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

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To: **Hon. David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

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

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

Date: **May 20, 2006**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met on April 3-4, 2006 in Washington, D.C. and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are attached.

This report addresses a number of action items: approval of published Rules 11, 32, 35, 45, and 49.1 for transmission to the Judicial Conference; approval of proposed amendments to Rules 29 and 41 for publication and comment; and approval of the time computation template for eventual publication. In addition, the Committee has several information items to bring to the attention of the Standing Committee, most notably continued discussion of a draft amendment to Rule 16.

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

1. ACTION ITEM–Rule 11. Pleas; Proposed Amendment Regarding Advice to Defendant Under Advisory Sentencing Guidelines.

This amendment is part of a package of proposals required to bring the rules into conformity with the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provisions of the federal sentencing statute that make the Guidelines mandatory violate the Sixth Amendment right to jury trial. With these provisions excised, 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)." 543 U.S. at 222. Rule 11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.

There were many public comments received on this and the other *Booker* amendments. The Sentencing Commission stated that the amendment tracked the approach the Commission believes to be implicit in *Booker*, but it suggested that the word "calculate" be replaced with "determine and calculate." Other comments suggested that the amendment gave the Guidelines greater prominence than warranted under *Booker*, insufficiently emphasizing the remaining sentencing factors set forth in 18 U.S.C. § 3553(a). There was extensive discussion of the public comments and an additional concern, raised at the meeting, that the amendment might be read as requiring a complete guideline calculation in every case. That would be inconsistent with cases such as *United States v. Crosby*, 397 F.3d 103 (2nd Cir. 2005). *Crosby* recognized that the district courts would "normally" have to determine the applicable guideline range. *Id.* at 111. However, in some cases the court may conclude that it is unnecessary to resolve a particular guideline issue because statutory factors under 3553(a) require a variance that moots the guideline issue. *Id.* at 112.

The Committee agreed that the function of the rule is to advise a defendant who is pleading guilty of the manner in which the court will determine the defendant's sentence. The published language captures the approach taken by most courts after *Booker*. There was, however, agreement that it would be useful to make it clear in the Note that the rule was not intended to be inconsistent with *Crosby*.

After considering other proposals, the Committee voted 9 to 3 to forward the amendment to the Standing Committee as published with the addition of a reference to *Crosby* in the Committee Note in order to avoid any possible confusion. Here, and in the other *Booker* amendments, the Committee also agreed to delete from the Committee Note a reference to the Fifth Amendment requirement of proof beyond a reasonable doubt from the description of *Booker*.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 11 be approved as published and forwarded to the Judicial Conference.

2. ACTION ITEM–Rule 32, Sentencing and Judgment; Proposed Amendment Regarding Notice to Defendant Under Advisory Sentencing Guidelines.

These amendments adapt two subdivisions of the Rule 32 to *United States v. Booker*, 543 U.S. 220 (2005), which directs courts to consider not only information relevant to the Sentencing Guidelines, but also information relevant to the statutory factors listed in 18 U.S.C. § 3553(a). The Committee is proposing amendments only to subdivisions (d) and (h), which govern presentence reports and notice of possible departures. As noted below, the Committee has withdrawn the

proposed amendment to subdivision (k) because of legislative activity that occurred after the approval of the amendments for publication and comment.

Subdivision (d). Subdivision (d) of the rule establishes the requirements for presentence reports. It already requires that the report include the applicable Guidelines and information relevant to the guideline calculations. The amendment adds the requirement that the report include information relevant to the statutory criteria under § 3553(a). However, in light of the difficulty that the probation office may have in determining the scope of the information that would be relevant to the broad statutory criteria under § 3553(a), the proposed amendment requires that information relevant to the statutory criteria be included only when required by the court.

The Committee received critical comments from the Federal Public Defenders and the National Association of Criminal Defense Lawyers who saw the published amendment as improperly giving primacy to the Guidelines in the sentencing process. They also urged that the rule address individually each of the sentencing factors under 3553(a) and that the rule be revised to require the probation office to collect all information relevant to each of the statutory factors. Additionally, they suggested that the title of the heading should be amended to refer to the "advisory" character of the Guidelines.

The Committee agreed that the heading should be revised to refer to the Guidelines as "advisory," and with that change it approved the amendment as published. The Committee felt the published language accurately reflects the approach most courts are taking after *Booker*, and it avoids placing an open-ended and unmanageable obligation on the probation office.

In the Committee Note accompanying the amendment to this subdivision and subdivision (h), the Committee also deleted the Fifth Amendment from the description of the *Booker* decision.

Subdivision (h). This amendment conforms Rule 32(h) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). The purpose of Rule 32(h) is to avoid unfair surprise to the parties in the sentencing process. Currently, it requires notice that the court is considering departing from the Guidelines on the basis of factors not identified in the presentence report or pleadings. The proposed amendment states that the court must provide this notice when it is considering either a departure or a non-guideline sentence based upon the factors in 18 U.S.C. § 3553(a) on the basis of a ground not identified in the presentence report or prehearing submissions. The amendment refers to departures and "non-guidelines" sentences. In the aftermath of *Booker*, the lower courts have used different labels to refer to sentences based on considerations that would not have constituted departures under the mandatory guideline regime, but are now permissible because the Guidelines are advisory (including the terms "'non-Guidelines sentence" and "variance"). As stated in the Committee Note, the amendment is intended to apply to such sentences, regardless of the terminology used by the sentencing court.

The public comments to the published draft revealed several ambiguities in the language. The language was interpreted by some as overly broad (requiring notice whenever the court intends

to rely on a non-guideline factor) and by others as too narrow (requiring no notice when a factor has been identified for one purpose, but the parties are unaware that the court is considering it for a wholly different purpose). Given the potential for misinterpretation, the Committee agreed that a modification of the published language was needed, and it unanimously accepted the alternative language proposed by the Sentencing Commission.

Subdivision (k). The Standing Committee also approved the publication of a proposed amendment to subdivision (k) intended to standardize the collection of data regarding post-*Booker* sentencing by requiring all courts to enter their judgments, including the statement of reasons, on forms prescribed by the Judicial Conference. This provision, which provoked considerable controversy, was withdrawn by the Committee in light of the enactment of § 735 of the USA Patriot Improvement and Reauthorization Act, which amended 28 U.S.C. § 994(w). The amended statute requires the chief judge of each district to provide the Sentencing Commission with an explanation of each sentence including "the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission." The Criminal Law Committee withdrew its request for an amendment to the Criminal Rules, and the Advisory Committee concluded that an amendment to subdivision (k) was no longer necessary.

Recommendation–The Advisory Committee recommends that the proposed amendments to Rule 32(d) and (h), as modified after public comment, be approved and forwarded to the Judicial Conference.

3. ACTION ITEM–Rule 35, Correcting or Reducing Sentence; Proposed Amendment Regarding Elimination of Reference to Mandatory Sentencing Guidelines.

This amendment conforms Rule 35(b)(1)(B) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), holding that the Guidelines are advisory, rather than mandatory. The rule currently states that the court may reduce a sentence if "reducing the sentence accords with the Sentencing Commission's guidelines and policy statements." Although the Guidelines do not currently include provisions governing the correction of sentences under Rule 35, the amendment removes the rule's language that seems, on its face, to be inconsistent with the decision in *Booker*.

Both the Sentencing Commission and the National Association of Criminal Defense Lawyers (NACDL) suggested changes in either the amendment or the note. After discussion, the Committee decided not to alter the amendment. In essence, the proposed changes introduced additional issues that were not part of the amendment as published. NACDL suggested that given the advisory character of the Guidelines, it is no longer appropriate for the rule to require that the motion be made by the government, since powerful evidence of cooperation should be considered under 18 U.S.C. § 3553(a) even in the absence of such a motion. The language of the rule, however, was enacted by Congress. Even if the Committee had the authority to delete this requirement under the Rules Enabling Act, it could not do so without publishing such an amendment for public comment. The

Sentencing Commission raised the question whether the *Booker* remedial opinion is applicable to the post-sentencing context. It suggested that the Committee Note be amended to address this issue. The Committee unanimously declined to introduce the new language to the Note, or otherwise to alter the rule as published for public comment. (The only exception was the agreement to eliminate the reference to the Fifth Amendment in the description of the *Booker* decision in this Note, as well as the notes accompanying the other *Booker* amendments.)

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

4. ACTION ITEM–Rule 45, Computing and Extending Time; Proposed Amendment Regarding Computation of Additional Time for Service.

This amendment has its origins in an amendment to Civil Rule 6 that clarifies the computation of the additional time provided 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). The amendment of the Civil Rule became effective on December 1, 2005. The proposed amendment to Rule 45 tracks the language of the civil rule.

The Committee received only one comment on the proposed amendment, which consisted of a statement of strong approval for the change. Without objection the Committee approved the amendment of Rule 45.

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

5. ACTION ITEM–Rule 49.1, Privacy Protections for Filings Made with the Court; Proposed Rule to Implement E-Government Act.

This new rule, which is based upon the common template developed by Professor Daniel Capra, implements the E-Government Act. It differs from the common provisions in several respects, including the partial redaction of an individual's home addresses (which reflects the special concerns of witnesses and victims in criminal cases) and an exemption from redaction for certain information needed for forfeitures. Rule 49.1 also deletes the template provisions relating to social security and immigration cases, which are exclusively civil. The proposed rule includes provisions regarding actions under 28 U.S.C. §§ 2254, 2255, and 2241. Although these actions are also technically civil, the Advisory Committee concluded it was appropriate to refer to them in Rule 49.1 because they are governed by procedural rules recently restyled by the Criminal Rules Committee.

The e-government rules, including Rule 49.1, generated extensive public comment. A subcommittee reviewed the public comments and considered the advice of Professor Capra and the reporters for the other committees prior to the Committee's April meeting.

Many of the public comments dealt with considerations common to all of the e-government rules, and the Committee sought to incorporate the common changes recommended by Professor Capra after consultation with all of the reporters. These included (1) using of the term "individual" rather than "person" throughout the rule, (2) clarifying that the responsibility for redaction lies with the person making the filing, (3) rewording the exemption from redaction for information necessary to identify property subject to forfeiture, so that it is clearly applicable in ancillary proceedings related to forfeiture, and (4) rewording the exemption from redaction for judicial decisions that were not subject to redaction when originally filed.

The Committee also discussed the provisions for filing under seal and protective orders. The provisions, which were common to all of the e-government rules, were the topic of considerable commentary from the public and members of the Committee. The Committee ultimately endorsed a change in the provision on protective orders, and we understand that language may be adopted by the other advisory committees. The discussion focused on the difference between the standards for sealing and those for protective orders, which were not parallel in the amendment as published for comment. Protective orders were authorized only "[i]f necessary to protect private or sensitive information," while no similar restriction is placed on sealing. The Committee was satisfied with the explanation that the standard for sealing is well established, and there should be no effort to restate that standard in Rule 49.1. The Committee concluded, however, that the provision for protective orders should be modified to incorporate the more flexible standard for the issuance of protective orders set forth in Civil Rule 26(c), which employs the phrase "[f]or good cause shown." The Committee amended subdivision (d) to incorporate this language, and Professor Capra said that he would bring this change to the attention of the other advisory committees. After the Committee meeting all of the reporters agreed to recommend language based on this change to Rule 49.1, but to shorten the phrase to "cause shown." This phrasing is used elsewhere in the Criminal Rules, so we have conformed Rule 49.1 as well to "cause shown." (Note that this provision is now found in (e) due to the renumbering following the addition of a new subdivision (c) regarding immigration cases; the new subdivision is discussed below.)

Other issues addressed in the public comments and Committee discussion were specific to Rule 49.1 or bear most heavily on that rule.

Several issues related to information identifying individuals, particularly date of birth and social security number. After consultation with CACM staff and Professor Capra, the Committee was persuaded that the current rule reflects a careful balancing of interests, and it declined to make any changes. It thus rejected the request of background screeners, who urged that the public record in criminal cases should include full identifying information, such as date of birth, in order to aid private criminal records searches. It also rejected a suggestion from within the Committee that even the disclosure of the last four digits of an individual's social security number might create a danger

of breaches of privacy or identity theft. The Committee was informed that CACM had considered the privacy and security issues relating to social security numbers, and had based the rule permitting disclosure of the last four digits on the practice of the Social Security Administration.

Several issues concerned actions under 18 U.S.C. §§ 2254, 2255, and 2241, which as noted above are covered by both Civil Rule 5.2 and Criminal Rule 49.1.

CACM and the National Association of Criminal Defense Lawyers (NACDL) expressed concern that a categorical exemption from redaction for filings in proceedings under 18 U.S.C. §§ 2254, 2255, and 2241, was unnecessarily broad. The Committee's rationale for exempting these actions was its conclusion that, as a practical matter, the pro se plaintiffs who file such actions will not generally be aware of the redaction requirements. To meet the overbreadth objection, the Committee decided to restrict the exemption to filings by pro se plaintiffs in these actions. The Committee declined, however, to eliminate the exemption entirely. It rejected the suggestion that it would be sufficient merely to relax the application of the redaction requirements in the case of pro se filings. If the rule as a technical matter requires redaction in the case of pro se filings, there could be adverse legal consequences for pro se plaintiffs who failed to redact sensitive information. If a pro se filing under §§ 2254, 2255, and 2241 contains unredacted information that raises security concerns, the court can issue a protective order.

Subsequent to the Advisory Committee meeting, Professor Cooper raised an additional issue regarding actions under 18 U.S.C. § 2241 raising immigration claims. Without going into great detail, the issue that emerged concerned efforts under Civil Rule 5.2 to mesh the special considerations attendant to immigration cases (including limited remote access) with the considerations applicable to actions under §§ 2254, 2255, and 2241. All of the reporters agreed that it was important to apply the same standards to all 2241 cases involving immigration rights. Rather than import additional provisions into Rule 49.1 to deal with such cases, the reporters agreed that it would be preferable to deal with 2241 cases involving immigration rights exclusively under Civil Rule 5.2. Accordingly, subdivision (c) was added to provide that such cases are governed exclusively by Rule 5.2. Since this change was needed to prevent a potential conflict with some or all of the provisions in Rule 5.2 governing immigration claims, it seemed to fall well within the authority that the Committee agreed to give to Judge Bucklew and the reporter.

CACM objected to the categorical exemption from redaction in Rule 49.1(b)(8), (9), and (10), for charging documents, affidavits in support of charging documents, arrest or search warrants, and filings prepared before the filing of a criminal charge that is not part of a docketed case. In CACM's view, redaction of specific private or sensitive information should be sufficient. The Committee reviewed the reasons for its original decision to exempt these filings, particularly the importance of particularity and identification in documents such as arrest or search warrants. Also, the public has a right to know with some specificity who has been charged with a criminal offense or where a search was executed. After discussion, the Committee agreed without objection to retain the exemptions as published.

CACM also expressed strong concern that Rule 49.1 as published did not protect the confidentiality of a grand jury foreperson's name, because it exempts charging documents from the redaction requirement. Disclosure of a grand juror's name, CACM noted, was inconsistent with its policy of protecting the privacy of jurors. Although the published draft includes the CACM policy in the Committee Note, the policy would require sealing on a case by case basis, which CACM deemed insufficient. In discussing this issue, the Committee noted that the petit jury verdict forms present a similar issue, since they are also signed by the foreperson.

The Committee considered an amendment to the published rule that would have redacted the foreperson's name and substituted that person's initials. After extended discussion of the problems posed by requiring redaction, the Committee concluded that the rule should be recommended to the Judicial Conference as published, though the concerns raised by CACM may warrant further study. Several considerations weighed against requiring redaction at this time. Some of the concerns were practical in nature, given the importance of having an original signed version of the documents initiating a criminal prosecution and recording the verdict in the public record. Although it might be possible to have two versions of these documents, one signed and filed under seal and the other merely initialed and filed in the public record, it was unclear exactly how that would work. Moreover, that procedure had not been the subject of notice and public comment. Committee members also expressed concern about an anonymous system of justice. Under Rule 10(a)(1) the court must ensure that the defendant has a copy of the signed grand jury indictment at the time of arraignment. Rule 6(f) provides for the return of a grand jury indictment in open court, and there was support for the view that absent specific findings the public should be entitled to see any document filed in open court. Given the complexity of the issue, the Committee thought that it would be desirable to have a study to determine whether public disclosure of foreperson signatures has caused significant problems before proposing a new rule requiring redaction of every grand jury indictment and every petit jury verdict form.

Finally, the Committee clarified the relationship between the CACM policy statement, which was included in the Committee Note as published, and the rule itself. At Professor Capra's suggestion, the Committee Note was revised to state more clearly that when the rule itself does not exempt the materials listed in the CACM policy statement from disclosure, privacy and law enforcement concerns are to be accommodated through the sealing and protective order provisions of the rule.

Professor Capra also asked the Committee to give the chair and reporter the authority to work with their counterparts on the other advisory committees to work out any last-minute wording issues and to bring all of the e-government rules into agreement as far as possible.

Recommendation–The Advisory Committee recommends that proposed Rule 49.1 be approved, as modified after public comment, and forwarded to the Judicial Conference.

IV. Action Items–Recommendations to Publish Amendments to the Rules

1. Rule 29, Motion for a Judgment of Acquittal; Proposed Amendment Concerning Deferral of Rulings.

At present, Rule 29 permits the court to grant a preverdict acquittal that is insulated from appellate review because of the Double Jeopardy Clause. By a narrow vote of 6-5 the Committee voted to recommend publication of an amendment to Rule 29 that would eliminate such unreviewable rulings. The current proposal has an unusually long history that this report will review briefly before turning to recent developments.

Background. For several years the Department of Justice has pressed for an amendment to Rule 29 on the ground that it is anomalous and highly undesirable to insulate erroneous preverdict acquittals from any appeal. This issue has been discussed at numerous meetings of the Advisory Committee, and was brought by the Department directly to the Standing Committee at the January 2005 meeting.

At present, the rule permits the court to grant acquittals under circumstances where Double Jeopardy will preclude appellate review. If the court grants a Rule 29 acquittal before the jury returns a verdict, appellate review is not permitted because Double Jeopardy would prohibit a retrial. If, however, the court defers its ruling until the jury has reached a verdict, and then grants a motion for judgment of acquittal, appellate review is available, because the jury's verdict can be reinstated if the acquittal is reversed on appeal.

After extensive discussion at several meetings, the Advisory Committee voted in May 2004 to leave the rule as it is because of concerns that the proposed amendment would be problematic in cases involving multiple defendants or multiple counts, as well as cases in which the jury is unable to reach a verdict. At that point, the Advisory Committee was under the impression there had been only a very small number of problematic preverdict acquittals under the present rule.

Subsequently, the Department of Justice developed additional information based upon a survey of all United States Attorneys. This information was intended to show the frequency of preverdict acquittals, and selected case studies were presented to show the impact erroneous and unreviewable preverdict acquittals have had on the administration of justice. Deputy Attorney General Christopher Wray presented the new information at the January 2005 meeting of the Standing Committee and strongly advocated the adoption of an amendment to Rule 29 that would provide the government with some means to appeal erroneous acquittals. He stated that the Department would support either a rule requiring that all judgments of acquittal be deferred until the jury has returned a verdict, or a rule that would defer such a ruling unless the defendant waives the Double Jeopardy rights that would normally bar the government from appealing.

Following this presentation, the Standing Committee asked the Advisory Committee to draft an amendment to Rule 29 that would address the concerns raised by the Department of Justice, as well as those concerning hung juries and cases involving multiple counts and multiple defendants, and to advise the Standing Committee on the desirability of adopting such an amendment.

At its April 2005 meeting the Advisory Committee once again considered the desirability and feasibility of amending Rule 29. The Committee was presented with the additional materials prepared by the Department of Justice for the Standing Committee, and Assistant Attorney General Christopher Wray presented the Department's position. After extensive discussion, the Committee voted 8 to 3 in favor of some change to Rule 29. However, many issues were raised regarding the rough draft under consideration (which allowed a defendant to consent to a preverdict ruling if he also waived his Double Jeopardy rights). Committee members felt that substantial revisions in the proposed amendment would be necessary. The proposed amendment was redrafted and subsequent versions were presented and discussed at the Committee's meetings in October 2005 and April 2006.

The current proposal. The Committee considered but ultimately rejected the option of prohibiting preverdict acquittals, because they serve a number of important functions. They provide the trial court with a valuable case-management tool, especially in complex cases involving a large number of defendants and/or counts. In complex cases it is very helpful to be able to simplify the case by eliminating some defendant(s) or count(s) from the jury's consideration if there is no evidence that could support a conviction. Retaining the option of preverdict acquittals is also highly desirable from the defense perspective, since there are obvious costs to continued participation in the latter stages of what may be a lengthy and costly trial.

The amendment addresses the problem by retaining the option of preverdict acquittals, but allowing them only when accompanied by a waiver by the defendant that permits the government to appeal and – if the appeal is successful – on remand to try its case against the defendant. The amended rule seeks to protect both a defendant's interest in holding the government to its burden of proof and the government's interest in appealing erroneous judgments of acquittal. Recognizing that Rule 29 issues frequently arise in cases involving multiple counts and/or multiple defendants, the amendment permits any defendant to move for a judgment of acquittal on any count (or counts).

The 6-5 vote by the Committee reflects serious reservations regarding the merits of the proposed amendment, rather than concerns about the language or form of the amendment. Indeed the language of the amendment, which has been refined over the course of numerous meetings, was approved without objection by the Committee at the April 2006 meeting. The discussion at the Committee focused on the policy issues. Members of the Committee who opposed the amendment saw it as inconsistent with the public policy underlying the Double Jeopardy Clause and as unduly restricting the trial court's authority. They were not persuaded that erroneous preverdict acquittals have been a sufficient problem to warrant such a restriction of constitutional rights and judicial authority. Additionally, since the rule contemplates a government appeal from a preverdict acquittal, they expressed concern that government appeals could create new problems, complicating the

continuation of the trial of related counts or defendants, or possibly denying the district courts of jurisdiction to continue such trials.

After hearing the Department's presentation in January 2005 the Standing Committee asked the Advisory Committee to draft an amendment that would respond to the Department's concerns and to advise the Standing Committee on the desirability of adopting such an amendment. The attached proposal reflects a consensus on the best way to amend Rule 29 if preverdict acquittals are to be restricted to allow the government to challenge them on appeal. The Committee, however, is divided nearly evenly on the desirability of such an amendment at the present time.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 29 be published for public comment.

2. Rule 41, Search and Seizure; Proposed Amendment Authorizing Magistrate Judge to Issue Warrants for Property Outside of the United States.

This amendment was initiated by the Department of Justice. It responds to a problem that the Department has encountered when federal prosecutors work with the State Department Bureau of Diplomatic Security to investigate and prosecute cases involving corruption in United States embassies and consulates around the world. Many cases involved allegations that corrupt consular officials and/or foreign service nationals are selling U.S. visas to foreign individuals who may or may not qualify for a U.S. visa. These crimes take place overseas, and often the most important evidence is located in the offices or residences associated with the consulate or embassy. These problems have arisen in cases involving embassies and consulates in many countries and in American Samoa, a United States territory that is administered by the Department of the Interior but has no federal district court. Although these locations are within U.S. control, they are not located within any State or U.S. judicial district.

As currently written, Rule 41(b) does not provide magistrate judges with the authority to issue warrants for such locations. *See, e.g., United States v. Wharton*, 153 F. Supp. 2d 878, 882 (W.D. La. 2001) ("clearly, Rule 41 did not empower any United States District Court to issue a search warrant for the defendant's property when it was located at the United States Embassy in Port-au-Prince, Haiti.") Although the USA PATRIOT Act amended Rule 41(b) to provide magistrate judges with the authority to issue warrants outside the magistrate's district, this authority is applicable only in cases involving certain terrorism offenses. *See* Rule 41(b)(3).

The language of the proposed amendment was based upon Rule 41(b)(3), which was added by the USA PATRIOT Act, and upon the definition of the special maritime and territorial jurisdiction of the United States contained in 18 U.S.C. § 7, which includes U.S. consulates and embassies. The proposed amendment provides for jurisdiction in any district in which activities

related to the crime under investigation may have occurred, or in the District of Columbia, which is the default jurisdiction for venue under 18 U.S.C. § 3238.

A similar but broader amendment was approved in 1990 by the United States Judicial Conference, which recommended that the Supreme Court adopt the new rule. The Supreme Court declined to adopt the rule at that time, concluding that the matter required "further consideration." The 1990 proposal was broadly worded: it applied to property "lawfully subject to search and seizure by the United States." The current proposal, however, is limited to property within any of the following:

> (1) a territory, possession, or commonwealth of the United States;
>
> (2) the premises of a United States diplomatic or consular mission in a foreign state, and the buildings, parts of buildings, and land appurtenant or ancillary thereto, used for purposes of the mission, irrespective of ownership; or
>
> (3) residences, and the land appurtenant or ancillary thereto, owned or leased by the United States, and used by United States personnel assigned to United States diplomatic or consular missions in foreign states.

These are all locations in which the United States has a legally cognizable interest or in which it exerts lawful authority and control.

The Committee was advised by the Department of Justice that the proposed amendment had been subject to extensive review by agencies such as the Department of State and the Office of Management and Budget. Its scope was deliberately kept narrow to avoid any thorny international issues. It addresses search warrants, not arrest warrants, since the latter may raise issues under extradition treaties.

The Department's presentation regarding the need for an amendment was persuasive. The Committee discussion focused on the means of providing the requested authority. One question was whether the Department should seek legislation rather than an amendment of the rules. Because the issues involved only forum, and not jurisdiction, the Department believed it was appropriate to come first to the Rules Committee. The magistrate judge member of the Committee expressed some concern that the proposal might unintentionally create a hierarchy or distinction among federal magistrate judges, by giving greater authority to the three magistrate judges seated in the District of Columbia. It was noted, however, that Congress has already created a functional distinction by vesting the District of Columbia with default jurisdiction over several categories of international and extraterritorial matters.

The Committee voted 10-1 to approve the amendment to Rule 41(b). Because no committee note had yet been prepared, the Committee agreed to consider and vote on the note by e-mail. On May 12, the draft note was circulated for comment. No member of the Committee requested changes

or a telephone conference, so the Committee was asked to vote on the Committee Note by e-mail. All members of the Committee approved the Note by e-mail.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 41(b) be published for public comment.

3. Time-Computation Template

Judge Kravitz briefed the Committee on the time-computation template, which abolishes the "10 day rule" and adopts the "days are days" principle. He also described in more detail the principles governing the template, and the issues still under consideration by his subcommittee. He explained that the Time-Computation Subcommittee hoped that all of the advisory committees would approve the template at their spring meetings, paving the way for the template to be presented to the Standing Committee at its June meeting. Then each of the advisory committees could begin to adapt the template to their own deadlines.

Following that briefing, the Committee approved the time-computation template for eventual publication in tandem with proposed amendments to the relevant rules of procedure.

Recommendation–The Advisory Committee recommends that the proposed time-computation template be approved for later publication.

V. Information Items

Four subjects discussed at the April 2006 meeting will be major items on the Committee's future agenda, and may eventually reach the Standing Committee.

A. Information Item–Consideration of an Amendment to Rule 16 Concerning Disclosure of Exculpatory Evidence

Since October 2003, the Committee has been considering a proposal to codify and expand the Government's disclosure obligations regarding exculpatory and impeachment evidence favorable to the defense. The Department of Justice has consistently opposed the proposal, believing it to be unnecessary, and expressing particular concern about pretrial disclosure of the identity of prosecution witnesses. This proposal has been discussed at length by a subcommittee and at six meetings of the full Committee. At the Committee's April 2005 meeting, the Committee first voted 8 to 3 in favor of proceeding with an amendment to Rule 16 and then returned the matter to the subcommittee for additional work on the language of the proposed amendment.

While participating fully in efforts to draft the language of a proposed amendment, the Department of Justice also undertook efforts to develop a revision of the United States Attorneys'

Manual (USAM) regarding the government's disclosure obligations that might serve as an alternative to an amendment to Rule 16. The Department presented a first draft of a proposed revision to the Rule 16 subcommittee in early 2006, received comments, and submitted a revised draft for discussion at the Committee's April 2006 meeting.

The Committee discussed at length the draft amendment to the USAM and the Department's suggestion that it be could be adopted as an alternative to a rule change. Some of the comments were directed to the wording of the proposed revision of the USAM, which some committee members felt were vague, hortatory, and subject to many exceptions. It was also noted that there would be no way, under the proposal, to determine in a given case whether the government had made the broad disclosure envisioned by the hortatory language of the rule. Other comments addressed the question whether a revision of the USAM could be a satisfactory substitute for a rules change. More fundamentally, proponents of a rules change noted that the provisions of the USAM are not judicially enforceable, and they also stressed the importance of having a judge, rather than a prosecutor, determine whether disclosure of exculpatory or impeaching material is warranted in a given case.

On the other hand, Department of Justice stressed that an amendment to the USAM could encourage the early disclosure to the defense of exculpatory and impeachment evidence and promote prosecutorial uniformity and regularity nationwide. The exceptions to disclosure were necessary to protect witnesses and national security. The Department of Justice will vigorously oppose the proposed amendment to Rule 16 at the Standing Committee and beyond.

Some members felt that the Committee should welcome the proposed amendment of the USAM and afford it time to work, recognizing that an amendment to Rule 16 could be pursued, if necessary, at a later date. Others felt that the Committee should not lose the benefit of the three years of work that have gone into the proposed amendment, which they viewed as both vitally important and ready for submission to the Standing Committee. One member of the Committee noted that he would be prepared to support the proposal that a revision of the USAM serve as an alternative to a rule change, but only if the draft USAM amendment were revised to eliminate the materiality test and to provide notice in each case of the degree of disclosure afforded.

On a motion to table the proposed amendment to Rule 16 until the October 2006 meeting, the Committee's original vote was split 6 to 6. As chair, Judge Bucklew broke the tie, voting in favor of tabling the amendment. It was noted, however, that two key subcommittee members who had worked on the proposed amendment for three years would complete their terms and be unable to participate in the Committee's next meeting in October 2006. Accordingly, after further discussion, the Committee agreed to table the proposed Rule 16 amendment until a special session of the Committee could be convened on or before September 30, 2006.

B. Other Information Items.

The Committee now has under consideration several issues that are likely to yield proposals that will be brought to the Standing Committee.

1. A subcommittee is reviewing the provisions of Rule 41 dealing with search warrants for computerized and digital data.

2. A subcommittee is reviewing proposals from the Department of Justice for amendments to the rules governing criminal forfeiture.

3. A subcommittee is reviewing proposals by the Department of Justice to amend the rules of criminal procedure to restrict the use of ancient writs, and to amend the rules governing actions under Sections 2254 and 2255 by prescribing the time for motions for reconsideration in those actions.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 11. Pleas

1 * * * * *

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

4 **(1)** ***Advising and Questioning the Defendant.*** Before
5 the court accepts a plea of guilty or nolo contendere,
6 the defendant may be placed under oath, and the
7 court must address the defendant personally in open
8 court. During this address, the court must inform the
9 defendant of, and determine that the defendant
10 understands, the following:

11 * * * * *

12 (M) in determining a sentence, the court's obligation
13 to calculate the applicable sentencing-guideline
14 range ~~apply the Sentencing Guidelines, and the~~

---

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

15 ~~court's discretion to depart from those~~

16 ~~guidelines under some circumstances~~ and to

17 consider that range, possible departures under

18 the Sentencing Guidelines, and other sentencing

19 factors under 18 U.S.C. § 3553(a); and

20 * * * * *

COMMITTEE NOTE

Subdivision (b)(1)(M). The amendment conforms Rule 11 to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* 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. 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 245-46. Rule 11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.

The Committee intends the advice to defendants to describe the manner in which courts determine sentences. Ordinarily the court must calculate the applicable guideline range. However, as was true prior to *Booker*, it may in some cases be unnecessary to resolve a

particular guideline issue. *See United States v. Crosby*, 397 F.3d 103, 111-12 (2nd Cir. 2005).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the text of the proposed amendment as released for public comment. Two changes were made to the Committee note. First, the reference to the Fifth Amendment was deleted from the description of the Supreme Court's decision in *Booker*. Second, the last paragraph of the Note was added to acknowledge cases such as *Crosby*, which recognize that there are situations in which calculations of certain guidelines issues is not required.

SUMMARY OF PUBLIC COMMENTS

Jon Sands (05-CR-009), on behalf of the Federal Public and Community Defenders, contends that the proposed advice to the defendant at the time of a plea misstates the effect of the *Booker* decision by "strongly indicat[ing] that the Guidelines are the primary sentencing principle," and thus not "provid[ing] meaningful or accurate information to defendants about the potential penalties they face." Instead, the court should either advise the defendant of all of the sentencing factors under 18 U.S.C. § 3553(a), or alternatively Rule 11(b)(1)(M) should be stricken.

In addition, Mr. Sands suggested the deletion from the Committee Note to Rule 11 and the other *Booker* rules of any

reference to the Fifth Amendment requirement of proof beyond a reasonable doubt, which he believes was not at issue in *Booker*.

The National Association of Criminal Defense Lawyers (05-CR-20) agrees that Rule 11 must be amended in light of *Booker*, but NACDL but argues that the change "does more than is required, and thus more than is appropriate." Instead of any reference to the guidelines, departures, and other sentencing factors, the rule should revert to its pre-guideline form and merely require the court to advise the defendant of the maximum penalty, whether any penalty is mandatory, and that the actual sentence cannot be predicted or promised. No more should be attempted. The proposed language is "misleading" and it "inappropriately" singles out the guidelines range and possible departures as factors the court must consider, "plainly implying these are of greater importance" than other factors under 18 U.S.C. § 3553(a), which are treated as an "afterthought." This seems to "inappropriately take sides in a developing controversy over the role the Guidelines should and do play in a post-*Booker* sentencing system." NACDL argues that this is substantive--not procedural--issue.

Judith Sheon on behalf of the U.S. Sentencing Commission (050CR-017) notes that the proposed amendment "tracks the three-step approach to sentencing that the Commission believes is implicit in *Booker*," and suggests changing the word "calculate" to "determine and calculate" to "better reflect the careful and multi-faceted factual and legal determinations made by a sentencing judge before arriving at the applicable sentencing range."

Rule 32. Sentence and Judgment

1 * * * * *

2 **(d) Presentence Report.**

3 **(1)** ***Applying the Advisory Sentencing Guidelines.*** The

4 presentence report must:

5 (A) identify all applicable guidelines and policy

6 statements of the Sentencing Commission;

7 (B) calculate the defendant's offense level and

8 criminal history category;

9 (C) state the resulting sentencing range and kinds of

10 sentences available;

11 (D) identify any factor relevant to:

12 (i) the appropriate kind of sentence, or

13 (ii) the appropriate sentence within the

14 applicable sentencing range; and

15 (E) identify any basis for departing from the

16 applicable sentencing range.

17 **(2)** ***Additional Information.*** The presentence report
18 must also contain the following information:
19 (A) the defendant's history and characteristics,
20 including:
21 (i) any prior criminal record;
22 (ii) the defendant's financial condition; and
23 (iii) any circumstances affecting the defendant's
24 behavior that may be helpful in imposing
25 sentence or in correctional treatment;
26 (B) verified information, stated in a
27 nonargumentative style, that assesses the
28 financial, social, psychological, and medical
29 impact on any individual against whom the
30 offense has been committed;
31 (C) when appropriate, the nature and extent of
32 nonprison programs and resources available to
33 the defendant;

34 (D) when the law provides for restitution,
35 information sufficient for a restitution order;
36 (E) if the court orders a study under 18 U.S.C.
37 § 3552(b), any resulting report and
38 recommendation; and
39 (F) any other information that the court requires,
40 including information relevant to the factors
41 under 18 U.S.C. § 3553(a).
42 * * * * *
43 **(h) Notice of ~~Possible Departure From Sentencing~~**
44 **~~Guidelines~~Intent to Consider Other Sentencing**
45 **Factors. Notice of ~~Possible Departure From~~**
46 **~~Sentencing Guidelines~~Intent to Consider Other**
47 **Sentencing Factors.** Before the court may ~~depart from~~
48 ~~the applicable sentencing range~~ rely on a ground not
49 identified for departure or a non-guideline sentence either
50 in the presentence report or in a party's prehearing

51 submission, the court must give the parties reasonable
52 notice that it is contemplating either departing from the
53 applicable guideline range or imposing a non-guideline
54 sentence ~~such a departure~~. The notice must specify any
55 ground not earlier identified for departing or imposing a
56 non-guideline sentence on which the court is
57 contemplating imposing such a sentence ~~a departure~~.
58 * * * * *

COMMITTEE NOTE

Subdivision (d). The amendment conforms Rule 32(d) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* 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. 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 245-46. Amended subdivision (d)(2)(F) makes clear that the court can instruct the probation office to gather and include in the presentence report any information relevant to the factors articulated in § 3553(a). The rule contemplates that a request can be made either by the court as a whole requiring information

affecting all cases or a class of cases, or by an individual judge in a particular case.

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) (suggesting the term

"variance"). This amendment is intended to apply to such sentences, regardless of the terminology used by the sentencing court.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

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 (d), the Committee revised the title to include the word "Advisory" in order better to reflect the guidelines' role under the *Booker* decision. 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.

Subdivision (k), which would have required that courts use a specified judgment and statement of reasons form, was withdrawn because of the passage of § 735 of the USA Patriot Improvement and Reauthorization Act. This legislation amended 28 U.S.C. § 994(w) to impose a statutory requirement that sentencing information for each case be provided on "the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission." The Criminal Law Committee, which had previously requested that the uniform collection of sentencing information be addressed by an amendment to the rules, withdrew that request in light of the enactment of the statutory requirement.

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

Comments regarding subdivision (d)

Jon Sands (05-CR-009), on behalf of the Federal Public and Community Defenders, contends that the amendment to Rule 32(d)(2)(F) should require Probation Officers to collect all information relevant to each of the sentencing factors under 18 U.S.C. § 3553(a). He recommends that these factors be enumerated in Rule 32(d), and that Rule 32(f)(1) be amended to facilitate the collection. Finally, he recommends that the heading of subparagraph (d)(1) be amended to read "Calculating the Advisory Sentencing Guidelines."

The National Association of Criminal Defense Lawyers (05-CR-020) states that the amendment does not go far enough in responding to *Booker*, which "commands a fundamental change ... with respect to the information the court must consider in determining the sentence, and the importance of that information." The structure of the current rule "reflects the primacy the guidelines had prior to *Booker*," and by retaining that structure the amendment "will misleadingly convey and wrongly encourage the continued primacy of the guidelines...." The rule should be revised to address individually all of the factors specified under 18 U.S.C. § 3553(a). The terminology of the rule also requires or encourages special consideration of the guidelines. Alternative terminology might include referring to a sentence outside the guideline range as an "individualized sentence."

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...."

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.

Comments regarding subdivision (k)

Because the amendment to subdivision (k) has been withdrawn, these comments have been omitted.

Rule 35. Correcting or Reducing a Sentence

1 * * * * *

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

3 **(1)** ***In General.*** Upon the government's motion made

4 within one year of sentencing, the court may reduce

5 a sentence if: the defendant, after sentencing,

6 provided substantial assistance in investigating or

7 prosecuting another person.

8 ~~(A) the defendant, after sentencing, provided~~

9 ~~substantial assistance in investigating or~~

10 ~~prosecuting another person; and~~

11 ~~(B) reducing the sentence accords with the~~

12 ~~Sentencing Commission's guidelines and policy~~

13 ~~statements.~~

* * * * *

COMMITTEE NOTE

Subdivision (b)(1). The amendment conforms Rule 35(b)(1) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (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. 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 245-46. Subdivision (b)(1)(B) has been deleted because it treats the guidelines as mandatory.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the text of the proposed amendment as released for public comment, but one change was made in the Committee Note. Here--as in the other *Booker* rules--the Committee deleted the reference to the Fifth Amendment from the description of the Supreme Court's decision in *Booker*.

SUMMARY OF PUBLIC COMMENTS ON RULE 35

Judith Sheon on behalf of the U.S. Sentencing Commission (050CR-017) recognizes that the purpose of the amendment is to

delete a reference to the mandatory application of the Guidelines post *Booker*, but it believes that the amended rule "should reflect the continued requirement that courts consult and consider guidelines and policy statements before making any such sentence reduction." The Commission also notes that there is a "substantial legal question" whether the *Booker* remedial opinion is applicable in the post-sentencing context. The Commission supports an addition to the Committee Note to clarify that "the changes were not intended to enlarge the bases of what a court may consider before imposing a post-sentence reduction."

The National Association of Criminal Defense Lawyers (05-CR-020) states that the proposed amendment is "largely right." However, now that the guidelines are not mandatory, "it is no longer appropriate that the rule require that the motion be made by an attorney for the government." As a policy matter, a sincere effort at cooperation may be "powerful evidence of rehabilitation" that should be considered under 18 U.S.C. § 3553(a) even in the absence of a government motion.

Rule 45. Computing and Extending Time

1 * * * * *

2 **(c) Additional Time After Certain Kinds of Service.**

3 ~~When these rules permit or require~~ Whenever a party

4 must or may ~~to~~ act within a specified period after ~~a notice~~

5 ~~or a paper has been served on that party~~ service and

6 service is made in the manner provided under Federal

7 Rule of Civil Procedure 5(b)(2)(B), ©, or (D), 3 days are

8 added after ~~to~~ the period would otherwise expire under

9 subdivision (a) ~~if service occurs in the manner provided~~

10 ~~under Federal Rule of Civil Procedure 5(b)(2)(B), ©, or~~

11 ~~(D)~~.

COMMITTEE NOTE

Subdivision (c). Rule 45(c) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. This amendment parallels the change in Federal Rule of Civil Procedure 6(e). Three days are added after the prescribed period otherwise expires under Rule 45(a). Intermediate Saturdays, Sundays, and legal holidays are included in

counting these added three days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday. The effect of invoking the day that the rule would otherwise expire under Rule 45(a) can be illustrated by assuming that the thirtieth day of a thirty-day period is a Saturday. Under Rule 45(a) the period expires on the next day that is not a Sunday or legal holiday. If the following Monday is a legal holiday, under Rule 45(a) the period expires on Tuesday. Three days are then added — Wednesday, Thursday, and Friday as the third and final day to act unless that is a legal holiday. If the prescribed period ends on a Friday, the three added days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the third and final day to act.

Application of Rule 45(c) to a period that is less than eleven days can be illustrated by a paper that is served by mailing on a Friday. If ten days are allowed to respond, intermediate Saturdays, Sundays, and legal holidays are excluded in determining when the period expires under Rule 45(a). If there is no legal holiday, the period expires on the Friday two weeks after the paper was mailed. The three added Rule 45(c) days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the final day to act.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No change was made in the rule as published for public comment.

SUMMARY OF PUBLIC COMMENTS ON RULE 45

The National Association of Criminal Defense Lawyers (05-CR-020) thanked the Committee for the clarification of a rule that had "occasionally vexed and confused the most dedicated practitioner."

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 49.1. Privacy Protection For Filings Made with the Court

1 **(a) Redacted Filings.** Unless the court orders otherwise, in
2 an electronic or paper filing with the court that contains
3 a social-security number, taxpayer-identification number,
4 or birth date, the name of an individual known to be a
5 minor, a financial-account number, or the home address
6 of an individual, a party or non-party making the filing
7 may include only:
8 **(1)** the last four digits of a social-security number and
9 taxpayer-identification number;
10 **(2)** the year of the individual's birth;
11 **(3)** a minor's initials;
12 **(4)** the last four digits of a financial-account number;
13 and

---

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

14 **(5)** the city and state of a home address.

15 **(b) Exemptions from the Redaction Requirement.** The
16 redaction requirement does not apply to the following:

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

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

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

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

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

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

29 **(7)** a court filing that is related to a criminal matter or
30 investigation and that is prepared before the filing of

31 a criminal charge or is not filed as part of any
32 docketed criminal case;
33 **(8)** an arrest or search warrant; and
34 **(9)** a charging document and an affidavit filed in
35 support of any charging document.
36 **(c) Immigration Cases.** A filing in an action brought under
37 28 U.S.C. § 2241 that relates to the petitioner's
38 immigration rights is governed by Federal Rule of Civil
39 Procedure 5.2.
40 **(d) Filings Made Under Seal.** The court may order that a
41 filing be made under seal without redaction. The court
42 may later unseal the filing or order the person who made
43 the filing to file a redacted version for the public record.
44 **(e) Protective Orders.** For good cause, the court may by
45 order in a case:
46 **(1)** require redaction of additional information; or

47 **(2)** limit or prohibit a non-party's remote electronic
48 access to a document filed with the court.

49 **(f) Option for Additional Unredacted Filing Under Seal.**
50 A person making a redacted filing may also file an
51 unredacted copy under seal. The court must retain the
52 unredacted copy as part of the record.

53 **(g) Option for Filing a Reference List.** A filing that
54 contains redacted information may be filed together with
55 a reference list that identifies each item of redacted
56 information and specifies an appropriate identifier that
57 uniquely corresponds to each item listed. The list must be
58 filed under seal and may be amended as of right. Any
59 reference in the case to a listed identifier will be
60 construed to refer to the corresponding item of
61 information.

62 **(h) Waiver of Protection of Identifiers.** A party waives the
63 protection of Rule 49.1 (a) as to the party's own

64 information by filing it without redaction and not under

65 seal.

COMMITTEE NOTE

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law No. 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. *See* http://www.privacy.uscourts.gov/Policy.htm. The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in

individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, protection may be sought under subdivision (d) or (e). Moreover, the Rule does not affect the protection available under other rules, such as Criminal Rule 16(d) and Civil Rules 16 and 26(c), or under other sources of protective authority.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party or nonparty making the filing.

Subdivision (e) provides that the court can order in a particular case more extensive redaction than otherwise required by the Rule, where necessary to protect against disclosure to nonparties of sensitive or private information. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a person who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. Subdivision (g) allows the option to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004.

In accordance with the E-Government Act, subdivision (f) of the rule refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a person to waive the protections of the rule as to that person's own personal information by filing it unsealed and in unredacted form. One may wish to waive the protection if it is determined that the costs of redaction outweigh the benefits to privacy. If a person files an unredacted identifier by mistake, that person may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 49.1 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" (March 2004). This document sets out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:

The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:

- unexecuted summonses or warrants of any kind (*e.g.*, search warrants, arrest warrants);
- pretrial bail or presentence investigation reports;

- statements of reasons in the judgment of conviction;
- juvenile records;
- documents containing identifying information about jurors or potential jurors;
- financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
- ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
- sealed documents (*e.g.*, motions for downward departure for substantial assistance, plea agreements indicating cooperation).

To the extent that the Rule does not exempt these materials from disclosure, the privacy and law enforcement concerns implicated by the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (d) or a protective order provision of subdivision (e).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

Numerous changes were made in the rule after publication in response to the public comments as well as continued consultation among the reporters and chairs of the advisory committees as each committee reviewed its own rule.

A number of revisions were made in all of the e-government rules. These include: (1) using of the term "individual" rather than "person" where possible, (2) clarifying that the responsibility for redaction lies with the person making the filing, (3) rewording the

exemption from redaction for information necessary to identify property subject to forfeiture, so that it is clearly applicable in ancillary proceedings related to forfeiture, and (4) rewording the exemption from redaction for judicial decisions that were not subject to redaction when originally filed. Additionally, some changes of a technical or stylistic nature (involving matters such as hyphenation and the use of "a" or "the") were made to achieve clarity as well as consistency among the various e-government rules.

Two changes were made to the provisions concerning actions under §§ 2241, 2254, and 2255, which the published rule exempted from the redaction requirement. First, in response to criticism that the original exemption was unduly broad, the Committee limited the exemption to pro se filings in these actions. Second, a new subdivision (c) was added to provide that all actions under § 2241 in which immigration claims were made would be governed exclusively by Civil Rule 5.2. This change (which was made after the Advisory Committee meeting) was deemed necessary to ensure consistency in the treatment of redaction and public access to records in immigration cases. The addition of the new subdivision required renumbering of the subdivisions designated as (c) to (g) at the time of publication.

The provision governing protective orders was revised to employ the flexible "cause shown" standard that governs protective orders under the Federal Rules of Civil Procedure.

Finally, language was added to the Note clarifying the impact of the CACM policy that is reprinted in the Note: if the materials enumerated in the CACM policy are not exempt from disclosure under the rule, the sealing and protective order provisions of the rule are applicable.

SUMMARY OF PUBLIC COMMENTS

Bruce Berg (05-CR-001), who represents the pre-employment screening industry, requests that the rule be amended to require that individual's full date of birth and social security number be made part of the public record to facilitate background checks.

Mike Sankey (05-CR-002) presented written testimony and appeared in person to supplement his testimony on behalf of the National Association of Professional Background Screeners, in support of listing the full date of birth for adults in order to assist in criminal history searches for employers.

Jack E. Horsley (05-CR-006) suggests that the employee number of a person who is state or federal employee be exempt from redaction.

Mark Golden (05-CR-010), writing on behalf of the National Court Reporters Association, applauds the advisory committees' efforts to address the privacy and security issues and proposes that language be added to make clear that the duty to redact information in filings rests solely with the parties.

The Honorable John R. Tunheim, on behalf of CACM (05-CR-011), expressed concern about several points. (1) The language in all e-rules referring to the record of a court "whose decision is being reviewed" may cause problems in bankruptcy. (2) Rule 49.1's list of exemptions from redaction is unnecessarily broad, because it would be sufficient to redact personal identifiers from habeas filings, a filing in relation to a criminal matter or investigation that is prepared before the filing of a criminal charge or that is not filed as part of any docketed criminal case, arrest or search warrants, and charging documents or affidavits in support thereof. (3) If the Rule

does not require redaction of the grand jury foreperson's name, CACM opposes the rule. (4) The relationship between the CACM guidance and the new rule is not clear.

The Honorable William G. Young (05-CR-012) suggests that the portion of the Criminal (and Civil) Committee Note concerning trial exhibits is ambiguous because it is unclear when they are "filed with the court" and hence subject to redaction. He also believes that allowing the filing of an unredacted document under seal is unwise, though he recognized that it is based in haec verba on the E-Government Act. Finally, he raises several issues regarding the redaction required by CACM's guidelines. Will redaction of residential street addresses from jury lists raise any constitutional concerns? Who will do that redaction? Are the CACM guidelines for transcript preparation so complex that they will unduly delay appellate proceedings?

Peter A. Winn (05-CR-014) believes the rules successfully balance the right of public access to court records against the need to prevent the misuse of sensitive personal and commercial information and implement the congressional directive to make court records available online; however, he recommends the use of the PACER system to create an intermediate system of courthouse only access, rather than achieving such intermediate access by protective orders.

Gregory A. Beck, Public Citizen Litigation Group (05-CR-15) expresses concern that allowing the court to order that a filing be made under seal without redaction will be interpreted--notwithstanding the committee note--to expand the authority to seal and thereby restrict public access to court records. He proposes that provision authorizing the filing of unredacted documents under seal be stricken from each of the e-government rules or limited by the phrase "as authorized by law."

Chris Jay Hoofnagle on behalf of the Electronic Privacy Information Center (05-CR-016) supports revisions to protect personal information by (1) minimization of the collection of personal information in court records, (2) further limiting access at the courthouse, (3) limitations on disclosure only for permitted uses, (4) reduction in unique identifiers, including the redaction of all digits of Social Security numbers, home addresses, telephone numbers, and mother's maiden names, (5) limitation on bulk downloads for commercial solicitations or profiling.

Peter D. Keisler on behalf of the Department of Justice (05-CR-018) recommends a clarification of the forfeiture exemption from redaction by reordering the clauses to make clear that parties may litigate regarding specific property without redaction in ancillary proceedings as well as in the main forfeiture proceeding.

The Reporters Committee for Freedom of the Press (05-CR-019) emphasizes the press's strong interest in the accessibility of all types of information in court records; it (1) opposes the redaction of years of birth and minors names from the right of public access, (2) proposes that the court have authority to unseal redacted information in the public interest, and (3) requests clarification of the standard for sealing filings and entering protective orders.

National Association of Criminal Defense Lawyers (05-CR-020) recommends that the exemption of habeas corpus and 2255 actions from the redaction requirements be replaced with a provision encourages–but does not require–pro se litigants to comply with the redaction requirements in all their filings, or in their habeas and 2255 filings.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 29. Motion for a Judgment of Acquittal

1 **(a) Time for a Motion.**

2 **(1)** ***Before Submission to the Jury.*** After the
3 government closes its evidence or after the close of
4 all the evidence, ~~the court on the defendant's motion~~
5 ~~must enter a judgment of acquittal of any offense for~~
6 ~~which the evidence is insufficient to sustain a~~
7 ~~conviction. The court may on its own consider~~
8 ~~whether the evidence is insufficient to sustain a~~
9 ~~conviction. If the court denies a motion for a~~
10 ~~judgment of acquittal at the close of the~~
11 ~~government's evidence, the defendant may offer~~
12 ~~evidence without having reserved the right to do so.~~
13 a defendant may move for a judgment of acquittal on
14 any offense. The court may invite the motion.

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

15 (2) ***After a Guilty Verdict or a Jury's Discharge.*** A
16 defendant may move for a judgment of acquittal, or
17 renew such a motion, within 7 days after a guilty
18 verdict or after the court discharges the jury,
19 whichever is later. A defendant may make the
20 motion even without having made it before the court
21 submitted the case to the jury.
22 (b) **Ruling on a Motion Made Before Verdict**. If a
23 defendant moves for a judgment of acquittal before the
24 jury reaches a verdict (or after the court discharges the
25 jury before verdict), the following procedures apply:
26 (1) ***Denying Motion or Reserving Decision.*** The court
27 may deny the motion or may reserve decision on the
28 motion until after a verdict. If the court reserves
29 decision, it must decide the motion on the basis of
30 the evidence at the time the ruling was reserved. The
31 court must set aside a guilty verdict and enter a

32 judgment of acquittal on any offense for which the
33 evidence is insufficient to sustain a conviction.
34 **(2)** ***Granting Motion; Waiver.*** The court may not grant
35 the motion before the jury returns a verdict (or
36 before the verdict in any retrial in the case of
37 discharge) unless:
38 (A) the court informs the defendant personally in
39 open court and determines that the defendant
40 understands that:
41 (i) the court can grant the motion before the
42 verdict only if the defendant agrees that the
43 government can appeal that ruling; and
44 (ii) if that ruling is reversed, the defendant
45 could be retried; and
46 (B) the defendant in open court personally waives
47 the right to prevent the government from
48 appealing a judgment of acquittal (and retrying

49 the defendant on the offense) for any offense for
50 which the court grants a judgment of acquittal
51 before the verdict.

52 **(c) Ruling on a Motion Made After Verdict.** If a
53 defendant moves for a judgment of acquittal after the jury
54 has returned a guilty verdict, the court must set aside the
55 verdict and enter a judgment of acquittal on any offense
56 for which the evidence is insufficient to sustain a
57 conviction.

58 ~~**(b) Reserving Decision.** The court may reserve decision on~~
59 ~~the motion, proceed with the trial (where the motion is~~
60 ~~made before the close of all the evidence), submit the~~
61 ~~case to the jury, and decide the motion either before the~~
62 ~~jury returns a verdict or after it returns a verdict of guilty~~
63 ~~or is discharged without having returned a verdict. If the~~
64 ~~court reserves decision, it must decide the motion on the~~
65 ~~basis of the evidence at the time the ruling was reserved.~~

66 ~~**(c) After Jury Verdict or Discharge.**~~

67 ~~(1) ***Time for a Motion.*** A defendant may move for a~~

68 ~~judgment of acquittal, or renew such a motion,~~

69 ~~within 7 days after a guilty verdict or after the court~~

70 ~~discharges the jury, whichever is later.~~

71 ~~(2) ***Ruling on the Motion.*** If the jury has returned a~~

72 ~~guilty verdict, the court may set aside the verdict and~~

73 ~~enter an acquittal. If the jury has failed to return a~~

74 ~~verdict, the court may enter a judgment of acquittal.~~

75 ~~(3) ***No Prior Motion Required.*** A defendant is not~~

76 ~~required to move for a judgment of acquittal before~~

77 ~~the court submits the case to the jury as a~~

78 ~~prerequisite for making such a motion after jury~~

79 ~~discharge.~~

COMMITTEE NOTE

Subdivisions (a), (b), and (c). The purpose of the amendment is to allow the government to seek appellate review of any judgment of acquittal. At present, the rule permits the court to

grant acquittals under circumstances where Double Jeopardy will preclude appellate review. If the court grants a Rule 29 acquittal before the jury returns a verdict, appellate review is not permitted because Double Jeopardy would prohibit a retrial. If, however, the court defers its ruling until the jury has reached a verdict, and then grants a motion for judgment of acquittal, appellate review is available, because the jury's verdict can be reinstated if the acquittal is reversed on appeal.

The amendment permits preverdict acquittals, but only when accompanied by a waiver by the defendant that permits the government to appeal and – if the appeal is successful – on remand to try its case against the defendant. Recognizing that Rule 29 issues frequently arise in cases involving multiple counts and or multiple defendants, the amendment permits any defendant to move for a judgment of acquittal on any count (or counts). Following the usage in other rules, the amendment uses the terms "offense" and "offenses," rather than count or counts.

The amended rule protects both a defendant's interest in holding the government to its burden of proof and the government's interest in appealing erroneous judgments of acquittal, while ensuring that the court will only have to consider the motion once. Although the change has required some reorganization of the subdivisions, no substantive change is intended other than the limitation on preverdict rulings and the new waiver provision.

Subdivision (a). Amended Rule 29(a), which states the times at which a motion for judgment of acquittal may be made, combines provisions formerly in subdivisions (a) and (c)(1). No change is intended except that the court may not grant the motion before verdict without a waiver by the defendant.

The amended rule omits the statement in Rule 29(a) that: "If the defendant moves for judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so." The Committee concluded that this language was no longer necessary. It referred to a practice in some courts, no longer followed, of requiring a defendant to "reserve" the right to present a defense when making a Rule 29 motion. There is no reason to require such a reservation under the amended rule.

Subdivision (b). Amended Rule 29(b) sets forth the procedures for motions for a judgment of acquittal made before the jury reaches a verdict or is discharged without reaching a verdict. (There is, of course, no need to rule if a not guilty verdict is returned.) Prior to verdict, the Rule authorizes the court to deny the motion or reserve decision, but the court may not grant the motion absent a defendant's waiver of Double Jeopardy rights. *See Carlisle v. United States*, 517 U.S. 416, 420-33 (1996) (holding that trial court did not have authority to grant an untimely motion for judgment of acquittal under Rule 29).

Accordingly, if the defendant moves for a judgment of acquittal at the close of the government's evidence or the close of all the evidence, in the absence of a waiver the court has two options: it may deny the motion or proceed with trial, submit the case to the jury, and reserve its decision until after a guilty verdict is returned. As under the prior Rule, if the defendant made the motion at the close of the government's evidence, the court must grant the motion if the evidence presented in the government's case is insufficient, *see Jackson v. Virginia*, 443 U.S. 307 (1979), even if evidence in the whole trial is sufficient. If the government successfully appeals, the guilty verdict can be reinstated. This general rule requiring the court to defer its ruling applies equally to motions for judgments of acquittal made in bench trials. *Cf. United States v. Morrison*, 429

U.S. 1 (1976) (holding that Double Jeopardy does not preclude appeal from judgment of acquittal entered after guilty verdict in bench trial, because verdict can be reinstated upon remand).

Similarly, if the defendant moves for a judgment of acquittal after the jury is discharged and the government wishes to retry the case, absent a waiver the court has two options. It may deny the motion, or it may reserve decision, proceed with the retrial, submit the case to the new jury, and rule on the reserved motion if there is a guilty verdict after the retrial. *See Richardson v. United States*, 468 U.S. 317, 324 (1984) ("a retrial following a 'hung jury' does not violate the Double Jeopardy Clause"). After the second trial, the court must grant the motion if the evidence presented at the first trial was insufficient when the motion was made, even if the evidence in the retrial was sufficient. This procedure permits the government to appeal, because the verdict at the second trial can be reinstated if the appellate court rules that the judgment of acquittal was erroneous.

The court may grant a Rule 29 motion for acquittal before verdict only as provided in subdivision (b)(2), the waiver provision. Under amended Rule 29(b)(2), the court may rule on the motion for judgment of acquittal before the verdict with regard to some or all of the counts, after first advising the defendant in open court of the requirement of the Rule and the protections of the Double Jeopardy Clause, and after the defendant waives those protections on the record. Although the focus of the rule is on the waiver of the defendant's Double Jeopardy rights, the rule does not refer explicitly to Double Jeopardy. Instead, it puts the waiver in terms a lay defendant can most readily understand: the defendant's waiver allows the government to appeal a judgment of acquittal, and to retry him if that appeal is successful.

As with any constitutional right, the waiver of Double Jeopardy rights must be knowing, intelligent, and voluntary. *See generally Johnson v. Zerbst,* 304 U.S. 458, 464 (1938); *United States v. Morgan*, 51 F.3d 1105, 1110 (2d Cir. 1995) ("the act of waiver must be shown to have been done with awareness of its consequences"). Although there are cases holding that a defendant's action or inaction can waive Double Jeopardy, the Committee believed that it was appropriate for the Rule to require waiver both under the rule and explicitly on the record. *See United States v. Hudson*, 14 F.3d 536, 539 (10th Cir. 1994) (when consent order did not specifically waive Double Jeopardy rights, no waiver occurred); *Morgan*, 51 F.3d at 1110 (civil settlement with government did not waive Double Jeopardy defense when settlement agreement was not explicit, even if individual was aware of ongoing criminal investigation). For a case holding that a defendant may waive his Double Jeopardy rights to allow the government to appeal, see *United States v. Kington*, 801 F.2d 733 (5th Cir. 1986), *appeal after remand, United States v. Kington*, 835 F.2d 106 (5th Cir. 1988).

Before the court may accept a waiver, it must address the defendant in open court, as required by subdivision (b)(2). A general model for this procedure is found in Rule 11(b), which provides for a plea colloquy that is intended to insure that the defendant is knowingly, voluntarily, and intelligently waiving a number of constitutional rights.

Subdivision (c). The amended subdivision applies to cases in which the court rules on a motion made after a guilty verdict. This was covered by subdivision (c)(2) prior to the amendment. The amended rule restates the applicable standard, using the same terminology as former subdivision (a)(1). No change is intended.

Rule 41. Search and Seizure

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

4 * * * * *

5 (5) a magistrate judge having authority in any district in
6 which activities related to the crime under
7 investigation may have occurred, or in the District of
8 Columbia, may issue a warrant for property that is
9 located outside the jurisdiction of any State or
10 district, but within any of the following:
11 (A) a territory, possession, or commonwealth of the
12 United States;
13 (B) the premises of a United States diplomatic or
14 consular mission in a foreign state, and the
15 buildings, parts of buildings, and land
16 appurtenant or ancillary thereto, used for

17 purposes of the mission, irrespective of

18 ownership; or

19 (C) residences, and the land appurtenant or ancillary

20 thereto, owned or leased by the United States,

21 and used by United States personnel assigned to

22 United States diplomatic or consular missions

23 in foreign states.

COMMITTEE NOTE

Subdivision (b)(5). Rule 41(b)(5) authorizes a magistrate judge to issue a search warrant for property located within certain delineated parts of United States jurisdiction that are outside of any State or any federal judicial district. The locations covered by the rule include United States territories, possessions, and commonwealths not within a federal judicial district as well as certain premises associated with United States diplomatic and consular missions. These are locations in which the United States has a legally cognizable interest or in which it exerts lawful authority and control. Under the rule, a warrant may be issued by a magistrate judge in any district in which activities related to the crime under investigation may have occurred, or in the District of Columbia, which serves as the default district for venue under 18 U.S.C. § 3238.

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.

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

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

I. ATTENDANCE AND OPENING REMARKS

The Judicial Conference Advisory Committee on the Rules of Criminal Procedure (the "committee") met in Washington, D.C., on April 3-4, 2006. The following members were present:

Judge Susan C. Bucklew, Chair
Judge Richard C. Tallman
Judge David G. Trager
Judge Harvey Bartle, III
Judge James P. Jones
Judge Mark L. Wolf
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King
Robert B. Fiske, Jr., Esquire
Donald J. Goldberg, Esquire
Thomas P. McNamara, Esquire
Assistant Attorney General Alice S. Fisher (ex officio)
Professor Sara Sun Beale, Reporter

Also participating in all or part of the meeting were:

Judge David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
Judge Mark R. Kravitz, Standing Committee Liaison to the Criminal Rules Committee
Judge Paul L. Friedman, Former Committee Member
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Paul J. McNulty, Deputy Attorney General
Benton J. Campbell, Counselor to the Assistant Attorney General
Jonathan J. Wroblewski, Counsel, United States Department of Justice
Peter G. McCabe, Rules Committee Secretary and Administrative Office Assistant Director
John K. Rabiej, Chief of the Rules Committee Support Office at the Administrative Office
James N. Ishida, Senior Attorney at the Administrative Office
Jeffrey N. Barr, Senior Attorney at the Administrative Office

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

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

II. APPROVAL OF MINUTES

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

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

III. STATUS OF MATTERS PENDING BEFORE CONGRESS AND PROPOSED AMENDMENTS

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

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

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

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

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

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

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

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

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

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

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

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

3. Rule 17. Subpoena. The proposed amendment requires judicial approval before service of a post-indictment subpoena seeking personal or confidential victim information from a third party and provides a mechanism for victim notification.

4. Rule 18. Place of Trial. The proposed amendment requires the court to consider victim convenience in setting the place for trial within the district.

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

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

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

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

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

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

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

C. Proposed Amendments Published for Public Comment

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

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

2. Rule 32. Sentencing and Judgment. The proposed amendment would conform the rule to *Booker* by (1) clarifying that the court can instruct the probation office to include in the presentence report information relevant to factors set forth in 18 U.S.C. § 3553(a); (2) requiring the court to notify parties that it is considering imposing a non-guideline sentence based on factors not previously identified; and (3) requiring the court to enter judgment on a special form prescribed by the Judicial Conference.

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

4. Rule 45. Computing and Extending Time. The proposed amendment clarifies how to calculate the additional three days given a party to respond when service is made by mail, leaving it with the clerk of court, or by electronic means under Civil Rule 5(b)(2)(B), (C), or (D).

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

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

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

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

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

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

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

> **Notice of Intent to Consider Other Sentencing Factors.** Before the court may rely on a ground not identified for departure or a non-guidelines sentence either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence. The notice must specify any ground not earlier identified for departing or imposing a non-guideline sentence on which the court is contemplating imposing such a sentence.

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

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

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

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

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

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

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

The committee without objection approved the Rule 45 amendment.

IV. SUBCOMMITTEE REPORTS

A. Rule 49.1. Proposed E-Government Rule

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

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

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

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

Professor Beale noted that the phrase "a party or non party making a filing" had been added to Rule 49.1(a) to make clear that the redaction obligation applies to all filers, not just parties. She also noted the Department of Justice's suggestion, agreed to by the other rules committee reporters, to move the phrase "in a forfeiture proceeding" to the end of paragraph (b)(1) to make clear that the redaction exemption also applies to forfeiture filings in related ancillary proceedings. The revised rule would read as follows: "(1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;"

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

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

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

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

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

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

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

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

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

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

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

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

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

Ms. Fisher responded that the USAM revision was proposed as an alternative to a rule change. Under its proposed revision standard, prosecutors would continue to weigh materiality before disclosing exculpatory or impeaching evidence, but would be encouraged to construe materiality broadly. She added that exceptions were important to protect witnesses and the national security. Judge Wolf suggested that, where witness safety or national security considerations

required an exception, the Department could simply request a protective order. Ms. Fisher replied that Judge Wolf's concerns could largely be addressed in a further revision of the USAM draft. Mr. Goldberg suggested that a judge rather than a prosecutor should determine whether non-disclosure of exculpatory or impeaching information is warranted in a particular case. He warned that, without the rule amendment, which the committee had been working on for nearly three years, conflicting local rules would emerge. Ms. Fisher suggested that the USAM revision would promote national uniformity and regularity of practice. Mr. McNamara replied that only a rule could accomplish that.

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

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

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

Concern was raised that the terms of Mr. Fiske and Mr. Goldberg, two Rule 16 Subcommittee members who had worked hard on the proposed rule amendment, would expire before the next committee meeting. It was suggested that the committee reconvene again before the expiration of their terms, perhaps by teleconference, to determine (1) whether the Department had added a new U.S. Attorneys' Manual section on disclosure of exculpatory and impeaching information, and (2) whether its wording adequately addressed the main concerns raised by Mr. Fiske and others. Judge Bucklew suggested resolving any wording questions so that the only issue left for the teleconference would be whether to send the proposed rule amendment to the Standing Committee. Following discussion of the changes made to the Rule 16 amendment since the October 2005 meeting, Mr. Fiske moved to table consideration of the Rule 16 amendment proposal until a special session of the committee could be convened on or before September 30, 2006.

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

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

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

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

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

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

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

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

Judge Tallman moved to approve the amendment for publication. Judge Wolf expressed concern that the proposal took power away from judges. Judge Jones noted that many judges would oppose the proposal. Mr. Wroblewski said that the proposed amendment would simply transfer power from a single trial-level judge to a panel of three appellate judges.

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

V. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES

A. Time Computation Subcommittee

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

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

The committee without objection approved the template for eventual publication.

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

The committee discussed the Department's proposed amendment to Rule 12(b)(3)(B), which would prohibit defendants from challenging the facial validity of an indictment or information during or following trial. Mr. Campbell said that the proposed amendment would not affect challenges to the court's jurisdiction, but would simply require defendants to file motions alleging a failure to state an offense in a more timely fashion, at the pre-trial stage.

Judge Wolf asked what a court should do if, mid-trial, an element of the offense is found to be missing from the indictment. Judge Jones asked whether constitutional issues would be raised if a defendant were convicted of being a felon in possession of a firearm, despite the fact that the interstate commerce nexus, though evidenced at trial, was never properly alleged. Judge Tallman

said that, absent a due process notice problem, the case law indicated that the court had the inherent authority to continue the trial and allow a superseding indictment to be filed. The proposed amendment would simply set a procedural deadline for raising a facial attack, he said, and would not mean that failure to do so constitutes a waiver of constitutional objections. Mr. Goldberg said that the proposal was consistent with *United States v. Cotton*, 535 U.S. 625 (2002). Responding to a question by Mr. McNamara, Mr. Campbell said that he suspected that the situation addressed by the proposed amendment was actually "not that common." Judge Wolf moved to table the proposal until the October 2006 meeting. Judge Trager suggested that the committee needed a more detailed memorandum analyzing the Department's proposal before taking any action.

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

C. Rule 41. Warrants for Digital Evidence

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

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

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

The committee discussed the Department's proposal to amend Rule 41(b) to authorize magistrate judges to issue warrants for property that lies within the jurisdiction of the United States but outside that of any state or federal judicial district. Mr. Campbell said that the proposed amendment would address, for instance, the Department's current inability to execute a search warrant in American Samoa, because the U.S. territory is not within the jurisdiction of any district court. Judge Jones asked why the proposed rule did not cover United States military bases or other areas abroad controlled by the United States. Mr. Campbell said that the proposal had undergone extensive review by such agencies as the Department of State and the Office of Management and Budget and that its scope was deliberately kept narrow to avoid any thorny international issues. Judge Trager moved to send the proposal to the Standing Committee with a recommendation that it be published for public comment.

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

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

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

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

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

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

F. Rules 7 and 32.2, Department of Justice Proposal

As an informational matter, Judge Bucklew reported that the Department's proposal to amend Rules 7 and 32.2 with respect to criminal forfeiture had been referred to a subcommittee chaired by Judge Wolf. The subcommittee had met twice and determined that additional work was necessary before it could make a recommendation. Judge Friedman, who recently issued an opinion

denying the government a monetary judgment in a criminal forfeiture case, expressed concern about affording the government an independent source of authority for monetary judgments.

VI. REPORT ON STATUS OF RELEVANT LEGISLATION

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

VII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

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

Respectfully submitted,

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