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07-AP-019
07-CV-020
07-CR-016

Re: Comments, August 2007 Proposed Rule Amendments

To: Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts

Dear Mr. McCabe:

Attached please find the comments of the Jordan Center for Criminal Justice and Penal Reform on the Committee's Proposed Rules Amendments published August 15, 2007.

Thank you for your consideration.

Sincerely,

Mark Jordan,
Policy Advisor

COMMENTS OF
JORDAN CENTER FOR
CRIMINAL JUSTICE AND PENAL REFORM

ON

PROPOSED RULES AMENDMENTS
PUBLISHED AUGUST 15, 2007

INTRODUCTION

The Jordan Center for Criminal Justice and Penal Reform ("Jordan Center") was established in January 2006 by supporters of imprisoned civil rights and social justice activist Mark Jordan following his 2005 wrongful conviction of murder in federal court. The Jordan Center seeks to foster and advance progressive criminal justice and penal reforms consistent with the nation's founding principles of liberty and freedom. The Jordan Center fulfills this mission through a variety of means that include public education, grassroots activism, litigation support services, rulemaking participation, and legislative monitoring, proposals and support.

The following comments are submitted in response to the August 2007 request for comment to proposed rules amendments published by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

COMMENTS

1. Proposed Amendments to Rule 15, Fed. R. Civ. P.

The Committee proposes amending Rule 15(a)(1), which currently permits a party to amend a pleading without leave of court once as a matter of course at any time, provided a responsive pleading has not been filed and the action has not been calendared, to impose a new 21-day time limit. We believe this amendment will result in far greater hardships than the benefits contemplated and is not judicially economical.

Specifically, the proposed amendment creates a gap from 21 days following service to the filing of a responsive pleading (if permitted) or a Rule 12 motion to dismiss in which an amended pleading may not be filed as a matter of course. Such a scheme creates anomalies and burdensome situations in which a party files a demand or complaint and 22 days or more later realizes a defect necessitating amendment. Under the current Rule, the party may simply file an amended pleading. Under the proposed rule, however, the party must either seek leave to amend pursuant to Rule 15(a)(2) or take the simpler course that is more burdensome to the respondent of awaiting the responsive pleading or motion to dismiss and then filing the amended pleading to which respondent must respond or move to dismiss anew. For this reason, we object to placing a time limitation on the first amendment preceding the responsive pleading.

We also believe that the proposed 21-day deadline set forth in proposed amended Rule 15(a)(1)(B) is too short and should be extended to 28 days. Our experience is that under the current 20-day rule, litigants seeking to amend a pleading in response to a responsive pleading routinely seek extensions of time for within which to do so. Moreover, a responsive pleading or motion to dismiss will often point out deficiencies that not only require amendment but also further factual investigation that may dramatically affect the legal landscape of an action. Accordingly, the time should be extended from 20 to 28 days.

2. Proposed Amendments to Rule 41, Fed. R. Crim. P.

We strongly object to the broad language proposed to become new Rule 41(e)(2)(B) as inherently inconsistent with the particularity requirement of the Fourth Amendment by implicitly authorizing routine seizure of electronic storage media as opposed to particularized information from the storage media for which probable cause might be reasonably believed to exist. The Committee, we respectfully suggest, erroneously appears to assume the constitutionality of such a generalized information storage media warrant issue scheme.

The Constitution provides that "no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV. The requirement protects against those "wide-ranging exploratory searches the Framers [of the Constitution] intended to prohibit," (Maryland v. Garrison, 480 U.S. 79, 84 (1987)), and against "general, exploratory rummaging in a person's belongings," (Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971) (plurality opinion)), and "prevents the seizure of one thing under a warrant describing another." Andersen v. Maryland, 427 U.S. 463, 480 (1976).

Implicit in the proposed rule is a complete disregard for the Fourth Amendment's particularity requirement to the extent that it authorizes routine and wholesale seizure of information storage media, likely to include multiple files and subfiles for which probable cause will be absent. *See, e.g.*, United States v. Weber, 923 F.2d 1338, 1344 (9th Cir. 1990) (warrant authorizing search for obscene materials insufficiently particular because agent's affidavit did not provide evidence agents would find anything but child pornography materials defendant ordered through government-generated advertisements).

Moreover, in the realm of electronic information storage media, we are usually talking about expressive materials protected by the First Amendment, a warrant permitting the seizure of which must set forth the information to be taken with the "most scrupulous exactitude." Stanford v. Texas, 379 U.S. 476, 485-86 (1965); *see also* Marcus v. Search Warrant, 367 U.S. 717, 722 (1961).

A genuine fear is that the existence of a rule implicitly sanctioning broad electronic information storage media warrants will result in watering down the Fourth Amendment's protections, resulting in seizure of vast amounts of information for which no particular basis exists to justify a search and seizure. The Committee Notes are illustrative of this disregard for the Fourth Amendment, incorporating the argument that it is "impractical for law enforcement to review all of the information during execution of the warrant at the search location" and presuming a "need for a two-step process," including seizure of the entire storage medium for review at some unspecified later date without deadline. We respectfully do not believe the Committee should disregard longstanding Fourth Amendment rights simply because evolving technologies have made respecting them less practical for law enforcement. Rather, we believe the proper approach, should the people be so willing to sacrifice a constitutional right for the sake of making it easier on law enforcement to rummage through their personal effects, or to otherwise keep to date with emerging technologies, is to amend the Constitution to meet any such negotiation, but certainly not through judicial rulemaking.

The Committee justifies this entire storage media approach by analogizing to "when business papers or other documents are seized," and again referencing impracticality considering the volume of information. The analogy is inapt. Absent a "permeated with fraud" business records exception to the particularity requirement, such an analogy is improper. *See, e.g.*, United States v. Kow, 58 F.3d 423, 428 (9th Cir. 1995) (warrant authorizing seizure of virtually every business record insufficiently particular); United States v. Fuccillo, 808 F.2d 173, 176-77 (1st Cir. 1987) (warrants authorizing seizure of stolen cartons of clothing insufficiently particular because warrants contained no information enabling agents to differentiate seizable and non-seizable cartons). Indeed, even the "permeated with fraud" exception does not provide full support for the analogy. *See* In re Grand Jury Investigation Concerning Solid State Devices, Inc., 130 F.3d 853, 856 (9th Cir. 1997) (warrant authorizing seizure of broad array of documents and data storage equipment insufficiently particular because no probable cause to believe majority of suspect's operations fraudulent).

While it is true that in very limited circumstances the Fourth Amendment permits the seizure of an entire class of items, that is only true where probable cause exists as to the entire class. *See* Andersen, 427 U.S. at 480. *See also* Voss v. Bergsgaard, 774 F.2d 402, 405-06 (10th Cir. 1985) (warrant authorizing seizure of all records relating to violation of tax laws resulting in seizure of all organizational records and documents not sufficiently particular because no probable cause that fraud permeated every aspect of organization).

From the face of the proposed rule, and certainly the Committee Notes, it would appear the rule was written by a group of biased ex-prosecuting officials and, in any event, certainly pro "law enforcement," willing to readily sacrifice—or in lawyering lingo "balance" away—individual liberties guaranteed by the Constitution whenever compliance is thought to be "impractical." Indeed, the Committee Notes read like a United States Attorney's Office memorandum, and do not once acknowledge Fourth Amendment implications.

A more accurate analogy is warrants for hard copy files and counsels against such broad "all files" warrants outside of the permeated with fraud exception. Where the subject items are tangible, hard copy business records, and the warrant applies only to part of that class, as it generally must, the warrant must provide a means of distinguishing the information that may be seized from that which may not. *See* Rickert v. Sweeney, 813 F.2d 907, 909 (8th Cir. 1987). Notably, such broad entire storage media warrants contemplated by the proposed rule will regularly and certainly violate the Privacy Protection Act, 42 U.S.C. § 2000aa, allowing such statutorily protected material to be swept up with the generalized electronic information storage media warrant.

Accordingly, to the extent the proposed rule would expressly incorporate electronic information storage media, rather than particular information, we believe the rule should not be adopted. Such a rule would encourage the few wayward courts that have taken an anti-Fourth Amendment, pro-police state approach to Rule 41, authorizing the seizure of electronic information despite a lack of probable cause as to the particular information.

We hope, in this regard, the Committee will agree it is not a policing agency nor an advocate for the Executive Branch of government, and will instead recommend the proposed Rule not be adopted and concern itself less with what may or may not be practical for police and prosecutors and more concerned with the constitutional rights and liberties which the Founders of our nation have seen fit to secure its citizens. Consistent with the preservation and safeguarding of those rights and liberties, we ask the Committee to reject that portion of the proposed rule authorizing "the seizure of electronic storage media" as opposed to particular "electronically stored information."

Our second objection is to the lack of custody and disposal controls over electronic information that might be copied, as implicitly authorized by Rule 41(F)(1)(B), especially should a rule allowing for broad media storage items be endorsed. The obvious concern here, implicating First, Fourth and Fifth Amendment concerns, is that information or storage media is copied pursuant to a broad warrant that may or may not be supportable by probable cause and may contain information outside the purpose of the warrant and maintain or use that copied information for general intelligence or other unauthorized or illicit purposes, possibly even making its way into some inter-agency database. Accordingly, unless some mandatory controls are in place to safeguard against such abuses, we believe the Rule should not be adopted.

Finally, we strongly object to the lack of a set time period for within which to return seized materials. The Committee again sides with and pleads the case for law enforcement and other anti-privacy special interests, offering that the sheer size and storage capacity of media, encryption and booby traps will overburden computer labs. However, no logical and rational distinction can be made between electronic information and its hard copy counterpart. The Committee is concerned that setting a time period for return "could result in frequent petitions to the court for additional time." When considering First, Fourth and Fifth Amendment rights, however, we see no problem with such frequent petitions and the government should be forced to continuously justify the failure to return innocuous information every step of the way.

3. Proposed Amendments to Rule 11 of Rules Governing Section 2254 and 2255 Cases.

We object to the proposed amendments to Rule 11 of the Rules Governing Section 2254 and 2255 Cases. They are unnecessary and unduly burdensome. Irrespective of whether a district court judge issues a certificate of appealability, and even if that judge denies such certificate, the petitioner may still appeal the decision and ask a circuit judge to issue the certificate regardless of the lower court's position.

Moreover, requiring judges entering adverse final orders to contemporaneously issue or deny a certificate of appealability deprives, possibly in an unconstitutional fashion, the parties of the opportunity to brief and be heard on the issue, and preserve arguments for appeal.

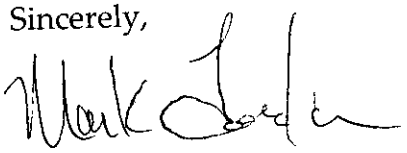
Accordingly, we suggest the Rule not be adopted. Alternatively, we suggest the Court, before issue or denial of a certificate of appealability, first be required to permit the parties to show cause why a certificate of appealability should not issue.

4. Rule 29(e), Fed. R. App. P.

The Appellate Rules Committee previously considered Rule 29(e)'s seven-day deadline for amicus brief filings, but decided not to change the rule. We believe this to be a mistake. The current deadline is often impossible to meet and presumes, often incorrectly, that amicus will be operating in conjunction with a party and therefore familiar with the litigation and have ready access to the record on appeal. We therefore encourage the Committee to revisit this issue and consider changing the deadline from 7 to 14 days.

We thank the Committee for its consideration.

Sincerely,



Mark Jordan,
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