MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE
May 19-20, 1988
Alexandria, VA

The Advisory Committee on the Federal Rules of Criminal Procedure met in Alexandria, VA on May 19 and 20[1], 1988. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Nielsen called the meeting to order at 9:00 a.m. on Thursday, May 19, 1987. The following members were present for all or part of the meeting:

Hon. Leland C. Nielsen, Chair
Hon. James DeAndra
Hon. James G. Exum, Jr.
Hon. William T. Hodges
Hon. John F. Keenan
Hon. Harvey Schlesinger
John Doar, Esq.[2]
James F. Hewitt, Esq.
Frederick B. Lacey, Esq.
Edward Marek, Esq.
Herbert J. Miller, Jr. Esq.
Roger Pauley, Esq. (designated by John Keeney)[3]

Stephen A. Saltzburg, Reporter

Also present were Judge Joseph Weis, Chairman of the Standing Committee on Practice and Procedure, and Professor Wayne La Fave, a member of the Standing Committee; James E. Macklin, Jr., Deputy Director of the Administrative Office, together with David Adair and Ann Gardner; and Anthony Partridge from the Federal Judicial Center. Judge Edward Becker, Chair of the Committee on Probation Services, was also present during the morning session.

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1 The meeting of the full Committee was concluded on May 19. A group of Committee members met on May 20 to consider proposed changes in the Misdemeanor Rules.

2 Mr. Doar was present on the 20th.

3 Mr. Pauley was designated by the Acting Assistant Attorney General for the Criminal Division to represent the Department of Justice at the meeting.

INTRODUCTION OF NEW MEMBERS

Judge Nielsen introduced Judge Keenan and Judge Exum, new members of the Committee, and then introduced all of the returning Committee members.

CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

Changes Previously Approved

The Committee's agenda noted that the Committee had approved three rules changes, two of which had already taken effect.

1. Rule 30 had been amended to permit the district court to instruct before argument, after argument, or at both times. The Committee had indicated, in response to suggestions that the amendment could result in abuses, to monitor the amended rule. No Committee member reported any problem with the rule as amended. The Committee will continue to monitor the rule.

2. Rule 6 (a) had been amended to address the selection of alternate grand jurors. It is removed from future agendas by unanimous consent, as no further action appears to be necessary at this time.

3. Rule 12.3 had been approved by the Committee for circulation, circulated for public comment, revised in light of the comment, approved by the Committee for submission to the Standing Committee, and returned by the Standing Committee with a question whether the new rule should be considered as part of a broader inquiry into criminal discovery. The Committee engaged in a general discussion of the rule, which was temporarily adjourned to permit Judge Becker to make a presentation.[4] After further consideration, Mr. Hewitt moved to hold Rule 12.3 for analysis as part of a broader look at discovery. Judge Keenan seconded the motion. It carried by a divided vote, 7-4.

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4 Although Judge Becker's presentation occurred between 9:15 a.m. and 10:00 a.m. on May 19, and preceded the Committee's discussion of certain other rules, the Committee returned to its agenda and discussed the rules in their agenda order. The agenda order is used in these minutes.

New Criminal Rules Approved by Committee in Principle

1. Proposed Amendment to Rule 41 (a) (Search Warrants For Property and People Outside the District). The Committee had approved this amendment in principle at its last meeting. The Reporter circulated the rules change to the Committee together with a proposed Advisory Committee's Note. Judge DeAnda moved the adoption of the amendment, and Judge Hodges seconded the motion. The motion then carried unanimously. A copy of the amendment is attached to these minutes.

2. Proposed Amendment to Rule 41 (e) (Return of Property). The Committee had approved this amendment in principle at its last meeting. The Reporter circulated the rules change to the Committee together with a proposed Advisory Committee's Note. Judge DeAnda moved the adoption of the amendment, Judge Hodges seconded the motion, and it carried unanimously. Judge Hodges asked whether the word "judge" in subdivision (e) should be changed to "court," and the Committee made the change by unanimous consent. A copy of the amendment is attached to these minutes.

New Criminal Rule Amendments Proposed

1. Technical Amendments (Effective 8/1/87) and Proposed Technical Amendments. The Committee examined technical amendments to the Criminal Rules that were effective August 1, 1987 and additional technical amendments that are not yet effective. It was satisfied that the amendments were truly technical and were no cause for concern.

2. Proposed Amendments to Rule 11 (To Reflect Effects of Sentencing Guidelines). The Committee reviewed Judge Becker's comments on Rule 11 and discussed possible changes, the most important of which would require some mention of guidelines in the court's colloquy with a defendant. There was concern that no warning might be misleading, but that a brief warning might be inadequate. Ultimately, Judge Hodges, seconded by Judge Keenan, moved that Rule 11 (c) (1) be amended to add the words "or supervised release" following the words "special parole." Mr. Partridge observed that Congress was considering making a similar change in the rule. The Committee voted unanimously to approve the amendment and to suggest that the Standing Committee ratify it without public circulation. Then, Mr. Hewitt moved, seconded by Judge Exum, that the words ", that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some

circumstances" after the word "term" in the same subdivision. The Committee approved the amendment, with Mr. Marek dissenting. The Committee will send this amendment to the Standing Committee with the recommendation that it be circulated for public comment. A copy of the proposed amendment, with a proposed Advisory Committee's Note is attached to these minutes.

3. Proposed Consideration of Rule 16. In connection with its discussion of proposed Rule 12.3, the Committee voted to discuss possible amendments to Rule 16 at its next meeting. Members were encouraged to suggest specific language changes for discussion at that meeting.

4. Proposed Amendment to Rule 25 (Unavailability of Judge. The Committee considered amending Rule 25 to conform it in substance to a proposed amendment to the Civil Rules. The Committee was concerned, however, about adapting the rule to bench trials. Mr. Hewitt moved to table the amendment, Mr. Miller seconded the motion, and it carried over the dissent of Mr. Pauley. Judge Hodges expressed concern about the words "upon certification of familiarity with the record," and the Committee agreed to examine the words at some subsequent meeting.

5. Proposed Amendments to Rule 32 (Sentencing Procedures). Consideration was given to possible amendments to Rule 32 to take account of the Sentencing Act of 1984 and the guidelines that took effect on November 1, 1987. Judge Edward Becker, Chairman of the Probation Committee, made a presentation on his Committee's views as to changes in Rule 32 and related rules that might be necessary or desirable. Judge Becker reported on inter-agency meetings and cooperation in an effort to make guideline sentencing work. He described training efforts and data collection that had already taken place and suggested that additional efforts were contemplated. Judge Becker added that the sentencing reform statute might require a look not only at Rule 32, but also at Criminal Rules 11, 16, 32 and 35, and Fed. R. Evid. 1101 (d) (3). He discussed each of these rules with the Committee. Thereafter, the Committee engaged in lengthy discussion with respect to various aspects of Rule 32. In the course of the discussions, several motions were made.[5]

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5 The motions are considered subdivision by subdivision, rather than in the exact order in which they were made, in order to promote clarity.

First, Judge Hodges, seconded by Mr. Marek, moved to change the first sentence of subdivision (a)(1) as follows (deleted material in brackets, new material underlined): "Sentence shall be imposed without unnecessary delay, but the court may, when there is [upon a motion that is jointly filed by the defendant and by the attorney for the Government and that asserts] a factor important to the sentencing determination that is not capable of being resolved, [at that time] postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved." The motion passed unanimously. A proposed amendment and Advisory Committee's Note is attached to these minutes.

Second, Judge Hodges, seconded by Judge DeAnda, moved that the final paragraph of subdivision (c) (1) be amended as follows: Except with the written consent of the defendant, t[T]he report shall not be submitted to the court or its contents disclosed [to anyone] unless the defendant has pleaded guilty or nolo contendere or has been found guilty[, except with the written consent of the defendant]." The purpose of the amendment is to permit the court to allow the parties to see a presentence report when the court sees it. The motion passed unanimously. A proposed amendment and Advisory Committee's Note is attached to these minutes.

Third, the Committee debated at length the wisdom and constitutionality of denying a defendant access to information in the presentence report under a guideline sentencing system. Subdivision (c) (3) (A) currently reads, in relevant part, as follows:

"At a reasonable time before imposing sentence the court shall permit the defendant and the defendant's counsel to read the report of the presentence investigation, including the information required by subdivision (c) (2) but not including any final recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. . . ."

Mr. Hewitt moved, seconded by Magistrate Schlesinger, that the words "At a reasonable time" be changed to "At least 10 days" and that the rule be amended to require the court to provide a copy of the report to the defendant and counsel rather than to permit them to read the report. The

motion carried unanimously. The Committee unanimously concluded that abrogation of subdivision (c) (3) (E) was appropriate to conform to this amendment. A proposed amendment and Advisory Committee's Note is attached to these minutes.

Mr. Hewitt had previously moved, seconded by Magistrate Schlesinger, that the words "and retain" be added following the words "to read." The motion had carried unanimously, but was superseded by the amendment described in the immediately preceding paragraph.

Mr. Hewitt, seconded by Judge DeAnda, moved that the words "but not including any final recommendation as to sentence" be deleted from the rule. The motion carried unanimously. A proposed amendment and Advisory Committee's Note is attached to these minutes.

Mr. Hewitt, seconded by Mr. Marek, moved that the words "but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons" be deleted from the rule. The motion was defeated by voice vote.

Fourth, the Committee discussed whether the rule should be amended to prohibit ex parte contacts between the court and probation officers. It concluded that no action should be taken at this time.

6. Proposed Amendment to Rule 45 (a) (Time). The Bankruptcy Committee inquired whether the Criminal Rules Committee would object to amending Rule 45 to change the 11 day provision to a 7 day provision, which is what the Rule provided some years ago. The inquiry was made as a result of a Standing Committee suggestion that uniformity among all of the procedural rules would be desirable. The Committee concluded after considerable discussion that weekends and holidays should not be counted when a party has 7 days or less to take action, but that they should be counted when a party has 8 or more days in which to act. Thus, Judge Hodges moved, seconded by Mr. Hewitt, that the Committee recommend to the Standing Committee that it suggest that an 8 day rule be the standard for all of the Advisory Committees. The motion passed unanimously.

7. Proposed Amendment to Rule 54 (a). The Committee examined proposals regarding the Pacific Territories for informational purposes only. No action was taken.

8. Proposed Technical Amendments to Rule 32.1 (To Recognize Supervised Release). The Commitee concluded that the rule should contain reference to persons who are on supervised release under the 1984 sentencing reform act. David Adair volunteered to circulate proposed technical changes. This was not included on the original agenda, but was added a result of the discussion concerning Rule 32.

9. Proposed Technical Amendments to Rule 40 (To Recognize Supervised Release). The Commitee concluded that the rule should contain reference to persons who are on supervised release under the 1984 sentencing reform act. David Adair volunteered to circulate proposed technical changes. This was not included on the original agenda, but was added a result of the discussion concerning Rule 32.

EVIDENCE RULE AMENDMENTS UNDER CONSIDERATION

Evidence Rules Approved by Committee

1. Proposed Amendment to Federal Rule of Evidence 609 (a) (Impeachment with Prior Convictions)--Tentatively Approved by Standing Committee. The Committee reviewed its approach to Rule 609 and concluded that it represented a careful balance of interests and should be returned to the Standing Committee with the recommendation that the amendment be circulated for comment. The Committee concluded that it was undesirable to disturb the special balancing test for criminal defendants, since any change might reopen the tremendous controversy that surrounded the original enactment of this rule. Judge Lacey moved, seconded by Mr. Marek, to send the amendment to the Standing Committee for circulation and public comment. The motion passed unanimously.

2. Technical Amendments and Proposed Technical Amendments to the Federal Rules of Evidence. The Committee examined technical amendments that took effect on October 1, 1987 and additional amendments that are to take effect and concluded that they are truly technical and require no Committee action.

New Matters--Evidence Rules

1. Proposed Amendment to Federal Rule of Evidence 803, to Adopt a new Rule 807, or to Take a Position on Proposed

Legislation (Child Witness Protection). The Committee discussed proposed legislation to create a special hearsay exception for children's statements. Mr. Hewitt, seconded by Judge Exum, moved to table any amendment. The motion carried unanimously. By unanimous consent, the Committee determined to express strong concern about the constitutionality of the proposed legislation to Congress.

2. Proposed Amendment to Federal Rule of Evidence 1101 (d)(3). Judge Becker suggested that at some point consideration might be given to amending the evidence rules to consider whether hearsay and authentication rules ought to have some applicability to sentencing. He did not recommend immediate action, and the Committee decided that no change should be made at this time.

SECTION 2254, SECTION 2255 AND MISDEMEANOR RULES

1. Proposed Amendments to Misdemeanor Rules. Magistrate Schlesinger had circulated proposed amendments to the Misdemeanor Rules which were drafted by a committee of Magistrates. The Committee discussed whether a group of Committee members should take a preliminary look at the proposed amendments and concluded that it should. On May 20, 1988, Magistrate Schlesinger, Mr. Hewitt, Mr. Marek, Mr. Doar, Judge Nielsen, and the Reporter discussed the proposed amendments. The tentative view of all present was that the Committee should consider abrogation of the misdemeanor rules and adoption of one or two additional rules for inclusion in the Federal Rules of Criminal Procedure. Magistrate Schlesinger indicated that his committee of Magistrates would draft proposed amendments and that the matter should be included on the agenda for the next meeting.

MISCELLANEOUS MATTERS

1. Procedural Issues. The Committee discussed ways in which to encourage more public input on suggested amendments prior to formal circulation. It concluded that at the next meeting, to be held in New Orleans, that law professors from the local schools should be invited to attend.

2. Mr. Pauley asked whether peremptory challenges could be reconsidered in light of the Supreme Court's opinion in Batson v. Kentucky. Specifically, he suggested reconsideration of the Committee's proposal a number of years ago to equalize the number of challenges between the government and the defense. The Committee agreed to add this to its agenda for the next meeting.

DESIGNATION OF TIME AND PLACE FOR NEXT MEETING

The Chair announced that the next meeting would be in New Orleans on November 17-18, 1988.

ADJOURNMENT

The meeting adjourned at 4:45 p.m. on May 19, 1988. The group discussing the misdemeanor rules convened at 9:00 a.m. on May 20. This meeting adjourned at 11:00 a.m.

STEPHEN A. SALTZBURG, Reporter
May 28, 1988

PROPOSED AMENDMENTS

Rule 11 (c) (1)

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determined that the defendant understands, the following:

(1)the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(New material underlined)

Advisory Committee's Note

The Committee believes that a technical change, adding the words "or supervised release," is necessary to recognize that defendants sentenced under the guideline approach will be concerned about supervised release rather than special parole. See 18 U.S.C. 3583, 3624 (e). The words "special parole" are left in the rule, since the district courts

continue to handle pre-guideline cases. The Committee believes that this amendment does not require circulation for public comment, since it merely conforms the rule to the relevant statute.

The amendment to require the district court to inform a defendant that the court is required to consider any applicable guidelines but may depart from them under some circumstances assures that the existence of guidelines will be known to a defendant before a plea of guilty or nolo contendere is accepted. Since it will be impracticable if not impossible to know which guildelines will be relevant prior to the formation of a presentence report and resolution of disputed facts, the amendment does not require the court to specify which guidelines will be important or which ground for departure might prove to be significant. The advice that the court is required to give cannot guarantee that a defendant who pleads will not later complain that he did not fully understand all the importance of guidelines when he pleaded. No advice is likely to serve as a complete protection against post-plea claims of ignorance or confusion. By giving the advice, the court places the defendant and defense counsel on notice of the importance that guidelines may play in sentencing and of the possibility of a departure from those guidelines. A defendant represented by competent counsel will be in a position to enter an intelligent plea.

The amended rule does not limit the district court's discretion to engage in a more extended colloquy with the defendant in order to impart additional information about sentencing guidelines or to inquire into the defendant's knowledge concerning guidelines. The amended rule sets forth only the minimum advice that must be provided to the defendant by the court.

PROPOSED AMENDMENTS

Rule 32. Sentence and Judgment

(a) Sentence.

(1) Imposition of Sentence. Sentence shall be imposed without unnecessary delay, but the court may, when there is [upon a motion that is jointly filed by the defendant and by the attorney for the Government and that asserts] a factor important to the sentencing determination that is not capable of being resolved, [at that time] postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. * * *

* * *

(c) Presentence Investigation.

(1) When Made. * * *

Except with the written consent of the defendant, t[T]he report shall not be submitted to the court or its contents disclosed [to anyone] unless the defendant has pleaded guilty or nolo contendere or has been found guilty[, except with the written consent of the defendant].

* * *

(3) Disclosure.

(A) At least 10 days [a reasonable time] before imposing sentence the court shall provide [permit] the

defendant and the defendant's counsel with a copy of [to read] the report of the presentence investigation, including the information required by subdivision (c) (2) [but not including any final recommendation as to sentence], but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. * * *

* * *

[(E) Any copies of the presentence investigation report made available to the defendant and the defendant's counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs.]

(E) [F] * * *

(New material underlined; deleted material in brackets)

Advisory Committee's Note

The amendment to subdivision (a)(1) is intended to clarify that the court is expected to proceed without unnecessary delay, and that it may be necessary to delay sentencing when an applicable sentencing factor cannot be

resolved at the time set for sentencing. Often, the factor will relate to a defendant's agreement to cooperate with the government. But, other factors may be capable of resolution if the court delays sentencing while additional information is generated. As currently written, the rule might imply that a delay requested by one party or suggested by Court sua sponte might be unreasonable. The amendment rids the rule of any such implication and provides the sentencing court with desirable discretion to assure that relevant factors are considered and accurately resolved.

In exercising this discretion, the court retains under the amendment the authority to deny a delay when it is inappropriate under the circumstances.

In amending subdivision (c) (1), the Committee conformed the rule to the current practice in some courts: i.e., to permit the defendant and the prosecutor to see a presentence report prior to a plea of guilty if the court, with the written consent of the defendant, receives the report at that time. The amendment permits, but does not require, disclosure of the report with the written consent of the defendant.

The amendment to change the "reasonable time" language in subdivision (c) (3) (A) to at least 10 days prior to sentencing conforms the rule to 18 U.S.C. 3552 d). Nothing in the statute or the rule prohibits a court from requiring disclosure at an earlier time before sentencing.

The language requiring the court to provide the defendant and defense counsel with a copy of the presentence report complements the abrogation of subdivision (E), which had required the defense to return the probation report. Because a defendant may seek to appeal a sentence, which is permissible under some circumstances, there will be cases in which the defendant has a need for the presentence report during preparation of the appeal. This is one reson why the Committee decided that the defendant should not be required to return the nonconfidential portions of the presentence report that have been disclosed. A other reason is that district courts may find it desirable in some cases to adopt portions of the presentence report when making findings of fact under the guidelines. They would be inhibited unnecessarily from relying on careful, accurate presentence reports if such reports could not be retained by defendants. A third reason why defendants should be able to retain the reports disclosed to them is that the Supreme Court's decision in United States Department of Justice v. Julian, 48 U. S. ___ (1988), 108 S.Ct. ___ (1988), suggests that defendants will routinely be able to secure their reports through Freedom of Information Act suits. No public interest is served by continuing to require the return of reports, and unnecessary FOIA litigation should be avoided as a result of the amendment to Rule 32.

Because guideline sentencing requires the sentencing court to make findings as to the various factors that affect sentencing, the Committee concluded that no good argument could be made to withhold from the defendant or the government the probation officer's recommendation, if any, as to sentence. If the recommendation might be considered by the sentencing court in determining whether to depart from the guidelines or even whether a particular sentencing factor is revelant, the parties should have an opportunity to address the recommendation and to challenge it if they so desire.

Although the Committee was concerned about the potential unfairness of having confidential or diagnostic material included in presentence reports but not disclosed to a defendant who might be adversely affected by such material, it decided not to recommend at this time a change in the rule which would require complete disclosure. Some diagnostic material might be particularly useful when a court imposes probation, and might well be harmful to the defendant if disclosed. Moreover, some such material might assist correctional officials in prescribing treatment programs for an incarcerated defendant. Information provided by confidential sources and information posing a possible threat of harm to third parties was particularly troubling to the Committee, since this information is often extremely negative and thus potentially harmful to a defendant. The Committee concluded, however, that it was preferable to permit the probation officer to include this information in a report so that the sentencing court may determine whether it ought to be disclosed to the defendant. If the court determines that it should not be disclosed, it will have to decide whether to summarize the contents of the information or to hold that no finding as to the undisclosed information will be made because such information will not be taken into account in sentencing. Substantial due process problems may arise if a court attempts to summarize information in a presentence report, the defendant challenges the information, and the court attempts to make a finding as to the accuracy of the information without disclosing to the defendant the source of the information or the details placed before the court. In deciding not to require disclosure of everything in a presentence report, the Committee made no judgment that findings could validly be made based upon nondisclosed information.

PROPOSED AMENDMENTS
FEDERAL RULE OF CRIMINAL PROCEDURE 41

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district where the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government. If property or a person is located in, but is moving or may move outside, a district, a federal magistrate in that district may issue a warrant for the property or person, to be executed either within that district or where the property or person is found. If property relevant to a criminal investigation within a district is located outside the United States and is lawfully subject to search and seizure by the United States, a federal magistrate in that district may issue a search warrant for such property.

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(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property [which was illegally seized]. The court [judge] shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be [restored] returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings [and it shall not be admissible in evidence at any hearing or trial]. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

New material underlined; deleted material in brackets.

Advisory Committee's Note

Rule 41 (a). The amendment to Rule 41 (a) serves two purposes. First, it furthers the constitutional preference for warrants by providing a mechanism whereby a warrant may be issued in a district for a person or property that is moving or might move outside the district while the warrant is sought or executed. Second, it clarifies the authority of federal magistrates to issue search warrants for property that is relevant to a criminal investigation being conducted in a district and, although located outside the United States, that is in a place where the United States may lawfully conduct a search.

Prior to the amendment, Rule 41 (a) consisted of one sentence, which is carried forward unchanged as the first sentence in the amended rule. The final clause of the sentence, "upon request of a federal law enforcement officer or an attorney for the government," modifies all warrants covered by Rule 41. Thus, the second and third sentences, which the amendment adds to the rule, do not expand the class of persons authorized to request a warrant. The two new sentences provide for search warrants for property that may be outside the district in which the warrant is issued. The new sentences limit to federal magistrates the power to issue such warrants, since these are unusual search warrants, which may be executed outside of the state in which they are issued.

The second sentence of the amended rule authorizes a federal magistrate to issue a warrant for property within the district that is moving or that might move outside that district. The amendment recognizes that there are inevitable delays between the application for a warrant and its authorization, on the one hand, and the execution of the warrant, on the other hand. The amendment also recognizes that when property is in motion, there may be good reason to delay execution of the warrant until the property comes to rest. The amendment provides a practical tool for federal law enforcement officers that avoids the necessity of their either seeking several warrants in different districts for the same property or their relying on an exception to the warrant requirement for a search of property that has moved outside a district.

The amendment affords a useful warrant procedure to cover familiar fact patterns, like the one typified by United States v. Chadwick, 433 U.S. 1 (1976). In Chadwick,

agents in San Diego observed suspicious activities involving a [illegible] and a train. When the train arrived in Boston, the agents made an arrest and conducted a warrantless search of the footlocker (which the Supreme Court held was invalid). Under the amended rule, agents who have probable cause in San Diego would be able to obtain a warrant for a search of the footlocker even though it is moving outside the district. Agents, who will not be sure exactly where the footlocker will be unloaded from the train, may execute the warrant when the journey ends. The Supreme Court's holding in Chadwick permits law enforcement officers to seize and hold an object like a footlocker while seeking a warrant. Although the amended rule would not disturb this holding, it provides a mechanism whereby agents may seek a probable cause determination and a warrant before interfering with the property and seizing it. It encourages reliance on warrants.

At some point, a warrant issued in one district might become stale when executed in another district. But, staleness can be a problem even when a warrant is executed in the district in which it is issued. See generally, United States v. Harris, 403 U.S. 573, 579, 589 (1971). At some point, an intervening event might make execution of a warrant unreasonable. Cf. Illinois v. Andreas, 463 U.S. 765, 772 (1983). But, evaluations of the execution of a warrant must, in the nature of things, be made after the warrant is issued.

The amendment does not change the final sentence of Rule 41 (c) (1), which provides that "[i]t [the warrant] shall designate a federal magistrate to whom it shall be returned." In the case of a warrant issued for property that is in motion or that might be moved, the issuing magistrate might find it desirable to have the warrant returned either to a magistrate in the issuing district or a magistrate in the district wherein the warrant is executed. Such a provision in a warrant will not only make it easier for officers to make the return, but it will also provide a more convenient forum in many instances for motions for return of property under Rule 41 (e).

The third sentence of the amended rule is limited to search warrants for property. No provision for search warrants for persons is made lest the rule be read as a substitute for extradition proceedings. The phrase "relevant to criminal investigation" is intended to encompass all of the types of property that are covered by Rule 41 (b) which is unchanged by the amendment.

It now appears that at least some searches and seizures by federal officers outside the territory of the United States are governed by the fourth amendment. See generally, Saltzburg, The Reach of the Bill of Rights Beyond the Terra Firma of the United States, 20 Va. J. Int'l L. 741 (1980). Prior to the amendment of the rule, it was unclear how federal officers could obtain warrants authorizing searches outside the district of the issuing magistrate. Military R. Evid. 315 provided guidance for searches of military personnel, but had no civilian counterpart. The amended rule provides necessary clarification and encourages reliance on warrants when they are practicable under the circumstances.

The amendment permits warrants to be issued when the United States may lawfully conduct a search outside the United States. The determination that a search may lawfully be conducted might require an assessment not only of United States law, but also of the law of a foreign nation. See United States v. Peterson, 812 F.2d 486 (9th Cir. 1987) (Kennedy, J.).

Rule 41 (e). The amendment to Rule 41 (e) conforms the rule to the practice in most districts and eliminates language that is somewhat confusing. The Supreme Court has upheld warrants for the search and seizure of property in the possession of persons who are not suspected of criminal activity. See, e.g., Zurcher v. Stanford Daily, 436 U.S. 547 (1978). Before the amendment, Rule 41 (e) permitted such persons to seek return of their property if they were aggrieved by an unlawful search and seizure. But, the rule failed to address the harm that may result from the interference with the lawful use of property by persons who are not suspected of wrongdoing. Courts have recognized that once the government no longer has a need to use evidence, it should be returned. See, e.g., United States v. Wilson, 540 F.2d 1100 (D.C. Cir. 1976). Prior to the amendment, Rule 41 (e) did not explicitly recognize a right of a property owner to obtain return of lawfully seized property even though the government might be able to protect its legitimate law enforcement interests in the property despite its return--e.g., by copying documents or by conditioning the return on government access to the property at a future time. As amended, Rule 41 (e) provides that an aggrieved person may seek return of property that has been unlawfully seized, and a person whose property has been lawfully seized may seek return of property when aggrieved by the government's continued possession of it.

No standard is set forth in the rule to govern the determination of whether property should be returned to a person aggrieved either by an unlawful seizure or by deprivation of the property. The fourth amendment protects people from unreasonable seizures as well as unreasonable searches, United States v. Place, 462 U.S. 696, 701 (1983), and reasonableness under all of the circumstances must be the test when a person seeks to obtain the return of property. If the United States has a need for the property in an investigation or prosecution, its retention of the property generally is reasonable. But, if the United States' legitimate interests can be satisfied even if the property is returned, continued retention of the property would become unreasonable.

The amendment deletes language dating from 1944 stating that evidence shall not be admissible at a hearing or at a trial if the court grants the motion to return property under Rule 41 (e). This language has not kept pace with the development of exclusionary rule doctrine and is currently only confusing. The Supreme Court has now held that evidence seized in violation of the fourth amendment, but in good faith pursuant to a warrant, may be used even against a person aggrieved by the constitutional violation. United States v. Leon, 468 U.S. 897 (1984). The Court has also held that illegally seized evidence may be admissible against persons who are not personally aggrieved by an illegal search or seizure. Rakas v. Illinois, 439 U.S. 128 (1978). Property that is inadmissible for one purpose (e.g., as part of the government's case-in-chief) may be admissible for another purpose (e.g., impeachment, United States v. Havens, 446 U.S. 620 (1980)). Federal courts have relied upon these decisions and permitted the government to retain and to use evidence as permitted by the fourth amendment.

Rule 41 (e) is not intended to deny the United States the use of evidence permitted by the fourth amendment and federal statutes, even if the evidence might have been unlawfully seized. See, e.g., United States v. Calandra, 414 U.S. 338, 349 n.6 (1978) ("Rule 41 (e) does not constitute a statutory expansion of the exclusionary rule.") Thus, the exclusionary provision is deleted, and the scope of the exclusionary rule is reserved for judicial decisions.

In opting for a reasonableness approach and in deleting the exclusionary language, the Committee rejects the

analysis of Sovereign News Co. v. United States, 690 F.2d 569 (6th Cir. 1982), cert. denied, 464 U.S. 814 (1983), which held that the United States must return photocopies of lawfully seized business records unless it could demonstrate that the records were "necessary for a specific investigation." As long as the government has a law enforcement purpose in copying records, there is no reason why it should be saddled with a heavy burden of justifying the copying. Although some cases have held that the government must return copies of records where the originals were illegally seized--see, e.g., United States v. Wallace & Tiernan Co., 336 U.S. 793, 801 (1948); Goodman v. United States, 369 F.2d 166 (9th Cir. 1966)--these holdings are questionable in situations in which the government is permitted under Supreme Court decisions to use illegally seized evidence, and their reasoning does not apply to legally seized evidence.

As amended, Rule 41 (e) avoids an all or nothing approach whereby the government must either return records and make no copies or keep originals notwithstanding the hardship to their owner. The amended rule recognizes that reasonable accommodations might protect both the law enforcement interests of the United States and the property rights of property owners and holders. In many instances documents and records that are relevant to ongoing or contemplated investigations and prosecutions may be returned to their owner as long as the government preserves a copy for future use. In some circumstances, however, equitable considerations might justify an order requiring the government to return or destroy all copies of records that it has seized. See, e.g., Paton v. LaPrade, 524 F.2d 862, 867-69 (3d Cir. 1975). The amended rule contemplates judicial action that will respect both possessory and law enforcement interests.

The word "judge" is changed to "court" in the second sentence of subdivision (e) to clarify that a magistrate may receive evidence in the course of making a finding or a proposed finding for consideration by the district judge.

PROPOSED AMENDMENTS

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General Rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a [the] witness other than a criminal defendant has been convicted of a crime shall be admitted, subject to Rule 403, [if elicited from him or established by public record during cross-examination but only] if the crime [(1)] was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that a criminal defendant has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant [, or]; and

(2) evidence that a witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Advisory Committee's Note

The amendment to Rule 609 (a) makes two changes in the rule. The first change removes from the rule the limitation that the conviction may only be elicited during cross-examination, a limitation that virtually every circuit

has found to be inapplicable. It is common for witnesses to reveal on direct examination their convictions to "remove the sting" of the impeachment. See, e.g., United States v. Bad Cob, 560 F.2d 877 (8th Cir. 1977). The amendment does not contemplate that court will necessarily permit proof of prior convictions through testimony, which might be time-consuming and more prejudicial than proof through a written record. Rules 403 and 611 (a) provide sufficient authority for the court to protect against unfair or disruptive methods of proof.

The second change effected by the amendment resolves an ambiguity as to the relationship of Rules 609 and 403 with respect to impeachment of witnesses other than the criminal defendant. The amendment does not disturb the special balancing test for the criminal defendant who chooses to testify. Thus, the rule recognizes that in virtually every case in which prior convictions are used impeach the testifying defendant, the defendant faces a unique risk of prejudice--i.e., the danger that convictions that would be excluded under Fed. R. Evid. 404 will be misused by a jury as propensity evidence despite their introduction solely for impeachment purposes. Although the rule does not forbid all use of convictions to impeach a defendant, it requires that the government show that the probative value of convictions as impeachment evidence outweighs their prejudicial effect.

Prior to the amendment, the rule appeared to give the defendant the benefit of the special balancing test when defense witnesses other than the defendant were called to testify. In practice, however, the concern about unfairness to the defendant is most acute when the defendant's own convictions are offered as evidence. Almost all of the decided cases concern this type of impeachment, and the amendment does not deprive the defendant of any meaningful protection, since Rule 403 now clearly protects against unfair impeachment of any defense witness other than the defendant. There are cases in which a defendant might be prejudiced when a defense witness is impeachment. Such cases may arise, for example, when the witness bears a special relationship to the defendant such that the defendant is likely to suffer some spill-over effect from impeachment of the witness.

The amendment also protects other litigants from unfair impeachment of their witnesses. The danger of prejudice from the use of prior convictions is not confined to criminal defendants. Although the danger that prior

convictions will be misused as character evidence is particularly acute when the defendant is impeached, the danger exists in other situations as well. The amendment reflects the view that it is desirable to protect all litigants from the unfair use of prior convictions, and that the ordinary balancing test of Rule 403, which provides that evidence shall not be excluded unless its prejudicial effect substantially outweighs its probative value, is appropriate for assessing the admissibility of prior convictions for impeachment of any witness other than a criminal defendant.

The amendment reflects a judgment that decisions interpreting Rule 609 (a) as requiring a trial court to admit convictions in civil cases that have little, if anything, to do with credibility reach undesirable results. See, e.g., Diggs v. Lyons, 741 F.2d 577 (3d Cir. 1984), cert. denied, 105 S. Ct. 2157 (1985). The amendment provides the same protection against unfair prejudice arising from prior convictions used for impeachment purposes as the rules provide for other evidence. The amendment finds support in decided cases. See, e.g., Petty v. Ideco, 761 F.2d 1146 (5th Cir. 1985); Czaka v. Hickman, 703 F.2d 317 (8th Cir. 1983).

Fewer decided cases address the question whether Rule 609(a) provides any protection against unduly prejudicial prior convictions used to impeach government witnesses. Some courts have read Rule 609(a) as giving the government no protection for its witnesses. See, e.g., United States v. Thorne, 547 F.2d 56 (8th Cir. 1976); United States v. Nevitt, 563 F.2d 406 (9th Cir. 1977), cert. denied, 444 U.S. 847 (1979). This approach also is rejected by the amendment. There are cases in which impeachment of government witnesses with prior convictions that have little, if anything, to do with credibility may result in unfair prejudice to the government's interest in a fair trial and unnecessary embarrassment to a witness. Fed. R. Evid. 412 already recognizes this and excludes certain evidence of past sexual behavior in the context of prosecutions for sexual assaults.

The amendment applies the general balancing test of Rule 403 to protect all litigants against unfair impeachment of witnesses. The balancing test protects civil litigants, the government in criminal cases, and the defendant in a criminal case who calls other witnesses. The amendment addresses prior convictions offered under Rule 609, not for other purposes, and does not run afoul, therefore, of Davis

v. Alaska, 415 U.S. 308 (1974). Davis involved the use of a prior juvenile adjudication not to prove a past law violation, but to prove bias. The defendant in a criminal case has the right demonstrate the bias of a witness and to be assured a fair trial, but not to unduly prejudice a trier of fact. See generally Rule 412. In any case in which the trial court believes that confrontation rights require admission of impeachment evidence, obviously the Constitution would take precedence over the rule.

The probability that prior convictions of an ordinary government witness will be unduly prejudicial is low in most criminal cases. Since the behavior of the witness is not the issue in dispute in most cases, there is little chance that the trier of fact will misuse the convictions offered as impeachment evidence as propensity evidence. Thus, trial courts will be skeptical when the government objects to impeachment of its witnesses with prior convictions. Only when the government is able to point to a real danger of prejudice that is sufficient to outweigh substantially the probative value of the conviction for impeachment purposes will the conviction be excluded.

The amendment continues to divide subdivision (a) into subsections (1) and (2). The Committee recommended no substantive change in subdivision (a)(2), even though some cases raise a concern about the proper interpretation of the words "dishonesty or false statement." These words were used but not explained in the original Advisory Committee Note accompanying Rule 609. Congress extensively debated the rule, and the Report of the House and Senate Conference Committee states that "[b]y the phrase 'dishonesty and false statement,' the Conference means crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." The Advisory Committee concluded that the Conference Report provides sufficient guidance to trial courts and that no amendment is necessary, notwithstanding some decisions that arguably take an unduly broad view of "dishonesty."

Finally, the Committee determined that it was unnecessary to add to the rule language stating that, when a prior conviction is offered under Rule 609, the trial court is to consider the probative value of the prior conviction for impeachment, not for other purposes. The Committee

concluded that the title of the rule, its first sentence, and its placement among the impeachment rules clearly establish that evidence offered under Rule 609 is offered only for purposes of impeachment.

Rule 32.1. Revocation or Modification of Probation or Supervised Release

(a) REVOCATION OF PROBATION OR SUPERVISED RELEASE.

(1) Preliminary Hearing. Whenever a [probationer] person is held in custody on the ground that the [probationer] person has violated a condition of probation or supervised release, the [probationer] person shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given authority pursuant to 28 U.S.C. § 636 to conduct such hearings, in order to determine whether there is probable cause to hold the [probationer] person for a revocation hearing. The [probationer] person shall be given

(A) notice of the preliminary hearing and its purpose and of the alleged violation [of probation];

(B) an opportunity to appear at the hearing and present evidence in the [probationer's] person's own behalf;

(C) upon request, the opportunity to question witnesses against the [probationer] person unless, for good cause, the federal magistrate decides that justice does not require the appearance of the witness; and

(D) notice of the [probationer's] person's right to be represented by counsel.

The proceedings shall be recorded stenographically or by an electronic recording device. If probable cause is found to

exist, the [probationer] person shall be held for a revocation hearing. The [probationer] person may be released pursuant to Rule 46(c) pending the revocation hearing. If probable cause is not found to exist, the proceeding shall be dismissed.

(2) Revocation Hearing. The revocation hearing, unless waived by the [probationer] person, shall be held within a reasonable time in the district of [probation] jurisdiction. The [probationer] person shall be given

(A) written notice of the alleged violation [of probation];

(B) disclosure of the evidence against the [probationer] person;

(C) an opportunity to appear and to present evidence in the [probationer's] person's own behalf;

(D) the opportunity to question adverse witnesses; and

(E) notice of the [probationer's] person's right to be represented by counsel.

(b) MODIFICATION OF PROBATION OR SUPERVISED RELEASE. A hearing and assistance of counsel are required before the terms or conditions of probation or supervised release can be modified, unless the relief to be granted to the [probationer] person on probation or supervised release upon the [probationer's] person's request or the court's own

motion is favorable to the [probationer] person, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation or supervised release is not favorable to the [probationer] person for the purposes of this rule.

RULES OF CRIMINAL PROCEDURE

Rule 40. Commitment to Another District

* * * * *

(d) ARREST OF PROBATIONER OR SUPERVISED RELEASEE. If a person is arrested for a violation of probation or supervised release in a district other than the district having [probation] jurisdiction, such person shall be taken without unnecessary delay before the nearest available federal magistrate. The federal magistrate shall:

(1) Proceed under Rule 32.1 if jurisdiction over the [probationer] person is transferred to that district; [pursuant to 18 U.S.C. § 3653;]

(2) Hold a prompt preliminary hearing if the alleged violation occurred in that district, and either (i) hold the [probationer] person to answer in the district court of the district having [probation] jurisdiction or (ii) dismiss the proceedings and so notify that court; or

(3) Otherwise order the [probationer] person held to answer in the district court of the district having [probation] jurisdiction upon production of certified copies of the [probation order] judgment, the warrant, and the application for the warrant, and upon a finding that the person before the magistrate is the person named in the warrant.

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