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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

To: **Hon. Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

From: **Hon. Reena Raggi, Chair**
Advisory Committee on Criminal Rules

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

Date: **December 11, 2014**

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on November 4-5 in Washington, D.C. This report discusses briefly the following information items:

(1) the Committee's decision not to purse suggested amendments to Rules 11 and 52 of the Federal Rules of Criminal Procedure and Habeas Rule 5;
(2) the appointment of new subcommittees to review the issues raised by the work of the Standing Committee's CM/ECF Subcommittee and to consider a proposal to amend Rule 35; and
(3) the first public hearing on the proposed amendment to Rule 41 regarding venue for applications to conduct remote electronic searches.

II. Action on Suggested Amendments to Rules 11 and 52 of the Federal Rules of Criminal Procedure and Rule 5 of the Habeas Rules

After discussion, the Committee decided not to pursue further three possible amendments that had been proposed by judges.

A. Rule 11

The Committee heard the report of the Rule 11 Subcommittee, chaired by Judge Morrison England, which considered a proposal by Chief Judge Claudia Wilken to amend Rule 11. Chief Judge Wilken sought an amendment that would allow trial judges to refer criminal cases to other judicial officers for the purpose of exploring settlement. At least six districts in the Ninth Circuit had employed this procedure before the Supreme Court's decision in *United States v. Davila*, 133 S.Ct. 2139 (2013), which indicated that the practice violated Rule 11. Judge Wilken reported that although the procedure was employed only rarely, it had great value in those cases, saving resources for the courts, the prosecution, and the defense.

After extended discussion, the Committee decided, by a divided vote, not to pursue the proposed amendment. Although judges in several districts (including the Northern District of California, Chief Judge Wilken's district) have found the procedure to be helpful, the Committee was not persuaded there was an urgent need for an amendment. Since guilty plea rates exceed 95% both nationwide and in the districts that had employed this procedure, there is no problem of courts being overwhelmed by trials. Additionally, members of the Committee identified a variety of serious concerns raised by the proposal. These included concerns that judges engaged in settlement discussions might intrude into the authority allocated to the executive branch or the attorney-client relationship, be unequipped to make sound sentencing recommendations, or compromise their neutrality when proposing a particular disposition. Additionally, the proposal would require the Committee to grapple with a variety of legal and ethical concerns, and might generate collateral challenges.

B. Rule 52

The Committee heard the report of the Rule 52 Subcommittee, chaired by Judge Raymond Kethledge, which considered a proposal by Judge Jon Newman to amend Rule 52. Judge Newman proposed an amendment to allow for appellate review of unpreserved sentencing errors without satisfying the requirements of plain error if the error caused prejudice and correction would not require a new trial. The Subcommittee concluded that there was not enough of a problem to warrant an amendment. Most defaulted Guidelines calculation errors that increase a defendant's sentence are now being corrected on plain error review. Although there may be a limited number of cases in which relief is not now being granted, the Subcommittee concluded that the benefit of the proposed amendment would probably be outweighed by additional litigation about the exception's reach, including determining when a judge would have imposed a lesser sentence but for the Guidelines error. The Subcommittee also noted that the proposed amendment could reduce the incentives to raise issues in a timely fashion, and would work a change in a Rule that the Supreme Court has cited with approval and relied upon.

The Committee unanimously accepted the Subcommittee's recommendation not to pursue the suggested amendment.

C. Rule 5 of the Habeas Rules

The Committee also voted unanimously not to pursue the suggestion of Judge Michael Baylson that it amend Rule 5 of the Rules Governing 2255 Proceedings. Judge Baylson proposed that the rule not require the state to serve a petitioner with the exhibits that accompany the state's answer unless the district judge so orders. Committee members emphasized that there is presently no disagreement among the courts of appeals on this issue, and that the proposed change would generate less uniformity. Other members noted that it was accepted practice to serve petitioners with all materials filed with the court. The states' attorneys have not requested a change, suggesting that the current rule is not posing a problem requiring amendment. In light of the other matters already under consideration, the Committee decided not to appoint a subcommittee to pursue this issue.

III. Electronic Filing

After discussion of the work of the Standing Committee's CM/ECF Subcommittee and the need for coordinated action by all of the advisory committees, Judge Raggi announced the appointment of a new subcommittee to be chaired by Judge David Lawson. Judge Lawson was also appointed to serve as the Criminal Rules liaison to the Standing Committee's CM/ECF Subcommittee. The new subcommittee will consider the issues raised by the Civil Rules Advisory Committee's approval of a proposed rule requiring e-filing (subject to exceptions) in civil cases.

The proposed change in the Civil Rule requires reconsideration of subdivisions (b) and (e) of Rule 49 of the Federal Rules of Criminal Procedure. Subdivision (b) presently provides that service "must be made in the manner provided for a civil action," and subdivision (e) provides that a local rule may allow (not require) electronic filing if reasonable exceptions are allowed. The proposed changes in the Civil Rule raise several issues: whether it is time for a national rule on electronic filing in criminal cases; whether the Criminal Rules should now require (rather than permit) electronic filing; and, if so, what exceptions should be made.

The subcommittee will also address two other proposals by Professor Dan Capra, the reporter for the Standing Committee's CM/ECF Subcommittee. Professor Capra has proposed a template rule providing that (1) all references in the rules to information include electronically stored information and (2) any reference to filing or sending papers includes transmission by electronic means.

IV. Rule 35

Judge Raggi appointed a new subcommittee, chaired by Judge James Dever, to consider a proposal from the New York Council of Defense Lawyers to amend Rule 35 to afford judges additional discretion to reduce sentences after they become final. The proposal would allow a

district judge, upon defense motion, to reduce the sentence of a defendant who had served two thirds of his term in three circumstances: (1) newly discovered scientific evidence casting doubt on the validity of the conviction; (2) substantial rehabilitation of the defendant; or (3) deterioration of defendant's medical condition (providing an alternative compassionate release). Members noted that the proposal raised many issues, including how it would operate in light of statutory limits on collateral review under §§ 2241 and 2255, as well as statutorily mandated minimum sentences.

V. Public Hearing on Proposed Amendment to Rule 41

At the conclusion of its regular business, the Committee held the first of two scheduled public hearings on the amendments published for public comment. The Committee heard eight witnesses, most of whom had also provided written comments. All of the witnesses focused on the proposed amendment to Rule 41, which provides venue for remote electronic searches outside the district where the application is made in two situations: (1) when technology has been used to conceal the location of the media to be searched, and (2) in an investigation into violation of the Computer Fraud and Abuse Act, 18 U.S.C. 1030(a)(5), when the media to be searched are damaged computers located in five or more districts.

Seven of the eight witnesses opposed the proposed amendment. In general, these witnesses focused on the policy and constitutional concerns raised by remote electronic searches generally, rather than the new venue provisions. Some witnesses argued that remote electronic searches raise a host of policy decisions that should be resolved by Congress before further rule-making action. Witnesses argued that remote electronic searches raise a variety of Fourth Amendment problems including the inability to comply with particularity and notice requirements, the reasonableness of the proposed surreptitious entry into electronic devices, and the types of information that may be seized. Although the draft Committee Note states that the proposed amendment does not address the Fourth Amendment issues and leaves the application of constitutional standards "to ongoing case law development," the witnesses who opposed the proposed amendment found this disclaimer insufficient to address their concerns. Some viewed the proposed amendment as an endorsement of the constitutionality of such searches despite the disavowal in the Committee Note. Others expressed concern that litigation would not be able to satisfactorily address the constitutional issues, pointing to inadequate notice, and the dearth of decisions evaluating remote electronic searches to date. Several witnesses also expressed concern for the practical consequences and unintended effects that may be caused by remote electronic searches. These serious consequences may affect not only the target device but other devices, including those that are part of the same network, that are hosted on the same server, or that visit the same web sites. Additionally, several witnesses expressed concern that the proposed amendment would necessarily involve the federal courts in authorizing extraterritorial searches in some cases in which technology has been used to hide the location of the target device. The execution of such warrants could violate international law as well as particular treaties and mutual legal assistance agreements, they argued.

Committee members actively questioned witnesses throughout, seeking clarification and potential avenues for addressing the problem that prompted the proposed amendment while also avoiding the concerns raised.

Judge Raggi thanked all of the witnesses for their statements and testimony, noting that they had been extremely helpful and had provided this information early in the process to give the Committee ample time to consider their views. She encouraged the witnesses to provide any further comments in writing as soon as possible. Judge Raggi also reminded Committee members that the second hearing date is January 30, 2015, in Nashville at Vanderbilt Law School.