

**ADVISORY COMMITTEE
ON
CRIMINAL RULES**

**Park City, Utah
October 1-2, 2007**

AGENDA
CRIMINAL RULES COMMITTEE MEETING
OCTOBER 1-2, 2007
PARK CITY, UTAH

I. PRELIMINARY MATTERS

- A. Chair's Remarks, Introductions, and Administrative Announcements
- B. Review and Approval of Minutes of April 2007 Meeting in Brooklyn
- C. Status of Criminal Rules: Report of the Rules Committee Support Office
- D. General Discussion of the Rulemaking Process Under the Rules Enabling Act

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Judicial Conference and the Supreme Court (No Memo)

- 1. Rule 11. Pleas. Proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by eliminating the court's requirement to advise a defendant during plea colloquy that it must apply the Sentencing Guidelines
- 2. Rule 32. Sentencing and Judgment. Proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by clarifying that the court can instruct the probation office to include in the presentence report information relevant to factors set forth in 18 U.S.C. § 3553(a).
- 3. Rule 35. Correcting or Reducing a Sentence. Proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by deleting subparagraph (B), which is consistent with the *Booker* holding that the sentencing guidelines are advisory, rather than mandatory
- 4. Rule 45. Computing and Extending Time. Proposed amendment clarifies the computation of an additional three days when service is made by mail, leaving with the clerk of court, or electronic means under Civil Rule 5(b)(2)(B), (C), or (D))
- 5. Rule 49.1. Privacy Protection for Filings Made with the Court. Proposed new rule implements the E-Government Act of 2002, relating to privacy and security concerns arising from electronic filing of documents with the court.

B. Proposed Amendments Approved by the Standing Committee and Transmitted to the Judicial Conference (No Memo)

1. Rule 1. Scope; Definitions. Proposed amendment defining “victim.”
2. Rule 12.1. Notice of Alibi Defense. Proposed amendment provides that victim’s address and telephone number should not be automatically provided to the defense.
3. Rule 17. Subpoena. Proposed amendment requires judicial approval before service of a post indictment subpoena seeking personal or confidential information about a victim from a third party and provides a mechanism for providing notice to victims.
4. Rule 18. Place of Trial. Proposed amendment requires court to consider the convenience of victims in setting the place for trial within the district.
5. Rule 32. Sentencing and Judgment. Proposed amendment deletes definitions of victim and crime of violence to conform to other amendments, clarifies when presentence report should include information about restitution, clarifies standard for inclusion of victim impact information in presentence report, and provides that victims have a right “to be reasonably heard” in judicial proceedings regarding sentencing.
6. Rule 41(b). Search and Seizure. Proposed amendment authorizing magistrate judge to issue warrants for property outside of the United States.
7. Rule 60. Victim’s Rights. Proposed new rule provides for notice to victims, attendance at proceedings, the victim’s right to be heard, and limitations on relief.
8. Rule 61. Conforming Title.

C. Proposed Amendments Approved by the Standing Committee for Publication for Notice and Public Comment (No Memo)

1. Rule 7. The Indictment and Information. Proposed amendment removing reference to forfeiture.
2. Rule 32. Sentencing and Judgment. Proposed amendment requiring government to state whether it is seeking forfeiture in presentence report.
3. Rule 32.2. Criminal Forfeiture. Proposed amendment clarifying applicable procedures.
4. Rule 41. Search and Seizure. Proposed amendment specifying warrant requirements for electronically stored information.

5. Rule 45. Computing and Extending Time. Proposed amendment simplifying time computation methods.
6. Related amendments proposed regarding the time periods in Rules 5.1, 7, 8, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, and 59 and Rule 8 of the Rules Governing §§ 2254 and 2255 Proceedings.
7. Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings. Proposed amendments concerning certificates of appealability.

III. CONTINUING AGENDA ITEMS

- A. Report on June Meeting of the Standing Committee and Follow Up**
- B. Rules Relating to Crime Victims (Memo)**
- C. Proposed Amendments to Rule 11 of the Rules Governing 2254 and 2255 Proceedings (Memo)**
- D. Rule 32(h) (Memo)**
- E. Rules 32.1 and 46 (Memo)**
- F. Rule 15 (Memo)**
- G. Time Computation – Statutory Provisions (Memo)**

IV. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES.

- A. Rule 32(i)(1)(A) (Letter from Judge Torres)**
- B. Indicative Rulings (Memo)**
- C. Rule 32.1(a)(6) (Letter from Judge Collings)**
- D. Rule 6(f) (Letter from Judge Battaglia)**
- E. Rule 11(b)(1)(M) (Memo)**
- F. Rule 12(b)(3)(B) and Rule 34 (Letter from Department of Justice)**

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

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

1. Bail Bond Fairness Act

B. Other Matters

1. Proposal for Victims Advocate Member on Rules Committee (Memo)

2. Limiting Disclosure of Information About Plea Agreements and Cooperating Defendants (Memo)

VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

A. Spring Meeting

B. Other

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Justice Robert H. Edmunds, Jr.
Rachel Brill, Esquire
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Subcommittee on CVRA

Judge James P. Jones, Chair
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Judge Harvey Bartle III, Chair
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ADVISORY COMMITTEE ON CRIMINAL RULES

			<u>Start Date</u>	<u>End Date</u>
Susan C. Bucklew Chair	D	Florida (Middle)	Member: 1998 Chair: 2004	---- 2007
Harvey Bartle III	D	Pennsylvania (Eastern)	2001	2007
Anthony J. Battaglia	M	California (Southern)	2003	2009
Rachel Brill	ESQ	Puerto Rico	2006	2009
Leo P. Cunningham	ESQ	California	2006	2009
Robert H. Edmunds, Jr.	JUST	North Carolina	2004	2007
Alice S. Fisher*	DOJ	Washington, DC	----	Open
James Parker Jones	D	Virginia (Western)	2003	2009
Nancy J. King	ACAD	Tennessee	2001	2007
Thomas P. McNamara	FPD	North Carolina	2005	2008
Richard C. Tallman	C	Ninth Circuit	2004	2007
David G. Trager	D	New York (Eastern)	2000	2007
Mark L. Wolf	D	Massachusetts	2005	2008
Sara Sun Beale Reporter	ACAD	North Carolina	2005	Open

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October 1, 2007

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ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

April 16-17, 2007
Brooklyn, New York

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on the Rules of Criminal Procedure (the “committee”) met in Brooklyn, New York, on April 16-17, 2007. All members participated during all or part of the meeting:

Judge Susan C. Bucklew, Chair
Judge Richard C. Tallman
Judge David G. Trager
Judge Harvey Bartle, III
Judge James P. Jones
Judge Mark L. Wolf
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King (by telephone)
Leo P. Cunningham, Esquire
Rachel Brill, Esquire
Thomas P. McNamara, Esquire
Alice S. Fisher, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter

Representing the Standing Committee at the meeting was Judge Mark R. Kravitz. 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
Timothy K. Dole, Attorney Advisor at the Administrative Office
Laurel L. Hooper, Senior Research Associate, Federal Judicial Center

The following officials from the Department’s Criminal Division also participated:

William A. Burck, Counselor to the Assistant Attorney General
Jonathan J. Wroblewski, Acting Director, Office of Policy and Legislation
Stefan D. Cassella, Deputy Chief, Asset Forfeiture and Money Laundering
Section

Ovie Carroll, Chief, Cybercrime Laboratory, Computer Crime and Intellectual Property Section

Richard W. Downing, Assistant Deputy Chief for Technology and Procedural Law, Computer Crime and Intellectual Property Section

Also participating in the meeting, for the discussion of the Forfeiture Subcommittee's recommendations, was David Smith of the National Association of Criminal Defense Lawyers.

A. Chair's Remarks, Introductions, and Administrative Announcements

Judge Bucklew welcomed the committee to Brooklyn and thanked Judge Trager for hosting it. She noted that this would be her last meeting as chair and that the terms of Judge Trager, Judge Bartle, and Professor King would also expire on September 30, 2007. She announced that the committee's next meeting, on October 1-2, 2007, would be held in Park City, Utah. She thanked the reporter and subcommittee members for their especially hard work in recent months and thanked the Administrative Office staff for their coordination assistance.

B. Review and Approval of Minutes

Judge Tallman moved to approve the draft minutes of the October 2006 meeting.

The committee unanimously approved the motion.

C. Report of the Rules Committee Support Office

Mr. Rabiej said that the Rules Committee Support Office had nothing to report other than information relating to specific amendments, which he would relate later in the meeting.

II. CRIMINAL RULE CHANGES UNDER CONSIDERATION

A. Proposed Amendments Approved by Standing Committee and Judicial Conference and Pending Before the Supreme Court

Judge Bucklew reported that the three rule amendments relating to *United States v. Booker*, 543 U.S. 220 (2005), the new criminal privacy rule required by the E-Government Act of 2002, and the Rule 45 amendment, all previously approved by the Judicial Conference, were pending before the Supreme Court:

1. Rule 11. Pleas. The proposed amendment conforms the rule to the Supreme Court's decision in *Booker* by eliminating the requirement that the court advise a defendant during plea colloquy that it must apply the Sentencing Guidelines.

2. Rule 32. Sentencing and Judgment. The proposed amendment conforms the rule to *Booker* by clarifying that the court can instruct the probation office to include in the presentence report information relevant to factors in 18 U.S.C. § 3553(a).
3. Rule 35. Correcting or Reducing a Sentence. The proposed amendment conforms the rule to *Booker* by deleting subparagraph (B), consistent with *Booker's* holding that the Sentencing Guidelines are advisory rather than mandatory.
4. Rule 45. Computing and Extending Time. The proposed amendment clarifies how to compute the additional three days that a party is given to respond when service is made by mail, leaving it with the clerk of court, or by electronic means under Civil Rule 5(b)(2)(B), (C), or (D).
5. Rule 49.1. Privacy Protection For Filings Made with the Court. The proposed new rule implements section 205(c)(3) of the E-Government Act of 2002, which requires the judiciary to promulgate federal rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically."

B. Proposed Amendment Approved by the Criminal Rules Committee for Consideration by the Standing Committee

Judge Bucklew noted that the committee had voted in October 2006 to forward to the Standing Committee for publication the proposed amendment to Rule 16 obligating prosecutors to disclose exculpatory or impeaching evidence without regard to its materiality. She said that Mr. Rabiej had advised Federal Judicial Center staff that the committee would like an update of its October 2004 study of local rules and how they treat a prosecutor's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). Judge Bucklew reported that the proposed rule amendment would be presented to the Standing Committee at its June 2007 meeting. Professor Beale noted that she was preparing a memorandum in support of the amendment.

C. Proposed Amendments Related to the Crime Victims' Rights Act Published for Public Comment

Judge Bucklew noted that the following published rule amendment proposals, relating to the Crime Victims' Rights Act (CVRA), had been the subject of significant public comment, including substantial testimony at the public hearing held on January 26, 2007, a letter from Senator Jon Kyl, and a law review article by Judge Paul Cassell:

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

2. 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.
3. Rule 17. Subpoena. The proposed amendment requires judicial approval before service of a post-indictment subpoena seeking personal or confidential victim information from a third party and provides a mechanism for victim notification.
4. Rule 18. Place of Trial. The proposed amendment requires the court to consider the convenience of victims — in addition to the convenience of the defendant and witnesses — in setting the place for trial within the district.
5. Rule 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.
6. Rule 60. Victim's Rights. The proposed new rule provides a victim the right to be notified, to attend public proceedings, and to be heard, and sets limits on relief.
7. Rule 61. Conforming Title. The proposed amendment simply renumbers the existing Rule 60.

After highlighting Professor Beale's written summary of the public comments, Judge Bucklew invited Judge Jones to report on the work of the CVRA Subcommittee in response to the public comments. Judge Jones began by acknowledging the hard work of the other subcommittee members: Judge Battaglia, Justice Edmunds, Professor King, Mr. Cunningham, and the Department's Mr. Wroblewski. In addition to participating in lengthy conference calls, the members had performed a significant amount of "homework," Judge Jones reported.

Complaints regarding the proposed CVRA rule amendments had been received at the public hearing "from both sides," he reported, some accusing the committee of showing indifference to victims' rights and others claiming that the committee's proposal violated a defendant's constitutional rights. After carefully reviewing all the comments received, the subcommittee recommended making certain changes to its original proposal. Two central principles that guided the original design of these amendments, however, were retained: first, the need to be prudent and wait for greater practical experience with the CVRA before a wholesale revision of the Federal Rules of Criminal Procedure is undertaken, particularly because these rules often serve as a model for state procedural rules; and second, the placement of most of the CVRA-related provisions in one central rule rather than sprinkling them throughout the rules, thereby emphasizing their importance and giving practitioners easy access.

The subcommittee continued urging adoption of the definitional provision in Rule 1. Judge Jones reported, but suggested moving a reference to the Act's ban on a defendant asserting victim's rights to the note accompanying proposed Rule 60(b)(2), where the rule discusses who may represent victims. The subcommittee recommended making clear in the note that courts have authority to determine who qualifies as a "victim" through appropriate fact finding and legal rulings. Professor Beale pointed out that certain commentators had urged broader substantive changes that, if adopted, would likely require republication and a new public comment cycle. Rather than delay the effective date of these proposed rule changes, she suggested that the committee maintain an ongoing list of additional CVRA-related proposals for consideration in future meetings. Judge Jones agreed and noted that republication of all the proposed CVRA-related rule amendment would cause a two-year delay, which seemed contrary to Congress's clear directive in 2004 that implementation of victims' rights be a high priority.

Professor Beale said that some commentators had expressed concern that giving the term "victim" the statutory definition in Rule 1 could have a broader, inadvertent impact on other areas of the law, such as restitution. Judge Jones suggested that the Rule 1 definition clearly governed the term only as used within the Federal Rules of Criminal Procedure, noting that Rule 1(b) begins as follows: "The following definitions apply to these rules:" It was noted, though, that courts often treat such definitions as gap fillers. Professor Beale suggested that courts could cite the CVRA's definition of "victim" directly without referring to Rule 1. After further discussion, a member recommended allowing the case law to sort out this issue.

The committee discussed the proposed Rule 12.1 amendment. Judge Jones noted that the proposal had been criticized for placing the burden on the defendant to show a need for witnesses' names and addresses. The subcommittee continued to believe, though, that the proposed language struck the proper balance. Reciprocal disclosure is maintained, he said, because once the defendant has shown a need for the information — not a heavy burden — the court is obligated to protect the defendant's right to trial preparation. Also, even now, he noted, the present rule allows an exception to disclosure obligations for good cause.

Mr. McNamara reported that the federal defenders community felt strongly that the proposed Rule 12.1 amendment was unconstitutional, because it would create a new right for victims and an unfair advantage for the government by requiring a defendant to disclose the names and addresses of alibi witnesses, but to wait before receiving the same information for the alleged victim. Professor Beale said that the question was who should bear the burden of showing that this is an unusual case. Judge Jones said that, in cases where the defendant knows the victim, disclosure of the name and address was unnecessary, and in most other cases, the defendant could easily show a need. The question, one member noted, was simply how to tee up the issue for the court's resolution. Another member questioned whether it made sense, though — particularly in the context of an alibi rule, one of the few circumstances where defendants must disclose aspects of their defense — to require defendants to show a need for basic contact information that they would nearly always require to carry out an investigation. Mr. Wroblewski suggested that the issue was not whether the government has to disclose whether the victim will be a rebuttal witness or whether the person must be produced, but simply the mechanism for

producing the person — whether the government is required to disclose the name and address to the defense or whether an alternate procedure could be followed. Referring to proposed Rule 12.1(b)(1)(B)(ii), one judge noted that he had often just required the government to bring the witness to the jury room and permit the defense to interview the person there.

A member reported that someone is currently being prosecuted for issuing threats against him, which gave him real concerns about having defendants know where victims live. Concern was expressed that not all judges would be as reasonable as those in the room and that some might refuse to give defendants access to addresses and phone numbers. It was suggested that sometimes the address should be given, but not the phone number. After further discussion, an alternative motion was made to amend the “Exceptions” provision in Rule 12.1(d) as follows:

(1) In General. For good cause, the court may grant an exception to any requirement of Rule 12.1(a)-(c).

(2) Victim’s Address and Telephone Number. If on motion in accordance with Rule 60(b)(1)-(4), the court finds that disclosure to the defendant of the address or telephone number of a victim whom the government intends to rely on a rebuttal witness to the defendant’s alibi defense would violate the victim’s right to be reasonably protected from the accused, the court shall fashion a reasonable alternative procedure that ensures effective preparation of the defense and also reasonable protection of the victim.

Professor Beale suggested that, because making this change could require republishing for a new round of public comment, it might make sense to proceed with the amendment as proposed and consider further adjustments at a future date. A participant questioned whether republication would be required. It was recommended that, given Senator Kyl’s letter to the committee dated February 16, 2007, and the floor statements on the CVRA made by Senator Kyl and Senator Dianne Feinstein, the committee should preserve the careful balance between competing concerns that is struck in the Act itself, as the subcommittee’s proposal does.

After further discussion, Judge Bucklew suggested that the committee vote on each proposed CVRA-related rule amendment separately instead of as a package and that, before considering the motion to revise the amendment to Rule 12.1, the committee first vote on the proposal as originally recommended by the CVRA Subcommittee. Judge Jones moved to forward to the Standing Committee the subcommittee’s Rule 12.1 amendment proposal.

The committee voted 9-2 to forward the proposed Rule 12.1 amendment to the Standing Committee as drafted by the CVRA Subcommittee.

Judge Jones moved for adoption of the subcommittee’s proposed Rule 1 amendment.

The committee voted 10-1 to forward the proposed Rule 1 amendment to the Standing Committee.

Following a break, Professor King, who was unable to travel to New York, joined the meeting by telephone. The committee discussed the proposed amendment to Rule 17(c)(3). In response to public comment, the CVRA Subcommittee recommended omitting the language providing for ex parte issuance of a court order authorizing a subpoena to a third party for private or confidential information about a victim. Also, the last sentence was revised to provide that, absent exceptional circumstances, the court must notify the victim before a subpoena for a victim's private or confidential information can be served upon a third party. This was a compromise. Victims should normally be notified. But without ex parte applications, the government could learn of the subpoena request, which might reveal defense strategy. The proposed rule amendment would also not deprive courts of their inherent power to entertain any application ex parte where good cause for doing so was shown.

One member suggested adding "or otherwise have the opportunity to be heard or object" to the end of the proposed language of Rule 17(c)(3), because victims may not have lawyers and may not know how to file a formal motion. Another member said that perhaps adding the words "or otherwise object" would be sufficient. Mr. McNamara reported that the defenders community considered the entire amendment proposal unnecessary and unwise, but that at the very least the phrase "unless there are exceptional circumstances" should be replaced with "for good cause shown." It was suggested that the rule acknowledge the fact that victims sometimes communicate directly with the court. Concern was expressed, though, about endorsing such informality in the rule, given the CVRA's effort to effect a paradigm shift and give victims formal status in the case and the need to give all parties proper notice. Judge Bucklew pointed out that, as a practical matter, she treated any request for relief contained in a letter from a victim as a motion. After further discussion, it was suggested that judges be allowed to sort out the proper application of this rule on a case-by-case basis. A motion was made to add the phrase "or otherwise object" at the end of the Rule 17(c)(3) amendment proposed by the subcommittee.

The committee voted 9-3 to add the phrase "or otherwise object" to the proposed Rule 17 amendment.

A motion was made to replace the phrase "there are exceptional circumstances" in the subcommittee's Rule 17 amendment proposal with the phrase "good cause is shown."

The motion was rejected by a vote of 8-4.

The committee then discussed the two-step process envisioned by the proposed Rule 17 amendment. Because the question for the judge was whether to require *any* notice to the victim, it was suggested that the rule set a high standard — "exceptional circumstances" — because normally victims should be informed when, say, their psychiatric records are being subpoenaed. The last sentence should therefore be changed to require that, absent exceptional circumstances, notice be given to both the victim and the government. This rule is all about notice, and most subpoenas are ex parte. Several members voiced support for addressing this issue in the committee note. After further discussion, a motion was made to add the following clarifying sentence to the note accompanying the proposed Rule 17 amendment: "The committee leaves to

the judgment of the district court the determination as to whether the judge will permit the matter to be decided ex parte and authorize service of the third-party subpoena without notice to anyone.” A suggestion that the addition to the note refer simply to “court” rather than “district court” was readily accepted.

The committee voted 10-0 to add the sentence suggested by Judge Tallman, as modified, to the committee note.

The committee considered a suggestion that the phrase “would include” replace the phrase “might include” in the last sentence of the second paragraph of the note accompanying the proposed Rule 17 amendment. Mr. Wroblewski said that he agreed that “exceptional circumstances” would include “evidence that might be lost or destroyed if the subpoena were delayed,” but disagreed that “would include” was proper to a “situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy.” It was suggested that the note discuss the fact that “exceptional circumstances” may mean different things depending on the nature of the information sought. One member noted that retaining the phrase “exceptional circumstances” would make clear that the bias remained in favor of notification.

The committee voted 7-5 to replace the phrase “might include” with the phrase “would include” in the last sentence of the second paragraph of the note accompanying the proposed Rule 17 amendment.

Judge Jones moved to forward the proposed Rule 17 amendment and its accompanying committee note, as modified, to the Standing Committee.

The committee voted 9-3 to forward the proposed Rule 17 amendment and its accompanying note, as modified, to the Standing Committee.

The CVRA Subcommittee recommended adding the phrase “any victim” to Rule 18 to make clear that courts must consider the convenience of the victim(s) when setting the place of prosecution and trial. The defenders community opposed the change because the CVRA gives victims only a right “not to be excluded from any such public proceeding,” not a right to attend them. Professor Beale agreed that there was a problem with the reference in lines 11 and 12 of the note to “right to attend proceedings under the Crime Victims’ Rights Act, codified at 18 U.S.C. § 3771(b),” because the statute indeed creates no such right. She also said that lines 16 and 17 of the note were included to underscore the court’s need to balance competing interests. Judge Wolf moved that the Rule 18 amendment be adopted.

The committee voted 9-2 to forward the proposed Rule 18 amendment to the Standing Committee.

Three suggestions to the note were discussed. Professor Beale proposed revising the first sentence of the note accompanying the proposed Rule 18 amendment to read as follows: “The rule requires that courts consider the convenience of victims — as well as that of the defendant

and witnesses — in setting the place for trial within the district.” It was suggested that the sentence in lines 13 and 14 of the note was unnecessary and should be omitted: “If the convenience of non-party witnesses is to be considered, the convenience of victims who will not testify should also be considered.” One member recommended rewording the final sentence to read, “The Committee recognizes that the court has substantial discretion to balance any competing interests.”

The committee without objection approved the three suggested changes to the note.

The CVRA Subcommittee had decided to retain the statutory phrase “right to be reasonably heard” as originally proposed in the Rule 32 amendment. The subcommittee had considered a suggestion that the rule be amended to give victims an express right to disclosure of all or parts of a presentence report, but ultimately had concluded that this was another area where future experience would better inform the rulemaking process.

A motion was made to reject the subcommittee’s proposal to change the term “permits” to “requires” in Rule 32(c)(1)(B). The rule currently provides: “If the law requires restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.”

The motion was rejected by a vote of 9-3.

A motion was made to reject the CVRA Subcommittee’s proposal to change the current requirement in Rule 32(d)(2)(B) that the presentence report contain “verified information.” The subcommittee had proposed replacing the phrase “verified information, stated in a nonargumentative style” with the word “information.” Professor Beale suggested that any concerns about the inclusion of unverified information in presentence reports could be addressed in a separate, future agenda item. It was noted that there was already a formal procedure affording both parties ample opportunity to object to statements in the presentence report.

One member suggested that perhaps more important would be to amend Rule 32 to require fair notice to defendants of what a victim intended to say at the sentencing hearing. It was suggested that any such requirement would raise serious practical difficulties. Mr. Wroblewski said that victim impact statements were included in most presentence reports. Professor Beale suggested that this was perhaps a topic for a future agenda item.

The motion was rejected by a vote of 10-2.

After a suggestion to revise the accompanying committee note was discussed and ultimately withdrawn, Judge Jones moved to forward the CVRA Subcommittee’s Rule 32 amendment proposal to the Standing Committee.

The committee voted 10-2 to forward the proposed Rule 32 amendment to the Standing Committee.

Following lunch, the committee discussed proposed Rule 60. In response to the comments received, the subcommittee had revised paragraph (b)(2) to make clear that a victim's lawful representative could assert the victim's rights and had changed the note to clarify that a victim's representative could be counsel.

It was noted that paragraphs (3) and (4) of proposed Rule 60(b) incorrectly referred to "subsection" instead of "subdivision" in lines 30 and 34. Professor Beale added that the reference to the specific provision should be replaced by a broader reference to the rights described "in these rules." A motion was made that the phrase "under these rules" replace "described in subdivision (a)" in lines 30 and 34. Concern was raised about having paragraph (b)(3) apply to victim's rights other than those described in subdivision (a). Following substantial discussion, the committee decided to vote first whether to replace the reference to "described in subsection (a)" with "described in these rules" in line 34 of proposed Rule 60.

The committee voted 10-2 to replace the reference to "subsection (a)" with "these rules" in line 34 of proposed Rule 60.

It was noted that the rule included other instances where the phrase "under these rules" was used instead of "described in these rules." Professor Beale suggested that "under these rules" was broader and could include rights implied but not expressly "described" in the rules. A motion was made to change all references to "victim's rights under these rules" to "victim's rights described in these rules," including lines 23, 25, and 46, and that the chair and the reporter be given discretion to make similar wording changes elsewhere, as appropriate.

The committee voted 10-2 to replace all references to "victim's rights under these rules" with "victim's rights described in these rules" and to give the chair and the reporter discretion to make similar wording changes elsewhere, as appropriate.

The committee returned to a discussion of whether the "Multiple Victims" provision in paragraph (b)(3) should apply to victim's rights other than those described in subdivision (a). One member questioned whether the provisions set forth in subdivision (a) were actually "rights," particularly those in paragraph (a)(2). A motion was made to change the phrase "described in subdivision (a)" in line 30 to "described in these rules." One member voiced support for the change because 18 U.S.C. § (d)(2), the CVRA's "multiple crime victims" provision, includes rights other than those set forth in subdivision (a) of proposed Rule 60.

The committee voted 9-2 to change the phrase "described in subdivision (a)" in line 30 to "described in these rules."

It was suggested that the last two sentences of proposed Rule 60(a)(2) were unnecessary and should be deleted: "The court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record." Another member, though, recommended retaining the sentences so that a clearer record is created for purposes of appeal. Several

members defended the decision to import key language from the statute directly into the text of the Criminal Rules. One member questioned, though, whether the second sentence of paragraph (a)(2) really added anything to what is already stated earlier in proposed Rule 60. Another argued against including a phrase like “fullest attendance possible” in the rule.

A motion was made to change the beginning of the first sentence of paragraph (a)(2) as follows: “In determining whether to exclude a victim, the court must”

The committee voted 11-0 to insert the introductory phrase, “In determining whether to exclude a victim,” at the beginning of the first sentence of paragraph (a)(2).

After a discussion of whether the statutory phrase “highest offense charged,” incorporated in proposed Rule 60(b)(5)(C), was sufficiently clear, Judge Jones moved to forward proposed Rule 60 to the Standing Committee, as revised.

The committee voted 10-2 to forward proposed Rule 60, as revised, to the Standing Committee.

Judge Bucklew asked whether there was any objection to renumbering Rule 60.

The committee decided without objection to forward the proposal to renumber Rule 60 to the Standing Committee.

D. Other Proposed Amendments Published for Public Comment

Judge Bucklew noted that public comment had also been received with respect to the following two published rule amendment proposals:

1. Rule 29. Motion for Judgment of Acquittal. The proposed amendment prohibits a judge from entering a judgment of acquittal before verdict, unless the defendant waives his Double Jeopardy rights.
2. Rule 41. Search and Seizure. The proposed amendment authorizes magistrate judges to issue warrants for property outside of the United States.

Judge Bucklew noted that the overwhelming majority of the public comments opposed the Rule 29 amendment. Judge Tallman, who chaired the subcommittee that worked on the Rule 29 amendment proposal, reported that the subcommittee had voted 3-2 to recommend tabling the published proposal to revise Rule 29, which included a double jeopardy rights waiver. In response, the Department had submitted an alternative, which would essentially require a judge to defer ruling on a Rule 29 motion from mid-trial until after the jury announces its verdict or announces that it is unable to reach a verdict. The only remaining question was whether a defendant has some inchoate constitutional right, either under the Double Jeopardy or Due Process clauses, to have the court decide a Rule 29 motion promptly — mid-trial — rather than

have the ruling postponed until later. Judge Tallman noted that both he and Judge Wolf had prepared memoranda on the issue, which had been distributed to all committee members. Judge Tallman added that the new version would have to be published.

Judge Tallman requested additional time for his subcommittee to work on the Department's alternative version for consideration by the committee in October 2007. One member urged that the committee continue considering the Double Jeopardy waiver provision proposed by Judge David Levi, which he considered a sound and constitutional approach to solving the infrequent, but troubling problem of erroneous court acquittals. Ms. Fisher said that the Department was not walking away from the proposal due to constitutional concerns, but was mindful of the public comments and thought that it should offer an alternative as a further compromise to prevent its three-year effort to amend Rule 29 from dying.

Judge Wolf moved that the published Rule 29 amendment proposal be tabled, but that the subcommittee continue working on it for subsequent consideration by the full committee. It was suggested that an effort to limit the power of a district court judge required a statutory change rather than a rule amendment. Judge Wolf noted that his memorandum included a discussion of this and related legal issues. Judge Bucklew said that the Department had indicated at one point that it considered it appropriate to take this issue directly to Congress, but that it wanted to give the rules committees the opportunity to have input.

If public criticism had changed the committee's estimation of the published proposal's merits such that it wished to table it and consider an alternate, the Standing Committee would likely be interested in understanding the new timeline, Judge Kravitz said. He added that a coordinated memorandum analyzing the Rules Enabling Act question was needed. Professor Beale noted that the committee had voted to table this proposal once before and that the Department had then gone to the Standing Committee and persuaded that body to direct the advisory committee to resume its consideration. One member voiced opposition to the motion to table the rule amendment proposal, given how much time the committee had already invested in the effort to amend Rule 29. In light of the comments, the motion was withdrawn.

Judge Bucklew inquired whether the Department would once again take its case to the Standing Committee if the advisory committee decided to table the proposal. Ms. Fisher said that the Department considered this a very important effort and would continue working to have the advisory committee approve a version of the rule amendment that the Standing Committee could vote on. It was noted that the Standing Committee had asked the advisory committee to take a second look at the Department's proposal because it preferred that the Department come to the rules committees rather than go directly to Congress. The new proposal dropped the double jeopardy waiver provision and altered only the timing of the court's decision. Another member said that the most controversial aspect of the proposal remained, namely, elimination of the court's power to issue its ruling mid-trial and thereby relieve one or more defendants of the burden of sitting through a lengthy trial.

Judge Wolf moved that the committee recommend to the Standing Committee that it not adopt the proposed Rule 29 amendment as published for public comment.

The committee voted 9-3 to recommend that the Standing Committee not adopt the Rule 29 amendment as published.

Ms. Fisher moved to send the revised version to the Standing Committee instead.

Professor Beale said that the new version would likely need to be published for public comment first. After further discussion, Judge Tallman suggested that it would be a waste of the subcommittee's time to continue working on the revised amendment if it lacked committee support. One member noted that Judge Tallman's memorandum of March 28, 2007, had indicated that further research was required and expressly stated that the new materials were being circulated "for informational purposes only at this time." He added that if the Department was intent on pursuing the amendment, the committee should take the time needed to consider the Department's latest proposal properly. It was suggested, though, that if there was limited committee support for amending Rule 29 at all, investing more time would be pointless. Judge Bucklew and Professor Beale noted that the Department's new Rule 29 amendment proposal had not yet been properly reviewed by the subcommittee, much less by the full committee.

Judge Jones moved that the proposal to revise Rule 29 be tabled indefinitely, *sine die*.

After further discussion, Judge Bucklew sought and received Ms. Fisher's consent for postponing consideration of her motion until the committee had first voted on the motion to table the proposal. One member stated that, although the Department had initially persuaded her that a serious problem existed in certain cases and although she saw no constitutional problem with any of the Rule 29 amendment proposals, the recent public testimony had convinced her that this was not an issue that requires a change of this magnitude.

Ms. Fisher said that the committee had previously been furnished empirical data showing the significant scope of the problem that the proposed Rule 29 amendment was designed to solve. Mr. Wroblewski said that, although the defense community had raised certain questions, it was clear that between 50 and 150 mid-trial Rule 29 motions are granted each year. Mr. McNamara said that the defenders had examined every case cited by the Department and had concluded, after talking to the persons involved, that the Rule 29 judgments were proper down the line.

Procedurally, one member asked whether tabling the Department's new Rule 29 proposal would end the matter. It was noted that the Standing Committee could still decide to proceed. Indeed, Judge Bucklew noted that the Standing Committee had returned the proposal to the advisory committee with instructions that it draft a rule amendment. Asked whether he thought that the Standing Committee would do so again, Judge Kravitz recounted the historical circumstances of the Standing Committee's reasoning. Although it was impossible to predict what the Standing Committee would do this time, the Standing Committee traditionally would

not try to draft a rule itself. Professor Beale suggested, and Judge Bucklew agreed, that if the committee decided not to amend Rule 29 as proposed, it should make clear to the Standing Committee the basis for its decision not to do so.

Following a break, Judge Bucklew invited the members to announce their votes on the motion to table the proposed Rule 29 amendment, and, if supporting it and if they felt comfortable doing so, to identify the primary reasons motivating the vote. The members who voted in favor of the motion cited one or more of the following reasons:

- Because the value of having trial judges prune cases before they go to the jury outweighs the cost of a few improvident acquittals not being appealable.
- Because the proposed amendment is a substantive change that would, if approved, violate the Rules Enabling Act and which should instead be handled by Congress.
- Because there is insufficient evidence of a problem, there being only anecdotal, not empirical, data to justify disrupting Rule 29's careful balance of interests.
- Because courts rarely decide Rule 29 motions prior to verdict. (One member reported having recently granted his first such motion in 15 years on the bench.)
- Because the proposal has failed to garner support despite the Department being afforded four years to make a persuasive case.
- Because the problems created by not being able to appeal erroneous judgment of acquittal do not outweigh the costs of making this rule change.

The committee voted 7-5 to table the proposal to revise Rule 29 indefinitely, sine die.

The committee then turned its attention to the proposed Rule 41(b) amendment, which, Judge Bucklew noted, would authorize magistrate judges to issue search warrants in locations under U.S. control but outside the jurisdiction of any U.S. judicial district. The only aspect of the proposal that elicited significant comment, she said, was whether to exclude American Samoa, as requested by the Pacific Islands Committee of the Ninth Circuit Judicial Council.

Judge Bucklew noted that, according to the Department's letter of March 7, 2007, "the High Court of American Samoa has now had an opportunity to review the proposed amendment . . . and has not objected to it." Mr. Wroblewski said that the court could have objected, but had not done so. Judge Tallman reported having made clear during his conversation with Judge J. Clifford Wallace, chair of the Ninth Circuit committee, that further action was needed if his committee was opposed to the inclusion of American Samoa in this proposed amendment. Because no such action was taken, Judge Tallman said he favored going forward with the proposed amendment without excluding American Samoa.

Professor Beale noted that the style consultant had felt strongly that the statutory phrase "ancillary and appurtenant to" is redundant and should not be imported into the rule. The language therefore had been simplified and the following sentence added to the note: "The difference between the language in this rule and the statute reflect the style conventions used in these rules, rather than any intention to alter the scope of the legal authority conferred." She

noted that the word “reflect” should actually be “reflects,” and that “magistrate” in the previous sentence of the note should actually read “magistrate judge.”

Justice Edmunds moved to forward the Rule 41(b) amendment to the Standing Committee with a request that it be adopted without the bracketed exclusion of American Samoa.

The committee voted unanimously to forward the Rule 41(b) amendment to the Standing Committee without the bracketed exclusion of American Samoa.

III. REPORTS OF THE SUBCOMMITTEES

A. Rule 45, Time Computation Amendment and Related Rules Changes

Mr. Cunningham reported on the work of the Time Computation Subcommittee, which he chaired. He noted that the time computation template proposed for Criminal Rule 45(a) was virtually identical to what is being considered for Civil Rule 6(a). The controversial issue, he added, was what to do about statutory deadlines. Professor Beale noted that because Civil Rule 6(a), unlike Criminal Rule 45, stated that its time counting method applied to “any applicable statute,” the following language, not found in the general template, had been added in brackets to the first paragraph of the note accompanying the proposed Criminal Rule 45(a) amendment:

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 nevertheless applied the restyled Rule 45(a) when computing various statutory periods.

It was noted that different courts count statutory periods differently, despite the fact that the Civil Rules expressly say that they apply to computation of statutory deadlines. Professor Beale noted that the proposed Rule 45(a) amendment would apply only to a “statute that does not specify a time-computation method.” One member wondered whether the proposed rule would abrogate a recent Third Circuit decision and suggested that it might be preferable not to comment on whether the time counting rules applied to statutes. It was suggested, however, that providing greater uniformity on this issue was important, at least with respect to the hundreds of deadlines statutes where Congress did not specify a time counting method. A list would be compiled for Congress of non-controversial statutory changes that could be approved parallel to the rules changes, so that everything could take effect in December 2009. It was reported that staff on Capitol Hill had raised no objections to the proposal and in fact seemed to favor it.

There was a discussion about the circumstances under which a court would be considered inaccessible. It was noted that a decision had been made not to try to define inaccessibility in the electronic age. One member asked whether time counting in § 2254 and § 2255 habeas cases

was governed by Civil Rule 6(a) or Criminal Rule 45(a). It was later reported that the only deadline affected by the time counting change in the Rules Governing § 2254 and § 2255 Proceedings themselves is the 10-day deadline in Rule 8(b) referring to a magistrate judge's ruling, which would presumably be changed to 14 days.

Judge Tallman moved that the proposed Rule 45(a) amendment be forwarded to the Standing Committee for publication.

The committee voted unanimously to forward the Rule 45(a) amendment to the Standing Committee for publication.

The members discussed individual deadlines found in various criminal rules that the subcommittee recommended amending to account for the time computation change. Mr. Cunningham explained that, as illustrated in the proposed amendment to Rule 5.1(c), the rule of thumb was for time periods under 30 days to be expressed in multiples of seven. Professor Beale referred to the chart provided in the materials and noted that the time period in Rule 5.1 is derived from 18 U.S.C. § 3060(b). When the proposed rule change was published for public comment, it could be made clear that this change would only take effect if Congress changed the statute. Mr. Wroblewski noted that there were numerous changes that would all have to take place simultaneously, an approach that the Department supported.

Judge Bucklew reported that, in some instances where the existing deadline is 7 days, such as in Rule 12.3(a)(4)(B) and Rule 12.3.(a)(4)(C), the subcommittee had recommended leaving the deadline at 7 days rather than increasing it to 14 days. It was suggested that, if the Standing Committee decided to adopt the waiver version of the proposed Rule 29 amendment; it might need to consider changing the 7-day deadline to 14 days. A member questioned changing the 7-day deadline in Rule 32(g) to 14 days. Professor Beale said that this was an inadvertent error and that the subcommittee actually had recommended leaving that deadline unchanged.

The committee discussed the current 10-day deadline for executing warrants in Rule 41(c)(2)(A)(i). Professor Beale said that the subcommittee had discussed staleness concerns, but ultimately decided to follow the rule of thumb of increasing deadlines to 7-day multiples. It was suggested that the staleness issue be addressed in the note by stating that this deadline change was not intended to change the staleness analysis.

A member asked why references in Rule 41(f)(2)(B) and (C) to "10 calendar days" were not also being changed to 7-day multiples. After further discussion, Professor Beale suggested changing all "10 calendar days" references in the criminal rules to "14 days." One member recommended retaining 10-day deadlines throughout Rule 41, due to the staleness concerns mentioned. Mr. Wroblewski suggested bracketing the number for public comment. It was suggested that the proposed amendment be published as "14 [7] days."

Professor Beale said that the committee did not recommend changing the 10-day deadline in Rule 46(h)(2) because the time period is derived from 18 U.S.C. §§ 3142 and 3144, which

provide their own time counting rules. Judge Kravitz suggested explaining why the deadline in Rule 46 was not changed in the nearby note accompanying the proposed Rule 45 amendment.

Mr. Cunningham reported that the subcommittee recommended changing the 5-day deadline in Rule 47(c) to 7 days and the 10-day deadlines in Rule 58(g)(2)(A) and (B) and in Rule 59(a) and (B)(2) to 14 days. It was noted that the Appellate Rules Committee was proposing changing the 10-day deadline in Rule 58's appellate rules counterpart to 14 days.

Judge Bartle moved to forward the entire package of rule changes prompted by the time computation change to the Standing Committee. Judge Trager moved to include similar changes to the rules governing habeas corpus cases filed under 28 U.S.C. § 2254 and § 2255.

The committee voted unanimously to forward to the Standing Committee for publication all the time computation rule amendments identified in the Criminal Rules and in the Rules Governing § 2254 and § 2255 Proceedings.

The Department reported having circulated the proposed deadline changes to all U.S. attorneys' offices and had received a number of comments, including two significant ones. First, there was concern about the interaction between the changes in the federal rules and time periods found in local rules. Because the federal time computation rules would trump any local time computation rules, it was important that courts and local bars begin focusing on this issue over the next year so that all changes can be made in a coordinated fashion. Second, there was concern over certain statutory deadlines. By the end of June 2007, the Department planned to provide a complete list to the Standing Committee and the Criminal Rules Committee of all statutes that needed changing, and over the summer, it hoped to draft legislation that Congress could enact to effect the desired changes.

Judge Bucklew adjourned the meeting for the day.

B. Proposed Amendment to Rule 41, Warrants for Electronically Stored Evidence; Department of Justice Presentation

The meeting resumed on April 17 with a two-hour PowerPoint presentation by Messrs. Carroll and Downing, both of the Computer Crime and Intellectual Property Section of the Department's Criminal Division, on issues involving electronically stored information ("ESI") and the proposed amendment to Rule 41. Following the Department's presentation, Judge Battaglia, chair of the ESI Subcommittee, led a discussion of the proposal to modify Rule 41 to embrace the concept of searching for electronically stored information. As suggested by George Washington University Law Professor Orin Kerr, the process involved two stages: execution of an on-site search for the storage device, followed by an off-site search for the stored information.

Judge Battaglia said that the ESI Subcommittee was recommending that a new subparagraph (B) be added to Rule 41(e)(2), stating that the normal deadline "for execution of the warrant in Rule 41(e) and (f) refers to the seizing or on-site copying of the media or

electronically stored information and not to any subsequent review of the media or electronically stored information.” The subcommittee also suggested adding a provision to Rule 41(f)(1) permitting the inventory of seized electronic information to be limited to a description of the physical electronic device on which the information is stored. He noted that there were many related issues that the subcommittee ultimately decided not to try to address by rule amendment.

Originally, Judge Battaglia said, he had thought that the rule should include a presumptive time period limiting the search of the electronically stored information, but had been convinced that such matters were best decided on a case by case basis, depending on the circumstances. Judge Bucklew noted that how long these searches took varied considerably depending on the law enforcement resources in a particular area of the country. Judge Battaglia mentioned that the Department had reported experiencing a 7-month backlog in some regions.

Mr. Wroblewski said that the Department was pleased with the subcommittee’s work. He said that this was an area that courts would likely be grappling with for years to come. He noted that the Ninth Circuit had recently issued an opinion relating to the issue. Although the Department was satisfied with the language of the proposed rule amendments, it had a few concerns with the accompanying notes. He suggested that the following two sentences, while currently true, should be deleted because they might soon be outdated: “Local technical offices that handle the forensic work vary in their capability, and backlog of media awaiting imaging and review. While in some major metropolitan areas, a sixty day time period might be generally feasible, it can be many months in other areas.” Professor Beale responded that she thought that the committee should document its current reasoning so that if the facts prompting this rule amendment ever changed, another appropriate rule change could be considered.

Mr. Wroblewski also reported Department concerns with the first sentence of the third paragraph of the note accompanying the proposed Rule 41(e) amendment, which appeared to invite the imposition of deadlines: “The rule does not prevent a judge from imposing a deadline for the return of the property at the time the warrant is issued.” In addition, the Department recommended changing the sentence that begins on line 31, “Recording a description at the scene is likely the exception,” to read instead, “Recording a description of the electronically stored information at the scene is likely the exception.”

The committee was asked whether it intended to adopt the civil rules’ definition of electronically stored information. Professor Beale suggested clarifying this in the note.

One member recommended against deleting the first sentence of the third paragraph of the note accompanying the proposed Rule 41(e) amendment, because it was important for judges to understand that deadlines for the return of property could be issued when the warrant is issued. Another member agreed, adding that she had “serious reservations” with not providing any presumptive deadlines for searches of electronically stored information, given her recent experience filing a Rule 41(g) motion for the return of seized property. The government’s response to her motion was that the property was the subject of an “ongoing investigation,” and there seemed to be nothing else that she could do to recover the seized property. Judge Battaglia

said that he understood Rule 41(g) to be an interactive process where the court sought to balance the owner's and the government's interests. The Department reported that it supported Judge Battaglia's practice and opposed identifying any presumptive deadline in the rule.

One member noted that seizure of a company's computer server can sometimes force the entire business to shut down, raising concerns that a business could be improperly pressured to cooperate as a result. Professor Beale suggested stating in the note a preference for copying on-site or otherwise minimizing any interference. Mr. Wroblewski responded that the rule has to apply to a variety of situations, including child pornography cases where the electronic information is itself contraband, the owner has no right to possession, and the preference would actually be to take the electronic storage device off-site. It was noted that the proposed Rule 41(e)(2)(B) amendment simply provides that a warrant "may authorize" — not "must authorize" — "the seizure of electronic storage media or the seizure or copying of electronically stored information," so that a warrant can be limited if the judge believes that seizing a business' entire computer server, for instance, would be unnecessarily disruptive. It was suggested that the language in the note should be retained to remind judges of the option of imposing a deadline for the property's return.

Language was suggested that would discourage physical seizure of an electronic storage device whenever copying it is feasible. Mr. Wroblewski said that such language would be inappropriate in cases where the electronic information was contraband. It was suggested that, the government be required — *except* in contraband cases — to return the storage device as soon as feasible after being copied. Declaring "feasibility" a loaded term, one member recommended allowing judges to determine what is appropriate on a case-by-case basis.

It was suggested that a reference to "access to the media" be added after the word "property" in the first sentence of the third paragraph of the note accompanying the proposed change to Rule 41(e)(2). After some discussion, it was recommended that the sentence read as follows: "The rule does not prevent a judge from imposing a deadline for the return of the media or access to the electronically stored information at the time the warrant is issued."

After further discussion, Judge Trager moved to forward the proposed Rule 41 amendment to the Standing Committee for publication. It was clarified that the vote was limited to the rule, not the accompanying note. It was suggested that "upon a proper showing" be added between the word "may" and "authorize" in the proposed language of Rule 41(e)(2)(B). Another member recommended addressing such concerns in the note, not the rule. Mr. Wroblewski remarked that probable cause to obtain a warrant was already required under Rule 41(d)(1).

The committee voted 9-3 to forward the proposed Rule 41 amendment to the Standing Committee for publication.

The committee discussed a few suggested changes to the note accompanying the proposed Rule 41 amendment. Professor Beale noted that the Department had suggested deleting the two sentences on lines 27-30 from the note. One member expressed surprise at the

Department's request, because these were the reasons that the Department had given the committee in support of omitting from the rule a presumptive time period for searching electronic storage devices. Voicing skepticism about the Department's backlog claim, another member suggested that the sentences be deleted. It was noted that publishing the Department's backlog claim could prompt the public to comment on the issue. One member suggested that the second sentence added little to what preceded it, which adequately documented the committee's rationale for omitting a presumptive time period such that, were the Department's claimed backlog to disappear at a future point, the committee would then have a basis to revisit the issue.

The committee voted unanimously to delete the sentence beginning, "While in some major metropolitan areas."

A motion was made to delete the sentence beginning, "Local technical offices."

The committee voted unanimously to delete the sentence beginning, "Local technical offices."

It was noted that the 10-day period in Rule 41 was being changed to a 14-day period under the new time counting framework. It was suggested that the reference to "electronically stored data" in line 21 of the proposed amendment to Rule 41(f)(1) be changed to "electronically stored information." Professor Beale warned that further massaging of the note might be required, in which case a final version would be disseminated by e-mail for committee approval.

C. Rule 49.1, Redaction of Arrest and Search Warrants

The committee discussed the request of the Committee on Court Administration and Case Management that arrest and search warrants not be exempted in proposed Rule 49.1(b)(7) and (b)(8) from the general requirement in proposed Rule 49.1 that personal identifiers, such as home addresses and Social Security numbers, be redacted. Judge Bartle, who chairs the E-Government Subcommittee, reported that it was the group's unanimous conclusion that requiring redaction of arrest and search warrants would be impractical and ill-advised and that the language of the criminal privacy rule as originally recommended should be retained.

It was noted that an affidavit in support of a search warrant issued after a case has been filed would not appear to be covered under the exemptions in proposed Rule 49.1(b)(7) and (b)(8). It was suggested that the rule might need to address such a situation. Professor Beale pointed out that it was probably too late to change the current rule amendment at this point.

Judge Bartle moved that a recommendation be made to the Standing Committee that no change be made to proposed Rule 49.1's exemption of search and arrest warrants from the redaction requirement.

The committee decided without objection to recommend to the Standing Committee that no change be made to proposed Rule 49.1's exemption of search and arrest warrants from the redaction requirement.

D. Proposed Amendments to Rule 11 of the Rules Governing § 2254 and § 2255 Proceedings; Proposed New Rule 37

The committee discussed the proposed amendments to Rule 11 of the Rules Governing § 2254 Proceedings and Rule 11 of the Rules Governing § 2255 Proceedings, and the proposed new Rule 37. Professor Bucklew noted that the Department's original proposal, submitted in January 2006, had been to abolish all writs other than habeas corpus. At the October 2006 meeting, the committee had voted initially to table the entire proposal, but then decided to continue working on it for reconsideration at the April 2007 meeting. Professor King, who chaired the Writ Subcommittee, noted that two different versions of proposed Rule 37 were provided for the committee's consideration: one favored by the subcommittee's majority, and an alternative minority-supported version.

It was emphasized that, unlike proposed Rule 37, the Rule 11 amendments had been unanimously supported by all the subcommittee members. The subcommittee had designed the proposed Rule 11 amendments to standardize the process for considering a certificate of appealability in § 2254 and § 2255 cases, requiring that the certificate be issued or denied at the time that the judge enters the final order. The bracketed language in subdivision (a) of the proposed Rule 11 amendments had been suggested by Professor Catherine Struve, Reporter for the Advisory Committee on Appellate Rules, who reported that appellate judges favored specific documentation of why a certificate of appealability had been denied. One member said that he saw no value in adding the sentence to the Rule 11 amendments, because the trial court would be denying the certificate of appealability after having just issued an opinion denying the habeas corpus petition. If required to state why he was denying a certificate, another member said, he would likely just incorporate by reference the reasons cited in his opinion. A motion was made not to include the bracketed language in the proposed Rule 11 amendments.

The committee voted by a clear majority not to include the bracketed language in the proposed Rule 11 amendments.

The committee discussed a second issue raised in Professor Struve's memorandum: the proposed amendment's lack of an express reference to post-judgment motions filed under Civil Rule 52(b) or 59(b). Following discussion, the consensus of the committee was to change the last sentence of Rules 11(b) as follows: "Federal Rule of Civil Procedure 52(b), 59(b), and 60(b) may not be used" One member questioned including the reference to motions for amendment of judgment under Civil Rule 52(b). Mr. Wroblewski said that everything should be funneled through this single rule. Another member said that there may be a problem where a judge holds a factual hearing in a § 2255 case and then makes an erroneous statement of facts. Professor King suggested addressing this in the note. It was questioned, though, whether Civil Rules 52(b) and 59(b) should be referenced in Rules 11(b). Professor Beale suggested flagging

this issue with brackets for public comment, an idea that was well-received. Following a discussion, it was determined that the 30-day provision in the proposed Rules 11(b) provisions did not need changing under the new time counting rules.

After further discussion, Professor King moved that the proposed amendments to Rule 11 of the Rules Governing § 2254 and § 2255 Proceedings be forwarded to the Standing Committee with a recommendation that they be published for public comment.

The committee voted unanimously to forward the proposed Rule 11 amendments to the Standing Committee for publication.

Committee members discussed proposed new Rule 37. Professor King noted that, if a majority believed that the committee lacked authority under the Rules Enabling Act to go forward with the proposed rule change, there was no need to discuss the second issue, involving whether a statute of limitations should be imposed on writs of error coram nobis. Professor Beale suggested that the committee keep in mind both the technical legal questions raised by this proposal and the prudential question of whether this step should be pursued at this time. One participant suggested that if, as the Department's memorandum asserted, there is "considerable and increasing confusion in the courts" about the availability of these writs and their implementation, the amendment might be worth pursuing, but there is significant skepticism that this is truly a pressing problem. Mr. Wroblewski said that the goal was simply to regularize the process by which final judgments in criminal cases are challenged and that the subcommittee was recommending revised language that, rather than abolish these writs, would simply bar their use "to seek relief from a criminal judgment." Professor Beale said that the original language for the proposal had been patterned after Civil Rule 60(b).

Asked whether empirical support had been developed to demonstrate a significant problem, Mr. Wroblewski responded that the Department was seeing the coram nobis writ sought used with increased frequency and that it was the affirmative responsibility of the rules committees to adopt rules to regularize the process by which final criminal judgments are challenged. He added that the new proposed Rule 37 was simply the logical extension of the broad legal trend reflected in the Antiterrorism and Effective Death Penalty Act and that no one had been able to articulate the value of preserving, say, the writ of audita querela. He said that a person in custody could file a habeas corpus petition and someone out of custody could seek a writ of coram nobis, and that no other writs were needed.

One member said that he agreed with the Department that much of the resistance to the proposal was unfounded and that the rule should identify "the sole procedures for seeking relief from a judgment in a criminal case," as stated at the beginning of proposed Rule 37(a). But, he suggested, the committee might want to consider omitting the last sentence of proposed Rule 37(a), which states: "Writs of error coram nobis, audita querela, bills of review, and bills in the nature of a bill of review may not be used to seek relief from a criminal judgment."

Judge Kravitz suggested that the Standing Committee would likely be interested in how the writs had been used over the past decade. Noting that a significant amount of supporting data had been gathered and presented before the Civil Rules Committee even began considering abolishing writs in Civil Rule 60, he asked whether it might make sense to ask the Federal Judicial Center or some other group to conduct a similar empirical study.

Judge Wolf moved that the committee not forward the Rule 37 proposal to the Standing Committee. Additional data substantiating the need for an amendment was required, and the proposal should be studied to determine whether it is proper under the Rules Enabling Act. Mr. McNamara noted that it was hard to tell, based solely on the Department's report that there were 284 coram nobis cases in 2005, what had happened in these cases and whether there truly were problems. Professor King said that she had been studying collateral review in the district courts for two years and that her impression is that courts are overwhelmed by them.

One judge expressed frustration with the many coram nobis petitions that he receives and urged support for the Rule 37 proposal, which he said would make it easier to find the one meritorious case in a hundred. Concern was expressed that the proposal would clearly represent a substantive amendment of the All Writs Act (28 U.S.C. § 1651) and therefore violate the Rules Enabling Act. The Department acknowledged that, in regularizing the process, this proposal would, at least in some circuits, reduce the remedies available, prompting one member to comment that the proposal therefore sounded substantive.

Following further discussion and a lunch break, the committee reconvened and voted on the motion not to forward the Rule 37 proposal to the Standing Committee.

The committee voted 7-4 not to forward the Rule 37 proposal to the Standing Committee.

There was a discussion about additional steps that could be taken with respect to the proposed amendment. Mr. Wroblewski asked whether the Federal Judicial Center or some other entity would be asked to collect data for presentation to the committee. Judge Bucklew asked whether there was support for avoiding the Rules Enabling Act problem by drafting a proposal for Congress to consider enacting directly. Mr. Wroblewski said that the Department would need some time to consider the matter and could inform the committee by letter at a later time.

E. Forfeiture Rules

Professor Bucklew acknowledged the hard work of the Forfeiture Subcommittee, chaired by Judge Wolf. She noted that two forfeiture experts had been invited to attend, Mr. Cassella from the Department and Mr. Smith from the defense side. Judge Wolf explained that, soon after the subcommittee began examining the Department's rule amendment proposal about a year ago, it became clear that this was a complicated, esoteric area of the law, that the subcommittee would benefit from the input of experts, and that it might be important to make the

expert presentations symmetrical. Early on, Professor Beale consulted with both sides in an effort to identify common ground and reach consensus around the key rule amendments needed.

The subcommittee recommended amending Rule 32.2(a) to generate a uniform practice by clarifying that: (1) notice of forfeiture is not a count or element of the offense and (2) the exact amount of money or precise property subject to forfeiture need not be specified in the indictment or information. It was noted that the potential use of a bill of particulars to elicit more information about the identity of the property is addressed in the committee note. Professor Beale noted that additional suggestions were expected from the style consultants.

The subcommittee recommended amending Rule 32.2(b)(1) to make clear that the rules of evidence are inapplicable to forfeiture procedures even if a jury decides. The Department had at one point recommended allowing “any relevant evidence,” but the subcommittee had ultimately decided instead to adopt the phrase “any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable.” It was noted that the subcommittee had bracketed the final sentence of the note to encourage public comment on the question of live testimony during forfeiture proceedings.

The Department advised that it would submit further suggestions during the public comment period, such as adding the phrase “unless the court determines that neither live testimony nor oral argument would aid the court in its determination” after the word “must” in the following sentence of the Rule 32.2(b)(1)(B) amendment proposal: “If the forfeiture is contested, on the request of either party the court must conduct a hearing after the verdict or finding of guilt.”

With respect to Rule 32.2(b)(2), the Forfeiture Subcommittee recommended requiring the court, unless impractical, to enter a preliminary forfeiture order sufficiently before sentencing to allow the parties to make suggestions before it becomes final.

Following further discussion, the committee’s attention was directed to the proposed Rule 32.2(b)(2)(C) amendment:

If the court is not able to identify all of the specific property subject to forfeiture or to calculate the total amount of the money judgment prior to sentencing, the court must [may] enter an order describing the property to be forfeited in generic terms, listing any identified forfeitable property, and stating that the order will be amended pursuant to subdivision (e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

The Forfeiture Subcommittee had placed the word “may” in brackets to reflect disagreement about whether “must” or “may” was preferable in subparagraph (C). Mr. Cassella said that the Department considered secondary whether “must” or “may” is used, as long as the court’s authority to issue a generic forfeiture order is clear. In the absence of such express authority, courts too often have postponed forfeiture questions for months or even years after the

sentencing, which has proven problematic, he said, because defendants have challenged a forfeiture order on the ground that it does not comply with the rule's requirement that it be made part of the sentence. Mr. Smith said that the defense community felt strongly that the term "may" should be used rather than "must," reflecting the sparing use of generic forfeiture orders. In light of the positions taken, Judge Wolf suggested deleting the term "must" altogether and simply using the term "may." There was no objection. Another member noted that footnote 2 could therefore be deleted. Professor Beale noted that the style consultants would likely be making additional changes to the proposed language of the amendments or the subheadings.

With respect to the proposed amendments to Rule 32.2(b)(3) and (4), Professor Beale said that she was aware of no controversy or significant policy issues raised by them. Rather, these proposed amendments were an attempt to make the process clear to those who may not be regularly involved in these types of proceedings.

The committee discussed the proposed Rule 32.2(b)(5) amendment, which would clarify the procedure for requesting a jury determination of forfeiture. One member noted that his practice was not to inform the jury that it might have to return to decide forfeiture matters if it found the defendant guilty, because doing so could improperly affect the verdict. Mr. Burck said that the Department had concerns about the possibility of reversible error if all the proposed procedures were not followed.

There was a discussion of the proposed amendments to Rules 32.2(b)(6) and (7) and Rule 32(d)(2)(G). Professor Beale noted that the style consultants had further suggestions on wording. One member suggested deleting the word "and" in Rule 32.2(d)(2)(E). The Department suggested that the following obsolete reference in Rule 7(c)(2) also be deleted as part of the same forfeiture rules amendment package:

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.

Judge Wolf agreed that it had been superseded by Rule 32.2(a) and that this should be corrected as part of the package. He moved to forward the proposed forfeiture rule amendments to the Standing Committee for publication, along with a proposal to abrogate Rule 7(c)(2).

The committee without objection decided to forward the forfeiture rule amendments to the Standing Committee for publication.

IV. OTHER PROPOSED AMENDMENTS

A. Pre-Trial Deadline for Challenges for Failure to State an Offense

Professor Beale noted that the Department had proposed amending Rules 12(b) and 34 to require the defense to raise before trial any claim that the indictment or information fails to state

an offense. The proposal had been initially discussed at the committee's April 2006 meeting, but had been tabled to the October 2006 meeting for further information and then deferred again pending the Supreme Court's decision in a potentially related case. Professor Beale noted that the Court had since decided *United States v. Resendiz-Ponce*, 549 U.S. ___, 127 S. Ct. 782 (2007), clearing the way for a resumed consideration of the rule amendment proposal.

It was suggested that the proposal should be referred to a subcommittee for further discussion. Judge Tallman, who had already left the meeting, had reportedly indicated particular interest earlier in the legal issues raised by the proposal. Mr. Wroblewski said that the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), had clarified that indictment defects are not jurisdictional. He added that he saw no need for subcommittee work on this amendment, because the proposal simply required indictment challenges to be raised at a time when something could be done about it, namely, before trial. One member said that he would like to have more time to think through the issue. After a few other comments were offered, Judge Bucklew suggested continuing the discussion of these proposed amendments at the committee's October 2007 meeting. There was no objection.

B. Update on Previously Proposed Amendments to Rules 15, 32(h), 32.1, and 46

Judge Bucklew drew the members' attention to a memorandum by Professor Beale summarizing the status of previously proposed amendments to Rules 15, 32(h), 32.1, and 46. She noted that the Department had withdrawn its proposal to amend Rule 15, which would have permitted deposing a prospective witness outside the defendant's physical presence if the court made certain specific findings. Meanwhile, the Rule 32(h) amendment proposal, originally published with the other *Booker*-related rule amendments, had been deferred pending resolution of two relevant cases by the Supreme Court. Also deferred, for the committee's consideration in October 2007, were proposed amendments to Rules 32.1 and 46, which would provide a procedure for issuing warrants when a defendant violates the conditions of pretrial release.

C. Proposed Amendment to Rule 32(i)(1)(A)

Judge Bucklew noted that Judge Ernest Torres of the District of Rhode Island had suggested amending Rule 32(i)(1)(A) to prevent an impasse at the sentencing stage if a defendant declines to read the presentence report. She said that she thought the issue was not an urgent matter and could probably wait to be discussed in October 2007.

D. Indicative Rulings

Judge Bucklew suggested also deferring discussion of the "indicative rulings" project, being led by the Civil Rules Committee, until the October 2007 meeting.

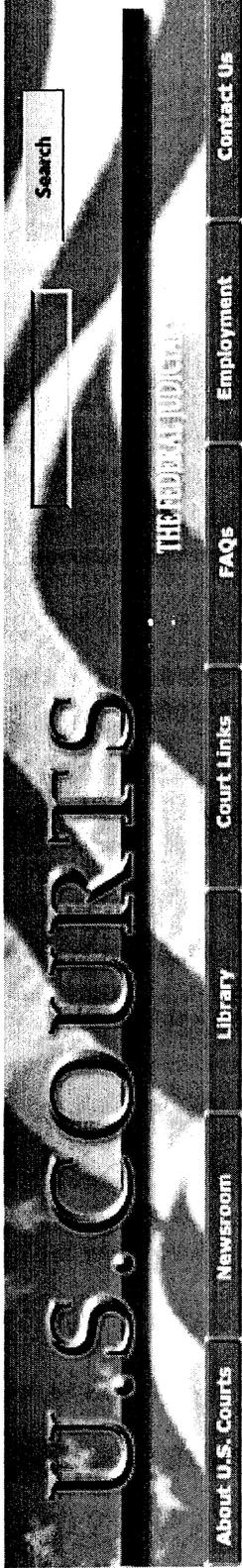
The meeting was adjourned.

**SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Bankruptcy Rules 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019, 1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 7012, 7022, 7023.1, 8001, 8003, 9006, 9009, and 9024 and new Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, and 6011, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law p. 17
2. Approve the proposed revisions to Bankruptcy Official Forms 1, 3A, 3B, 4, 5, 6, 7, 9A-I, 10, 16A, 18, 19, 21, 22A, 22B, 22C, 23, and 24 to take effect on December 1, 2007 p. 17
3. Approve the proposed new Bankruptcy Official Forms 25A, 25B, 25C, and 26 to take effect on December 1, 2008 p. 17
4. Approve the proposed amendments to Criminal Rules 1, 12.1, 17, 18, 32, 41(b), 45, 60, and new Rule 61, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law p. 27
5. Approve proposed new Evidence Rule 502, and transmit it to Congress with a recommendation that it be adopted by Congress p. 33
6. Approve sending the report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a "Harm to Child" Exception to the Marital Privileges to Congress p. 34

<p>NOTICE</p> <p>NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.</p>



Federal Rulemaking

- [Rules Published for Comment](#)
- [Pending Rules Amendments](#)
- [Completed Rules Amendments](#)
- [Rules and Forms in Effect](#)
- [Researching Rules Amendments](#)
- [The Rulemaking Process](#)
- [Meetings and Hearings](#)
- [Legislation](#)
- [Publications](#)
- [Local Court Rules](#)
- [Contact Rules Support](#)
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Federal Rulemaking

The Rulemaking Process
A Summary for the Bench and Bar
 April 2006

THE FEDERAL RULES OF PRACTICE AND PROCEDURE
ADMINISTRATIVE OFFICE OF THE U.S. COURTS

JAMES C. DUFF, DIRECTOR

The federal rules govern procedure, practice, and evidence in the federal courts. They set forth the procedures for the conduct of court proceedings and serve as a pattern for the procedural rules adopted by many state court systems.

Authority

The Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§ 2071-2077.

The Judicial Conference of the United States is also required by statute to "carry on a continuous study of the operation and effect of the general rules of practice and procedure." 28 U.S.C. § 331. As part of this continuing obligation, the Conference is authorized to recommend amendments and additions to the rules to promote:

- simplicity in procedure,
- fairness in administration,
- the just determination of litigation, and
- the elimination of unjustifiable expense and delay.

The Rules Committees

The Judicial Conference's responsibilities as to rules are coordinated by its Committee on Rules of Practice and Procedure, commonly referred to as the "Standing Committee." 28 U.S.C. § 2073(b). The Judicial Conference has authorized the appointment of five advisory committees to assist the Standing Committee, dealing respectively with the appellate, bankruptcy, civil, criminal, and evidence rules. 28 U.S.C. § 2073(a)(2). The Standing Committee reviews and coordinates the recommendations of the five advisory committees, and it recommends to the Judicial Conference proposed rules changes "as may be necessary to maintain consistency and otherwise promote the interests of justice." 28 U.S.C. § 2073(b).

The Standing Committee and the advisory committees are composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice. Each committee has a reporter, a prominent law professor, who is responsible for coordinating the committee's agenda and drafting appropriate amendments to the rules and explanatory committee notes.

The Assistant Director for Judges Programs of the Administrative Office of the United States Courts currently serves as secretary to the Standing Committee, coordinates the operational aspects of the rules process, and maintains the records of the committees. The Rules Committee Support Office of the Administrative Office provides the day to day administrative and legal support for the secretary and the committees.

Open Meetings and Records

Meetings of the rules committees are open to the public and are widely announced. All records of the committees, including minutes of committee meetings, reports of the committees, suggestions and comments submitted by the public, statements of witnesses, transcripts of public hearings, and memoranda prepared by the reporters, are public and are maintained by the secretary. Copies of the rules and proposed amendments are available from the Rules Committee Support Office. The proposed amendments are also published on the Judiciary's website <<http://www.uscourts.gov>>.

HOW THE RULES ARE AMENDED

The pervasive and substantial impact of the rules on the practice of law in the federal courts demands exacting and meticulous care in drafting rule changes. The rulemaking process is time consuming and involves a minimum of seven stages of formal comment and review. From beginning to end, it usually takes two to three years for a suggestion to be enacted as a rule.

The process, however, may be expedited when there is an urgent need to amend the rules.

All interested individuals and organizations are provided an opportunity to comment on proposed rules amendments and to recommend alternative proposals. The comments received from this extensive and thorough public examination are studied very carefully by the committees and generally improve the amendments. The committees actively encourage the submission of comments, both positive and negative, to ensure that proposed amendments have been considered by a broad segment of the bench and bar.

STEP 1. INITIAL CONSIDERATION BY THE ADVISORY COMMITTEE

Making suggestions for changes

Proposed changes in the rules are suggested by judges, clerks of court, lawyers, professors, government agencies, or other individuals and organizations. They are considered in the first instance by appropriate advisory committees (appellate, bankruptcy, civil, criminal, or evidence). Suggestions for changes, additions, or deletions must be submitted in writing to the secretary, who acknowledges each letter and distributes it to the chair of the Standing Committee and the chair and reporter of the advisory committee.

The reporter normally analyzes the suggestions and makes appropriate recommendations to the advisory committee. The suggestions from the public and the recommendations of the reporter are placed on the advisory committee's agenda and are normally discussed at its next meeting. The advisory committees usually meet twice a year in the spring and fall, and they also conduct business by telephone and correspondence.

Consideration of suggestions

In considering a suggestion for a change in the rules, the advisory committee may take several courses of action, including:

1. Accepting the suggestion, either completely or with modifications or limitations;
2. Deferring action on the suggestion or seeking additional information regarding its operation and

impact;

3. Rejecting a suggestion because it does not have merit or would be inconsistent with other rules or a statute; or

4. Rejecting a suggestion because, although it may be meritorious, it simply is not necessary or important enough to warrant the significant step of an amendment to the federal rules.

The secretary is required, to the extent feasible, to advise the person making a suggestion of the action taken on it by the advisory committee.

Drafting Rules Changes

When an advisory committee decides initially that a particular change in the rules would be appropriate, it normally asks its reporter to prepare a draft amendment to the rules and an explanatory committee note. The draft amendment and committee note are discussed and voted upon at a committee meeting.

The Standing Committee has a style subcommittee that works with the respective advisory committees in reviewing proposed amendments to ensure that the rules are written in clear and consistent language. In addition, the reporter of the Standing Committee and the reporters of the five advisory committees are encouraged to work together to promote clarity and consistency among the various sets of federal rules.

STEP 2. PUBLICATION AND PUBLIC COMMENT

Once an advisory committee votes initially to recommend an amendment to the rules, it must obtain the approval of the Standing Committee, or its chair, to publish the proposed amendment for public comment. In seeking publication, the advisory committee must explain to the Standing Committee the reasons for its proposal, including any minority or separate views.

After publication is approved, the secretary arranges for printing and distribution of the proposed amendment to the bench and bar, to publishers, and to the general public. More than 10,000 persons and organizations are on the mailing list, including

- federal judges and other federal court officers,
- United States attorneys,
- other federal government agencies and officials,
- state chief justices,

- state attorneys general,
- legal publications,
- law schools,
- bar associations, and
- interested lawyers, individuals, and organizations requesting distribution.

In order to promote public comment, the proposed amendments are sent to points of contact that have been established with 53 state bar associations.

The public is normally given 6 months to comment in writing to the secretary regarding the proposed amendment. In an emergency, a shorter time period may be authorized by the Standing Committee.

During the 6-month comment period, the advisory committee schedules one or more public hearings on the proposed amendments. Persons who wish to appear and testify at the hearings are required to contact the secretary at least 30 days before the hearings.

STEP 3. CONSIDERATION OF THE PUBLIC COMMENTS AND FINAL APPROVAL

BY THE ADVISORY COMMITTEE

At the conclusion of the public comment period, the reporter is required to prepare a summary of the written comments received from the public and the testimony presented at the hearings. The advisory committee then takes a fresh look at the proposed rule changes in light of the written comments and testimony.

If the advisory committee decides to make a substantial change in its proposal, it may provide a period for additional public notice and comment.

Once the advisory committee decides to proceed in final form, it submits the proposed amendment to the Standing Committee for approval. Each proposed amendment must be accompanied by a separate report summarizing the comments received from the public and explaining any changes made by the advisory committee following the original publication. The advisory committee's report must also include minority views of any members who wish to have their separate views recorded.

STEP 4. APPROVAL BY THE STANDING COMMITTEE

The Standing Committee considers the final recommendations of the advisory committee and may

accept, reject, or modify them. If the Standing Committee approves a proposed rule change, it will transmit it to the Judicial Conference with a recommendation for approval, accompanied by the advisory committee's reports and the Standing Committee's own report explaining any modifications it made. If the Standing Committee makes a modification that constitutes a substantial change from the recommendation of the advisory committee, the proposal will normally be returned to the advisory committee with appropriate instructions.

STEP 5. JUDICIAL CONFERENCE APPROVAL

The Judicial Conference normally considers proposed amendments to the rules at its September session each year. If approved by the Conference, the amendments are transmitted promptly to the Supreme Court.

STEP 6. SUPREME COURT APPROVAL

The Supreme Court has the authority to prescribe the federal rules, subject to a statutory waiting period. 28 U.S.C. §§ 2072, 2075. The Court must transmit proposed amendments to Congress by May 1 of the year in which the amendment is to take effect. 28 U.S.C. §§ 2074, 2075.

STEP 7. CONGRESSIONAL REVIEW

The Congress has a statutory period of at least 7 months to act on any rules prescribed by the Supreme Court. If the Congress does not enact legislation to reject, modify, or defer the rules, they take effect as a matter of law on December 1. 28 U.S.C. §§ 2074, 2075.

SUMMARY OF PROCEDURES

Action	Date
STEP 1	
<ul style="list-style-type: none"> ■ Suggestion for a change in the rules. (Submitted in writing to the secretary.) 	At any time.
<ul style="list-style-type: none"> ■ Referred by the secretary to the appropriate advisory committee. 	Promptly after receipt.

- Considered by the advisory committee. Normally at the next committee meeting.
 - If approved, the advisory committee seeks authority from the Standing Committee to circulate to bench and bar for comment. Normally at the same meeting or the next committee meeting.
- STEP 2
- Public comment period. 6 months.
 - Public hearings. During the public comment period.
- STEP 3
- Advisory committee considers the amendment afresh in light of public comments and testimony at the hearings. About one or two months after the close of the comment period.
 - Advisory committee approves amendment in final form and transmits it to the Standing Committee. About one or two months after the close of the comment period.
- STEP 4
- Standing Committee approves amendment, with or without revisions, and recommends approval by the Judicial Conference. Normally at its June meeting.
- STEP 5
- Judicial Conference approves amendment and transmits it to the Supreme Court. Normally at its September session.
- STEP 6
- The Supreme Court prescribes the amendment. By May 1.
- STEP 7
- Congress has statutory time period in which to enact legislation to reject, modify, or defer the amendment. By December 1.

- Absent Congressional action, the amendment becomes law. December 1.

To suggest changes or comment on proposed changes in the rules, write to:

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

For further information and materials, contact:

John K. Rabiej, Chief
Rules Committees Support Office
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544
(202) 502-1820

JUDICIAL CONFERENCE

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**AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE**

Rule 11. Pleas

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**(b) Considering and Accepting a Guilty or Nolo
Contendere Plea.**

(1) *Advising and Questioning the Defendant.*

Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) in determining a sentence, the court's obligation to calculate the applicable

2 FEDERAL RULES OF CRIMINAL PROCEDURE

sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and

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Rule 32. Sentence and Judgment

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(d) Presentence Report.

(1) *Applying the Advisory Sentencing*

Guidelines. The presentence report must:

- (A) identify all applicable guidelines and policy statements of the Sentencing Commission;
- (B) calculate the defendant's offense level and criminal history category;
- (C) state the resulting sentencing range and kinds of sentences available;
- (D) identify any factor relevant to:

- (i) the appropriate kind of sentence, or
- (ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(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;

4 FEDERAL RULES OF CRIMINAL PROCEDURE

- (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).

* * * * *

Rule 35. Correcting or Reducing a Sentence

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(b) Reducing a Sentence for Substantial Assistance.

(1) *In General.* Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.

* * * * *

Rule 45. Computing and Extending Time

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(c) Additional Time After Certain Kinds of Service.

Whenever a party must or may act within a specified period after service and service is made in the manner provided under Federal Rule of Civil

6 FEDERAL RULES OF CRIMINAL PROCEDURE

Procedure 5(b)(2)(B), (C), or (D), 3 days are added after the period would otherwise expire under subdivision (a).

Rule 49.1. Privacy Protection For Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

- (1) the last four digits of the social-security number and taxpayer-identification number;
- (2) the year of the individual's birth;
- (3) the minor's initials;

(4) the last four digits of the financial-account number; and

(5) the city and state of the home address.

(b) Exemptions from the Redaction Requirement.

The redaction requirement does not apply to the following:

(1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 49.1(d);

8 FEDERAL RULES OF CRIMINAL PROCEDURE

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255;

(7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;

(8) an arrest or search warrant; and

(9) a charging document and an affidavit filed in support of any charging document.

(c) **Immigration Cases.** A filing in an action brought under 28 U.S.C. § 2241 that relates to the petitioner's immigration rights is governed by Federal Rule of Civil Procedure 5.2.

(d) **Filings Made Under Seal.** The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the

person who made the filing to file a redacted version for the public record.

- (e) **Protective Orders.** For good cause, the court may by order in a case:
 - (1) require redaction of additional information; or
 - (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.
- (f) **Option for Additional Unredacted Filing Under Seal.** A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.
- (g) **Option for Filing a Reference List.** A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be

10 FEDERAL RULES OF CRIMINAL PROCEDURE

amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 49.1(a) as to the person's own information by filing it without redaction and not under seal.

**[Model Form for Use in 28 U.S.C. § 2254 Cases
Involving a Rule 9 Issue under Section 2254 of Title
28, United States Code]**

(Abrogated.)

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE***

Rule 1. Scope; Definitions

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1 **(b) Definitions.** The following definitions apply to these
2 rules:

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3
4 **(11) "Victim" means a "crime victim" as defined in 18**
5 U.S.C. § 3771(e).

* * * * *

Committee Note

Subdivision (b)(11). This amendment incorporates the definition of the term "crime victim" found in the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(e). It provides that "the term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."

Upon occasion, disputes may arise over the question whether a particular person is a victim. Although the rule makes no special provision for such cases, the courts have the authority to do any necessary fact finding and make any necessary legal rulings.

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

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

The Committee revised the text of Rule 1(b)(11) in response to public comments by transferring portions of the subdivision relating to who may assert the rights of a victim to Rule 60(b)(2). The Committee Note was revised to reflect that change and to indicate that the Court has the power to decide any dispute as to who is a victim.

Rule 12.1. Notice of an Alibi Defense

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(b) Disclosing Government Witnesses.

3

(1) Disclosure.

4

(A) In General. If the defendant serves a Rule

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12.1(a)(2) notice, an attorney for the

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government must disclose in writing to the

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defendant or the defendant's attorney:

8

(i) (A) the name, address, and telephone

9

number of each witness — and the

10

address and telephone number of each

11 witness other than a victim — that the
12 government intends to rely on to
13 establish that the defendant's presence
14 defendant was present at the scene of
15 the alleged offense; and

16 (ii) ~~(B)~~ each government rebuttal witness to
17 the defendant's alibi defense.

18 (B) Victim's Address and Telephone Number. If
19 the government intends to rely on a victim's
20 testimony to establish that the defendant was
21 present at the scene of the alleged offense and
22 the defendant establishes a need for the
23 victim's address and telephone number, the
24 court may:

25 (i) order the government to provide the
26 information in writing to the defendant
27 or the defendant's attorney; or

4 FEDERAL RULES OF CRIMINAL PROCEDURE

28 (ii) fashion a reasonable procedure that
29 allows preparation of the defense and
30 also protects the victim's interests.

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

37 (c) **Continuing Duty to Disclose.**

38 (1) ***In General.*** Both an attorney for the government
39 and the defendant must promptly disclose in
40 writing to the other party the name; of each
41 additional witness — and the address; and
42 telephone number of each additional witness other
43 than a victim — if:

44 (A) ~~(1)~~ the disclosing party learns of the witness
45 before or during trial; and

46 (B) ~~(2)~~ the witness should have been disclosed
47 under Rule 12.1(a) or (b) if the disclosing
48 party had known of the witness earlier.

49 (2) *Address and Telephone Number of an Additional*
50 *Victim Witness.* The address and telephone
51 number of an additional victim witness must not be
52 disclosed except as provided in Rule 12.1
53 (b)(1)(B).

54

* * * * *

Committee Note

Subdivisions (b) and (c). The amendment implements the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the

defendant with the information necessary to prepare a defense, but also protects the victim's interests.

In the case of victims who will testify concerning an alibi claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (c).

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

The Committee made very minor changes in the text at the suggestion of the Style Consultant. The Committee revised the Note in response to public comments, omitting the suggestion that the court might upon occasion have the defendant and victim meet.

Rule 17. Subpoena

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* * * * *

2

(c) Producing Documents and Objects.

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4

(3) Subpoena for Personal or Confidential

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Information About a Victim. After a complaint,

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indictment, or information is filed, a subpoena

7

requiring the production of personal or confidential

8 information about a victim may be served on a
9 third party only by court order. Before entering the
10 order and unless there are exceptional
11 circumstances, the court must require giving notice
12 to the victim so that the victim can move to quash
13 or modify the subpoena or otherwise object.

14

* * * * *

Committee Note

Subdivision (c)(3). This amendment implements the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(a)(8), which states that victims have a right to respect for their "dignity and privacy." The rule provides a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. Third party subpoenas raise special concerns because a third party may not assert the victim's interests, and the victim may be unaware of the subpoena. Accordingly, the amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party. The phrase "personal or confidential information," which may include such things as medical or school records, is left to case development.

The amendment provides a mechanism for notifying the victim, and makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2) — or object by other means such

as a letter — on the grounds that it is unreasonable or oppressive. The rule recognizes, however, that there may be exceptional circumstances in which this procedure may not be appropriate. Such exceptional circumstances would include, evidence that might be lost or destroyed if the subpoena were delayed or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy. The Committee leaves to the judgment of the court a determination as to whether the judge will permit the question whether such exceptional circumstances exist to be decided *ex parte* and authorize service of the third-party subpoena without notice to anyone.

The amendment applies only to subpoenas served after a complaint, indictment, or information has been filed. It has no application to grand jury subpoenas. When the grand jury seeks the production of personal or confidential information, grand jury secrecy affords substantial protection for the victim's privacy and dignity interests.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The proposed amendment omits the language providing for *ex parte* issuance of a court order authorizing a subpoena to a third party for private or confidential information about a victim. The last sentence of the amendment was revised to provide that unless there are exceptional circumstances the court must give the victim notice before a subpoena seeking the victim's personal or confidential information can be served upon a third party. It was also revised to add the language "or otherwise object" to make it clear that the victim's objection might be lodged by means other than a motion, such as a letter to the court.

Rule 18. Place of Prosecution and Trial

1 Unless a statute or these rules permit otherwise, the
2 government must prosecute an offense in a district where the
3 offense was committed. The court must set the place of trial
4 within the district with due regard for the convenience of the
5 defendant, any victim, and the witnesses, and the prompt
6 administration of justice.

Committee Note

The rule requires the court to consider the convenience of victims — as well as the defendant and witnesses — in setting the place for trial within the district. The Committee recognizes that the court has substantial discretion to balance any competing interests.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

There were no changes in the text of the rule. The Committee Note was amended to delete a statutory reference that commentators found misleading, and to draw attention to the court's discretion to balance the competing interests, which may be more important as the court must consider a new set of interests.

10 FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 32. Sentencing and Judgment

1 (a) ~~[Reserved.] Definitions.~~ The following definitions
2 apply under this rule:

3 (1) ~~“Crime of violence or sexual abuse” means:~~

4 (A) ~~a crime that involves the use, attempted use,~~
5 ~~or threatened use of physical force against~~
6 ~~another’s person or property, or~~

7 (B) ~~a crime under 18 U.S.C. §§ 2241–2248 or~~
8 ~~§§ 2251–2257.~~

9 (2) ~~“Victim” means an individual against whom the~~
10 ~~defendant committed an offense for which the~~
11 ~~court will impose sentence.~~

12 * * * * *

13 (c) **Presentence Investigation.**

14 (1) *Required Investigation.*

15 * * * * *

16 (B) *Restitution*. If the law ~~requires~~ permits
17 restitution, the probation officer must conduct
18 an investigation and submit a report that
19 contains sufficient information for the court
20 to order restitution.

21 * * * * *

22 (d) **Presentence Report.**

23 * * * * *

24 (2) *Additional Information*. The presentence report
25 must also contain the following information:

26 (A) the defendant's history and characteristics,
27 including:

- 28 (i) any prior criminal record;
29 (ii) the defendant's financial condition; and
30 (iii) any circumstances affecting the
31 defendant's behavior that may be

12 FEDERAL RULES OF CRIMINAL PROCEDURE

32 helpful in imposing sentence or in
33 correctional treatment;

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

39 * * * * *

40 (i) **Sentencing.**

41 * * * * *

42 (4) ***Opportunity to Speak.***

43 (A) *By a Party.* Before imposing sentence, the
44 court must:

45 (i) provide the defendant's attorney an
46 opportunity to speak on the defendant's
47 behalf;

48 (ii) address the defendant personally in
49 order to permit the defendant to speak
50 or present any information to mitigate
51 the sentence; and

52 (iii) provide an attorney for the government
53 an opportunity to speak equivalent to
54 that of the defendant's attorney.

55 (B) *By a Victim.* Before imposing sentence, the
56 court must address any victim of a the crime
57 ~~of violence or sexual abuse~~ who is present at
58 sentencing and must permit the victim to be
59 reasonably heard ~~—speak—~~ or ~~submit any~~
60 ~~information about the sentence. Whether or~~
61 ~~not the victim is present, a victim's right to~~
62 ~~address the court may be exercised by the~~
63 ~~following persons if present:~~

14 FEDERAL RULES OF CRIMINAL PROCEDURE

- 64 ~~(i) a parent or legal guardian, if the victim~~
65 ~~is younger than 18 years or is~~
66 ~~incompetent; or~~
67 ~~(ii) one or more family members or~~
68 ~~relatives the court designates, if the~~
69 ~~victim is deceased or incapacitated.~~

70 * * * * *

Committee Note

Subdivision (a). The Crime Victims' Rights Act, codified as 18 U.S.C. § 3771(e), adopted a new definition of the term "crime victim." The new statutory definition has been incorporated in an amendment to Rule 1, which supersedes the provisions that have been deleted here.

Subdivision (c)(1). This amendment implements the victim's statutory right under the Crime Victims' Rights Act to "full and timely restitution as provided in law." *See* 18 U.S.C. § 3771(a)(6). Whenever the law permits restitution, the presentence investigation report should contain information permitting the court to determine whether restitution is appropriate.

Subdivision (d)(2)(B). This amendment implements the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771. The amendment makes it clear that victim impact information should be treated in the same way as other information contained in the

presentence report. It deletes language requiring victim impact information to be “verified” and “stated in a nonargumentative style” because that language does not appear in the other subparagraphs of Rule 32(d)(2).

Subdivision (i)(4). The deleted language, referring only to victims of crimes of violence or sexual abuse, has been superseded by the Crime Victims’ Rights Act, 18 U.S.C. § 3771(e). The act defines the term “crime victim” without limiting it to certain crimes, and provides that crime victims, so defined, have a right to be reasonably heard at all public court proceedings regarding sentencing. A companion amendment to Rule 1(b) adopts the statutory definition as the definition of the term “victim” for purposes of the Federal Rules of Criminal Procedure, and explains who may raise the rights of a victim, so the language in this subdivision is no longer needed.

Subdivision (i)(4) has also been amended to incorporate the statutory language of the Crime Victims’ Rights Act, which provides that victims have the right “to be reasonably heard” in judicial proceedings regarding sentencing. *See* 18 U.S.C. § 3771(a)(4). The amended rule provides that the judge must speak to any victim present in the courtroom at sentencing. Absent unusual circumstances, any victim who is present should be allowed a reasonable opportunity to speak directly to the judge.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the text of the rule. In response to public comments, the Committee Note was amended to make it clear that absent unusual circumstances any victim who is in the courtroom

should have a reasonable opportunity to speak directly to the judge.

Rule 41. Search and Seizure

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(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

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(3) a magistrate judge — in an investigation of domestic terrorism or international terrorism — with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district; ~~and~~

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(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may

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14

15 authorize use of the device to track the movement
16 of a person or property located within the district,
17 outside the district, or both; and

18 **(5)** a magistrate judge having authority in any district
19 where activities related to the crime may have
20 occurred, or in the District of Columbia, may issue
21 a warrant for property that is located outside the
22 jurisdiction of any state or district, but within any
23 of the following:

24 **(A)** a United States territory, possession, or
25 commonwealth;

26 **(B)** the premises — no matter who owns them —
27 of a United States diplomatic or consular
28 mission in a foreign state, including any
29 appurtenant building, part of a building, or
30 land used for the mission's purposes; or

Rule 41(b)(5) provides the authority to issue warrants for the seizure of property in the designated locations when law enforcement officials are required or find it desirable to obtain such warrants. The Committee takes no position on the question whether the Constitution requires a warrant for searches covered by the rule, or whether any international agreements, treaties, or laws of a foreign nation might be applicable. The rule does not address warrants for persons, which could be viewed as inconsistent with extradition requirements.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

With the assistance of the Style Consultant, the Committee revised (b)(5)(B) and (C) for greater clarity and compliance with the style conventions governing these rules. Because the language no longer tracks precisely the statute, the Committee Note was revised to state that the proposed rule is intended to have the same scope as the jurisdictional provision upon which it was based, 18 U.S.C. § 7(9).

Rule 60. Victim's Rights

1 **(a) In General.**

- 2 **(1) Notice of a Proceeding.** The government must use
3 its best efforts to give the victim reasonable,
4 accurate, and timely notice of any public court
5 proceeding involving the crime.

20 FEDERAL RULES OF CRIMINAL PROCEDURE

- 6 **(2) Attending the Proceeding.** The court must not
7 exclude a victim from a public court proceeding
8 involving the crime, unless the court determines by
9 clear and convincing evidence that the victim's
10 testimony would be materially altered if the victim
11 heard other testimony at that proceeding. In
12 determining whether to exclude a victim, the court
13 must make every effort to permit the fullest
14 attendance possible by the victim and must
15 consider reasonable alternatives to exclusion. The
16 reasons for any exclusion must be clearly stated on
17 the record.
- 18 **(3) Right to Be Heard on Release, a Plea, or**
19 Sentencing. The court must permit a victim to be
20 reasonably heard at any public proceeding in the
21 district court concerning release, plea, or
22 sentencing involving the crime.

23 **(b) Enforcement and Limitations.**

24 **(1) Time for Deciding a Motion.** The court must
25 promptly decide any motion asserting a victim's
26 rights described in these rules.

27 **(2) Who May Assert the Rights.** A victim's rights
28 described in these rules may be asserted by the
29 victim, the victim's lawful representative, the
30 attorney for the government, or any other person as
31 authorized by 18 U.S.C. § 3771(d) and (e).

32 **(3) Multiple Victims.** If the court finds that the number
33 of victims makes it impracticable to accord all of
34 them their rights described in these rules, the court
35 must fashion a reasonable procedure that gives
36 effect to these rights without unduly complicating
37 or prolonging the proceedings.

38 **(4) Where Rights May Be Asserted.** A victim's rights
39 described in these rules must be asserted in the

22 FEDERAL RULES OF CRIMINAL PROCEDURE

40 district where a defendant is being prosecuted for
41 the crime.

42 (5) Limitations on Relief. A victim may move to
43 reopen a plea or sentence only if:

44 (A) the victim asked to be heard before or during
45 the proceeding at issue, and the request was
46 denied;

47 (B) the victim petitions the court of appeals for a
48 writ of mandamus within 10 days after the
49 denial, and the writ is granted; and

50 (C) in the case of a plea, the accused has not
51 pleaded to the highest offense charged.

52 (6) No New Trial. A failure to afford a victim any
53 right described in these rules is not grounds for a
54 new trial.

Committee Note

This rule implements several provisions of the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771, in judicial proceedings in the federal courts.

Subdivision (a)(1). This subdivision incorporates 18 U.S.C. § 3771(a)(2), which provides that a victim has a “right to reasonable, accurate, and timely notice of any public court proceeding. . . .” The enactment of 18 U.S.C. § 3771(a)(2) supplemented an existing statutory requirement that all federal departments and agencies engaged in the detection, investigation, and prosecution of crime identify victims at the earliest possible time and inform those victims of various rights, including the right to notice of the status of the investigation, the arrest of a suspect, the filing of charges against a suspect, and the scheduling of judicial proceedings. *See* 42 U.S.C. § 10607(b) & (c)(3)(A)-(D).

Subdivision (a)(2). This subdivision incorporates 18 U.S.C. § 3771(a)(3), which provides that the victim shall not be excluded from public court proceedings unless the court finds by clear and convincing evidence that the victim’s testimony would be materially altered by attending and hearing other testimony at the proceeding, and 18 U.S.C. § 3771(b), which provides that the court shall make every effort to permit the fullest possible attendance by the victim.

Rule 615 of the Federal Rules of Evidence addresses the sequestration of witnesses. Although Rule 615 requires the court upon the request of a party to order the witnesses to be excluded so they cannot hear the testimony of other witnesses, it contains an exception for “a person authorized by statute to be present.” Accordingly, there is no conflict between Rule 615 and this rule, which implements the provisions of the Crime Victims’ Rights Act.

Subdivision (a)(3). This subdivision incorporates 18 U.S.C. § 3771(a)(4), which provides that a victim has the “right to be reasonably heard at any public proceeding in the district court involving release, plea, [or] sentencing”

Subdivision (b). This subdivision incorporates the provisions of 18 U.S.C. § 3771(d)(1), (2), (3), and (5). The statute provides that the victim, the victim’s lawful representative, and the attorney for the government, and any other person as authorized by 18 U.S.C. § 3771(d) and (e) may assert the victim’s rights. In referring to the victim and the victim’s lawful representative, the committee intends to include counsel. 18 U.S.C. § 3771(e) makes provision for the rights of victims who are incompetent, incapacitated, or deceased, and 18 U.S.C. § 3771(d)(1) provides that “[a] person accused of the crime may not obtain any form of relief under this chapter.”

The statute provides that those rights are to be asserted in the district court where the defendant is being prosecuted (or if no prosecution is underway, in the district where the crime occurred). Where there are too many victims to accord each the rights provided by the statute, the district court is given the authority to fashion a reasonable procedure to give effect to the rights without unduly complicating or prolonging the proceedings.

Finally, the statute and the rule make it clear that failure to provide relief under the rule never provides a basis for a new trial. Failure to afford the rights provided by the statute and implementing rules may provide a basis for re-opening a plea or a sentence, but only if the victim can establish all of the following: the victim asserted the right before or during the proceeding, the right was denied, the victim petitioned for mandamus within 10 days as provided by 18 U.S.C. § 3771 (d)(5)(B), and — in the case of a plea — the defendant did not plead guilty to the highest offense charged.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

Subdivision (a)(2) was revised to make it clear that the duty to permit fullest attendance arises in the context of the victim's possible exclusion.

Subdivision (b)(2) was revised to respond to concerns that the amendments did not clearly state that the victim's lawful representative could assert the victim's rights. The Committee Note makes it clear that a victim or the lawful representative of a victim may generally participate through counsel, and provides that any other person authorized by 18 U.S.C. § 3771(d) and (e) may assert the victim's rights, such as persons authorized to raise the rights of victims who are minors or are incompetent.

References throughout subdivision (b) were revised to indicate that they were applicable to the victim's rights described in the Federal Rules of Criminal Procedure, not merely subdivision (a) of Rule 60.

Other minor changes were made at the suggestion of the Style Consultant to improve clarity.

Rule ~~6160~~. Title

- 1 These rules may be known and cited as the Federal
- 2 Rules of Criminal Procedure.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

No changes were made.

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE***

Rule 7. The Indictment and the Information

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* * * * *

(c) Nature and Contents.

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~~(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.

2 FEDERAL RULES OF CRIMINAL PROCEDURE

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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.

The committee's proposed Booker amendment to Rule 32(d)(2)(F) – shown as a single underline below -- has been approved by the Supreme Court (and will take effect on December 1, 2007, unless Congress acts otherwise). The Rules Committee has proposed a further amendment to the rule, which is shown below as a double underline.

1 **Rule 32. Sentence and Judgment**

2 * * * * *

3 **(d) Presentence Report.**

4 * * * * *

5 **(2) *Additional Information.*** The presentence report
6 must also contain the following information:

7 **(A)** the defendant's history and characteristics,
8 including:

9 **(i)** any prior criminal record;

- 10 (ii) the defendant's financial condition; and
11 (iii) any circumstances affecting the
12 defendant's behavior that may be
13 helpful in imposing sentence or in
14 correctional treatment;
- 15 (B) verified information, stated in a
16 nonargumentative style, that assesses the
17 financial, social, psychological, and medical
18 impact on any individual against whom the
19 offense has been committed;
- 20 (C) when appropriate, the nature and extent of
21 nonprison programs and resources available
22 to the defendant;
- 23 (D) when the law provides for restitution,
24 information sufficient for a restitution order;

4 FEDERAL RULES OF CRIMINAL PROCEDURE

- 25 (E) if the court orders a study under 18 U.S.C.
26 § 3552(b), any resulting report and
27 recommendation; and
28 (F) any other information that the court requires,
29 including information relevant to the factors
30 under 18 U.S.C. § 3553(a); and
31 (G) whether the Government seeks forfeiture
32 under Rule 32.2.

33 * * * * *

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.

Rule 32.2. Criminal Forfeiture

- 1 (a) **Notice to the Defendant.** A court must not enter a
2 judgment of forfeiture in a criminal proceeding unless

3 the indictment or information contains notice to the
4 defendant that the government will seek the forfeiture of
5 property as part of any sentence in accordance with the
6 applicable statute. The notice should not be designated
7 as a count of the indictment or information. The
8 indictment or information need not identify the property
9 subject to forfeiture or specify the amount of any
10 forfeiture money judgment that the government seeks.

11 **(b) Entering a Preliminary Order of Forfeiture**

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

13 **(A) *Forfeiture Determinations.*** As soon as
14 practical after a verdict or finding of guilty;
15 — or after a plea of guilty or nolo contendere
16 is accepted; — on any count in an indictment
17 or information on regarding which criminal
18 forfeiture is sought, the court must determine
19 what property is subject to forfeiture under

6 FEDERAL RULES OF CRIMINAL PROCEDURE

20 the applicable statute. If the government
21 seeks forfeiture of specific property, the court
22 must determine whether the government has
23 established the requisite nexus between the
24 property and the offense. If the government
25 seeks a personal money judgment, the court
26 must determine the amount of money that the
27 defendant will be ordered to pay.

28 (B) *Evidence and Hearing.* The court's
29 determination may be based on evidence
30 already in the record, including any written
31 plea agreement, or, and on any additional
32 evidence or information submitted by the
33 parties and accepted by the court as relevant
34 and reliable. If if the forfeiture is contested,
35 on either party's request the court must
36 conduct a hearing on evidence or information.

37 presented by the parties at a hearing after the
38 verdict or finding of guilt.

39 **(2) *Preliminary Order.***

40 (A) Contents. If the court finds that property is
41 subject to forfeiture, it must promptly enter a
42 preliminary order of forfeiture setting forth
43 the amount of any money judgment, or
44 directing the forfeiture of specific property,
45 and directing the forfeiture of any substitute
46 assets if the government has met the statutory
47 criteria, without regard to any third party's
48 interest in all or part of it. The order must be
49 entered without regard to any third party's
50 interest in the property. Determining whether
51 a third party has such an interest must be
52 deferred until any third party files a claim in
53 an ancillary proceeding under Rule 32.2(c).

8 FEDERAL RULES OF CRIMINAL PROCEDURE

54 (B) Timing. Unless doing so is impractical, the
55 court must enter the preliminary order of
56 forfeiture sufficiently in advance of
57 sentencing to allow the parties to suggest
58 revisions or modifications before the order
59 becomes final as to the defendant under Rule
60 32.2(b)(4).

61 (C) General Order. If, before sentencing, the
62 court cannot identify all the specific property
63 subject to forfeiture or calculate the total
64 amount of the money judgment, the court
65 may enter a forfeiture order listing any
66 identified property, describing other property
67 in general terms, and stating that the order
68 will be amended under Rule 32.2(e)(1) when
69 additional specific property is identified or

70 the amount of the money judgment has been
71 calculated.

72 (3) ***Seizing Property.*** The entry of a preliminary order
73 of forfeiture authorizes the Attorney General (or a
74 designee) to seize the specific property subject to
75 forfeiture; to conduct any discovery the court
76 considers proper in identifying, locating, or
77 disposing of the property; and to commence
78 proceedings that comply with any statutes
79 governing third party rights. ~~At sentencing—or at~~
80 ~~any time before sentencing if the defendant~~
81 ~~consents—the order of forfeiture becomes final as~~
82 ~~to the defendant and must be made a part of the~~
83 ~~sentence and be included in the judgment.—The~~
84 court may include in the order of forfeiture
85 conditions reasonably necessary to preserve the
86 property’s value pending any appeal.

10 FEDERAL RULES OF CRIMINAL PROCEDURE

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

88 **(A) When Final.** At sentencing — or at any time
89 before sentencing if the defendant consents
90 — the preliminary order of forfeiture
91 becomes final as to the defendant. If the
92 order directs the defendant to forfeit specific
93 assets, it remains preliminary as to third
94 parties until the ancillary proceeding is
95 concluded under Rule 32.2 (c).

96 **(B) Notice and Inclusion in Judgment.** The
97 district court must include the forfeiture when
98 orally announcing the sentence or otherwise
99 ensure that the defendant knows of the
100 forfeiture at sentencing. The court must also
101 include the order of forfeiture, directly or by
102 reference, in the judgment, but the court's

103 failure to do so may be corrected at any time
104 under Rule 36.

105 (C) Time for Appeal. The time for a party to file
106 an appeal from the order of forfeiture, or
107 from the district court's failure to enter an
108 order, begins to run when judgment is
109 entered. If the court later amends or declines
110 to amend an order of forfeiture to include an
111 additional asset under Rule 32.2(e), a party
112 may file an appeal regarding that asset under
113 Federal Rule of Appellate Procedure 4(b).
114 The time for that appeal runs from the date
115 when the order granting or denying the
116 amendment becomes final.

117 **(4 5) Jury Determination.**

118 (A) Retaining Jury. ~~Upon a party's request in a~~
119 ~~case in which a jury returns a verdict of~~

12 FEDERAL RULES OF CRIMINAL PROCEDURE

120 ~~guilty, the jury must~~ In any case tried before
121 a jury, if the indictment or information states
122 that the government is seeking forfeiture, the
123 court must determine before the jury begins
124 deliberating whether either party requests that
125 the jury be retained to determine the
126 forfeatability of specific property if it returns
127 a guilty verdict.

128 (B) Special Verdict Form. If a timely request to
129 have the jury determine the forfeiture is
130 made, the government must submit a
131 proposed Special Verdict Form listing each
132 asset subject to forfeiture and asking the jury
133 to determine whether the government has
134 established the requisite nexus between the
135 property and the offense committed by the
136 defendant.

- 137 **(6) Notice of the Order of Forfeiture.**
- 138 **(A) Publishing and Sending Notice.** If the court
- 139 orders the forfeiture of specific property, the
- 140 government must publish notice of the order
- 141 and send notice to any person who reasonably
- 142 appears to be a potential claimant with
- 143 standing to contest the forfeiture in the
- 144 ancillary proceeding.
- 145 **(B) Content of Notice.** The notice must describe
- 146 the forfeited property, state the times under
- 147 the applicable statute when a petition
- 148 contesting the forfeiture must be filed, and
- 149 state the name and contact information for the
- 150 attorney for the government to be served with
- 151 the petition.
- 152 **(C) Means of Publication.** Publication must take
- 153 place as described in Supplemental Rule

14 FEDERAL RULES OF CRIMINAL PROCEDURE

154 G(4)(a)(iii) of the Federal Rules of Civil
155 Procedure, and may be by any means
156 described in Supplemental Rule G(4)(a)(iv).
157 Publication is unnecessary if any exception in
158 Supplemental Rule G(4)(a)(i) applies.

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

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

169 * * * * *

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.

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).

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

**The seven day period under Rule 35(a) may change to 14 days under the current proposals associated with the time computation amendments to Rule 45.

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 asset 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.

Rule 41. Search and Seizure

1 * * * * *

2 (e) Issuing the Warrant.

20 FEDERAL RULES OF CRIMINAL PROCEDURE

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* * * * *

(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 storage media or electronically stored information consistent with the warrant. The time for the executing the warrant in Rule 41(e) and (f) refers to the seizing or on-site copying of the storage media or electronically stored information, and not to any later review.

(BC) Warrant for a Tracking Device. A tracking-device warrant must identify the person or

20 property to be tracked, designate the
21 magistrate judge to whom it must be
22 returned, and specify a reasonable length of
23 time that the device may be used. The time
24 must not exceed 45 days from the date the
25 warrant was issued. The court may, for good
26 cause, grant one or more extensions for a
27 reasonable period not to exceed 45 days each.
28 The warrant must command the officer to:

29 * * * * *

30 **(f) Executing and Returning the Warrant.**

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

33 * * * * *

34 **(B) *Inventory.*** An officer present during the
35 execution of the warrant must prepare and
36 verify an inventory of any property seized.

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. This 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 time period within which any subsequent offsite review of the media or electronically stored information would take place, the practical reality is that there is no basis for a “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

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

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 earlier access to the storage media or the electronically stored information 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.

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.

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE***

Rule 45. Computing and Extending Time

- 1 ~~(a) Computing Time.~~ The following rules apply in
2 computing any period of time specified in these rules,
3 any local rule, or any court order:
- 4 ~~(1) Day of the Event Excluded.~~ Exclude the day of
5 the act, event, or default that begins the period.
- 6 ~~(2) Exclusion from Brief Periods.~~ Exclude
7 intermediate Saturdays, Sundays, and legal
8 holidays when the period is less than 11 days.
- 9 ~~(3) Last Day.~~ Include the last day of the period unless
10 it is a Saturday, Sunday, legal holiday, or day on
11 which weather or other conditions make the clerk's
12 office inaccessible. When the last day is excluded,
13 the period runs until the end of the next day that is

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

2 FEDERAL RULES OF CRIMINAL PROCEDURE

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

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

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

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

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

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

22 ~~(iv) Memorial Day;~~

23 ~~(v) Independence Day;~~

24 ~~(vi) Labor Day;~~

25 ~~(vii) Columbus Day;~~

26 ~~(viii) Veterans' Day;~~

27 ~~(ix) Thanksgiving Day;~~

28 ~~(x) Christmas Day; and~~

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

32 ~~(b) Extending Time.~~

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

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

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

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

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

4 FEDERAL RULES OF CRIMINAL PROCEDURE

46 after a notice or a paper has been served on that party, 3
47 days are added to the period if service occurs in the
48 manner provided under Federal Rule of Civil Procedure
49 5(b)(2)(B), (C), or (D).

50 * * * * *

Rule 45. Computing and Extending Time

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

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

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

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

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

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

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

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

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

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

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

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

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

58 (B) any other day declared a holiday by the
59 President, Congress, or the state where the
60 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., Casaldue 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

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* * * * *

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

7

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21 intended alibi defense under Rule 12.1(a)(2), but
22 no later than ~~10~~ 14 days before trial.

23 * * * * *

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

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

2 * * * * *

3 **(3) *Response to the Notice.*** An attorney for the
4 government must serve a written response on the
5 defendant or the defendant's attorney within ~~10~~ 14
6 days after receiving the defendant's notice, but no
7 later than ~~20~~ 21 days before trial. The response
8 must admit or deny that the defendant exercised
9 the public authority identified in the defendant's
10 notice.

18 FEDERAL RULES OF CRIMINAL PROCEDURE

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

12 (A) *Government's Request.* An attorney for the
13 government may request in writing that the
14 defendant disclose the name, address, and
15 telephone number of each witness the
16 defendant intends to rely on to establish a
17 public-authority defense. An attorney for the
18 government may serve the request when the
19 government serves its response to the
20 defendant's notice under Rule 12.3(a)(3), or
21 later, but must serve the request no later than
22 ~~20~~ 21 days before trial.

23 (B) *Defendant's Response.* Within ~~7~~ 14 days after
24 receiving the government's request, the
25 defendant must serve on an attorney for the
26 government a written statement of the name,

27 address, and telephone number of each
28 witness.

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

37 * * * * *

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

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2 (c) **After Jury Verdict or Discharge.**

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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

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

8

* * * * *

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).

26 FEDERAL RULES OF CRIMINAL PROCEDURE

17 To appeal, the defendant must file a notice
18 with the clerk specifying the judgment being
19 appealed and must serve a copy on an
20 attorney for the government.

21 * * * * *

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

1 **(a) Nondispositive Matters.** A district judge may refer to
2 a magistrate judge for determination any matter that
3 does not dispose of a charge or defense. The magistrate
4 judge must promptly conduct the required proceedings
5 and, when appropriate, enter on the record an oral or
6 written order stating the determination. A party may
7 serve and file objections to the order within ~~10~~ 14 days
8 after being served with a copy of a written order or after

9 the oral order is stated on the record, or at some other
10 time the court sets. The district judge must consider
11 timely objections and modify or set aside any part of the
12 order that is contrary to law or clearly erroneous.
13 Failure to object in accordance with this rule waives a
14 party's right to review.

15 **(b) Dispositive Matters.**

16 * * * * *

17 **(2) Objections to Findings and Recommendations.**

18 Within ~~10~~ 14 days after being served with a copy
19 of the recommended disposition, or at some other
20 time the court sets, a party may serve and file
21 specific written objections to the proposed findings
22 and recommendations. Unless the district judge
23 directs otherwise, the objecting party must
24 promptly arrange for transcribing the record, or
25 whatever portions of it the parties agree to or the

28 FEDERAL RULES OF CRIMINAL PROCEDURE

26 magistrate judge considers sufficient. Failure to
27 object in accordance with this rule waives a party's
28 right to review.

29 * * * * *

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**

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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.

30 FEDERAL RULES OF CRIMINAL PROCEDURE

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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**

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Rule 8. Evidentiary Hearing

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(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.

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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 2254 CASES IN THE
UNITED STATES DISTRICT COURTS**

Rule 11. Certificate of Appealability

1 At the same time the judge enters a final order adverse
2 to the petitioner, the judge must either issue or deny a
3 certificate of appealability. If the judge issues a certificate,
4 the judge must state the specific issue or issues that satisfy the
5 showing required by 28 U.S.C. § 2253(c)(2).

Committee Note

As provided in 28 U.S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2254 unless a judge issues a certificate of appealability, which must specify the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11 makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2254 Proceedings in the District Courts. Rule 11 also requires the judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). 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.

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

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

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

Rule 11. Certificate of Appealability; Time to Appeal

- 1 **(a) Certificate of Appealability.** At the same time the
2 judge enters a final order adverse to the applicant, the
3 judge must either issue or deny a certificate of
4 appealability. If the judge issues a certificate, the judge
5 must state the specific issue or issues that satisfy the
6 showing required by 28 U.S.C. § 2253(c)(2).
- 7 **(b) Time to Appeal.** Federal Rule of Appellate Procedure
8 4(a) governs the time to appeal an order entered under
9 these rules. These rules do not extend the time to appeal
10 the original judgment of conviction.

Committee Note

Subdivision (a). As provided in 28 U.S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 unless a judge issues a certificate of appealability, which must specify 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 judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). 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.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Proposed Amendments Relating to Victims

DATE: September 2, 2007

The Advisory Committee's initial set of rules relating to victims has been approved by the Standing Committee for transmittal to the Judicial Conference at its meeting on September 18.

The Advisory Committee also received numerous requests for consideration of additional proposals that went beyond the scope of the rules it had already proposed, and the Committee agreed to treat victim rights as a continuing agenda item.

Over the last two months the Crime Victim Rights Act (CVRA) subcommittee chaired by Judge Jones met by telephone conference to continue its work. The subcommittee considered some of the proposals that were made in the written comments provided during the public comment period on the pending amendments, as well as proposed amendments contained in S. 1749, which was introduced by Senator Kyl. S. 1749 and a redlined version of the rules as they would be amended by it are attached.

The first results of the subcommittee's work are three additional amendments, which the subcommittee now proposes for discussion by the full Committee. The draft amendments and accompanying committee notes are attached.

At the same time, additional information is being developed on a number of fronts that will assist the Committee in determining whether other amendments are needed, and if so, how to craft them in order to be most effective in responding to the particular cases and problems that have arisen. Two studies are being conducted.

One study is being conducted by the Federal Judicial Center at the request of Judge Bucklew. As indicated in the attached letter, we have been working with the FJC staff to determine how best to prioritize and focus this study. In addition to studying the implementation of the CVRA in the federal courts, this study will also study the experience of state courts which have crime victim rights laws. Recognizing that the federal caseload differs in many respects from that in the states,

and various aspects of federal procedure also vary from the procedures in particular states, an effort will be made to determine how to tailor any needed rules to the distinctive needs of the federal courts, in light of the experiences of the state courts.

Another study is being made by the Government Accountability Office, which is studying the implementation of the CVRA in selected districts. We understand that this study is now underway.

This item is on the agenda for the October meeting in Park City.

FEDERAL RULES OF CRIMINAL PROCEDURE

recognizance, unsecured bond, or conditions, the Bail Reform Act requires the court to consider “the safety of any other person or the community.” See 18 U.S.C. § 3142(b) & (c). In considering proposed conditions of release, 18 U.S.C.

§ 3142(g)(4), requires the court to consider “the nature and seriousness of the danger to any person in the community that would be posed by the person’s release.” In addition, the Crime Victims’ Rights Act, 18 U.S.C. § 3771(a)(1), states that victims have the “right to be reasonably protected from the accused.”

Rule 12.3. Notice of a Public-Authority Defense

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(4) *Disclosing Witnesses.*

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(C) *Government’s Reply.* Within 7 days after

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receiving the defendant’s statement, an

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attorney for the government must serve on

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the defendant or the defendant’s attorney a

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written statement of the name, ~~address, and~~

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~~telephone number~~ of each witness --and the

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address and telephone number

FEDERAL RULES OF CRIMINAL PROCEDURE

11 of each witness other than a victim--that the
12 government intends to rely on to oppose the
13 defendant's public-authority defense.

14 (D) Victim's Address and Telephone
15 Number. If the government intends to
16 rely on a victim's testimony to oppose
17 the defendant's public-authority defense
18 and the defendant establishes a need for
19 the victim's address and telephone
20 number, the court may:

21 (i) order the government to
22 provide the information in writing to the
23 defendant or the defendant's attorney;

24 or

25 (ii) fashion a reasonable procedure
26 that allows preparation of the defense
27 and also protects the victim's interests.

FEDERAL RULES OF CRIMINAL PROCEDURE

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(b) Continuing Duty to Disclose.

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(1) In General. Both an attorney for the

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government and the defendant must promptly

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disclose in writing to the other party the name of

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any additional witness—and the— address, and

34

telephone number of any additional witness other

35

than a victim — if:

36

(† **A**) the disclosing party learns of the

37

witness before or during trial; and

38

(† **B**) the witness should have been disclosed

39

under Rule 12.3(a)(4) if the disclosing

40

party had known of the witness earlier.

41

(2) Address and Telephone Number of an

42

Additional Victim Witness. The address and

43

telephone number of an additional victim witness

FEDERAL RULES OF CRIMINAL PROCEDURE

44 must not be disclosed except as provided in

45 (a)(4)(D).

46 * * * * *

COMMITTEE NOTE

Subdivisions (a) and (b). The amendment implements the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when a public authority defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests.

In the case of victims who will testify concerning a public authority claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 21. Transfer for Trial

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2 **(b) For Convenience.** Upon the defendant's motion, the
3 court may transfer the proceeding, or one or more counts,
4 against that defendant to another district for the convenience
5 of the parties, any victim, and the witnesses, and in the
6 interests of justice.

7

* * * * *

Committee Note

Subdivision (b). This amendment requires the court to consider the convenience of victims – as well as the convenience of the parties and witnesses and the interests of justice – in determining whether to transfer all or part of the proceeding to another district for trial. The Committee recognizes that the court has substantial discretion to balance any competing interests.

110TH CONGRESS
1ST SESSION

S. 1749

To amend the Federal Rules of Criminal Procedure to provide adequate protection to the rights of crime victims, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 29, 2007

Mr. KYL introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Federal Rules of Criminal Procedure to provide adequate protection to the rights of crime victims, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; SENSE OF CONGRESS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the
5 “Crime Victims’ Rights Rules Act of 2007”.

6 (b) **SENSE OF CONGRESS CONCERNING CRIME VIC-**
7 **TIMS’ REPRESENTATION IN THE FEDERAL CRIMINAL**
8 **JUSTICE SYSTEM.**—

9 (1) **FINDINGS.**—Congress finds that—

1 (A) the amendments made by title I of the
2 Justice for All Act of 2004 (Public Law 108–
3 405; 118 Stat. 2261) afford a crime victim cer-
4 tain rights and standing in court proceedings
5 involving an offense against that crime victim;

6 (B) the rights and standing afforded to
7 crime victims by those amendments are directly
8 affected by the Rules of Criminal Procedure,
9 which govern the administration of the Federal
10 criminal justice system.

11 (C) the Judicial Conference of the United
12 States, as the principal body concerned with the
13 administration of United States courts and the
14 recommendation of rules of procedure, has an
15 obligation to ensure that the rights and stand-
16 ing of crime victims are accounted for in the
17 Federal criminal justice system.

18 (2) SENSE OF CONGRESS.—It is the sense of
19 Congress that the Chief Justice of the United
20 States, having sole authority to appoint members of
21 committees of the Judicial Conference of the United
22 States, should designate not fewer than 1 member
23 on each of the Committee on Rules of Practice and
24 Procedure and the Advisory Committee on Criminal
25 Rules for the purpose of ensuring that the rights

1 and standing of crime victims are accounted for in
2 the Federal criminal justice system.

3 **SEC. 2. DEFINITIONS.**

4 Rule 1(b) of the Federal Rules of Criminal Procedure
5 is amended by adding at the end the following:

6 “(11) ‘Victim’ means a person directly and
7 proximately harmed as a result of the commission of
8 a Federal offense or an offense in the District of Co-
9 lumbia. In the case of a crime victim who is under
10 18 years of age, incompetent, incapacitated, or de-
11 ceased, the legal guardian of the crime victim or the
12 representative of the crime victim’s estate, family
13 member, or any other person appointed as suitable
14 by the court, may assume the crime victim’s rights
15 under these rules, but in no event shall the defend-
16 ant be named as such guardian or representative.”.

17 **SEC. 3. INTERPRETATION.**

18 Rule 2 of the Federal Rules of Criminal Procedure
19 is amended by inserting after “administration” the fol-
20 lowing: “to the government, the defendant, and the vic-
21 tim”.

22 **SEC. 4. ARREST WARRANT OR SUMMONS ON A COMPLAINT.**

23 Rule 4 of the Federal Rules of Criminal Procedure
24 is amended—

1 (1) in subdivision (a), in the second sentence,
2 by inserting after “a summons,” the following: “if
3 consistent with the right of the victim to be reason-
4 ably protected from the accused,”; and

5 (2) in subdivision (c), by adding at the end the
6 following:

7 “(5) REASONABLE NOTICE TO THE VICTIM.—
8 Upon return of an executed warrant, the judge be-
9 fore whom the defendant is brought shall direct that
10 reasonable efforts be made to notify the victim re-
11 garding the arrest and of the date, time, and place
12 of the initial appearance and of the right of the vic-
13 tim to be heard at the initial appearance.”.

14 **SEC. 5. INITIAL APPEARANCE.**

15 Rule 5 of the Federal Rules of Criminal Procedure
16 is amended—

17 (1) in subdivision (a)—

18 (A) by redesignating paragraph (3) as
19 paragraph (4); and

20 (B) by inserting after paragraph (2) the
21 following:

22 “(3) REASONABLE NOTICE TO THE VICTIM.—
23 Reasonable efforts shall be made to give notice to
24 the victim of the date, time, and place of the initial

1 appearance and of the right of the victim to be
2 heard at the initial appearance.”;

3 (2) in subdivision (d)(3), by adding after the
4 period at the end the following: “In making the deci-
5 sion to detain or release the defendant, the judge
6 shall consider the right of the victim to be reason-
7 ably protected from the defendant and shall make
8 reasonable efforts to notify the victim if the defend-
9 ant is released and the conditions of such release.”;
10 and

11 ~~(3)~~ in subdivision (f), by inserting before the
12 period at the end the following: “and reasonable ef-
13 forts are made to give the victim notice and the
14 right to participate”.

15 **SEC. 6. PRELIMINARY HEARING.**

16 Rule 5.1 of the Federal Rules of Criminal Procedure
17 is amended—

18 (1) in subdivision (a), in the matter preceding
19 paragraph (1), by inserting after “a preliminary
20 hearing” the following: “, after making reasonable
21 efforts to give notice to the victim,”; and

22 (2) in subdivision (d), by inserting after
23 “prompt disposition of criminal cases” the following:
24 “and the right of the victim to proceedings free from
25 unreasonable delay”.

1 **SEC. 7. ARREST WARRANT OR SUMMONS ON AN INDICT-**
 2 **MENT OR INFORMATION.**

3 Rule 9(c)(3) of the Federal Rules of Criminal Proce-
 4 dure is amended by inserting before the period at the end
 5 the following: “, after making reasonable efforts to give
 6 notice to the victim”.

7 **SEC. 8. REASONABLE NOTICE TO VICTIMS.**

8 (a) **IN GENERAL.**—The Federal Rules of Criminal
 9 Procedure are amended by inserting after Rule 10 the fol-
 10 lowing:

11 **“Rule 10.1. Reasonable Notice to Victims**

12 “(a) **IDENTIFICATION OF VICTIMS.**—During the
 13 prosecution of a case, the attorney for the government
 14 shall at the earliest reasonable opportunity, identify any
 15 victim.

16 “(b) **REASONABLE NOTICE OF CASE EVENTS.**—Dur-
 17 ing the prosecution of a crime, and whenever reasonable
 18 notice is required to be provided under these rules, reason-
 19 able efforts shall be made to provide any victim the earliest
 20 possible notice of—

21 “(1) the scheduling, including scheduling
 22 changes or continuances, of each court proceeding
 23 that the victim is either required to attend or enti-
 24 tled to attend;

25 “(2) the release or detention status of a defend-
 26 ant or suspected offender;

1 “(3) the filing of charges against a defendant,
2 or the proposed dismissal of any charges, including
3 the placement of the defendant in a pretrial diver-
4 sion program and the conditions of such placement;

5 “(4) the right of the victim to make a state-
6 ment about pretrial release of the defendant;

7 “(5) the right of the victim to make a state-
8 ment about acceptance of a plea of guilty or nolo
9 contendere;

10 “(6) the right of the victim to attend a public
11 proceeding;

12 “(7) if the defendant is convicted, the date and
13 place set for sentencing and the right of the victim
14 to address the court at sentencing; and

15 “(8) after the defendant is sentenced, the sen-
16 tence imposed and the availability of the Bureau of
17 Prisons notification program, which provides the
18 date, if any, on which the offender will be eligible for
19 parole or supervised release.

20 “(c) MULTIPLE VICTIMS.—The attorney for the gov-
21 ernment shall advise the court if the attorney believes that
22 the number of victims makes it impracticable to provide
23 reasonable personal notice to each victim. If the court
24 finds that the number of victims makes it impracticable
25 to give reasonable personal notice to each victim, the court

1 shall fashion a reasonable procedure calculated to give rea-
2 sonable notice under the circumstances.”.

3 (b) CONFORMING AMENDMENT.—The table of con-
4 tents for the Federal Rules of Criminal Procedure is
5 amended by inserting after the item relating to Rule 10
6 the following:

“10.1 Reasonable Notice to Victims.”.

7 **SEC. 9. PLEAS.**

8 Rule 11 of the Federal Rules of Criminal Procedure
9 is amended—

10 (1) in subdivision (a)(3), by striking “the par-
11 ties’ views” and inserting the following: “the views
12 of the parties and victims”;

13 (2) in subdivision (b), by adding at the end the
14 following:

15 “(4) VICTIM’S VIEWS.—Before the court ac-
16 cepts a plea of guilty or nolo contendere or allows
17 any plea to be withdrawn, the court must address
18 any victim who is present personally in open court.
19 During this address, the court must determine
20 whether the victim wishes to present views regarding
21 the proposed plea or withdrawal and, if so, what
22 those views are. The court shall consider the views
23 of the victim in acting on the proposed plea or with-
24 drawal.”; and

25 (3) in subdivision (c)—

1 (A) in paragraph (1), in the matter pre-
 2 ceding subparagraph (A), by inserting after the
 3 second sentence the following: “The attorney
 4 for the government shall make reasonable ef-
 5 forts to notify any victim of, and consider the
 6 views of any victim about, any proposed plea
 7 negotiations.”; and

8 (B) in paragraph (2), by adding at the end
 9 the following: “When a plea is presented in
 10 open court, the attorney for the government or
 11 attorney for any victim shall advise the court if
 12 the attorney is aware that the victim has any
 13 objection to the proposed plea agreement.”.

14 **SEC. 10. PLEADINGS AND PRETRIAL MOTIONS.**

15 Rule 12(g) of the Federal Rules of Criminal Proce-
 16 dure is amended by adding at the end the following: “The
 17 court shall make reasonable efforts to notify the victim
 18 if the defendant is released under this subdivision.”.

19 **SEC. 11. DISCLOSURES.**

20 (a) ALIBI DEFENSE.—

21 (1) IN GENERAL.—Rule 12.1(b)(1)(A) of the
 22 Federal Rules of Criminal Procedure is amended—

23 (A) by striking “, address, and telephone
 24 number”; and

1 (B) by inserting after “each witness” the
2 following: “and the address and telephone num-
3 ber of each witness (other than a victim) that”.

4 (2) CONTINUING DUTY TO DISCLOSE.—Rule
5 12.1(c) of the Federal Rules of Criminal Procedure
6 is amended—

7 (A) by striking “, address,” and inserting
8 “of each additional witness and the address”;
9 and

10 (B) by inserting before “if:” the following:
11 “(other than a victim)”.

12 (b) PUBLIC AUTHORITY DEFENSE.—

13 (1) IN GENERAL.—Rule 12.3(a)(4)(C) of the
14 Federal Rules of Criminal Procedure is amended—

15 (A) by striking “, address, and telephone
16 number”; and

17 (B) by inserting after “each witness” the
18 following: “, and the address and telephone
19 number of each witness (other than a victim),
20 that”.

21 (2) CONTINUING DUTY TO DISCLOSE.—Rule
22 12.3(b) of the Federal Rules of Criminal Procedure
23 is amended—

1 (A) by striking “, address,” and inserting
2 the following: “of any additional witness and
3 the address”; and

4 (B) inserting before “if:” the following:
5 “(other than a victim)”.

6 **SEC. 12. DEPOSITIONS.**

7 Rule 15 of the Federal Rules of Criminal Procedure
8 is amended—

9 (1) in subdivision (a)(1), in the first sentence,
10 by inserting “, other than a victim,” after “a pro-
11 spective witness”; and

12 (2) by adding at the end the following:

13 “(i) VICTIM ATTENDANCE.—A victim may attend any
14 public deposition taken under this Rule.”.

15 **SEC. 13. DISCOVERY AND INSPECTION.**

16 Rule 16(a) of the Federal Rules of Criminal Proce-
17 dure is amended by adding at the end the following:

18 “(4) DISCLOSURE TO VICTIMS.—The govern-
19 ment may disclose to a victim any information that
20 the government has disclosed to the defendant.”.

21 **SEC. 14. SUBPOENAS.**

22 Rule 17(h) of the Federal Rules of Criminal Proce-
23 dure is amended—

24 (1) by striking “No party” and inserting the
25 following:

1 “(1) IN GENERAL.—No party”; and

2 (2) by adding at the end the following:

3 “(2) VICTIMS.—No record or document con-
4 taining personal or confidential information about a
5 victim may be subpoenaed without making reason-
6 able efforts to give notice to the victim, given
7 through the attorney for the government or for the
8 victim, and an opportunity to be heard.”.

9 **SEC. 15. PRETRIAL CONFERENCE.**

10 Rule 17.1 of the Federal Rules of Criminal Procedure
11 is amended by adding at the end the following: “The court
12 shall make reasonable efforts to give the victim notice of
13 any pretrial conference and a victim may attend and be
14 heard on any matter relating to the rights of a victim.”.

15 **SEC. 16. VENUE.**

16 (a) IN GENERAL.—The second sentence of Rule 18
17 of the Federal Rules of Criminal Procedure is amended
18 by inserting after “the defendant” the following: “, the
19 victim,”.

20 (b) PLEA AND SENTENCE.—Rule 20(a)(2) of the
21 Federal Rules of Criminal Procedure is amended by in-
22 serting before the period at the end the following: “, after
23 consultation with the victim”.

24 (c) JUVENILES.—Rule 20(d)(1)(E) of the Federal
25 Rules of Criminal Procedure is amended by inserting be-

1 fore the semicolon the following: “, after consultation with
2 the victim”.

3 (d) TRANSFER FOR TRIAL.—Rule 21 of the Federal
4 Rules of Criminal Procedure is amended by adding at the
5 end the following:

6 “(e) VICTIMS’ VIEWS.—The court shall not transfer
7 any proceeding without giving any victim an opportunity
8 to be heard. The court shall consider the views of the vic-
9 tim in making any transfer decision.”.

10 **SEC. 17. TRIAL.**

11 Rule 23(a)(3) of the Federal Rules of Criminal Pro-
12 cedure is amended by inserting before the period at the
13 end the following: “, after considering the views of the vic-
14 tim”.

15 **SEC. 18. INTERPRETERS.**

16 Rule 28 of the Federal Rules of Criminal Procedure
17 is amended in the first sentence, by inserting before the
18 period at the end the following: “, including an interpreter
19 for the victim”.

20 **SEC. 19. POST CONVICTION PROCEDURES.**

21 (a) PRESENTENCE INVESTIGATION.—Rule 32(e) of
22 the Federal Rules of Criminal Procedure is amended—

23 (1) in paragraph (1)(B), by striking “requires”
24 and inserting “permits”; and

25 (2) by adding at the end the following:

1 “(3) VICTIM INFORMATION.—The probation of-
 2 ficer shall determine whether any victim wishes to
 3 provide information for the presentence report.”.

4 (b) PRESENTENCE REPORT.—Rule 32 of the Federal
 5 Rules of Criminal Procedure is amended—

6 (1) in subdivision (d)—

7 (A) in paragraph (2)—

8 (i) in subparagraph (E), by striking

9 “and” at the end;

10 (ii) by redesignating subparagraph

11 (F) as subparagraph (G); and

12 (iii) by inserting after subparagraph

13 (E) the following:

14 “(F) a description of the impact of the
 15 crime on the victim; and”; and

16 (B) in paragraph (3)(C), by inserting “,
 17 the victim,” after “the defendant”;

18 (2) in subdivision (e)(2)—

19 (A) by striking “The probation officer”
 20 and inserting the following:

21 “(A) IN GENERAL.—The probation offi-
 22 cer”; and

23 (B) by adding at the end the following:

24 “(B) VICTIMS.—The probation officer
 25 must give the presentence report to the victim

1 and any attorney for such victim at least 35
2 days before sentencing, unless the court, after
3 receiving an objection from the defendant, the
4 attorney for the government, or another victim,
5 finds that disclosure of a portion of the report
6 would be an unwarranted invasion of personal
7 privacy and not in the interest of justice, in
8 which case such portions shall be redacted.”;
9 and

10 (3) in subdivision (f)(1), by adding at the end
11 the following: “The attorney for the government or
12 for the victim shall raise for the victim any reason-
13 able objection by the victim to the presentence re-
14 port.”.

15 (c) DEPARTURES.—Rule 32(h) of the Federal Rules
16 of Criminal Procedure is amended by—

17 (1) striking “or in a party’s prehearing submis-
18 sion” and inserting “, in a party’s prehearing sub-
19 mission, or in a victim impact statement”; and

20 (2) adding at the end the following “The attor-
21 ney for the government or the victim shall advise de-
22 fense counsel and the court of any ground identified
23 by the victim that might reasonably serve as a basis
24 for departure.”.

1 (d) SENTENCING.—Rule 32(i) of the Federal Rules
2 of Criminal Procedure is amended—

3 (1) in paragraph (1)(C), by inserting after
4 “parties’ attorneys” the following: “and any victim”;

5 (2) in paragraph (1)(D), by inserting after
6 “allow a party” the following: “or a victim”;

7 (3) in paragraph (2), in the first sentence, by
8 inserting after “permit the parties” the following:
9 “or the victim”; and

10 (4) by amending subparagraph (B) of para-
11 graph (4) to read as follows:

12 “(B) BY A VICTIM.—Before imposing sen-
13 tence, the court must address any victim of the
14 crime who is present at sentencing and must
15 permit the victim to speak or submit any infor-
16 mation about the sentence.”.

17 (e) DEFINITIONS.—Rule 32 of the Federal Rules of
18 Criminal Procedure is amended by—

19 (1) striking subdivision (a);

20 (2) redesignating subdivisions (b) through (k)
21 as subdivisions (a) through (j) respectively;

22 (f) CONFORMING AMENDMENTS.—

23 (1) RULE 26.—Rule 26.2(g)(2) of the Federal
24 Rules of Criminal Procedure is amended by striking
25 “Rule 32(i)(2)” and inserting “Rule 32(h)(2)”.

1 (2) RULE 32.—Rule 32(h) of the Federal Rules
2 of Criminal Procedure, as so redesignated by sub-
3 section (e), is amended—

4 (A) in paragraph (1)(B), by striking “Rule
5 32(d)(3)” and inserting “Rule 32(c)(3)”; and

6 (B) in paragraph (4)(C), by striking “Rule
7 32(i)(4)” and inserting “Rule 32(h)(4)”.

8 (3) COPYRIGHT.—Section 2319(d)(1) of title
9 18, United States Code, is amended by striking
10 “Rule 32(e)” and inserting “Rule 32(b)”.

11 (4) RECORDINGS.—Section 2319A(d)(1) of title
12 18, United States Code, is amended by striking
13 “Rule 32(e)” and inserting “Rule 32(b)”.

14 (5) COUNTERFEIT GOODS OR SERVICES.—Sec-
15 tion 2320(d)(1) of title 18, United States Code, is
16 amended by striking “Rule 32(e)” and inserting
17 “Rule 32(b)”.

18 (6) CHILDREN.—Section 3509(f) of title 18,
19 United States Code, is amended by striking “Rule
20 32(e)” and inserting “Rule 32(b)”.

21 (7) PRESENTENCE REPORTS.—Section 3552 of
22 title 18, United States Code, is amended—

23 (A) in subsection (a), by striking “Rule
24 32(e)” and inserting “Rule 32(b)”; and

25 (B) in subsection (d)—

1 (i) by striking “The court shall assure
2 that” and inserting the following:

3 “(1) IN GENERAL.—The court shall assure
4 that”; and

5 (ii) by adding at the end the fol-
6 lowing:

7 “(2) CRIME VICTIMS.—The court shall assure
8 that, not later than 10 days before the date of sen-
9 tencing, the report filed under this section is dis-
10 closed to any crime victim (as that term is defined
11 in section 3771(e)) and any attorney for such crime
12 victim, except any portion of such report excised by
13 the court for compelling reasons or made confiden-
14 tial by law. If the court excises any portion of the
15 presentence report, it shall inform the parties and
16 the victim of its decision and shall state on the
17 record the reasons for the excision.”.

18 (8) PROBATION.—Section 3664(c) of title 18,
19 United States Code, is amended by striking “Rule
20 32(c)” and inserting “Rule 32(b)”.

21 **SEC. 20. REVOKING OR MODIFYING PROBATION OR SUPER-**
22 **VISED RELEASE.**

23 Rule 32.1 of the Federal Rules of Criminal Procedure
24 is amended—

25 (1) in subdivision (a)—

1 (A) in paragraph (1), in the matter pre-
2 ceding subparagraph (A), by inserting after
3 “must be taken” the following: “, with reason-
4 able efforts to give notice to the victim and”;
5 and

6 (B) in paragraph (6), by striking “The
7 magistrate” and inserting the following: “After
8 considering the right of the victim to be reason-
9 ably protected, the magistrate”; and
10 (2) in subdivision (b), by adding at the end the

11 following:

12 “(3) CRIME VICTIMS.—The court shall make
13 reasonable efforts to give notice to the victim before
14 any revocation hearing.”.

15 **SEC. 21. NEW TRIAL.**

16 Rule 33(a) of the Federal Rules of Criminal Proce-
17 dure is amended in the first sentence by inserting after
18 “Upon the defendant’s motion” the following: “and after
19 making reasonable efforts to give notice to the victim and
20 an opportunity for the victim to be heard”.

21 **SEC. 22. ARRESTING JUDGMENT.**

22 Rule 34(a) of the Federal Rules of Criminal Proce-
23 dure is amended in the matter preceding paragraph (1),
24 by inserting after “must arrest judgment” the following:

1 “, after making reasonable efforts to give notice to the
2 victim and an opportunity to be heard,”.

3 **SEC. 23. CORRECTING OR REDUCING A SENTENCE.**

4 Rule 35 of the Federal Rules of Criminal Procedure
5 is amended—

6 (1) in subdivision (a), by inserting after “the
7 court” the following: “, after making reasonable ef-
8 forts to give notice to the victim and an opportunity
9 to be heard,”; and

10 (2) in subdivision (b), by inserting “, after
11 making reasonable efforts to give notice to the vic-
12 tim and an opportunity to be heard,” after “may re-
13 duce a sentence” each place the term appears.

14 **SEC. 24. CLERICAL ERROR.**

15 Rule 36 of the Federal Rules of Criminal Procedure
16 is amended by inserting after “it considers appropriate,”
17 the following: “including making reasonable efforts to give
18 notice to the victim,”.

19 **SEC. 25. STAYING A SENTENCE OR A DISABILITY.**

20 Rule 38(e)(1) of the Federal Rules of Criminal Proce-
21 dure is amended by inserting before the period at the end
22 the following: “, after making reasonable efforts to give
23 notice to the victim and an opportunity to be heard”.

1 **SEC. 26. VICTIM'S PRESENCE.**

2 (a) IN GENERAL.—The Federal Rules of Criminal
3 Procedure are amended by inserting after Rule 43 the fol-
4 lowing:

5 **“Rule 43.1 Victim’s Presence**

6 “(a) VICTIM’S RIGHT TO ATTEND.—A victim has the
7 right to attend any public court proceeding, unless the
8 court, based on clear and convincing evidence, determines
9 that testimony by the victim would be materially altered
10 if the victim heard other testimony at that proceeding. Be-
11 fore making any determination to exclude a victim, the
12 court shall make every effort to permit the fullest attend-
13 ance possible by the victim and shall consider reasonable
14 alternatives to the exclusion of the victim from the crimi-
15 nal proceeding. The reasons for any decision to exclude
16 a victim shall be clearly stated on the record.

17 “(b) PROCEEDING WITH AND WITHOUT REASON-
18 ABLE NOTICE.—

19 “(1) WITHOUT VICTIM.—The court may hold a
20 public proceeding without the attendance of a victim
21 if reasonable efforts have been made to give notice
22 to that victim under Rule 10.1.

23 “(2) WITHOUT NOTICE.—The court may hold a
24 public proceeding (other than a trial or sentencing)
25 without proper notice to a victim only if—

26 “(A) doing so is in the interests of justice;

1 “(B) the court makes reasonable efforts to
2 provide prompt notice to that victim of the
3 court’s action and of the victim’s right to seek
4 reconsideration of the action if a victim’s right
5 is affected; and

6 “(C) the court makes reasonable efforts to
7 insure that notice will be properly provided to
8 that victim for all subsequent public pro-
9 ceedings.

10 “(e) NUMEROUS VICTIMS.—If the court finds that
11 the number of victims makes it impracticable to afford all
12 of the victims the right to be present, the court shall fash-
13 ion a reasonable procedure to facilitate the attendance of
14 the victims.

15 “(d) RIGHT TO BE HEARD ON VICTIM’S ISSUES.—
16 In addition to any right to be heard established elsewhere
17 under these rules, at any public proceeding at which a vic-
18 tim has the right to attend, the victim has the right to
19 be heard on any matter affecting the rights of a victim.”.

20 (b) CONFORMING AMENDMENT.—The table of con-
21 tents for the Federal Rules of Criminal Procedure is
22 amended by inserting after the item relating to Rule 43
23 the following:

“43.1 Victim’s Presence.”.

1 **SEC. 27. COUNSEL FOR VICTIMS.**

2 Rule 44 of the Federal Rules of Criminal Procedure
3 is amended by adding at the end the following:

4 “(d) COUNSEL FOR VICTIMS.—When the interests of
5 justice clearly require, the court may appoint counsel for
6 a victim to assist the victim in exercising the rights of
7 the victim under these rules or any other provision of Fed-
8 eral law.”.

9 **SEC. 28. RIGHT TO BE HEARD.**

10 Rule 46 of the Federal Rules of Criminal Procedure
11 is amended by adding at the end the following:

12 “(k) VICTIM’S RIGHT TO BE HEARD.—A victim has
13 the right to be heard regarding any decision to release the
14 defendant. The court shall consider the views of the victim
15 and the right of the victim to be reasonably protected from
16 the defendant in making any release decision, including
17 such decisions in petty cases. In a case where the court
18 finds that the number of victims makes it impracticable
19 to afford all of the victims the right to be heard in open
20 court, the court shall fashion a reasonable procedure to
21 facilitate hearing from representative victims.”.

22 **SEC. 29. MOTIONS AND SUPPORTING AFFIDAVITS.**

23 Rule 47(b) of the Federal Rules of Criminal Proce-
24 dure is amended by adding at the end the following: “In
25 deciding whether to grant the government’s motion to dis-
26 miss, the court shall consider the views of the victim.”.

1 **SEC. 30. SERVING AND FILING PAPERS.**

2 Rule 49(a) of the Federal Rules of Criminal Proce-
3 dure is amended by inserting after “on every other party”
4 the following: “, and on the victim or any counsel for a
5 victim who has entered a notice of appearance,”.

6 **SEC. 31. PROMPT DISPOSITION.**

7 Rule 50 of the Federal Rules of Criminal Procedure
8 is amended to read as follows:

9 **“Rule 50. Prompt Disposition**

10 “(a) SCHEDULING PREFERENCE.—Scheduling pref-
11 erence shall be given to criminal proceedings as far as is
12 practicable.

13 “(b) DEFENDANT’S RIGHT AGAINST DELAY.—The
14 court shall assure that the right of the defendant to a
15 speedy trial is protected, as provided by the Speedy Trial
16 Act of 1974 (18 U.S.C. 3161 note).

17 “(c) VICTIM’S RIGHT AGAINST DELAY.—The court
18 shall assure that the right of the victim to proceedings
19 free from unreasonable delay is protected. The victim has
20 the right to be heard regarding any motion to continue
21 any proceeding. If the court grants a motion to continue
22 over the objection of the victim, the court shall state its
23 reasons in writing.”.

24 **SEC. 32. PRESERVING CLAIMED ERROR.**

25 Rule 51(b) of the Federal Rules of Criminal Proce-
26 dure is amended—

1 (1) in the first sentence, by inserting after “A
2 party” the following: “or a victim”; and

3 (2) in the second sentence, by inserting after
4 “If a party” the following: “or a victim”.

5 **SEC. 33. DIRECTION TO SENTENCING COMMISSION.**

6 The United States Sentencing Commission is directed
7 to make appropriate amendments to sentencing guidelines,
8 policy statements, and official commentary to ensure that
9 crime victims have meaningful participation in the sen-
10 tencing process.

○

FEDERAL RULES OF CRIMINAL PROCEDURE

3 believe that an offense has been committed and that
4 the defendant committed it, the judge must issue an
5 arrest warrant to an officer authorized to execute it. At
6 the request of an attorney for the government, the
7 judge must issue a summons, if consistent with the
8 right of the victim to be reasonably protected from the
9 accused, instead of a warrant, to a person authorized
10 to serve it. A judge may issue more than one warrant
11 or summons on the same complaint. If a defendant
12 fails to appear in response to a summons, a judge
13 may, and upon request of an attorney for the
14 government must, issue a warrant.

15 * * * * *

16 (c) **Execution or Service, and Return.**

17 * * * * *

18 (5) Reasonable notice to the victim. Upon return of
19 an executed warrant, the judge before whom the

FEDERAL RULES OF CRIMINAL PROCEDURE

20 defendant is brought shall direct that reasonable
21 efforts be made to notify the victim regarding the
22 arrest and of the date, time, and place of the
23 initial appearance and of the right of the victim
24 to be heard at the initial appearance.

25 * * * * *

Rule 5. Initial Appearance

1 **(a) In General.**

2 * * * * *

3 **(3) *Reasonable notice to the victim.*** Reasonable
4 efforts shall be made to give notice to the victim
5 of the date, time, and place of the initial
6 appearance and of the right of the victim to be
7 heard at the initial appearance.

8 **(34) *Appearance Upon a Summons.*** When a
9 defendant appears in response to a summons

FEDERAL RULES OF CRIMINAL PROCEDURE

10 under Rule 4, a magistrate judge must proceed
11 under Rule 5(d) or (e), as applicable.

12 * * * * *

13 **(d) Procedure in a Felony Case.**

14 * * * * *

15 **(3) *Detention or Release.*** The judge must detain or
16 release the defendant as provided by statute or
17 these rules. In making the decision to detain or
18 release the defendant, the judge shall consider
19 the right of the victim to be reasonably protected
20 from the defendant and shall make reasonable
21 efforts to notify the victim if the defendant is
22 released and the conditions of such release.

23 **(4) *Plea.*** A defendant may be asked to plead only
24 under Rule 10.

25 **(e) Procedure in a Misdemeanor Case.** If the defendant
26 is charged with a misdemeanor only, the judge must

FEDERAL RULES OF CRIMINAL PROCEDURE

27 inform the defendant in accordance with Rule
28 58(b)(2).

29 **(f) Video Teleconferencing.** Video teleconferencing
30 may be used to conduct an appearance under this rule
31 if the defendant consents and reasonable efforts are
32 made to give the victim notice and the right to
33 participate.

Rule 5.1. Preliminary Hearing

1 **(a) In General.** If a defendant is charged with an offense
2 other than a petty offense, a magistrate judge must
3 conduct a preliminary hearing, after making
4 reasonable efforts to give notice to the victim, unless:

- 5 **(1)** the defendant waives the hearing;
6 **(2)** the defendant is indicted;
7 **(3)** the government files an information under Rule
8 7(b) charging the defendant with a felony;

FEDERAL RULES OF CRIMINAL PROCEDURE

9 (4) the government files an information charging the
10 defendant with a misdemeanor; or

11 (5) the defendant is charged with a misdemeanor
12 and consents to trial before a magistrate judge.

13 * * * * *

14 **(d) Extending the Time.** With the defendant's consent
15 and upon a showing of good cause—taking into
16 account the public interest in the prompt disposition
17 of criminal cases and the right of the victim to
18 proceedings free from unreasonable delay – a
19 magistrate judge may extend the time limits in Rule
20 5.1(c) one or more times. If the defendant does not
21 consent, the magistrate judge may extend the time
22 limits only on a showing that extraordinary
23 circumstances exist and justice requires the delay.

24 * * * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 9. Arrest Warrant or Summons on an Indictment or Information

1

* * * * *

2

(c) Execution or Service; Return; Initial Appearance.

3

* * * * *

4

(3) *Initial Appearance.* When an arrested or

5

summoned defendant first appears before the

6

court, the judge must proceed under Rule 5, after

7

making reasonable efforts to give notice to the

8

victim.

1

Rule 10.1. Reasonable Notice to Victims

2

(a) Identification of Victims. During the prosecution of

3

a case, the attorney for the government shall at the

4

earliest reasonable opportunity, identify any victim.

5

(b) Reasonable Notice of Case Events. During the

6

prosecution of a crime, and whenever reasonable

FEDERAL RULES OF CRIMINAL PROCEDURE

- 7 notice is required to be provided under these rules,
8 reasonable efforts shall be made to provide any victim
9 the earliest possible notice of
10 **(1)** the scheduling, including scheduling changes or
11 continuances, of each court proceeding that the
12 victim is either required to attend or entitled to
13 attend;
14 **(2)** the release or detention status of a defendant or
15 suspected offender;
16 **(3)** the filing of charges against a defendant, or the
17 proposed dismissal of any charges, including the
18 placement of the defendant in a pretrial diversion
19 program and the conditions of such placement;
20 **(4)** the right of the victim to make a statement about
21 pretrial release of the defendant;

FEDERAL RULES OF CRIMINAL PROCEDURE

- 22 (5) the right of the victim to make a statement about
23 acceptance of a plea of guilty or nolo
24 contendere;
- 25 (6) the right of the victim to attend a public
26 proceeding;
- 27 (7) if the defendant is convicted, the date and place
28 set for sentencing and the right of the victim to
29 address the court at sentencing; and
- 30 (8) after the defendant is sentenced, the sentence
31 imposed and the availability of the Bureau of
32 Prisons notification program, which provides the
33 date, if any, on which the offender will be
34 eligible for parole or supervised release.
- 35 (c) **Multiple Victims.** The attorney for the government
36 shall advise the court if the attorney believes that the
37 number of victims makes it impracticable to provide
38 reasonable personal notice to each victim. If the court

FEDERAL RULES OF CRIMINAL PROCEDURE

28 views of the victim in acting on the proposed
29 plea or withdrawal.

30 (c) **Plea Agreement Procedure.**

31 (1) ***In General.*** An attorney for the government and
32 the defendant's attorney, or the defendant when
33 proceeding pro se, may discuss and reach a plea
34 agreement. The court must not participate in
35 these discussions. The attorney for the
36 government shall make reasonable efforts to
37 notify any victim of, and consider the views of
38 any victim about, any proposed plea
39 negotiations. * * * * *

40 (2) ***Disclosing a Plea Agreement.*** The parties must
41 disclose the plea agreement in open court when
42 the plea is offered, unless the court for good
43 cause allows the parties to disclose the plea
44 agreement in camera. When a plea is presented

FEDERAL RULES OF CRIMINAL PROCEDURE

45 in open court, the attorney for the government or
46 attorney for any victim shall advise the court if
47 the attorney is aware that the victim has any
48 objection to the proposed plea agreement.

49 * * * * *

Rule 12. Pleadings and Pretrial Motions

1 * * * * *

2 **(g) Defendant's Continued Custody or Release Status.**

3 If the court grants a motion to dismiss based on a
4 defect in instituting the prosecution, in the indictment,
5 or in the information, it may order the defendant to be
6 released or detained under 18 U.S.C. § 3142 for a
7 specified time until a new indictment or information is
8 filed. This rule does not affect any federal statutory
9 period of limitations. The court shall make

FEDERAL RULES OF CRIMINAL PROCEDURE

13 (B) each government rebuttal witness to the
14 defendant's alibi defense.

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

21 (c) **Continuing Duty to Disclose.** Both an attorney for
22 the government and the defendant must promptly
23 disclose in writing to the other party the name;
24 address; of each additional witness and the address
25 and telephone number of each additional witness
26 (other than a victim) if:

27 (1) the disclosing party learns of the witness before
28 or during trial; and

FEDERAL RULES OF CRIMINAL PROCEDURE

12 attorney for the government must serve on
13 the defendant or the defendant's attorney a
14 written statement of the name, ~~address, and~~
15 ~~telephone number~~ of each witness, and the
16 address and telephone number of each
17 witness (other than a victim), that the
18 government intends to rely on to oppose the
19 defendant's public-authority defense.

20 (5) *Additional Time.* The court may, for good
21 cause, allow a party additional time to comply
22 with this rule.

23 (b) **Continuing Duty to Disclose.** Both an attorney for
24 the government and the defendant must promptly
25 disclose in writing to the other party the name;
26 ~~address, of any additional witness and the address and~~
27 telephone number of any additional witness (other
28 than a victim) if:

FEDERAL RULES OF CRIMINAL PROCEDURE

- 29 (1) the disclosing party learns of the witness before
30 or during trial; and
- 31 (2) the witness should have been disclosed under
32 Rule 12.3(a)(4) if the disclosing party had
33 known of the witness earlier.

34 * * * * *

Rule 15. Depositions

1 **(a) When Taken.**

- 2 (1) *In General.* A party may move that a
3 prospective witness, other than a victim, be
4 deposed in order to preserve testimony for trial.
5 The court may grant the motion because of
6 exceptional circumstances and in the interest of
7 justice. If the court orders the deposition to be
8 taken, it may also require the deponent to
9 produce at the deposition any designated

FEDERAL RULES OF CRIMINAL PROCEDURE

10 material that is not privileged, including any
11 book, paper, document, record, recording, or
12 data.

13 * * * * *

14 **(i) Victim Attendance.** A victim may attend
15 any public deposition taken under this Rule.

Rule 16. Discovery and Inspection

1 **(a) Government's Disclosure.**

2 * * * * *

3 **(4) Disclosure to victims.** The government may
4 disclose to a victim any information that the
5 government has disclosed to the defendant.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 17. Subpoena

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(h) Information Not Subject to a Subpoena. No party

(1) In general. No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statement.

(2) Victims. No record or document containing personal or confidential information about a victim may be subpoenaed without making reasonable efforts to give notice to the victim, given through the attorney for the government or for the victim, and an opportunity to be heard.

Rule 17.1. Pretrial Conference

1
2

On its own, or on a party's motion, the court may hold one or more pretrial conferences to promote a fair and

FEDERAL RULES OF CRIMINAL PROCEDURE

3 expeditious trial. When a conference ends, the court must
4 prepare and file a memorandum of any matters agreed to
5 during the conference. The government may not use any
6 statement made during the conference by the defendant or
7 the defendant's attorney unless it is in writing and is signed
8 by the defendant and the defendant's attorney. The court
9 shall make reasonable efforts to give the victim notice of
10 any pretrial conference and a victim may attend and be
11 heard on any matter relating to the rights of a victim.

Rule 18. Place of Prosecution and Trial

1 Unless a statute or these rules permit otherwise, the
2 government must prosecute an offense in a district where
3 the offense was committed. The court must set the place of
4 trial within the district with due regard for the convenience
5 of the defendant, the victim, and the witnesses, and the
6 prompt administration of justice.

FEDERAL RULES OF CRIMINAL PROCEDURE

- 17 (E) the United States attorneys for both districts
18 approve the transfer in writing, after
19 consultation with the victim; and
20 (F) the transferee court approves the transfer.

21 * * * * *

Rule 21. Transfer for Trial

- 1 * * * * *
- 2 (e) Victims' Views. The court shall not transfer any
3 proceeding without giving any victim an opportunity
4 to be heard. The court shall consider the views of the
5 victim in making any transfer decision.

Rule 23. Jury or Nonjury Trial

- 1 (a) **Jury Trial.** If the defendant is entitled to a jury trial,
2 the trial must be by jury unless:

FEDERAL RULES OF CRIMINAL PROCEDURE

10 (5) Rule 8 of the Rules Governing Proceedings
11 under 28 U.S.C. § 2255.

Rule 28. Interpreters

1 The court may select, appoint, and set the reasonable
2 compensation for an interpreter, including an interpreter for
3 the victim. The compensation must be paid from funds
4 provided by law or by the government, as the court may
5 direct.

Rule 32. Sentencing and Judgment

1 ~~(a) Definitions. The following definitions apply under~~
2 ~~this rule:~~
3 ~~— (1) “Crime of violence or sexual abuse” means:~~
4 ~~— (A) a crime that involves the use, attempted~~
5 ~~use, or threatened use of physical force~~
6 ~~against another’s person or property; or~~

FEDERAL RULES OF CRIMINAL PROCEDURE

7 ~~(B) a crime under 18 U.S.C. §§ 2241–2248 or~~
8 ~~§§ 2251–2257.~~

9 ~~(2) “Victim” means an individual against whom the~~
10 ~~defendant committed an offense for which the~~
11 ~~court will impose sentence.~~

12 **(ba) Time of Sentencing.**

13 (1) *In General.* The court must impose sentence
14 without unnecessary delay.

15 (2) *Changing Time Limits.* The court may, for
16 good cause, change any time limits prescribed in
17 this rule.

18 **(cb) Presentence Investigation.**

19 (1) *Required Investigation.*

20 (A) *In General.* The probation officer must
21 conduct a presentence investigation and
22 submit a report to the court before it
23 imposes sentence unless:

FEDERAL RULES OF CRIMINAL PROCEDURE

24 (i) 18 U.S.C. § 3593(c) or another statute
25 requires otherwise; or

26 (ii) the court finds that the information in
27 the record enables it to meaningfully
28 exercise its sentencing authority under
29 18 U.S.C. § 3553, and the court
30 explains its finding on the record.

31 (B) *Restitution*. If the law requires permits
32 restitution, the probation officer must
33 conduct an investigation and submit a
34 report that contains sufficient information
35 for the court to order restitution.

36 (2) *Interviewing the Defendant*. The probation
37 officer who interviews a defendant as part of a
38 presentence investigation must, on request, give
39 the defendant's attorney notice and a reasonable
40 opportunity to attend the interview.

FEDERAL RULES OF CRIMINAL PROCEDURE

- 57 (B) verified information, stated in a
58 nonargumentative style, that assesses the
59 financial, social, psychological, and
60 medical impact on any individual against
61 whom the offense has been committed;
- 62 (C) when appropriate, the nature and extent of
63 nonprison programs and resources available
64 to the defendant;
- 65 (D) when the law provides for restitution,
66 information sufficient for a restitution
67 order;
- 68 (E) if the court orders a study under 18 U.S.C.
69 § 3552(b), any resulting report and
70 recommendation; ~~and~~
- 71 (F) a description of the impact of the crime on
72 the victim; and

FEDERAL RULES OF CRIMINAL PROCEDURE

90 defendant's attorney, and an attorney for
91 the government at least 35 days before
92 sentencing unless the defendant waives this
93 minimum period.

94 (B) Victims. The probation officer must give
95 the presentence report to the victim and any
96 attorney for such victim at least 35 days
97 before sentencing, unless the court, after
98 receiving an objection from the defendant,
99 the attorney for the government, or another
100 victim, finds that disclosure of a portion of
101 the report would be an unwarranted
102 invasion of personal privacy and not in the
103 interest of justice, in which case such
104 portions shall be redacted.

105 (3) *Sentence Recommendation.* By local rule or by
106 order in a case, the court may direct the

FEDERAL RULES OF CRIMINAL PROCEDURE

107 probation officer not to disclose to anyone other
108 than the court the officer's recommendation on
109 the sentence.

110 **(fe) Objecting to the Report.**

111 (1) *Time to Object.* Within 14 days after receiving
112 the presentence report, the parties must state in
113 writing any objections, including objections to
114 material information, sentencing guideline
115 ranges, and policy statements contained in or
116 omitted from the report. The attorney for the
117 government or for the victim shall raise for the
118 victim any reasonable objection by the victim to
119 the presentence report.

120 (2) *Serving Objections.* An objecting party must
121 provide a copy of its objections to the opposing
122 party and to the probation officer.

FEDERAL RULES OF CRIMINAL PROCEDURE

123 **(3) *Action on Objections.*** After receiving
124 objections, the probation officer may meet with
125 the parties to discuss the objections. The
126 probation officer may then investigate further
127 and revise the presentence report as appropriate.

128 **(gf) Submitting the Report.** At least 7 days before
129 sentencing, the probation officer must submit to the
130 court and to the parties the presentence report and an
131 addendum containing any unresolved objections, the
132 grounds for those objections, and the probation
133 officer's comments on them.

134 **(hg) Notice of Possible Departure from Sentencing**
135 **Guidelines.** Before the court may depart from the
136 applicable sentencing range on a ground not identified
137 for departure either in the presentence report ~~or in a~~
138 ~~party's prehearing submission, in a party's prehearing~~
139 submission, or in a victim impact statement, the court

FEDERAL RULES OF CRIMINAL PROCEDURE

140 must give the parties reasonable notice that it is
141 contemplating such a departure. The notice must
142 specify any ground on which the court is
143 contemplating a departure. The attorney for the
144 government or the victim shall advise defense counsel
145 and the court of any ground identified by the victim
146 that might reasonably serve as a basis for departure.

147 **(ih) Sentencing.**

148 **(1) *In General.*** At sentencing, the court:

149 (A) must verify that the defendant and the
150 defendant's attorney have read and
151 discussed the presentence report and any
152 addendum to the report;

153 (B) must give to the defendant and an attorney
154 for the government a written summary
155 of—or summarize in camera—any
156 information excluded from the presentence

FEDERAL RULES OF CRIMINAL PROCEDURE

157 report under ~~Rule 32(d)(3)~~ Rule 32(c)(3) on
158 which the court will rely in sentencing, and
159 give them a reasonable opportunity to
160 comment on that information;

161 (C) must allow the parties' attorneys and any
162 victim to comment on the probation
163 officer's determinations and other matters
164 relating to an appropriate sentence; and

165 (D) may, for good cause, allow a party or a
166 victim to make a new objection at any time
167 before sentence is imposed.

168 **(2) *Introducing Evidence; Producing a Statement.***

169 The court may permit the parties or the victim to
170 introduce evidence on the objections. If a
171 witness testifies at sentencing, Rule 26.2(a)–(d)
172 and (f) applies. If a party fails to comply with a
173 Rule 26.2 order to produce a witness's statement,

FEDERAL RULES OF CRIMINAL PROCEDURE

174 the court must not consider that witness's
175 testimony.

176 * * * * *

177 (4) *Opportunity to Speak.*

178 (A) *By a Party.* Before imposing sentence, the
179 court must:

180 (i) provide the defendant's attorney an
181 opportunity to speak on the
182 defendant's behalf;

183 (ii) address the defendant personally in
184 order to permit the defendant to speak
185 or present any information to mitigate
186 the sentence; and

187 (iii) provide an attorney for the
188 government an opportunity to speak
189 equivalent to that of the defendant's
190 attorney.

FEDERAL RULES OF CRIMINAL PROCEDURE

191 (B) *By a Victim.* Before imposing sentence, the
192 court must address any victim of ~~a crime of~~
193 ~~violence or sexual abuse~~ the crime who is
194 present at sentencing and must permit the
195 victim to speak or submit any information
196 about the sentence. Whether or not the
197 victim is present, a victim's right to address
198 the court may be exercised by the following
199 persons if present:

200 (i) a parent or legal guardian, if the
201 victim is younger than 18 years or is
202 incompetent; or

203 (ii) one or more family members or
204 relatives the court designates, if the
205 victim is deceased or incapacitated.

206 (C) *In Camera Proceedings.* Upon a party's
207 motion and for good cause, the court may

FEDERAL RULES OF CRIMINAL PROCEDURE

208 hear in camera any statement made under
209 ~~Rule 32(i)(4)~~Rule 32(h)(4).

210 * * * * *

Rule 32.1. Revoking or Modifying Probation or Supervised Release

1 **(a) Initial Appearance.**

2 **(1) *Person In Custody.*** A person held in custody
3 for violating probation or supervised release
4 must be taken, with reasonable efforts to give
5 notice to the victim and without unnecessary
6 delay before a magistrate judge.

7 * * * * *

8 **(6) *Release or Detention.*** ~~The magistrate~~ After
9 considering the right of the victim to be
10 reasonably protected, the magistrate judge may
11 release or detain the person under 18 U.S.C. §
12 3143(a) pending further proceedings. The burden

FEDERAL RULES OF CRIMINAL PROCEDURE

13 of establishing that the person will not flee or
14 pose a danger to any other person or to the
15 community rests with the person.

16 (b) **Revocation.**

17 * * * * *

18 (3) Crime victims. The court shall make reasonable
19 efforts to give notice to the victim before any
20 revocation hearing.

21 * * * * *

Rule 33. New Trial

1 (a) **Defendant's Motion.** Upon the defendant's motion
2 and after making reasonable efforts to give notice to
3 the victim and an opportunity for the victim to be
4 heard, the court may vacate any judgment and grant a
5 new trial if the interest of justice so requires. If the

FEDERAL RULES OF CRIMINAL PROCEDURE

6 case was tried without a jury, the court may take
7 additional testimony and enter a new judgment.

8 * * * * *

Rule 34. Arresting Judgment

1 (a) **In General.** Upon the defendant's motion or on its
2 own, the court must arrest judgment, after making
3 reasonable efforts to give notice to the victim and an
4 opportunity to be heard, if:

5 (1) the indictment or information does not charge an
6 offense; or

7 (2) the court does not have jurisdiction of the
8 charged offense.

9 * * * * *

Rule 35. Correcting or Reducing a Sentence

FEDERAL RULES OF CRIMINAL PROCEDURE

1 **(a) Correcting Clear Error.** Within 7 days after
2 sentencing, the court, after making reasonable efforts
3 to give notice to the victim and an opportunity to be
4 heard, may correct a sentence that resulted from
5 arithmetical, technical, or other clear error.

6 **(b) Reducing a Sentence for Substantial Assistance.**

7 **(1) In General.** Upon the government's motion
8 made within one year of sentencing, the court
9 may reduce a sentence, after making reasonable
10 efforts to give notice to the victim and an
11 opportunity to be heard, if:

12 (A) the defendant, after sentencing, provided
13 substantial assistance in investigating or
14 prosecuting another person; and

15 (B) reducing the sentence accords with the
16 Sentencing Commission's guidelines and
17 policy statements.

FEDERAL RULES OF CRIMINAL PROCEDURE

- 18 (2) *Later Motion.* Upon the government's motion
19 made more than one year after sentencing, the
20 court may reduce a sentence, after making
21 reasonable efforts to give notice to the victim
22 and an opportunity to be heard, if the defendant's
23 substantial assistance involved:
- 24 (A) information not known to the defendant
25 until one year or more after sentencing;
- 26 (B) information provided by the defendant to
27 the government within one year of
28 sentencing, but which did not become
29 useful to the government until more than
30 one year after sentencing; or
- 31 (C) information the usefulness of which could
32 not reasonably have been anticipated by the
33 defendant until more than one year after
34 sentencing and which was promptly

FEDERAL RULES OF CRIMINAL PROCEDURE

35 provided to the government after its
36 usefulness was reasonably apparent to the
37 defendant.

38 * * * * *

Rule 36. Clerical Error

1 After giving any notice it considers appropriate,
2 including making reasonable efforts to give notice to the
3 victim, the court may at any time correct a clerical error in
4 a judgment, order, or other part of the record, or correct an
5 error in the record arising from oversight or omission.

Rule 38. Staying a Sentence or a Disability

1 * * * * *

2 **(e) Restitution and Notice to Victims.**

3 **(1) *In General.*** If the defendant appeals, the district
4 court, or the court of appeals under Federal Rule

FEDERAL RULES OF CRIMINAL PROCEDURE

5 of Appellate Procedure 8, may stay—on any
6 terms considered appropriate—any sentence
7 providing for restitution under 18 U.S.C. § 3556
8 or notice under 18 U.S.C. § 3555, after making
9 reasonable efforts to give notice to the victim
10 and an opportunity to be heard.

11 * * * * *

1 **Rule 43.1. Victim's Presence**

2 **(a) Victim's Right To Attend.** A victim has the right to
3 attend any public court proceeding, unless the court,
4 based on clear and convincing evidence, determines
5 that testimony by the victim would be materially
6 altered if the victim heard other testimony at that
7 proceeding. Before making any determination to
8 exclude a victim, the court shall make every effort to
9 permit the fullest attendance possible by the victim

FEDERAL RULES OF CRIMINAL PROCEDURE

10 and shall consider reasonable alternatives to the
11 exclusion of the victim from the criminal proceeding.
12 The reasons for any decision to exclude a victim shall
13 be clearly stated on the record.

14 **(b) Proceeding With and Without Reasonable Notice.**

15 **(1) Without victim.** The court may hold a public
16 proceeding without the attendance of a victim if
17 reasonable efforts have been made to give notice
18 to that victim under Rule 10.1.

19 **(2) Without notice.** The court may hold a public
20 proceeding (other than a trial or sentencing)
21 without proper notice to a victim only if-

22 **(A) doing so is in the interests of justice;**

23 **(B) the court makes reasonable efforts to**
24 provide prompt notice to that victim of the
25 court's action and of the victim's right to

FEDERAL RULES OF CRIMINAL PROCEDURE

26 seek reconsideration of the action if a
27 victim's right is affected; and

28 (C) the court makes reasonable efforts to insure
29 that notice will be properly provided to that
30 victim for all subsequent public
31 proceedings.

32 (c) **Numerous Victims.** If the court finds that the number
33 of victims makes it impracticable to afford all of the
34 victims the right to be present, the court shall fashion
35 a reasonable procedure to facilitate the attendance of
36 the victims.

37 (d) **Right To Be Heard on Victim's Issues.** In addition
38 to any right to be heard established elsewhere under
39 these rules, at any public proceeding at which a victim
40 has the right to attend, the victim has the right to be
41 heard on any matter affecting the rights of a victim.

FEDERAL RULES OF CRIMINAL PROCEDURE

11

* * * * *

Rule 49. Serving and Filing Papers

1 **(a) When Required.** A party must serve on every other
2 party, and on the victim or any counsel for a victim
3 who has entered a notice of appearance, any written
4 motion (other than one to be heard ex parte), written
5 notice, designation of the record on appeal, or similar
6 paper.

7

* * * * *

Rule 50. Prompt Disposition

1 ~~Scheduling preference must be given to criminal~~
2 ~~proceedings as far as practicable.~~

3 **(a) Scheduling Preference.** Scheduling preference shall
4 be given to criminal proceedings as far as is
5 practicable.

5 sought—of the action the party wishes the court to
6 take, or the party’s objection to the court’s action and
7 the grounds for that objection. If a party or a victim
8 does not have an opportunity to object to a ruling or
9 order, the absence of an objection does not later
10 prejudice that party. A ruling or order that admits or
11 excludes evidence is governed by Federal Rule of
12 Evidence 103.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings

DATE: September 3, 2007

At its June meeting, the Standing Committee approved a portion of the Committee's proposed amendment for publication, but remanded the remainder to the Committee for further study. The portions that were approved for publication concerned the certificate of appealability.

The portions that were remanded were intended to provide an exclusive means for seeking reconsideration of a ruling in §§ 2254 and 2255 cases, replacing applications under Civil Rule 60(b) with a new rule specifically drafted for this purpose, which would incorporate and state in clear language the Supreme Court's ruling in Gonzalez v. Crosby, 125 S.Ct. 2641 (2005). Gonzalez limited the reach of Rule 60(b) in order to harmonize it with AEDPA. The Court concluded that although Rule 60(b) continues to play a valid role in habeas proceedings, certain actions styled as Rule 60(b) motions will be treated as second or successive habeas petitions subject to AEDPA.

The Committee's parallel amendments (attached at the end of this memorandum)--

- (1) specified that a motion for reconsideration was the only mechanism for obtaining relief in the district court from a ruling in a §§ 2254 or 2255 action,
- (2) set the time period for such a motion at 30 days,
- (3) described the claims that could be raised in such a motion, and
- (4) provided that Fed. R. Civ. P. 60(b) may not be used in §§ 2254 or 2255 proceedings.

The Committee bracketed Fed. R. Civ. P. 52(b) and 59(b), and requested comment on whether the amendment should also bar their use in §§ 2254 or 2255 proceedings.

The concerns voiced at the Standing Committee meeting have been the subject of further discussion throughout the summer involving other reporters, as well as Professor King (who chaired our subcommittee), Professor Daniel Meltzer (a member of the Standing Committee who took a special interest in this issue), and the Department of Justice. As a result of these discussions, I believe the issues for discussion by the Rules Committee are the following:

(1) Is there a sufficient justification for an amendment at this time, in light of the concerns raised about the scope or impact of any amendment?

(2) Does the language previously proposed clearly and accurately restate Gonzalez? If not, could other language do so?

(3) Is the 30 day time limit appropriate?

(4) How should the amendment deal with claims that may presently be raised under F.R.Civ. P. 52, 59, and 60(a)?

I have included a memorandum from the Department of Justice in which it responds to the issues raised in correspondence with Professors Meltzer and Struve following the Standing Committee meeting, and will attempt in this introductory memorandum to provide an overview of the issues.

1. The justification for an amendment at this time

Our committee notes stated that the rules were intended to end confusion and abuse in the use of Rule 60(b). As noted by those questioning the need for an amendment, however, the cases cited predated Gonzalez, and this is probably not an adequate basis for proposing an amendment at this time. The Department of Justice agrees that there is presently no extensive confusion in the lower courts following Gonzalez, at least concerning the Court's distinction between applications that must be considered successive petitions and those that are properly considered under Rule 60(b). Rather, the Department believes that at this point the principal justifications for amending the rules are that:

(1) it would be helpful to clarify the standards and procedures for litigants in §§ 2254 and 2255 proceedings,

(2) it would be desirable to replace the multiple, uncertain, and extended time periods in Rule 60(b) with a uniform time period that would better fit the AEDPA/appellate framework, and

(3) the proposed rule would simplify adjudication by eliminating two troublesome issues that arise in litigation under Rule 60(b): the determination which section of 60(b) (and thus which time period) is applicable, and the determination of the scope of the "extraordinary circumstances" required to invoke Rule 60(b)(6).

The timing issue is discussed below.

2. Gonzalez and the scope of the relief to be afforded

The subcommittee and the Rules Committee sought to incorporate the Gonzalez ruling in the proposed amendment, but concern has been expressed that at least some claims that could—or might—be permissible under Gonzalez would be cut off by the language we proposed. Laying aside the question—discussed below—of the interaction with Civil Rules 52 and 59, the dispute involves several types of claims.

(a) Concerns have been raised concerning clerical errors, which can presently be raised under Civil Rule 60(a).¹ The Committee did not intend to make any change in the courts' ability to correct such clerical errors in §§ 2254 and 2255 cases, and no reference is made to them in the text of the rule or the committee note—which refer only to Rule 60(b). The rule itself, however, could be read to extend to clerical errors, since it provides that “the only procedure for obtaining relief in the district court from a final order” is by motion for reconsideration.² Since everyone agrees that there is no intention to preclude corrections under Rule 60(a), we can, and should, clarify this if we proceed with the proposed amendments.

(b) The other concerns arise from the language of Gonzalez itself. They are more subtle, and more difficult to resolve. Professors Meltzer and Struve have expressed concern that at least two kinds of issues MIGHT be raised under Gonzalez, but not under the language we proposed. The amendments stated that a motion for reconsideration may not raise “new claims of error, or attack the district court’s previous resolution of such a claim on the merits,” but may “only raise a defect in the integrity of the [§ 2254 or 2255] proceedings.” The language “defect in the integrity” of the proceedings was taken directly from Gonzalez, and there is agreement that anything that falls within its parameters will not be barred as a second or successive petition under AEDPA. But there is disagreement about whether it is fair to say that ONLY a defect in the integrity of the §§ 2254/2255 proceedings can be raised under Gonzalez.

Gonzalez distinguished between efforts to use Rule 60(b) to relitigate the district court’s resolution of a claim on the merits (which would be an improper effort to circumvent AEDPA) and the use of Rule 60(b) to attack “not the substance of the federal court’s resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings.” 125 S.Ct. at 2648 (footnote omitted). The Court also distinguished between an attack on the merits—which it

¹Similarly, Fed. R. Crim. P. 36, allows the correction of a clerical error “at any time.” It is doubtful that it applies to errors in cases brought under §§ 2254 and 2255, since they are civil rather than criminal.

²The Department of Justice reasons (pages 6-7) that a motion to correct a clerical error would not be barred by the proposed rule because it does not “seek relief from the final order.” Rather, it seeks only to correct a clerical mistake in how the result is expressed. It agrees that if deemed necessary, the commentary could be amended to state this explicitly. Others might prefer such a clarification to be made in the text of the rule, rather than the commentary.

defined as a claim that grounds exist for habeas relief--and an attack on a ruling that precluded the district court from reaching the merits, such as a failure to exhaust state remedies, or procedural default. *Id.* at 2648 n.4. The Committee draft assumed that such rulings are examples of “defect[s] in the integrity of the proceedings,” which may be raised under the proposed amendments.

Professor Meltzer has a different view. First, he notes that the “defect in the integrity” language—which refers in footnote 5 to fraud on the court—is an odd way to describe the entire category of non-merits rulings. He sees this, instead, as a different and potentially more capacious category. Thus in his view Gonzalez permits a Rule 60(b) petitioner to raise either procedural non-merits objections to the district court’s ruling or defects in the integrity of the proceedings that would allow reconsideration of the merits. Under Professor Meltzer’s reading, the proposed amendments may preclude raising the very kind of claim that the Gonzalez Court permitted to be raised under Rule 60(b): an error in the interpretation of the statute of limitations, which prevented the district court from reaching the merits of the petitioner’s claim for relief. That would be the case if “defect in the integrity of the proceedings” refers only to those defects, such as fraud, that can undermine any judicial determination; in contrast, the statute of limitations ruling at issue in Gonzalez was simply an erroneous interpretation of law.

The second category of claims that Professor Meltzer believes may be allowed under Rule 60(b) after Gonzalez but cut off by the proposed amendments are those mentioned in the Court’s footnote 9. He argues that the footnote (which he concedes to be “Delphic”) suggests the Court has not ruled out Rule 60(b) as an appropriate avenue for raising claims that a proper understanding of the substantive offense does not include the conduct for which the defendant was convicted. (This would apply, for example, to conduct that fell outside the definition of “use” in Bailey or mail fraud convictions for conduct that exceeded the scope of fraud as defined in McNally.) Subsequent to my correspondence with Professor Meltzer and the Department, at least one district court has held that a Bailey claim may be pursued under Rule 60(b). See Peterson v. United States, 2007 WL 2120309 (M.D. Fla. 2007).

The Justice Department strongly disagrees with this interpretation of footnote 9. In the Department’s view (footnote 2, pages 2-3) the kind of claim to which the Court referred in passing may only be raised in an initial 2254 or 2255 motion, and not under Rule 60(b). The placement of the footnote and the cases chosen as examples provide some support to the Department’s interpretation. The footnote appears in the section of the opinion discussing whether the applicant’s claim met the “extraordinary circumstances” requirement of Rule 60(b)(6), and the cases cited are initial applications, not successive petitions. Indeed, in an earlier portion of the Gonzalez opinion, the Court had endorsed lower court decisions holding that Rule 60(b) motions based on a change in the substantive law will be treated as successive petitions subject to § 2244(b)(2)(A) which provides that the only new law upon which a successive petition may rely is “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.”

Professor Meltzer argues that because there are at least arguable interpretations of Gonzalez that are not coextensive with the language that the Committee has proposed, he is not

comfortable with that language. Moreover, he sees the difficulty of drafting a rule that does not preclude claims that might be available under Gonzalez as a reason to reexamine the need to codify Gonzalez rather than to allow the lower courts to flesh out its full implications.

The Department of Justice has suggested that if the Committee concludes it is necessary, language could be added to “make clear that by ‘defect in the integrity’ of the proceedings the Rule includes all of the examples cited by the Court in Gonzalez,” including claims regarding procedural rulings that preclude merits review. Assuming that language agreement could be reached on such language,³ it would not resolve the disagreement concerning the claims referred to in footnote 9.

3. Concerns about limiting the time for raising claims

For the Department of Justice, the creation of one uniform time limit, rather than the different and uncertain limits applicable to Rule 60(b) motions, is the most important feature of the proposed amendment. Determining which time limit is applicable to particular claims has proved to be difficult in some cases, such as Abdur’Rahman v. Bell, 2007 WL 2011267 (6th Cir. 2007). See also Outler v. United States, 485 F.3d 1273, 1281 et seq. (11th Cir. 2007) (extended discussion of the applicability of one year statute of limitations). In the Department’s view, clarification is desirable, and a short time limit is also desirable in order to bring such rulings into line with the general time limitations imposed by AEDPA.

Professor Meltzer, in contrast, questions the justification for drastically shortening a period that is now at least one year under Rule 60(b), and may be longer for claims that are brought under some subsections of Rule 60(b). If these periods are appropriate for other civil litigants, why should they not continue to be applicable to the litigants in §§ 2254 and 2255 proceedings, who are most often pro se, and whose access to legal materials may be very limited? Indeed, the Gonzalez Court cited the general requirement that Rule 60(b) motions be brought within a reasonable time and the more specific one year limit for certain grounds under Rule 60(b) with approval as features of the Rule that “limit the friction between the Rule and the successive-petition prohibitions of AEDPA.” 125 S.Ct. at 2649.

As discussed at greater length at pages 3-4 of its attached memorandum, the Department argues that this is not an appropriate comparison. Civil Rule 60 (along with Rules 52(b) and 59, discussed below) provides the only means other than an appeal to attack a civil judgment. Rule 60 thus governs a wide gamut, running from clerical mistakes to new trial and newly discovered evidence, and it sets different time periods—and a longer time period than the proposed amendment—in order to respond to this wide variety. The situation is quite different in the criminal context, where Rules 33, 34, 35, 36, and § 2255 provide the means to raise a wide variety of challenges (including clerical mistakes, new trial, and newly discovered evidence).

³It should also be noted that at the Standing Committee meeting, Judge Hartz expressed the tentative view that “defect in the integrity of the proceeding” was an overarching criterion that must be satisfied to bring any Rule 60(b) claim.

Each rule provides for its own time period, and §§ 2254 and 2255 provide for a period of one year in which to raise the issues that they cover. The period for first petitions under 2254 and 2255 is as generous as Rule 60(b), which also provides for a one year period for some claims.⁴ In the Department's view, it makes no sense to add a one year period of civil review under Rule 60(b) in addition to the existing mechanisms for collateral review provided by the Criminal Rules noted above plus §§ 2254 and 2255.

These arguments pose a significant policy issue for the Committee to resolve. Because most of the prior discussion at the subcommittee and committee levels focused on the proposed Rule 37 amendment rather than the Rule 11 proposals, there has been relatively little focus on this issue. In addition to the question what time limit is appropriate, it would be useful to focus on the question whether this is an appropriate topic for rule making at the present time. It would also be useful to focus on the question whether there should be any distinction drawn between federal convictions challenged under § 2255, in which Rules 33, 34, 35, and 36 provide alternative mechanisms for relief, and state convictions challenged under § 2254, where those rules are not available. The Gonzalez case, in which the Court noted that Rule 60(b) "has an unquestionably valid role to play," 125 S.Ct. at 2649, was brought under §2254, and the Court noted in a footnote that it was limiting its consideration to cases brought under that section. Id. at 2646 n.3.

4. Concerns about precluding the use of Fed. R. Civ. P. 52(b) and 59

Professor Struve has expressed concern about the potential of the proposed rule to preclude petitioners in proceedings under §§ 2254 and 2255 from seeking relief under Rule 52(b) and 59. Rule 52(b) allows the court to amend its finding or judgment within 10 days. Rule 59(e) allows the filing of a motion to alter or amend a judgment within 10 days after the entry of judgment. As proposed to the Standing Committee, our amendments bracketed these rules to indicate that we sought comments on the desirability of precluding their continued use in cases brought under §§ 2254 and 2255. Pre-Gonzalez there was some disagreement among the lower courts about whether the use of these provisions was the equivalent of a second or subsequent petition for purposes of AEDPA.

Noting she has not undertaken a complete survey of the decisional law, Professor Struve concludes that it is at least arguable that the Committee's proposal would change the law with respect to motions under Rules 52 and 59, despite the fact that these rules—which themselves incorporate very stringent time limits—are unlikely to cause friction with AEDPA's framework.

The Justice Department's letter responds (page 5-6) to Professor Struve's concerns. It argues that the 30 day period in the proposed amendments is more generous than 10 day periods under Rules 52 and 59, and that it provides a more than adequate substitute for these provisions.

⁴Rule 60(b) provides that the motion must be made within a reasonable time, and, for the reasons identified in subsections (1), (2), and (3), not more than one year after the judgment or order was entered.

In the Department's view, it is desirable to replace the use of Civil Rules 52 and 59 in these cases with a rule that is designed for the specific context (and is located--where it may easily be found--in the Rules for §§ 2254 and 2255 proceedings).

If the Committee decides to proceed with proposed amendments to the §§ 2254 and 2255 Rules, it could again place these provisions in brackets to solicit comments, or pursue this issue more thoroughly prior to publication.

August 20, 2007

MEMORANDUM

TO: Professor Sara Sun Beale
Reporter, Advisory Committee on Criminal Rules

FROM: Jonathan J. Wroblewski
Director, Office of Policy and Legislation

Kathleen Felton
Deputy Chief, Appellate Section

SUBJECT: Proposal to Amend Rule 11 of the Rules Governing Section 2254 and Section 2255 Proceedings

This is in response to your email message of July 24, 2007, concerning the pending proposal to amend Rule 11 of the Rules Governing Section 2254 and Section 2255 Proceedings. We welcome the opportunity to respond to Professors Meltzer and Struve and their concerns about the proposal. We address each of their concerns in turn.

A. Contrary to the Professor Meltzer's "quick first reaction," the intent and language of the Proposed Rule 11(b) incorporates, rather than rejects, the limitations on judicial review promulgated in Gonzalez v. Crosby, 545 U.S. 524 (2005). The only major changes, which this Committee approved, are to tailor the reconsideration procedure to actions under 28 U.S.C. § 2254 and § 2255, to make it more prominent by placing it in the rules governing such actions, and to remove the troublesome anomaly of giving petitioners an amount of time to seek reconsideration greater or equal to the amount of time they have to file the § 2254 or § 2255 petition itself.

In Gonzalez, the Supreme Court agreed that a § 2254 petitioner cannot use Fed. R. Civ. P. 60(b) to evade the "restrictions that apply to 'second or successive' habeas corpus petitions under the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) codified at 28 U.S.C. § 2244(b)." 545 U.S. at 526, 531.⁷ The Court reasoned that the second or

⁷ The Gonzalez Court "limit[ed] its consideration to § 2254 cases," but noted that § 2255's provision governing second or successive applications "is similar to, and refers to, the statutory subsection [§ 2244] applicable to second or successive § 2254 petitions." 545 U.S. at 529 n.3. Courts have since held that Gonzalez applies to § 2255 cases as well. See, e.g., In re

successive requirements apply to any post-petition filing that constitutes a “habeas corpus application.” 545 U.S. at 530 (citations omitted). The Court defined such filings as “a filing that contains one or more ‘claims,’” and the Court defined “claim” as “an asserted federal basis for relief from a state court’s judgment of conviction.” *Id.* The Court ruled that if Rule 60(b) motions attempt “to present new claims for relief from the state court’s judgment of conviction,” or to “present[] new evidence in support of a claim already litigated,” or to raise “a purported change in the substantive law governing the claim,” such Rule 60(b) motions “conflict with AEDPA standards” and “impermissibly circumvent the requirement” that the Court of Appeals must first certify a second or successive petition. *Id.* at 530-32. “[S]uch a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly.” *Id.* at 531. The same is true for any “Rule 60(b)” motion that “attacks the federal court’s resolution of a claim *on the merits*,” that is, asserts or re-asserts “grounds entitling a petitioner to habeas corpus relief”; such motions too “should be treated as a successive habeas petition.” *Id.* at 532 & n.4, 534 (emphasis by Court).

Proposed Rule 11(b) adopts this *Gonzalez* standard, by providing that “[t]he motion may not raise new claims of error in the movant’s conviction or sentence, or attack the district court’s previous resolution of such a claim on the merits” The proposed Rule 11(b) is thus much clearer for prisoners than Civil Rule 60(b), which, as it is drafted for civil cases and not habeas cases, fails to distinguish those grounds that cannot be raised due to AEDPA.

Gonzalez goes on to state that there is no conflict with AEDPA “when a Rule 60(b) motion attacks, not the substance of the federal court’s resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings.” 545 U.S. at 532. As examples of such defects in the integrity of the habeas proceedings, the Court cites assertions of “[f]raud on the federal habeas court,” an erroneous “default judgment,” or “lack of subject-matter jurisdiction,” or assertions that the habeas court’s “ruling which precluded a merits determination was in error – for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.” *Id.* at 532 & nn. 4-5, 534. The Court went on to hold that “[p]etitioner’s motion in the present case, which alleges that the federal courts misapplied the federal statute of limitations set out in § 2244(d), fits this description,” because it “does not present a revisitation of the merits.” *Id.* at 533-34, 535-36 (emphasis by Court).⁸

Nailor, 487 F.3d 1018, 1021-23 (6th Cir. 2007); *United States v. Nelson*, 465 F.3d 1145, 1147 (10th Cir. 2006).

⁸ Regarding the Professor’s comments on attacks based on the substantive reach of criminal statutes, footnote 9 of *Gonzalez* did not leave open whether Civil Rule 60(b) can be used to raise claims that the criminal statute did not apply to a defendant’s conduct. The Court earlier in the opinion had already delineated what could or could not be raised under Civil Rule 60(b). The Court found that petitioner’s period of limitation claim could be raised, but then ruled against the petitioner, stating that “not every interpretation of the federal habeas statutes setting forth the requirements for habeas provides cause for reopening cases long since final.” 545 U.S. at 536. Footnote 9 then cautioned that “[a] change in the interpretation of a *substantive*

This Gonzalez standard, too, is incorporated in proposed Rule 11(b), which provides that the motion “may only raise a defect in the integrity of the § 2255 [or § 2254] proceedings.” This language encompasses all the examples given by the Gonzalez court – that the § 2254 or § 2255 court had a fraud perpetrated on it, entered a mistaken default judgment, lacked subject-matter jurisdiction, or failed to reach the merits due to an erroneous ruling on failure to exhaust, procedural default, or statute-of-limitations bar. Thus, proposed Rule 11(b) is much clearer for prisoners because, unlike Civil Rule 60(b), it specifies which claims can validly be raised in such a motion after AEDPA.⁹

Thus, there is no basis for any concern that the proposed Rule 11(b) would restrict the claims subject to judicial review more than Gonzalez itself did. Indeed, the proposed Rule 11(b) is in one respect more lenient than Civil Rule 60(b) after Gonzalez. Gonzalez reiterated that the Supreme Court had “required a movant seeking relief under Rule 60(b)(6) to show ‘extraordinary circumstances’ justifying the reopening of a final judgment.” 545 U.S. at 535. The proposed Rule 11(b) does not incorporate that requirement.

Proposed Rule 11(b) does do one thing that Gonzalez did not: conform the time period for filing such a motions to the AEDPA context. AEDPA was adopted in large part to reduce the often lengthy delays in bringing proceedings under § 2254 and § 2255. Those delays not only delayed but also degraded justice by attempting to re-examine criminal convictions many years later, when the loss of evidence, loss of memory, and unavailability of the original witnesses, prosecutors, and judges hampered not only the ability to respond to the petition, but also the ability to retry or resentence the petitioner. Accordingly, AEDPA required petitioners to file their principal § 2254 and § 2255 motions within a “1-year period of limitation,” and restricted their ability to bring second or successive motions. 28 U.S.C. §§ 2244(b)(2), 2244(d)(1), 2255 ¶¶ 6, 8.

The time periods in Civil Rule 60(b) are inconsistent with and work contrary to the goals and time limits of AEDPA. Civil Rule 60(b) provides that “[t]he motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.” Fed. R. Civ. P. 60(b). Thus, Rule 60(b), if applied

statute may have consequences for cases that have already reached final judgment, particularly in the criminal context,” id. at 536 n.9 (emphasis by the Court), and cited Bousley v. United States, 523 U.S. 614, 619-21 (1998), and Fiore v. White, 531 U.S. 225, 228-29 (2001). As those cases demonstrate, the consequence that such a reinterpretation of a *substantive* claim has is that a petitioner can make and may win such a claim in an initial § 2255 or § 2254 motion. The Court in no way endorsed the use of Civil Rule 60(b) to raise such claims, which seek relief from the “judgment of conviction” and are thus barred under the Court’s clear delineation earlier in the opinion. 545 U.S. at 530-31.

⁹ If the Committee thinks it necessary, a sentence can be added to the commentary to Proposed Rule 11(b) to make clear that by “defect in the integrity” of the proceeding the rule includes all of the examples cited by the Court in Gonzalez.

to the habeas context, would allow a party to have *as much time or more* to challenge the ruling on a § 2254 or § 2255 motion as the petitioner had to file the § 2254 or § 2255 motion itself. This adds a substantial delay to the handling of § 2254 and § 2255 motions, further prolongs the final disposition of cases, and further jeopardizes the ability of the other party to respond or to retry or resentence the case.¹⁰

This inconsistency from applying Civil Rule 60(b)'s time limitations in the AEDPA context is hardly surprising, because Civil Rule 60(b) is designed for an entirely different context. Civil Rule 60, with Civil Rules 52(b) and 59, provide the only means other than appeal to attack a civil judgment. As such, Civil Rules 52(b), 59 and 60 cover the gamut of possible collateral challenges to a civil judgment, including new trial, clerical mistakes, and newly discovered evidence, and Rule 60(b) gives a period of a year or so to raise the challenges it covers. In the federal criminal context, Criminal Rules 33, 34, 35, and 36, and § 2255, provide the means to raise such collateral challenges, including new trial, clerical mistakes, and newly discovered evidence, and § 2255 gives a period of a year to raise the challenges it covers.¹¹ Applying Civil Rule 60(b) to the AEDPA thus adds what was designed to be a single layer of collateral review to pre-existing and perfectly-adequate provisions for collateral review. To overlay on top of the federal criminal mode of collateral relief and its 1-year time period, the civil mode of collateral relief and its 1-year-plus time period, is simply a misapplication that unnecessarily delays the resolution of § 2255 and § 2254 motions.

Proposed Rule 11(b) removes this unnecessary and undesirable overlay by providing a reconsideration mechanism but requiring that motions to reconsider be filed within 30 days of the entry of the order. Such a time period – greater than the time period for criminal defendants to file an appeal, and equal to the time period to file normal civil appeals and government

¹⁰ Gonzalez noted that Rule 60(b)'s "requirement that the motion 'be made within a reasonable time' and the more specific 1-year deadline for asserting three of the most open-ended grounds of relief" helped to "limit the friction between the Rule and the successive-petition prohibitions of AEDPA." 545 U.S. at 535. That having some time limitations is better than having none at all does not mean, however, that such time limitations do not create friction and delay in § 2255 proceedings. Proposed Rule 11(b) eliminates the remaining friction by tailoring its time limitations to the AEDPA context.

¹¹ In so doing, § 2255 is at least as generous to criminal collateral challenges as Civil Rule 60(b) is for civil collateral challenges. Section 2255 always grants the petitioner a full one-year period, which can run not only from "the date on which the judgment of conviction becomes final" but also from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of reasonable diligence," or the date the Supreme Court recognizes a new right, or the date an impediment imposed by the government is removed. 28 U.S.C. § 2255 ¶ 6. Section 2255 also allows second or successive motions to be filed based on "newly discovered evidence" and new rules of constitutional law. Id. ¶ 8. Furthermore, Criminal Rule 33 allows motions for new trial grounded on newly discovered evidence to be filed within 3 years after conviction. Fed. R. Crim. P. 33(b)(1).

criminal appeals, Fed. R. App. P. 4(a)(1)(A), (b) – is sufficient to permit petitioners to file the type of non-merits reconsideration motions permitted by Gonzalez.¹² The 30-day period also fits comfortably within the 60-day period allowed for appeals from § 2254 and § 2255 rulings, allowing the parties to delay filing a notice of appeal while reconsideration is sought. See Fed. R. App. P. 4(a)(1)(B). Indeed, the parallel proposal to amend Fed. R. App. 4(a)(4) would provide that the filing of a timely motion under proposed Rule 11 would postpone the running of the time to appeal while the motion was being decided. Proposed Rule 11(b) thus avoids the confusion entailed by overlapping time periods and simultaneous proceedings in different courts. By contrast, applying the lengthy and overlapping time periods of Civil Rule 60(b) invites such confusing simultaneous proceedings.¹³

Accordingly, this Committee was correct in approving Proposed Rule 11(b) to preserve the ability to raise the claims permitted by Gonzalez, while replacing the inapposite language and inappropriate time periods of Civil Rule 60(b).

B. Professor Struve correctly reads Proposed Rule 11(b) to bar motions under Civil Rules 52(b) and 59. The Supreme Court found that those rules applied in habeas corpus proceedings only because no other provision was “addressed to the timeliness of a motion to reconsider the grant or denial of habeas corpus relief,” because “the requirement of a prompt motion for reconsideration is well suited to the ‘special problems and character of such [habeas] proceedings,’” and because “[a]pplication of the strict [10-day] time limits of Rules 52(b) and 59 to motions for reconsideration of rulings on habeas corpus petitions, then, is thoroughly consistent with the spirit of the habeas corpus statutes.” Browder v. Director, Dept. of Corrections of Illinois, 434 U.S. 257, 271 (1978) (citations omitted). Proposed Rule 11(b) supplies the missing provision for motions to reconsider the grant or denial of collateral relief, and requires such motions to be promptly filed. Indeed, given that Proposed Rule 11(b) is *more* generous than Civil Rules 52(b) and 59, allowing 30 days instead of 10 days, replacing such motions poses no time hardship to petitioners.

Moreover, given the challenges permitted by Proposed Rule 11(b), it sufficiently replaces Civil Rules 52(b) and 59. Civil Rule 52(b) permits a motion to amend or make additional findings. Civil Rule 59 permits a motion for a new trial “for any of the grounds for which rehearings have been granted in suits in equity,” and a “motion to alter or amend a judgment.” Fed. R. Civ. P. 59(a), (e). To the extent either of these concepts is appropriately applied to judgments under § 2254 or § 2255, they are adequately encompassed by Proposed Rule 11(b),

¹² Professor Meltzer notes that the Government also uses Civil Rule 60(b) motions in § 2254 and § 2255 proceedings, and probably wins a higher percentage of them. The Government is nonetheless willing to subject itself to same limitations it is proposing for prisoners.

¹³ See Fed. R. App. P. 4(a)(4)(A)(vi) (a motion under Civil Rule 60 does not postpone the running of the time of appeal unless the motion is filed within 10 days).

which allows petitioners to seek reconsideration and raise defects in the integrity of the collateral review proceedings.

To the extent that Civil Rules 52(b) and 59 permit motions based on newly discovered evidence, that is sufficiently addressed as well. As pointed out above, Criminal Rule 33, § 2255, and the successive § 2255 provisions already provide the mechanism for criminal defendants to raise claims based on newly-discovered evidence. As Professor Struve notes, the Supreme Court in Gonzalez ruled that a “motion presenting new evidence in support of a claim already litigated” challenging the criminal judgment “is in substance a successive habeas petition and should be treated as such.” 545 U.S. at 531. If, however, the newly discovered evidence raises “a defect in the integrity of the federal habeas proceedings,” id., it can be raised in the reconsideration motion under Proposed Rule 11(b).

It is true that, because motions under Civil Rules 52(b) and 59 must be filed within 10 days, they are less likely to cause friction within AEDPA’s framework than Civil Rule 60(b). These rules cause confusion, however, because they are not designed for proceedings under § 2254 and § 2255, and employ terminology (e.g., “new trial”) that is inapposite to those proceedings.

Further, as noted above, these Civil Rules are designed to provide the method of collateral review in civil cases, but the Criminal Rules and § 2255 already provide the method of collateral review of federal criminal judgments. These Civil Rules are misapplied here when they are overlaid on § 2255 and § 2254 as if to provide collateral review of collateral review. It is far clearer and better to replace such out-of-context rules with Proposed Rule 11(b), which is designed for and better fits the AEDPA context and expressly encompasses the standards laid down by the Supreme Court in Gonzalez. This Committee was correct to approve Proposed Rule 11(b).¹⁴

C. Professor Meltzer mentions Civil Rule 60(a), which permits the correcting of “clerical mistakes in judgments [and] orders” at any time. Fed. R. Civ. P. 60(a). To the extent that this Rule is properly used to correct only clerical mistakes in a final order in a § 2254 or § 2255 proceeding, it does not conflict with AEDPA. See Day v. McDonough, 126 S. Ct. 1675, 1684 (2006). Nor is it barred by Proposed Rule 11(b). Proposed Rule 11(b) provides that its motion for reconsideration is “[t]he only procedure for obtaining relief in the district court from a final order” in a § 2254 or § 2255 proceeding, but a proper motion to correct a clerical mistake does not seek relief from the final order – it does not seek to change the result but only to fix clerical mistakes in how the result is expressed.¹⁵

¹⁴ If the Committee thinks it necessary, a sentence should be added to the commentary to Proposed Rule 11(b) to make clear that it takes the place of Civil Rules 52(b) and 59 in § 2254 and § 2255 proceedings.

¹⁵ If the Committee thinks it necessary, a sentence should be added to the commentary to Proposed Rule 11(b) to make clear that it does not bar the proper use of Civil Rules 60(a) in § 2254 and § 2255 proceedings.

To the extent that Civil Rule 60(a) is misused to raise a substantive challenge to the result, however, it is barred by the terms of Civil Rule 60(a). To the extent it is misused to raise a substantive challenge to the criminal judgment, it is a successive petition under Gonzalez.¹⁶ To the extent the petitioner seeks to seek relief from a defect in the integrity of the proceedings under § 2254 or § 2255, he must raise his claim under Proposed Rule 11(b).

D. Finally, Professor Meltzer states that he is “not sure whether there is a strong case for a rule that simply codifies the Supreme Court’s decision if the courts are implementing it without unusual difficulty.” Rules, however, are not solely for courts. They are also, and indeed primarily, for litigants – to explain clearly what types of filings can be filed, and when they can be filed, and what types of claims can be raised in them. Nowhere is that more necessary than where the litigants are *pro se*, as here. *Pro se* litigants do not necessarily know which Supreme Court cases to look at, or have the ready ability to research to discover how courts are implementing them. Putting a rule in the “Rules Governing Section 2254 [or 2255] Proceedings” tells *pro se* litigants what they can and cannot do in a much fairer and more effective way than hoping that they will find Gonzalez, research how it has been applied, and follow the proper procedure. Similarly, sending *pro se* prisoners to Civil Rules, which were not drafted with AEDPA cases in mind, and hoping they can figure out which rules apply in § 2254 and § 2255 proceedings, and how they can be used, is less helpful or likely to be effective than expressly stating in the Rules Governing the procedure to be followed in § 2254 and § 2255 proceedings. Indeed, the confusion and abuse that resulted from sending *pro se* prisoners to the Civil Rules is well documented and, at least prior to Gonzalez, undisputed.

Furthermore, there is no reason to believe that Gonzalez has ended that confusion. A Westlaw search shows that § 2254 or § 2255 petitioners filed Civil Rule 60(b) motions that resulted in Westlaw opinions in approximately 1200 federal cases decided after Gonzalez, and in approximately 700 cases decided more than a year after Gonzalez. A quick sampling shows that in many of those cases, the petitioners misused Civil Rule 60(b), and their Rule 60(b) motions had to be recharacterized as second or successive motions and/or denied as improper. This confirms that for *pro se* litigants, Gonzalez is not enough.

Professor Meltzer states that “there is no way in a system of uncounseled prisoner litigation to forestall frivolous filings.” This is true, but the whole purpose of rules is to try to guide litigants to reduce frivolous filings. Any judge or prosecutor who has to deal with the flow of frivolous filings knows how desirable any reduction of frivolous filings would be, and how welcome any effort to reduce them is. Furthermore, clear rules do not only reduce the quantity of frivolous filings, but they also help redirect litigants, including *pro se* litigants, into the proper filings that have a greater chance of benefitting them. By clearly stating when a prisoner can seek reconsideration, and of what types of issues, proposed Rule 11(b) will help encourage earlier filing regarding proper issues, and encourage prisoners whose timing or issues do not fit

¹⁶ Furthermore, Criminal Rule 36 already gives the power to correct clerical errors in the criminal judgment at any time.

within the rule to file the filings that may actually be proper – a notice of appeal, or a second or successive motion.

**Proposed Amendment to Rules Governing
Section 2255 Proceedings for the United States
District Courts**

**Rule 11. Certificate of Appealability; Motion for
Reconsideration; Time to Appeal**

1 (a) Certificate of Appealability. At the same time the
2 judge enters a final order adverse to the applicant, the judge
3 must either issue or deny a certificate of appealability. If
4 the judge issues a certificate, the judge must state the
5 specific issue or issues that satisfy the showing required by
6 28 U.S.C. § 2253(c)(2).

7 (b) Motion for Reconsideration. The only procedure
8 for obtaining relief in the district court from a final order is
9 through a motion for reconsideration. The motion must be
10 filed within 30 days after the order is entered. The motion
11 may not raise new claims of error in the movant's
12 conviction or sentence, or attack the district court's
13 previous resolution of such a claim on the merits, but may

RULES GOVERNING SECTION 2255 PROCEEDING

14 only raise a defect in the integrity of the § 2255
15 proceedings. Federal Rules of Civil Procedure [52(b),
16 59(b),]⁵ and 60(b) may not be used in § 2255 proceedings.
17 (c) Time for Appeal. Federal Rule of Appellate
18 Procedure 4(a) governs the time to appeal an order entered
19 under these rules. These rules do not extend the time to
20 appeal the original judgment of conviction.

Committee Note

Subdivisions (a) and (b). As provided in 28 U.S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 unless a judge issues a certificate of appealability, which must specify 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. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid

⁵The Committee invites comment on the desirability of including these rules.

RULES GOVERNING SECTION 2255 PROCEEDING

unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

The Rules Governing Section 2255 Proceedings have not previously provided a mechanism by which a litigant can seek reconsideration of the District Court's ruling on a motion under 28 U.S.C. § 2255. Because no procedure was specifically provided by these Rules, some litigants have resorted to Civil Rule 60(b) to provide such relief. Invocation of that civil rule, however, "has generated confusion among the federal courts." Abdur'Rahman v. Bell, 537 U.S. 88, 89 (2002) (Stevens, J., dissenting from the dismissal of certiorari as improvidently granted); In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004), *vacated*, 125 S. Ct. 2991 (2005); Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir. 2004); *see also* Pitchess v. Davis, 421 U.S. 482, 490 (1975). Convicted defendants have invoked Rule 60(b) to evade statutory provisions added by AEDPA in 1996, including a one-year time period for filing, the certificates of appealability requirement, and the limitations on second and successive applications. *See* Gonzalez v. Crosby, 125 S. Ct. 2641, 2646-48 (2005) ("Using Rule 60(b) to present new claims for relief," to present "new evidence in support of a claim already litigated," or to raise "a purported change in the substantive law," "circumvents AEDPA's requirement"). The Supreme Court in Gonzalez attempted a "harmonization" of Rule 60(b) and the AEDPA requirements for state prisoners by holding that Rule 60(b) motions can be treated as successive habeas petitions if they "assert, or reassert, claims of error in the movant's state conviction," but can proceed if they attack "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." 125 S. Ct. at 2648, 2651.

RULES GOVERNING SECTION 2255 PROCEEDING

Rule 11 is amended to end this confusion and abuse by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings. Under the amendment, the sole method of seeking reconsideration by the district court of a § 2255 order is the procedure provided by Rule 11 of the Rules Governing § 2255 Proceedings, and not any other provision of law, including Rule 60(b). The amended Rule 11 provides disappointed § 2255 litigants with an appropriate opportunity to seek reconsideration in the district court based on a “defect in the integrity of the federal habeas proceeding,” Gonzalez, 125 S. Ct. at 2648-49 & n.5, but within an appropriate and definitive time period, and with an express prohibition on raising new claims that “assert, or reassert, claims of error in the movant’s” conviction or sentence, or “attack[] the federal court’s previous resolution of a claim *on the merits*,” id. at 2648 & nn.4-5, 2651 (emphasis by Court). Defects subject to motion under Rule 11 include purely ministerial or clerical errors in the order of the district court. Rule 11 will thus provide clear and quick relief in the district court, while safeguarding the requirements of § 2255 and the finality of criminal judgments.

Rules Governing Section 2254 Proceedings in the United States District Courts

- 1 **Rule 11. Certificate of Appealability; Motion for**
2 **Reconsideration**
3 (a) Certificate of Appealability. At the same time the
4 judge enters a final order adverse to the petitioner, the

RULES GOVERNING SECTION 2255 PROCEEDING

5 judge must either issue or deny a certificate of
6 appealability. If the judge issues a certificate, the judge
7 must state the specific issue or issues that satisfy the
8 showing required by 28 U.S.C. § 2253(c)(2).

9 (b) Motion for Reconsideration. The only procedure
10 for obtaining relief in the district court from a final order is
11 through a motion for reconsideration. The motion must be
12 filed within 30 days after the order is entered. The motion
13 may not raise new claims of error in the petitioner's
14 conviction or sentence, or attack the district court's
15 previous resolution of such a claim on the merits, but may
16 raise only a defect in the integrity of the § 2254
17 proceedings. Federal Rules of Civil Procedure [52(b),
18 59(b),]⁶ and 60(b) may not be used in § 2254 proceedings.

⁶The Committee invites comment on the desirability of including these rules.

RULES GOVERNING SECTION 2255 PROCEEDING

Committee Note

As provided in 28 U.S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2254 unless a judge issues a certificate of appealability, which must specify 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 § 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. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). 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.

The Rules Governing Section 2254 Proceedings have not previously provided a mechanism by which a litigant can seek reconsideration of the District Court's ruling on a motion under 28 U.S.C. § 2254. Because no procedure was specifically provided by these Rules, some litigants have resorted to Civil Rule 60(b) to provide such relief. Invocation of that civil rule, however, "has generated confusion among the federal courts." Abdur'Rahman v. Bell, 537 U.S. 88, 89 (2002) (Stevens, J., dissenting from the dismissal of certiorari as improvidently granted); In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004), *vacated*, 125 S. Ct. 2991 (2005); Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir. 2004); *see also* Pitchess v. Davis, 421 U.S. 482, 490 (1975). Convicted defendants have invoked Rule 60(b) to evade statutory provisions added by AEDPA in 1996, including a one-year time

RULES GOVERNING SECTION 2255 PROCEEDING

period for filing, the certificates of appealability requirement, and the limitations on second and successive applications. *See Gonzalez v. Crosby*, 125 S. Ct. 2641, 2646-48 (2005) (“Using Rule 60(b) to present new claims for relief,” to present “new evidence in support of a claim already litigated,” or to raise “a purported change in the substantive law,” “circumvents AEDPA’s requirement”). The Supreme Court in *Gonzalez* attempted a “harmonization” of Rule 60(b) and the AEDPA requirements for state prisoners by holding that Rule 60(b) motions can be treated as successive habeas petitions if they “assert, or reassert, claims of error in the movant’s state conviction,” but can proceed if they attack “not the substance of the federal court’s resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings.” 125 S. Ct. at 2648, 2651.

Rule 11 is amended to end this confusion and abuse by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings. Under the amendment, the sole method of seeking reconsideration by the district court of a § 2254 order is the procedure provided by Rule 11 of the Rules Governing § 2254 Proceedings, and not any other provision of law, including Rule 60(b). The amended Rule 11 provides disappointed § 2254 litigants with an appropriate opportunity to seek reconsideration in the district court based on a “defect in the integrity of the federal habeas proceeding,” *Gonzalez*, 125 S. Ct. at 2648-49 & n.5, but within an appropriate and definitive time period, and with an express prohibition on raising new claims that “assert, or reassert, claims of error in the movant’s” conviction or sentence, or “attack[] the federal court’s previous resolution of a claim *on the merits*,” *id.* at 2648 & nn.4-5, 2651 (emphasis by Court). Defects subject to motion under Rule 11 include purely ministerial or clerical errors in the order of the district court. Rule 11 will thus provide clear and quick relief in

RULES GOVERNING SECTION 2255 PROCEEDING

the district court, while safeguarding the requirements of § 2254 and the finality of criminal judgments.

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

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: September 5, 2007

DATE: Rule 32(h)

This proposed amendment returns to the Advisory Committee as a result of a remand from the Standing Committee. This memo provides (1) a brief description of the history of the rule, and (2) additional information relevant to the issues raised in prior discussion in the Standing Committee and the Advisory Committee.

The Advisory Committee's proposal would have amended Rule 32(h) to read as follows:

(h) Notice of Intent to Consider Other Sentencing Factors. Before the court may rely on a ground not identified for departure or a non-guideline sentence either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence. The notice must specify any ground not earlier identified for departing or imposing a non-guideline sentence on which the court is contemplating imposing such a sentence.

The redlined version, draft Committee Note, and summary of public comments are appended at the end of this memorandum.

1. The history of the proposed amendment

The amendment to Rule 32(h) was part of a set of rules proposed by the Committee to adapt the Criminal Rules to the Court's *Booker* decision, which held that the Guidelines are advisory, rather than mandatory. The amendment was approved by the Advisory Committee in April 2005 and approved by the Standing Committee for publication later that year. After considering the public comments, the Advisory Committee revised the language of the proposed amendment, and recommended its adoption to the Standing Committee.

In June 2006 the Standing Committee (which approved the other *Booker* rules), voted to send the proposed revisions back to the Advisory Committee for further consideration in light of concerns expressed at that meeting as well as developments in case law. Several concerns were raised at the Standing Committee. First, the amendment could undercut the right of allocution and interfere with judicial discretion. Matters may arise at allocution that should be taken into account, and the court might be required in such cases to adjourn the hearing. The rule might restrict the courts' ability to impose an appropriate sentence under *Booker* and §3553(a). Moreover, there might be significant differences between departures and variances for this purpose. Finally, there are significant variations in the law developing in the circuits on relevant points. In some circuits the parties may not have an expectation of a guideline sentence, and hence there is no basis for surprise if the sentence is not within the guideline range.

The Advisory Committee discussed the remand from the Standing Committee at the October meeting in Amelia Island, and voted, 7 to 4, to continue consideration of an amendment to Rule 32(h). Committee members expressed a range of views. Some felt that Rule 32(h) made sense only when the Guidelines were mandatory, and that it should be abrogated rather than extended to variances as well as departures. Under advisory guidelines the parties no longer have an expectation of a guideline sentence absent special notice, and it may be impossible to provide advance notice of all factors that might influence the sentence. Concern was also expressed that the new arguments may be raised by the defendant, prosecution, or victims in a complex sentencing hearing, and the court may see the case differently than it had anticipated. Yet it is difficult to postpone a sentencing at mid proceeding, particularly when victims or family members have made special efforts to attend. On the other hand, both the Federal Defenders and the Department of Justice support the amendment. They view the amendment (and the existing provision of Rule 32(h)) as an important mechanism to allow the adversarial testing of key sentencing determinations. Rule 32(h) should not be abrogated because it codifies the Supreme Court's decision in *Burns v. United States*, 501 U.S. 129, 138-39 (1991), which held that notice is required. *Burns* and the current rule incorporating its ruling into Rule 32(h) have not created significant difficulties, and extending the requirement of notice to variances should not ordinarily require the postponement or continuance of sentencing proceedings.

The Federal Community and Public Defenders strongly urged the Committee to extend Rule 32(h). In October 2006 Federal Public Defender Jon M. Sands wrote to draw the Committee's attention to serious problems that had arisen in some cases in which notice was not afforded. In a case where the Guideline range was 21-27 months the court sentenced the defendant to 120 months because, the court stated, the defendant would have been convicted of sexually assaulting a minor if the minor had not moved back to Mexico. The PSR contained no specific information other than the fact that a sexual assault charge had been dismissed. The judge did not identify the source of his information and gave no notice that he would rely upon this understanding of the facts, which the defendant had no opportunity to refute. In another case cited by Mr. Sands a mentally retarded prisoner received a life sentence when the government introduced, without notice, a prison disciplinary report, which the defendant had no opportunity to challenge.

In deciding to continue consideration of an amendment to Rule 32(h), the Committee identified several questions about which further information would be needed. First, the Committee's actions should take account of the Supreme Court's expected rulings on the relationship between the Guidelines and other sentencing factors, which form a critical backdrop for rules governing the procedures for sentencing. Second, the Committee would monitor the lower court decisions challenging the failure to give notice under Rule 32(h). Finally, the Committee would need further information about the meaning of the notice requirement as it has been interpreted in cases under Rule 32(h) in order to evaluate the feasibility of giving notice and the likelihood that a notice requirement would require frequent continuances before or during scheduled sentencing proceedings.

2. Related developments in the Supreme Court

As noted above, Rule 32(h) codifies the Supreme Court's decision in *Burns v. United States*, 501 U.S. 129, 138-39 (1991). *Burns* held:

before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling. This notice must specifically identify the ground on which the district court is contemplating an upward departure.

The Court explained that Rule 32 “provides for focused, adversarial development of the factual and legal issues relevant to determining the appropriate Guidelines sentence,” and requires that the court “ ‘afford counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence.’ ” *Id.* at 134.¹⁷ Whether a court's sua sponte departure from the Guidelines would be factually and legally warranted is such a matter “relating to the appropriate sentence” upon which the defendant has the right to comment. *Id.* at 135. The Court noted that it would make no sense to have such a right to comment without the right to be notified that the court is contemplating such a ruling. Indeed, the Court noted that if read Rule 32 to dispense with such notice, it would “have to confront the serious question whether notice in this setting is mandated by the Due Process Clause.” *Id.* at 138. The Court also expressed concern that the absence of notice would lead to undesirable action by the parties. *Id.* at 137. At best the parties might engage in wasteful efforts to anticipate all possible departures. At worst they would not do so, perhaps fearful of suggesting possibilities that had not occurred to the district court.

¹⁷The Court was quoting Fed. R. Crim. P. 32(a)(1). As revised and renumbered, this requirement now appears in Rule 32(i)(1)(C), which provides that at sentencing the court “must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence” This language provides--as it did in *Burns*--an independent ground for arguing that the requirement of notice is implicit in order to permit the parties to exercise this right to comment.

One of the key questions is whether the Court's subsequent decision in *Booker* so altered the role of the Guidelines that (1) the notice required by Rule 32(h) is no longer necessary even for departures, or (2) should not be extended to variances. Although the Supreme Court has not spoken directly to this issue, its most recent Guidelines decision, *Rita v. United States*, 127 S.Ct. 2456 (2007), cited both Rule 32(h) and the *Burns* decision with approval, treating them as an important feature of the post-*Booker* sentencing process. After ruling that the appellate courts reviewing a within-guideline sentence may apply a presumption of reasonableness, the Court noted that this presumption did not apply in the district court. It then described the sentencing process in the following passage:

The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines. 18 U.S.C. § 3552(a); Fed. Rule Crim. Proc. 32. He may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the "heartland" to which the Commission intends individual Guidelines to apply, USSG § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless. See Rule 32(f). Thus, the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure. See Rules 32(f), (h), (i)(C) and (i)(D); see also *Burns v. United States*, 501 U.S. 129, 136, 111 S.Ct. 2182, 115 L.Ed.2d 123 (1991) (recognizing importance of notice and meaningful opportunity to be heard at sentencing). In determining the merits of these arguments, the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.

127 S.Ct. at 2465 (emphasis added). This discussion thus emphasizes the themes that motivated the Court's ruling in *Burns*: the importance of adversarial testing, as well as the linkage between notice and the opportunity to be heard which is provided by Rule 32(i)(1)(C) (the parties' attorneys have the right to comment on "matters relating to an appropriate sentence"). It also treats this model of adversarial testing as applicable both to departures (which fall outside the heartland of particular Guidelines) or variances, i.e., § 3553(a) considerations.

3. Decisions in the lower courts interpreting Rule 32(h)

There is now a full-blown five to five split in the circuits on the question whether Rule 32(h), even without the Committee's proposed amendment, requires the court to give notice before varying on a ground not identified in either the presentence report or the parties' prehearing submissions.¹⁸ Although the question before these courts was not precisely the same as the one facing this Committee, many of the opinions contain relevant policy discussions. Five circuits have held that Rule 32(h) does not require the court to give advance notice when it is

¹⁸The First Circuit has recognized the split but not resolved the issue. See *United States v. Jones*, 178 Fed. Appx. 27, 29 & n.2 (1st Cir. 2006) (remanding for resentencing on other grounds).

contemplating a variance on a ground not identified in the PSR or the parties's prehearing submissions, and five others have ruled that such notice is required.

The five circuits that have concluded that notice is not required are the Third, Fifth, Seventh, Eighth, and Eleventh Circuits. Although there are some variations, in general these courts have identified several reasons for concluding that notice is not required. The fact that text of Rule 32(h) refers only to departures is mentioned in some of these opinions,¹⁹ but nearly all go on to consider whether the rule should be extended to require notice of variances that have not been identified in either the PSR or the parties' submissions. In general, these courts reason that the concerns that motivated the Court in *Burns* are no longer applicable in the post-*Booker* regime of heavily discretionary sentencing. They observe that the statutory factors under § 3553(a) are known to the parties, and put them on notice that the court has discretion to consider any of these factors. Thus, in the view of these courts, there is no longer any element of unfair surprise, and the parties have sufficient notice to allow them to address the issues. See, e.g., *United States v. Mejia-Huerta*, 480 F.3d 713, 722 (5th Cir.), petition for cert. filed, 75 USLW 3585 (Apr 18, 2007) (No. 06-1381); *United States v. Irizarry*, 458 F.3d 1208, 1212 (11th Cir. 2006), petition for cert. filed (Oct 26, 2006) (No. 06-7517); *United States v. Vampire Nation*, 451 F.3d 189, 196 (3rd Cir.), cert. denied, 127 S.Ct. 424 (2006); *United States v. Walker*, 447 F.3d 999, 1006-07 (7th Cir.), cert. denied, 127 S.Ct. 314 (2006). In addition, the Third Circuit reasoned that requiring the court to provide notice whenever it intended to depart or vary from the Guidelines on grounds not already identified would "elevate the advisory sentencing range to a position of importance that it can no longer enjoy." The Seventh Circuit went even further, commenting that after *Booker* the concept of departures is "'obsolete' and 'beside the point,'" given the discretion inherent in the advisory character of the Guidelines, and accordingly the concerns that animated the *Burns* decision and the drafting of Rule 32(h) "no longer apply." *United States v. Walker*, 447 F.3d 999, 1006 (7th Cir. 2006). These arguments suggest that Rule 32(h) should be abrogated, rather than extended to variances.

Some of the opinions focus on the question whether it would be feasible for the courts to give notice of possible variances. In the *Vampire Nation* case, the Third Circuit stated:

Booker contemplates that the district court will impose a discretionary sentence *after* consideration of the advisory Guidelines, the grounds raised by counsel, the defendant's allocution, victim statements, other evidence, and the factors set forth in § 3553(a). *Booker* does not contemplate that the court will somehow arrive at its sentence prior to sentencing, and requiring advance notice of "any ground" beyond the factors set forth in § 3553(a) would undoubtedly prove to be unworkable.

¹⁹See, e.g., *United States v. Mejia-Huerta*, 480 F.3d 713, 722 (5th Cir.), petition for cert. filed, 75 USLW 3585 (Apr 18, 2007) (No. 06-1381) ("We first note that the plain language of Rule 32(h) limits its application to *departures*." (emphasis in original)).

451 F.3d at 197 (citations and footnote omitted). In a footnote, the court drew particular attention to the problem of giving notice of issues raised by victims. It noted that the Crime Victims' Rights Act gives victims a right to be heard that is "in the nature of an independent right of allocution." *Id.* at 197 n.4. Since it would be "impossible" to predict what victims might say at sentencing, "it would be unworkable to require district courts to provide advance notice of their intent to vary their discretionary sentence on victim statements that have not yet been made." *Id.*

The five circuits that have concluded that notice is required under Rule 32(h) are the Second, Fourth, Sixth, Ninth, and Tenth Circuits. These courts have concluded that the rationale of *Burns* applies to variances in an advisory sentencing scheme as well as departures. In *United States v. Anati*, 457 F.3d 233, 237 (2nd Cir. 2006), the court explained:

In *Burns*, the Supreme Court was concerned not only with unfair surprise, but with the facilitation, through notice, of adversarial testing of factual and legal considerations relevant to sentencing. 501 U.S. at 134, 135, 111 S.Ct. 2182. Notice permits the parties to focus their attention on the considerations upon which the resulting sentence will rest. *See Evans- Martinez*, 448 F.3d at 1167. Although the Court's obligation to consider section 3553(a) factors is known in advance of sentencing, application of those factors turns on relevant facts, some of which might be in the Court's mind but not previously disclosed. If the court applies the section 3553(a) factors based on facts not in the record to impose *sua sponte* a non-Guidelines sentence, the adversarial testing required by *Burns* will not have occurred.

457 F.3d at 237. *Accord United States v. Atencio*, 476 F.3d 1099, 1104 (10th Cir. 2007).²⁰ Other courts have agreed that the identification of the statutory criteria in § 3553(a) provides no basis for distinguishing *Burns*. As the Sixth Circuit explained in *United States v. Cousins*, 469 F.3d 572, 580 (6th Cir. 2006), before *Booker* the parties were assumed to know Chapter 5 of the Guidelines, which identifies possible grounds for departures. The court found no meaningful distinction between the notice provided by "Chapter 5's lengthy list of departure criteria" and the 3553(a) factors. Moreover, if the parties do not receive notice of a ground upon which a court is considering a variance, they face the same problems that concerned the Court in *Burns*. They will be reluctant to suggest possible variances that may not have occurred to the court, and hence

²⁰*See also* Recent Case, *United States v. Vampire Nation*, 451 F.3d 189 (3d Cir.) (2006), 120 HARV. L. REV. 1723 (2007) (summarizing the split and criticizing the Third Circuit's holding that notice is not required); Mark P. Rankin, *Grid & Bear It*, CHAMPION 44 (Mar. 2007) (summarizing the split and discussing the interplay between Rule 32(h) and both Rule 32(i)(1)(C) and due process).

will be unable to comment on and ensure that the court's possible variance is fully vetted by adversarial testing. *United States v. Evans-Martinez*, 448 F.3d 1163, 1168 (9th Cir. 2006).²¹

4. What constitutes adequate notice?

One of the chief concerns raised in both the Advisory Committee and the Rules Committee was the feasibility of providing notice of variances in an advisory sentencing system. Put another way, there was concern that the notice requirement would require frequent, if not routine, interruptions and delays in the sentencing process.

After holding that reasonable notice is required, the *Burns* Court noted that it was expressing no opinion on the question of the timing for the notice, leaving that to the lower courts (which it observed were free to adopt procedures by local rule). 501 U.S. at 139 n. 6. A review of the lower court decisions under *Burns* (both cases involving departures and variances) reveals several key points:

(1) A number of cases have treated the question whether the notice was adequate as one that is necessarily context specific. *See, e.g., United States v. Meeker*, 411 F.3d 736 (6th Cir. 2005) (holding that notice provided at 4:45 pm on Friday prior to sentencing hearing at 10:00 am on Monday was sufficient). As the *Meeker* court noted, prior decisions established, for example, that more time is required for issues that are particularly complicated, and less time is necessary if cumulative evidence is already in the record. *Id.* at 744. The question is whether the notice that was provided was sufficient to permit the parties' attorneys to comment meaningfully on, and test the contemplated basis for a departure or variance.

(2) Many courts have stated that notice must be given *prior to* the sentencing hearing. *United States v. Sharp*, 436 F.3d 730, 735 (7th Cir. 2006) (if PSR or prosecutor's recommendation does not identify basis for possible sentencing increase, judge must inform defendant "a sufficient time in advance of sentencing (i.e., [sic] not during the actual sentencing) of the specific grounds the court is considering relying on to increase the terms of confinement"); *United States v. Florez*, 163 Fed. Appx. 806, 808 (11th Cir. 2006) (plain error where first mention of possible departure was made by district court at sentencing hearing); *United States v. Dodge*, 216 Fed. Appx. 712, 714 (9th Cir. 2007) (because issue was not raised prior to sentencing there was error); *United States v. Valentine*, 21 F.3d 395, 398 n. 6 (11th Cir.

²¹Although the scope of the *Evans-Martinez* decision is not crystal clear, it has been interpreted both within and outside the circuit as applying Rule 32(h) to variances. *See, e.g., United States v. Garcia-Renteria*, 229 Fed. Appx. 595, 597 (9th Cir. 2007). *Evans-Martinez* has been distinguished within the circuit, however, in cases involving resentencing after revocation of supervised release. *United States v. Leonard*, 483 F.3d 635, 638 (9th Cir. 2007).

1994) (“on the spot” notice during the sentencing hearing not sufficient). *See also United States v. Cole*, 2007 WL 2263934 (2nd Cir. 2007) (notice given during the sentencing hearing insufficient, where court stated that it would assume defendant, who had not accounted for his ill gotten gains, had stashed them somewhere, such as an offshore account). Some cases from the Ninth Circuit state that notice must be given “not later than the outset of sentencing.” *United States v. Garcia-Renteria*, 229 F.3d 595, 597 (9th Cir. 2007) (citations omitted). *But see United States v. Patrick*, 988 F.2d 641, 647 n.7 (6th Cir. 1993) (noting that *Burns* left open the possibility that notice at the hearing might be sufficient).

(3) Some courts have held that notice is required for both factual and legal arguments. *E.g.*, *United States v. Hinojosa-Gonzalez*, 142 F.3d 1122, 1123 (9th Cir. 1998).

(4) The failure to give reasonable notice in advance is not generally reversible error if the defendant is unable to show prejudice. In cases in which no contemporaneous objection was made, the appellant must show plain error under Rule 52(b), and whether such an error is found turns, to a large degree, on whether the lack of adversarial testing may have significantly affected the sentence. Compare *United States v. Meeker*, 411 F.3d 736, 746 (6th Cir. 2005) (finding no prejudice where the evidence supporting the upward departure was “essentially irrebuttable,” the defendant did not identify any factual errors, and the evidence relied upon was of the same character and subject to the same rebuttals as evidence of which the defendant had notice), with *United States v. Florez*, 163 Fed. Appx. 806, 808 (11th Cir. 2006) (finding lack of notice affected defendant’s substantial rights where court relied without notice on multiple prior arrests, because defense demonstrated on appeal that there were arguments it could have made to oppose reliance on these arrests, and the departure substantially increased the defendant’s sentence). Even in cases in which a contemporaneous objection was made, Rule 52(a) imposes a harmless error rule. But when a contemporaneous objection is made, the parties should seek a continuance in order to permit them to address the issues in question *before* sentence is imposed, thereby avoiding reversible error. *See, e.g.*, *United States v. Atencio*, 476 F.3d 1099, 1105 (10th Cir. 2007) (en banc) (stating court will generally assume a reasonable continuance will cure failure to give notice under Rule 32(h), rendering the error harmless), and *United States v. Calzada-Maravillas*, 443 F.3d 1301, 1306 (10th Cir. 2006) (advising sentencing courts to cure failure to provide advance notice by informing the parties of the proposed departure before sentencing and allowing them to prepare arguments and evidence).

5. Conclusion

The Circuits are split evenly on the question how Rule 32(h) should be interpreted. Ordinarily it would be desirable for the Advisory Committee to revise the rule to address the issue clearly and resolve the controversy. Here, however, the split is not based upon the difficulty of interpreting the language of the rule. To some extent it is based upon a disagreement about the proper application of the Supreme Court’s reasoning in *Burns*, but it also

reflects a profound disagreement about the merits of requiring advance notice of the grounds upon which a court may wish to rest a variance.

There are several strong arguments in favor of recommending that the Standing Committee approve an amendment extending notice to all grounds upon which the sentencing court may sentence above or below the Guideline range. First, the Supreme Court's decision in *Rita* provides a signal that from the Court's perspective the adversarial testing provided by Rule 32 continues to play an important role in the advisory sentencing scheme. The cases described in Mr. Sands' letter (reprinted *infra*) demonstrate the importance of adversarial testing for variances as well as departures. The Department of Justice, the defense bar, and the Sentencing Commission all strongly supported the amendment. Second, it is not desirable that the rights of a defendant vary in an important respect from circuit to circuit. In five circuits it is error (and in some circuits plain error) to fail to provide notice that is not required in five other circuits. Third, requiring notice for departures but not variances requires that a sentence outside the Guideline range be assigned to one category or the other. At the present time, however, in a significant number of cases sentencing courts classify sentences outside the guideline range as both departures and variances.²² If Rule 32(h) requires notice in the case of departures but not variances, the existence of such hybrid sentences adds one more element of complexity.²³

On the other hand, there is a strong belief in the circuits that do not require notice that it would be impractical (as well as unnecessary) to extend Rule 32(h) to variances, and this view is likely to cause significant opposition to the amendment in the Standing Committee and/or the Judicial Conference. To the extent that the notice must be afforded before the sentencing hearing, it does raise the question how to accommodate the requirement of notice with the realities of the sentencing process, particularly given the fact that victims may present their views orally at the sentencing hearing. In some cases it seems that a continuance to allow either the defendant or the government to prepare its response will indeed be needed.

²²In FY 2006, for example, after excluding government sponsored departures (*e.g.*, 5K1.1 motions) approximately 15% of non-guideline sentences were classified by the sentencing court as hybrids. There were non-government sponsored upward or downward departures in 13.6% of the cases, including 2.03% that were classified by the sentencing court in terms referring to both the authority to depart and to base a sentence on statutory factors under *Booker*. U.S. SENTENCING COMM. FINAL QUARTERLY DATA REPORT FISCAL YEAR 2006, Table 1 & nn. 2, 3, and 4 (listing .03% of the cases as upward departures with references to *Booker* or §3553(a) factors, and 2.0% of the cases as downward departures with references to *Booker* or §3553(a) factors).

²³In *United States v. Calzada-Maravillas*, 443 F.3d 1301, 1305 (10th Cir. 2006), after recognizing that it was dealing with such a hybrid sentence the court confined its discussion to the effect of failing to give notice for a departure.

Assuming that the Committee concludes that uniformity is desirable, it should seek to establish as strong a basis as possible for any proposed rule. It might take the following steps, as well as others.

- The recent experience of the Appellate Rules Committee with a highly controversial rule might provide a useful precedent. The Committee recognized that a rule allowing citation of all appellate opinions would generate serious opposition in circuits that relied heavily on unpublished opinions and precluded their citation. In order to assuage these concerns, the Appellate Rules Committee asked the Federal Judicial Center to prepare a study comparing the experience in the circuits that precluded citation to or reliance on unpublished opinions with the experience in the remaining circuits that did not have such rules. The report provided evidence that the circuits allowing citation of unpublished opinions had not encountered serious problems. This evidence was probably critical to the eventual adoption of Appellate Rule 32.1. Similarly, it might be helpful to survey the experience of the district judges in circuits where notice is already required, in order to determine whether serious problems have arisen. If they have not, this would buttress the case for extending the practice nationally.

- The Committee might also solicit additional views and advice from the Sentencing Commission, which supported the proposed amendment during the public comment period and has indicated informally its continued support by enquiries to the reporter regarding the status of the rule.

- Finally, the Committee may wish to further refine the language of the rule to improve its clarity.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE**

Rule 32. Sentencing and Judgment

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(h) Notice of ~~Possible Departure From Sentencing~~
~~Guidelines~~Intent to Consider Other Sentencing
Factors. Before the court may ~~depart from the~~
~~applicable sentencing range~~ rely on a ground not
identified for ~~departure or a non-guideline sentence~~
either in the presentence report or in a party's
prehearing submission, the court must give the parties
reasonable notice that it is contemplating either
departing from the applicable guideline range or
imposing a non-guideline sentence ~~such a departure~~.
The notice must specify any ground not earlier
identified for departing or imposing a non-guideline
sentence on which the court is contemplating
imposing such a sentence ~~a departure~~.

FEDERAL RULES OF CRIMINAL PROCEDURE

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* * * * *

COMMITTEE NOTE

Subdivision (h). The amendment conforms Rule 32(h) to the Supreme Court’s decision in *United States v. Booker*, 125 S. Ct. 738 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act “makes the Guidelines effectively advisory,” and “requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004).” *Id.* at 757. The purpose of Rule 32(h) is to avoid unfair surprise to the parties in the sentencing process. Accordingly, the required notice that the court is considering factors not identified in the presentence report or in the submission of the parties that could yield a sentence outside the guideline range should identify factors that might lead to either a guideline departure or a sentence based on factors under 18 U.S.C. § 3553(a).

The amendment refers to a “non-guideline” sentence to designate a sentence not based exclusively on the guidelines. In the immediate aftermath of *Booker*, the lower courts have used different labels to refer to sentences based on considerations that would not have warranted departures under the mandatory guideline regime, but are now permissible because the guidelines are advisory. Compare *United States v. Crosby*, 397 F.3d 103, 111 n. 9 (2d Cir. 2005) (referring to “non-Guidelines” sentence), with *United States v. Wilson*, 350 F. Supp.2d 910, 911 (D. Utah 2005)

FEDERAL RULES OF CRIMINAL PROCEDURE

(suggesting the term “variance”). This amendment is intended to apply to such sentences, regardless of the terminology used by the sentencing court.

GAP REPORT

The Committee revised the text of subdivisions (d) and (h) in response to public comments and withdrew subdivision (k) because of new legislation that preempted it. * * * * In subdivision (h), the Committee responded to numerous comments that exposed ambiguity in the published rule. The Committee adopted the Sentencing Commission’s suggested revision to clarify the scope of the requirement that the sentencing court give notice to the parties when it intends to rely on grounds not identified in either the presentence report or the parties’ submissions.

* * * * *

Finally, here--as in the other *Booker* rules--the Committee deleted the reference in the Committee Note to the Fifth Amendment from the description of the Supreme Court’s decision in *Booker*.

SUMMARY OF PUBLIC COMMENTS ON RULE 32

FEDERAL RULES OF CRIMINAL PROCEDURE

Comments regarding subdivision (h)

Chief U.S. Probation Officer Tony Garoppolo (05-CR-002) reads the proposed amendment to Rule 32(h) broadly, and objects that it “effectively gives primacy to the sentencing guidelines as a factor for the Court to consider in sentencing; he also notes that the term “departure” is outdated in light of the *Booker* decision and suggests the use of the phrase “non-guidelines sentence.”

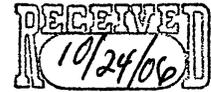
The Honorable Stewart Dalzell (05-CR-006) reads the amendment to Rule 32(h) broadly and expresses “strong opposition” on the ground that *Booker* requires the courts to consider all of the factors under 18 U.S.C. § 3553(a) in every case. In his view the amendment would delay the consideration of these factors and require a second sentencing hearing in most cases.

Judith Sheon on behalf of the U.S. Sentencing Commission (050CR-017) supports the goal of the amendment, but expresses concern that the proposed language “may be overly broad and not fully comport with the spirit and intent of Rule 32(h).” The Commission suggests the modification of the language to clarify that the notice requirement applies only when the court contemplates a sentence based upon a ground “not earlier identified for departing or imposing a non-guideline sentence....”

FEDERAL RULES OF CRIMINAL PROCEDURE

The National Association of Criminal Defense Lawyers (05-CR-020) objects that the amendment “perpetuates the primacy of the guidelines” and “wrongly limits the circumstances in which notice is required.” References to “departing” and “non-guideline sentence” should be eliminated. It would be preferable to refer to “Guideline” and “individualized” sentences.

06-CR-H



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October 23, 2006

Peter G. McCabe
Committee on Rules of Practice and Procedure
Of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Fed. R. Crim. P. 32

Dear Mr. McCabe:

I understand that the Rules Advisory Committee has withdrawn a proposed amendment of Fed. R. 32(h) that would require courts to give reasonable notice when contemplating a sentence outside the guideline range, whether or not based on a guideline "departure." In my capacity as Chair of the Federal Defender Sentencing Guideline Committee, I write to urge the Rules Advisory Committee to reconsider.

As you may know, seven courts of appeals have now held that the Guidelines are presumptively reasonable. While we believe that this is a return to the presumptive guideline system the Supreme Court struck down in *United States v. Booker*, 543 U.S. 220 (2005), that nonetheless is the system currently operating in seven circuits. In the five other circuits, the guidelines must be calculated first, must be calculated correctly, and must be taken into account. Of all of the statutory factors courts must now consider, only the guideline range has a number attached to it. Thus, whether treated as advisory or presumptive, the guidelines continue to be the single most determinative factor of a defendant's sentence length. Further, Rule 32 continues not to require information relevant to statutory factors other than the guidelines to be included in the pre-sentence report.

This is all to say that the purely discretionary and indeterminate sentencing system that existed twenty years ago does not exist and will never exist as long as we have sentencing guidelines with numbers attached. What this means is that the defendant, defense counsel, and the prosecutor rely first and foremost on the guidelines in making critical decisions, such as whether or not to plead guilty and if so, on what terms. Most importantly, the defendant, and the government as well, prepare for sentencing (and can only prepare) based on the facts and reasons of which they have reasonable notice.

When sentence is imposed without reasonable notice of the facts or reasons, the proceeding is unfair, unreliable, and undermines respect for the law. For example, in a recent case in the Northern District of Texas, where the guidelines are presumptive, the defendant pled guilty to illegal re-entry after deportation. The guideline range was 21-27 months. According to the PSR, the defendant had several prior DWI convictions and one arrest for sexual assault of a minor that had been dismissed, and there were no known mitigating or aggravating factors to support a departure. At sentencing, without notice, the judge imposed a 120 month sentence because, according to the judge, the defendant would have been convicted of sexual assault of a minor but that the victim moved back to Mexico. There was nothing in the PSR about the circumstances of the sexual assault charge, the alleged victim moving back to Mexico, or why the charge was dismissed. The judge did not say where he got this information, and, of course the defendant had no opportunity to challenge it.

In another recent case in Alabama, the court sentenced a mentally retarded young man to life in prison where the guideline sentence was a term of years. This was based on the government's introduction, without notice, of a disciplinary report from the local jail and statement of a guard there regarding an altercation between the defendant and the guard. Defense counsel objected to the lack of notice, and sought a continuance in order to obtain and present evidence to refute the guard's version of events. The objection was overruled.

In *Burns v. United States*, 501 U.S. 129 (1991), the Supreme Court interpreted a prior version of Fed. R. Crim. P. 32 to require that "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government," the district court must "give the parties reasonable notice that it is contemplating such a ruling," and "must specifically identify the ground on which the district court is contemplating an upward departure." *Id.* at 138-39. The *Burns* holding was then incorporated into Rule 32 as subsection (h).

The Court interpreted Rule 32 to require notice to ensure that it complied with the Due Process Clause. The Court noted that the guidelines place no limit on the number of grounds for a sentence outside the guideline range, a due process concern that is more pronounced after *Booker*, not less. The Court emphasized the due process need to test the facts, which cannot be done without notice. Efficiency was also a concern, for reasons just as applicable to sentencing under § 3553(a). The Court said:

Th[e] right to be heard has little reality or worth unless one is informed" that a decision is contemplated. . . . Because the Guidelines place essentially no limit on the number of potential factors that may warrant a departure, no one is in a position to guess when or on what grounds a district court might depart, much less to "comment" on such a possibility in a coherent way. . . . At best, under the Government's rendering of Rule 32, parties will address possible *sua sponte* departures in a random and

wasteful way by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative. At worst, and more likely, the parties will not even try to anticipate such a development; where neither the presentence report nor the attorney for the Government has suggested a ground for upward departure, defense counsel might be reluctant to suggest such a possibility to the district court, even for the purpose of rebutting it. In every case in which the parties fail to anticipate an unannounced and uninvited departure by the district court, a critical sentencing determination will go untested by the adversarial process contemplated by Rule 32 and the Guidelines.

. . . Notwithstanding the absence of express statutory language, this Court has readily construed statutes that authorize deprivations of liberty or property to require that the Government give affected individuals *both* notice *and* a meaningful opportunity to be heard. . . . The Court has likewise inferred other statutory protections essential to assuring procedural fairness. . . . In this case, were we to read Rule 32 to dispense with notice, we would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause.

Burns, 501 U.S. at 136-138 (internal citations omitted).

We understand that the Committee withdrew the notice provision based on recent caselaw on the issue. There is a circuit split regarding whether a defendant must receive notice of a district court's intent to impose a sentence above the guideline range for reasons other than a guideline departure.¹ The courts that have held no notice is required have said there is no "unfair surprise" because sentencing is discretionary, includes a review of the unlimited factors set forth in § 3553(a), and defendants are aware of that.² The position of the Seventh and Eighth Circuits that lack of notice does not offend due process because sentencing is discretionary is at odds with their position that the guidelines are presumptive.³ The Eleventh Circuit has said that lack of notice is not plain error because there is no precedent establishing that Rule 32(h) survives *Booker*.⁴

The courts that have held that notice is required have relied on Rule 32(h) and due process of law.⁵ In holding that notice is required after *Booker*, the Fourth Circuit

¹ Compare *United States v. Vampire Nation*, 451 F.3d 189 (3d Cir. 2006) (no notice required); *United States v. Walker*, 447 F.3d 999 (7th Cir. 2006) (same); *United States v. Egenberger*, 424 F.3d 803 (8th Cir. 2006) (same); *United States v. Simmerer*, 156 Fed. Appx. 124 (11th Cir. 2005) (lack of notice was not plain error) with *United States v. Evans-Martinez*, 448 F.3d 1163 (9th Cir. 2006) (lack of notice was plain error); *United States v. Davenport*, 445 F.3d 366 (4th Cir. 2006) (lack of notice was error); *United States v. Dozier*, 444 F.3d 1215 (10th Cir. 2006) (same).

² See *Vampire Nation*, 451 F.3d at 196; *Walker*, 447 F.3d at 1006-07.

³ See *Walker*, 447 F.3d at 1007 n 7; *Egenberger*, 424 F.3d at 805-06.

⁴ See *Simmerer*, 156 Fed. Appx. 124 at *3.

correctly recognized that notice ensures accuracy, and that a defendant may not be sentenced on the basis of materially false information.⁶ As the Ninth Circuit correctly recognized, “the district court must correctly calculate the applicable range, which serves as a ‘starting point’ in sentencing. The district court then has the discretion to sentence both above and below the range suggested by the Guidelines. Parties must receive notice the court is contemplating such a possibility in order to ensure that issues with the potential to impact sentencing are fully aired.”⁷ Of note, the position of the Department of Justice is that due process requires notice.⁸

One of the rationales offered by the Third Circuit is that notice would be “unworkable” because *Booker* contemplates that sentence will be imposed after the court considers the advisory guidelines, the defendant’s allocution, victim statements, other evidence, and the § 3553(a) factors.⁹ Sentencing courts have always been required to impose sentence after considering the guidelines, the defendant’s allocution, victim statements, any evidence produced at the hearing, and any grounds for departure. This did not make notice “unworkable.” The Third Circuit’s concern about the unpredictability of victim impact statements is especially troubling. As the Tenth Circuit recognized, if the judge forms an intent to increase the sentence based on a victim’s statement, the defendant must be given an opportunity to respond.¹⁰

For these reasons, we urge the Committee to reconsider its decision to withdraw the notice provision.

Very truly yours,



JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines
Committee

⁵ See *Evans-Martinez*, 448 F.3d at 1166-67; *Davenport*, 445 F.3d at 371; *Dozier*, 444 F.3d at 1127-28.

⁶ *Davenport*, 445 F.3d at 371 (citing *Townsend v. Burke*, 334 U.S. 736, 741 (1948)).

⁷ See *Evans-Martinez*, 448 F.3d at 1167.

⁸ See *Walker*, 447 F.3d at 1007 n 7.

⁹ *Vampire Nation*, 451 F.3d at 197 & n 4.

¹⁰ *Dozier*, 444 F.3d at 1127-28.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 32.1 and Rule 46, Revoking Probation or Supervised Release & Revoking Pretrial Release

DATE: September 3, 2007

At its October 2006 meeting the Advisory Committee discussed Judge Battaglia's proposal to amend Rules 32.1 and 46 to provide express authority for the issuance of arrest warrants and summons in cases in which the government seeks to revoke release on bail or supervised release. The discussion identified a variety of issues on which the Committee sought further information, and also suggested possible revisions.

Judge Battaglia has prepared a memorandum that provides additional information and proposes language intended to respond to some of the concerns and suggestions raised in October. His new memorandum as well as the original memorandum are attached.

This item is on the agenda for the October meeting in Park City.

United States District Court

Southern District Of California
U.S. Courts Building
940 Front Street
Room 1145
San Diego, California 92101-8927

Anthony J. Battaglia
United States Magistrate Judge

Phone: (619) 557-3446
Fax: (619) 702-9988

MEMORANDUM

TO: Judge Susan Bucklew & Judge Richard Tallman

CC: Sara Sun Beale
John Rabiej

FROM: Judge Battaglia

RE: Possible Amendments to Rules 32.1 and 46 - Follow up

DATE: September 7, 2007

In the October meeting of the Advisory Committee, we considered my suggestion of possible amendments to Rules 32.1 and 46, respectively. Attached is my memo of October 5, 2006, as Exhibit A, in that regard.

This memorandum provides additional information on issues that were raised at the October meeting, and proposes revised language intended to respond to the various issues and concerns discussed below. I now propose the following amendments:

32.1(a) (New) The Issuance of a Warrant. Upon receiving an affidavit showing probable cause to believe that a person has violated a condition of probation or supervised release, a federal judge may issue a warrant or summons to a person authorized to serve them. If a defendant fails to appear in response to a summons, the court may, and upon request of an

attorney for the government must, issue a warrant to an officer authorized to execute it. The warrant may be requested by telephonic or other means pursuant to the provisions of Rules 41(c)(2)(B), 41(d)(3) and (e)(3).

(a)(b) Initial Appearance. . . .

and

46(f) (New) Issuance of a Warrant on a Violation. Upon receiving an affidavit showing probable cause to believe that a person has violated a condition of pretrial release, a federal judge may issue a warrant or summons to a person authorized to serve them. If a defendant fails to appear in response to a summons, the court may, and upon request of an attorney for the government must, issue a warrant to an officer authorized to execute it. The warrant may be requested by telephonic or other means pursuant to the provisions of Rules 41(c)(2)(B), 41(d)(3) and (e)(3).

The purpose of amending the rules would be to close a procedural “gap” in our constellation of rules relative to the issuance of arrest warrants. The suggestion was prompted by the Ninth Circuit decision in *United States v. Vargas-Amaya*, 389 F.3rd 901 (9th Cir. 2004). *Vargas-Amaya*, follows the line of cases that note that the warrant clause of the Fourth Amendment secures an individuals right to be protected against the issuance of a warrant for his arrest, except upon probable cause supported by oath or affirmation. *United States v. Piccard*, 207 F.2d 427, 475 (9th Cir. 1953).

Simply stated, the issue is what showing should be made when a warrant is sought from a judge to initiate proceedings to revoke supervision (including probation) or bail? Rules 32.1 and 46 deal with revocation of supervised release and bail, respectively, without procedural guidance on how to obtain a warrant. In fact, Rule 32.1 starts with “a person held in custody.” Rule 32.1 brings 18 U.S.C. § 3606 into consideration. That statute establishes a probation officers authority to arrest a person without a warrant and the ability of a court to issue a warrant for a probationer or releasee. With regard to bail, and Rule 46, our consideration requires reference to 18 U.S.C. § 3148(b) which allows an attorney for the government to initiate a proceeding or warrant concerning revocation of bail. These will be addressed separately below.

With regard to arrests associated with revocation of supervised release, § 3606 provides as follows:

§3606. Arrest and return of a probationer

If there is probable cause to believe that a probationer or a person on supervised release has violated a condition of his probation or release, he may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him . . . The court having supervision of the probationer or releasee, or if there is no such court, the court last having supervision of the probationer or releasee, may issue a warrant for the arrest of a probationer or releasee for violation of a condition of release, and a probation officer or United States marshal may execute the warrant in the district in which the warrant was issued or in any district in which the probationer or releasee is found.

With regard to bail, 18 U.S.C. § 3148(b) provides:

The attorney for the government may initiate a proceeding for revocation of an Order of Release by filing a motion with the district court. A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release, and that person shall be brought before a judicial officer in the district in which such persons arrest was ordered for a proceeding in accordance with this section.

At the October meeting, a variety of questions were raised with regard to my original proposal. These are, in no particular order, as follows:

1. Should the request for the warrant be by a motion or petition?
2. Could the warrant issue on "other information" made known to the judge?
3. Would such an amendment limit the sua sponte ability of the court to issue a warrant?
4. Shouldn't changes to Rules 32.1 and 46 track Rules 4 and 9 whereupon the Court must issue a warrant where defendant fails to appear in response to a summons and upon request of an attorney for the government?
5. Should we include presentations by oral or reliable electronic means in any procedural guidance?
6. What is the distinction between a warrant and a summons?
7. Have the probation or pre-trial services offices addressed the issue in forms? and,
8. What input would the criminal law committee bring to the issue?

1. Motion or Petition?

The current forms in use (PROB 12C and PROB 12D, attached hereto,) are in the nature of a petition. A petition has been the historic manner for a presentation in support of a request for an arrest warrant. A petition appears to remain the appropriate name for this request. This is an *ex parte* matter, without notice to anyone, and the court hears from only one side. Referring to it as a motion may infer some change in the manner in which the proceeding should be handled. While it would be tempting to refer to the item as a “motion,” considering the implementation of CM/ECF and its “motion driven” means of tracking events and recording judicial work, the reality is that is not necessary where warrants are concerned. Warrants are recorded for statistical purposes upon issuance, and not with respect to any submitted application. I would suggest, therefore, that there is logic in continuing with the “petition” practice.

2. Issuing the Warrant on “Other Information?”

The purpose of these amendments is to provide guidance to those seeking a warrant from the court. If the Court is privy to information supporting a warrant, i.e., failure to appear, as previously directed by the court, these proposed amendments would not be an impediment to the court proceeding as appropriate. If the “other information” is something less than would satisfy the court that there is probable cause, however, the warrant clause of the Fourth Amendment would apply. See, *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 453, 2 L. Ed. 495 (1806). These proposed amendments are to provide procedural guidance to those seeking the warrant, nothing more.

3. Would the Proposed Amendments Limit the Ability of the Court to Issue a Warrant or the Probation Officer to Request One?

The Notes could make clear that the procedural guidance would not limit the Court’s *sua sponte* ability to direct a warrant for a probationer or releasee’s arrest. Limits, to the extent appropriate, would be fashioned by case law. The probation office has already embraced the holding in *Vargas-Amaya*, through incorporating the concept of necessary probable cause and a statement under oath in their internal documents and forms. This is demonstrated in more detail under item 8, below. The notes could also indicate that this procedural guidance does not limit the probation officer’s power under 18 U.S.C. § 3606 to arrest without a warrant.

4. Issuing the Warrant on Request of an Attorney for the Government.

The Department of Justice has pointed out that under Rules 4 and 9, a judge must issue a warrant upon request of an attorney for the government when a defendant fails to appear. John Wroblewski has reported that the requirement of Rule 4 was added as a result of a Congressional mandate following a proposal that the issuance of a warrant be a discretionary decision. In being

consistent in the rules, and recognizing Congress's intent, the proposed amendment should conform in this regard. This will be addressed in a revised set of amendments that follow.

The proposed amendment that follows directs the court to issue the warrant where there has been a failure to appear in response to a summons and the government so requests. Of course, the Court may proceed to issue the arrest warrant without the government's request. The proposal does not include a mandate to issue the warrant for other alleged violations of nonappearance conditions of release. In current practice, petitions for a warrant on probation, supervised release or pretrial release violations frequently are for something other than the requirement to appear in Court as ordered. It is submitted that the Court should retain the discretion to decide if someone who has failed to file a monthly report, failed to get a job, or tested positive for drug use, should be caused to appear through a warrant or a summons. Additionally, Rules 4 and 9 are specific to the failure to appear occurrence. Of course, Rule 4 goes much beyond, because it refers to the issuing of process upon the filing of a complaint. The distinction is, of course, when someone is under supervision, they are already within the jurisdiction of the court. With a complaint, and the filing of charges before an arrest, and the acquisition of jurisdiction has not occurred.

5. Oral or Reliable Electronic Means

To the extent the Committee deems this advisable, using an approach as set forth in Rule 41 for telephonic (oral) search warrants, where reliable electronic means can be utilized, could serve as the model. Again, this would be limited to circumstances where someone seeks an arrest warrant from a judge. It will not limit the ability of the court to proceed *sua sponte*, or the probation officer to proceed to arrest without a warrant under 18 U.S.C. §3606. The mechanism for an amendment to incorporate oral (telephonic) or reliable electronic means procedures could be by reference to Rule 41(c)(2)(B), Rule 41(d)(3) and (e)(3). That way, there would be consistency throughout the rules, and any amendment made to Rule 41(c)(2)(B), Rule 41(d)(3) and (e)(3) would equally apply to any similar use of Rules 32.1 and 46, respectively. These provisions require some finding that it is reasonable to dispense with the typical procedure and build in safeguards to protect the integrity of the process.

Rule 41 was amended in 1977 to add the telephonic search warrant provision. The Committee releasing amended Rule 41 to include other reliable electronic means. These amendments recognized that there were some circumstances making it reasonable to obtain a warrant on oral testimony, particularly if a delay in obtaining the warrant through traditional means might result in the destruction or disappearance of the property, or because of the time when the warrant was sought, the distance from the magistrate judge of the person seeking the warrant, or both. That same reasoning would hold true if someone's apprehension is necessary to avoid flight or protect person or property.

6. What is the Distinction Between a Warrant and a Summons?

Arrest warrants are executed by authorized law enforcement officers, and involve taking the defendant into custody. A summons may be served by any person. It involves delivering a copy of the summons to the defendant or the defendant's house, or by mailing a copy to the defendant's last known address. Unlike a warrant, it does not authorize the incarceration of the defendant prior to the court appearance, but commands the defendant to appear. If a defendant fails to appear in response to a summons, a warrant may issue.

7. Criminal Law Committee Response to *Vargas-Amaya*

James Ishida solicited a view from the Criminal Law Committee staff on the issue. They report that after the *Vargas-Amaya* opinion, the national forms were reviewed and slight revisions made. Those National forms, copies of which are attached, added a block for the officer to sign under penalty of perjury.

8. Have the Probation or Pretrial Service Offices Addressed the Issue in Forms

See Item 7, the National forms have been revised , as stated above, and these are in use by the Probation Office. I think it is important to point out that while 18 U.S.C. § 3606 does provide the probation officer with authority to arrest, as a matter of policy, probation officers are discouraged from using their arrest authority, since they do not have the necessary training, equipment and support to safely execute the arrest. The Guide To Judiciary Policies and Procedures, Vol. 10, Chapter 4, Part C(10) specifically provides:

10. Arrest.

The probation officer is authorized by statute to arrest an offender with or without a warrant if there is probable cause to believe the offender has violated a condition of supervision. 18 U.S.C. § 3606. Unless otherwise directed by the court, probation officers are discouraged from using their arrest authority since they may not have the necessary training, equipment, and support to safely execute the arrest.

The concept expressed in the Guide is also restated in the Office of Probation and Pretrial Services Monograph 109. Chapter 5 of the Monograph is attached as Exhibit B.

Monograph 109 also indicates the need to provide evidence supporting requests for arrest warrants adhering to probable cause standards or higher.

Susan Bucklew
Richard Tallman
August 30, 2007
Page 136

9. Amendments Limit Current Authority for a Warrantless Arrest?

As noted under the previous item, neither the judiciary nor the probation office advocates the use of a probation officer's arrest authority. Certainly, any amendments can be clear that they offer procedural guidance, but do not restrict the probation officer's authority by law. The reality is, however, that the stated judicial policy in favor of warrants supports the need to have guidance in the federal rules.

In light of the questions posed, and the information collected to date, I have redrafted my proposals, as indicated on page 1 of this memorandum. I hope this supplemental information assists the Committee in its deliberations on proceeding in this regard.

Respectfully submitted,

Anthony J. Battaglia

EXHIBIT A

United States District Court

Southern District Of California
U.S. Courts Building
940 Front Street
Room 1145
San Diego, California 92101-8927

Anthony J. Battaglia
United States Magistrate Judge

Phone: (619) 557-3446
Fax: (619) 702-9988

MEMORANDUM

TO: Judge Bucklew

CC: Sara Sun Beale and John Rabiej

FROM: Judge Battaglia

RE: Possible Amendments to Rule 32.1 and 46

DATE: October 5, 2006

A colleague called me recently searching for procedural guidance on the procedure required for the issuance of an arrest warrant for alleged violations of supervised release conditions. As demonstrated below, there is no current procedural rule addressing the issue, and in fact there is a "gap" in our constellation of rules relative to warrants and charging documents.

I did an informal survey of the judges serving on the Federal Magistrate Judge Association Board of Directors and the judges serving on the Executive Board of the Ninth Circuit Magistrate Judges. I have the pleasure of serving on both. Those judges feel that procedural guidance would be very useful. In fact, they pointed out that "we have same problem" associated with warrants for alleged violation of pretrial release conditions.

Rules 3 (complaint), 4 (warrant on a complaint), 9 (warrant on indictment or information), and 41 (search warrants), respectively, specify the necessary documentation and

“showing” associated with the issuance of charging documents as well as warrants. They specify the necessary “written statement of essential facts constituting the offense charged . . . under oath . . .” Fed. R. Crim. P. 3, “one or more affidavits . . . establish probable cause” Fed. R. Crim. P. 4 and 9; or, “affidavit,” Fed. R. Crim. P. 41(d)(2) required to obtain a warrant. There are no counter-parts for issuing a warrant, and none of the existing rules are broad enough to address warrants for proceeding in these circumstances.

I am therefore writing to propose amendments to Rules 32.1 and 46, respectively, and would ask that this matter be placed on the October, 2006 or April 2007 Agenda (as you determine best) for the committee’s review.

EXHIBIT A

As most judges will attest, in the normal course, petitions are brought by probation officers for the issuance of a warrant for alleged violation of probation or supervised release conditions. Probation officers and pre-trial services officers bring similar petitions related to pre-trial release conditions. These will be addressed separately below.

Probation and Supervised Release Violation Warrants

I would propose a new paragraph (a) to Rule 32.1 to address this issue. Language could be similar to the following:

(a) **The Issuance of a Warrant.** After receiving an affidavit from a probation officer or an attorney for the government, a federal judge may issue a warrant to a person authorized to serve it, if there is probable cause to believe that a person has violated a condition of probation or supervised release. The judge may alternatively issue a summons, instead of a warrant, to a person authorized to serve it.

(a)(b) **Initial Appearance.** . . .

This amendment would then require relettering of the subparagraphs that follow.

Discussion

Currently, Rule 32.1 starts with “a person held in custody.” Fed. R. Crim. P. 32.1(a). The predicate procedure to the arrest is absent. This amendment would satisfy a need for procedural guidance in seeking arrest warrants for proceedings under Fed. R. Crim. P. 32.1. As noted above, procedural guidance is provided for search warrants, complaints, arrest warrants on

complaints, and arrest warrants on information. All require a finding of probable cause upon oath or affirmation, which is consistent with the Warrant Clause of the Fourth Amendment. See also, *United States v. Piccard*, 207 F.2d 472, 475 (9th Cir. 1953) (noting the Warrant Clause secures an individual's right "to be protected against the issuance of warrant for his arrest, except upon probable cause supported by oath or affirmation"). See also *ex parte Burford*, 7 U.S. (3 Cranch) 448, 453, 2 L. Ed. 495 (1806) ("warrant of commitment was illegal, for want of stating some good cause certain, supported by oath").

The proposed amendment would be consistent with 18 U.S.C. § 3606,²⁴ which requires probable cause, 18 U.S.C. § 3606, however lacks procedural specificity. The amendment would also conform to current practice as stated above. Finally, this would also be consistent with the "warrant or summons" requirement of 18 U.S.C. § 3565(c) for delayed revocation of probation, as well as 18 U.S.C. § 3583(i), dealing with delayed revocation of supervised release. That section provides that a court ordered summons issued during the term of supervised release, extends the Court's jurisdiction to revoke beyond the expiration of the term. One court has recently concluded that the "warrant" mentioned in § 3583(i) must be based on a sworn statement establishing probable cause. *United States v. Vargas-Amaya*, 389 F.3d 901 (9th Cir. 2004).

EXHIBIT A

The use of the term "affidavit" is used intending the interpretation supplied by 28 U.S.C. § 1746.²⁵ In that regard, a declaration under penalty of perjury would suffice. In the normal course, these applications or petitions are signed under penalty of perjury. This interpretation and practical use has been upheld in *United States v. Bueno-Vargas*, 383 F.3d 1104 (9th Cir. 2004).

The proposed amendment is stated in permissive language, in the event the judge wants to take action other than the issuance of a warrant. The wording acknowledges the judges ability to issue a summons, instead of a warrant, similar to Rule 4. Rule 4 distinguishes a summons from a warrant in that "it must require the defendant to appear before a magistrate judge at a stated time and place" as opposed to being a subject of an arrest. (See, Fed. R. Crim. P. 4(b)(2).)

²⁴ "If there is probable cause to believe that a probationer or a person on supervised release has violated a condition of his probation, he may be arrested, and, upon arrest shall be taken without unnecessary delay before the court having jurisdiction over him. . ."

²⁵ "Wherever . . . any matter is required or permitted to be supported, evidenced, established or proved by the sworn declaration, verification, certificate, statement, oath or affidavit in writing of the person making the same . . . such matter may, with like force and effect, be supported, evidenced, established or proved by the unsworn declaration, certificate, verification or statement in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, . . ."

Additionally, the amendment would not preclude the Court's ability to *sua sponte* initiate proceedings based on information acquired from any source. *U.S. v. Davis*, 151 F.3d 1304, 1307-08 (10th Cir 1998).

In practice, there are occasions where the judge will choose to take no action beyond recommending the probation officer to continue to monitor and report if the suspect's conduct continues. The judge might otherwise chose a summons over a warrant under a particular set of circumstances. Leaving this in a permissive form would preserve that discretion and flexibility. In a mandatory form, then in every instance, where probable cause is shown, a warrant would have to issue. That may be the practice of many judges individually, but allowing for variation would appear consistent for judges who might have different local or personal practice.

Pre-trial Release Violation Warrants

Warrants for an alleged violation of a condition of pre-trial release are covered by 18 U.S.C. § 3148(b). This section provides in pertinent part:

The attorney for the government may initiate a proceeding for revocation of an Order of Release by filing a motion with the district court. A judicial officer may issue a warrant for the arrest of person charged with violating a condition of release, and the person shall be brought before a judicial officer in the district in which such persons arrest was ordered for a proceeding in accordance with this section.

There is no reference in the statute to the procedural requirements upon which the warrant should be supported. Additionally, in practice, probation officers or pre-trial services officers typically apply for the warrants. Clearly, probable cause would be the legal standard. I would therefore, recommend an amendment to Rule 46²⁶ as follows:

EXHIBIT A

(f) Issuance of a Warrant on a Violation. After receiving an affidavit from an attorney for the government, a probation officer or a pretrial services officer, a federal judge may issue a warrant if there is probable cause to believe that a person has violated a condition of pretrial release. The judge may alternatively issue a summons, instead of a warrant.

²⁶ Rule 46 covers release from custody, generally, including a reference to pre-trial release [Fed. R. Civ. P. 46(a)] but does not address pre-trial release violations. This would seem to be the logical place for the proposed amendment.

If adopted, this would require relettering current section (f), and those that follow for consistency. This amendment would make clear that current practice experience, that probation officers and pre-trial services officers bring forth the applications for these warrants. It also confirms the need to establish probable cause in a trustworthy format. In this case, the format would again be the "affidavit" as is interpreted in 28 U.S.C. § 1746. By retaining the ability of the "attorney for the government" to proceed, the rule would be consistent with current 18 U.S.C. § 3148(b) in that regard.

I trust that this brief summary adequately addresses the issue and a potential solution that would serve as a basis for discussion by the Advisory Committee on Criminal Rules.

EXHIBIT B

The Supervision of Federal Offenders, Monograph 109
Office of Probation and Pretrial Services
Administrative Office of the United States Courts
Revised March 2007

Chapter V-Managing Noncompliant Behavior, Revocation Procedures, Page 18

Commencing Action by Warrant for Arrest

Prior to requesting issuance of an arrest warrant, the officer must fully investigate and document the alleged violation(s). If, however, the defendant poses an imminent danger to himself or others so as to require immediate action, a warrant may be requested prior to obtaining complete documentation.

Officers should request an arrest warrant to initiate revocation proceedings when any of the following circumstances are present:

- * the offender has absconded from supervision;
- * the offender's presence in the community poses a danger to others;
- * the offender poses a risk of nonappearance; or
- * the offender has failed to respond to a previous summons.

Probation Form 19, the warrant for arrest of probationer or supervised releasee, is issued by the court, filed with the clerk's office and transmitted to the United States marshal for execution. A copy of Probation Form 12C should be attached to the warrant so that it may be given to the alleged violator at the time of arrest. For offenders who have absconded, officers are also to complete Probation Form 20, "Personal History of Absconder," immediately upon issuance of a warrant to assist the U.S. marshal in executing the warrant.

The evidence supporting requests for an arrest warrant should adhere to the probable cause standard or higher. [See V - 16 for a definition of probable cause.]

Warrantless Arrest

Although 18 U.S.C. § 3606 provides that a probation officer may initiate a revocation proceeding by warrantless arrest without the prior filing of a petition for court action, such a procedure is not authorized by the Judicial Conference Committee on Criminal Law. Offenders are conditionally released by the court, and the officer must always use the warrant or summons process to commence revocation proceedings. Officers do not have the training, equipment, or support to execute an arrest safely.

UNITED STATES DISTRICT COURT

for

Petition for Warrant or Summons for Offender Under Supervision

Name of Offender: _____ Case Number: _____

Name of Sentencing Judicial Officer: _____

Date of Original Sentence: _____

Original Offense: _____

Original Sentence: _____

Type of Supervision: _____ Date Supervision Commenced: _____

Assistant U.S. Attorney: _____ Defense Attorney: _____

PETITIONING THE COURT

- To issue a warrant
- To issue a summons

The probation officer believes that the offender has violated the following condition(s) of supervision:

<u>Violation Number</u>	<u>Nature of Noncompliance</u>
-------------------------	--------------------------------

U.S. Probation Officer Recommendation:

- The term of supervision should be
 revoked.
 extended for _____ years, for a total term of _____ years.
- The conditions of supervision should be modified as follows:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____

U.S. Probation Officer

THE COURT ORDERS:

- No action.
 The issuance of a warrant.
 The issuance of a summons.
 Other

Signature of Judicial Officer

Date

UNITED STATES DISTRICT COURT

for

Request for Summons and Modification of the Conditions or Term of Supervision

Name of Offender: _____ Case Number: _____

Name of Sentencing Judicial Officer: _____

Date of Original Sentence: _____

Original Offense: _____

Original Sentence: _____

Type of Supervision: _____ Date Supervision Commenced: _____

PETITIONING THE COURT

The offender, not having waived a hearing, the probation officer requests that a summons be issued and hearing held to modify the conditions of supervision as follows:

CAUSE

The probation officer believes that the action requested above is necessary for the following reasons:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: _____

U.S. Probation Officer

THE COURT ORDERS:

No action.

The issuance of a summons.

Other: _____

Signature of Judicial Officer

Date

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: September 5, 2007

DATE: Rule 15

As indicated in the attached letter to Judge Tallman, the Department of Justice proposes amending Rule 15 to permit the deposition of a witness outside the *physical* presence of the defendant under limited circumstances.

This is a revised version of a proposal presented for discussion purposes at the Advisory Committee's October 2006 meeting on Amelia Island. The portion of the minutes from that meeting dealing with the earlier proposal are provided following the Department's letter explaining its proposal.

This item is on the agenda for the October meeting in Park City.



U.S. Department of Justice

Criminal Division

Office of Policy and Legislation

Washington, D.C. 20530

September 7, 2007

The Honorable Richard C. Tallman
Chair, Advisory Committee
on the Criminal Rules
United States Court of Appeals
Park Place Building, 21st Floor
1200 Sixth Avenue
Seattle, Washington 98101

Dear Judge Tallman:

In October 2006, the Department of Justice recommended that Rule 15 of the Federal Rules of Criminal Procedure be amended to permit depositions of government witnesses without the defendant's physical presence in extraordinary cases where (1) the witness' attendance at trial cannot be secured because, for example, she is overseas, (2) it is not possible for the defendant to travel to the witness, and (3) the defendant can nonetheless meaningfully participate in the deposition. We subsequently asked the Committee to defer consideration of the proposal as we considered additional refinements to the proposal to address both practical and constitutional issues. With this letter, we are submitting an amended proposal, and we ask that the Advisory Committee begin consideration of the proposal at its October 2007 meeting.

As we indicated in 2006, as part of Department's efforts to prosecute transnational crimes, we have found, with some frequency, that critical witnesses live in, or have fled to, countries where they cannot be reached by the government's subpoena power. Although Rule 15 permits depositions of witnesses in certain circumstances, the current Rule does not specifically address cases where an important witness is not in the United States and where it would be impossible to securely transport the defendant to the witness's location for a deposition.

Recognizing that there are both important witness confrontation principles involved in such cases as well as vital law enforcement and public safety interests, we believe the Rule should be amended to authorize a deposition outside of the defendant's physical presence only in very limited circumstances. We recommend an amendment to Rule 15(c) that delineates these circumstances and the specific findings a trial court must make before permitting parties to depose a witness outside the defendant's presence. We recommend the following changes to the Rule:

“(c) Defendant’s Presence.

“(1) Defendant in Custody. Except as provided in paragraph (3), the officer who has custody of the defendant must produce the defendant at the deposition 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. Except as provided in paragraph (3), a defendant who is not in custody has the right upon request to be present at the deposition, 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.¹

“(3) Limited Authority to Hold Depositions Outside the Defendant’s Presence.

“(A) Government Witnesses. A deposition of a government witness may take place without the defendant’s physical presence if the court makes case-specific findings of all of the following: (i) the deposition involves a witness whose testimony could provide substantial proof of a material fact; (ii) there is no ability to secure the witness’ attendance at trial; (iii) the secure transportation to and continuing custody of an in-custody defendant at the witness’s location cannot be assured, no reasonable set of conditions will assure an out-of-custody defendant’s appearance at the deposition or thereafter at trial or sentencing, or the country in which the witness is located will not permit the defendant to attend the deposition; and (iv) reasonable means will permit the defendant to meaningfully participate in the deposition.

“(B) Defense Witnesses. The defendant has no right to be present at a deposition of a defense witness that takes place outside the United States.

The proposed amendment requires the trial court to make case-specific findings that the testimony sought would provide substantial proof of a material fact and that there are reasons why the witness cannot travel to testify at trial and why the defendant cannot be brought to the

¹We also recommend the Committee Note include language that makes clear that the new requirements of unavailability and materiality in subsection (c) should not be read in any way to affect the threshold requirement in subsection (a) of “exceptional circumstances” that make a deposition “in the interests of justice.”

witness. Several courts of appeals have authorized depositions of foreign witnesses without the defendant being present in these 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.*²

²In a First Circuit case, a British witness refused to come to the United States to testify at trial, and the defendant could not be securely transported to the United Kingdom because the British authorities refused to take him into temporary custody and the U.S. Marshals Service lacked the authority to do so abroad. *United States v. McKeeve*, 131 F.3d 1, 7 (1st Cir. 1997). When the deposition took place in the U.K., the defendant in the U.S. was equipped with two telephone lines to listen to the proceedings and to consult with his attorney, respectively. *Id.*

We believe the Rule should be amended to explicitly authorize the deposition of overseas witnesses without the defendant's presence in appropriate and limited circumstances to establish a uniform and proper means for obtaining witness testimony from overseas witnesses. For example, in *United States v. Yates*, 438 F. 3d 1307 (11th Cir. 2006), in a case charging defendants with various prescription-drug-related offenses arising from their involvement in an Internet pharmacy, the government sought the testimony of two essential witnesses in Australia, a processor of customer Internet payments and a doctor whose name defendants used on Internet drug prescriptions. After both witnesses refused to travel to the United States, the district court granted the government's motion to permit them to testify via live, two-way video teleconferencing that permitted the defendants, judge, and jury to see the witnesses and the witnesses to see the courtroom.

On appeal, the Eleventh Circuit, sitting *en banc*, held that obtaining trial testimony of these foreign witnesses through video teleconferencing violated the Confrontation Clause of the Sixth Amendment by failing to meet the "considerations of public policy and the necessities of the case" standard that warrants a departure from face-to-face confrontation. *Yates*, at 1312 (quoting *Maryland v. Craig*, 497 U.S. 836, 849 (1990)), 1316. The court held that the trial judge's dual findings that the government had asserted an important public policy of providing the fact-finder with crucial evidence and that the government had an interest in expeditiously and justly resolving the case were "not the type of public policies that are important enough to outweigh the Defendants' rights to confront their accusers face-to-face." *Id.* at 1316. *Craig* required case-specific findings based on an evidentiary record that explained why the defendant could not be placed in the same room as the witnesses.

In remanding the case for retrial, the court indicated that Rule 15 depositions would be a satisfactory alternative to video teleconferencing, since the rule provided for the defendant's presence. In addressing the government's observation that Rule 15 depositions occasionally occur outside the defendant's presence, the panel acknowledged that there may be the "rare, exceptional case" where a defendant is absent, but, only where there is "evidentiary support for a case-specific finding that the witnesses and Defendants could not be placed in the same room for the taking of pre-trial deposition testimony pursuant to Rule 15." *Yates* at 1317. The Eleventh Circuit previously upheld such a deposition in a case where the defendant listened to the live deposition of a foreign witness through a telephone line and was able to consult with his lawyer during the proceeding. *United States v. Mueller*, 74 F.3d 1152, 1157 (11th Cir. 1996).

We believe the proposal addresses the constitutional requirements underlying the Eleventh Circuit's discussion in *Yates* as well as the Supreme Court's rejection, in 2002, of this Committee's proposal to amend Rule 26. The 2002 proposed amendment would have permitted

The court found that when "a foreign nation effectively preclude[s] the defendant's presence, furnishing the defendant with the capability for live monitoring of the deposition, as well as a separate (private) telephone line for consultation with counsel, usually will satisfy the demands of the Confrontation Clause." *Id.* at 8.

a court to receive the video transmission of an absent witness if certain conditions were met. In a statement accompanying the Court’s 2002 decision on Rule 26, Justice Scalia noted that “[i]n *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 *Craig* to testify via one-way video transmission because doing so had been found “necessary to protect a child witness from trauma.” *Id.* at 857. Justice Scalia noted that the amendment to Rule 26 “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.’” The current proposal, on the other hand, requires precisely the case-specific findings the Court in *Craig* – and in the 2002 statement – demanded.

We believe the proposal warrants timely and thorough consideration by the Advisory Committee, as it relates to a significant and growing concern. As the district court noted in the *Yates* case, “in today’s world of the Internet and increasing globalization, more and more situations will arise in which witnesses with material knowledge are beyond the subpoena power of the Court.” *Id.* at 1316, fn. 7. Moreover, we believe the proposal embodies an appropriate balance of defendant rights with the need to obtain material witness testimony from persons beyond the subpoena power of the United States. As we describe above, appellate courts examining the issue have authorized depositions of such witnesses without the defendant’s presence in certain limited circumstances. These ruling are consistent with the recent Supreme Court decisions on the Confrontation Clause, including *Crawford v. Washington*, 541 U.S. 36 (2004), in that the depositions occurred only when the witnesses were unavailable and only where the defendant had an opportunity to cross-examine. *Id.* At 59. We are asking the Committee to codify the rulings of these courts and to explicitly authorize these depositions.

We look forward to working with the Committee on this proposal.

Sincerely,



Jonathan J. Wroblewski
Director, Office of Policy and Legislation



Kathleen Felton
Deputy Chief, Appellate Section

cc: Professor Sara Sun Beale
Mr. John Rabiej

ADVISORY COMMITTEE ON CRIMINAL RULES

MINUTES

October 26-27, 2006
Amelia Island, Florida

* * * *

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

The committee discussed the Department's proposal to amend Rule 15 to permit deposition of a witness outside the defendant's *physical* presence under limited circumstances. Because the proposed amendment had come in relatively late, Judge Bucklew explained, it was only being brought to the committee's attention for informational purposes. She said that John Rabiej had noted that the committee had worked for several years on a similar proposal that would have allowed the court to authorize video testimony from a different location under certain circumstances. That proposed Rule 26 amendment had been approved by the Standing Committee and the Judicial Conference, but rejected by the Supreme Court in 2002. In an opinion criticizing the proposal, Justice Scalia had quipped, "Virtual confrontation might be sufficient to protect virtual constitutional rights." Judge Bucklew advised the committee to bear these concerns in mind as it weighed this new proposed amendment.

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

Justice Edmunds asked whether the phrase "meaningfully participate" was a term of art in federal law. Mr. Wroblewski said no and explained that, although the proposed rule mentions "video teleconferencing" as the model, it was designed to include "other reasonable means" as long as the court found that they would "permit the defendant to meaningfully participate in the deposition."

Ms. Brill suggested that Justice Scalia might consider video teleconferencing more “meaningful participation” than participation via older technologies, such as telephone or facsimile. Professor King noted that the case law on the right to counsel indicated that the defendant had to be afforded the means to communicate confidentially with counsel when physically separated from his or her attorney during these types of proceedings.

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

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

* * * *

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Time Computation – Statutory Provisions

DATE: September 5, 2007

During the public comment period on the proposed amendment to Rule 45 (which introduces a new method of time computation) and related proposals adjusting the time periods in individual rules, the Committee has been asked to move forward with a related phase of the time computation project: the identification of a small number of statutory time periods that it would be critical to amend if the new time computation rules are adopted.

The goal is to apply the new time computation methods to all statutory time periods as well as the time periods contained in the Criminal, Civil, Bankruptcy, and Appellate rules, seeking legislation to revise the statutory periods for which the new “days are days” method of counting (which does not exclude weekends and holidays) would cause significant problems.

The attached memorandum from the Department of Justice responds to the request that the Department identify the statutory time periods it sees as posing the greatest concern in the criminal context. As noted in the Department’s memorandum, its list is preliminary, rather than final, and is provided for the purpose of discussion in the Advisory Committee.

I anticipate that at its April meeting the Advisory Committee will be asked to (1) approve and recommend adoption of the amendment to Rule 45 and the accompanying rules, with changes as needed to respond to the public comments, and (2) approve of a list of key criminal statutes that the Committee recommends be revised in conjunction with the amended time computation rules.

This item is on the agenda for the October meeting in Park City.

MEMORANDUM

TO: Professor Sara Sun Beale
Reporter, Advisory Committee on the Criminal Rules

FROM: Jonathan J. Wroblewski
Director, Office of Policy and Legislation

Kathleen Felton
Deputy Chief, Appellate Section

SUBJECT: Pending Time-Computation Rules Amendments

DATE: September 5, 2007

As you know, while the Department of Justice generally supports the ongoing time-computation project, we remain concerned about the interplay of the proposed rules amendments with both existing statutory time periods and local rules. In a letter earlier this year to Leo Cunningham, the Chair of Time-Computation Subcommittee, we indicated that we thought it would be inappropriate for the proposed amendment to Rule 45 of the Federal Rules of Criminal Procedure to go forward without ensuring that coordinated and compensating changes are made to existing statutory and local rule time periods of less than 11 days. Just as the pending amendments to the Criminal Rules would lengthen many time periods in the Rules of less than 11 days to compensate for the proposed change in the time-computation rule, so similar changes ought to be considered in relevant statutory and local rule provisions before the new time computation rule is made applicable to these provisions.

If the proposed amendment is enacted without adjusting the relevant statutes, we believe (1) the purposes and policies underlying at least some of the relevant statutes may be frustrated and (2) litigants, government lawyers and agencies, and the courts themselves will face confusion, non-culpable procedural errors, and undue hardship that would otherwise be avoidable. The recent Supreme Court decision in *Bowles v. Russell*, 551 U.S. ___, 127 S.Ct. 2360 (2007), is an emphatic reminder that even good faith procedural errors can have dire consequences, regardless of who makes those errors.

As I mentioned to you the other day, the Department has begun to canvass agencies across the federal government in hopes of developing a comprehensive list of statutes that might be affected by the various time-computation amendments currently out for public comment. We hope to have the results of this work before the deadline for public comments on the published amendments.

We have, to date, identified a number of criminal and related statutes that may be materially affected by the proposed Rule 45. Per your request, we are including this list here in order to assist the Committee in its continuing discussion of the impact of the proposed amendments on criminal statutes at the October meeting. As I mentioned to you, the list is preliminary, and we hope to have a final, comprehensive list for the spring meeting. We believe each of the listed statutes should be reviewed by the Committee to determine how it would be affected by the proposed Rule 45 amendment. We welcome any comments and look forward to discussing these issues with you and the Committee.

- - -

Statutes that provide time frames for courts to complete certain actions:

-18 U.S.C. § 2339B(f)(5)(B)(iii)(I), (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-- **(I)** shall hear argument . . . not later than **4 days** after the adjournment of the trial; **(III)** shall render its decision not later than **4 days** after argument on appeal”

-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. § 3174(d)(1); judicial council’s written report “setting forth in sufficient detail the reasons for granting” a 3174(a) or (c) application must be submitted “within **ten days**” of the application’s approval.

-18 U.S.C. § 3174(e); “within **ten days**” of a temporary suspension of a district’s time limits by that district’s chief judge, “the [district] chief judge shall apply to the judicial council of the circuit for a suspension pursuant to subsection (a).”

-18 U.S.C. § 3552(d); “the court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least **ten days** prior to the date for sentencing”

-18 U.S.C. § 3771(d)(3); a petition for a writ of mandamus in pursuant of the rights described in 18 U.S.C. § 3771(a) shall be taken up and decided by the court of appeals “within **72 hours** after the petition has been filed.”

-18 U.S.C. App. 3 § 7(b)(1); in an appeal pursuant to this 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 this statute, the court of appeals “shall render its decision within **four days** of argument on appeal.”

Statutes that have time restrictions on the time to appeal from a court decision or order:

-18 U.S.C. App. 3 § 7(b) (the Classified Information Procedures Act); an interlocutory “appeal shall be taken within **ten days** after the decision . . . appealed from and the trial shall not commence until the appeal is resolved.”

-28 U.S.C. § 636(b); any 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.

-28 U.S.C. § 1292(b); “if application is made to [the Court of Appeals] within **ten days** after the entry of [an interlocutory] order . . .” in a civil action, the Court of Appeals may, “in its discretion, permit an appeal to be taken from such order.”

Statutes that place time restrictions on court filings and motions:

-18 U.S.C. § 3509(b)(1)(A); 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.”

-18 U.S.C. § 3771(d); in order for a victim to motion to reopen a plea or sentence is, “the victim [shall] petition[] the court of appeals for a writ of mandamus within **10 days**.”

-18 U.S.C. § 4244(a); a motion for a hearing regarding the mental state of a convicted defendant who hasn’t been sentenced yet must be made “within **ten days** after the defendant is found guilty.”

-28 U.S.C. § 1867(a); “within **seven days** after the defendant discovered or could have discovered . . . the grounds therefor . . . the defendant may move to dismiss the indictment or stay the proceedings against him”

-28 U.S.C. § 1867(b); “within **seven days** after the Attorney General of the United States discovered or could have discovered . . . the grounds therefor . . . the Attorney General may move to dismiss the indictment or stay the proceedings”

Statutes that set time restrictions for giving notice to litigants or other entities:

-18 U.S.C. § 1514(a)(2)(E); “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”

-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.”

-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.”

-18 U.S.C. § 3492(a); “the testimony of any witness in a foreign country may be taken either on oral or written interrogatories . . . after **five days**’ notice in writing by the applicant party . . . to the opposite party” In addition, “selection fo foreign counsel shall be made by the party whom such foreign counsel is to represent within **10 days** prior to the taking of testimony.”

-18 U.S.C. § 3552(d); “the court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least **ten days** prior to the date for sentencing”

-18 U.S.C. § 3612(b)(2); “not later than **ten days** after entry of the judgment or order, the court shall transmit a certified copy of the judgment or order to the Attorney General.”

-18 U.S.C. § 4114(a); if an offender is transferred to the United States in violation of United States laws or treaties, “the offender may be returned to the country from which he was transferred to complete the sentence” if that country requests the offender’s return, provided that “the Attorney General . . . notify the appropriate authority of the country . . . within **ten days** of a final decision of a court of the United States ordering the offender released.”

Statutes that place time restrictions on government actions:

-18 U.S.C. § 2518(5); an order authorizing interception of “wire, oral, or electronic communication” begins “on the earlier of the day on which the investigating or law enforcement officer first begins to conduct an interception under the order, or **ten days** after the order is entered.”

-18 U.S.C. § 2518(7)(b); any investigative or law enforcement officer authorized under this subsection “may intercept . . . wire, oral, or electronic communication if an application for an order approving the interception is made . . . within **forty-eight hours** after the interception has occurred, or begins to occur.”

-18 U.S.C. § 2704(a); requirements for acquiring stored electronic communications include “notice to the subscriber or customer” which “shall be made by the governmental entity within **three days** after receipt of such confirmation.”

-18 U.S.C. § 3125(a)(2); any investigative or law enforcement officer authorized under this subsection “may have installed and use a pen register or trap and trace device if, within **forty-eight hours** after the interception has occurred, or begins to occur, an order approving the installation or use is issued.”

-18 U.S.C. §3161(h)(1)(H); “delay resulting from transportation of any defendant” is not included in computing some specified time requirements unless transportation “time consumed [is] in excess of **ten days** from the date [of] . . . an order directing such transportation.”

-18 U.S.C. § 3664(d)(5); the government shall inform the court “if the victim’s losses are not ascertainable by the date that is **10 days** prior to sentencing.”

-18 U.S.C. § 4246(g); if the director of a facility certifies that a patient who is under the Attorney General’s custody has a mental condition and that “release would create a substantial risk of bodily injury” to others, the individual shall nevertheless be released from the facility and the Attorney General’s custody “not later than **ten days** after” said certification by the facility director unless federal charges are pending or a valid State (as determined by this statute) is willing to accept custody of the person and initiate civil commitment proceedings.

Statutes that place time restrictions on non-government parties:

-18 U.S.C. § 607(b); political contributions received by officials’ staff members inside “a room or building occupied in the discharge of official duties by an officer or employee of the United States” must be “transferred within **seven days** of receipt to a political committee.”

-28 U.S.C. § 1864(a); a juror qualification form shall be filled out, signed, sworn, and returned “to the clerk or jury commission by mail within **ten days**.”

Statutes that place time restrictions on temporary restraining orders:

-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.”

-18 U.S.C. § 3771(d)(3); proceedings by a court of appeals on a petition for a writ of mandamus regarding a victim’s asserted rights shall not “be stayed or subject to a continuance of more than **five days**.”

-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.”

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Proposed Amendment to Rule 32(i)(1)(A)

DATE: September 3, 2007

As discussed more fully in his letter, which is attached, Judge Ernest Torres has suggested that an amendment to Rule 32(i)(1)(A) may be desirable in order to prevent an impasse at the sentencing stage if a defendant declines to read the presentence report.

As far as I can determine, there have been no cases in which such an impasse has arisen. Rather, the concern is that the language of the current rule could pose such a problem if read literally.

This item is on the agenda for the October meeting in Park City.

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND
UNITED STATES COURTHOUSE
ONE EXCHANGE TERRACE
PROVIDENCE, RHODE ISLAND 02903

ERNEST C. TORRES
CHIEF JUDGE

October 23, 2006

Honorable Susan C. Bucklew
United States District Court
1430 Sam M. Gibbons
United States Courthouse
801 North Florida Avenue
Tampa, FL 33602

Dear Susan:

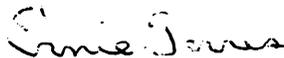
Until 1995, the Federal Rules of Criminal Procedure provided that, at the time of sentencing, the Court was required to "determine that the defendant and defendant's counsel have had the opportunity to read and discuss the Presentence Investigation Report." [emphasis added]. However, in 1995, that language was changed and, what is now Rule 32(i)(1)(A) requires that the Court "must verify that the defendant and the defendant's attorney have read and discussed the Presentence Report."

I am unable to find any indication in the Committee notes indicating the reason for that change. To the extent that the current language indicates that a defendant cannot be sentenced unless he actually has read the report and discussed it with counsel, I suspect that the change in wording may have unintended consequences. As presently worded, the rule may be construed in a way that would permit a defendant to prevent sentencing by unilaterally refusing to read the report or discuss it with counsel. That, of course, was not the case under the prior version which required, only, that the defendant be afforded an opportunity to do so.

I would like to suggest that the Committee review the rule and consider restoring the original language in order to avoid any confusion.

Thank you for your consideration.

Sincerely yours,



Ernest C. Torres
Chief Judge

ECT:dms
cc: Hon. Mark Wolf

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Indicative Rulings

DATE: September 6, 2007

Two proposed rules that were approved in June by the Standing Committee for publication create a mechanism for obtaining “indicative rulings.” The indicative rulings project presently involves the Civil and Appellate Rules. Provided below are (1) Professor Catherine Struve’s report describing the project, (2) the pertinent portions of the reports from the Appellate Rules Committee and the Civil Rules Committee approving the proposed rules, and (3) the proposed rules.

Proposed Civil Rule 62.1 establishes procedures facilitating the remand of certain post-judgment motions filed after an appeal has been docketed in a case in which the district court indicates that it would grant the motion. Proposed Appellate Rule 12.1 sets out procedures to be followed for motions that the district court cannot grant because an appeal is pending.

Appellate Rule 12.1 was drafted in broad terms that would not limit the existing authority for indicative rulings in any case -- civil, criminal, or bankruptcy. As Professor Struve’s memo explains, there has been some use of indicative rulings in criminal cases. She found one Supreme Court case that recognized indicative rulings in a criminal case, and the local rules of the D.C. and 7th Circuits, which appear to be applicable to criminal cases, provide procedures for indicative rulings. In order to highlight the question whether the rule should be applicable to criminal cases, and to solicit public comment on this point, a reference in the Committee Note to criminal cases was placed in brackets.

The question for discussion is whether the Criminal Rules should be amended to parallel proposed Civil Rules 62.1. We try to be consistent throughout the rules when dealing with the same general issue. In the original submission, however, Solicitor General Seth Waxman proposed an indicative-ruling Appellate Rules amendment applicable only to civil cases, explicitly excluding criminal cases. During its consideration of Waxman’s proposal, the Appellate Rules Committee

discussed at some length excluding habeas corpus cases, but little was said about extending it to or excluding criminal cases. The Appellate Rules Committee ultimately asked the Civil Rules Committee to take the lead in proposing a rule authorizing indicative rulings because most of these actions are initiated in civil cases.

This item was on the agenda for the April meeting in Brooklyn, but was discussion was deferred. It is on the agenda for the October meeting in Park City.

MEMORANDUM

DATE: March 27, 2007
TO: Advisory Committee on Appellate Rules
CC: Reporters and Advisory Committee Chairs
FROM: Catherine T. Struve
RE: Item No. 07-AP-B: Proposed Appellate Rule on indicative rulings

This memo considers possible options for a proposed Appellate Rule 12.1 that would reflect the procedure to be followed when a district court is asked for relief that it lacks authority to grant due to a pending appeal. If the Appellate Rules Committee approves the proposed Rule, the goal would be to seek permission to publish the proposed Rule for comment this summer, along with proposed Civil Rule 62.1.

I. History of the proposal

In March 2000, the Solicitor General proposed that the Appellate Rules Committee consider adopting a new Appellate Rule 4.1 to address the practice of indicative rulings.¹ The Department of Justice argued that a FRAP rule on this topic would promote awareness of the possibility of indicative rulings; would ensure that the possibility was available in all circuits; and would render the relevant procedures uniform throughout the circuits.² The Appellate Rules Committee discussed the proposal at its April 2000 meeting and retained the matter on its study agenda. At the April 2001

¹ See Minutes of the Advisory Committee on Appellate Rules, April 13, 2000.

² See *id.*

meeting, the Committee concluded that the DOJ's proposal should be referred to the Civil Rules Committee, on the ground that any such rule would more appropriately be placed in the Civil Rules.³

At its May 2006 meeting, the Civil Rules Committee approved a recommendation to publish for comment a new Civil Rule 62.1 concerning indicative rulings. Though the Committee decided not to request publication in summer 2006, it reported on the proposal at the Standing Committee's June 2006 meeting; at that meeting, there was some discussion of the placement and caption of the proposed Civil Rule. Further discussion of the proposed Civil Rule took place at the Standing Committee's January 2007 meeting, and the Standing Committee has asked the Appellate Rules Committee to consider adopting an Appellate Rules provision that recognizes the Civil Rule 62.1 procedure. The Standing Committee has asked the Civil and Appellate Rules Committees to coordinate so that the provisions concerning indicative rulings will dovetail and will be published for comment simultaneously. A copy of the current draft of proposed Civil Rule 62.1 is enclosed.

In February 2007, we asked Fritz Fulbruge for his input (and that of his fellow circuit clerks) on the indicative-ruling proposal. His memo – which reports his thoughts and those of the D.C. Circuit and Third Circuit clerks – is attached. Fritz reports that overall the clerks do not seem enthusiastic about the proposed rule, in part because “the appellate courts are satisfied with leaving the issue at rest because of locally developed procedures.” Mark Langer, the D.C. Circuit clerk, states: “I prefer not to have any rule. We handle things pretty well here without a rule.” Despite their doubts about the necessity of a national rule, however, Fritz and the two other clerks who commented on the proposal have provided very helpful insights, which I have attempted to incorporate into this memo and the proposed Rule and Note.

II. Current circuit practices concerning indicative rulings

Ordinarily, “a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).⁴ Thus, in civil cases the pendency of an appeal limits the district court's possible dispositions of a motion for relief from the judgment under Rule 60(b).⁵ The court has three options:

³ See Minutes of the Advisory Committee on Appellate Rules, April 11, 2001.

⁴ See also *In re Jones*, 768 F.2d 923, 931 (7th Cir. 1985) (Posner, J., concurring) (“The purpose of the rule is to keep the district court and the court of appeals out of each other's hair....”).

⁵ By pendency of an appeal, I mean to refer to instances when the notice of appeal has become effective. A Civil Rule 60(b) motion that is filed no later than 10 days after entry of judgment tolls the time for taking an appeal, and a notice of appeal filed before the disposition of

(1) deny the motion,⁶ (2) defer consideration of the motion,⁷ or (3) indicate its inclination to grant

such a motion does not “become[] effective” until the entry of the order disposing of the motion. Appellate Rule 4(a)(4)(B)(i).

⁶ See *Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (1st Cir. 1979) (“[W]hen an appeal is pending from a final judgment, parties may file Rule 60(b) motions directly in the district court without seeking prior leave from us. The district court is directed to review any such motions expeditiously, within a few days of their filing, and quickly deny those which appear to be without merit...”); *Hyle v. Doctor's Assocs., Inc.*, 198 F.3d 368, 372 n.2 (2d Cir. 1999) (“Like most circuits ... , we have recently recognized the power of a district court to deny a Rule 60(b) motion after the filing of a notice of appeal from the judgment sought to be modified, see, e.g., *Selletti v. Carey*, 173 F.3d 104, 109 (2d Cir. 1999); *Toliver v. County of Sullivan*, 957 F.2d 47, 49 (2d Cir. 1992), notwithstanding an earlier contrary authority, see *Weiss v. Hunna*, 312 F.2d 711, 713 (2d Cir. 1963), which had previously been cited with apparent approval, see *New York State National Organization for Women*, 886 F.2d 1339, 1349-50 (2d Cir. 1989); *Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981).”); *United States v. Contents of Accounts Numbers 3034504504 and 144-07143 at Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 971 F.2d 974, 988 (3d Cir. 1992); *Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891 (4th Cir. 1999) (“[W]hen a Rule 60(b) motion is filed while a judgment is on appeal, the district court has jurisdiction to entertain the motion, and should do so promptly. If the district court determines that the motion is meritless, as experience demonstrates is often the case, the court should deny the motion forthwith; any appeal from the denial can be consolidated with the appeal from the underlying order.”); *Karaha Bodas Co. v. Perusahaan Perambangan Minyak Dan Gas Bumi Negara*, No. 02-20042, 2003 WL 21027134, at *4 (5th Cir. 2003) (unpublished per curiam opinion) (“Under the Fifth Circuit's procedure, the appellate court asks the district court to indicate, in writing, its inclination to grant or deny the Rule 60(b) motion. If the district court determines that the motion is meritless, the appeal from the denial is consolidated with the appeal from the underlying order.”); *Kusay v. United States*, 62 F.3d 192, 195 (7th Cir. 1995) (“Many cases, including *United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984), say that a district court may deny, but not grant, a post-judgment motion while an appeal is pending. *Cronin* involved a motion for a new trial under Fed.R.Crim.P. 33, but the principle is general.”); *Hunter v. Underwood*, 362 F.3d 468, 475 (8th Cir. 2004) (“Our case law ... permits the district court to consider a Rule 60(b) motion on the merits and deny it even if an appeal is already pending in this court ...”); *Mahone v. Ray*, 326 F.3d 1176, 1180 (11th Cir. 2003) (“[D]istrict courts retain jurisdiction after the filing of a notice of appeal to entertain and deny a Rule 60(b) motion.”).

The Supreme Court has stated in passing that “the pendency of an appeal does not affect the district court's power to grant Rule 60 relief.” *Stone v. I.N.S.*, 514 U.S. 386, 401 (1995). But a number of courts “have explicitly recognized that the statement in *Stone* is dicta and thus have not modified their similar Rule 60(b) approach.” *Shepherd v. Int'l Paper Co.*, 372 F.3d 326, 331 (5th Cir. 2004) (adopting this view).

the motion and await a remand from the Court of Appeals for that purpose.⁸ The district court's options are further limited within the Ninth Circuit, because that circuit takes the view that the

⁷ Cf. *LSJ Inv. Co. v. O.L.D., Inc.*, 167 F.3d 320, 324 (6th Cir. 1999) (holding that although Sixth Circuit “cases allow the court to entertain a motion for relief even while an appeal is pending, they do not require the court to do so. Once the defendants appealed, it was not erroneous for the district court to let the appeal take its course.”).

Some circuits, however, have suggested that deferral is generally inappropriate. See, e.g., *Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (1st Cir. 1979) (“[W]hen an appeal is pending from a final judgment, parties may file Rule 60(b) motions directly in the district court without seeking prior leave from us. The district court is directed to review any such motions expeditiously, within a few days of their filing, and quickly deny those which appear to be without merit....”).

⁸ See *Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891 (4th Cir. 1999) (“If the district court is inclined to grant the motion, it should issue a short memorandum so stating. The movant can then request a limited remand from this court for that purpose.”); *Karaha Bodas Co., L.L.C. v. Perusahaan Perambangan Minyak Dan Gas Bumi Negara*, No. 02-20042, 2003 WL 21027134, at *4 (5th Cir. 2003) (unpublished per curiam opinion) (“If the district court is inclined to grant the motion, it should issue a short memorandum so stating. Appellant may then move this court for a limited remand so that the district court can grant the Rule 60(b) relief. After the Rule 60(b) motion is granted and the record reopened, the parties may then appeal to this court from any subsequent final order.”); *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 364 (6th Cir. 2001) (“Where a party seeks to make a motion under Fed.R.Civ.P. 60(b) to vacate the judgment of a district court, after notice of appeal has been filed, the proper procedure is for that party to file the motion in the district court. . . . If the district judge was inclined to grant the motion, he or she could enter an order so indicating; and, the party could then file a motion in the Court of Appeals to remand.”); *Kusay v. United States*, 62 F.3d 192, 195 (7th Cir. 1995) (“A district judge disposed to alter the judgment from which an appeal has been taken must alert the court of appeals, which may elect to remand the case for that purpose.”); *Pioneer Ins. Co. v. Gelt*, 558 F.2d 1303, 1312 (8th Cir. 1977) (“If, on the other hand, the district court decides that the motion should be granted, counsel for the movant should request the court of appeals to remand the case so that a proper order can be entered.”); *Mahone v. Ray*, 326 F.3d 1176, 1180 (11th Cir. 2003) (“[A] district court presented with a Rule 60(b) motion after a notice of appeal has been filed should consider the motion and assess its merits. It may then deny the motion or indicate its belief that the arguments raised are meritorious. If the district court selects the latter course, the movant may then petition the court of appeals to remand the matter so as to confer jurisdiction on the district court to grant the motion.”); *Hoai v. Vo*, 935 F.2d 308, 312 (D.C. Cir. 1991) (“[W]hen both a Rule 60(b) motion and an appeal are pending simultaneously . . . the District Court may consider the 60(b) motion and, if the District Court indicates that it will grant relief, the appellant may move the appellate court for a remand in order that relief may be granted.”).

district court lacks power to deny a Rule 60(b) motion while an appeal is pending.⁹ Though the Ninth Circuit thus diverges from other circuits on the question of whether a district court can deny such a motion without a remand, its indicative-ruling procedure seems fairly similar, in other respects, to that in other circuits.¹⁰

Local rules or practices addressing the practice of indicative rulings currently exist in the Sixth,¹¹ Seventh¹² and D.C.¹³ Circuits. I was unable to find local rules or handbook provisions

⁹ See *Smith v. Lujan*, 588 F.2d 1304, 1307 (9th Cir. 1979).

That the Sixth Circuit might take this view is suggested by its statement that the pendency of an appeal deprived the district court of jurisdiction to decide a Rule 60(b) motion. See *S.E.C. v. Johnston*, 143 F.3d 260, 263 (6th Cir. 1998), *abrogated on other grounds by Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 16 (2004).

¹⁰ See, e.g., *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004).

¹¹ Sixth Circuit Rule 45 provides in relevant part:

Duties of Clerks--Procedural Orders

(a) Orders That May be Entered by Clerk. The clerk may prepare, sign and enter orders or otherwise dispose of the following matters without submission to this Court or a judge, unless otherwise directed:

...

(7) Orders granting remands and limited remands for the purpose of allowing the district court to grant a particular relief requested by a party and to which no other party has objected, or where the parties have moved jointly, where such motion is accompanied by the certification of the district court pursuant to *First National Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343 (6th Cir. 1976).

The procedure set by *First National Bank* is as follows: “[T]he party seeking to file a Rule 60(b) motion ... should ... file[] that motion in the district court. If the district judge is disposed to grant the motion, he may enter an order so indicating and the party may then file a motion to remand in this court.” *First Nat’l Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343, 346 (6th Cir. 1976).

¹² Seventh Circuit Rule 57 provides:

Circuit Rule 57. Remands for Revision of Judgment

A party who during the pendency of an appeal has filed a motion under Fed. R. Civ. P. 60(a) or 60(b), Fed. R. Crim. P. 35(b), or any other rule that permits the modification of a final judgment, should request the district court to indicate whether it is inclined to grant the motion. If the district court so indicates, this court will remand the case for the purpose of modifying the judgment. Any

concerning indicative rulings in the other Circuits. The reason may be that, as Fritz reports, the indicative-ruling procedure is not often used; Fritz estimates that in the Fifth Circuit such requests surface only about 30 times per year.

III. Questions to be addressed

It is fairly straightforward to draft a rule that parallels the proposed Civil Rule 62.1. However, a number of questions suggest themselves. This section considers those questions.

Parts III.A. and III.B. observe that the indicative-ruling procedure is also employed in the criminal context and (at least occasionally) in the bankruptcy context. Accordingly, I have drafted the proposed Rule to encompass contexts other than those implicated by proposed Civil Rule 62.1.

Part III.C. discusses the dangers that would arise from an unconditional remand; in particular, such a remand creates the risk that the district court will deny the motion for postjudgment relief and

party dissatisfied with the judgment as modified must file a fresh notice of appeal.

¹³ D.C. Circuit Handbook of Practice and Internal Procedures VIII.E. provides:

E. Motions for Remand (See D.C. Cir. Rule 41(b).)

Parties may file a motion to remand either the case or the record for a number of reasons, including to have the district court or agency reconsider a matter, to adduce additional evidence, to clarify a ruling, or to obtain a statement of reasons. The Court also may remand a case or the record on its own motion.

If the *case* is remanded, this Court does not retain jurisdiction, and a new notice of appeal or petition for review will be necessary if a party seeks review of the proceedings conducted upon remand. See D.C. Cir. Rule 41(b). In general, a remand of the case occurs where district court or agency reconsideration is necessary. See, e.g., *Raton Gas Transmission Co. v. FERC*, 852 F.2d 612 (D.C. Cir. 1988); *Siegel v. Mazda Motor Co.*, 835 F.2d 1475 (D.C. Cir. 1987). By contrast, if only the record is remanded, such as where additional fact-finding is necessary, this Court retains jurisdiction over the case. See D.C. Cir. Rule 41(b).

It is important to note that where an appellant, either in a criminal or a civil case, seeks a new trial on the ground of newly discovered evidence while his or her appeal is pending, or where other relief is sought in the district court, the appellant must file the motion seeking the requested relief in the district court. See *Smith v. Pollin*, 194 F.2d 349, 350 (D.C. Cir. 1952); Fed. R. Crim. P. 33; Fed. R. Civ. P. 60. If that court indicates that it will grant the motion, the appellant should move this Court to remand the case to enable the district court to act. See *Smith v. Pollin*, 194 F.2d at 350.

the movant will have lost the opportunity to challenge the underlying judgment. For this reason, I have added language to the Note urging that a limited remand will often be the preferable course. Part III.C. also considers the choice between requiring an indication that the district court “might” grant the motion and requiring a statement that it “would” grant the motion in the event of a remand.

Part III.D. notes that it may be useful to alert practitioners to the need for a new notice of appeal to challenge any denial of a motion for postjudgment relief; this observation is included in the draft Note. Part III.E. considers the Rule’s reference to an appeal that “has been docketed and is pending,” and discusses whether docketing is the appropriate point of demarcation in this context. Part III.F. discusses which events should trigger a duty to notify the court of appeals, and also considers whether the Rule or Note should address the logistics of communications by the parties and the district court to the court of appeals. Part III.G. lists alternative numbering possibilities for the draft Rule.

A. Should the Appellate Rule encompass remands in criminal cases?

The indicative-ruling process on the criminal side appears to be roughly similar to that envisioned in proposed Civil Rule 62.1. When a new trial motion under Criminal Rule 33¹⁴ is made during the pendency of an appeal, “[t]he District Court ha[s] jurisdiction to entertain the motion and either deny the motion on its merits, or certify its intention to grant the motion to the Court of Appeals, which [can] then entertain a motion to remand the case.” *United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984).¹⁵

¹⁴ Criminal Rule 33(b)(1) explicitly notes the need for a remand before the district court can grant a motion for a new trial: “If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.”

¹⁵ See *U.S. v. Graciani*, 61 F.3d 70, 77 (1st Cir. 1995) (adopting this procedure); *U.S. v. Camacho*, 302 F.3d 35, 36-37 (2d Cir. 2002) (citing *Cronin* and stating that “the district court retains jurisdiction to deny a Rule 33 motion during the pendency of an appeal, even though it may not grant such motion unless the Court of Appeals first remands the case to the district court”); *U.S. v. Fuentes-Lozano*, 580 F.2d 724, 726 (5th Cir. 1978) (per curiam) (“A motion for a new trial may be presented directly to the district court while the appeal is pending; that court may not grant the motion but may deny it, or it may advise us that it would be disposed to grant the motion if the case were remanded. Alternatively, as here, to avoid delay, the appellant may seek a remand for the purpose of permitting the district court fully to entertain the motion.”); *U.S. v. Phillips*, 558 F.2d 363, 363-64 (6th Cir. 1977) (per curiam) (“[T]he proper procedure for a party wishing to make a motion for a new trial while appeal is pending is to first file the motion in the district court. If that court is inclined to grant the motion, it may then so certify, and the appellant should then make a motion in the court of appeals for a remand of the case to allow the district court to so act.”); *U.S. v. Frame*, 454 F.2d 1136, 1138 (9th Cir. 1972) (per curiam) (“By necessary implication, Rule 33 permits a district court to entertain and deny a motion for a new

Under the current rules,¹⁶ a pending appeal affects motions under Criminal Rule 35(a) differently than motions under Rule 35(b). It appears that the district court lacks jurisdiction to modify a final judgment under Rule 35(b)¹⁷ while an appeal from that judgment is pending.¹⁸

trial based upon newly discovered evidence without the necessity of a remand. Only after the district court has heard the motion and decided to grant it is it necessary to request a remand from the appellate court.”); *Garcia v. Regents of Univ. of Ca.*, 737 F.2d 889, 890 (10th Cir. 1984) (per curiam) (“It is settled that under Rule 33 of the Federal Rules of Criminal Procedure a district court may entertain a motion for new trial during the pendency of an appeal, although the motion may not be granted until a remand request has been granted by the appellate court.”).

¹⁶ The caselaw concerning motions under Criminal Rule 35 is complicated because of courts’ readings of a previous version of the Rule. Prior to the enactment of the Sentencing Reform Act of 1984, Rule 35(a) stated that “[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.” Applying that Rule, the Ninth Circuit held that “the trial court retains jurisdiction to correct [a] sentence under Rule 35(a) while [an] appeal is pending.” *Doyle v. U.S.*, 721 F.2d 1195, 1198 (9th Cir. 1983). Congress’s amendment to Rule 35(a), however, led the Ninth Circuit to change its approach and hold that the district court lacked jurisdiction to grant Rule 35(a) relief during an appeal, because the amended Rule 35 provided “that district courts are to ‘correct a sentence that is determined on appeal ... to have been imposed in violation of law, ... upon remand of the case to the court.’” *U.S. v. Ortega-Lopez*, 988 F.2d 70, 72 (9th Cir. 1993).

¹⁷ See, e.g., *U.S. v. Campbell*, 40 Fed.Appx. 663, 664 (3d Cir. 2002) (nonprecedential opinion) (“After the filing of the original notice of appeal, this Court assumed exclusive jurisdiction over the subject matter of the appeal . . . , and the District Court lost jurisdiction to consider a Rule 35 motion. . . . It was for that reason that the parties . . . sought a summary remand to the District Court to permit disposition of the government’s motion.”); *U.S. v. Bingham*, 10 F.3d 404, 405 (7th Cir. 1993) (per curiam) (“Where a party moves for sentence reduction under Rule 35(b) during the pendency of an appeal, it must request that the district court certify its inclination to grant the motion. If the district court is inclined to resentence the defendant, it shall certify its intention to do so in writing. The government (or the parties jointly) may then request that we remand by way of a motion that includes a copy of the district court’s certification order.”).

¹⁸ This approach accords with the view expressed by the Supreme Court prior to the adoption of the Criminal Rules. See *Berman v. U.S.*, 302 U.S. 211, 214 (1937) (“As the first sentence was a final judgment and appeal therefrom was properly taken, the District Court was without jurisdiction during the pendency of that appeal to modify its judgment by resentencing the prisoner.”).

Appellate Rule 4(b), however, explicitly provides that the district court may correct a sentence under Rule 35(a) despite the pendency of an appeal.¹⁹

Two of the three circuits that have provisions addressing indicative rulings address them in the criminal as well as civil context: The Seventh Circuit's rule addresses motions to reduce a sentence under Criminal Rule 35(b), while the D.C. Circuit's Handbook addresses motions for a new trial based on newly discovered evidence under Criminal Rule 33. As noted above, the current draft Rule is drafted so as to encompass the criminal context; and the Note refers to the procedure described in *Cronic*.

B. Should the Appellate Rule encompass remands in bankruptcy cases?

Ordinarily, appeals from bankruptcy court decisions are taken to the district court,²⁰ or to a bankruptcy appellate panel where such a panel exists.²¹ Such appeals are governed by Part VIII of the Bankruptcy Rules.²² Final decisions on such appeals are appealable, in turn, to the Court of

¹⁹ Rule 35(a) provides that “[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.” Rule 4(b)(5) provides in part: “The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.” The brevity of Rule 35(a)’s 7-day deadline helps to avoid scenarios in which the district court and court of appeals are both acting with respect to the same judgment. *Cf.* 1991 Advisory Committee Note to Rule 35 (“The Committee believed that the time for correcting such errors should be narrowed within the time for appealing the sentence to reduce the likelihood of jurisdictional questions in the event of an appeal and to provide the parties with an opportunity to address the court’s correction of the sentence, or lack thereof, in any appeal of the sentence.”).

²⁰ See 28 U.S.C. § 158(a).

²¹ See 28 U.S.C. § 158(b).

²² See Bankruptcy Rule 8001 et seq.; see also Bankruptcy Rule 8018(a)(1) (“Circuit councils which have authorized bankruptcy appellate panels pursuant to 28 U.S.C. § 158(b) and the district courts may, acting by a majority of the judges of the council or district court, make and amend rules governing practice and procedure for appeals from orders or judgments of bankruptcy judges to the respective bankruptcy appellate panel or district court consistent with—but not duplicative of—Acts of Congress and the rules of this Part VIII.”).

Appeals,²³ and the Appellate Rules apply to the proceedings in the Court of Appeals.²⁴ The intermediate step may be bypassed – and an appeal taken directly the Court of Appeals from a bankruptcy court decision – if the requirements of 28 U.S.C. § 158(d)(2) are met.²⁵ Under the temporary procedures that currently govern such direct appeals, the Appellate Rules would generally apply.²⁶

At least one Bankruptcy Appellate Panel has indicated that the indicative-ruling process followed in the Civil Rule 60(b) context applies equally when Rule 60(b) relief is sought from a bankruptcy court after an appeal has been taken to the district court from the bankruptcy court’s decision. *In re Lafata*, 344 B.R. 715, 722 (B.A.P. 1st Cir. 2006) (“Clearly, under the law of *Zoe Colocotroni*, the bankruptcy court had jurisdiction to consider a Rule 60(b) motion filed during the pendency of an appeal of the December 8th orders.”). But in *Lafata*, because the district court had decided the appeal, a request for Rule 60(b) relief in the bankruptcy court was improper. *See id.* at 723 (“Eastern cannot attempt to avoid the decision of the District Court through the use of a Rule 60(b) motion in the bankruptcy court, and a subsequent appeal to the Panel.”).

²³ *See* 28 U.S.C. § 158(d)(1).

²⁴ *See* 1983 Advisory Committee Note to Bankruptcy Rule 8001.

²⁵ Section 158(d)(2) provides in part:

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that--

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

²⁶ *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, Title XII, § 1233(b), Apr. 20, 2005, 119 Stat. 203 (2005).

From skimming through the cases on the indicative-ruling procedure, I get the impression that it may not be quite as widely used in the bankruptcy context. None of the three extant circuit provisions addresses its use in bankruptcy litigation. Accordingly, though the draft Rule should be broad enough to encompass such uses, the Note does not specifically refer to them.

C. “Might” versus “would” and the nature of the remand

As demonstrated by the recent discussions concerning proposed Civil Rule 62.1, arguments can be made for both the position that an indicative ruling must indicate that the district court “would” grant the relevant motion, and the position that the ruling can indicate either that the court “would” grant it or that the court “might” grant it. District courts may prefer the option of saying “might,” since it means the district court need not fully analyze the motion unless and until the court of appeals remands; courts of appeals, by contrast, may prefer not to be asked to remand unless the district court has taken the trouble to determine whether it actually would grant the motion.²⁷ The Civil Rules Committee has discussed the choice between “might” and “would” at length, and is considering the possibility of using “might or would” in the version of proposed Rule 62.1 that is published for comment, in order to solicit comment on the choice.

The three circuit clerks who reviewed the proposed rule varied in their responses on this question. Marcie Waldron, the Third Circuit clerk, initially suggested: “[I]t is better to say ‘might’ than ‘would.’ Sometimes it’s just that the 60(b) motion is substantial enough that the judge wants to have briefing.” Her later email also seems to come out in favor of “might”; she points out that

²⁷ One case from the Second Circuit suggests that the court is unwilling to remand unless the district court states its *intent to grant* the motion. Thus, writing of Criminal Rule 33 motions, the court explained: “If the district court decides to grant the Rule 33 motion, the district court may then signal its intention to this Court. . . . Only when presented with evidence of the district court’s willingness to grant a Rule 33 motion will we remand the case.” *U.S. v. Camacho*, 302 F.3d 35, 36-37 (2d Cir. 2002).

Sixth Circuit Rule 45 refers to the *First National Bank* case, which provides for remands after the district judge enters an order indicating that he or she “is disposed to grant the motion.” *First National Bank*, 535 F.2d at 346. The D.C. Circuit Handbook refers to remands after the district court “indicates that it will grant the motion.” Seventh Circuit Rule 57 concerns remands after the district court indicates that it is “inclined to grant the motion.” The Seventh Circuit in *Boyko* suggested that a limited remand (for the purpose of further consideration of the motion) may be appropriate if the district judge thinks there is “some chance that he would grant the Rule 60(b) motion” *Boyko*, 185 F.3d at 675.

when a case has been calendared or argued, the appellate judges would rather get earlier notice “that there was a possibility of a change in the district court’s decision.”²⁸

By contrast, Mark Langer, the D.C. Circuit clerk, objects to the choice of “might” because it “would really change the way we do business here. Our district judges, or the parties, only ask for this kind of remand when the district judge ‘would’ grant the post-judgment relief.” Fritz agrees that “would” is preferable to “might,” since the latter would increase the burden on the appellate clerks.

Even if one is agnostic on this question, it underscores the need for care in dealing with a related issue: the scope of the remand. In a system where a remand can occur after the district court indicates merely that it “might” grant the requested postjudgment relief, an unconditional remand can be dangerous for the appellant.²⁹ Since the time to file a notice of appeal from the initial judgment will certainly have run by the time the district court (on remand) rules on the motion for postjudgment relief, the movant will have no opportunity to revive the appeal (by filing a new notice of appeal from the underlying judgment) in the event that the district court denies the postjudgment motion. Though the movant can appeal the denial of postjudgment relief, “an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review.” *Browder v. Dir., Dep’t of Corr. of Ill.*, 434 U.S. 257, 263 n.7 (1978).³⁰

²⁸ The latter point might also be a reason for requiring the movant to notify the circuit clerk when the motion is made in the district court, but, as noted in Part III.F. below, Ms. Waldron does not support such a requirement.

²⁹ *Cf. U.S. v. Siviglia*, 686 F.2d 832, 837-38 (10th Cir. 1982) (en banc) (per curiam) (“We find nothing in Siviglia’s motion to remand to indicate that he sought only a partial or limited remand in order to preserve the direct appeal of his conviction should the district court deny his motion for dismissal or new trial. On the contrary, Siviglia advised the Court in his motion to remand that should the district court deny his motion for dismissal or new trial, he intended to appeal “such denial,” which he did. Accordingly, the motion for remand, in practical effect, constituted an abandonment of any appeal going to the merits of his conviction. In this connection, our examination of Siviglia’s brief addressing the merits of his second conviction indicate quite clearly that his grounds for reversal are unsubstantial. So, the motion for remand indicates, to us, that Siviglia was staking all on his ability to convince the district court that the charges against him should either be dismissed, or that he should be granted a new trial thereon, or, absent that, a reversal on appeal of any such denial order.”).

³⁰ Thus, the Seventh Circuit has observed that an “unlimited remand may not be a completely satisfactory solution” for litigants:

Suppose that the district court, on remand, thinks better of its inclination to grant the Rule 60(b) motion, and denies it; is the plaintiff remitted to the limited appellate review conventionally accorded rulings on such motions? And what about the defendant in a case in which the Rule 60(b) motion is granted before he

Such considerations may well explain why some circuits provide for a “limited remand” to enable the district court to rule on the motion in question. *See, e.g., Fobian*, 164 F.3d at 892 (discussing Fourth Circuit approach); *Karaha Bodas*, 2003 WL 21027134, at *4 (discussing Fifth Circuit approach); *U.S. v. Work Wear Corp.*, 602 F.2d 110, 114 (6th Cir. 1979) (“This Court granted a limited remand to the district court to allow presentation of the Rule 60(b)(6) motion.”); *Chisholm v. Daniel*, No. 89-16430, 1992 WL 102562, at **2 n.1 (9th Cir. 1992) (unpublished opinion) (“This court granted Hwang a limited remand for the district court to decide the Rule 60(b) motion.”); *Sierra Pac. Indus. v. Lyng*, 866 F.2d 1099, 1113 n.21 (9th Cir. 1989) (“The proper procedure in such a situation is to ask the district court for an indication that it is willing to entertain a Rule 60(b) motion. If the district court gives such an indication, then the party should make a motion in the Court of Appeals for a limited remand to allow the district court to rule on the motion.”); *Rogers v. Fed. Bureau of Prisons*, 105 Fed.Appx. 980, *982 (10th Cir. 2004) (unpublished opinion) (“[W]e issued a limited remand so the District Court could consider the Rule 60(b) motion. We further noted our intention to remand the entire matter if the District Court decided to grant the Rule 60(b) motion”).

Seventh Circuit Rule 57 purports to require that the court of appeals must remand all proceedings, rather than remanding for a limited purpose. Writing in the context of request for relief under Civil Rule 60(b), the court explained that partial remands were inappropriate “because the grant of the Rule 60(b) motion operates to vacate the original judgment, leaving nothing for the appellate court to do with it – in fact mooted the appeal.” *Boyko v. Anderson*, 185 F.3d 672, 673-74 (7th Cir. 1999). However, the Seventh Circuit does not actually bar the use of limited remands; in that circuit, a limited remand would be the appropriate device when the district court has indicated that it might (rather than would) grant the relevant motion:

[I]f the judge thought there was some chance that he would grant the Rule 60(b) motion, but he needed to conduct an evidentiary hearing in order to be able to make a definitive ruling on the question, he should have indicated that this was how he wanted to proceed. *Boyko* would then have asked us to order a limited remand to enable the judge to conduct the hearing. If after the hearing the judge decided (as we know he would have, since he did) that he did want to grant the Rule 60(b) motion,

has had a chance to argue to the appellate court that the original judgment was correct-- is he, too, remitted to the limited appellate review of such grants? Probably the answer to both questions is "no," the scope of review of Rule 60(b) orders is flexible and can be expanded where necessary to give each party a full review of the district court's original judgment.

Boyko v. Anderson, 185 F.3d 672, 674 (7th Cir. 1999). The *Boyko* court’s suggestion that the scope of appellate review of the Rule 60(b) order can “probably” be extended to encompass a full review of the original judgment hardly seems like an unequivocal assurance that unconditional remands are safe for the would-be appellant.

he should have so indicated on the record and Boyko would then have asked us to remand the case to enable the judge to act on the motion and we would have done so.

Boyko, 185 F.3d at 675.

In a similar vein, the Tenth Circuit has observed that the court of appeals has three options when faced with a request to remand so that the district court can consider a request for Rule 60(b) relief:

[T]his court, confronted with the motion to remand before the trial court has heard the motion for a new trial pursuant to Rule 60(b), has three alternatives: (1) it can remand unconditionally as was done in *Siviglia* but at great risk to the appellant; (2) it can partially remand for consideration of the motion for new trial, retaining jurisdiction over the original appeal and consolidating any subsequent appeal from action on the motion for new trial after the trial court has acted; or (3) it can deny the motion to remand without prejudice, permitting the parties to proceed before the trial court on the motion, and grant a renewed motion to remand after the trial court has indicated its intent to grant the motion for a new trial. If the trial court denies the motion for new trial, it can do so without a remand from this court and appeal may be taken therefrom and consolidated with the original appeal if still pending.

Garcia v. Regents of Univ. of Ca., 737 F.2d 889, 890 (10th Cir. 1984) (per curiam). The court of appeals held that the last of the three options was the appropriate choice “unless the appellant indicates a clear intent to abandon the original appeal.” *Id.*

These considerations indicate that the better practice is to exercise caution in setting the terms of the remand. If the district court has stated merely that it “might” grant the relevant motion, then an unconditional remand would be perilous for the appellant; in such cases, the court of appeals should not grant an unconditional remand unless the appellant has clearly stated its intent to abandon the appeal. By contrast, if the rule requires that the district court state that it “would” grant the motion, one could perhaps, in some cases, follow a simpler procedure: The court of appeals could then remand for the purpose of allowing the district court to grant the motion. Arguably – because the motion is to be granted – the remand could be a full rather than a limited remand. But it still seems prudent for the unlimited nature of the remand to be conditional upon the grant of the motion; otherwise, if the district court were to change its mind and deny the motion, the appellant might be left without an opportunity to revive her appeal from the original judgment. Moreover, in some instances the court of appeals might wish to limit the remand so that it can proceed with the initial appeal even after the district court has granted relief on remand; the Note acknowledges this possibility.

- D. Should the rule address whether a dissatisfied party must file a fresh notice of appeal with respect to action taken by the district court?**

It may be worthwhile to include in the Committee Note some observations concerning notices of appeal.³¹ In a circuit that shares the majority view that a pending appeal does not prevent a district court from *denying* a Civil Rule 60(b) motion,³² the movant must make sure to take an appeal from such a denial in order to preserve the right to challenge the denial on appeal.³³ Likewise, “where a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals.” *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990).

³¹ Both the Seventh Circuit rule and the D.C. Circuit handbook provision address this issue.

³² *See, e.g., Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 890 (4th Cir. 1999) (“If a Rule 60(b) motion is frivolous, a district court can promptly deny it without disturbing appellate jurisdiction over the underlying judgment. Swift denial of a Rule 60(b) motion permits an appeal from that denial to be consolidated with the underlying appeal.”).

³³ *See Jordan v. Bowen*, 808 F.2d 733, 736-37 (10th Cir. 1987) (viewing district court’s response to appellant’s motion for indicative ruling as a denial of appellant’s request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial).

E. Is docketing the right demarcation with respect to the transfer of jurisdiction from the district court to the court of appeals?

The draft Rule refers to motions the district court lacks authority to grant “because of an appeal that has been docketed and is pending.” One question this suggests is how courts handle requests for postjudgment relief during the period between the filing of the notice of appeal and the docketing of the appeal.

Appeals as of right from the district court³⁴ are taken by filing a notice of appeal in the district court.³⁵ The district clerk “must promptly send a copy of the notice of appeal and of the docket entries ... to the clerk of the court of appeals.”³⁶ Upon receiving these items, “the circuit clerk must docket the appeal.”³⁷ Appeals by permission entail a petition for permission to appeal.³⁸ If permission is granted, no notice of appeal is necessary.³⁹ Once the district clerk notifies the circuit clerk that the petitioner has paid the required fees, “the circuit clerk must enter the appeal on the docket.”⁴⁰

The Fourth Circuit has held that in at least some circumstances the district court can grant relief from the judgment after the filing of the notice of appeal but prior to the docketing of the appeal.⁴¹ Dictum in some other opinions suggests that docketing is the time when jurisdiction passes

³⁴ The procedure appears generally similar, in pertinent respects, for appeals from district courts or bankruptcy appellate panels exercising appellate jurisdiction in bankruptcy cases. *See* Appellate Rule 6(b)(1).

³⁵ *See* Appellate Rule 3(a).

³⁶ *See* Appellate Rule 3(d)(1).

³⁷ *See* Appellate Rule 12(a).

³⁸ *See* Appellate Rule 5(a).

³⁹ *See* Appellate Rule 5(d)(2).

⁴⁰ *See* Appellate Rule 5(d)(3).

⁴¹ *See Williams v. McKenzie*, 576 F.2d 566, 570 (4th Cir. 1978) (“We hold that on the facts of this particular case, and especially since the appeal was not docketed in this court at the time the district judge reopened the habeas hearing for the taking of additional testimony, that the entertainment of the F.R.C.P. 60(b)(2) motion was appropriate.”); *see also Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891-92 (4th Cir. 1999) (citing *Williams* with approval).

to the court of appeals.⁴² Additional support for this view might, arguably, be gleaned from the role that docketing of the appeal plays with respect to motions under Rule 60(a). The docketing of the appeal demarcates the time after which the court of appeals' permission is necessary in order for the district court to correct clerical errors under Rule 60(a). To the extent that the choice of docketing as the demarcation point reflects the view that a court of appeals is unlikely to expend effort on an appeal before it is docketed,⁴³ similar reasoning would support the use of docketing to demarcate the time after which a remand is necessary in order for the district court to grant relief under Rule 60(b).⁴⁴ However, a possible counter-argument is that 60(b) relief can have a more significantly disruptive effect on the appeal than 60(a) relief, and therefore that more caution is called for – perhaps weighing in favor of using the filing of the notice of appeal as the cutoff time. Marcie Waldron points out that Appellate Rule 42(a) – which permits the district court to dismiss an appeal before the appeal “has been docketed by the circuit clerk” – provides additional support for the notion that docketing is the relevant demarcation for the shift from district court to appellate court authority.

In contrast to the Fourth Circuit's approach, some other circuits have indicated that it is the filing of the notice of appeal (and thus presumably not the later docketing of the appeal) that demarcates when jurisdiction passes from the trial to the appellate court.⁴⁵ Some of these courts echo the *Griggs* Court's statement that “[t]he filing of a notice of appeal is an event of jurisdictional significance--it confers jurisdiction on the court of appeals and divests the district court of its control

⁴² See *Azzeem v. Scott*, No. 98-40347, 1999 WL 301363, at *1 (5th Cir. 1999) (unpublished opinion) (“A district court is divested of jurisdiction upon the docketing in this court of a timely filed notice of appeal.”).

⁴³ Cf., e.g., *In re Modern Textile, Inc.*, 900 F.2d 1184, 1193 (8th Cir. 1990) (“The underlying purpose of this rule, we believe, is to protect the administrative integrity of the appeal, i.e., to ensure that the issues on appeal are not undermined or altered as a result of changes in the district court's judgment, unless such changes are made with the appellate court's knowledge and authorization.”).

⁴⁴ Some courts have reasoned from this aspect of Rule 60(a) to conclude that the docketing of the appeal marks the passing of jurisdiction from the lower to the appellate court. See, e.g., *Radio Television Espanola S.A. v. New World Entm't, Ltd.*, 183 F.3d 922, 932 (9th Cir. 1999) (“When Television Espanola's appeal of the district court's decision was docketed with the Ninth Circuit on October 22, 1997, the district court lost jurisdiction to review its October 6 entry of judgment.”).

⁴⁵ See, e.g., *Kusay v. U.S.*, 62 F.3d 192, 194 (7th Cir. 1995) (“Just as the notice of appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district court.”).

over those aspects of the case involved in the appeal.” *Griggs*, 459 U.S. at 58.⁴⁶ The view that filing the notice of appeal is the relevant time might also be supported by the fact that an appeal as of right is “taken” by filing the notice of appeal in the district court. Appellate Rule 3(a)(1).

Thus, my quick survey of the caselaw suggests that questions exist regarding the district court’s power to grant relief from a judgment after the filing of the notice of appeal but before the docketing of the appeal in the court of appeals. One argument for using docketing as the point when jurisdiction passes from one court to another would presumably be that – at least in the case of appeals as of right – the court of appeals is unlikely to expend any time on an appeal before it is docketed. That may not be the case when it comes to appeals by permission, but there, too, the likelihood that the court of appeals would expend effort on the appeal between the grant of permission and the docketing of the appeal may be low.

The three circuit clerks who have commented on the proposed rule favor the use of docketing as the point of demarcation. Fritz has summarized their reasoning thus:

Even after all the appellate courts convert to the appellate Case Management/Electronic Case Filing system, incarcerated pro se cases likely still will be processed with a lot of paper, so some of the benefits of electronic filing are lost. Even with electronic notice of the filing of an appeal at the district court there are issues. At present, some district courts require that notices be filed in paper; others merely “lodge” an electronic notice until a review is made and approval given by a district court clerk. When the notice of appeal is filed at the district court in electronic form there will still be delays before the appellate court actually enters the case on the appellate docket.

F. Issues regarding notification to the Court of Appeals

Proposed Civil Rule 62.1 requires the movant to notify the appellate clerk when the motion is filed and when the district court acts on the motion. The appellate clerks who reviewed the proposal, however, vigorously oppose the notion of requiring notification when requests are made or when the district court denies a request. As Marcie Waldron, the Third Circuit clerk, points out, “I don’t want to be notified every time a 60(b) is filed. We only need to know if the district court wants to grant the motion.” Fritz points out, moreover, that most indicative-ruling issues in the Fifth Circuit arise in cases involving pro se litigants, who “are not a dependable source of information.” Accordingly, draft Rule 12.1(a) includes two bracketed options – one that requires notification when the motion is filed and when it is resolved, and another that requires notification only when the

⁴⁶ See, e.g., *Venen v. Sweet*, 758 F.2d 117, 120 (3d Cir. 1985) (“As a general rule, the timely filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction on a Court of Appeals and divesting a district court of its control over those aspects of the case involved in the appeal.”).

district court responds favorably to the motion. A parallel provision appears in proposed Civil Rule 62.1, and thus it will be important to coordinate with the Civil Rules Committee on this point.

Marcie Waldron does suggest, however, that notification would be useful, after a remand, when the district court has decided the motion:

I think the proposed rule should state that the parties must notify the circuit clerk when the district court has decided the motion. Sometimes the district court resolution satisfies everyone and the appeal can go away, but no one bothers to let us know. (Some of our district courts are bad about sending supplemental records.) Or since we retain jurisdiction, if the 60b is denied, they don't always file a new Notice of Appeal and we never know to start the appeal up again.

(She notes, however, that “[t]his problem may evaporate with CM/ECF notifications.”) Draft Rule 12.1(b) includes bracketed language that would implement this suggestion.

Another question concerns the mechanics of the procedure by which litigants and the district court communicate the required information to the court of appeals. The current draft Rule 12.1 does not specify the mechanics of those communications. Fritz notes that the circuit practices vary on this point, and suggests that it would be difficult to attain national uniformity with respect to these logistical details. Accordingly, the draft Rule does not specify the procedure for communicating the required information to the court of appeals, but the Note states that “[i]n accordance with Rule 47(a)(1), a local rule may prescribe the format for the notification[s] under subdivision[s] (a) [and (b)] and the district court’s statement under subdivision (b).”

G. Placement and title of the proposed rule

The DOJ’s original proposal was that the rule be numbered 4.1; a Rule 4.1 would, of course, fall between the rules governing appeals as of right and appeals by permission. I have tentatively numbered the draft Rule “12.1” because that would place it at the end of the FRAP title concerning appeals from district court judgments or orders. Another possibility in the same title would be 8.1 (following Rule 8, which concerns stays or injunctions pending appeal). Other options would be in Title VII, concerning general provisions: 33.1 (following Rule 33 on appeal conferences); 42.1 (following Rule 42 on voluntary dismissal); or 49 (at the end of the title).

1 **Rule 12.1 [Remand After an] Indicative Ruling by the District Court [on a Motion for**
2 **Relief That Is Barred by a Pending Appeal]**

3 (a) **Notice to the Court of Appeals.** If a timely motion is made in the district court for relief
4 that it lacks authority to grant because an appeal has been docketed and is pending, the
5 movant must notify the circuit clerk [when the motion is filed and when the district court acts
6 on it] [if the district court states that it [might or] would grant the motion].

7 (b) **Remand After an Indicative Ruling.** If the district court states that it [might or] would
8 grant the motion, the court of appeals may remand for further proceedings [and, if it remands,
9 may retain jurisdiction of the appeal] [but retains jurisdiction [of the appeal] unless it
10 expressly dismisses the appeal]. [If the court of appeals remands but retains jurisdiction, the
11 parties must notify the circuit clerk when the district court has decided the motion on
12 remand.]

13 **Committee Note**

14 This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts and
15 generalizes the practice that most courts follow when a party moves under Civil Rule 60(b) to vacate
16 a judgment that is pending on appeal. After an appeal has been docketed and while it remains
17 pending, the district court cannot on its own reclaim the case to grant relief under a rule such as Civil
18 Rule 60(b). But it can entertain the motion and deny it, defer consideration, or indicate that it might
19 or would grant the motion if the action is remanded. Experienced appeal lawyers often refer to the
20 suggestion for remand as an "indicative ruling."

21 Appellate Rule 12.1 is not limited to the Civil Rule 62.1 context; Rule 12.1 may also be used,
22 for example, in connection with motions under Criminal Rule 33. *See United States v. Cronin*, 466
23 U.S. 648, 667 n.42 (1984). The procedure formalized by Rule 12.1 is helpful whenever relief is
24 sought from an order that the court cannot reconsider because the order is the subject of a pending
25 appeal.

26 Rule 12.1 does not attempt to define the circumstances in which an appeal limits or defeats
27 the district court's authority to act in face of a pending appeal. The rules that govern the relationship

1 between trial courts and appellate courts may be complex, depending in part on the nature of the
2 order and the source of appeal jurisdiction. Appellate Rule 12.1 applies only when those rules, as
3 they are or as they develop, deprive the district court of authority to grant relief without appellate
4 permission.

5 To ensure proper coordination of proceedings in the district court and in the court of appeals,
6 the movant must notify the circuit clerk [when the motion is filed in the district court and again when
7 the district court rules on the motion] [if the district court states that it [might or] would grant the
8 motion]. If the district court states that it [might or] would grant the motion, the movant may ask
9 the court of appeals to remand the action so that the district court can make its final ruling on the
10 motion. In accordance with Rule 47(a)(1), a local rule may prescribe the format for the
11 notification[s] under subdivision[s] (a) [and (b)] and the district court’s statement under subdivision
12 (b).

13 Remand is in the court of appeals’ discretion. The court of appeals may remand all
14 proceedings, terminating the initial appeal. In the context of postjudgment motions, however, that
15 procedure should be followed only when the appellant has stated clearly its intention to abandon the
16 appeal. The danger is that if the initial appeal is terminated and the district court then denies the
17 requested relief, the time for appealing the initial judgment will have run out and a court might rule
18 that the appellant is limited to appealing the denial of the postjudgment motion. The latter appeal
19 may well not provide the appellant with the opportunity to raise all the challenges that could have
20 been raised on appeal from the underlying judgment. *See, e.g., Browder v. Dir., Dep’t of*
21 *Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978) (“[A]n appeal from denial of Rule 60(b) relief does
22 not bring up the underlying judgment for review.”). The Committee does not endorse the notion that
23 a court of appeals should decide that the initial appeal was abandoned – despite the absence of any
24 clear statement of intent to abandon the appeal – merely because an unlimited remand occurred, but
25 the possibility that a court might take that troubling view underscores the need for caution in
26 delimiting the scope of the remand.

27 The court of appeals may instead choose to remand for the sole purpose of ruling on the
28 motion while retaining jurisdiction to proceed with the appeal after the district court rules on the
29 motion (if the appeal is not moot at that point and if any party wishes to proceed). This will often
30 be the preferred course in the light of the concerns expressed above. It is also possible that the court
31 of appeals may wish to proceed to hear the appeal even after the district court has granted relief on
32 remand; thus, even when the district court indicates that it would grant relief, the court of appeals
33 may in appropriate circumstances choose a limited rather than unlimited remand.

34 [If the court of appeals remands but retains jurisdiction, subdivision (b) requires the parties
35 to notify the circuit clerk when the district court has decided the motion on remand. This is a joint
36 obligation that is discharged when the required notice is given by any litigant involved in the motion
37 in the district court.]

38 When relief is sought in the district court during the pendency of an appeal, litigants should
39 bear in mind the likelihood that a separate notice of appeal will be necessary in order to challenge
40 the district court’s disposition of the motion. *See, e.g., Jordan v. Bowen*, 808 F.2d 733, 736-37 (10th

1 Cir. 1987) (viewing district court’s response to appellant’s motion for indicative ruling as a denial
2 of appellant’s request for relief under Rule 60(b), and refusing to review that denial because
3 appellant had failed to take an appeal from the denial); *TAAG Linhas Aereas de Angola v.*
4 *Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) (“[W]here a 60(b) motion is filed
5 subsequent to the notice of appeal and considered by the district court after a limited remand, an
6 appeal specifically from the ruling on the motion must be taken if the issues raised in that motion
7 are to be considered by the Court of Appeals.”).Judges Rosenthal and Stewart have invited our
8 committee to look into the issue whether a specific amendment to the Criminal Rules makes sense.
9 Also, the question of indicative rulings in habeas corpus cases, although civil in nature, should
10 probably be addressed by the Criminal Rules Committee.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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EVIDENCE RULES

MEMORANDUM

DATE: May 25, 2007 (revised June 22, 2007)

TO: Judge David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Carl E. Stewart, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 26 and 27, in Santa Fe, New Mexico. The Committee approved for publication a number of proposed amendments and a proposed new Rule.

* * * * *

Part II.B. sets forth proposed new Rule 12.1 concerning indicative rulings; this Rule is designed to dovetail with the Civil Rules Committee's proposed new Civil Rule 62.1. Part II.C. presents a proposed amendment to Rule 22 in the light of the Criminal Rules Committee's proposed new Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255. Parts II.D. through II.F. present a proposed amendment to Rule 4(a)(4)(B)(ii) regarding notices of appeal; proposed amendments to Rules 4(a)(1)(B) and 40(a)(1) to clarify the treatment of U.S. officers or employees sued in an individual capacity; and a proposed amendment to Rule 26(c) to clarify operation of the three-day rule.

* * * * *

II. Action Items

The Advisory Committee seeks the Standing Committee's permission to publish the following proposed amendments and new rule in August 2007.

* * * * *

**PROPOSED AMENDMENT TO THE FEDERAL
RULES OF APPELLATE PROCEDURE***

**Rule 12.1. Remand After an Indicative Ruling by the
District Court on a Motion for Relief That Is Barred by a
Pending Appeal**

- 1 **(a) Notice to the Court of Appeals.** If a timely motion is
2 made in the district court for relief that it lacks authority
3 to grant because of an appeal that has been docketed and
4 is pending, the movant must promptly notify the circuit
5 clerk if the district court states either that it would grant
6 the motion or that the motion raises a substantial issue.
- 7 **(b) Remand After an Indicative Ruling.** If the district
8 court states that it would grant the motion or that the
9 motion raises a substantial issue, the court of appeals
10 may remand for further proceedings but retains
11 jurisdiction unless it expressly dismisses the appeal. If
12 the court of appeals remands but retains jurisdiction, the

*New material is underlined.

2 FEDERAL RULES OF APPELLATE PROCEDURE

- 13 parties must promptly notify the circuit clerk when the
14 district court has decided the motion on remand.

Committee Note

This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party moves under Civil Rule 60(b) to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant relief under a rule such as Civil Rule 60(b) without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the action is remanded or that the motion raises a substantial issue. Experienced appeal lawyers often refer to the suggestion for remand as an “indicative ruling.”

[Appellate Rule 12.1 is not limited to the Civil Rule 62.1 context; Rule 12.1 may also be used, for example, in connection with motions under Criminal Rule 33. *See United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984).] The procedure formalized by Rule 12.1 is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal.

Rule 12.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court’s authority to act in face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Appellate Rule 12.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission.

To ensure proper coordination of proceedings in the district court and in the court of appeals, the movant must notify the circuit clerk if the district court states that it would grant the motion or that the motion raises a substantial issue. The “substantial issue” standard may be illustrated by the following hypothetical: The district court grants summary judgment dismissing a case. While the plaintiff’s appeal is pending, the plaintiff moves for relief from the judgment, claiming newly discovered evidence and also possible fraud by the defendant during the discovery process. If the district court reviews the motion and indicates that the motion “raises a substantial issue,” the court of appeals may well wish to remand rather than proceed to determine the appeal.

If the district court states that it would grant the motion or that the motion raises a substantial issue, the movant may ask the court of appeals to remand the action so that the district court can make its final ruling on the motion. In accordance with Rule 47(a)(1), a local rule may prescribe the format for the litigants’ notifications and the district court’s statement.

Remand is in the court of appeals’ discretion. The court of appeals may remand all proceedings, terminating the initial appeal. In the context of postjudgment motions, however, that procedure should be followed only when the appellant has stated clearly its intention to abandon the appeal. The danger is that if the initial appeal is terminated and the district court then denies the requested relief, the time for appealing the initial judgment will have run out and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion. The latter appeal may well not provide the appellant with the opportunity to raise all the challenges that could have been raised on appeal from the underlying judgment. See, e.g., *Browder v. Dir., Dep’t of Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978) (“[A]n appeal from denial of Rule 60(b) relief does

not bring up the underlying judgment for review.”). The Committee does not endorse the notion that a court of appeals should decide that the initial appeal was abandoned – despite the absence of any clear statement of intent to abandon the appeal – merely because an unlimited remand occurred, but the possibility that a court might take that troubling view underscores the need for caution in delimiting the scope of the remand.

The court of appeals may instead choose to remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules on the motion (if the appeal is not moot at that point and if any party wishes to proceed). This will often be the preferred course in the light of the concerns expressed above. It is also possible that the court of appeals may wish to proceed to hear the appeal even after the district court has granted relief on remand; thus, even when the district court indicates that it would grant relief, the court of appeals may in appropriate circumstances choose a limited rather than unlimited remand.

If the court of appeals remands but retains jurisdiction, subdivision (b) requires the parties to notify the circuit clerk when the district court has decided the motion on remand. This is a joint obligation that is discharged when the required notice is given by any litigant involved in the motion in the district court.

When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a separate notice of appeal will be necessary in order to challenge the district court’s disposition of the motion. *See, e.g., Jordan v. Bowen*, 808 F.2d 733, 736-37 (10th Cir. 1987) (viewing district court’s response to appellant’s motion for indicative ruling as a denial of appellant’s request for relief under Rule 60(b), and refusing to review

that denial because appellant had failed to take an appeal from the denial); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) (“[W]here a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals.”).

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To: Honorable David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

From: Honorable Lee H. Rosenthal, Chair
Advisory Committee on Federal Rules of Civil Procedure

Date: December 12, 2006 (Revised June 29, 2007)

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the Vanderbilt Law School in Nashville, Tennessee, on September 7 and 8, 2006.

* * * * *

Part II of this report presents items recommended for approval for publication next summer. These items are proposed amendments to Rules 13(f) and 15(a) on amending pleadings and to Rule 48 on jury polling, along with a proposed new Rule 62.1 on "indicative rulings" that addresses the authority of a district court to act on certain requests for relief after notice of appeal is filed. These were introduced in summary form as information items at the June 2006 meeting but with the recommendation that in light of other recent and anticipated amendments, publication would be in August 2007.

* * * * *

Discussion

Consideration of adding a provision for jury polling was suggested during Standing Committee discussion a few meetings ago. Criminal Rule 31(d) provides a good model that is adopted for this recommendation. One departure is required to account for the parties' opportunity to stipulate to a nonunanimous verdict. And a style departure was made by referring to ordering a new trial rather than declaring a mistrial and discharging the jury. The Civil Rules consistently refer to a new trial; the closest illustration in rules sequence is Rule 49(b), which deals with the similar problem of inconsistencies when a general verdict is supplemented by interrogatories.

Jury polling is occasionally resisted on the ground that it may lead to frequent retrials. The Federal Judicial Center gathered figures on more than 100,000 jury trials over the 25 years from 1980 to 2004. Fewer than 1% of these trials resulted in a hung jury. This figure suggests that the likely risk is not great.

C. RULE 62.1: "INDICATIVE RULINGS"

New Rule 62.1 is recommended for adoption:

Rule 62.1. Indicative Ruling on Motion for Relief That is Barred by a Pending Appeal

- 1 **(a) Relief Pending Appeal.** If a timely motion is made for
 2 relief that the court lacks authority to grant because of
 3 an appeal that has been docketed and is pending, the
 4 court may:
- 5 **(1) defer considering the motion;**
- 6 **(2) deny the motion; or**
- 7 **(3) state either that it would grant the motion if the**
 8 court of appeals remands for that purpose or that
 9 the motion raises a substantial issue.

- 10 **(b) Notice to the Court of Appeals.** The movant must
11 promptly notify the circuit clerk under Federal Rule of
12 Appellate Procedure 12.1 if the district court states that
13 it would grant the motion or that the motion raises a
14 substantial issue.
- 15 **(c) Proceedings on Remand.** The district court may decide
16 the motion if the court of appeals remands for further
17 proceedings.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the action is remanded or that the motion raises a substantial issue. Experienced appeal lawyers often refer to the suggestion for remand as an “indicative ruling.”

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court’s authority to act in face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district

court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Appellate Rule 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the case is remanded for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

2006 Discussion

New Rule 62.1 responds to a suggestion made to the Appellate Rules Committee by the Solicitor General. The Appellate Rules Committee concluded that any new rule provision would be better included in the Civil Rules because the underlying question involves district-court authority to act while an appeal is pending.

The basic approach recommended in this proposal is borrowed from the procedure followed when a Rule 60(b) motion is made for relief from a judgment while an appeal from the judgment is pending. The courts of appeals recognize that the appeal defeats district-court "jurisdiction" to grant the motion. But they all rule that the district court can consider the motion. Most agree that the district court retains jurisdiction to deny the motion. But all agree that the district court lacks "jurisdiction" to grant the motion. If the district court concludes that the motion should be granted, it can indicate that it would do so if the case is remanded for that purpose. (At least one circuit also requires a remand to establish authority to deny the motion after the district court indicates that it would deny if the case is remanded. And another court at times chooses to vacate the judgment with leave to reinstate the appeal after the district court acts on remand.)

The common Rule 60(b) procedure is satisfactory. It honors the wisdom of the rule that only one court should have control of a case at one time. It recognizes that the time to move under Rule 60(b) is not suspended by a pending appeal, so that the motion often must be made or lost before the appeal is decided. The refusal to suspend the time to move in turn rests on the importance of prompt inquiry into many of the issues that may be raised by such motions.

Although it is well established, the procedure incident to a Rule 60(b) motion made pending appeal is often overlooked by lawyers. Some district judges have been unaware of its existence. It would be useful to write this procedure into Rule 60(b) to make it well known, to make it consistent across all courts, and to provide some useful procedural incidents such as the movant's

duty to inform the court of appeals both when the motion is made and again when the district court acts on the motion.

The proposal goes beyond Rule 60(b) motions, generalizing the procedure to embrace any order that the district court lacks authority to revise because of a pending appeal. The orders most likely to be caught up in the broader rule will be interlocutory orders with respect to injunctions. Civil Rule 62(c) and Appellate Rule 8(a)(1)(C) seem to establish district-court authority to act despite a pending appeal, and indeed seem to indicate that relief should be sought first in the district court. Several courts of appeals, however, do not read those rules as they seem to be written. See 16 Federal Practice & Procedure: Jurisdiction 2d, § 3921.2, pp. 59-64. Rule 62.1 will provide an alternative path to district-court action in those circuits. And it will provide a clear source of authority for more exotic combinations of appeals taken while the district court continues to proceed with respect to matters not subject to the appeal.

Rule 62.1 does not attempt the difficult task of defining the circumstances in which a pending appeal ousts district-court power to act on a motion. It is drafted to apply only when an independent source of authority establishes the district court's lack of power.

The recommendation contemplates publication in a form that seeks comment on alternative wording. The question is whether the district court should be able to indicate that it believes the case should be remanded without committing itself to revise the order. One rule text version allows the district court to indicate that it "might" grant relief. The other version requires the district court to indicate that it "would" grant relief. The argument for insisting that the district court indicate that it "would" grant relief is that a case should be remanded, interrupting the progress of the appeal, only after the district court has invested the time and energy — and imposed the burden on the parties — required to reach final decision on the motion. The argument for recognizing authority to indicate that the district court "might" grant relief is that this approach better integrates the resources of both courts. Initial consideration may persuade the district court that the motion raises important questions, but that final resolution will require a heavy investment that should not be made without assurance that the court of appeals will not decide the appeal — perhaps mooting or changing the inquiry — before the inquiry is complete, or else refuse to remand after the district court indicates that it would grant the motion. Once the district court indicates that it might grant the motion, and explains the reasons why the issues seem important but too difficult to pursue to completion without a remand, the court of appeals has control. The court of appeals can balance the district court's statement of the reasons that support remand against the progress of the appeal and its own deliberations. These arguments would be summarized in the message transmitting the proposal for publication, with a request for comment on the choice.

2007 Discussion

A year ago the Advisory Committee recommended approval for publication of a new Civil Rule 62.1 on "indicative rulings." The recommendation was to defer publication to August 2007 as part of a larger package of Civil Rules proposals. The recommendation was discussed at the June 2006 and January 2007 Standing Committee meetings. The Appellate Rules Committee became convinced that it should consider a parallel provision in the Appellate Rules. The attached Appellate Rules Committee materials and draft Appellate Rule 12.1 provide the background not only for the Appellate Rules Committee's work but also for earlier work on Civil Rule 62.1.

The rule text recommended for approval for publication has been revised to reflect proposed Appellate Rule 12.1. An over- and underlined version is set out below to illustrate the revisions and to show the version that the Civil Rules Committee approved for publication before the Appellate Rules Committee recommended publication of Appellate Rule 12.1. The most important change results from the opportunity to rely on Appellate Rule 12.1 to address the form of the remand for further district-court proceedings. Subdivision (c) is shortened to become a formal recognition of remand that closes the circle opened by subdivisions (a) and (b).

Subdivision (b) also was revised to coordinate with Appellate Rule 12.1. It had been designed to invite comment on the choice between two alternatives for giving notice to the court of appeals. One alternative would require notice to the court of appeals when the motion for relief is filed in the district court and a second notice when the district court acts on the motion. That alternative had the advantage of giving the court of appeals early warning that it might want to adjust the progress of the appeal. It had a potential disadvantage arising from the frequent uncertainty whether a pending appeal ousts the district court's authority to grant the relief requested by a motion. In practice, notice would likely be given only when the question of district-court authority is identified. The other alternative, and the one adopted by Appellate Rule 12.1, requires notice to the court of appeals only when the district court states that it would grant the motion or that the motion raises a substantial issue. This second approach has been adopted for Rule 62.1(b) without suggesting any alternative for comment.

Other changes reflect the discussion at the January Standing Committee meeting. The Rule title was settled. There was rather extensive discussion of the question whether the court of appeals should be asked to consider remand if the district court indicates only that it "might" grant the motion for relief. The interim resolution was a recommendation to publish as "[might or] would grant"; the letter transmitting the proposal for publication would have invited comment on the question whether the rule should require that the district court state that it "would" grant relief, or should pave the way for appellate consideration if the district court states only that it "might" grant relief. This approach has been modified to acquiesce in the Appellate Rules Committee's recommendation. Proposed Rule 62.1 now imitates Appellate Rule 12.1, allowing the district court to state either that it would grant the motion on remand or instead to state that the motion raises a substantial issue. If a statement that the motion raises a substantial issue implies a slightly lower degree of district-court consideration or commitment, the difference does not warrant further negotiation. The most important point is that the court of appeals remains in control, deciding whether to remand in light of the progress of the appeal, the importance of the issues raised by the motion for relief, the prospect that relief would change or perhaps moot the issues on appeal, and the persuasiveness of the district court's explanation of the reasons for remand.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 32.1(a)(6)

DATE: September 3, 2007

Judge Robert B. Collings has written the attached letter suggesting an amendment to Rule 32.1(a)(6) to clarify the current rule's incorporation of 18 U.S.C. § 3143(a).

The problem arises because Rule 32.1(a)(6) governs release during the pendency of proceedings to revoke or modify supervised release or probation, and §3143(a) its terms applies only to release pending sentence or appeal. As described more fully in Judge Collings' letter and his decision United States v. Mincey, several clauses in the statute pose interpretative difficulties. Although the courts have generally managed to fight their way through the interpretative thicket, Judge Collings proposes that the Rule be clarified to avoid the confusion.

Given the number of decisions (including Judge Collings' decision in Mincey) which reach the result he advocates, it is not clear whether there is sufficient confusion to warrant an amendment. However, if an amendment is needed, it might be preferable to word the revision to avoid any reference to §3143(a), and instead to state the applicable standard within the rule itself.

This item is on the agenda for the October meeting in Park City.

United States District Court
District of Massachusetts
John Joseph Moakley United States Courthouse
1 Courthouse Way, Suite 6420
Boston, Massachusetts 02210

RECEIVED
4/24/07

07-CR-A

Chambers of
Robert B. Collings
United States Magistrate Judge

April 17, 2007

Telephone No.
(617) 748-9229

Peter G. McCabe, Esquire
Secretary, Advisory Committee on
Criminal Rules
Administrative Office of United
States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Peter:

Re: *United States v. Mincey*
- F. Supp. 2d - , 2007 WL 1113688 (D. Mass., 4/16/2007)

Enclosed is a copy of an opinion I have written on issues which arise when heeding the command of Rule 32.1(a)(6), Fed. R. Crim. P., to decide whether to release or detain persons charged with violating supervised release or probation by using the provisions of Title 18 U.S.C. §3143(a). Since §3143 does not, by its terms, apply to the situation of one arrested for violating supervised release or probation, difficulties have arisen.

For example, defense counsel take the position that the phrase "other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment" as used in §3143(a)(1) applies to persons arrested for violations of supervised release or probation. They argue that since the Sentencing Commission has not issued "guidelines" for persons found to have violated supervised release or probation but only "policy statements", the "clear and convincing evidence" standard does not apply.

Also, it does not appear that § 3143(a)(2) can govern the issue since it speaks of whether "...there is a substantial likelihood that a motion for

Peter G. McCabe, Esquire
Page Two
April 17, 2007

acquittal or new trial will be granted" which seems totally inapplicable to the case of one arrested for a violation of supervised release or probation.

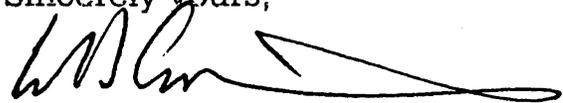
To obviate these problems, I suggest that the Advisory Committee on Criminal Rules propose an amendment so that Rule 32.1(a)(6) reads as follows:

The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a)(1) pending further proceedings. The person shall have 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.

This proposal would make clear what the defendant's burden is, i.e., "by clear and convincing evidence." It would also make only § 3143(a)(1) applicable to persons arrested for violation of supervised release and/or probation, not the whole of § 3143(a).

I believe that this suggestion is worth considering . If you have any questions, please do not hesitate to contact me.

Sincerely yours,



Robert B. Collings
United States Magistrate Judge

Copy to:

Honorable Mark L. Wolf
Chief Judge, United States District Court
Boston, Massachusetts

U.S. v. Mincey
D.Mass.,2007.

Only the Westlaw citation is currently available.

United States District Court,D. Massachusetts.

UNITED STATES of America,

v.

Lloyd MINCEY, Defendant.

Criminal No. 2000-10214-GAO.

April 16, 2007.

Theodore B. Heinrich, United States Attorney's
Office, John Joseph Moakley, Boston, MA, for
Plaintiff.

MEMORANDUM AND ORDER ON
GOVERNMENT'S MOTION FOR DETENTION
COLLINGS, U.S.M.J.

I. The Facts

*1 On April 13, 2005, the defendant Lloyd Mincey ("the defendant") was sentenced on two counts of possession with intent to distribute and distribution of cocaine base. He received a sentence of seventy-two months imprisonment followed by five years of supervised release. His supervised release commenced on November 23, 2005.

On February 21, 2007, the United States Probation Department filed a Petition and Affidavit for Warrant and Summons for Offender Under Supervision seeking that the Court issue an arrest warrant for the defendant. The District Judge ordered the issuance of a warrant for the defendant's arrest on February 23, 2007. The defendant was arrested on March 30, 2007. He appeared before the undersigned on that date, the Government moved for detention, and a detention hearing was set for April 5, 2007.

On April 5, 2007, a question arose as to what the

burden of proof was on the defendant at a detention hearing held after an arrest for violation of supervised release. While it was clear to all that the burden was on the defendant, the Assistant U.S. Attorney took the position that the defendant's burden was to prove that he would not flee or pose a danger to the community by "clear and convincing evidence" as per 18 U.S.C. § 3143(a)(1). The Court indicated that it had been the Court's view espoused over a number of years that a lesser standard applied.

II. The Applicable Law

Rule 32.1(a)(6), Fed.R.Crim.P., provides:

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

See also Rule 46(d), Fed.R.Crim.P. ("Rule 32.1(a)(6) governs release pending a hearing on a violation of probation or supervised release.")

Title 18 U.S.C. § 3143(a)(1) ^{FN1} provides:

FN1. It does not appear that 18 U.S.C. § 3143(a)(2) on its face is applicable to persons arrested on charges of violating the terms of probation or supervised release. For example, in the case of a person arrested for violating probation or supervised release, how can the issue of whether "... there is a substantial likelihood that a motion for acquittal or new trial will be granted," 18 U.S.C. § 3143(a)(2)(A)(i), be applicable? *But see United States v. Wallace*, 2006 WL 2559894 (N.D.W.Va., 2006); *United States v. Fernandez*, 144 F.Supp.2d 115 (N.D.N.Y., 2001).

--- F.Supp.2d ----, 2007 WL 1113688 (D.Mass.)
(Cite as: --- F.Supp.2d ----)

Although in the Wallace case the Court does not state what burden of proof it is applying, the Court in the *Fernandez* case applied the “clear and convincing evidence” burden on the defendant. *Fernandez*, 144 F.Supp.2d at 122.

§ 3143. Release or detention of a defendant pending sentence or appeal

(a) Release or detention pending sentence.--(1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, **other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment**, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c). If the judicial officer makes such a finding, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c).

Emphasis added.

II. The Problem

At the initial appearance, the Assistant U.S. Attorney argued that the defendant's burden was by clear and convincing evidence because in the case of persons charged with violations of supervised release or probation, the guidelines do recommend terms of imprisonment.^{FN2} As can be seen from the emphasized portion quoted, supra, Section 3143(a)(1) by its own terms does not apply in any respect to cases in which the defendant is “... a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment.” So the question with respect to the Government's argument becomes whether there is an “... applicable guideline promulgated pursuant to 28 U.S.C. 994” which does “... recommend a term of imprisonment” for a person who is either alleged or has been found to have violated the terms and conditions of his probation or supervised release.

FN2. It is to be noted that in cases in which the Federal Defender's office in this district represented the defendant in the past, the Federal Defender argued the opposite, i.e., that since the guidelines do not recommend a term of imprisonment in cases of violation of probation or supervised release, the defendant did not have to meet a burden of proof by “clear and convincing evidence”.

*2 To answer that question, it is necessary to look first at 28 U.S.C. § 994(a). That section gives the Sentencing Commission (“the Commission”) the power to “promulgate” (1) “guidelines ... for use of a sentencing court in determining the sentence to be imposed in a criminal case,” (28 U.S.C. § 994(a)(1)), (2) “general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18 ...” (28 U.S.C. § 994(a)(2)) and (3) “guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation ... and the provisions for ... revocation of supervised release set forth in section 3583(e) of title 18.” (28 U.S.C. § 994(a)(3)). As can be seen, the statute makes a distinction between the “promulgation” of “guidelines” and the “promulgation” of “policy statements.” With respect to revocation of probation or supervised release, the Sentencing Commission has a choice of promulgating either. 28 U.S.C. § 994(a)(3).

So far as appears, the Commission has only promulgated “policy statements” with respect to revocation of probation and supervised release. *See Guidelines Manual*, Chapter 7, Part B. Thus, the Assistant U.S. Attorney was wrong when he argued that § 3143(a)(1) applied because the guidelines recommend a period of imprisonment in cases in which a person is found to have been in violation of probation or supervised release.

In these circumstances, if we follow the Government's argument to its logical conclusion, it appears that we might have the anomalous situation in which Rule 32.1(a)(6), Fed.R.Crim.P., provides

--- F.Supp.2d ---, 2007 WL 1113688 (D.Mass.)
(Cite as: --- F.Supp.2d ---)

that 18 U.S.C. § 3143(a) is applicable in determining whether a person arrested for violation of supervised release is released on bail or detained when § 3143(a)(1) by its terms cannot be applicable because the Sentencing Commission has not promulgated any guidelines pursuant to 28 U.S.C. § 994 with respect to violations of probation or supervised release.

III. The Solution

There is no reason to reach such an unhelpful result, for there is a much more persuasive argument as to why § 3143(a)(1) is applicable to persons charged with violations of probation or supervised release. The clear intent of Rule 32.1(a)(6) is that the question of release or detention of persons charged with violations of supervised release or probation be governed by that statute.

However, the statute does not, by its terms, apply to that group-rather it applies to "... person[s] who ha[ve] been found guilty of an offense and who [are] awaiting imposition or execution of sentence ...". The phrase "other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment" operates as a modification of the delineated group-i.e., modifies the group delineated as "... persons who ha[ve] been found guilty of an offense and who [are] awaiting imposition or execution of sentence ...".

*3 It seems to me that the most sensible way to integrate Rule 32.1(a)(6), Fed.R.Crim.P., and § 3143(a)(1) is simply to take § 3143(a)(1) and substitute the words "a person alleged to have violated probation or supervised release" for the entire phrase "a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment." In this manner, in cases of persons alleged to have violated probation or supervised release, there is no issue as to what the guidelines do or do not recommend.

The case of *United States v. Giannetta*, 695 F.Supp. 1254 (D.Me., 1988) basically takes this approach holding:

The pertinent provisions of 18 U.S.C. § 3143, as applicable in these revocation proceedings, equate the probationer's situation to that of a defendant convicted and awaiting imposition of sentence. Section 3143(a) provides that the probationer shall be detained "unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c)." Only if the judicial officer makes such a finding is the probationer eligible for release in accordance with the provisions of section 3142(b) or (c).

Thus, the burden of proof assigned to the probationer by the statute is that of proof by "clear and convincing evidence."

Giannetta, 695 F.Supp. at 1256 citing *United States v. DiMauro*, 614 F.Supp. 461, 463 (D.Me., 1985) and *United States v. Kenney*, 603 F.Supp. 936, 938-39 (D.Me., 1985).^{FN3}

FN3. The *DiMauro* and *Kenney* cases dealt with the applicability of § 3143 in cases involving motion for bail pending appeal after conviction and sentence.

The only Court of Appeals to have considered the issue has taken the same position. *United States v. Loya*, 23 F.3d 1529, 1531 (9 Cir., 1994) ("... we hold that if a defendant moves for bail pending his or her revocation hearing, the district court shall determine the person's eligibility for release under the standards of release set forth in 18 U.S.C. § 3143.")^{FN4}

FN4. That the burden is by "clear and convincing evidence" seems to be generally accepted. See "Representing a Client Charged with Violating Conditions of Supervised Release-Part One", *The Champion*, Vol. XXX, No. 9 (November, 2006) at 29 ("... the defendant, no matter the violation or underlying offense of

--- F.Supp.2d ---, 2007 WL 1113688 (D.Mass.)
(Cite as: --- F.Supp.2d ---)

conviction, bears the burden of proof regarding flight risk and the threat to the community. When the defendant appears on a violator's warrant, the defendant must prove the absence of these risks by clear and convincing evidence." (footnotes omitted)).

IV. Conclusions of Law

Accordingly, the Court rules that the phrase "other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment" in § 3143(a)(1) does not apply in any respect to the situation of a person who is charged with violating probation or supervised release. The Court further rules that when applying Rule 32.1(a)(6)'s dictate that "[t] he magistrate judge may release or detain the person under 18 U.S.C. § 3143(a) pending further proceedings," a court should read § 3143(a)(1) as if it read as follows:

the judicial officer shall order that a person who has been charged with a violation of probation or supervised release be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c). If the judicial officer makes such a finding, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c).^{FN5}

FN5. To help clarify the procedures to be employed when a person is arrested on a charge of violating probation or supervised release, the Judicial Conference's Advisory Committee on Criminal Rules might propose an amendment to Rule 32.1(a)(6) so it would read as follows:

The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a)(1) pending further proceedings. The person shall have 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.

It does not appear, based on the caselaw cited herein, that such an amendment would effectuate any change in substantive law.

V. Applying the Law to the Instant Case

*4 The defendant in the instant case has not proven by clear and convincing evidence that he will not pose a danger to the safety of any other person or the community if released. His original charge was for distributing crack cocaine on two occasions in 1999 while he was on parole from state prison. He was detained prior to trial. One of the violations of supervised release alleged is based on his arrest on February 11, 2007 for distribution of heroin in a school zone. His first conviction for distributing heroin was in 1989 when he was seventeen. At age twenty, he was convicted of illegally possessing a dangerous weapon. Also at age twenty he was convicted on two counts of assault and battery with a handgun. At age twenty-three he was convicted of illegal possession of a gun. He was sentenced to 4-5 years in state prison, was paroled, and violated the parole. He was released on July 29, 2000. In short, the Court sees no basis on which it could find by clear and convincing evidence that the defendant would not be a danger to the community if released.

VI. Order

It is ORDERED that the defendant be, and he hereby is, DETAINED pending the Final Revocation Hearing currently scheduled for April 25, 2007 at 2:15 P.M. before the District Judge to whom this case is assigned.

D.Mass.,2007.
U.S. v. Mincey
--- F.Supp.2d ---, 2007 WL 1113688 (D.Mass.)

END OF DOCUMENT

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 6(f)

DATE: August 30, 2007

In the memorandum that follows, Judge Battaglia proposes amending Rule 6(f) to allow the court to receive the return of an indictment by video conference. The proposed amendment responds to a problem that arises when the only magistrate judge who can receive the return is not present in the same city as the grand jury.

As a prefatory matter, I wanted to clarify one point that might cause some confusion. 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 "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. I understand from Judge Battaglia that employing other federal judges to receive grand jury returns may solve the problem in some instances, but it cannot address all of the situations where this problem has arisen. The problem is most pronounced in the most sparsely settled districts, especially those in the Western states.

This item is on the agenda for the October meeting in Park City.

MEMORANDUM

United States District Court, Southern District of California



To: Judge Bucklew and Judge Tallman

cc: Sara Sun Beale and John Rabiej

From: Judge Battaglia

Date: July 6, 2007

Re: Proposed Rule 6(f) Amendment

I propose that we consider amending Rule 6(f) to address a current problem for judges who are required to travel significant distances to handle the taking of a grand jury return when no other judge is available in the court where the grand jury sits. The solution is to allow judges to take grand jury returns by video-teleconferencing where circumstances warrant.

Currently, Rule 6(f) provides, in part, that “the grand jury . . . must return the indictment to a magistrate judge in open court.” This is addressed, generally in practice, by the grand jury or its foreperson appearing in court with the judge. As demonstrated herein, this requires many judges to travel great distances and is far from efficient or expedient when reasonable electronic means are available to otherwise comply with the requirements of Rule 6.

I find no case law discussing the “open court” requirement for the grand jury return, nor any published committee notes with regard to the evolution of Rule 6(f). The term “open court” has been interpreted in case law relative to arraignment proceedings. In *Valenzuela v. United States District Court*, 915 F.2d 1276, 1280 (1990), the Court stated that “open court” means “the District Court must arraign the accused face-to-face with the accused physically present in the courtroom.” That case was interpreting Rule 10, and the connotation of “open court” in the context of arraignment. Arraignment, of course, is a mandatory appearance for a Defendant under Rule 43. Since *Valenzuela*, we have seen the adoption of standards for alternatives to physical presence at critical stages of criminal cases. In 2002, Rule 5 (Initial Appearances) and Rule 10 (Arraignments) were amended to allow the use of video-teleconferencing where the Defendant consents. Of course, a grand jury return proceeding is far different than an initial appearance, arraignment or other critical stage of a case where Defendant’s presence is mandated. Defendants rarely know of a grand jury

return, much less appear. Many of the concerns associated with the “open court” requirement for arraignment and other proceedings, simply do not apply to the grand jury return situation.

The proposed amendment could be fashioned as follows:

(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. Where good cause exists, the judge may take the return by video teleconference to the court where the grand jury sits. . .

The proposed amendment would specifically allow a judge to take a grand jury return by video teleconference. Utilizing video teleconference, the grand jury (or the foreperson) could appear in the court in the United States court house where the jury sits. The judge could participate by video from a remote location, convene court, and take the return. All indictments could be transmitted in advance, by reliable electronic means, to the judge for review. This process would accommodate the Speedy Trial Act⁴⁷ and preserve the judges time and safety for tasks besides traveling to remote or distant locations to attend to these matters.

The Problem⁴⁸

The problem with the current rule and conforming practice is epitomized in the Eastern District of Washington. There is only one magistrate judge each in Spokane and Yakima. If either judge is absent, their colleague has a 210 mile drive to accept a grand jury return⁴⁹. In ideal weather and traffic conditions, the drive takes at least three hours. One grand jury return would effectively take a judge’s entire work day, rather than the relatively brief moments the actual proceeding requires. Beside the inconvenience and inefficiency of making the journey, the traveling judge is also exposed to the perils of making such a road trip. Perils that increase exponentially in harsh driving conditions in the winter. The drive from Spokane to Yakima includes high mountain passes that could be made treacherous if not impassable.

⁴⁷ 18 U.S.C. 3161(b), “Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which the individual was arrested or served with a summons in connection with such charges.”

⁴⁸ Examples are from an e:mail survey of United States magistrate judges conducted in November 2006. The survey responses uniformly support the proposed amendment.

⁴⁹ Regrettably, the magistrate judge in Yakima recently passed away. With prolonged absences due to retirement, illness or death, the problem is particularly acute and judges will have to travel regularly to take grand jury returns.

Washington Eastern is not alone. In the Northern District of West Virginia, there is a single magistrate judge in Clarksburg. Clarksburg is 110 miles from the closest pinch hitter judge in Wheeling. Similarly within that district, Elkins and Martinsburg are 160 and 240 miles away respectively. In the Southern District of Iowa, if the lone magistrate judge in Davenport is unavailable, a colleague in Des Moines must travel the 160 miles to accept the return.

Florida has a related but unique difficulty. Key West has a grand jury without a magistrate judge. A magistrate judge sitting in Fort Lauderdale travels the 190 miles to Key West to accept the returns. In Alaska, when the judges are absent due to conferences or committee meetings, a part time judge must be available to accept the role.

Arizona does not have a problem yet, however, talks of impaneling grand juries in Flagstaff and Yuma could create problems. Each city has only one magistrate judge. Should either be unavailable a fill-in colleague is between 145 and 260 miles away.

Open Court Requirement

Although Rule 6(f) requires indictments to be returned in “open court,” failure to do so has generally been construed as harmless error. In *United States v. Lennick*, the grand jury indictment was not given to a magistrate judge while court was in session, but rather to a court clerk while court was not in session. The court applied a harmless error review standard and refused to dismiss the indictment. *United States v. Lennick*, 18 F.3d 814, 818 (9th Cir. 1994). The court acknowledged that the actions technically violated Rule 6(f), but reasoned that the formal defect did not render the proceedings fundamentally unfair. *Id.*

This proposed change does not advocate the abolition of any formality associated with the return of a grand jury indictment or even the “open court” requirement. Rather, this change accommodates issues of efficiency and safety while preserving the thrust of the open court requirement. Video teleconference return would be faithful to the formalities of a court in session. The public would not be denied access to the proceedings; anyone who wants to, can observe the return from the courtroom where the grand jury appears.

Good Cause Requirement

The proposed amendment includes the predicate of “good cause.” This is to ensure that the use of video teleconference is used as an alternative or as necessary, but not the preferred procedural default.

Rule 6(f) Legislative History

The legislative history of Rule 6 itself suggests a trend toward flexibility in light of efficiency and safety concerns. In 1977 rule 6(f) was amended to allow a U.S. magistrate judge to receive an indictment. The 1977 Amendment attempted to foreclose the possibility of noncompliance with the

Speedy Trial Act timetable. The Committee considered the problems in a one-judge district, where the judge is holding court in another part of the district or otherwise absent. The return of the indictment must await the later reappearance of the judge where the grand jury is sitting. It is clear that the Committee was willing to take into consideration the logistical difficulties of districts with only one judge. The 1977 Amendment recognizes situations that require special consideration to ensure smooth and timely criminal proceedings.

Rule 6(f) was again amended in 1999 to broaden the scope of who could return the indictment. The rule originally called for the “grand jury” to return the indictment but the rule was amended to allow the “grand jury - or its foreperson or deputy foreperson” to also return the indictment. The amendment was meant to avoid the problems associated with requiring the entire jury to be present in the courtroom for the return of an indictment.

Current Use of Video Teleconferencing

Video teleconferencing in the courtroom is not a novel idea. Rule 10(c)⁵⁰ now permits the use of video teleconferencing to arraign a consenting defendant.

In amending Rule 10, the Committee considered how the use of video teleconferencing may erode the magistrate judge’s ability to accurately assess the physical, emotional and mental condition of a defendant, all factors which may weigh on pretrial decisions such as release from detention. The Committee also recognized that some jurisdictions face a high volume of criminal proceedings and that delays may occur in travel time from one location to another. In some cases requiring extraordinary travel for judges or participants to handle relatively brief matters. The current edition of Rule 10(c) does not require video teleconferencing but gives the court discretion to adopt it.

Unlike in Rule 10(c) arraignments, the observable condition of a defendant is not at issue in Rule 6(f) grand jury returns. In fact, the defendant is not present for the proceedings. The judge and foreperson are the key actors in a grand jury return and their demeanor does not impact pretrial decisions. The current change, therefore, lacks a significant concern considered in the 2002 amendment to Rule 10(c) but still addresses the efficiency and safety concerns that amendment accommodated.

Use of video teleconferencing in federal proceedings is not limited to arraignments. At least two districts have already used video teleconferencing to receive grand jury indictments. The Southern District of Iowa has accepted returns using their fiber optic system, Iowa Communication Network (ICN). The ICN is a state network that reaches out to every county in Iowa. The Southern District uses the ICN to teleconference returns ameliorating the difficulties associated with the lone

⁵⁰Rule 5, regarding initial appearances, which requires a defendant to appear “before” a magistrate judge, was also amended to allow video-teleconferencing if the defendant consents. “Before” means “in the physical presence of” or “in sight of” or “face-to-face with ‘a judicial officer’”. *Purba v. Immigration and Naturalization Serv.*, 884 F2d 516, 517 (9th Cir. 1989).

magistrate judge in Davenport. Similarly, Vermont regularly takes grand jury returns by video teleconference.

Conclusion

The need for a change is apparent and video teleconferencing for grand jury returns adds various benefits to a strained judiciary. This proposed amendment and the change is not only beneficial, but also very feasible.

battaglia/advisory committee/rule 6 memo

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 11(b)(1)(M) Interpretation Issue

DATE: August 30, 2007

At a recent meeting of the Chief District Judges and Clerks from the Ninth Circuit, two former members of the Criminal Rules Committee, Chief Judges Alicemarie Stotler (C.D. Calif.) and John Roll (D. Arizona), informed Judge Tallman of concern among their colleagues about Rule 11(b)(1)(M), which is scheduled to become effective on December 1, 2007. This amendment, which was part of our *Booker* package, requires the court to advise the defendant who enters a guilty or nolo contendere plea of the court's obligation, in determining the sentence, "to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)."

The amendment, which deletes language that treated the Guidelines as mandatory, was intended to inform the defendant how sentencing works under the advisory guidelines. As Judge Tallman explained to Judges Stotler and Roll, it was not intended to require the court to calculate the actual Guidelines range, including enhancements or reductions to the Base Offense Level, at the time the plea is taken, and then explain how each of the 3553(a) factors would actually apply to the defendant. (Indeed, without a PSR the court cannot know what the range is likely to be at the time of the plea, or which 3553(a) factors may require careful consideration in fashioning an appropriate sentence.) The court is simply to inform the defendant of the process that will be followed to determine the sentence.

The concerns relayed to Judge Tallman suggest that there is presently some confusion about the effect of the amendment and concern that the court will be required to anticipate the entire guideline calculation at the time a plea is taken. Judge Tallman asked the Ninth Circuit Chief Judges to keep the Rules Committee apprised if experience after December 1 results in substantial problems among their judges while taking pleas.

This is on the agenda for the October meeting in Park City as a discussion item.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 12(b) Challenges for Failure to State an Offense; Rule 34

DATE: September 9, 2007

Rule 12(b)(3)(B) requires motions alleging defects in an indictment to be raised before trial, and Rule 12(e) treats failure to raise such a defect in a timely fashion as a waiver of the defect unless the court grants relief from the waiver for good cause shown. Rule 12(b)(3)(B) contains an exception, however, allowing the court “at any time while the case is pending” to “hear a claim that the indictment or information fails to invoke the court’s jurisdiction or to state an offense.” (Emphasis added.)

As described in the attached memorandum, the Department of Justice recommends that Rule 12(b)(3)(B) be amended to require that challenges for failure to state an offense be raised before trial. The Department argues that the defendant should not be permitted to raise such claims belatedly, when the government’s opportunity to amend the indictment or information has passed.¹ If the amendment to Rule 12 is approved, the Department also proposes a related amendment to Rule 34.

The proposal to amend Rule 12 has been on the Committee’s agenda for some time. It was initially discussed at the Committee’s April meeting in 2006. Mr. Campbell emphasized that the amendment would not affect challenges to the court’s subject matter jurisdiction, but would merely require defendants to file pretrial motions alleging failure to state an offense in a more timely fashion, i.e., before trial. Several members of the Committee questioned how the proposal would work in various situations, and they suggested that it would be useful to have additional information. The proposal was tabled until the October 2006 meeting, and then deferred again pending the Supreme Court’s decision in United States v. Resendiz-Ponce. The decision in Resendiz-Ponce, 127 S.Ct. 782 (2007), cleared the way for resuming consideration of the proposed amendment, but the

¹As a practical matter, the concerns animating the Rule 12 proposal are closely related to those underlying the Department’s long time support of an amendment to Rule 29, because some mid-trial dismissals occur because the defendant belatedly raises an issue of this nature. The Committee drafted an amendment to Rule 29, which was published for comment in 2006. In April 2007 the Committee voted not to recommend the Rule 29 amendment to the Standing Committee.

agenda for the April 2007 meeting was so long that the Rule 12 proposal was deferred to the October meeting.

The following background may be helpful.

1. The history of the rule

The original 1944 version of the Rule provided that the “failure of the indictment or information to charge an offense shall always be noted by the court whenever and however brought to its attention.” At the time the rule was drafted, a valid indictment was generally understood to be a jurisdictional prerequisite. *See generally* Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398 (2006).² This view was reflected in Ex parte Bain, 121 U.S. 1 (1887), and many other cases. *See* Fairfax, *supra*, 91 MINN. L. REV. at 408-23.

2. The Supreme Court’s decision in Cotton

There appears to be no constitutional impediment to the proposal in light of the Supreme Court’s unanimous decision in United States v. Cotton, 122 S.Ct. 1781 (2002). Defects in an indictment, Cotton held, do *not* deprive the court of jurisdiction. In Cotton, the indictment omitted drug quantity, a fact that had to be submitted to the jury and proven beyond a doubt after Apprendi v. New Jersey, 530 U.S. 466 (2000). Insofar as Ex parte Bain held that such an error was jurisdictional, Cotton expressly overruled Bain. 122 S.Ct. at 1785. Freed from what it deemed the erroneous view that omissions from an indictment deprive the court of jurisdiction,³ Cotton then applied a plain-error analysis because of the defendant’s failure to raise the claim in a timely fashion. The Court upheld the conviction holding that the error, though plain, did not warrant relief. In light of the overwhelming and essentially uncontroverted evidence of drug quantity at the trial, the Court concluded that the failure to include this element in the indictment did not seriously affect the fairness, integrity, or public reputation of the proceedings. Id. at 1786. The Court brushed aside the defendant’s argument that its ruling was inconsistent with the Fifth Amendment’s vital function of checking prosecutorial power. The Court noted that the grand jury’s role is no more important than that of the trial jury, and that the right to a jury trial can be forfeited by failure to make a timely assertion of the right. Id. at 1787. Although the opinion makes no reference to this point, commentators have noted that the Court was surely aware that there were a very large number of

²As Fairfax explains, opposition to this traditional view developed in the early Twentieth Century. It was opposed by those who favored allowing waiver of indictment, and more generally by legal realists and others who favored the abolition of the grand jury. Id. at 423-430. The provision in Rule 7 allowing waiver of indictment was very controversial because it conflicted with the traditional jurisdictional view, but was supported on grounds of efficiency. Id. at 430-448.

³For a critique of Cotton and a reexamination of the jurisdictional function of the grand jury clause, see id. 413-23.

similar cases in the lower courts following Apprendi.⁴

The Cotton opinion does not mention the timing provisions of Rule 12(b)(3). The government's brief in Cotton argued that when an objection to an indictment's failure to state an offense is not raised in the district court, it is not deemed to be waived under Rule 12(b)(3) but is nonetheless subject to plain error review on appeal under Rule 52(b).⁵ The Court appears to have accepted this interpretation of the interaction between Rules 12 and 52.

3. The effect of the proposed amendment

The proposed amendment would treat assertions that an indictment fails to state a claim like any other defect in an indictment or information: (1) requiring them to be raised by pretrial motion, and (2) treating failure to make a timely motion as a waiver under Rule 12(e) unless the court grants relief from the waiver after a showing of good cause.

Since Cotton already applied plain error review to a claim first made on appeal, the effect of the amendment would be felt principally in the district court. Under the amendment, for example, if an error of failure to state an offense were raised midtrial it would be deemed waived unless the court were to grant relief from the waiver for good cause shown under Rule 12(e). Although the proposal thus insulates such an indictment from midtrial attack, it appears that the amendment would not relieve the court of its obligation to charge the trial jury on all of the elements of the offense, including any elements that were omitted from the indictment.⁶

The Department's memorandum contains draft amendments to Rules 12 and 34, with accompanying committee notes. This issue is on the agenda for the October meeting in Park City.

⁴Id. at 453, citing Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 948-50 (2006).

⁵This point is made in 1A WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 193 & n.13.6 (2007 Pocket Part), in which the authors note that they anticipate that the Court may revisit prior decisions in which the Court did not apply harmless error review. For an example of a case in which the issue was raised in the trial court after trial, and treated on appeal as properly raised in the district court, see *United States v. Vitillo*, 490 F.3d 314, 319-24 (3rd Cir. 2007).

⁶The amendment could raise other issues. For example, one function of the indictment is notice. An indictment might fail to state an offense because it omits one or more elements. An omission of this nature might mean that the defendant had no notice of a key elements of the government's case (though notice could have been provided by some other means, such as a bill of particulars). Would the amendment foreclose the defense from raising notice-related objections at trial?



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

February 22, 2007

The Honorable Susan C. Bucklew
Chair, Advisory Committee
on the Criminal Rules
United States District Court
109 United States Courthouse
611 North Florida Avenue
Tampa, FL 33602

Dear Judge Bucklew:

On January 3, 2006, the Department of Justice recommended that the Federal Rules of Criminal Procedure be amended to remove an anomaly in the Criminal Rules that allows defendants freely to challenge whether an indictment or information states a criminal offense for the first time during – and even after – trial.

Subsequently, on April 17, 2006, the Supreme Court granted the government's petition for a writ of certiorari in *United States v. Resendiz-Ponce*, No. 05-998), to decide whether the omission of an offense element from a federal indictment can constitute harmless error, under Fed. R. Crim. P. 52(a). We did not believe *Resendiz-Ponce* would directly affect the merits of our proposal to amend the rules concerning when a challenge to the indictment must be raised. We nevertheless thought it advisable for the Committee to defer its consideration of the proposal until after the Court ruled in *Resendiz-Ponce*, in order to determine whether the Court's decision provided guidance about the nature of an indictment error and the proper standard of appellate review.

On January 9, 2007, the Court decided *Resendiz-Ponce* without deciding whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error. Instead, relying in part on the non-technical pleading requirements expressed in Fed. R. Crim. P. 7, the Court ruled that the allegations of the indictment in the case were not defective in the first place. *United States v. Resendiz Ponce*, 549 U.S. ___, 2007 WL 43827 (2007). The Court reversed the lower court decision on that ground without reaching the harmless error issue. *Id.*

As *Resendiz-Ponce* confirms, under longstanding constitutional doctrine, federal indictments must set forth every element of the charged offense. No change to the Rules is required to meet that requirement. But we continue to believe that a defendant should be required to raise a claim that the indictment fails to allege an essential element or that it fails to

allege “the essential facts constituting the offense charged” (Fed. R. Crim. P. 7(c)(1)) before trial – when the government can seek a superseding indictment – rather than for the first time during or after a trial or guilty plea, or on appeal, after significant resources have already been expended and when correcting any error may be impossible.

Although Rule 12(b) generally requires defendants to raise “before trial” any allegation of a defect in the indictment or information, by its terms, the Rule creates an anomaly that permits defendants to claim “at any time” that the indictment or information fails to state an offense. Relying on that language, courts have allowed defendants to raise such a claim for the first time even after they have been convicted at trial, have pleaded guilty, or are on appeal – long after the government’s opportunity to supersede the indictment or amend the information has passed. *See also* Fed. R. Crim. P. 34 (Arrest of Judgment).

Our proposal would require defendants to raise this claim in a timely manner before trial or a plea of guilty. Defendants who fail to raise such a claim in a timely fashion could still raise a claim later but would need to satisfy the requirements of plain error. We have attached a proposed amendment to Rule 12, and a conforming amendment to Rule 34, along with proposed Committee Notes that more fully explain the basis for the amendments. The proposed Notes also explain the reasons why Rules 12 and 34 were first drafted in the manner they were and why Supreme Court decisions have rendered those reasons no longer valid.

Courts have “urged the Judicial Conference Advisory Committee on Criminal Rules to consider amending” the rule along the lines we are suggesting. *United States v. Hedaithy*, 392 F.3d 580, 586-89 & n.7 (3d Cir. 2004). While post-trial Rule 12 motions for failure to charge an offense are infrequent, judges have recognized that allowing such motions at any time “reduces criminal defendants’ incentives to raise defenses in a timely fashion in district court,” “has led to strategic decisions by defendants to delay raising the defense,” “undermines judicial economy and finality,” fails to “respect[] the proper relationship between trial and appellate courts,” causes “the waste of judicial resources,” and “mak[es] it more difficult for defendants and prosecutors to enter plea agreements that benefit both the parties and society as a whole.” *United States v. Panarella*, 277 F.3d 678, 686-88 (3d Cir. 2002).

We think this proposal is now ripe for consideration by the Committee, and we hope the Committee will approve the proposal for public comment at its April 2007 meeting. We appreciate your assistance with the proposal and look forward to continuing our work with you and the Committee to improve the federal criminal justice system.

Sincerely,


Benton J. Campbell
Acting Chief of Staff

cc: Professor Sara Sun Beale
Mr. John Rabiej

Rule 12. Pleadings and Pretrial Motions

(a) Pleadings. The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

(b) Pretrial Motions.

(1) In General. Rule 47 applies to a pretrial motion.

(2) Motions That May Be Made Before Trial. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.

(3) Motions That Must Be Made Before Trial. The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment or information, including that it fails to state an offense – but at any time while the case is pending, the court may hear a claim that the district court lacks indictment or information fails to invoke the court's jurisdiction or to state an offense;

(C) a motion to suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

(4) Notice of the Government's Intent to Use Evidence.

(A) At the Government's Discretion. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) At the Defendant's Request. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) Motion Deadline. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(e) Waiver of a Defense, Objection, or Request. A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.

(f) Recording the Proceedings. All proceedings at a motion hearing, including any findings of fact and conclusions of law made orally by the court, must be recorded by a court reporter or a suitable recording device.

(g) Defendant's Continued Custody or Release Status. If the court grants a motion to dismiss based on a defect in instituting the prosecution, in the indictment, or in the information, it may order the defendant to be released or detained under 18 U.S.C. § 3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.

(h) Producing Statements at a Suppression Hearing. Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). At a suppression hearing, a law enforcement officer is considered a government witness.

Advisory Committee Note

When enacted in 1944, Rule 12(b) provided that a motion alleging a defect in the indictment or information had to be raised before trial, except that at any time while the case is pending, the court could hear a claim that the indictment or information fails to invoke the court's jurisdiction or "to charge an offense." The latter exception, rephrased "to state an offense," is now found in Rule 12(b)(3)(B). This exception has been interpreted to allow defendants to raise an indictment's alleged failure to state an offense for the first time during or after trial, after a plea of guilty, or on direct appeal. *E.g.*, *United States v. Rosa-Ortiz*, 348 F.3d 33, 36 (1st Cir. 2003); *United States v. Panarella*, 277 F.3d 678, 682-86 (3d Cir. 2002).

This exception is inconsistent with Rule 12's general goal to require defendants to raise challenges to an indictment or information before trial, when the defect might be fixed, and before effort is expended in trials, pleas, sentencing and other proceedings based on an invalid indictment:

Rule 12 sharply restricts the defense tactic of "sandbagging" that was available in many jurisdictions under common law pleading. Recognizing that there was a defect in the pleading, counsel would often forego raising that defect before trial, when a successful objection would merely result in an amendment of the

pleading. If the trial ended in a conviction, he could then raise the defect on a motion in arrest of judgment and obtain a new trial. Federal Rule 12 eliminated this tactic as to all objections except the failure to show jurisdiction or to charge an offense.

United States v. Ramirez, 324 F.3d 1225, 1228 (11th Cir. 2003).

The Supreme Court removed the justification and the need for the exception to the general rule requiring challenges to an indictment before trial for failure to state an offense in *United States v. Cotton*, 535 U.S. 625 (2002). The Court rejected the assertion that the failure of an indictment to state an offense “was a 'jurisdictional' defect” which could be raised without regard to the rules for preservation of claims of error. *Id.* at 629. The Court explained that the source of this view, *Ex parte Bain*, 121 U.S. 1 (1887), was “a product of an era” in which “this Court could examine constitutional errors in a criminal trial only on a writ of habeas corpus, and only then if it deemed the error 'jurisdictional'”, which “led to a somewhat expansive notion of 'jurisdiction' which was 'more a fiction than anything else.’” *Cotton*, 535 U.S. at 629-30 (citations omitted). The Court ruled that, given the subsequent authorization of review by direct appeal and the subsequent expansion of collateral review, “*Bain's* elastic concept of jurisdiction” was neither needed nor valid, and the Court overruled *Bain* “[i]nsofar as it held that a defective indictment deprives a court of jurisdiction.” *Cotton*, 535 U.S. at 630-31. The Court held that a claim that an indictment which failed to allege an offense had to be timely raised, or it would be forfeited and would have to meet “the plain-error test of Federal Rule of Criminal Procedure 52(b).” *Cotton*, 535 U.S. at 631.

Courts, however, have considered themselves bound by the language of Rule 12(b)(3)(B), and have “urged the Judicial Conference Advisory Committee on Criminal Rules to consider amending” the rule. *United States v. Hedaithy*, 392 F.3d 580, 586-89 & n.7 (3d Cir. 2004). Judges have recognized that the exception in the existing rule for failure to charge an offense, “reduces criminal defendants' incentives to raise defenses in a timely fashion in district court,” “has led to strategic decisions by defendants to delay raising the defense,” “undermines judicial economy and finality,” fails to “respect[] the proper relationship between trial and appellate courts,” causes “the waste of judicial resources,” and “mak[es] it more difficult for defendants and prosecutors to enter plea agreements that benefit both the parties and society as a whole.” *Panarella*, 277 F.3d at 686-88.

Accordingly, Rule 12(b)(3)(B) has been amended to remove this exception. The amended rule requires that claims that an indictment fails to state an offense be raised before trial as provided in Rule 12(b)(3), (c) and (e). A defendant who fails thus to raise such a claim forfeits it, and can obtain relief only by meeting Rule 52(b)'s plain-error test, or the “cause and prejudice” test if the claim is first raised under 28 U.S.C. § 2255. *United States v. Ratigan*, 351 F.3d 957, 964 (9th Cir. 2003).

The Supreme Court in *Cotton* did reiterate that defects in subject-matter jurisdiction -- “the courts' statutory or constitutional power to adjudicate the case’ . . . can never be forfeited or

waived,” and can be corrected “regardless of whether the error was raised in district court.” 535 U.S. at 630. The jurisdictional exception is therefore retained in Rule 12(b)(3)(B), and permits the district court's subject-matter jurisdiction to be challenged at any time while the proceedings initiated by the indictment or information are pending in the district court or on direct appeal. *United States v. Wolff*, 241 F.3d 1055, 1057 (8th Cir. 2001).

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if:

~~(1) the indictment or information does not charge an offense; or~~

~~(2) the court does not have jurisdiction of the charged offense.~~

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

Advisory Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the “indictment or information fails . . . to state an offense.” The amended Rule 12 instead requires that such a defect in the indictment or information be raised before trial, when the defect might be fixed, and before effort is expended in trials, pleas, sentencings and other proceedings based on an invalid indictment or information. See *United States v. Panarella*, 277 F.3d 678, 682-86 (3d Cir. 2002). In amending Rule 12, the Committee noted that the Supreme Court removed the justification and the need for the exception for failure to state an offense in *United States v. Cotton*, 535 U.S. 625 (2002), when the Court rejected the assertion that the failure of an indictment to state an offense “was a ‘jurisdictional’ defect” which could be raised without regard to the rules for preservation of claims of error. *Id.* at 629.

Rule 34 is similarly being amended to prevent defendants from waiting until after the court accepts a verdict of guilty or a plea of guilty or nolo contendere to claim that an indictment or information does not correctly charge the offense. Waiting to raise such a claim may prevent the defect from being fixed and waste the efforts expended in trials and pleas based on flawed indictments or informations. Because the Supreme Court made clear in *Cotton* that the failure of an indictment or information to correctly charge an offense is not a jurisdictional defect, a defendant seeking to raise such a claim after trial must show plain error. *United States v. Bieganowski*, 313 F.3d 264, 286 (5th Cir. 2002). Because a guilty plea precludes all claims, except claims that challenge the court’s subject-matter jurisdiction, that is, “the court’s statutory or constitutional power to adjudicate the case,” and failure to charge an offense is not such a claim, *Cotton*, 535 U.S. at 630, a defendant who pleads guilty cannot raise a claim that the indictment or information failed to correctly charge the offense; instead, any remedy must be by withdrawal of the plea under Rule 11(d), or challenge to the plea as permitted by Rule 11(e), e.g., a motion under 28 U.S.C. § 2255 claiming the plea was the result of ineffective assistance of counsel. *United States v. Broce*, 488 U.S. 563, 568-76 (1989); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *United States v. Cothran*, 302 F.3d 279, 283 (5th Cir. 2002).

The Supreme Court has made clear that defects in subject-matter jurisdiction – “the courts' statutory or constitutional power to adjudicate the case” – can be raised after trial. *Cotton*, 535 U.S. at 630; *Broce*, 488 U.S. at 574-76. Accordingly, Rule 34's provision for raising jurisdiction is left intact, and provides a clear avenue to challenge the district court's subject-matter jurisdiction within 7 days after the court accepts the verdict of guilty or plea of guilty or nolo contendere.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: September 6, 2007

DATE: Proposal for Victim Advocate Member on Rules Committee

As indicated in the attached correspondence, Professor Douglas Beloof has proposed that the Chief Justice create a permanent position on the Advisory Committee on Criminal Rules for a victims' advocate. The Chief Justice has asked the Standing Committee to review this request and make a recommendation, and the views of the Advisory Committee have been solicited.

This item is on the agenda for the October meeting in Park City.

FILE COPY



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

April 10, 2007

Dr. Douglas E. Beloof
Associate Professor of Law
Director, National Crime Victim Law Institute
at Lewis & Clark Law School
10015 S.W. Terwilliger Blvd.
Portland, Oregon 97219-7799

Dear Professor Beloof:

Chief Justice John Roberts asked me to respond to your January 25, 2007, letter, which recommends that a permanent position on the Judicial Conference Advisory Committee on Criminal Rules be established for a victims' advocate. Your suggestion is thoughtful and deserves consideration. At the Chief Justice's direction, I have sent your letter to Judge David Levi, chair of the Committee on Rules of Practice and Procedure, asking his committee to review your request and make a recommendation for the Chief Justice's consideration.

I should point out that, as a general matter, appointing advocates to Judicial Conference committees is neither feasible nor prudent. I do want to emphasize, however, that we share your commitment to the protection of victims' rights, and carefully take into account crime victims' interests in the rulemaking process. The Advisory Committee on Criminal Rules has several members who are quite familiar with victims' rights issues, including private-sector lawyers who have represented corporate victims, federal judges who deal regularly with crime victims, many of whom served as federal and state prosecutors before appointment to the bench, and the representative from the Department of Justice, which has been engaged in a massive federal program to protect victims' rights spearheaded by its Office of Victims' Rights Ombudsman. To ensure that the committees are well informed, the rules committees consist of members who represent a broad spectrum of professional expertise and experiences. For the rulemaking process to be effective, the bench, bar, and public must have confidence that the rules committees are impartial bodies who represent not the interests of special groups but the interests of all in improving the administration of justice.

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Dr. Douglas E. Beloof

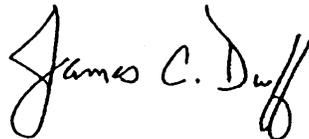
Page 2

Your letter correctly points to the two exceptions where institutional representatives sit on the rules committees. Each of the rules committees includes a Department of Justice ex officio institutional representative, both because the Department is the principal litigator and because its membership represents the sole opportunity of the Executive Branch and the President to participate directly in the rulemaking process – whose rules have the force of law. A Federal Public Defender, as a principal litigator in federal courts, sits on the Advisory Committee on Criminal Rules and brings expertise and experiences that are unique. The Public Defender also serves as an essential counterweight to the Department of Justice.

The openness of the Rules Enabling Act process affords lawyers and interested persons with many opportunities to address the committees, answer questions, and make suggestions. The National Crime Victim Law Institute, like other organizations with an interest in the criminal rules, is encouraged to comment upon proposed amendments and to make proposals for rules amendments. All of the rules committees particularly value these interactions because it is through broad public participation by citizens, judges, and members of the bar that the committees avoid inadvertent mistakes and gather information about practices throughout the nation.

Thank you for your letter and your recommendation.

Sincerely,

A handwritten signature in black ink that reads "James C. Duff". The signature is written in a cursive style with a large, looped initial "J".

James C. Duff
Director

cc: Honorable David Levi
Honorable Susan Bucklew
Honorable Patrick Leahy
Honorable Arlen Specter
Honorable Jon Kyl
Honorable Dianne Feinstein



January 25, 2007

Honorable John G. Roberts, Jr.
Chief Justice
Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543

Re: Adding a Crime Victims' Attorney Representative to the Advisory Committee on Criminal Rules

I am writing on behalf of crime victims around the country to request that you add a crime victims' representative to the Advisory Committee on Criminal Rules. I am a Law Professor and the Executive Director of the National Crime Victim Law Institute (NCVLI), based at Lewis and Clark Law School. I have been cited as a leading authority in crime victim law by the United States Senate Judiciary Committee. NCVLI is widely recognized as the leading crime victims' organization enforcing victims' rights in criminal procedure.

Currently, the Advisory Committee contains institutional representatives for federal prosecutors and defense attorneys – namely, Alice S. Fisher, Assistant Attorney General to the Criminal Division of the U.S. Department of Justice, and Thomas P. McNamara, Federal Public Defender. Indeed, the institutional affiliations of Ms. Fisher and Mr. McNamara are listed in official court publications describing the Committee members. The Advisory Committee, however, lacks an institutional representative for crime victims.

This omission, if it was ever justified, is no longer appropriate. In the Crime Victims' Rights Act (CVRA), codified in 18 U.S.C. § 3771 [copy attached], crime victims have their own independent rights throughout the federal criminal justice process. The intent of Congress was to make crime victims “an independent participant in the proceedings” and a “central reason for these rights is to force a change in a criminal justice culture which has failed to focus on the legitimate interests of crime victims...” 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

Like Congress, the Court has acknowledged the interests of crime victims. In *Morris v Slappy*, 461 U.S. 1, 14 (1982), the court held that “in the administration of justice, courts may not ignore the concerns of the victim.” In *Payne v. Tennessee*, 501 U.S. 808, 827(1991), the Court affirmed that, “Justice, although due the accused, is also due the accuser.” (“[R]eaffirm[ing] the view expressed by Justice Cardozo” in *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1937)). In *Calderon v. Thompson*, the Court explained that to unsettle expectations in the execution of moral judgment “is to inflict a profound injury to the ‘powerful and legitimate interest in punishing the guilty,’ an interest shared by the State and victims of crime alike.” 523 U.S. 538, 556 (1998) (quoting *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring)).

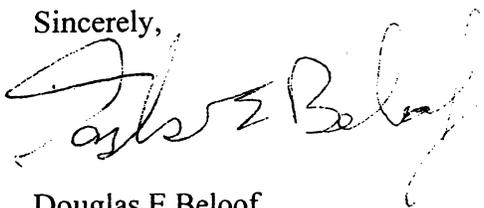
January 25, 2007
Honorable John G. Roberts, Jr.
Page 2

In view of the fact that crime victims' interests have been recognized by the Court and Congress has granted victims the ability to assert, and enforce independent federal statutory rights in federal courts, victims are entitled to have their own institutional representative on the Committee when changes to the federal rules are discussed. Such representation is particularly critical in the next few months, because the Criminal Rules Committee is discussing the amendments dealing with crime victims' rights under the CVRA.

Indeed, the lack of crime victim representation on the Committee – at the same time as prosecutors and defense attorneys have institutional representation there – violates the spirit, if not the letter, of the CVRA. The Act broadly guarantees that crime victims have the right to be “treated with fairness” in the federal criminal process. It is unfair to give institutional representation to other participants in the system, but not victims. Furthermore, courts are charged in the CVRA with ensuring that “a victim is afforded the rights” under the CVRA. 18 U.S.C. 3771(b). Moreover, it has been generally understood that the Criminal Rules Committee should have a membership that is “representative of . . . every professional viewpoint.” Wright, Federal Practice and Procedure § 2 at p. 5 (1999 & 2006 Supp.). Crime victims now have their own, distinct interests and are entitled to have their own viewpoint expressed in the rulemaking process. Moreover, there is an increasing number of qualified victim lawyers.

I would be happy to provide your staff with a list of a number of experienced crime victims' attorneys who would make excellent additions to the Committee. Thank you for your attention to this issue.

Sincerely,



Douglas E Beloof
Associate Professor of Law
Director, National Crime Victim Law Institute
at Lewis & Clark Law School

cc: Judge Susan Bucklew, Chair, Advisory Committee on Criminal Rules
Senator Jon Kyl (Senate Judiciary Committee), Sponsor of the CVRA
Senator Dianne Feinstein (Senate Judiciary Committee), Sponsor of the CVRA

attachment: (J. Roberts only): 18 USC 3771

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Limiting Disclosure of Information About Plea Agreements and Cooperation

DATE: September 3, 2007

Whosarat.com is a website that purports to identify informants in criminal cases; in some cases it includes information obtained from federal court files. Both local and national judicial groups have been studying the problem posed by such sites. Although no specific proposal is being brought before the Advisory Committee at this time, this is on the agenda as a discussion item.

The first group of materials I have included were provided by Judge Harvey Bartle, whose court has adopted the attached protocol precluding electronic access by the public to plea and sentencing documents, which will, however, remain available to the general public at the courthouse. News accounts of the problems that led the court to adopt the protocol are also included. Judge Bartle, whose term on the Committee has expired, hopes to attend the meeting in Park City, which would permit the Committee to hear from him directly about his court's experience.

I have also provided a memorandum from Judge Tunheim, chair of the Committee on Court Administration and Case Management (CACM), which describes CACM's opposition to a proposal by the Department of Justice to restrict remote electronic access to plea agreements to court users and participants in the case.

This item is on the agenda for discussion at the October meeting in Park City.

United States District Court

Eastern District of Pennsylvania

CHAMBERS OF
HARVEY BARTLE III
CHIEF JUDGE

16614 UNITED STATES COURTHOUSE
SIXTH AND MARKET STREETS
PHILADELPHIA, PENNSYLVANIA 19106-1752

(215) 597-2693

July 26, 2007

Professor Sara Sun Beale
Duke University School of Law
Science Drive and Towerview Road
Box 90360
Durham, NC 27708-0360

Dear Sara,

Thank you for your recent phone call.

Enclosed are the newspaper articles about www.whosarat.com and the steps our court has taken to deal with this serious problem. I am also including the protocol adopted by our judges.

If you have any questions, please let me know.

Sincerely,



Harvey Bartle III

HB: fcp
Enclosures

I move that:

The Court ADOPT the following Protocol:

1. All documents on the ECF System related to pleas and sentencings and orders relating to these documents, will be designated on the docket as *Plea Documents, Sentencing Documents and Judicial Documents* respectively, no matter their content.
2. All documents not under seal shall remain available for inspection by the public in the Office of the Clerk as heretofore.
3. Passwords will be provided to all appropriate parties such as judges, law clerks, the Government, specific defense counsel involved in the filing, Probation, and where necessary, personnel at the court of Appeals, so as to provide electronic access to all documents, not under seal and related to pleas and sentencing and orders related to those documents.

The Real Intelligence

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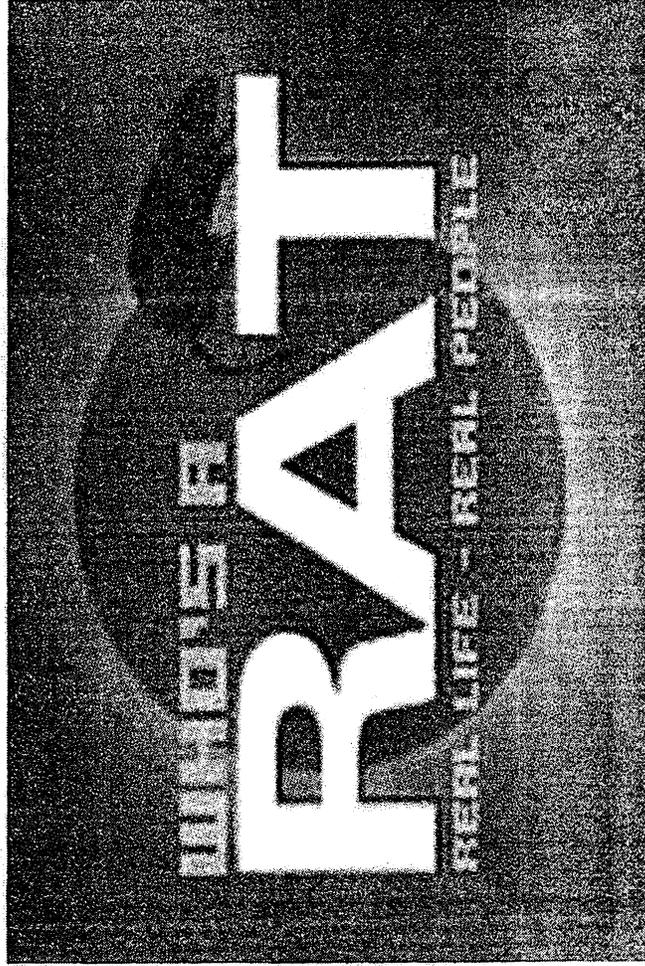
VOL 236 • NO. 11 \$3.00

ALM

Courts Move to Protect Informants From Web Site

BY SHANNON P. DUFFY
Courthouse Correspondent

In response to a controversial Web site that exposes the identities of criminal defendants who have agreed to cooperate with authorities, the federal judges on the Eastern District of Pennsylvania bench have adopted a plan designed to make it impossible for any visitor to the court's Web site to discern whether a defendant is cooperating. The new protocol, adopted last week, is a direct response to the Who's a Rat Web site, www.whosarat.com, and will result in a modification of the docketing of all sentencing and plea documents in all criminal cases. Chief U.S. District Judge Harvey Bartle III said that under the current system, users of the court's Web site were able to discern which defendants had entered into agreements to cooperate either by viewing the plea document or simply noting that these documents were under seal. The fact that such documents were sealed is a "red flag," Bartle said, that could lead to the exposure of the cooperating defendant. To fix the problem, Bartle said, the court decided to restrict access to all sentencing and plea documents in all criminal cases —



The graphic shown above is from the Who's a Rat Web site. Judges recently made it more difficult for the Web site to gain access to information about individuals who have cooperated in federal investigations.

regardless of whether the defendant is cooperating. "Those documents will still be publicly available in the courthouse for anyone who

wants to come here and see them — provided they are not under seal — but you will not be able to sit back in your armchair and gain access to them," Bartle said in an interview.

In adopting the plan, which is set to take effect in September, the Eastern District becomes the second federal court to directly address the controversy sparked by the Who's a Rat? Web site. The Southern District of Florida recently adopted a similar plan.

Bartle asked U.S. District Judge Anita B. Brody to form a committee that ultimately included Assistant U.S. Attorney Linda Dale Hoffa, the chief of the criminal division in the U.S. Attorney's Office, and Assistant Federal Defenders Felicia Samer and Leigh Skipper.

The Who's a Rat Web site was created in 2004 by Sean Buccu, a Boston-area disc jockey who claims he was busted on marijuana charges on the word of a longtime heroin addict who had become a paid informant.

A lengthy disclaimer on the site says that it "is definitely not an attempt to intimidate or harass informants or agents or to obstruct justice. This Web site's purpose is for defendants with few resources to investigate, gather and share information about a witness or law enforcement officer."

Buccu claims that federal agents knew that the informant against him had lied in a

over 99 percent of the total votes cast. The stock was sold for \$22.53 per share.

That price represents a premium of approximately 30.8 percent over Central Parking's closing share price on Nov. 27, 2006, the day before the company announced that it had engaged the Blackstone Group to

real estate financing and due diligence for Lubert-Adler and Chrysalis and Sullivan & Cromwell handled the corporate matters for Lubert-Adler and Chrysalis.

Ropes & Gray handled the operating financing and Day handled the majority of the real estate financing, Krouse said.

succeeded in his efforts to "intimidate and persuade" his co-defendant from pleading guilty and cooperating "by advising [him] that to do so would mean he would be profiled on the Web site."

Levitt said in his brief that although Buccì claims that his site is "simply designed to assist defendants in their cases by providing them with access to information about cooperators," the name of the site belies that.

Just last week, Senior U.S. District Judge Morris E. Lasker of the District of Massachusetts sentenced Buccì to 151 months in prison.

Assistant U.S. Attorney Peter K. Levitt had urged the judge in court papers to reject any plea for leniency from Buccì due to the "devastating effect" that the Who's a Rat Web site had on the witnesses in his case.

Levitt's sentencing brief said the Web site had succeeded in "terrifying" the witnesses and their family members, and that Buccì also

the company operated approximately 3,000 parking facilities containing approximately 1.4 million spaces at locations in 37 states, the District of Columbia, Canada, Puerto Rico, the United Kingdom, the Republic of Ireland, Chile, Colombia, Peru, Spain, Switzerland and Greece.

Stylianous Sinnis, argued in his brief that the court should reject a recommendation to enhance Buccì's sentence for his operation of the Web site, noting that the judge had already refused to revoke Buccì's bail over his alleged intimidation of a witness.

Sinnis' brief said that the court found that "while Mr. Buccì's actions 'pushed the envelope' they did not violate his conditions of release and did not constitute threatening or intimidating a witness."



BARTLE

Levitt also argued that Buccì's claimed "altruistic motives are also belied by the fact that, since its inception, the person alleged by the defendant to be the informant in this case has been featured as 'Rat of the Week,' demonstrating that personal revenge and intimidation has been a motivating factor."

Buccì's lawyer, Assistant Federal Defender

tion that would preserve the right of the public to get access to court documents, while at the same time making it difficult for operators of Web sites like Buccì's to gather data.

Hoffa said the issue was one that prosecutors and defense lawyers found themselves in agreement on because both camps have an interest in protecting the safety of cooperating witnesses.

Sarner said that two clients of the Philadelphia Federal Defender's office have been featured on the Who's a Rat site, and that she supported the plan to make documents inaccessible.

No enhancement should apply, Sinnis argued, because "defendant's constitutionally protected speech of operating the Web site is an insufficient basis for a two-point enhancement for obstruction."

But in Florida and now in Pennsylvania, the federal courts have decided that while Buccì and others may have a First Amendment right to disclose the names of informants, the courts should get out of the business of making it easy for them to do so.

Brody, in an interview, said the court didn't want to wait for a tragedy, such as a witness being killed, before taking action.

Levitt said in his brief that the court found that "while Mr. Buccì's actions 'pushed the envelope' they did not violate his conditions of release and did not constitute threatening or intimidating a witness."

Sinnis' brief said that the court found that "while Mr. Buccì's actions 'pushed the envelope' they did not violate his conditions of release and did not constitute threatening or intimidating a witness."

Under the new protocol, visitors to the Eastern District's Web site, known as PACER, will be restricted from accessing any documents in criminal cases relating to plea agreements or sentencing.

The PACER system will not identify which documents are under seal, but instead will direct anyone interested to come to the court's clerk's office to see them.

Lawyers, both prosecutors and defense, will have access to the documents through PACER by using a password.

Web Site

continued from 1

previous investigation, but nonetheless continued their probe of Buccì despite gleaning no evidence from months of surveillance.

When Buccì was arrested, agents seized more than 100 kilos of marijuana from his home. In February, Buccì was convicted by a jury on 16 counts, with a specific finding that his marijuana-distribution conspiracy involved over 1,000 kilos of the drug.

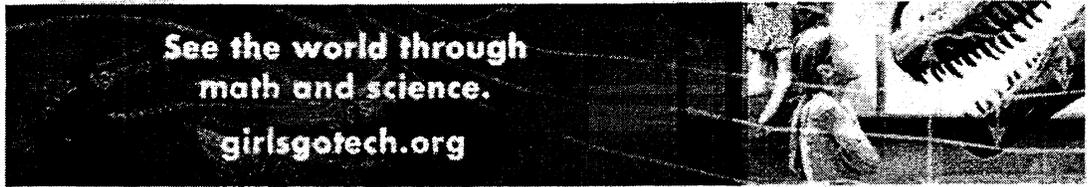
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Site that snitches on snitches irks judges

Whosarat.com, which profiles informants, worries some jurists.

By Emilie Lounsberry
Inquirer Staff Writer

In spring 2003, Eugene "Twin" Coleman began cooperating with the FBI after he was linked to a murder and a cocaine ring run by one of Philadelphia's most notorious drug kingpins.

By the time Kaboni Savage was convicted in December 2005, two other potential witnesses had been gunned down. Coleman's mother and five other family members were dead, too, killed in a house fire that investigators believe was set in retaliation.

Coleman went into the federal witness-protection program.

But if he thought he could fade into obscurity, he was wrong. His role as an informant is detailed at www.whosarat.com. The vitriol-filled Web site lists more than 4,300 purported snitches from around the world. And that is sending a wave of worry through the criminal justice system, where informants play a critical role.

For fees ranging from \$7.99 for one week's access to \$89.99 for a lifetime membership (and a T-shirt), anyone can do a search or post information, with photos, about cooperating witnesses and their dime-dropping deeds. Most profiles include angry messages. Court documents often are attached as proof.

"He's a drug dealer, and a murderer, why should anyone believe what comes out of his mouth," said the posting about Coleman. "He's going to lie, in hopes to get his self out of a jam."

The site has caught the attention, and the ire, of some federal judges. They've begun limiting public access to the kind of court papers that have been posted at whosarat.com: plea agreements and sentencing documents that disclose who is cooperating with the government.

"If it saves one life, it's worth it, in my view - or saves one case," said Chief Judge Harvey



LA

The e-mail address of a defense witness in one of Gilson's murder cases turned up in a whosarat.com posting.

In a New Mexico drug case, a cooperating witness' photo and profile from whosarat.com were distributed in the West Philadelphia neighborhood where he lived, according to U.S. Attorney Patrick L. Meehan. Flyers were put on windshields and utility poles, calling the man a "snitch," "informer" and "rat."

Felicia Samer, a supervisory federal defender who also was on Bartle's committee, acknowledged that whosarat.com could jeopardize the safety of cooperating witnesses. She called the court's decision to limit online access to some documents a "reasonable course of action" because they still could be obtained with a trip to the courthouse.

U.S. District Judge John R. Tunheim of Minnesota, who is chairing the committee working on a nationwide policy, said he favored something less restrictive. "I feel strongly that information needs to be readily available," he said.

On whosarat.com, Coleman is Informant 3296. His photo is not posted, and the only document attached is a news clipping about his case.

Partly because of Coleman's testimony, Kaboni Savage is serving a 30-year sentence for drug offenses, money-laundering and witness intimidation, among other charges. A federal prosecutor said he had never before seen a defendant as "vicious, vindictive and hateful" as Savage.

Contact staff writer Emilie Lounsberry at 215-854-4828 or elounsberry@phillynews.com.

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Judges Respond to Site Outing Informants

MARYCLAIRE DALE

The Associated Press

PHILADELPHIA - In response to a Web site that outs criminal informants and undercover agents, some U.S. judges are withholding certain court documents from the Internet.

Federal judges in eastern Pennsylvania and southern Florida are keeping plea and sentencing memos out of online case files because of concerns that the information is being posted on a Web site called WhosARat.com.

The documents still will be available in person at the federal courthouse.

"It's better in my view to act sooner rather than later, before any tragedy occurs," Chief U.S. District Judge Harvey Bartle III said Friday. His colleagues in the Eastern District of Pennsylvania unanimously agreed on the plan, which was hatched in meetings with prosecutors and public defenders, he said.

"We're not going to have secret documents," Bartle said. "It will still be available for anybody that still wants to walk into the courthouse office and get it."

Former Boston disc jockey Sean Bucci, upset about a reported informant's role in his drug case, started the site in 2004. Bucci was sentenced this year to more than 12 years in prison.

His lawyer, public defender Stellio Sinnis, argues that defendants already know who is cooperating, and that the site lets the public know what informants get for helping prosecutors.

"I think sometimes that courts and juries rely too much on informant or co-defendant testimony without sufficiently weighing the breaks they stand to gain and how that (affects) their credibility," Sinnis said Friday.

Sinnis said he does not know of anyone physically harmed because of information posted on the Web site. But U.S. Attorney Patrick Meehan blames WhosARat.com for endangering an informant in a drug case; the man's picture and profile were taken from the Web site and plastered around his Philadelphia neighborhood.

"That puts him at risk from anybody who may want to take a pot shot at him," Meehan said.

In his district, a young mother who bought guns for friends in a drug gang was slain hours before she was to testify in 2001, while six relatives of a drug informant were killed in a 2004 arson that remains under investigation.

Meehan credits informants with helping police make arrests in scores of homicides in the Philadelphia region.

"I have great empathy for witnesses and victims who are reluctant to come forward. Though without them we will not be successful in making cases," he said.

Frank O. Bowman III, a University of Missouri law professor and former federal prosecutor, shares Meehan's concerns for the safety of informants and the undercover agents described on WhosARat.com.

However, he questions the ability of researchers and reporters to monitor the workings of the justice system without broad electronic access.

Through charging decisions and sentencing recommendations, the Department of Justice has immense power to induce people to sign plea agreements, and the vast majority do, Bowman said.

"Like all kinds of immense power, it needs to be open to sunshine. The public needs to be aware of how the department is using its sentencing leverage, its power, to induce people to plead guilty and forgo jury rights," he said.

...

On the Net:

WhosARat: <http://www.whosarat.com>

Find this article at:

http://www.philly.com/philly/wires/ap/news/nation_world/20070723_ap_judgesrespondtositeoutinginformants.html

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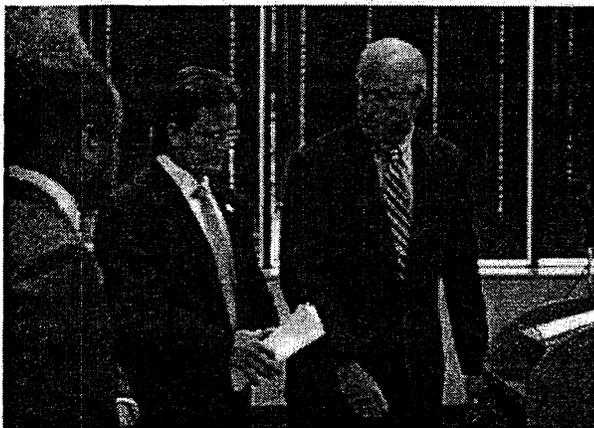
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Stoking a culture of fear for witnesses

A Web site called the "new enemy" of those aiding prosecutions has played a key role in a W. Phila. case.

By Emilie Lounsberry

Inquirer Staff Writer



TOM GRALISH / Inquirer Staff Photographer
U.S. Attorney Patrick Meehan (right) with the FBI's J.P. Weis announces the indictment against two for witness intimidation.

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As a culture of fear continues to deter witnesses from coming forward in Philadelphia, a federal grand jury yesterday accused a drug dealer and his

girlfriend of conspiring to intimidate a government witness by having his neighborhood plastered with flyers labeling him a "rat" and a "snitch."

The information on the flyers had come from whosarat.com, a controversial Web site that lists more than 4,300 informants from around the world, and was assailed by U.S. Attorney Patrick Meehan as the "new enemy" of cooperating witnesses and law enforcement.

"It's a by-product of the stop-snitching culture that we should all find deeply disturbing," Meehan said at a news conference, and "has the potential to compromise countless prosecutions across the country."

While Meehan said the site is protected by the First Amendment, he said that the FBI and local law enforcement will aggressively pursue anyone who tries to intimidate witnesses - such as the two indicted yesterday.

Joseph Miles Davis, 39, is already serving a 17-year prison sentence, in part, because of key testimony of the cooperating witness, a West Philadelphia man identified only as D.S. Davis was convicted in a scheme to import PCP.

If Davis is convicted of the new charges, he will probably face an additional 10 years in prison, said Assistant U.S. Attorney Mark Miller.

Adero M. Miwo, 24, of Jenkintown, faces a possible prison sentence of about three or four years if she is convicted at trial, Miller said. Both were charged with conspiracy and witness intimidation.

Her attorney, Jerome Brown, said that Miwo would plead not guilty. "Everybody is innocent until proven guilty," he said.

Miwo went to Germantown Friends, volunteered with Habitat for Humanity, worked at a child-care center, raised money for an orphanage in Africa, and was wrapping up her final semester in college when she was arrested in March, according to a bail motion filed by Brown.

The whosarat.com Web site has triggered a wave of concern in the justice system, with a committee of federal judges exploring a nationwide policy that is expected to curtail at least some documents now available on federal court Web sites.

Last week, Chief Judge Harvey Bartle 3d of U.S. District Court in Philadelphia said that here all plea agreements and sentencing documents, which in some cases detail a defendant's cooperation, will no longer be posted on the court's Web site, though they will be available at the federal courthouse.

Chris Brown, a whosarat.com spokesman, said the Web site was merely a forum, protected by the First Amendment, of public information posted by others. He said that he "can't believe that someone got indicted for hanging a flyer" and that such publicity only "makes the site that much more popular."

Cooperating witnesses have long played an important, though controversial role, in the justice system. They typically get reduced sentences in return for their testimony - but sometimes they lie.

When, however, their testimony is corroborated, they are extremely valuable to prosecutors, and have helped convict some of the most dangerous murderers and drug dealers.

But with a growing murder rate and widespread fears of retaliation, eyewitnesses have been reluctant to come forward in Philadelphia, and veteran homicide prosecutor Edward McCann said that "fear on the streets" was probably the biggest impediment to arrests in murder cases.

Whosarat.com isn't helping matters, officials said.

J.P. Weis, head of the FBI office in Philadelphia, said such Web sites show a "profound lack of respect" for the legal system.

The "warped message" on city streets, he said, "is that it's somehow worse to provide information about a crime than it is to actually commit a crime." And that, Weis said, is "mind-boggling."

Yesterday's indictment said the intimidation began after Davis and D.S. were indicted by a federal grand jury in New Mexico in 2006 on drug charges, and D.S. became a government witness against Davis.

Information about D.S. surfaced on whosarat.com - his photo, along with a nasty comment: "This guy is a drunk, and heavy weed smoker, and a recognized car thief among his peers. He is the one who needs to be taken off the streets," according to court documents filed in New Mexico.

Davis and Miwo were behind the distribution of flyers with information from that Web site, the indictment charged.

The flyers were put on car windshields and utility poles and even sent by mail to residents of the West Philadelphia neighborhood where D.S. had lived, according to Meehan.

As a result, D.S. had to be taken to a secret location, but he was a key witness

against Davis, who was convicted in March.

After the trial, the indictment contended, Davis and Miwo then set out to get the witness to recant his testimony - and even came up with a script for what he should say. Miwo also offered D.S. \$11,000 in return for changing his testimony, the indictment stated.

Contact staff writer Emilie Lounsberry at 215-854-4828 or elounsberry@phillynews.com.

Find this article at:

http://www.philly.com/inquirer/home_top_stories/20070726_Stoking_a_culture_of_fear_for_witnesses.html

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COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

August 30, 2007

MEMORANDUM

To: Chief Judges, United States Courts of Appeals
Judges, United States District Courts
United States Magistrate Judges

From: John R. Tunheim, Chair 

RE: ELECTRONIC PUBLIC ACCESS TO PLEA AGREEMENTS

Last November, Judge Paul G. Cassell, Chair of the Criminal Law Committee, and I wrote to you regarding a website, www.whosarat.com, which purports to identify informants in criminal cases and, in some cases, includes information obtained from federal court case files. Because of the importance the Court Administration and Case Management (CACM) Committee has placed on this issue, I wanted to give you an update on what has occurred over the past eight months.

In December of 2006, the Department of Justice (at the request of Judge Cassell and myself) provided the Judiciary with its views on the issue, and requested that the Judicial Conference consider restricting remote electronic access to plea agreements to court users and participants in the case only. Public Internet access, through PACER,¹ would be prohibited. (The plea agreements would, however, remain publicly available in the clerk's office.) The Department also requested that notices be posted on courts' PACER and CM/ECF² log-in screens explicitly warning against using court records for illicit purposes, such as witness intimidation, and that the Judiciary adopt a nationwide policy of restricting the use of cellular telephones and other electronic devices capable of photographing, videotaping, or recording parties or witnesses in federal courtrooms.

At its June 2007 meeting, the CACM Committee had a lengthy discussion of the issues presented by these types of websites, as well as of the Department of Justice's views and proposals. While acutely aware of the concerns raised, the Committee held the view that the Judiciary was obligated to balance measures aimed at protecting informants with the fundamental right of the public to open court proceedings, especially in criminal

¹Public Access to Court Electronic Records.

²Case Management/Electronic Case Files.

cases. In applying this analysis, the Committee found the Department's request to restrict remote electronic public access to all plea agreements to be both overly broad – in its application to all plea agreements, including those that do not reveal any element of cooperation – and incomplete – in that plea agreements containing cooperation provisions would still be available to the public at the clerks' offices and could still be converted to electronic format and disseminated easily over the Internet. The Committee also recognized the difficulty in designing a system whereby the public court proceedings would not reveal cooperation – either through the notation of sealed entries in the district court case file or through filings with the appellate court to enforce the plea agreement. The Committee noted that United States attorneys, as the originators of most plea agreements, may be able to draft plea agreements to contain standard general and hypothetical references to cooperation, while otherwise informing the court of actual cooperation of a particular defendant through a non-public document. Finally, the Committee viewed the recommendation as potentially being in conflict with the pending Rule 49.1(e) of the Federal Rules of Criminal Procedure (discussed below), which appears to require a case-by-case determination before a document is restricted from remote public access and may not allow for a blanket public access restriction on any particular type of document. This rule will take effect on December 1, 2007, subject to final congressional action.

Regarding the Department's request that an electronic banner-type notice be posted on courts' CM/ECF and PACER log-in screens warning against using court records for illicit purposes, the Committee noted that courts are free to post such notices if they choose. The Committee, however, questioned their effectiveness at deterring individuals intent on malicious or illegal goals.

As to the Department's request regarding a national policy on the use of wireless devices in the courtroom, the Committee noted that there are rules and policies in place to control taking photographs or broadcasting from courtrooms which set out clear prohibitions regarding the use of any device for such purposes in federal courtrooms. In addition, a March 3, 2005, memorandum was sent to all judges from Judge John Lungstrum, then-Chair of the CACM Committee, setting forth all the issues, problems, and considerations relating to the use of wireless devices in courtrooms and urging courts to develop local policies to address them. The Committee determined that these efforts were responsive to the Department's request in this area.

The Committee, however, decided to seek more information and views on the issue of access to plea agreements before making a recommendation to the Judicial Conference. To this end, it asked its privacy policy implementation subcommittee to create a forum to receive the views of interested groups, including the courts, media, law enforcement, the public, and prosecution and defense attorney groups to further consider

this issue. The Committee hopes to use the comments received through the public forum to propose a national policy to the Judicial Conference. The subcommittee is beginning to consider the format and scheduling of such a forum, and I will certainly advise you of the details once they have been established.

Finally, I wanted to alert you to a pending Federal Rule of Criminal Procedure that will offer courts options in individual cases involving defendants whose plea agreements contain information on their cooperation with the government. As noted above, pending Fed. R. Crim. P. 49.1(e) provides for the issuance of protective orders on a case-by-case basis that either (1) require the parties to file a document with additional information redacted,³ or (2) allow the court to limit or prohibit a non-party's remote electronic access to a particular document.⁴ A court could use this rule to address cooperation related concerns by ordering that the parties submit a plea agreement that has the cooperation information redacted for public access purposes. Alternatively, the court could order the clerk to place the unredacted document in the case file, and to restrict remote electronic public access to it.

I hope this information is useful to you and your courts as you consider issues associated with handling sensitive information in the context of CM/ECF. If you have any questions, please feel free to contact me or the Administrative Office's Court Administration Policy Staff, which staffs the Court Administration and Case Management Committee, at 202-502-1560.

cc: Federal Public/Community Defenders
District Court Executives
Clerks, United States District Courts
Chief Probation Officers
Chief Pretrial Services Officers

³Pending Fed. R. Crim. P. 49.1 (a) requires that filings with the court have certain information redacted (e.g., social security, taxpayer identification, and financial account numbers, dates of birth, and minor's names).

⁴The pending rule states: "(e) Protective Orders. For good cause, the court may by order in a case: (1) require redaction of additional information; or (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court."

