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

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Donald W. Molloy, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: December 4, 2018

I. Introduction

The Advisory Committee on Criminal Rules met on October 10, 2018, in Nashville, Tennessee. This report discusses several information items, including the Committee's decision to undertake a review of Rule 43(a), and the first phase of its consideration of the provisions governing discovery concerning expert witnesses.

II. Information Items

A. Rule 43(a) (18-CR-C)

A Subcommittee has been appointed to consider the suggestion in the opinion in *United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018), that "it would be sensible" to amend Rule 43(a)'s requirement that the defendant must be physically present for the plea and sentence. On two recent occasions, the Committee has rejected suggestions that it expand the use of video conferencing for pleas or sentencing, but members concluded that it would be appropriate to revisit the issue with

this case in mind. In *Bethea*, the defendant's many health problems made it extremely difficult and for him to come to the courtroom, and given his susceptibility to broken bones, doing so might have been dangerous for him. But even in such an exceptional case, and even at the defendant's request, the panel in *Bethea* concluded, "the plain language of Rule 43 requires all parties to be present for a defendant's plea" and "a defendant cannot consent to a plea via videoconference." Committee members emphasized that physical presence is extraordinarily important at plea and sentencing proceedings, but they also recognized that *Bethea* was a really compelling case. On the other hand, members wondered if the case might be a one-off. Members noted that practical accommodations at the request of the defendant and with the agreement of the government and the court have been made in such rare situations, obviating the need for an amendment. Judge Molloy concluded that the issue warranted further study.

The Subcommittee, chaired by Judge Denise Page Hood, will assess the need for a narrow exception to the requirement of physical presence for plea or sentence, how such an exception could be defined, and what safeguards would be necessary, including the procedures needed to ensure a knowing and intelligent waiver, and to accommodate the right to counsel when the defendant and counsel are in different locations.

B. Time for Ruling on Habeas Motions (18-CR-D)

The Committee considered, and decided not to pursue, Mr. Gary Peel's suggestion that both the Criminal and Civil Rules be amended to require "district court judges to issue decisions/opinions on pending motions within a specified number of days," and suggesting 60 or 90 days absent exigent circumstances. Mr. Peel states that the failure of judges to rule on motions in Section 2254 and 2255 cases, in particular, is a "systemic problem," and that it is not uncommon for Section 2254 and 2255 motions to remain "pending" or "under consideration" for a year or more.

The problem of delay in resolving these matters has been raised in commentary. The reporters provided data from two studies in the past documenting this delay and showing that time to disposition for 2254 noncapital cases varies considerably, with many districts taking multiple years on average to close these cases. Marc Falkoff, the author of the more recent study, argued that the reason for delay in these cases is that these cases are not among those that must be reported as motions that have been pending for more than six months. They have been exempted from that reporting requirement. Mr. Falkoff suggested that that exemption be removed.

Although the Committee did not favor setting strict timelines for the consideration of 2254 and 2255 cases, members expressed concern about the long delays, and the effect of exempting habeas cases from the CJA reporting requirements. This exemption gives district judges an incentive to prioritize the other matters that are reported. Members agreed that eliminating the exemption would have an effect on judge's behavior. On the other hand, they also recognized that the situation varies from district to district, with some jurisdictions—some with only a small number of district judges—having exceptionally heavy habeas caseloads.

Because the reporting requirements fall within the jurisdiction of the Judicial Conference Committee on Court Administration and Case Management (CACM), the Committee requested that Judge Molloy refer its concerns about the incentives created by the current exemption, and the role it may play in delaying the disposition of habeas cases, to CACM. The referral would draw attention to the issue, without presuming to prejudge the conclusion. Judge Molloy subsequently did so, by letter, and was informed that the issue has been placed on the agenda for CACM's June 19, 2019 meeting.

C. Disclosure of Defendant's Full Name and Date of Birth (18-CR-E)

After discussion, the Committee decided not to pursue a proposal from the National Association of Professional Background Screeners (NAPBS), which recommended that the Civil and Criminal Rules, and the architecture of the PACER system, be revised to provide each criminal defendant's full name and date of birth. NAPBS proposed that this information not be visible to the general public when it accessed PACER, but be available as a search term so that background screeners would be able to perform their search functions more accurately and efficiently. This is similar to a request that NAPBS made in 2006 when Criminal Rule 49.1 and the other E-Government Act amendments were promulgated. The Association's request was a little broader at that time. At that time, NAPBS wanted Social Security numbers. This proposal is more limited, and is premised on its argument that making this data available would benefit not only screeners, but also society at large because their screening would be more efficient and accurate. The proposal emphasizes that something similar is presently done in the bankruptcy system to assist in identifying assets, and so on.

No member favored taking up the proposal. The information provided in bankruptcy serves a different function, and the suggested change did not serve the functions that the Criminal Rules are designed to serve. Moreover, it could impose a burden on the courts to collect and add this information, and to modify PACER. Accordingly, the Committee decided not to pursue the proposal.

D. Cooperators

The Committee received an update on the work of the Cooperators Task Force from Judge Kaplan, chair of the Task Force, and Judge St. Eve, who served as a member. The Task Force has completed its work and delivered its report to the Director of the Administrative Office, James C. Duff. The Task Force divided its report into two sections.

An interim report containing recommendations for changes in Bureau of Prisons (BOP) procedures was delivered in August, but efforts to implement these changes have been delayed by leadership changes in that organization. Director Duff has designated Judge St. Eve as the liaison to the BOP, and Judge St. Eve reported that she is working to get its support for the recommendations. She also noted that some of the recommendations, if accepted by the BOP, will

take time to implement because they concern matters governed by agreements with the union representing the BOP employees.

The second and final part of the Task Force report made five principal recommendations.

The first recommended a modification of the existing approach to docketing and filing of materials on CM/ECF from which the fact of cooperation and the details of cooperation can be ascertained. The report proposes something called the plea and sentencing folder approach, or PSF approach. Once implemented, each docket sheet would have tabs for two subfolders, one called the plea documents folder and the other called the sentencing documents folder. All documents that relate to sentencing or to pleas would go into the respective folders. The plea documents would include the plea agreement, plea transcript, and the like. The sentencing folder would include 5K letters, character letters, sentencing motions, sentencing memos and transcripts, and other things relating to sentencing.

The documents for both folders would be available for public viewing at the courthouse, but only on a restricted basis. Someone who wanted to view those folders would have to furnish appropriate identification, and their access would be logged by the Clerk's Office. The object is to create a record of who had access so that if there is an incident involving a cooperator, it would be possible to determine who saw what and when. That would give the investigative personnel something to go on.

Remote access to those folders would not be available to the general public, but would be available to attorneys, self-represented parties in the cases in which they are representing themselves, and individuals who demonstrate to the assigned judge a need for the documents. The objective of this is to restore, to some degree, the practical obscurity enjoyed by court filings that had cooperator information before we converted over to CM/ECF.

There will be some significant implementation time, as well as a great deal of flexibility left to local courts. Each judge and district would have discretion to vary. For example, any judge, just as today, could seal any document that he or she thought appropriate. If a document were sealed or otherwise restricted by the judge, the same restrictions on access that apply today would apply, even with respect to people who view the content of the folders at the courthouse after providing identification, and even to attorneys and others who have remote access. So there is a considerable amount of room for local courts that want to be more protective. A deliberate decision was made to leave the question of press remote access to individual districts. The thinking there was two-fold. First, press access tends to be more of an issue in certain of the larger districts and not much of an issue in many others. Second, there was a sense that given that premise, it would be better not to wave a red flag in circumstances where a national controversy could erupt unnecessarily. Courts have been pretty successful in dealing appropriately with press access in appropriate cases and the Task Force thought it best to leave that where it is.

The second major recommendation is to modify criminal docket sheets. No information would be removed by this, but the sheets would be modified to take what is referred to as JS-3 information off the top of the docket sheet. The information would still be in there, but it would be less readily available.

The remaining three recommendations are less extensive. First, references to Rule 35(b) would be deleted from the amended judgment form. That form currently indicates whether a sentence has been amended as a result of a Rule 35(b) motion, which is for substantial assistance to the government. Second, an educational program would be undertaken so that people understand and properly implement the system. It is clear to the Task Force that once this whole system is adopted and implemented, there will be a need for a considerable amount of education for judges, U.S. Attorneys, the BOP, probation and pretrial staff, and others. Finally, the BOP would be asked to track incidents of assault and other misbehavior affecting cooperators on the basis of motivation, that is, whether the assault or misbehavior was cooperation related. The BOP does not do this now and it would be extremely helpful if that data were collected so that we would have some means of measuring how successful these recommendations, once implemented, prove to be, whether the trend line is in the right direction or the wrong direction. The BOP does not want that information in the institutions, so the suggestion has been made that an anonymized database be created by the Department of Justice based on information furnished by the BOP, so that the information would available in a useful form and would be out of the institutions.

As of October 10, the full report was in Director Duff's hands.

The Committee had tabled its consideration of Rule 49.2, a potential new rule on remote access, pending the completion of the Task Force's work. The submission by the Task Force of its final report and recommendations to Director Duff raises the question whether the effort to draft Rule 49.2 is unnecessary. Ms. Womeldorf advised the Committee that the answer is not clear, as there has been interest in some quarters in proposing and publishing a rule or rules that would implement the Task Force's recommended PSF approach. The E-Government Act provides that exceptions to remote access can be made by rules adopted pursuant to the Rules Enabling Act. CACM, with assistance from the Administrative Office, continues to investigate the best means to implement the PSF approach. Judge Molloy will ask the Cooperators Subcommittee to consider before the full Committee's spring 2019 meeting whether any additional action by the rules committees is warranted at this juncture.

E. Pretrial Disclosure Concerning Expert Witnesses

The last information item concerns Rule 16's provisions on the discovery of expert witness information. At its April meeting, the Committee decided to take a close look at these provisions. It had received two proposals from district judges suggesting that it would be beneficial to expand pretrial discovery of expert witness testimony, bringing the requirements in criminal cases closer to the current requirements in civil cases. Both judges urged that expanded discovery was needed to help the parties prepare for trial, and to provide the necessary basis for rulings on *Daubert*

motions. Members agreed that the scope of pretrial disclosure of expert testimony is an important issue that needs to be addressed, though it will not lend itself to a simple solution. There are many different kinds of experts, and criminal proceedings are not parallel in all respects to civil proceedings. Additionally, the Department of Justice had recently adopted new internal guidelines calling for significantly expanded discovery of expert forensic witnesses, and it may take some time for the effects of the new guidelines to be fully realized.

A Subcommittee to consider the issue, chaired by Judge Ray Kethledge, is planning a mini-conference for February 15, 2019, in Dallas. The Committee used a portion of its October meeting as an educational session on these issues. Multiple representatives from the Department of Justice made presentations to the Committee. The speakers were:

Andrew Goldsmith, National Criminal Discovery Coordinator
Zachary Hafer, Chief of the Criminal Division, District of Massachusetts
Ted Hunt, Senior Advisor on Forensic Science, Office of the Deputy Attorney General
Erich Smith, Physical Scientist/Examiner, Firearms-Toolmarks Unit, FBI Laboratory
Jeanette Vargas, Deputy Chief of the Civil Division, Southern District of New York

The presentations covered the Department's development and implementation of new policies governing disclosure, its efforts to improve the quality of its forensic analysis, and its discovery and disclosure practices in cases involving forensic and non-forensic evidence. They also provided an opportunity to compare discovery in criminal cases with the discovery provided under Civil Rule 26(a).

TAB 5B

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
October 10, 2018, Nashville, TN

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met in Nashville, Tennessee, on October 10, 2018. The following members, liaison members, and reporters were in attendance:

Judge Donald W. Molloy, Chair
Brian Benczkowski, Esq.
Judge James C. Dever
Donna Lee Elm, Esq.
Judge Gary S. Feinerman
Judge Michael J. Garcia (by telephone)
James N. Hatten, Esq.
Judge Denise Page Hood
Judge Lewis A. Kaplan (by telephone)
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Judge Bruce McGivern
Catherine Recker, Esq.
Susan Robinson, Esq.
Jonathan Wroblewski, Esq.
Judge David G. Campbell, Chair, Standing Committee
Judge Amy J. St. Eve, Standing Committee Liaison (by telephone)
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Daniel R. Coquillette, Standing Committee Reporter (by telephone)
Professor Cathie Struve, Standing Committee Associate Reporter (by telephone)

And the following persons were present to support the Committee:

Rebecca A. Womeldorf, Chief Counsel, Rules Committee Staff
Julie Wilson, Counsel, Rules Committee Staff
Ahmad Al Dajani, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Federal Judicial Center
Shelly Cox, Rules Committee Staff

The following persons attended to inform to the Committee about Department of Justice disclosure procedures for expert witnesses:

Kira Antell, Senior Counsel, Office of Legal Policy
Eric Booker, Section Chief of FBI laboratory at Quantico
Andrew Goldsmith, National Criminal Discovery Coordinator
Zachary Hafer, Chief of the Criminal Division, District of Massachusetts

Ted Hunt, Senior Advisor on Forensic Science, Office of the Deputy Attorney General
Elizabeth J. Shapiro, Deputy Director, Civil Division, Department of Justice
Erich Smith, Physical Scientist/Examiner, Firearms-Toolmarks Unit, FBI Laboratory
Jeanette Vargas, Deputy Chief of the Civil Division, Southern District of New York

Finally, two observers attended:

Patrick Egan, American College of Trial Lawyers
Amy Brogioli, American Association for Justice.

Judge Molloy brought the meeting to order, and welcomed the new members: Judge Michael Garcia from the New York Court of Appeals, Katie Recker (who has attended many meetings in the past as a representative of the American College of Trial Lawyers), Susan Robinson, from Charleston, West Virginia, and Brian Benczkowski, Assistant Attorney General for the Criminal Division of the Department of Justice.

The Committee unanimously approved the minutes of the April 2018 meeting, subject to typographical corrections brought to the reporters' attention.

Ms. Womeldorf reported on the progress of Rules amendments. She noted that the Standing Committee and the Judicial Conference had approved Rule 16.1 and the changes to the Rules for 2254 and 2255 cases, which will be forwarded to the Supreme Court. Assuming the Court accepts them, they will be forwarded to Congress. If Congress does not act, those rules will be effective December 1, 2019. She drew the Committee's attention to p. 57 of the Agenda Book, which includes language added to the Committee Note by the Standing Committee to address a concern about the relationship between the new rule and local rules.

Professor Beale explained that this Committee first included a reference to local rules in the Committee Note to accommodate local rules with shorter time periods. We intended to make it clear that the Rule doesn't prevent local rules from setting shorter time periods, but just sets an outer boundary. At the Standing Committee, members emphasized that local rules cannot contravene the Rules of Criminal Procedure, and expressed concern that the statement in the Note might be read to undercut that principle. The new language referring to local rules that "supplement and [are] consistent with" was added to the Note by the Standing Committee to highlight that everything being done under local rules must be consistent with the Rules of Criminal Procedure. The language was inserted into a sentence that this Committee had approved, which had focused on making sure that the Rule didn't override the existing authority of the district judge. Professor Coquillette noted that he agreed with what had been said about local rules, and this was an important change.

Ms. Womeldorf then reported on Judicial Conference developments and noted the public release of the 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act Program. That Committee has been working for a number of years. A key recommendation, and

major change, is that Congress create an independent federal defender commission within the judicial branch but outside the oversight of the Judicial Conference. The idea is to parallel the Sentencing Commission, which is part of the judicial branch but not under the judiciary's control. A member added there have long been concerns that defense attorneys run into conflicts because of the need to keep something confidential, and that led to this recommendation. They are now working on an interim plan that looks like it's been approved by several of the committees, so we are going ahead with the plans. But the recommendation will take Congressional action.

In response to a question about how many of the roughly 34 recommendations made in the report had been adopted, Ms. Womeldorf stated that many have been adopted. But it is a large report and other recommendations are still under study. The full report is available on the uscourts.gov website.

Ms. Wilson provided the legislative update, referencing the chart in the Agenda Book, pp. 113-121, and noted there were no legislative developments that would amend the Criminal or habeas Rules. The Rules staff is monitoring a lot of activity on the Civil Rules, including a bill to restructure the Ninth Circuit and provisions creating new federal judgeships.

Judge Molloy turned to the proposal to amend Rule 43, which emanated from a decision of the Seventh Circuit suggesting that the Rules be amended so that under certain circumstances a defendant need not be present for plea or sentencing. He noted this is not the same as the issue the Committee addressed recently, where a judge wanted to sentence remotely while the defendant was in the courtroom. This proposal concerns a defendant who was sentenced at his own request while not in the courtroom and then raised the issue on appeal.

Professor Beale reported that this proposal came from the Circuit Executive of the Seventh Circuit Court of Appeals, who forwarded an opinion in which the Seventh Circuit panel said it had no authority to uphold a guilty plea and sentence where the defendant wasn't present, regardless of the circumstances. The defendant in the case, Bethea, had several very severe health conditions, and even touching him could break his bones. So it was to the defendant's advantage not to have to travel to the courtroom in another city for his guilty plea and sentencing. But on appeal, he challenged the legitimacy of his sentence, and the court of appeals set it aside. The court held Rule 43 says the defendant must be present, and there is error even if the defendant asked not to be present. The court also suggested it might be a good idea if the rule was more flexible.

She noted that the Committee has previously considered on at least two occasions whether to allow a video plea or sentencing in felony cases, and the answer has been no. But those were different suggestions. One arose when we were doing a complete review of changes to implement improvements in technology. For example, we concluded that it would be advantageous to allow electronic service and filing of the grand jury indictment, and we amended Rule 6 accordingly. But we did not provide for video pleas and sentencing. The second, more recent, proposal the Committee rejected was from an individual judge who spent

many months away from his courthouse and thought it would be convenient to be able to sentence remotely, unless the defendant could show a very good reason he had to be present. This question raised by this proposal is different: whether Rule 43 should be amended to allow a defendant to be absent for sentencing if, on a case by case basis, the defendant could show exceptional circumstances, perhaps after waiving or being advised of his right to be present. If this might be a good idea, we would need a subcommittee to determine whether such an exception could be narrowly drafted. This Committee is on record saying it is far, far, better to take pleas and sentence in person. So the key policy question is whether we should permit any exceptions, which, inevitably, could creep. That is what is teed up for discussion.

Professor King added that in researching this topic in federal and state courts the reporters had identified issues any subcommittee asked to take on this proposal may have to tackle, including any limits on when the defendant could make a request, under what circumstances the judge could refuse a defense request, whether the prosecutor has to agree, and how to avoid pressure from the prosecutor and the judge to waive presence. If there was sentiment on the Committee to convene a subcommittee, there is plenty to consider.

Judge Molloy asked for members to express their views.

One member stated that the Rule is sufficiently clear the way it is.

Another indicated she had been in the courtroom on multiple occasions where a defendant decides at the plea hearing he doesn't want to plead. It is far preferable to have a defendant in front of the judge at that solemn time.

A member agreed it is far preferable to have the defendant there in person, but noted that the Seventh Circuit case presented a much more compelling situation than those we previously addressed, where the judge wanted to be absent. It is worth taking a look at this.

Another member stated that she had a client who did this once for a very compelling reason, and did not appeal. She said it is curious this case was appealed. She favored sending this issue to a subcommittee, because there are rare compelling cases, and the letter of the rule is so strict that it would not allow exceptions.

A member wondered how often this happens and whether, when it does, there is usually no appeal. It seems likely that it happens quietly for the benefit of the defendant. If it is rare, and there are quiet workarounds, it is not obvious that we need to go through the work of trying to draft rules to deal with a very unusual set of circumstances. He was skeptical about having a subcommittee.

Another member responded that there are societal interests in sentencing, not just the defendant's. Accordingly, having the Rule clearly stated is important. Judge Molloy noted the Crime Victim's Rights Statute states victims have a right to be present.

Another member was skeptical of the need for a subcommittee. First, this doesn't seem to happen very much and there are probably workarounds when these problems do arise. He also

expressed doubt about the Seventh Circuit's ruling that presence is not waivable. The opinion says proceeding without the defendant is per se prejudice, but that assumes the issue has been presented to the court for it to consider. But this is outright waiver. The defendant is asking the district court to do something, the court does it, and then the defendant wants to appeal. That's not forfeiture, it's waiver. His condition is so extraordinary, but this is a really important value, and the Rule is really clear. I'd be very reluctant to do anything to the Rule. And this case does not present a compelling instance to do something.

Another member said a lot happens in a plea, and the potential for the defendant and the judge not to be communicating at the same level because they are separated by video screens is very concerning. Just getting through the factual basis from the clients' perspective is very, very difficult, and the member would be reluctant to see any further alienation between the defendant and that experience.

A member agreed that physical presence is extraordinarily important in the sentencing context, and he'd be reluctant to see any deviation. He was not quite as sure about the plea context. This as a really compelling case. The member agreed that the court might have mixed up per se prejudice with waiver, and saw the value of a subcommittee examining a possible amendment for pleas.

Another member said she thought with both pleas and sentencing there is a lot going on in the room. If you have it on video conference it's not clear whether the judge gets the impression of everybody participating in it so that there isn't any error. Technology will get better and better. But this is a slippery slope. If we start to allow it, there's a danger that things may be characterized as extraordinary that it might not really be extraordinary. She did not believe the Committee would want to look at it again.

Professor Coquillette commented that this is an area where the Supreme Court has historically taken a role in rule making, particularly Justice Scalia. They are extremely sensitive about this area.

Assistant Attorney General Benczkowski stated that as a general matter the Department does not seek to take pleas or conduct sentencings in this manner. The Department would be skeptical about going down this road for many of the reasons already stated.

Judge Campbell observed that the Civil Rules Committee has tried to draw a very narrow exception to the requirement that a witness be in court to testify during a trial. Civil Rule 43(a) says "for good cause in compelling circumstances, and with appropriate safeguards, the court may permit" remote testimony. He also asked why Criminal Rule 43 makes an exception allowing defendants to be in a remote location for initial appearances and arraignments under Rules 5 and 10, but not for a plea?

Professor King stated that when the Committee addressed in a comprehensive way where technology such as video conferencing might be appropriate or inappropriate, members thought it was too important to be present at pleas and sentencings to allow for an exception. The reasons

were like those just articulated about the importance of one on one communication between the judge and the defendant, there was no interest in moving videoconferencing to pleas and sentencing.

Professor Beale noted several differences between the current proposal and earlier amendments allowing video presence. The waivers that occurred at the plea hearing are a different order of magnitude from those at earlier points in the process, where the Committee was persuaded that the advantages, convenience, and speed at which things could be done would warrant allowing for some ability to do conduct proceedings remotely. In recent discussions, the Committee has concluded that the line should be drawn at pleas and sentencing. Pleas because of the importance of making sure the defendant really knows what is going on. And sentencing, because presence has such a huge impact on the defendant and his ability to allocute, as well as to understand what is happening. As a member once said, sentencing is the most human thing a judge does. Those are more significant, requiring the face to face.

Judge Molloy remembered discussion on similar issues when Judge Anthony Battaglia brought some of these issues to the Committee. It was important that the defendant had to ask for the video. It couldn't be the court that asked. And many members who do defense work stressed the importance of having the defendant in the courtroom. What happens is much different when people are doing it remotely, than if you are eyeball to eyeball.

Professor King recalled that there may also have been a much more pragmatic reason for allowing videoconferencing in preliminary proceedings. Especially in the large Western districts where apprehension and immediate detention may take place a long distance from the judge, and transporting the defendant was sometimes not feasible within the required time frame, there were already efforts to have videoconferencing for those preliminary proceedings. So it fit with not only the view of the judges about the relative importance of those proceedings, but also the way that they were already starting to use video technology.

Professor Beale agreed and added it might be a drive of 300 miles, and in bad weather in the winter. The question the Committee wrestled with was how important was presence in the courtroom was, and exceptions were sensible if something had to be done quickly.

Judge Campbell noted there were cases where the defendant was so disruptive that you couldn't conduct a trial with the defendant in the courtroom, and courts have authorized proceedings to have the defendant taken out to watch by video. He doubted whether the Seventh Circuit's per se prejudice rule is necessarily correct. Professor Beale responded that Rule 43(c)(1)(C) authorizes the judge to have the defendant removed after a warning about disruptive behavior.

A member noted that a waiver by misconduct can go all the way through sentencing. He also related that he once had a case where the defendant claimed he was a sovereign citizen, opted out, and did not recognize the validity of the proceeding. He had a trial, was convicted, and

sentenced. The member did not know if he appealed. Another member noted he had a capital case where the defendant punched his lawyer in his face and was removed.

Professor Beale observed that in the *Bethea* case the defendant got a lot longer sentence than he anticipated, and this likely led to the appeal.

A member indicated this wouldn't have happened in the case where her office represented someone remotely sentenced, because it was a Rule 11(c)(1)(C) case, where the plea stipulation covered the sentence.

A member suggested that the Seventh Circuit's decision in *Bethea* may be a one off. Professor Beale responded that there was the other district court case cited in the reporters' memo where the defendant was very, very ill and the estimate was it was going to cost at least $4000 to bring him to court in an ambulance. It is unclear how many of these cases are there. We have an aging population, and people who are not in good health can commit crimes from their keyboards at home. Maybe the Committee should wait and see if there are a number of these cases. If there are, it could return to the issue. In addition to the Civil Rules language, there are some state cases, and state rules on this we could consider. And there is some language in our own rules -- Rule 15(a), discussing when depositions can be taken, says "because of exceptional circumstances and in the interest of justice," and that might cover the interests of victims and others. But perhaps there are not yet enough of these cases that we think there is a good idea to start creating an exception.

Judge Molloy noted this is a published opinion of a circuit court, and it would be a good idea to have a subcommittee look into it, explore the ideas that have been expressed here, and come back with some definitive answer. The Seventh Circuit obviously had a concern about it, although they may have gotten it wrong. He stated that he would establish a subcommittee to consider the issue. Judge Campbell added that there are other parts of the rules that are implicated if a subcommittee is formed. For example, Rule 11(b)(2) says the court must address the defendant personally in open court.

Answering a question from another member inquiring about any cases where the defendant has tried to achieve a quiet work around and the judge said "No, the Rule is clear," one member said she was aware of another case where a defendant was sentenced by video a little while ago, but she didn't know of any case where a person who has legitimate need has been turned down.

Professor Beale said Rule 43(c)(1)(B) says sentencing can proceed if the defendant is voluntarily absent after being there for trial. So there are some exceptions already in the rule. Some of the pressure points are taken care of already.

Another member suggested that the Court's decision in *United States v. Davila* might be relevant. The Supreme Court ruled that the Eleventh Circuit had erred in applying a per se reversal rule for judicial participation in plea negotiations, and there was a specific reference to the harmless error standard in Rule 11(h). He agreed that this Seventh Circuit case is an oddity.

Judge Molloy turned to the next matter on the agenda: the time for ruling on habeas petitions. Professor King noted that the discussion of this proposal begins on p. 147 of the agenda book. It came to the Committee from Mr. Peel, who is litigating his own 2255 case. He wanted the Civil and Criminal Rules Committees to consider a rule that judges must decide pending petitions and motions within a certain period of time.

Based on prior consideration of timelines for judicial decisions by the Civil and Criminal Rules Committees over the years, the reporters thought a strict timing rule for the consideration of 2254 and 2255 cases would be a non-starter for many reasons. However, the issue of delay in resolving these matters has been a problem raised in commentary. It's been a particular problem in capital cases, and very controversial there. But this proposal concerns only non-capital cases. There have been two studies in the past documenting this delay, as noted in the reporters' memo.

Professor King projected two bar graphs on the screen, one from each study, showing the variation in average time to disposition for 2254 noncapital cases in every district, with many districts taking multiple years on average to close these cases. The author of the more recent study argued that the reason for delay in these cases is that these cases are not among those that must be reported as motions that have been pending for more than six months. They've been exempted from that reporting requirement. This author suggested that the exemption be removed. The reporters included that suggestion in the memorandum as one potential response to Mr. Peel's proposal. There are a few other options also suggested at the end of the memo, if the Committee is concerned about delay in these cases. The memo also explains that there is language about the judge "promptly" examining, but there is no specific timeline for the court's decision. So the question for the Committee is whether to create a subcommittee, do something else, or just let it go.

Professor Beale noted that the reporters asked Ms. Womeldorf whether this Committee can make suggestions about things that are not about the rules, such as whether these kinds of motions should be included among those that courts are asked as an administrative matter to report. The general answer was that we can make such a suggestion, to CACM or others, but we obviously don't have the ability to make that change ourselves. There might also be best practices that move these things along expeditiously, such as additional training, specialization, or organization of the pro se clerks. Although this Committee cannot promulgate best practices, if we think this is a problem, we can talk about what we might be able to usefully suggest to other groups who may want to look at this.

Professor King added that even though the proposal went to both the Civil and Criminal Rules Committees, and 2254 cases are governed by the Civil Rules as well as the 2254 Rules, this Committee had jurisdiction over habeas cases and the rules governing them. So if this Committee doesn't do anything, it is not likely to happen.

Judge Kaplan joined the meeting by phone at this point and gave his report on the Cooperators Task Force, with the remainder of the discussion on habeas delay to follow.

Judge Kaplan regretted he couldn't be at the meeting because of a trial. The Cooperators Task Force rendered its Final Report to Director James Duff in August. That was the second installment. There was an interim report earlier that dealt with recommendations principally relating to the Bureau of Prisons (BOP). Director Duff has written to the BOP forwarding that report. The BOP is in the process of deciding what they intend to do about it. Director Duff appointed Judge Amy St. Eve to be the liaison to the BOP, and she is in the best position to report about where that stands. The second and final part of the report made five principal recommendations.

The first recommended a modification of our approach to docketing and filing of materials on CM/ECF from which the fact of cooperation and the details of cooperation could be ascertained. As a result of very hard work by the working group charged with this area, chaired by Judge Phil Martinez, the recommendation proposes something called the plea and sentencing folder approach, or PSF approach. He described the essentials of this approach in very broad strokes. Once implemented, each docket sheet would have tabs for two sub folders, one called the plea documents folder and the other called the sentencing documents folder. All documents that relate to sentencing or to pleas would go into the respective folders. The plea documents would include the plea agreement, plea transcript, and the like. The sentencing folder would include 5K letters, character letters, sentencing motions, sentencing memos and transcripts, and other things. The documents for both folders would be available for public viewing at the courthouse, but only on a restricted basis. Someone who wanted to view those folders would have to furnish appropriate identification, and their access would be logged by the Clerk's Office. The object is to create a record of who had access so that if there is an incident involving a cooperator, it would be possible to determine who saw what and when. That would give the investigative personnel something to go on. Remote access to those folders would not be available to the general public, but would be available to attorneys, self-represented parties in the cases in which they are representing themselves, and individuals who demonstrate to the judge assigned a need for the documents. The objective of this is to restore, to some degree, the practical obscurity enjoyed by court filings that had cooperator information before we converted over to CM/ECF.

There are details to be worked out, and there will be some significant implementation time. There will also be a lot of flexibility left to local courts. Each judge and district would have discretion to vary. For example, any judge, just as today, could seal any document that he or she thought appropriate. If a document were sealed by a judge or otherwise restricted by him, the same restrictions on access that apply today would apply even with respect to people who view the content of the folders at the courthouse after providing identification and even to attorneys and others who have remote access. So there is a considerable amount of room there for local courts, particularly for those who want to be more protective, to do that. Another thing to flag is that a deliberate decision was made to leave the question of press remote access to individual districts. The thinking there was two-fold. First, press access tends to be more of an issue in some of the larger districts and not much of an issue in many others. Second, there was

a sense that given that premise, it would be better not to wave a red flag in circumstances where a national controversy could erupt unnecessarily. Courts have been pretty successful in dealing appropriately with press access in appropriate cases and the Task Force thought it best to leave that where it is.

The second major recommendation is to modify criminal docket sheets. No information would be ultimately removed by this, but the sheets would be modified essentially to take what is referred to as JS-3 information off the top of the docket sheet. The information would still be in there, but it would be less readily available.

The other recommendations are much less extensive.

- Deletion of references to Rule 35(b) on the amended judgment form. That form currently indicates whether a sentence has been amended as a result of a Rule 35(b) motion, which is for substantial assistance to the government.

- An educational program be undertaken so that people understand and properly implement the system. It is clear to the Task Force that once this whole system is adopted and implemented, there will be a need for a considerable amount of education for judges, US Attorneys, BOP, probation and pretrial staff, and others.

- Asking the BOP to track incidents of assault and other misbehavior affecting cooperators on the basis of motivation, that is, whether the assault was cooperation related. The BOP does not do this now and it would be extremely helpful if that data were collected so that we would have some means of measuring how successful these recommendations once implemented prove to be, whether the trend line is in the right direction or the wrong direction. BOP does not really want to have that information in the institutions, so the suggestion has been made that an anonymized database be created by the Department of Justice based on information furnished by the BOP, the information that would available in a useful form and would be out of the institutions.

In terms of where this all stands, it is on Director Duff's desk. There was a conference call with him last week about just exactly how this becomes policy, assuming that it does, and he is taking appropriate advice from the AO General Counsel and no doubt others as to whether this lies within his authority to simply adopt, or whether he needs to or wishes to present it to the Executive Committee or the Conference. He has promised an early report back.

Judge Kaplan continued that he, and Judges St. Eve and Martinez, have recommended to Director Duff that it would be desirable to refer different parts of these recommendations to different entities: the changes in CM/ECF to adopt the PSF approach and the modification of the docket sheets and judgment form to CACM; the education program to the FJC; and the creation of the anonymized data base to be implemented by CACM and the Criminal Law Committee of the Conference. All of these committees will need cooperation from BOP and DOJ.

That is the proposal. Judge Kaplan said they expect to hear from Director Duff shortly about the mechanics of getting this into full implementation mode. It is clear that some of these recommendations might take longer than others. There is significant software work that will have to be done in order to implement the PSF approach, and we don't yet have a timeline on that. That will fall to CACM to work out.

In conclusion, he added that the Task Force consisted of seven voting judge members—three from CACM, three from Criminal Rules, and Judge St. Eve from the Standing Committee—and eight adjunct members representing every constituency affected by this: BOP, DOJ, Criminal Law Committee, and others. We had also a very helpful hearing in Washington last spring with a representative group of federal defenders. Ultimately the work done by the working groups on BOP and CM/ECF was critical and we ended up with a unanimous consensus on all of this, which he was enormously pleased to report. He offered to take questions.

Judge Molloy noted that the report was a monumental piece of work by Judge Kaplan, Judge St. Eve, and other members of the Committee. He asked if it was correct that the recommendations of the Task Force are not subject to debate when they are referred to CACM, the Criminal Law Committee, or others: would it be a direction to implement what has been proposed and recommended by the Task Force?

Judge Kaplan responded yes, the question is whether Director Duff is going to make that policy decision or whether he's going to go with some or all of it to the Conference.

A member inquired whether the recommendations address who or what would qualify as a press organization that would be able to get remote access. Judge Kaplan said the recommendations do not address the issue, leaving the question of whether and who gets remote access on the basis of press to each district. He personally despaired of being able to define "press" for this purpose. A member said that anybody can be press at this point and expressed concern that certain elements might create a press organization as a front for obtaining information for purposes that we might not want them to have the information. Judge Kaplan agreed that concern is well founded

Judge Campbell inquired whether, if the Director moves forward with this, the Rule this Committee was considering on limiting remote access would be moot, or at least taken off the table for now. Judge Kaplan said that would be his view, and Judge Molloy said that was consistent with his view, too.

Judge Molloy asked Judge St. Eve if she could report any supplemental information about the Bureau of Prisons (BOP).

Judge St. Eve commended Judge Kaplan for strong leadership on this project. As for the BOP, in late April a letter was sent to then director Mark Inch with the 14 recommendations that came out of the Task Force. The day before Director Duff was scheduled to discuss the Task Force recommendations with the BOP's main representative to the Task Force, BOP Director Inch resigned, so that put us back a little bit. BOP now has an acting Director, and they are

juggling multiple issues. Judge St. Eve was keeping in monthly contact with BOP trying to keep this on their plate so that the BOP implements some of these recommendations. And Jonathan Wroblewski and Judge St. Eve have been in discussion as well. The BOP is interested in putting this in place, but they have hurdles, including their Union, that they have to jump through. They are already doing some of the recommendations, such as encouraging video teleconferencing when appropriate. But they have not yet put in place the meatier recommendations. Judge St. Eve described continuing efforts to arrange a meeting between Director Duff and BOP's acting leadership. She encouraged the Department of Justice to continue supporting the Task Force recommendations, and to help us push BOP.

Assistant Attorney General Benczkowski thanked Judge St. Eve for her comments, and said the Department will continue to push BOP. He noted, however, that the BOP director reports to the Deputy Attorney General, not to him. Mr. Benczkowski stated that he intended to speak to have a conversation with the Deputy Attorney General to request that he keep this moving forward. He appreciated the work that went into the Task Force, expressed the Department's support, and stated they would continue to push BOP.

Ms. Womeldorf said that there is still considerable desire in some quarters that this Committee move forward with Rule 49.2, which was put on the back burner to see what came out of the Task Force process. There is considerable overlap between the PSF approach and that Rule, and she thought that in prior discussions this Committee thought that the PSF approach would achieve a lot of the objectives behind protecting cooperator information without necessitating a rule. But there are certain constituencies that would like to see a rule with notice and comment and hearings if there is going to be a change of this nature to public access to these kinds of documents. There is still discussion about the question whether the Task Force recommendations moot the Rule. She has been asked by staff of the CACM Committee whether this Committee will have more formal consideration of Rule 49.2 and another vote on that. She informed the staff that she did not know, and would raise it. She observed that Director Duff would not refer the issue back to Criminal Rules, because it is his understanding that it is still on our docket. Judge Kaplan commented that Ms. Womeldorf was indispensable to this process, and we owe her a debt of gratitude.

Professor King asked if Ms. Womeldorf was suggesting that this Committee should decide whether it is going ahead with consideration of Rule 49.2, regardless of whether the Task Force believes that is moot. Ms. Womeldorf answered that was the issue for this Committee to decide. It was not the Task Force's decision whether or not to move forward with a Rule, it is this Committee's decision. But she noted that the Committee may consider that decision to have already essentially been made through the Committee's last discussion, which tabled Rule 49.2 pending Task Force action.

Professor King suggested it would be helpful to hear from Judge Kaplan, who is the chair of the Cooperators Subcommittee, what his views are about whether the Committee needs to do something about that pending proposal on Rule 49.2. Judge Molloy asked Judge Kaplan whether

Rule 49.2, which was tabled, is now moot? Or does it require some actual determination by our Committee?

Judge Kaplan said he was inclined to think the answer to both questions was yes, but he'd like to think about that some more. His present view is that the Committee doesn't need to amend the Rule, but in any case the Committee has to make the decision not to go forward.

Professor Beale suggested that as we don't have Judge Kaplan here at the meeting, there has been no final decision on that report, it is unclear who would have to approve it, and Director Duff is still deciding whether it needs to be referred to other groups, perhaps that decision whether it is time to take this off our agenda could be deferred until our spring meeting. Then we could decide if our rules should reflect the new reality in some way, which would then provide a place for Notice and Comment. But we can put that off, since we held it pending the Task Force action, which isn't quite finished. The agenda book could reflect that the spring will be the time for final action on whether to take it off the agenda or move forward.

Judge Molloy asked Ms. Womeldorf to clarify what would happen if the Committee decided that the Task Force Report takes care of it, and we are not going to amend the rules. Was there nonetheless some pressure to have that discussion and possibly hearings?

Ms. Womeldorf answered that this is the Committee's decision to make. She also explained that concerns about the E-Government Act are what's lurking in the background. Professor Beale reminded the Committee that it is clear under the E-Government Act if a limitation on electronic access is made by rule, there is no problem. Ms. Womeldorf agreed.

Professor King agreed putting a decision off a little while makes a lot of sense and that the E-Government issue is one that the Subcommittee could look at it before it comes back to the full Committee. And it could talk to people who have strong concerns about that, then bring that information back to the Committee so we are not trying to do that on the fly.

Judge Molloy said that when Judge Kaplan finishes his trial, we will bring that issue to the Subcommittee. Professor Beale noted we've lost some members of that Subcommittee and will have to replace them. Judge Molloy thanked Judge Kaplan for the report, so he could return to his trial.

The Committee returned to the request regarding habeas delay. Judge Molloy said those statistics are terrible but that he was not sure our Committee even has jurisdiction to resolve that problem. Professor Beale noted there had been some conversation before the meeting about who would have jurisdiction, and we concluded it was CACM, primarily because they have previously recommended changes be made to the Civil Justice Reporting Act requirements, precisely to create a greater incentive to move faster with bankruptcy appeals and social security cases. That discussion is on page 150 of the Agenda Book. Since our Committee does not have jurisdiction to change those guidelines for reporting the question is whether to make any recommendations to CACM, or recommend that the FJC to study this, or do nothing.

A member observed that 2255 and 2254 cases are reportable on the three-year list, and asked whether there are a lot of them going beyond three years.

Professor King answered yes, at least as of the date the data was collected. There is also a citation in the memo to a decision of a district judge who read the article suggesting the reporting requirement be modified and agreed with it.

A member said she would be remiss if she didn't speak up for the defendants in the 2254 and 2255 cases who are up against AEDPA and are limited on time severely, and then have the court just run on sometimes for years. She can appreciate their frustration. The Committee has the authority to impose a time limit on these, but that is unwise. The size of these cases varies. She asked the judges, does that reporting requirement really impact you moving faster?

Judge Molloy answered that it depends on the district. We get a monthly report from the clerk of court that says here are the cases that have been waiting for 30 days, 60 days, and 90 days. That creates an incentive to get matters off of that list. Arizona does something similar to that. He noted that some of these handwritten petitions can barely be read when they are filed, and the pro se law clerks get the first stab at them. Cases should not be hanging out for two or three years, but putting artificial dates or time limits in a rule would not necessarily solve the problem. With the new work formulas, it looks like pro se law clerks are being cut back, which may affect the screening process.

Judge Campbell said if the question is would putting this on the CJRA report change the behavior of Article III judges, the answer is yes, it would. Not all. But there are a lot of judges who are conscious of that report and work hard to comply with it. So he did think it would change behavior, and perhaps more than putting it in a rule would. He noted he tends to be a hawk on these things, and would love to see it in the report. He'd prefer to see it in a three-month report rather than a six month report, but that would draw strong opposition.

Professor Beale observed that judges are human. If there will be a public list that shows if you are late, almost everything is being measured for the list, and this is the one thing that isn't, then you will try to get to your numbers and the one thing not being measured will get pushed down. That seems undesirable.

Judge Campbell said there are some places where this is a real challenge for the judges. The Eastern District of California, which includes all of the major prisons in the state, is exhibit A. They have five judges, Congress hasn't given them any more judgeships, and they are just buried with prisoner litigation including 2254s and 2255s. So whoever takes on this issue would need to talk to the districts where it is really a challenge. It's sort of the out of sight out of mind idea. If there isn't the CJA report reminding the judge that this motion is pending and something is going to happen if it isn't decided, that motion can remain on the docket for way too long. Our Committee does not have jurisdiction to change the reporting requirement. But if it concludes the issue should be studied, there would be nothing inappropriate in its writing to CACM and say

here is Mr. Peel's recommendation, here are some studies, and we recommend that you look at this.

A member said she favored recommending that it be examined, at least for the reporting. Judges are trying to do good work, but they are balancing things, and the reporting requirement matters.

Another member agreed that if these cases went on the CJRA report, then judges are going to look at it. In the member's district, judges would look at it a lot. And in other districts, that's what keeps them on track. The member was especially interested in getting the views of districts that are overwhelmed with these cases.

Ms. Womeldorf suggested that this could be one of the things the CACM Committee could do as part of its investigation. It is not uncommon to do what Judge Campbell is suggesting, in this case a letter from Judge Molloy to the new chair of the CACM. As a matter of deference to another Judicial Conference committee on matters falling within their jurisdiction, it would probably be disfavored to presume the outcome in the referral. The committee with jurisdiction would have to do the study and talk to the jurisdictions that would be most affected. And CACM also has responsibility for different metrics such as how that weighs into staffing formulas. Possibly measuring this and the delay more precisely than the current system would help the other staffing problem that have been noted. Professor Beale commented that this might even help some districts make the case for more judges.

A member wondered if the letter should mention that we have not investigated those districts with heavy prisoner caseloads, and Ms. Womeldorf agreed a referral letter could mention that, as well as the Falkoff study and Professor King's work. It is fine to call things to another committee's attention, just not to suggest where it should end up.

Another member noted another issue: if there is to be a reporting requirement, what is the triggering event? In his district, 2254s pose very different issues than 2255s, because the records of the local courts in 2254 cases are in Spanish. Getting the local record is a problem, because it has to be translated. And the government takes the position they don't have any money to do the translating. So we wait months and months to get the record. Every district has its own story. But whoever does look into this there is going to be a lot to look into and a lot to consider.

Ms. Womeldorf noted that this discussion will be captured in the minutes, and available to CACM as well.

Another member said he agreed with everything everybody has said. It is a CACM issue, and it is worth looking at. Like most things in life, you get what you measure from people, but it is up to them to decide. Another member agreed. Whether something is on the Biden report is impactful on judges.

Another member observed that on appeal he had not noticed any particular problem in terms of our administration of these cases. He agreed these reporting requirements do change

behavior. Although the courts of appeals don't have the Biden rule, his court does it internally. It shames people, one person has one number and everyone else has something else.

Judge Molloy said he would draft a letter and run it by Ms. Womeldorf and send it to CACM, with Mr. Peel's materials. Judge Molloy thought a vote wasn't needed, but asked for objections and there were none.

In preparation for its consideration of possible changes in Rule 16's provisions concerning expert witnesses, the Committee then heard presentations from the following representatives from the Department of Justice:

Andrew Goldsmith, National Criminal Discovery Coordinator
Zachary Hafer, Chief of the Criminal Division, District of Massachusetts
Ted Hunt, Senior Advisor on Forensic Science, Office of the Deputy Attorney General
Erich Smith, Physical Scientist/Examiner, Firearms-Toolmarks Unit, FBI Laboratory
Jeanette Vargas, Deputy Chief of the Civil Division, Southern District of New York

The presentations covered the Department's development and implementation of new policies governing disclosure, its efforts to improve the quality of its forensic analysis, and its practices in cases involving forensic and non-forensic evidence. They also provided an opportunity to compare discovery in criminal cases with the discovery provided under Civil Rule 26(a).

Professor Beale introduced the next agenda item, a proposal from the Association of Professional Background Screeners, which recommended that the Civil and Criminal Rules, and the architecture of the PACER system, be revised to provide greater information, specifically each criminal defendant's full name and full date of birth. The suggestion was that this information would not be visible to the general public when it accessed PACER, but would be available as a search term so that background screeners would be able to perform their search functions more accurately and efficiently. Professor Beale noted that this is similar to a request that the Association made in 2006 when Criminal Rule 49.1 and the other E-Government Act amendments were promulgated. The Association's request was a little broader at that time. They wanted Social Security numbers, and probably now recognize that that would be a nonstarter. But the Association is still seeking to persuade the Committee that their proposal is good for them and good for society at large because the results of their screening will be more efficient and accurate. Accordingly, they made this request to us and to the Civil Committee, and sought changes in the PACER architecture without perhaps being clear on who would have the necessary authority over the PACER system. The proposal emphasizes that something similar is presently done in the bankruptcy system to identify assets and so on. The Association argues that a similar change could be implemented in civil and criminal cases.

Professor Beale stated that the question before the Committee is whether there is enough interest in this proposal to move it forward. She commented that it is really not the function of the rules to assist such external groups not involved in criminal litigation.

Judge Molloy asked Mr. Hatten for his views. Mr. Hatten expressed the view that this is not a purpose that the PACER system was designed for, and it would not be a good idea to add these types of personal data that might be of interest to hackers. He expressed concern that it would be a slippery slope to begin changing the PACER system in order to benefit a group interested in searching our records. Why not the same for another group? He also noted that the system was undergoing changes. He added that PACER itself has little data and relies on each individual court to supply the information. So this would filter down. The courts would have to enter this type of information in each of their databases, and then PACER would make it available. That would create a small burden on the courts. Mr. Hatten stated that legislation has been introduced that would make CM/ECF a single system, searchable and made available to the states for a fee, but Mr. Hatten was not sure whether it would get serious consideration. He did not see this as a viable purpose of the system.

Judge Molloy asked other members for their views. None favored taking up the proposal. The information provided in bankruptcy serves a different function, and the suggested change did not serve the functions that the Criminal Rules are designed to serve. Judge Molloy agreed that the Committee should not pursue the proposal.

Noting that the spring meeting of the Committee would take place on May 7, 2019, in Alexandria, Virginia, Judge Molloy adjourned the meeting.

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