FEDERAL MAGISTRATE JUDGES ASSOCIATION

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February 4, 2013

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice & Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Comments on Proposed Amendments to Federal Rules of Criminal Procedure and Evidence

Dear Mr. McCabe:

The Federal Magistrate Judges Association submits the attached comments to the Rules Advisory Committee. The comments were first considered by the Standing Rules Committee of the FMJA. The committee members are:

Honorable S. Allan Alexander, Northern District of Mississippi, Chair
Honorable David E. Peebles, Northern District of New York, Co-chair
Honorable Clinton E. Averitte, Northern District of Texas
Honorable William Baughman, Jr., Northern District of Ohio
Honorable Alan J. Baverman, Northern District of Georgia
Honorable Susan Baxter, Western District of Pennsylvania
Honorable Hugh W. Brenneman, Jr., Western District of Michigan
Honorable Geraldine Soat Brown, Northern District of Illinois
Honorable Joe B. Brown, Middle District of Tennessee
Honorable Martin C. Carlson, Middle District of Pennsylvania
Honorable Waugh B. Crigler, Western District of Virginia
Honorable Judith Dein, District of Massachusetts
Honorable Marilyn D. Go, Eastern District of New York
Honorable Steven Gold, Eastern District of New York
Honorable David A. Sanders, Northern District of Mississippi
Honorable Nita L. Stormes, Southern District of Pennsylvania
Honorable Mary Pat Thynge, District of Delaware

The committee members come from several kinds of districts and have varying types of duties. Many of them consulted with their colleagues in the course of preparing these comments. The comments were then reviewed and unanimously approved by the Officers and Directors of the FMJA.

We are pleased to have this opportunity to present written comments representing the view of the FMJA, and we welcome the opportunity to testify.

Sincerely,

Karen Wells Roby

cc. S. Allan Alexander
Shari Bedker, FMJA

COMMENTS OF
THE FEDERAL MAGISTRATE JUDGES ASSOCIATION
ON PROPOSED AMENDMENTS TO

THE FEDERAL RULES OF CRIMINAL PROCEDURE
and
THE FEDERAL RULES OF EVIDENCE
(Class of 2014)

COMMENTS OF FEDERAL MAGISTRATE JUDGES ASSOCIATION RULES COMMITTEE ON PROPOSED CHANGES TO THE FEDERAL RULES OF CRIMINAL PROCEDURE and THE FEDERAL RULES OF EVIDENCE (Class of 2014)

I. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

A. PROPOSED RULES 5(d) and 58 – Consular Notification

COMMENT: These proposed new rules add the requirement that the court must advise a defendant who is not a United States citizen of the right to consular notification, as required by the Vienna Convention on consular notifications. The FMJA endorses the purpose behind the proposed amendments, but suggests rewording of the amendment.

DISCUSSION:

1. **Rule 5(d)(1)(F):** As noted by the Advisory Committee, the Judicial Conference transmitted a prior version of proposed Rules 5(d) and 58 to the Supreme Court in 2011, but the Court returned these rules for reconsideration in April 2012. The FMJA raised three concerns with respect to the 2011 proposed amendments. The FMJA felt that the proposed rules imposed on the judiciary an obligation of the executive branch under the Vienna Convention and that formally requiring consular notification in the Criminal Procedure Rules would be viewed as support for the position that the Convention creates individual rights, which has not yet been determined by the Supreme Court. We also cautioned that great care should be taken so as not to pressure defendants into incriminating

themselves in cases where non-citizen status might be a substantive element of the charged offense.

Although the wording of this redrafted rule is an improvement over the version proposed in 2011, the FMJA remains concerned that incorporating any statement into the Rules regarding consular notification carries some risk that it will be interpreted as a substantive right. We also suggest that it would be very helpful to amend the language of the proposed rule further to insure better protection of defendants from self-incrimination and to assure consistency with the requirements of the Vienna Convention.

Proposed Rule 5(d)(1)(F) provides that "if the defendant is held in custody and is not a United States citizen," the judge must inform the defendant about consular notification to the extent described in subsections (I) and (ii). The beginning portion of the subsection has two features that could cause confusion: First, as constructed, the beginning phrase of the rule could be interpreted to mean that a court should make a preliminary determination whether a defendant is a United States citizen before giving the requisite information and need not give the information if the defendant is a United States citizen. Further, by use of the words "in custody," the beginning phrase suggests a limitation not found in Article 36 of the Vienna Convention.

The FMJA suggests changing the wording of the sentence to state only "that a defendant who is not a United States citizen may request that an attorney for the government . . . ." With such a change, a court would give consular notification information to <u>every</u> defendant without having to determine the citizenship of a defendant and without inquiry of the defendant.

The Advisory Committee recently proposed a rule requiring that advice regarding immigration consequences be given to <u>all</u> defendants during a plea colloquy, rather than just the

defendants who may be affected. As the Advisory Committee explained, a rule that the court give warnings to all defendants without having to determine citizenship is the most effective method for conveying information about collateral immigration consequences. See discussion of proposed Rule 11(b)(1)(O) in the May 2012 Report of the Advisory Committee on Criminal Rules.

We also suggest eliminating the words "in custody" from the beginning phrase to avoid suggesting a limitation not found in Article 36 of the Vienna Convention. By its terms, the Article covers any national who is "arrested or committed to prison or to custody pending trial or is detained in any other manner." The Convention contains no distinction in treatment between persons who are arrested and are not in custody as opposed to persons who are in custody. In contrast, there are several Federal Rules specifying different procedures or considerations depending on whether a defendant is "in custody" or not. *See, e.g.*, Rules 5.1© (timing of preliminary hearing); 15© (appearance at depositions); 32(1)(b) (requirement of prompt preliminary hearing if in custody). However, because all defendants who are brought before the court for an initial appearance are arrestees, whether formally in custody or not, they are all within the contemplated ambit of Article 36. We suggest that the proposed amendment to Rule 5 be revised to apply to all defendants irrespective of custodial status.

The proposed language change to this recent version of Rule 5(d)(1)(F) will necessarily require that the rest of that subsection be slightly modified. FMJA proposes the following change to the draft rule:

Rule 5. Initial Appearance

* * * * *

(d) Procedure in a Felony Case.

(1) Advice. If the defendant is charged with a felony, the judge must inform the defendant of

the following:

* * * * *

(D) any right to a preliminary hearing; and

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant; and

(F) ~~if the~~ **that a** defendant ~~is held in custody and~~ **who** is not a United States citizen~~: (i) that the defendant~~ may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested~~;~~ and ~~(ii)~~ that even without the defendant's request, consular notification may be required by a treaty or other international agreement.

2. **Rule 58:** The FMJA suggests that the wording of proposed Rule 58(b)(2)(H) be amended similarly as follows:

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(b) Pretrial Procedure.

* * * * *

(2) Initial Appearance. At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

* * * * *

(F) the right to a jury trial before either a magistrate judge or a district judge – unless the charge is a petty offense; and

(G) any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release; and

(H) ~~*if the*~~ **that a** defendant **who** ~~*is held in custody*~~

~~and~~ is not a United States citizen: ~~*(I) that the defendant*~~ may request that an attorney for the government or a federal law enforcement officer notify a consular officer from the defendant's country of nationality that the defendant has been arrested; ~~–~~ and ~~*(ii)*~~ that even without the defendant's request, consular notification may be required by a treaty or other international agreement.

II. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

A. PROPOSED RULE 801. Definitions That Apply to this Article; Exclusions from Hearsay

COMMENT: The proposed revision to this Rule provides that prior consistent statements are admissible under the hearsay exemption whenever they would be admissible to "otherwise rehabilitate[] the declarant's credibility as a witness." Fed. R. Evid. 801(d)(1)(B)(ii) (*proposed*). Thus, the revision would allow any prior consistent statement that rehabilitates the witness to be admitted as substantive evidence. *See* Committee Note at 218. The FMJA believes that the proposed amendment is unnecessary and will open the door to admission of self-serving consistent statements whose only effect is bolstering the witness's credibility.

DISCUSSION:

Currently, under Rule 801(d)(1)(b), "prior consistent statements are treated as admissible non-hearsay only if they are offered to rebut a specific allegation of recent fabrication, not to rehabilitate credibility that has been generally called into question." *United States v. Drury*, 396 F.3d 1303, 1316 (11th Cir. 2005); *see also Whitson v. Knox County Board of Education*, 468 Fed. Appx. 532, 539 (6th Cir. Mar. 20, 2012).

Also, a prior consistent statement is admissible only if it was "made before the alleged influence, or motive to fabricate, arose." *Tome v. United States*, 513 U.S. 150, 158 (1995).

The Committee Note to the proposed revision suggests that the revised rule should be interpreted so that prior consistent statements, for example, (1) which are probative to explain what otherwise appears to an inconsistency in the witness's testimony, or (2) to rebut a charge of faulty recollection, are admissible not merely as rehabilitative evidence, but substantive evidence as well. *Id.* At the same time, however, the Note states that the "amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. *It does not allow impermissible bolstering of a witness.*" *Id.* at 218-219 (emphasis supplied).

The FMJA is concerned that, despite the Advisory Committee's stated purpose, the proposed revision to Rule 801(d)(1)(B) significantly undermines the rule against bolstering a witness and opens the door to the admission of self-serving consistent statements as substantive evidence. The language of the revision contains no limitation as to the type of evidence admissible as long as it "otherwise rehabilitates" the witness's credibility. That broad language conceivably would make admissible any prior consistent statement, and potentially, the repeated incantation of a prior consistent statement, as substantive evidence. We think there is a valid reason why prior consistent statements have been rigorously limited in the past, to prevent a party from introducing repetitive statements that have the only effect of bolstering the witness's credibility. Such an established practice should not be easily discarded, particularly where the revision as drafted uses far broader language than the Note envisions.

Significantly, magistrate judges on the FMJA Rules Committee who are from disparate backgrounds – federal prosecutors,

criminal defense lawyers and civil litigators – all agreed that the language of the revision, untethered from the traditional expressed or implied claim of recent fabrication, amounted to an invitation for mischief. It would allow any party – either the prosecution or defense in a criminal case or the plaintiff or defendant in a civil case – to introduce a witness's prior consistent statements just because the witness was "subject to cross-examination" about a prior statement and the statement "otherwise rehabilitates" the witness's credibility. We are concerned that the only limitation upon the adverse consequences of such a broad rule of admissibility would be the judge's utilization of powers under Rule 403.

The FMJA recognizes that, as the Rule currently operates, it is difficult for judges to differentiate for juries the distinction between evidence that is admissible substantively and evidence only admissible for rehabilitative purposes. Similarly, an argument could be made that the distinction is lost on many jurors. However, we believe that the "cure" for such ailments, as proposed, is worse than any "disease" caused by these difficulties.

The FMJA suggests that the revision either specifically state limits to the expansion of what types of rehabilitation evidence are admissible – for example, to rebut a charge of faulty recollection – or that the Rule not be changed at all.

B. PROPOSED RULES 803(6)-(8). Hearsay exceptions for business records, absence of business records, and public records.

COMMENT: These rules have been amended to make clear that the burden of proving untrustworthiness of records or their absence is on the party who opposes introduction of such evidence. The FMJA endorses the proposed amendments.