform argued that requiring a COA ruling to be contemporaneous with the final order deprives the parties of the opportunity to be heard on the issue

PROPOSED AMENDMENT TO RULES GOVERNING § 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

Rule 11. Certificate of Appealability; Time to Appeal

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entry of the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). A denial of the certificate by the district court may not be appealed, but a certificate may be sought from the court of appeals under Federal Rule of Appellate Procedure 22. A motion for reconsideration of a denial of a certificate does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered

under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability. These rules do not extend the time to appeal the original judgment of conviction.

Committee Note

Subdivision (a). As provided in 28 U.S.C. § 2253(c), an applicant may not appeal to the court of appeals from a final order in a proceeding under § 2255 unless a judge issues a COA, identifying the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2255 Proceedings in the District Courts. Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued. *See* 3d Cir. R. 22.2, 111.3. This will ensure prompt decision making when the issues are fresh, rather than postponing consideration of the certificate until after a notice of appeal is filed. These changes will expedite proceedings, avoid unnecessary remands, and help to inform the applicant's decision whether to file a notice of appeal

Subdivision (b). The amendment is designed to make it clear that the district court's grant of a COA does not eliminate the need to file a notice of appeal

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

In response to public comments, a sentence was added stating that prior to the entry of the final order the district court may direct the parties to submit arguments on whether or not a certificate should issue This allows a court in complex cases (such as death penalty cases with numerous claims) to solicit briefing that might narrow the issues for appeal. For purposes of clarification, two sentences were added at the end of subdivision (a) stating that (1) although the district court's denial of a certificate is not appealable, a certificate may be sought in the court of appeals, and (2) a motion for reconsideration of a denial of a certificate does not extend the time to appeal Finally, a sentence indicating that notice of appeal must be filed even if a COA is issued was added to subdivision (b).

Minor changes were also made to conform to style conventions.

SUMMARY OF PUBLIC COMMENTS

Commonwealth of Massachusetts Office of the Attorney General urged the Committee to reject the amendments. First, it would be burdensome for district judges to rule on the COA in cases where the petitioner may never appeal. Second, judges making these rulings would do so without any opportunity for input from petitioners or their counsel which often narrows the claims on which the court must consider a certificate.

Joseph Luby, Acting Executive Director of the Public Interest Litigation Clinic, argued that the proposed rule denies the petitioner an opportunity to be heard on why the COA should issue, to narrow the claims on which a COA is sought, to raise post-petition developments in the law or factual investigation, or to address the specific reasoning used by the court. These concerns could be

addressed by setting a time limit after the final order for seeking a COA.

Gene Vorobyov, Attorney, argued that allowing the COA issue to be decided after the final order instead of at the same time would allow the judge to come at it with a fresh eye and permit additional research by the petitioner, the petitioner should not have to request a COA before the district judge has ruled, and the existing rule works just fine.

Paul R. Bottei, Assistant Federal Public Defender, Middle District of Tennessee, argued that the proposed rule denies the petitioner the opportunity to meet his or her burden of showing entitlement to a COA because there is no opportunity to brief how the court's denial is wrong or debatable. He argued that this issue depended upon not only the precedent in that district but also the precedent from other districts and circuits, which may differ depending upon the ground for denial or dismissal. Providing the first opportunity to brief these points in the court of appeals is inefficient because the appellate court is less familiar with the case. He proposed an alternative rule providing the petitioner be allowed a time certain after the entry of a final order in which to ask for a certificate.

The Jordan Center for Criminal Justice and Penal Reform argued that requiring a COA ruling to be contemporaneous with the final order deprives the parties of the opportunity to be heard on the issue

Rule 6. The Grand Jury

(f) Indictment and Return. A grand jury may indict only if at least 12 jurors concur. The grand jury–or its foreperson or deputy foreperson–must return the indictment to a magistrate judge in open court. To avoid unnecessary cost or delay, the magistrate judge may take the return by video teleconference in the court where the grand jury sits. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.

* * * * *

Committee Note

Subdivision (f). The amendment expressly allows a judge to take a grand jury return by video teleconference. Having the judge in the same courtroom remains the preferred practice because it promotes the public's confidence in the integrity and solemnity of a federal criminal proceeding. But, there are situations when no judge is present in the courthouse where the grand jury sits, and a judge would be required to travel long distances to take the return

Avoiding delay is also a factor since the Speedy Trial Act, 18 U.S.C. § 3161(b), requires that an indictment be returned within 30 days of an arrest of an individual to avoid a dismissal of the case. The amendment is particularly helpful when there is no judge present at a courthouse where the grand jury sits and the nearest judge is hundreds of miles away.

Under the amendment the grand jury (or the foreperson) would appear in a courtroom in the United States courthouse where the grand jury sits. Utilizing video teleconference the judge could participate by video from a remote location, convene court, and take the return. Indictments could be transmitted in advance to the judge for review by reliable electronic means. This process accommodates the Speedy Trial Act, 18 U.S.C. § 3161(b), and preserves the judge's time and safety.

Rule 15. Depositions

* * * * *

(c) Defendant's Presence.

(1) ***Defendant in Custody.*** The officer who has custody of the defendant must produce the defendant at the deposition <u>in the United States</u> and keep the defendant in the witness's presence during the examination, unless the defendant.

(A) waives in writing the right to be present, or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) ***Defendant Not in Custody.*** A defendant who is not in custody has the right upon request to be present at the deposition in the United States, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant—absent good cause—waives both the right to appear and any objection to the taking and use of the deposition based on that right.

(3) ***Taking Depositions Outside the United States Without the Defendant's Presence.*** The deposition of a witness who is outside the United

States may be taken without the defendant's presence if the court makes case-specific findings of all of the following:

(A) the witness's testimony could provide substantial proof of a material fact,

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present for one of the following reasons:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody

cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing, and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

* * * * *

Committee Note

This amendment addresses the growing frequency of cases in which important witnesses—government and defendant witnesses both—live in, or have fled to, countries where they cannot be reached by the court's subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the Rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness's attendance at trial cannot be obtained, and it would be impossible to securely transport the defendant or a co-defendant to the witness's location for a deposition

Recognizing that important witness confrontation principles and vital law enforcement and public safety interests are involved in these instances, the amended Rule authorizes a deposition outside of a

defendant's physical presence only in very limited circumstances where case-specific findings are made by the trial court of significant need and public policy justification. New Rule 15(c) delineates these circumstances and the specific findings a trial court must make before permitting parties to depose a witness outside the defendant's presence. Several courts of appeals have authorized depositions of witnesses without the defendant being present in such limited circumstances. *See, e g., United States v. Salim*, 855 F.2d 944, 947 (2d Cir. 1988); *United States v Gifford*, 892 F 2d 263, 264 (3d Cir. 1989), *cert denied*, 497 U.S. 1006 (1990); *United States v Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998).

The party requesting the deposition shoulders the burden of proof—by a preponderance of the evidence—as to the elements that must be shown. Courts have long held that when a criminal defendant raises a constitutional challenge to proffered evidence, the government must generally show, by a preponderance of the evidence, that the evidence is constitutionally admissible. *See, e.g., Bourjaily v. United States*, 483 U.S. 171, 175–76 (1987). Here too, the party requesting the deposition, whether it be the government or a defendant requesting a deposition outside the physical presence of a co-defendant, bears the burden of proof. Moreover, if the witness's presence for a deposition in the United States can be secured, thus allowing defendants to be physically present for the taking of the testimony, this would be the preferred course over taking the deposition overseas and requiring the defendants to participate in the deposition by other means.

Finally, this amendment does not supercede the relevant provisions of 18 U.S.C § 3509, authorizing depositions outside the defendant's physical presence in certain cases involving child victims and witnesses, or any other provision of law.

It is not the intent of the Committee to create any new rights by enactment of this rule, which establishes procedures to procure testimony from foreign witnesses who may be located beyond the reach of federal subpoena power. The Committee recognizes that a request to admit testimony obtained under the new foreign deposition procedure may give rise to potential challenges. The Committee left the resolution of any such challenges to the development of case law.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

* * * * *

(6) ***Release or Detention.*** The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a)(1) pending further proceedings. The burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community rests with the person

* * * * *

Committee Note

This amendment is designed to end confusion regarding the applicability of 18 U.S.C § 3143(a) to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion regarding the applicability of § 3143(a) arose because several subsections of the statute are ill suited to proceedings involving the revocation of probation or supervised release *See United States v Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

The current rule provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger but does not specify the standard of proof that must be met The amendment incorporates into the rule the standard of clear and convincing evidence, which has been established by the case law. *See, e g , United States v Loya*, 23 F.3d 1529, 1530 (9th Cir. 1994); *United States v. Giannetta*, 695 F. Supp. 1254, 1256 (D. Me. 1988)

List of Statutes Proposed By Criminal Rules Committee for Amendment

Objections to Reports or Findings of Magistrate Judge

The Criminal Rules Committee agreed with the Civil Rules Committee that the requirement under **28 U.S.C. § 636(b)** that a party may file written objections to the findings and recommendations of a magistrate "within **ten days** after being served with a copy" of the magistrate's report should be extended to **14 days**.

Statutes Dealing With Period Between Arraignment and Preliminary Hearing

The Criminal Rules Committee recommends that all of the timing provisions applicable to the period between the initial appearance and the preliminary hearing be extended to 14 days. 18 U.S.C. § 3060(b) and Rule 5.1(c) currently provide that the preliminary hearing must be held within 10 days of arraignment, and a number of other timing provisions related to that preliminary phase of the prosecution are also set at 10 days. These provisions should remain synchronized and all be extended to 14 days. This recommendation is consistent with the Committee's proposed amendment to Rule 5.1(c), which extends that period to 14 days. The relevant statutes are:

-18 U.S.C. § 3060(b) preliminary examinations, except in certain circumstances, "shall be held . . no later than the **tenth day** following the date of the initial appearance of the arrested person."

-18 U.S.C. § 983(j)(3); a temporary restraining order with respect to property against which no complaint has yet been filed "shall expire not more than **10 days** after the date on which it is entered."

-18 U.S.C. § 1467(c); a temporary restraining order with respect to property against which no indictment has yet been filed "shall expire not more than **10 days** after the date on which it is entered."

-18 U.S.C. § 1514(a)(2)(C), a temporary restraining order "prohibiting harassment of a victim or witness in a Federal criminal case" shall not remain in effect more than "**10 days** from issuance."

-18 U.S.C. § 1963(d)(2), a restraining order, injunction, or "any other action to preserve the availability of property . . . shall expire not more than **ten days** after the date on which it is entered "

-21 U.S.C. § 853(e)(2); "a temporary restraining order under this subsection . shall expire not more than **ten days** after the date on which it is entered."

Statutes Providing Very Short Periods For Interlocutory Appeals in Certain National Security and Classified Information Procedure Act Cases

The statutes in this group require that appellate courts hear arguments or render decisions within **4 days** in certain cases involving material support and the Classified Information Procedure Act (CIPA). Although these statutes reflect a Congressional determination that expedited treatment is essential, the subcommittee felt that the new calendar days approach could cause significant problems if the 4 day statutory period encompasses a weekend or holiday. Accordingly, the Criminal Rules Committee favors seeking legislation that would specify that the following time periods **exclude Saturdays, Sundays, and legal holidays**. The Criminal Rules Committee concluded that this would be preferable to seeking a different and longer time period.

-18 U.S.C. § 2339B(f)(5)(B)(iii)(I); if an appeal is taken under 18 U.S.C. § 2339B (statute against providing material support or resources to designated foreign terrorists), "the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals- - **(I)** shall hear argument . . not later than **4 days** after the adjournment of the trial, ..."

-18 U.S.C. § 2339B(f)(5)(B)(iii)(III); if an appeal is taken under 18 U.S.C § 2339B (statute against providing material support or resources to designated foreign terrorists), "the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals- -**(III)** shall render its decision not later than **4 days** after argument on appeal . . . ."

-18 U.S.C. App. 3 § 7(b)(1); in an appeal pursuant to the CIPA statute, "the court of appeals shall hear argument . . within **four days** of the adjournment of the trial."

-18 U.S.C. App. 3 § 7(b)(3); in an appeal pursuant to CIPA statute, the court of appeals "shall render its decision within **four days** of argument on appeal."

Other CIPA Appeals

The Criminal Rules Committee supports extending to **14 days** the period for an appeal under another provision of CIPA, **18 U.S.C. App. 3 § 7(b)**, which provides that an "appeal shall be taken within **ten days** after the decision . . appealed from and the trial shall not commence until the appeal is resolved " In contrast to the 4 day appeal provisions noted above, which apply to appeals taken during trial, this provision applies to appeals taken before trial. It is important not to shorten the effective time available for the government to take an appeal under this section, because the Department of Justice must first coordinate with other agencies which have responsibility for particular classified information, and then obtain approval for the appeal from the Solicitor General during this period

Dissolution of a Temporary Restraining Order

18 U.S.C. § 1514(a)(2)(E) provides that "if on **two days** notice to the attorney for the Government . . . the adverse party appears and moves to dissolve or modify [a] temporary restraining order, the court shall proceed to hear and determine such motion . . . ." The Criminal Rules Committee felt that the approach of **excluding Saturdays, Sundays, and holidays** would also be appropriate here for reasons similar to those discussed in connection with CIPA and material support appeals.

Victim Mandamus

The time for a victim's motion for a writ of mandamus in the court of appeals to reopen a plea or sentence is **10 days** under **18 U.S.C. § 3771(d)** The Criminal Rules Committee supports extending this to **14 days**. Under the proposed amendment to FRAP 4, the defendant's time to appeal would also be extended from 10 to 14 days.

Other Statutory Periods

The Criminal Rules Committee also supports the extension of several other time periods:

18 U.S.C. § 3509(b)(1)(A) provides that a person seeking an order for a child's testimony to be taken via 2-way closed circuit video "shall apply for such an order at least **5 days** before the trial date." The Criminal Rules Committee favors extending this period to **7 days** to permit adequate time for the party against whom the child would testify to file any objections, and for the court to rule on the request.

Under **18 U.S.C. § 2252A(c)** a defendant seeking to utilize select affirmative defenses against charges of child pornography must notify the court "in no event later than **10 days** before the commencement of the trial." The Criminal Rules Committee favors extending the time for notification to **14 days** to conform to the times provided for notice of other defenses. The committee has proposed extending the period for such notice under Rule 12.1 (alibi defense) and Rule 12 3 (public-authority defense) to 14 days.

Under **18 U.S.C. § 3432** "a person charged with treason or other capital offense shall at least **three entire days** before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial." The time computation rules should not diminish the procedural rights of a person facing a charge of treason or a capital crime The Criminal Rules Committee supports seeking legislation that would **exclude Saturdays, Sundays, and holidays from the three days**. That would ensure that defendants have as much time as they do at present.

SUPREME COURT OF THE UNITED STATES

AMENDMENTS TO RULE 26(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

[April 29, 2002]

JUSTICE SCALIA filed a statement.

I share the majority's view that the Judicial Conference's proposed Fed Rule Crim Proc. 26(b) is of dubious validity under the Confrontation Clause of the Sixth Amendment to the United States Constitution, and that serious constitutional doubt is an appropriate reason for this Court to exercise its statutory power and responsibility to decline to transmit a Conference recommendation

In *Maryland* v. *Craig*, 497 U S. 836 (1990), the Court held that a defendant can be denied face-to-face confrontation during live testimony at trial only if doing so is "necessary to further an important public policy," *id.*, at 850, and only "where there is a case-specific finding of [such] necessity," *id.*, at 857–858 (internal quotation marks omitted) The Court allowed the witness in that case to testify via one-way video transmission because doing so had been found "necessary to protect a child witness from trauma " *Id.*, at 857. The present proposal does not limit the use of testimony via video transmission to instances where there has been a "case-specific finding" that it is "necessary to further an important public policy " To the contrary, it allows the use of video transmission whenever the parties are merely unable to take a deposition under Fed Rule Crim. Proc. 15. Advisory Committee's Notes on Fed. Rule Crim. Proc 26, p 54 Indeed, even this showing is not necessary· the Committee says that video transmission may be used generally as an alternative to depositions. *Id* , at 57.

This is unquestionably contrary to the rule enunciated in *Craig* The Committee reasoned, however, that "the use

of a two-way transmission made it unnecessary to apply the *Craig* standard" *Id*, at 55 (citing *United States* v *Gigante*, 166 F. 3d 75, 81 (CA2 1999) ("Because Judge Weinstein employed a two-way system that preserved . . face-to-face confrontation . , it is not necessary to enforce the *Craig* standard in this case"), cert. denied, 528 U S 1114 (2000)). I cannot comprehend how one-way transmission (which *Craig* says does not ordinarily satisfy confrontation requirements) becomes transformed into full-fledged confrontation when reciprocal transmission is added. As we made clear in *Craig*, *supra*, at 846–847, a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant's presence*—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones

The Committee argues that the proposal is constitutional because it allows video transmission only where depositions of unavailable witnesses may be read into evidence pursuant to Rule 15. This argument suffers from two shortcomings. First, it ignores the fact that the constitutional test we applied to live testimony in *Craig* is different from the test we have applied to the admission of out-of-court statements. *White* v. *Illinois*, 502 U. S. 346, 358 (1992) ("There is thus no basis for importing the 'necessity requirement' announced in [*Craig*] into the much different context of out-of-court declarations admitted under established exceptions to the hearsay rule"). Second, it ignores the fact that Rule 15 accords the defendant a right to face-to-face confrontation during the deposition. Fed. Rule Crim. Proc 15(b) ("The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at

the examination and keep the defendant in the presence of the witness during the examination . . .").

JUSTICE BREYER says that our refusal to transmit "denies all litigants—prosecutors and consenting defendants alike—the benefits of advances in modern technology that will help to create trial procedures that are both more efficient and more fair" *Post*, at 3. This is an exaggeration for two reasons First, because Congress is free to adopt the proposal despite our action And second, because nothing prevents a defendant who believes this procedure is "more efficient and more fair" from voluntarily waiving his right of confrontation.* The only issue here is whether he can be *compelled* to hazard his life, liberty, or property in a criminal teletrial.

Finally, I disagree with JUSTICE BREYER's belief that we should forward this proposal despite our constitutional doubts, so that we can "later consider fully any constitutional problem when the Rule is applied in an individual case" *Post*, at 2 I see no more reason for us to forward a proposal that we believe to be of dubious constitutionality than there would be for the Conference to make a proposal that it believed to be of dubious constitutionality. We do not live under a system in which the motto for legislation is "anything goes, and litigation will correct our constitutional mistakes" It seems to me that among the reasons Congress has asked us to vet the Conference's proposals—indeed, perhaps *foremost* among those reasons—is to provide some assurance that the proposals do not raise seri-

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*JUSTICE BREYER's assertion to the contrary notwithstanding, existing Fed Rule Crim Proc 26 does not prohibit the use of video transmission by consent *United States* v *Mezzanatto*, 513 U S 196, 201 (1995) ("The provisions of [the Federal Rules of Criminal Procedure] are presumptively waivable [unless] an express waiver clause suggest[s] that Congress intended to occupy the field and to preclude waiver under other, unstated circumstances")

ous constitutional doubts. Congress is of course not bound to accept our judgment, and may adopt the proposed Rule 26(b) if it wishes But I think we deprive it of the advice it has sought (in this area peculiarly within judicial competence) if we pass along recommendations that we believe to be constitutionally doubtful.

JUSTICE BREYER, with whom JUSTICE O'CONNOR joins, filed a dissenting statement

I would transmit to Congress the Judicial Conference's proposed Fed. Rule Crim. Proc 26(b), authorizing the use of two-way video transmissions in criminal cases *in* (1) "exceptional circumstances," *with* (2) "appropriate safeguards," and *if* (3) "the witness is unavailable " The Rules Committee intentionally designed the proposed Rule with its three restrictions to parallel circumstances in which federal courts are authorized now to admit depositions in criminal cases. See Fed Rule Crim. Proc 15. Indeed, the Committee states that its proposal permits "use of video transmission of testimony only in those instances when deposition testimony could be used." Advisory Committee Notes on Fed. Rule Crim. Proc 26, p 53. See Appendix, *infra*, at 5

The Court has decided not to transmit the proposed Rule because, in its view, the proposal raises serious concerns under the Confrontation Clause. But what are those concerns? It is not obvious how video testimony could abridge a defendant's Confrontation Clause rights in circumstances where an absent witness' testimony could be admitted in nonvisual form via deposition regardless And where the defendant seeks the witness' video testimony to help secure exoneration, the Clause simply does not apply

JUSTICE SCALIA believes that the present proposal does

not much concern itself with the limitations on the use of out-of-court statements set forth in *Maryland* v *Craig*, 497 U S 836 (1990) I read the Committee's discussion differently than does JUSTICE SCALIA, and I attach a copy of the Committee's discussion so that the reader can form an independent judgment. In its five pages of explanation, the Committee refers to *Maryland* v. *Craig* five times It begins by stating that "arguably" its test is "at least as stringent as the standard set out in [that case] " It devotes a lengthy paragraph to explaining why it believes that its proposal satisfies *Craig*, and it refers to the two relevant Court of Appeals decisions, both of which have so held. See *United States* v. *Gigante*, 166 F 3d 75 (CA2 1999), cert. denied, 528 U S 1114 (2000), *Harrell* v *Butterworth*, 251 F. 3d 926 (CA11 2001), cert denied, 535 U S. ____ (2002). Given the Committee's discussion of the matter, its logic, the legal authority to which it refers, and the absence of any dissenting views, I believe that any constitutional problems will arise, if at all, only in a limited subset of cases. And, in any event, I would not overturn the unanimous views of the Rules Committee and the Judicial Conference of the United States without a clearer understanding of just why their conclusion is wrong Cf Statement of Justice White, 507 U. S. 1091, 1095 (1993) (The Court's role ordinarily "is to transmit the Judicial Conference's recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity")

To transmit the proposed Rule to Congress is not equivalent to upholding the proposed Rule as constitutional Were the proposal to become law, the Court could later consider fully any constitutional problem when the Rule is applied in an individual case. At that point the Court would have the benefit of the full argument that now is lacking At the same time, that approach would

permit application of the proposed Rule in those cases in which application is clearly constitutional And, while JUSTICE SCALIA is correct that Congress is free to consider the matter more deeply and to adopt the proposal despite our action, the Court's refusal to transmit the proposed Rule makes full consideration of the constitutional arguments much less likely.

Without the proposed Rule, not only prosecutors but also defendants, will find it difficult, if not impossible, to secure necessary out-of-court testimony via two-way video—JUSTICE SCALIA's statement to the contrary notwithstanding. Cf *ante*, at 3. Without proposed Rule 26(b), some courts may conclude that other Rules prohibit its use. See, *e.g*, Fed. Rule Crim. Proc. 26 (testimony must "be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence or other Rules adopted by the Supreme Court") Others may hesitate to rely on highly general and uncertain sources of legal authority Cf. *United States* v *Gigante*, 971 F. Supp. 755, 758–759 (EDNY 1997) (relying on court's "inherent power" to structure a criminal trial in a just manner under Fed Rules Crim Proc. 2 and 57(b)), *United States* v. *Nippon Paper Industries Co.*, 17 F Supp. 2d 38, 43 (Mass 1998) (relying on "a constitutional hybrid" procedure that "borrow[ed] from the precedent associated with Rule 15 videotaped depositions [and] marr[ied] it to the advantages of video teleconferencing"). Thus, rather than consider the constitutional matter in the context of a defendant who objects, the Court denies all litigants—prosecutors and consenting defendants alike—the benefits of advances in modern technology And it thereby deprives litigants, judges, and the public of technology that will help to create trial procedures that are both more efficient and more fair.

I consequently dissent from the Court's decision not to transmit the proposed Rule

APPENDIX TO STATEMENT OF BREYER, J.

Rule 26. Taking Testimony

(a) In General In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S C §§2072–2077.

(b) Transmitting Testimony from a Different Location In the interest of justice, the court may authorize contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if·

(1) the requesting party establishes exceptional circumstances for such transmission,

(2) appropriate safeguards for the transmission are used; and

(3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5)

COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 26(a) is amended, by deleting the word "orally," to accommodate witnesses who are not able to present oral testimony in open court and may need, for example, a sign language interpreter The change conforms the rule, in that respect, to Federal Rule of Civil Procedure 43

A substantive change has been made to Rule 26(b). That amendment permits a court to receive the video transmission of an absent witness if certain conditions are met As currently written, Rule 26 indicates that normally only testimony given in open court will be con-

sidered, unless otherwise provided by these rules, an Act of Congress, or any other rule adopted by the Supreme Court. An example of a rule that provides otherwise is Rule 15. That Rule recognizes that depositions may be used to preserve testimony if there are exceptional circumstances in the case and it is in the interest of justice to do so If the person is "unavailable" under Federal Rule of Evidence 804(a), then the deposition may be used at trial as substantive evidence The amendment to Rule 26(b) extends the logic underlying that exception to contemporaneous video testimony of an unavailable witness The amendment generally parallels a similar provision in Federal Rule of Civil Procedure 43

The Committee believed that permitting use of video transmission of testimony only in those instances when deposition testimony could be used is a prudent and measured step A party against whom a deposition may be introduced at trial will normally have no basis for objecting if contemporaneous testimony is used instead. Indeed, the use of such transmitted testimony is in most regards superior to other means of presenting testimony in the courtroom The participants in the courtroom can see for themselves the demeanor of the witness and hear any pauses in the testimony, matters that are not normally available in non-video deposition testimony. Although deposition testimony is normally taken with all counsel and parties present with the witness, there may be exceptions. *See, e g., United States v Salim*, 855 F. 2d 944, 947–948 (2d Cir. 1988) (conviction affirmed where deposition testimony, taken overseas, was used although defendant and her counsel were not permitted in same room with witness, witness's lawyer answered some questions, lawyers were not permitted to question witness directly, and portions of proceedings were not transcribed verbatim).

The revised rule envisions several safeguards to address

possible concerns about the Confrontation Clause rights of a defendant First, under the rule, the court is authorized to use "contemporaneous two-way" video transmission of testimony Thus, this rule envisions procedures and techniques very different from those used in *Maryland* v *Craig*, 497 U. S 836 (1990) (transmission of one-way closed circuit television of child's testimony) Two-way transmission ensures that the witness and the persons present in the courtroom will be able to see and hear each other. Second, the court must first find that there are "exceptional circumstances" for using video transmissions, a standard used in *United States* v. *Gigante*, 166 F. 3d 75, 81 (2d Cir.), cert. denied, 528 U. S. 1114 (1999) While it is difficult to catalog examples of circumstances considered to be "exceptional," the inability of the defendant and the defense counsel to be at the witness's location would normally be an exceptional circumstance Third, arguably the exceptional circumstances test, when combined with the requirement in Rule 26(b)(3) that the witness be unavailable, is at least as stringent as the standard set out in *Maryland* v. *Craig*, 497 U. S 836 (1990). In that case the Court indicated that a defendant's confrontation rights "may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important government public policy and only where the reliability of the testimony is otherwise assured." *Craig*, 497 U. S. at 850 In *Gigante*, the court noted that because the video system in *Craig* was a one-way closed circuit transmission, the use of a two-way transmission made it unnecessary to apply the *Craig* standard.

The Committee recognized that there is a need for the trial court to impose appropriate safeguards and procedures to insure the accuracy and quality of the transmission, the ability of the jurors to hear and view the testimony, and the ability of the judge, counsel, and the

witness to hear and understand each other during questioning. *See, e.g., United States* v. *Gigante*, 166 F 3d 75 (2d Cir. 1999).

Deciding what safeguards are appropriate is left to the sound discretion of the trial court. The Committee envisions that in establishing those safeguards the court will be sensitive to a number of key issues. First, it is important that the procedure maintain the dignity and decorum normally associated with a federal judicial proceeding. That would normally include ensuring that the witness's testimony is transmitted from a location where there are no, or minimal, background distractions, such as persons leaving or entering the room. Second, it is important to insure the quality and integrity of the two-way transmission itself. That will usually mean employment of technologies and equipment that are proven and reliable Third, the court may wish to use a surrogate, such as an assigned marshal or special master, as used in *Gigante, supra*, to appear at the witness's location to ensure that the witness is not being influenced from an off-camera source and that the equipment is working properly at the witness's end of the transmission. Fourth, the court should ensure that the court, counsel, and jurors can clearly see and hear the witness during the transmission And it is equally important that the witness can clearly see and hear counsel, the court, and the defendant Fifth, the court should ensure that the record reflects the persons who are present at the witness's location. Sixth, the court may wish to require that representatives of the parties be present at the witness's location Seventh, the court may inquire of counsel, on the record, whether additional safeguards might be employed. Eighth, the court should probably preserve any recording of the testimony, should a question arise about the quality of the transmission Finally, the court may consider issuing a pretrial order setting out the appropriate safeguards employed

under the rule *See United States* v *Gigante,* 971 F. Supp. 755, 759–760 (E D N.Y 1997) (court order setting out safeguards and procedures)

The Committee believed that including the requirement of "unavailability" as that term is defined in Federal Rule of Evidence 804(a)(4) and (5) will insure that the defendant's Confrontation Clause rights are not infringed In deciding whether to permit contemporaneous transmission of the testimony of a government witness, the Supreme Court's decision in *Maryland* v. *Craig,* 497 U. S 836 (1990) is instructive. In that case, the prosecution presented the testimony of a child sexual assault victim from another room by one-way closed circuit television The Court outlined four elements that underlie Confrontation Clause issues: (1) physical presence, (2) the oath, (3) cross-examination, and (4) the opportunity for the trier-of-fact to observe the witness's demeanor. *Id* , at 847. The Court rejected the notion that a defendant's Confrontation Clause rights could be protected only if all four elements were present. The trial court had explicitly concluded that the procedure was necessary to protect the child witness, i.e., the witness was psychologically unavailable to testify in open court The Supreme Court noted that any harm to the defendant resulting from the transmitted testimony was minimal because the defendant received most of the protections contemplated by the Confrontation Clause, i.e , the witness was under oath, counsel could cross-examine the absent witness, and the jury could observe the demeanor of the witness. *See also United States* v. *Gigante, supra* (use of remote transmission of unavailable witness's testimony did not violate confrontation clause); *Harrell* v. *Butterworth,* [251] F 3d [926] (11th Cir. 2001) (remote transmission of unavailable witnesses' testimony in state criminal trial did not violate confrontation clause).

Although the amendment is not limited to instances

Appendix to statement of BREYER, J.

such as those encountered in *Craig*, it is limited to situations when the witness is unavailable for any of the reasons set out in Federal Rule of Evidence 804(a)(4) and (5). Whether under particular circumstances a proposed transmission will satisfy some, or all, of the four protective factors identified by the Supreme Court in *Craig* is a decision left to the trial court.

The amendment provides an alternative to the use of depositions, which are permitted under Rule 15 The choice between these two alternatives for presenting the testimony of an otherwise unavailable witness will be influenced by the individual circumstances of each case, the available technology, and the extent to which each alternative serves the values protected by the Confrontation Clause See *Maryland* v *Craig, supra.*

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

April 28-29, 2008
Washington, D.C.

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the "Committee") met in Washington, D.C., on April 28-29, 2008. All members participated during all or part of the meeting:

Judge Richard C. Tallman, Chair
Judge James P. Jones
Judge John F. Keenan
Judge Donald W. Molloy
Judge Mark L. Wolf
Judge James B. Zagel
Magistrate Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Andrew D. Leipold
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Thomas P. McNamara, Esquire
Alice S. Fisher, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Assistant Reporter

Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, its Reporter, Professor Daniel R. Coquillette, and liaison member, Judge Reena Raggi. Also supporting the Committee were:

Peter G. McCabe, Rules Committee Secretary and Administrative Office Assistant Director for Judges Programs
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, Federal Judicial Center

Two other officials from the Department's Criminal Division — Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton, Deputy Chief of the Appellate Section — were present. Ruth E. Friedman, Director of the Federal Defenders' Capital Habeas Project, attended part of the meeting.

A. Chair's Remarks and Administrative Announcements

After welcoming everyone and making administrative announcements, Judge Tallman recognized Professor King for her years of distinguished service as a Committee member and thanked her for agreeing to serve further in the capacity of Assistant Reporter. Judge Tallman made a request that subcommittee chairs try to begin their work earlier in the period between meetings to ensure that it is completed in time for the next Committee meeting.

B. Review and Approval of the Minutes

A motion was made to approve the draft minutes of the October 2007 meeting.

The Committee unanimously approved the minutes.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Supreme Court

Mr. Rabiej reported that the following proposed rule amendments, which include those making conforming changes under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, were approved by the Supreme Court and submitted last week to Congress. Unless Congress enacts legislation to reject, modify, or defer them, they will take effect on December 1, 2008.

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

Rule 12.1. Notice of Alibi Defense. The proposed amendment provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised.

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.

Rule 18. Place of Trial. The proposed 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.

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

Rule 41(b) Search and Seizure The proposed amendment authorizes magistrate judges to issue warrants for property outside the United States, but still subject to administrative control of the United States government such as legation properties in foreign countries or territorial possessions such as American Samoa

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

Rule 61. Conforming Title The proposed amendment renumbers Rule 60

Mr Rabiej reported no action in Congress on the Crime Victims' Rights Rules Act bill introduced in this session of Congress by Senator Jon Kyl (R-AZ) Judge Tallman noted that the Judicial Conference had voiced strong opposition to this new measure, which would circumvent the federal rulemaking process by directly changing the Federal Rules of Criminal Procedure without affording anyone the opportunity for notice and comment and bypassing the deliberative process that Congress previously established for judicial rulemaking under the Rules Enabling Act. Mr. Rabiej also reported that no responses had yet been received from the 20 or so different groups from which the Committee had requested suggestions for further CVRA-related rule amendments. Judge Tallman noted that, on the recommendation of this Committee and the Standing Committee, Chief Justice John Roberts had recently approved Director Duff's letter to Lewis & Clark Law School Professor Doug Beloof declining his suggestion that a permanent crime victims' advocate position be added to the Advisory Committee on Criminal Rules.

Ms Hooper provided an update on the Federal Judicial Center's efforts to educate the Judiciary about the CVRA The Center has produced a DVD, featuring Judge Jones and Judge Zagel, that examines the Act's requirements, the related rules amendments, and the experiences of judges and prosecutors in applying the Act The Center has updated its monograph, "The Crime Victims' Rights Act of 2004 and the Federal Courts" and will distribute it, along with related materials, at all national workshops for district court judges this year A panel session on "the CVRA and Issues and Challenges for the Federal Judiciary" will be held at the Sentencing Institute in Long Beach, CA on June 25-27, 2008, to be co-chaired by former Judge Paul Cassell and Benji McMurray Also, the Center is nearing completion of a report, prepared at the Committee's request, reviewing victims' rights laws in all 50 states, the District of Columbia, and the territories. To understand how victims' rights laws operate in practice, the Center has conducted interviews with state judges, victim coordinators, prosecution staff, and defense counsel in six states, and with professionals from victim assistance organizations

Ms Hooper reported a few preliminary findings from the study First, expansion of criminal proceedings to include greater participation and input from victims does not appear to impede judges' ability to effectively manage their caseloads even when multiple victims wish to participate Second, although many jurisdictions require only that victims be treated with "fairness and respect," the lack of more detailed legislative guidance has not resulted in a significant increase in litigation seeking to broaden victims' rights Third, most states allow a victim to be heard orally regarding a plea agreement and at sentencing, and a few permit victims

to speak at a bail or bond hearing or an initial appearance In practice, though, few victims choose to speak, a phenomenon that some attribute to untimely notice Fourth, most jurisdictions allow the victim to confer with the prosecutor, but states vary with regard to the type of information that is authorized to be disclosed to the victim by the prosecutor Only 10 jurisdictions, for instance, allow victims some access to the presentence report five allow victims to review the report, two allow them to receive copies, and three allow discretionary disclosure by the prosecutor Fifth, a few jurisdictions have formalized complaint procedures for victims who believe that their rights were violated. Typically, this is done by filing a writ of mandamus, but one jurisdiction allows a nominal monetary damages remedy where there was an intentional failure to afford a victim his rights

Ms Hooper reported that the Center is still committed to producing a judge's pocket guide on victims' rights, but wanted to ensure that it would not be duplicative of the materials that have already been prepared She also noted that the GAO is expected to issue a full report on the effect and efficacy of CVRA implementation in the federal courts by October 2008 If, after reviewing the GAO report, the Committee believes that further research is necessary, the Center is ready to undertake it

Judge Tallman asked representatives from the Department of Justice whether, in their meetings with crime victims groups, any additional feedback had been obtained Mr. Wroblewski reported meeting about two months ago with 20-25 people from a dozen or more victims' organizations and explaining the Department's involvement with the rules committees Although the Department had not yet received any suggestions or comments, Mr Wroblewski said that these meetings would continue to be held on a regular basis. Judge Tallman mentioned that he had recently been asked about the Department's efforts at automating victim notification Mr. Wroblewski reported that the Department sends out millions of notices to victims each year through the computerized Victim Notification System.

B. Additional CVRA-Related Proposed Amendments

Mr Rabiej noted that the three additional CVRA-related rule amendments had been approved for public notice and comment and would be published on August 15, 2008 Public hearing dates on each coast would be tentatively scheduled for sometime in January 2009

> Rule 5 Initial Appearance The proposed amendment directs a court to consider a victim's right to be reasonably protected when making the decision to detain or release a defendant
>
> Rule 12 3 Notice of Public-Authority Defense. The proposed amendment provides that for security and privacy the victim's address and telephone number should not be automatically provided to the defense Courts remain free to authorize disclosure for good cause shown

Rule 21 Transfer for Trial The proposed amendment requires consideration of the convenience of victims in determining whether to transfer the proceedings to another district for trial

Professor Beale pointed out that the Style Consultant had slightly modified the original wording of these proposed amendments Also, the Standing Committee had agreed that the arguably unnecessary statement in proposed Rule 5(d)(3) should be retained to underscore that, in making the determination on bail and release, "the court must consider any statute or rule that protects a victim from the defendant "

C. Proposed Forfeiture Rule Amendments

The Committee discussed the following three proposed rule amendments governing forfeiture that had been published for public comment

Rule 7 The Indictment and Information The proposed amendment removes reference to forfeiture

Rule 32. Sentencing and Judgment. The proposed amendment requires the government to state in the presentence report whether it is seeking forfeiture

Rule 32 2. Criminal Forfeiture. The proposed amendment clarifies certain procedures, such as that the government's notice of forfeiture need not identify the specific property or money judgment that is subject to forfeiture and should not be designated as a count in an indictment or information.

Professor Beale reported that the proposals had elicited a single comment, from Judge Lawrence Piersol of the District of South Dakota, who voiced concern that the proposed Rule 32.2 amendment could cause sentencing delays But, she said, Proposed Rule 32.2(b)(2)(B) specifies that courts must enter preliminary forfeiture orders before sentencing "[u]nless doing so is impractical " Proposed Beale added that two changes to the published version were recommended standardizing the references to "assets" and "property," and eliminating the bracketed language. A member pointed out that the "and" at the end of proposed Rule 32(d)(2)(E) on page 43, line 6, of the agenda book requires deletion

There was discussion about the phrase "either party's request" in proposed 32.2(b)(1)(B), on page 46, lines 30-31, and the phrase "the date when the order granting or denying the amendment becomes final" in proposed Rule 32 2 (b)(4)(C) on page 51, lines 101-102. Clarification was also requested regarding the phrase "the government must submit a proposed Special Verdict Form " Following Committee discussion, it was decided that these various phrases should be retained as drafted

Judge Zagel moved to approve the forfeiture rule amendments as revised

The Committee voted unanimously to send the proposed forfeiture rule amendments, as revised, to the Standing Committee.

D. Proposed Rule 41 Amendment on Seizure of Electronically Stored Information

The Committee discussed the proposed Rule 41 changes recently published. Judge Battaglia, chair of the Electronically Stored Information Subcommittee, reported that one public comment had been received. The Jordan Center for Criminal Justice and Penal Reform had suggested that, by authorizing the "seizure of electronic storage *media*" rather than "*information*," the proposed change would violate the Fourth Amendment's particularity requirement by allowing information to be seized without establishing probable cause. Another objection was the absence of controls to prevent the government from using copied information for "general intelligence or other unauthorized or illicit purposes." The Jordan Center also recommended that the rule require that the seized materials be returned within a set time period.

Judge Battaglia reported that the subcommittee had decided to address those concerns by adding a clarification to the Committee Note that the "amended rule does not address the specificity of description that the Fourth Amendment may require in a warrant for electronically stored information, leaving this and the application of other constitutional standards to ongoing case law development." The subcommittee also proposed adding "copying or" to the last line of Rule 41(e)(2)(B) to clarify that copying, not just review, may take place off-site. Professor King noted the typographical error, the third "the," on page 63, line 11, which would be fixed.

The Committee discussed the proposed elimination of all case citations, for style reasons, from the Rule 41 Committee Note. Mr. Rabiej noted that certain members of the Standing Committee had strong views on how detailed Committee Notes should be. Judge Tallman said that, because this area of the law was evolving, it would be wise where possible to omit citations to cases that might soon be out of date.

One member raised concern about government handling of seized electronic media and the delay in the return of the media. Judge Tallman suggested that these issues were best left to case law development. After further discussion, Judge Wolf moved that the Committee Note's reference on page 65 to "other constitutional standards to ongoing case law development" be changed to "other constitutional standards concerning both the seizure and the search to ongoing case law development."

The motion was unanimously approved.

In response to a member's inquiry, Judge Tallman confirmed that the Jordan Center's suggestion that controls be added to prevent the government from using copied information for "general intelligence or other unauthorized or illicit purposes" had been declined because it would be a substantive change of law that should instead be the subject of case law development or congressional action.

Judge Keenan moved that the Committee send the proposed Rule 41 amendment, as revised, to the Standing Committee

The Committee voted, with one dissent, to send the proposed Rule 41 amendment, as revised, to the Standing Committee.

E. Proposed Time Computation Rule Amendments

Professor Beale reported that no public comments had been received in response to publication of the following proposed time computation rule amendments

> Rule 45 Computing and Extending Time The proposed amendment simplifies the method for computing time
>
> Rules 5.1, 7, 8, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, and 59, and to Rule 8 of the Rules Governing §§ 2254 and 2255 Cases. Amendments to these rules are intended to adjust the deadlines in light of the new time computation principles.

Judge Rosenthal explained that the Criminal Rules Committee was the last of four advisory committees meeting to finalize this coordinated effort She noted that the goal was to achieve seamless synchronization with Congress so that the rule amendments, statutory changes, and local rule changes all take effect on December 1, 2009. She said that congressional staff, many of whom were former law firm associates, had expressed general approval in recent meetings for simplifying time computation across the board. There was discussion whether the rule amendments should be made conditional on the proposed statutory changes or whether they should take effect even if Congress declined to enact the statutory changes. The consensus of the Committee seemed to be that every effort should be made to have the proposed time computation rule amendments take effect at the same time as the proposed statutory changes Mr. Cunningham moved that the proposed rule amendments be approved

The Committee voted unanimously to approve the proposed time computation rule amendments.

III. CONTINUING AGENDA ITEMS

A. Proposed Time Computation Statutory Amendments

The Committee discussed which statutes Congress should be asked to amend in light of the proposed time computation changes Judge Tallman noted that unless statutes were changed, the rules committees' effort to simplify time computations would have the opposite effect, adding a new layer of complexity Judge Rosenthal explained that there was a desire, first, not to have the rules be inconsistent with the statutes, and second, not to disadvantage practitioners by shortening their deadlines One member pointed out that the rules expressly apply the new time computation approach to statutes unless a statute specifies a different approach To increase the

probability of passage in Congress. Judge Rosenthal noted that an effort was being made to keep all proposed statutory changes uncontroversial and outcome neutral

The Committee discussed the report submitted by the Committee's Time Computation Subcommittee The subcommittee was asked to explain why it was deviating from the "days are days" approach and recommending instead that Congress simply exclude Saturdays, Sundays, and legal holidays from the four-day periods set forth in 18 U S C. § 2339B(f)(5)(B)(iii)(I) and (III) and 18 U S C App 3 § 7(b)(1) and (3) within which appellate courts must hear arguments or render decisions in certain cases involving material support and the Classified Information Procedure Act Judge Rosenthal explained that the Department of Justice had voiced significant concerns with converting these periods to seven calendar days and that keeping the proposed statutory changes uncontroversial was critical to the project's success. Assistant Attorney General Fisher said that these procedures had been used in the case of convicted terrorism conspirator Zacarias Moussaoui. Professor Beale noted that the subcommittee recommended a similar approach for the two-day deadline for dissolution of a temporary restraining order in 18 U S C. § 1514(a)(2)(E)

With respect to the current 10-day period in 18 U.S.C App 3 § 7(b) within which an interlocutory appeal in a CIPA case "shall be taken" after the trial court renders a decision, however, the Department supported recommending its extension to 14 calendar days Ms Fisher explained that this provision typically applied when a court is ordering the government to turn over classified information or sanctioning the government for not turning over classified information, in which case consulting with the applicable agencies sometimes took time

Professor Beale reported subcommittee support for the following recommendations.

- extending to 14 calendar days the current 10-day period in 18 U S C § 3771(d) within which a victim must file a motion for a writ of mandamus in the court of appeals to reopen a plea or sentence,
- extending to seven calendar days the current period of five days before trial in 18 U S C § 3509(b)(1)(A) within which an order for a child's testimony to be taken via two-way closed circuit video must be sought; and
- extending to 14 calendar days the current 10-day period in 18 U S C § 2252A(c) within which a defendant seeking to utilize certain affirmative defenses against child pornography charges must notify the court.

The Committee discussed the current three-day period in 18 U S C § 3432 "A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial " Ms. Fisher said that the Department had no strong preference, but would recommend retaining the three days and only excluding Saturdays, Sundays, and legal holidays One member noted that the three-day deadline in 18 U S C § 3432 was important to prosecutors not in capital cases, but in non-capital cases, because it allows prosecutors to argue that if the deadline is three days in capital cases, it should be no greater in

ordinary, non-capital cases Judge Tallman suggested that the Department's compromise offer was probably advisable, given the witness security concerns

It was noted that these proposed statutory changes were going to be published and, if problematic, might elicit public comment Following further discussion, a motion was made to recommend retaining the current three-day period in 18 U S C § 3432 within which a person charged with treason must be furnished with a copy of the indictment and a list of the jurors and witnesses, but to recommend excluding Saturdays, Sundays, and holidays from the three days

The motion was approved, with minimal dissent.

A motion was made to recommend extending to 14 calendar days the current 10-day period in 18 U S C App. 3 § 7(b) for interlocutory appeals of a trial court's ruling in a Classified Information Procedure Act case.

The motion was approved unanimously.

Judge Battaglia moved that the Committee recommend that the Standing Committee send to Congress the other proposed time computation statutory changes set forth on pages 123-125 of the agenda book

The Committee voted unanimously to recommend that the Standing Committee send to Congress the other proposed time computation statutory changes.

B. Proposed Amendments to Rule 11 of the Rules Governing §§ 2254 and 2255 Cases

The Committee discussed the proposal to amend Rule 11 of the Rules Governing §§ 2254 and 2255 Cases to, among other things, require a judge to grant or deny the certificate of appealability at the time a final ruling is issued Professor King noted that the proposal had been submitted by the Department originally after the Supreme Court decided *Gonzalez v Crosby*, 545 U S. 524 (2005) After considering the five public comments received on proposed Rule 11(a), all opposing the published proposal, the Writ Subcommittee, chaired by Mr McNamara, concluded that the proposal required modification, but split 3-2 over how to modify it.

Two alternative drafts were included in the agenda book for the Committee's consideration The majority retained the published proposed requirement that the certificate of appealability be ruled on "at the same time" as an adverse final order, but recommended adding the phrase, "unless the judge directs the parties to submit arguments on whether or not a certificate should issue." Also, the majority proposed adding the following sentence "If the certificate is issued or denied upon entry of the final order, a party may move for reconsideration of the decision on the certificate not later than 14 days after the entry of the order " The minority proposed requiring only that motions for certificate of appealability be filed 14 days following a final order adverse to the applicant, a time frame that the minority contended was necessary for

counsel to consider the final order Judge Tallman thanked the subcommittee for working so diligently over the course of several months on this challenging area, whose numerous minefields for unwary petitioners had sometimes resulted in meritorious claims being procedurally barred

Mr Wroblewski said that the Department preferred the published version of Rule 11(a), designed to codify existing practice as explained in *Gonzalez* One member said that requiring simultaneous rulings would not codify the practice in his own circuit, but that he considered it nonetheless desirable because judges would have to deal with a case only once, ruling on the certificate of appealability at the same time as the final order rather than long afterward Another member said he favored the simultaneous ruling requirement because it gave judges a way to inform the parties when issuing the final order that they had struggled in reaching certain decisions A motion was made to require the judge in Rule 11(a) to rule on the certificate of appealability "at the same time" as the judge enters a final order adverse to the applicant

The Committee decided, with minimal dissent, to require the judge in Rule 11(a) to rule on the certificate of appealability "at the same time" as the final order.

Judge Tallman recommended making clear in the rule that filing a motion for reconsideration of the denial of a certificate of appealability does not toll the statute of limitation for filing the appeal — a point that has proven to be a trap for the unwary Another member expressed concern about including a reference in the habeas rule to a motion for reconsideration because it could also pose a trap for the unwary and it would likely mislead pro se litigants into thinking that they needed to file them in every case After extensive discussion, Judge Molloy moved that Rule 11(a) begin as follows: "The judge must issue or deny a certificate of appealability at the same time the judge enters a final order adverse to the applicant The judge may direct the parties to submit arguments on whether or not a certificate should issue prior to entry of the final order "

The Committee decided unanimously to approve the proposed language at the beginning of Rule 11(a).

Judge Jones moved to eliminate the second sentence of the majority Rule 11(a) proposal on page 143, lines 6-9 — "If the certificate is issued or denied upon entry of the final order, a party may move for reconsideration of the decision on the certificate not later than 14 days after the entry of the order" — and to change "motion for reconsideration" in line 12 to "certificate of appealability " Several members voiced concern that, unless it was stated in the text of the rule that filing a motion for reconsideration did not toll the statute of limitation for filing the appeal, meritorious habeas claims would continue to be procedurally barred for lack of a timely appeal After extensive discussion, Judge Tallman suggested taking a vote on Judge Jones' motion

The Committee decided unanimously to eliminate the second sentence of the majority Rule 11(a) proposal and to change line 12 as proposed.

After additional discussion, Judge Tallman moved to add the following to the end of the majority Rule 11(a) proposal on page 143, line 15 "A motion for reconsideration of the denial of a certificate of appealability does not extend the time for filing a notice of appeal."

The Committee decided by a clear majority to add the proposed sentence to the end of the majority Rule 11(a) proposal.

Professor King described the changes to Rule 11(b) and (c) of the Rules Governing §§ 2254 and 2255 Cases recommended by a majority of the Writ Subcommittee. First, to prevent confusion in light of the previous subdivision's reference to an unrelated motion for reconsideration (i.e., of the denial of a certificate of appealability), it recommended changing the title of Rule 11(b) from "Motion for Reconsideration" to "Motion for Relief from Final Order." Second, the subcommittee suggested expanding the definition of permitted grounds for obtaining relief from a final order, beyond "a defect in the integrity of the § 2255 proceeding," to include "an error in a ruling in the § 2255 proceeding which precluded a determination of a claim on the merits." Third, it was thought that the proposed rule amendment should expressly supplant not only motions brought under Rule 60(b), but also those under Rule 52(b) and Rule 59. Fourth, the subcommittee sought to clarify that Rule 11(b) does not require a separate certificate of appealability. Finally, it recommended stating expressly that a timely notice of appeal is required even if a certificate of appealability is issued under Rule 11(a).

Professor King also summarized the objections raised by the Writ Subcommittee's minority: (1) the proposed change is unnecessary, (2) it unduly and unnecessarily shrinks the filing period to 30 days; (3) it bars certain grounds for relief still available post-*Gonzales*; (4) it bars other currently existing routes for relief, such as Rules 52 and 59, which were not addressed in *Gonzales*, and (5) it purports to make a significant policy change that the rules committees lack the authority to make under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077.

Ms. Ruth Friedman, director of the Federal Defenders Capital Habeas Project, said that by eliminating Rules 52 and 59 as avenues for relief, the proposed Rule 11(b) amendment would be going far beyond merely codifying *Gonzales*. She recommended against conflating Rules 52 and 60(b), two very different provisions. She suggested instead requiring that Rule 59 motions for correction of errors be filed within 10 days and that Rule 60(b) motions for addressing fairness issues be filed within a year. Asked whether the Department intended anything beyond codifying *Gonzales*, Mr. Wroblewski responded that the objective was simply to regularize the process and to lay out in the text of the Rules Governing §§ 2254 and 2255 Cases what was supposed to happen following entry of a final order. One member suggested that the proposal was premature and that additional time was needed for post-*Gonzales* case law to develop. The Department moved to approve for publication the Rule 11(b) amendment as drafted by the subcommittee majority.

The motion failed by a vote of 4 to 8.

One member explained that he had voted against the majority proposal for Rule 11(b) because eliminating Rules 52 and 59 as avenues for relief extinguished substantive rights Professor King suggested that although *Gonzales* did not specifically deal with Rule 52 and 59, its rationale implied that other rules could not be used to circumvent the successive petition bar Ms Fisher moved to approve the proposed Rule 11(b) amendment for publication, omitting the references to Rules 52 and 59 After brief discussion, however, Ms Fisher retracted her motion, explaining that the Department required additional time to consider the matter further

The Committee turned its attention to the proposed Rule 11(c) amendment It was noted that it would need to be redesignated as Rule 11(b) Judge Tallman expressed approval for Judge Molloy's earlier suggestion that "issues" in line 14 be changed to "issues or denies " A motion was made to approve proposed Rule 11(c) — now 11(b) — for publication as revised

The Committee decided unanimously to approve proposed Rule 11(c), now 11(b), for publication as revised.

C. Proposed Amendment to Rule 15

The Committee discussed the Department's proposed amendment of Rule 15 to authorize depositions in a limited category of cases to take place outside the defendant's physical presence Professor Beale noted that the current proposal included a few changes recommended by the Rule 15 Subcommittee, chaired by Judge Keenan. The scope of the proposed rule amendment is now restricted to situations where the witness is outside the United States In subparagraph (c)(3)(A), the proposed authorization to hold depositions outside the defendant's presence under limited situations now applies to all witnesses, not just government witnesses The existing case law standard for witness unavailability — "there is a substantial likelihood the witness's attendance at trial cannot be attained" — is reflected in proposed Rule (c)(3)(A)(ii) Proposed Rule (c)(3)(A)(iii) makes clear that a deposition outside the U S can only take place without the defendant present only when "it is not possible to obtain the witness's presence in the United States for a deposition " The Committee Note was revised to specify the applicable burden of proof and to clarify that the proposed rule amendment does not supersede statutes that independently authorize depositions outside the defendant's physical presence, such as certain cases involving child victims and witnesses identified in 18 U S C § 3509

Following extensive discussion regarding proposed Rule 15(c)(3)(B) and whether it should be placed in the Committee Note rather than in the rule, Judge Keenan moved to revise the proposed provision in the rule to read "Nothing in this rule creates a right for the defendant to be present at a deposition of his/her witness that takes place outside the United States " After further discussion, though, Judge Keenan withdrew his motion

Judge Zagel moved to approve in principle the proposed Rule 15(c)(3)(B) amendment Ms Fisher urged adoption of the proposed rule amendment as a way to correct a problem with Rule 15 depositions She stressed that defendants must not be able to allege that they need to

depose a critical witness in, say, Pakistan and to claim a right to be transported to Pakistan to attend the deposition Judge Zagel requested a vote on his motion to publish the rule as drafted

The motion failed by a vote of 5 to 6.

Judge Wolf moved to add "in the United States" on page 185 to proposed Rule 15(c)(1), line 7, and to (c)(2), line 20, to delete "Except as provided in paragraph (3)" from lines 4-5 and 18, and to delete (c)(3)(B)

The motion was approved, with one dissent.

To avoid the double use of the word "outside," Judge Molloy moved to change the title of proposed Rule 15(c)(3) to "Limited Authority to Hold Depositions Outside the United States Without the Defendant's Presence "

The motion was approved unanimously.

It was suggested that the situation covered by proposed Rule 15(c)(3)(B) could be addressed in the Committee Note Professor Beale promised to circulate a draft by email after the meeting for Committee approval Mr Wroblewski noted that the bracketed language in the Note on page 188, lines 27-46, had been intended only for the benefit of the Committee and the Standing Committee and would not be part of the actual note It was suggested and agreed that the Note not cite simply to cases decided before *Crawford v Washington*, 541 U S. 36 (2004). There was also consensus that the sentence on page 189, lines 8-13, should be deleted Mr. Wroblewski moved to approve the proposed Rule 15 amendment, as revised, and forward it to the Standing Committee for publication

The Committee voted unanimously to approve Rule 15, as revised, for publication.

D. Proposed Amendment to Rule 6(f)

The Committee discussed the proposed Rule 6(f) amendment, copies of which were distributed as a handout. The proposal would permit courts to receive the return of a grand jury indictment by video conference Judge Battaglia, chair of the Rule 6(f) Subcommittee, noted that judges have sometimes had to travel up to 250 miles one-way to attend a 30-second proceeding The subcommittee had two recommendations The first was that the "open court" requirement be retained as a safeguard against the infamous Star Chambers proceedings The second was that the "good cause" threshold be replaced with a showing that video conferencing is needed "to avoid unnecessary cost or delay " Professor Beale added that it was emphasized in the Committee Note that having the judge and grand jury in the same courtroom remained the preferred practice She also noted that all "magistrate judge" references in the rules, such as in lines 4 and 10, include district judges by definition There was agreement that line 5 should also refer to "magistrate judge" instead of "judge " It was also agreed that the characterization of a district as "unpopulated" in lines 26-27 of the Note was unnecessary and should be revised. The

Committee also agreed to replace the phrase "in the court" in line 32 with "in a courtroom." Judge Battaglia moved to approve the proposed Rule 6(f) amendment for publication.

The Committee voted unanimously to send the proposed Rule 6(f) amendment to the Standing Committee for publication.

E. Proposed Amendment to Rule 12

Judge Wolf, appointed at the last meeting to chair the Rule 12 Subcommittee, reported that the group had conferred in several teleconferences, but that additional time was needed to formulate a recommendation. A report would be presented at the Committee's next meeting.

F. Proposed Amendments to Rules 32.1 and 46

Professor Beale said that the proposed amendments to Rules 32.1 and 46 had been deferred until the October 2008 meeting so that additional input could be obtained from the Criminal Law Committee and the Office of Probation and Pretrial Services.

G. Proposed Amendment to Rule 32.1(a)(6)

Professor Beale briefly reviewed the history of Magistrate Judge Robert Collings' suggestion that Rule 32.1(a)(6) be amended to clarify its reference to 18 U.S.C. § 3143(a) and to specify that the applicable burden of proof is clear and convincing evidence. Judge Battaglia emphasized that this was not a substantive change and that numerous courts have concluded, after extensive analysis, that only § 3143(a)(1) applies to the situation in the rule. Following a discussion of whether clear and convincing was indeed the appropriate burden of proof for alleged violations of the conditions of supervised release under Rule 32.1(a)(6), Judge Battaglia moved to send the proposed amendment to the Standing Committee for publication.

The Committee voted, with one dissent, to send the proposed Rule 32.1(a)(6) amendment to the Standing Committee for publication.

H. Rule 32(h)

Professor Beale explained that the proposed Rule 32(h) amendment had originally been part of the package of amendments proposed in the wake of *United States v. Booker*, 543 U.S. 220 (2005). But because the Supreme Court had granted certiorari and heard oral arguments in *Irizarry v. United States*, No. 06-7517, to resolve a circuit split, and because a decision was expected by June, the Rule 32(h) Subcommittee was deferring consideration of the proposed rule change. The Department noted that after *Booker*, the Constitution Project had proposed certain changes to Rule 32, which the American Bar Association was currently considering, to reform sentencing procedures and increase their transparency. Ms. Felton reported that, during oral argument in *Irizarry*, the Justices had asked counsel why the Supreme Court should not defer to the rulemaking process. Professor Beale promised to distribute copies of the *Irizarry* oral

argument transcript and the *Irizarry* amicus brief filed by Catholic University of America Law Professor Peter B Rutledge and Ohio State University Law Professor Douglas A Berman

IV. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES.

A. Proposal to Amend Rule 7

Judge Battaglia described his proposal to amend Rule 7(b) to permit a defendant to waive indictment by video conference Several members voiced concern that recent rule amendment proposals authorizing court proceedings by video conference seemed to be on a slippery slope Professor Coquillete suggested adding restrictive language similar to that used in the proposed Rule 6(f) amendment· "To avoid unnecessary cost or delay " He also noted that rule changes normally required empirical evidence of a problem One member suggested perhaps examining the Criminal Rules more comprehensively and assessing which proceedings should and should not be conducted by video conference After significant discussion, Judge Battaglia moved to send the proposed Rule 7 amendment to the Standing Committee for publication

The motion failed by a vote of 3-8.

It was suggested that Judge Battaglia's Rule 6(f) Subcommittee, perhaps under a new name, undertake a comprehensive look at how video conferencing is used in the courts and at which Criminal Rules should and should not permit its use Judge Tallman agreed and requested the Federal Judicial Center's assistance in collecting relevant empirical data Justice Edmunds asked if he could be replaced on the subcommittee, explaining that he would be unusually busy in coming months seeking re-election Professor Leipold agreed to take his place.

B. Consent Calendar Suggestions:

Earlier in the meeting, Judge Tallman had drawn the Committee's attention to five suggested rule amendments included in the agenda book as consent calendar items·

03-CR-C: On April 1, 2003, attorney Carl Person suggested that each federal judge require, as a condition to approving plea agreements, that the prosecutor agree that one out of every 10 cases involving a plea bargain be selected at random to go to trial. Once the system is in place, he recommended adjusting the percentage of cases that must be randomly selected for trial based on the percentage of the defendants in randomly selected cases who are acquitted Mr Person reasoned that such a system would create an incentive for federal prosecutors to bring a smaller number of cases and prepare them more carefully There were concerns that this proposal would burden the judicial system with trials in a way that might violate the substantive rights of criminal defendants

03-CR-F: On November 5, 2003, attorney Steve Allen suggested that Rule 9(a) of the Rules Governing § 2254 Cases be amended to refer to a claim, not to a petition He cited *Walker v Crosby*, 341 F 3d 1240 (11th Cir 2003), which construed the one-year statute

of limitation in 28 U S C § 2244(d)(1) as applicable to all claims in a habeas petition, thereby reviving claims that might have otherwise been time-barred In 2004, subdivision (a), to which Mr Allens's proposal relates, was deleted as unnecessary in light of the one-year statute of limitation for § 2254 actions imposed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U S C § 2244(d)

05-CR-C: On December 14, 2004, Judge James F McClure, Jr , suggested that the Committee revise Rule 10 to permit waiver of arraignment This proposal was discussed briefly at the Committee's October 2005 meeting in Charleston, but was tabled after several Committee members noted that during the general restyling of the Criminal Rules in 2002, the Committee had declined to allow waiver of the arraignment itself because it serves as a triggering event for several other rules.

05-CR-F: On November 2, 2005, Judge Michael Baylson suggested that the Committee discuss the increase in petitioner litigation under *Gonzalez* Judge Baylson's recommendation is closely related to the work of the Writ Subcommittee, including the proposal to amend Rule 11 of the Rules Governing §§ 2254 and 2255 Cases

07-CR-C: On October 2, 2007, Mr. Kelly D Warfield suggested that "the one-year statute of limitation under 28 U S.C. 2244 (d) should be rescind[ed] " The Rules Enabling Act, however, does not authorize the rules committees to rescind statutes

It was moved that the Committee decline to take action on these suggestions

The Committee decided unanimously not to take action on these suggestions.

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

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

Judge Tallman summarized the legislation pending in Congress that would prohibit district judges from forfeiting corporate surety bonds for any reason other than failure to appear Some districts are forfeiting bonds if the defendant violates other conditions of release and is rearrested, a scenario that corporate bail bondsmen want to see eliminated Mr Rabiej noted that the proposed Bail Bond Fairness Act would amend Rule 46(f) directly, thereby bypassing the rulemaking process The Judiciary has opposed this legislation for 15 years, and the Department of Justice had recently sent a letter to Congress also opposing the bill Nonetheless, the House passed it, and some Senators, including Senate Majority Leader Harry Reid, are supporting it

B. Other Matters

1. Limiting Disclosure of Information About Plea Agreements and Cooperating Defendants

Professor Beale reported that the Committee on Court Administration and Case Management (CACM) had declined to recommend adoption of a national policy at this time on internet access to plea agreements and other case docket information revealing defendant cooperation with the government. The 68 public comments received in response to CACM's September 2007 publication in the *Federal Register* of the proposed removal of all plea agreements from the internet were 4-to-1 against the proposal. Courts have been experimenting with various ways of addressing the problem posed by websites such as www.whosarat.com. Professor Coquillette mentioned that the Standing Committee had established a task force to study how cases under seal are, and should be, docketed. One member noted that sealing requirements vary from circuit to circuit. Another member added that there is not yet public consensus on the proper balance between government transparency and individual privacy.

2. Questions Involving Implementation of Rule 49.1

Mr. Rabiej noted that the Administrative Office had received a variety of queries from courts regarding the proper implementation of Rule 49.1. Most involved the nine Rule 49.1(b) exemptions from the redaction requirement, which were resulting in the public having internet access to unredacted personal identifiers contained in the exempted documents. What was gained by requiring painstaking redaction of the names of all minors who are crime victims from most filings in a case, courts asked, if Rule 49.1(b)(9) allows those names to appear unredacted in, say, the criminal complaint? Ms. Fisher said that, to her knowledge, the government is diligently redacting personal identifiers from all court filings unless, for instance, the personal identifier is the subject of a warrant or part of the caption. If mistakes are indeed being made, she said, it may simply represent a training issue. Judge Tallman noted that Rule 49.1(d) and (e) offer courts a way to address those situations, albeit it only on a case by case basis.

3. Draft Revisions of Civil and Criminal AO Forms

Mr. McCabe reported that the Forms Working Group of judges and clerks had revised several forms in light of the new federal rules on privacy and to restyle their language in simple, modern English. He drew the members' attention to the draft revisions of 33 civil and criminal forms prepared by the working group, included in the agenda book for member comment.

4. Chart of Rule Amendment Activity by Committee

Mr. Rabiej explained the significance of several distributed charts showing the number of rule amendments by each advisory rules committee over the past 25 years. Judge Tallman suggested that the committees should generally take a conservative approach to changing rules given the significant increase of late in the number of proposed rule changes.

VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

After noting that the next meeting would be held on October 20-21, 2008, at the Biltmore Hotel in Phoenix, Judge Tallman adjourned the meeting.