ADVISORY COMMITTEE
ON
CRIMINAL RULES

Washington, DC
April 28-29, 2008

AGENDA
CRIMINAL RULES COMMITTEE MEETING
APRIL 28-29, 2008
WASHINGTON, D.C.

I. PRELIMINARY MATTERS

A. Chair's Remarks and Administrative Announcements

B. Review and Approval of Minutes of October 2007 Meeting in Park City

C. Status of Criminal Rules: Report of the Rules Committee Support Office

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Judicial Conference For Transmittal to the Supreme Court

1. Rule 1. Scope; Definitions. Proposed amendment defining "victim."

2. Rule 12.1. Notice of Alibi Defense. Proposed amendment provides that victim's address and telephone number should not be automatically provided to the defense.

3. Rule 17. Subpoena. Proposed amendment requires judicial approval before service of a post indictment subpoena seeking personal or confidential information about a victim from a third party and provides a mechanism for providing notice to victims.

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

5. Rule 32. Sentencing and Judgment. Proposed amendment deletes definitions of victim and crime of violence to conform to other amendments, clarifies when presentence report should include information about restitution, clarifies standard for inclusion of victim impact information in presentence report, and provides that victims have a right "to be reasonably heard" in judicial proceedings regarding sentencing.

6. Rule 41(b). Search and Seizure. Proposed amendment authorizing magistrate judge to issue warrants for property outside of the United States.

7. Rule 60. Victim's Rights. Proposed new rule provides for notice to victims, attendance at proceedings, the victim's right to be heard, and limitations on relief.

8. Rule 61. Conforming Title

B. Proposed Amendments Approved by the Standing Committee for Publication for Notice and Public Comment in August 2008 (No Memo)

1. Rule 5. Initial Appearance. Proposed amendment directs court to consider victim's right to be reasonably protected when making decision to detain or release defendant.

2. Rule 12.3. Notice of Public-Authority Defense. Proposed amendment provides that victim's address and telephone number should not be automatically provided to the defense.

3. Rule 21. Transfer for Trial. Proposed rule requires consideration of convenience of victims in determining whether to transfer proceeding to another district for trial

C. Proposed Amendments Published for Notice and Public Comment – Forfeiture (Memo)

1. Rule 7. The Indictment and Information. Proposed amendment removing reference to forfeiture.

2. Rule 32. Sentencing and Judgment. Proposed amendment requiring government to state whether it is seeking forfeiture in presentence report.

3. Rule 32.2. Criminal Forfeiture. Proposed amendment clarifying applicable procedures.

D. Proposed Amendments Published for Notice and Public Comment – Seizure of Electronically Stored Information (Memo)

E. Proposed Amendments Published for Notice and Public Comment – Time Computation (Memo)

1 Rule 45. Computing and Extending Time. Proposed amendment simplifying time computation methods.

2. Related amendments proposed regarding the time periods in Rules 5.1, 7, 8, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, and 59.

F. Proposed Amendment Concerning Certificates of Appealability in §§ 2254 and 2255 Proceedings Published for Notice and Comment (Memo)

III. CONTINUING AGENDA ITEMS

A. Time Computation – Statutory Provisions (Memo)

B. Proposed Amendments to Rule 11 of the Rules Governing 2254 and 2255 Proceedings (Memo)

C. Proposed Amendment to Rule 6(f) (Memo and Proposed Rule)

D. Proposed Amendment to Rule 12 (Memo)

E. Proposed Amendment to Rule 15 (Memo and Proposed Rule)

F. Proposed Amendments to Rules 32.1 and 46 (Memo)

G. Proposed Amendment to Rule 32.1(a)(6) (Memo and Proposed Rule)

H. Rule 32(h) (Memo)

IV. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES.

A. Proposal to Amend Rule 7 (Memo)

V. RULES AND PROJECTS PENDING BEFORE CONGRESS, STANDING COMMITTEE, JUDICIAL CONFERENCE, AND OTHER ADVISORY COMMITTEES.

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure.

B. Other Matters

1. Limiting Disclosure of Information About Plea Agreements and Cooperating Defendants (Memo from CACM)

2. Questions Involving Implementation of Rule 49.1 (message from John Rabiej)

3. Draft Revisions of Civil and Criminal AO Forms (Memo and Draft Forms)

VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

A. Fall Meeting – October 20-21, Biltmore Hotel, Phoenix

B. Other

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Appellate:

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Judge Eugene R. Wedoff (Bankruptcy Rules Committee)
Judge Diane P. Wood (Standing Committee)

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Judge Reena Raggi (Standing Committee)

Evidence:

Judge Kenneth J. Meyers (Bankruptcy Rules Committee)
Judge Michael M. Baylson (Civil Rules Committee)
Judge John F. Keenan (Criminal Committee)
Judge Marilyn Huff (Standing Committee)

ADVISORY COMMITTEE ON CRIMINAL RULES

			Start Date	End Date
Richard C. Tallman	C	Ninth Circuit	Member: 2004	—-
Chair			Chair: 2007	2010
Anthony J. Battaglia	M	California (Southern)	2003	2009
Rachel Brill	ESQ	Puerto Rico	2006	2009
Leo P. Cunningham	ESQ	California	2006	2009
Robert H. Edmunds, Jr.	JUST	North Carolina	2004	2010
Alice S. Fisher*	DOJ	Washington, DC	---	Open
James P. Jones	D	Virginia (Western)	2003	2009
John F. Keenan	D	New York (Southern)	2007	2010
Andrew Leipold	ACAD	Illinois	2007	2010
Thomas P. McNamara	FPD	North Carolina	2005	2008
Donald W. Molloy	D	Montana	2007	2010
Mark L. Wolf	D	Massachusetts	2005	2008
James B. Zagel	D	Illinois (Northern)	2007	2010
Sara Sun Beale	ACAD	North Carolina	2005	Open
Reporter				

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I.

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

October 1-2, 2007
Park City, Utah

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the "committee") met in Park City, Utah, on October 1-2, 2007. All members participated during all or part of the meeting:

Judge Richard C. Tallman, Chair
Judge James P. Jones
Judge John F. Keenan
Judge Donald W. Molloy
Judge Mark L. Wolf
Judge James B. Zagel
Magistrate Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Andrew D. Leipold
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Thomas P. McNamara, Esquire
Alice S. Fisher, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter

Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, and its Reporter, Professor Daniel R. Coquillette. Also present were Judge Susan C. Bucklew, former chair of the advisory committee, and Professor Nancy J. King, a former member and now a consultant to the advisory committee. Also supporting the committee were:

Peter G. McCabe, Rules Committee Secretary and Administrative Office
Assistant Director for Judges Programs
John K. Rabiej, Chief of the Rules Committee Support Office at the
Administrative Office
James N. Ishida, Senior Attorney at the Administrative Office
Timothy K. Dole, Attorney Advisor at the Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center

Two other officials from the Department's Criminal Division — Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton, Deputy Chief of the Appellate Section — were present. Lisa Rich, Director of Legislative Affairs, United States Sentencing Commission, attended the meeting. Judge Paul G. Cassell, chair of the Criminal Law Committee, was present for part of the meeting. In addition, former committee member Judge

Harvey Bartle III of the Eastern District of Pennsylvania and Appellate Rules Committee Reporter Professor Catherine Struve participated by telephone during parts of the meeting.

A. Chair's Remarks, Introductions, and Administrative Announcements

Judge Tallman welcomed everyone, particularly the new members — Judge Zagel, Judge Molloy, Judge Keenan, and Professor Leipold. Judge Tallman and Judge Rosenthal thanked outgoing chair Judge Bucklew for her nine years of service — six as a member and three as the chair.

B. Review and Approval of Minutes

A motion was made to approve the draft minutes of the April 2007 meeting.

The committee unanimously approved the motion.

II. PENDING RULE AMENDMENTS

A. Proposed Amendments Approved by the Standing Committee for Publication

Mr. Rabiej reported that the Standing Committee had approved publication of the following proposed rule amendments for notice and public comment. He noted that they were posted on the Judiciary's website and that more than 5,000 hard copies were being printed.

1. Rule 7. The Indictment and Information. The proposed amendment removes reference to forfeiture.

2. Rule 32. Sentencing and Judgment. The proposed amendment requires the government to state in the presentence report whether it is seeking forfeiture.

3. Rule 32.2. Criminal Forfeiture. The proposed amendment makes several changes to the forfeiture process. It clarifies that the government's notice of forfeiture need not identify the specific property or money judgment that is subject to forfeiture and should not be designated as a count in an indictment or information.

4. Rule 41. Search and Seizure. The proposed amendment specifies the requirements for a warrant for electronically stored information.

5. Rule 45. Computing and Extending Time. The proposed amendment simplifies the method for computing time.

6. Rules 5.1, 7, 8, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, and 59, and to Rule 8 of the Rules Governing §§ 2254 and 2255 Proceedings. Amendments to these rules are

intended to accommodate the new "days are days" time-computation standard specified in Rule 45.

7. Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings. The proposed amendments make the requirements concerning certificates of appealability more prominent by adding and consolidating them in the pertinent Rule 11 and also require the judge to grant or deny the certificate at the time a final order is issued.

B. Proposed Amendments Approved by the Supreme Court

Professor Beale noted that three rule amendments related to *United States v. Booker*, 543 U.S. 220 (2005), a new privacy rule, and an amendment to Rule 45 had all been approved by the Judicial Conference and the Supreme Court and were set to take effect on December 1, 2007.

1. Rule 11. Pleas. The proposed amendment conforms the rule to the Supreme Court's decision in *Booker* by eliminating the requirement that the court advise a defendant during plea colloquy that it must apply the Sentencing Guidelines.

2. Rule 32. Sentencing and Judgment. The proposed amendment conforms the rule to *Booker* by clarifying that the court can instruct the probation office to include in the presentence report information relevant to factors in 18 U.S.C. § 3553(a).

3. Rule 35. Correcting or Reducing a Sentence. The proposed amendment conforms the rule to *Booker* by deleting subparagraph (B), consistent with *Booker*'s holding that the sentencing guidelines are advisory rather than mandatory.

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

5. Rule 49.1. Privacy Protection For Filings Made with the Court. The proposed new rule implements section 205(c)(3) of the E-Government Act of 2002, which requires the Judiciary to promulgate federal rules "to protect privacy and security concerns relating to electronic filing of documents and [their] public availability." Mr. McCabe noted that the AO Forms Working Group, chaired by Judge Harvey Schlesinger, had identified a dozen or so forms that required revision to accommodate the privacy rules.

C. Proposed Amendments Approved by the Standing Committee and the Judicial Conference

Mr. Rabiej noted that the following proposed rule amendments, which include those relating to the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, were approved by the Standing Committee in June 2007 and by the Judicial Conference in September 2007, and were about to be forwarded to the Supreme Court.

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

2. Rule 12.1. Notice of Alibi Defense. The proposed amendment provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised.

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

4. Rule 18. Place of Trial. The proposed amendment requires the court to consider the convenience of victims — in addition to the convenience of the defendant and witnesses — in setting the place for trial within the district.

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

6. Rule 41(b). Search and Seizure. The proposed amendment authorizes magistrate judges to issue warrants for property outside the United States.

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

8. Rule 61. Conforming Title. The proposed amendment renumbers Rule 60.

At Judge Tallman's request, Professor Coquillette provided a brief primer on the rulemaking process and the committee's role. Professor Coquillette commended Mr. McCabe's law review article on the nearly 75-year history of the rulemaking process, urging that copies be distributed. He noted that, by enacting the Rules Enabling Act, Congress had delegated an important part of its powers in 1934, creating a common forum for inter-branch cooperation — with significant public input — to produce procedural rules that would supersede all prior federal

law. One member suggested that a brochure setting forth the various constitutional, statutory, and prudential constraints on the rules committee might be helpful.

Judge Tallman urged committee members to resist partisanship and to work cooperatively to approve rule amendment proposals that improve court efficiency while respecting all relevant constitutional rights. Judge Rosenthal emphasized how well the existing deliberative process worked. Mr. McCabe noted that reducing the three-year rulemaking timeline by eliminating steps or shortening time limits had been considered on at least two prior occasions, but ultimately rejected. Mr. Rabiej described the process and underscored the wealth of information available on the Federal Rulemaking website, http://www.uscourts.gov/rules.

III. PROPOSALS FOR COMMITTEE CONSIDERATION

A. Report on June 2007 Meeting of the Standing Committee

Judge Bucklew reported on the Standing Committee's June 2007 meeting. The proposed amendments to Rule 16 generated the greatest interest. She said that the advisory committee's proposed revision had not been approved due to (1) concerns that it would require government disclosure of exculpatory and impeaching evidence without regard to its materiality and (2) questions whether a need for the change had been sufficiently shown. Then-Deputy Attorney General Paul J. McNulty had strongly opposed the proposal at the meeting. Other proposed amendments discussed included the proposed changes to Rule 11 of the rules governing § 2254 and § 2255 proceedings — part of which was remanded for the advisory committee's consideration (see below) — and the CVRA amendments.

Though declining to approve the proposed amendment to Rule 16, Judge Rosenthal reported that the Standing Committee suggested that the advisory committee consider whether to continue studying the Rule 16 amendment proposal. And if so, to ask the Federal Judicial Center to research (a) the effect of the recent change to the U.S. Attorneys' Manual and (b) the experience of courts governed by local rules similar to the Rule 16 amendment proposal. Ms. Hooper reported that, given the Courtroom Usage Study's current demand on resources, the Center could not immediately conduct a substantial survey. One member suggested studying the impact of local rules, which would require fewer resources. Ms. Fisher said that the Department has been carrying out substantial training on the U.S. Attorneys' Manual changes and could already start helping the FJC think of ways to capture the data needed for the Center's study.

Judge Bucklew advised the Standing Committee the reasons the advisory committee did not pursue the proposed amendment to Rule 29 on judgments at acquittal.

B. Proposed Amendments to Rule 11 of the Rules Governing § 2254 and § 2255 Proceedings

The committee discussed the portion of the proposed amendments to Rule 11 of the rules governing § 2254 and § 2255 Proceedings that the Standing Committee had deferred for further consideration. Professor Beale noted that these were part of a three-part package of changes originally proposed by the Department, addressing post-conviction remedies. The advisory committee had earlier rejected proposed new Rule 37, which would have regularized the collateral review of criminal judgments and abolished certain writs of error. The Standing Committee approved only the certificate of appealability part of the proposed amendments.

Professor Beale summarized the pending proposal, which would make Rule 11 the exclusive method to obtain relief in these cases, set a 30-day time limit, limit the types of claims allowed, and prohibit use of Civil Rule 60(b) motions in these cases. A member moved that the committee refer the remaining proposals to amend Rule 11 of the rules governing § 2254 and § 2255 Proceedings back to the Writs Subcommittee for further study. Judge Tallman agreed and asked Professor King to remain on the subcommittee in her new consulting capacity, Mr. McNamara to chair it, and Judge Keenan to join it. Judge Tallman later asked Justice Edmunds if he would also serve to provide the group with an appellate perspective.

C. Rule 32(h)

The committee discussed the proposed post-*Booker* amendment to Rule 32(h). Professor Beale noted that, as published, the proposal had generated significant public comment. The Standing Committee had declined to approve it and sent it back for further study. There was discussion over whether the committee should wait until the Supreme Court decides *Gall v. United States*, No. 06-7949. The question presented in *Gall* is: "Whether, when determining the 'reasonableness' of a district court sentence under [*Booker*], it is appropriate to require district courts to justify a deviation from the United States Sentencing Guidelines with a finding of extraordinary circumstances." A consensus developed that the Rule 32(h) rule amendment proposal should be referred back to a subcommittee on sentencing issues for further study. Judge Tallman appointed Judge Molloy as the subcommittee's new chair and asked Judge Wolf to join Justice Edmunds, Ms. Brill, Mr. McNamara, and the Department.

D. Rule 15

Ms. Fisher summarized the background of the Department's proposal to amend Rule 15 to permit the deposition of a witness outside the defendant's *physical* presence under certain circumstances where doing so is impracticable or impossible. Ms. Fisher said the proposed amendment was needed in national security and other cases. The Department had sought to address the Confrontation Clause concerns raised in *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006), and the objections raised by Justice Scalia's opinion when the Supreme Court rejected a proposed amendment addressing a similar issue a few years ago. One member noted

that it was unusual for a rule to refer specifically to "defense witnesses" in subparagraph (c)(3)(B) of the proposed Rule 15 amendment rather than simply to "witnesses." Another suggested that the rule should clarify the burden of proof and who bears it. Based on the comments, the proposal was referred to the Rule 15 Subcommittee. Judge Tallman asked Judge Keenan to chair the subcommittee with Professor Leipold, Mr. Cunningham, and the Department.

E. Rule 12(b)(3)(B) and Rule 34

The committee discussed the Department's proposed amendment of Rule 12(b) to bar claims that an indictment fails to state an offense unless raised before trial. Mr. Wroblewski explained that the Department wanted all challenges to be flagged before a jury is empaneled, when the problem can still be fixed. Several members asked, though, what should be done if an indictment is in fact found to be defective after jeopardy attaches. Should an erroneous indictment be sent to the jury? After further discussion, it was decided that the proposed Rule 12(b) amendment should be referred to a small subcommittee for further study. Judge Tallman asked Judge Wolf to chair the subcommittee, and asked Mr. McNamara and Professor Leipold to serve as members.

F. Time Computation Project — Statutory Provisions

For the benefit of the new members, Mr. Cunningham described the history of the rules committees' coordinated effort to simplify time computations by adopting a "days are days" counting principle, adjusting the time limits specified in individual rules to take account of the new counting method, and to fix shorter deadlines in multiples of 7 days, where feasible. Professor Beale noted that the time-computation rules amendments had been published for public comment. At issue now were the statutory deadlines and statutory time computation rules. Mr. Wroblewski reported that the Department planned to send the rules committees a letter shortly, identifying all U.S. Code provisions that the Department considers critical that the Congress should amend. Judge Rosenthal noted that, ideally, Congress would pass a statute taking effect at the same time as the revised rules that would adjust the relevant statutory deadlines as appropriate in light of the new "days are days" time-counting rule. Mr. Rabiej suggested that reaching consensus on all proposed changes would be challenging. The committee discussed prioritizing the desired legislative changes.

Judge Rosenthal urged members to review the list of proposed changes carefully, warning that relatively few private practitioners were likely to take the time to do so during the public comment period. One member asked whether the committee had examined the interplay of the revised time deadlines with agency deadlines in asset forfeiture and other matters. Professor Beale agreed that this required scrutiny. Judge Wolf asked that he be sent a document that he could forward to bar presidents and others, with applicable questions and a deadline for their responses. One member recommended posting the proposed changes online, for public airing.

Professor Coquillette agreed, suggesting that accompanying language be prepared to make clear the substantial improvement that the new time-computation framework represents.

G. Rule Amendments Relating to Crime Victims

After welcoming Judge Cassell to the meeting, Judge Tallman congratulated Judge Jones on his recent appointment as a district representative to the Judicial Conference and asked him to report on the most recent rule amendments being proposed by the CVRA Subcommittee. Judge Jones recounted the history of the effort to implement the Crime Victims' Rights Act in the rules. He noted that the originally published package of proposed rule amendments had generated criticism from both sides. While criminal victims' advocates, including Judge Cassell, contended that the proposals were inadequate, others argued that the proposed changes would improperly tilt the adversarial equilibrium of criminal cases against accused persons. The package of amendments was revised to account for some of the concerns raised during the public comment. A revised version of the original amendment proposals, approved by the Standing Committee in June 2007 and by the Judicial Conference in September 2007, is on its way to the Supreme Court.

Judge Jones explained that the CVRA Subcommittee was now recommending adoption of a set of follow-up amendments, in Rules 5, 12.3, and 21. Judge Cassell noted that he had recently announced his resignation from the bench, having recognized that his passions were best pursued as an advocate rather than a judge. Judge Tallman thanked Judge Cassell for his significant input on CVRA-related matters throughout the rulemaking process.

Concern was raised that there were inconsistent references in the proposed rules to "the victim," "any victim," or "a victim"— an issue that will be addressed by the Style Subcommittee. Someone proposed placing the proposed Rule 5 amendment in Rule 46 instead, but others suggested that magistrate judges were more likely to find the provision in Rule 5. It was noted that the reference to 7 days in Rule 12.3(a)(4)(C) might be affected by the time-computation amendments — which the committee might want to flag during the public comment period with an asterisk. After further discussion, Judge Jones moved to approve the CVRA-related amendments to Rules 5(d)(3), 12.3, and 21.

The committee voted to approve the proposed CVRA-related amendments for publication.

H. Rules 32.1 and 46

Judge Battaglia noted that the committee had first discussed his proposal to amend Rules 32.1 and 46 in October 2006. He explained the background of the proposed rules amendment, which would standardize national practices and expressly authorize issuance of an arrest warrant or summons when the government seeks revocation of bail or supervised release. Following discussion of the proposal, Judge Battaglia moved to send the proposed amendments to the

Standing Committee for publication. Professor Beale suggested that the committee could approve the proposed rules amendments now, but wait until the next meeting to give final approval to the committee note and the final language of the amendment suggested by the Style Subcommittee.

A member expressed concern about the mandatory nature of the proposed language, noting that a judge could decide to issue either a summons or a warrant, depending on the circumstances. Ms. Fisher said that the Department did not feel strongly about this issue. Judge Tallman suggested that the rule use "may issue" instead of "must issue" in both proposals. It was noted that a judge could decide to issue a summons or might want to issue an arrest warrant. Judge Battaglia accepted the suggestion. One member questioned the reference to "affidavit," which could be construed as excluding a declaration. Judge Rosenthal reported that, as part of the Civil Rules restyling, the term "affidavit" was used, and suggested that this could be clarified in the note. Mr. Wroblewski pointed out that the reference to Rule 41(c)(2)(B) should be to Rule 41(d)(2)(B). Professor Beale commented that, even if approved, the proposal would still need to be restyled, all references cross-checked, and a committee note drafted.

The committee voted, with one dissent, to send the proposed amendments to the Standing Committee as revised and with an accompanying Committee Note, which would be approved by the committee at a later date.

I. Proposal for Victims' Advocate Member on Rules Committee

Judge Tallman informed the committee that the Chief Justice had referred to the Standing Committee — which in turn had referred to the advisory committee — a request that he appoint to the committee a permanent victims' advocate member. Before discussing that request, Judge Tallman asked Ms. Hooper to report on the FJC's work with the Government Accountability Office (GAO) on CVRA-related issues. Ms. Hooper said that a judges' pocket guide and a DVD on the CVRA and related rules amendment were being developed, which should be ready for distribution by year's end. Judge Tallman noted that CVRA issues were also being incorporated into the curriculum of the Center's "baby judges school" training program. Ms. Hooper described the GAO study and FJC's meeting with the Executive Office for U.S. Attorneys to determine what victim data are available.

Judge Tallman expressed concern about adding a victims' advocate as a committee member. Judge Cassell suggested that Lewis & Clark Law Professor Douglas Beloof, would make an excellent addition to the committee. After additional discussion, Judge Rosenthal said that adding members whose express role was to advance a particular agenda raised institutional concerns and that the rules committees should remain forums for people with different experiences coming together to identify solutions to problems. Ms. Fisher said that the Department had every interest in knowing victims' interests and suggested that perhaps it could meet regularly with representatives from the victims' community before each committee meeting to ensure that the Department understood their issues. Based on the members' comments, the

committee decided that it was inadvisable, and would set an adverse precedent, to have institutional members appointed to the committee whose sole portfolio is their advocacy on behalf of crime victims.

The committee voted, with one dissent, not to recommend that the Chief Justice appoint a permanent crime victims' advocate member to the committee.

J. Rule 32(i)(1)(A)

The committee resumed its meeting on Tuesday morning with a discussion of the letter sent by Judge Ernest Torres of the District of Rhode Island recommending a change to Rule 32(i)(1)(A). Professor Beale explained that the rule had been amended in 1995 to require courts to "verify that the defendant and the defendant's attorney *have* read and discussed the Presentence Report" — rather than, as the rule had required before 1995, simply to "determine that the defendant and defendant's counsel have had the *opportunity* to read and discuss" it. Judge Torres had suggested that the wording of the rule would create an impasse if a defendant flatly refused to read the Presentence Report.

A few district judges described what they do at sentencing when it becomes apparent that the defendant has not in fact read the report either due to illiteracy or insufficient fluency in English. Often, they said, they simply invite the defendant to take the time during a brief recess to read the report with the help of their attorney or, if needed, an interpreter. It was suggested that, were a defendant willfully to refuse to read and discuss the report, appellate courts would likely interpret the refusal as a waiver of the defendant's right to read and discuss the report. Based on the comments, the committee concluded that amending Rule 32(i)(1)(A) was unnecessary. Judge Tallman said that he would write a letter to Judge Torres, explaining the committee's reasons for not pursuing a change to the rule.

K. Rule 32.1(a)(6)

The committee discussed the suggestion of Magistrate Judge Robert B. Collings of the District of Massachusetts that Rule 32.1(a)(6) be amended to clarify the rule's incorporation of 18 U.S.C. § 3143(a). One member recommended pursuing the proposed amendment as a way to simplify the rule and offer clearer guidance to busy judges. Another member questioned whether "clear and convincing" was the correct standard for establishing that "the person will not flee or pose a danger to any other person or to the community." Judge Tallman cautioned that establishing the proper burden of proof sounded substantive and may be inappropriate under the Rules Enabling Act. It was noted that the rule referenced the statute and that invoking the statutory standard is entirely appropriate. Judge Tallman asked the Reporter to investigate the matter further and to prepare a memorandum for the committee's consideration addressing (a) whether Judge Collings' proposed standard properly reflects the case law and (b) if so, whether there is any impediment to including the standard in the rule. One member suggested that the memorandum might also address whether a separate section is needed on revocation of

supervised release. Judge Tallman agreed that this issue should be part of the Reporter's research. Judge Battaglia offered to assist. Mr. Wroblewski offered to contribute a list of relevant statutes.

L. Rule 6(f)

The committee discussed Judge Battaglia's suggestion that Rule 6(f) be amended to allow courts, for good cause, to receive the return of a grand jury indictment by video conference. Professor Beale and Judge Tallman noted that the proposal was particularly important in districts that are geographically large but have few judges, who sometimes have to drive hours to preside over a 10-minute proceeding. One member proposed striking the phrase "in open court" instead, but others suggested that the phrase was a vital safeguard against the ancient practice of secret Star Chambers indictments. Another member suggested that the phrase "for good cause" be changed to "for judicial convenience," but Judge Battaglia warned that doing so might enable video conference to become the default practice. Further study was necessary. Judge Tallman asked Judge Battaglia to chair a subcommittee, whose members would include Professor Leipold and Justice Edmunds, assisted by Professor Beale and Professor King.

M. Rule 11(b)(1)(M)

Judge Tallman reported that concerns about the recent post-*Booker* amendment of Rule 11(b)(1)(M) had been raised during a recent meeting in Montana of Ninth Circuit chief district judges and clerks that he attended, chaired by Judge Molloy. The amendment, set to take effect on December 1, 2007, requires a court to advise a defendant entering a guilty or nolo contendere plea of the court's obligation, in imposing the sentence, "to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)." Central District of California Chief Judge Alicemarie H. Stotler and District of Arizona Chief Judge John M. Roll, both former rules committee members, asked how extensively the sentencing process needed to be described and whether judges would have to calculate sentencing guidelines at the guilty plea hearing so that they could give notice of "the applicable sentencing-guideline range."

Several members suggested that the language of the amended rule was clear that the court needed only to inform the defendant of the court's future obligations to calculate the sentencing-guideline range at sentencing, not to perform the actual calculation at the guilty plea hearing. The committee decided to wait until after the *Booker* rule amendments take effect on December 1, 2007, and see whether any evidence emerges from the field that the amended rule is causing actual confusion. Judge Tallman suggested that the committee propose language that the FJC could include in the Bench Book.

N. Bail Bond Fairness Act

Judge Tallman noted that legislation had been introduced in Congress at the request of corporate bail bondsmen that would prohibit district judges from forfeiting corporate surety bonds for any reason other than failure to appear. Some courts have forfeited bonds when the defendant violates other conditions of release and is rearrested. The Judicial Conference opposes this legislation. Mr. Wroblewski noted that the Department also opposes it.

O. Indicative Rulings

Professor Struve joined by telephone to describe the indicative-rulings project and to ask whether the committee thought that the Criminal Rules should be amended to parallel the proposed amendments to the Civil and Appellate Rules recently published for public comment. Proposed Civil Rule 62.1 would create a mechanism for an appellate court to remand certain post-judgment motions if the district court were to indicate that it considered the motion meritorious. She noted that indicative rulings have also been used in criminal cases. Judge Tallman said that his circuit often handles this type of situation informally, through clerk-to-clerk communications. Ms. Felton said that the Department of Justice was concerned about the scope of the proposed amendment. Judge Rosenthal suggested that it would be helpful for the rules to clarify the options available in these situations, even if they occur relatively infrequently. After further discussion, the committee decided to pursue further study of this proposal.

P. Disclosing Cooperation Agreements

Former committee member Judge Bartle joined by telephone to report on his court's efforts to address the problem posed by www.whosarat.com and similar websites purporting to identify informants in criminal cases.

Judge Bartle described the Eastern District of Pennsylvania's adoption a month ago of a new protocol to address this problem. The protocol was developed with input from the defense bar, the U.S. Attorney, and others. Rather than describing sealed documents on the public docket as "Plea Agreement Entered by Defendant X" or "Memorandum in Support of Reduction in Sentence," they are now described generically as "Plea Agreement," "Sentencing Document," or "Judicial Document." The documents themselves remain publicly available only at the Clerk's Office, but are no longer posted on PACER. Also, the docket does not identify a document as "under seal," because that is often interpreted as indicative of defendant cooperation. Although the new protocol does not solve all problems, Judge Bartle hoped that it would help diminish the threat of witness intimidation.

Professor Beale noted that, in addition to the materials received from Judge Bartle, the agenda book included a memorandum from Judge John R. Tunheim of the District of Minnesota, chair of the Committee on Court Administration and Case Management, opposing the Department's proposal to remove all plea agreements from PACER and limit remote electronic

access to court users and participants in the case. The committee concluded that the proposal would not be effective because cooperation agreements would be freely available at the courthouse. The committee sought public comment on other options to address this vexing problem. (At its December 4-5 meeting, the committee reviewed the public comments and concluded that courts should be allowed to develop their own procedures to address this issue.)

Judge Tallman asked whether Judge Bartle had been in touch with Judge Tunheim. Judge Bartle said that he was about to write Judge Tunheim asking that the Judicial Conference not adopt any national policy that would bar his court's new protocol. Mr. Wroblewski said that the Department considered this a serious matter and had suggested the program in Judge Bartle's court in a recent letter to Judge Tunheim. He noted that in the Southern District of New York, documents indicating cooperation are never filed, but simply returned to the parties — an option that the Department did not view as ideal. Judge Bartle said that his court had also considered, but rejected, that option. Judge Tallman noted that the practice created a record full of gaping holes, which was problematic on appeal. Professor Leipold made a plea on behalf of academic researchers for continued public access to all key documents in criminal cases.

After proposing that the next meeting be held the last week of April 2008, Judge Tallman adjourned the meeting.

II. A.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

MEMORANDUM

To: The Chief Justice of the United States and the Associate Justices of the Supreme Court

From: James C. Duff

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 1, 12.1, 17, 18, 32, 41, 45, 60, and new Rule 61 of the Federal Rules of Criminal Procedure, which were approved by the Judicial Conference at its September 2007 session. The Judicial Conference recommends that the amendments and new rule be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments and new rule, I am transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference as well as the Report of the Advisory Committee on the Federal Rules of Criminal Procedure.

Attachments

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 1. Scope; Definitions

* * * * *

(b) Definitions. The following definitions apply to these rules:

* * * * *

(11) "Victim" means a "crime victim" as defined in 18 U.S.C. § 3771(e).

* * * * *

Rule 12.1. Notice of an Alibi Defense

* * * * *

(b) Disclosing Government Witnesses.

(1) ***Disclosure.***

(A) *In General.* If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the

government must disclose in writing to the defendant or the defendant's attorney:

(i) the name of each witness — and the address and telephone number of each witness other than a victim — that the government intends to rely on to establish that the defendant was present at the scene of the alleged offense; and

(ii) each government rebuttal witness to the defendant's alibi defense.

(B) *Victim's Address and Telephone Number.* If the government intends to rely on a victim's testimony to establish that the defendant was present at the scene of the alleged offense and the defendant

establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows preparation of the defense and also protects the victim's interests.

(2) ***Time to Disclose.*** Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

(c) Continuing Duty to Disclose.

(1) ***In General.*** Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of each additional witness — and the address and telephone number of each additional witness other than a victim — if:

(A) the disclosing party learns of the witness before or during trial; and

(B) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

(2) ***Address and Telephone Number of an Additional Victim Witness.*** The address and telephone number of an additional victim witness must not be disclosed except as provided in Rule 12.1 (b)(1)(B).

* * * * *

Rule 17. Subpoena

* * * * *

(c) Producing Documents and Objects.

* * * * *

(3) ***Subpoena for Personal or Confidential Information About a Victim.*** After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

* * * * *

Rule 18. Place of Prosecution and Trial

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

Rule 32. Sentencing and Judgment

(a) [Reserved.]

* * * * *

(c) Presentence Investigation.

(1) *Required Investigation.*

* * * * *

(B) *Restitution.* If the law permits restitution, the probation officer must conduct an

investigation and submit a report that contains sufficient information for the court to order restitution.

* * * * *

(d) Presentence Report.

* * * * *

(2) ***Additional Information.*** The presentence report must also contain the following:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

* * * * *

(i) Sentencing.

* * * * *

(4) *Opportunity to Speak.*

(A) *By a Party.* Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) *By a Victim.* Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.

* * * * *

Rule 41. Search and Seizure

* * * * *

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

* * * * *

(3) a magistrate judge — in an investigation of domestic terrorism or international terrorism — with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district;

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both; and

(5) a magistrate judge having authority in any district where activities related to the crime may have occurred, or in the District of

Columbia, may issue a warrant for property that is located outside the jurisdiction of any state or district, but within any of the following:

(A) a United States territory, possession, or commonwealth;

(B) the premises — no matter who owns them — of a United States diplomatic or consular mission in a foreign state, including any appurtenant building, part of a building, or land used for the mission's purposes; or

(C) a residence and any appurtenant land owned or leased by the United States and used by United States personnel assigned to a United States diplomatic or consular mission in a foreign state.

* * * * *

Rule 45. Computing and Extending Time

* * * * *

(c) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a specified period after service and service is made in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under subdivision (a).

Rule 60. Victim's Rights

(a) In General.

(1) ***Notice of a Proceeding.*** The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime.

(2) ***Attending the Proceeding.*** The court must not exclude a victim from a public court proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at that proceeding. In determining whether to exclude a victim, the court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.

(3) ***Right to Be Heard on Release, a Plea, or Sentencing.*** The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning

release, plea, or sentencing involving the crime.

(b) Enforcement and Limitations.

(1) ***Time for Deciding a Motion.*** The court must promptly decide any motion asserting a victim's rights described in these rules.

(2) ***Who May Assert the Rights.*** A victim's rights described in these rules may be asserted by the victim, the victim's lawful representative, the attorney for the government, or any other person as authorized by 18 U.S.C. § 3771(d) and (e).

(3) ***Multiple Victims.*** If the court finds that the number of victims makes it impracticable to accord all of them their rights described in these rules, the court must fashion a reasonable procedure that gives effect to these

rights without unduly complicating or prolonging the proceedings.

(4) ***Where Rights May Be Asserted.*** A victim's rights described in these rules must be asserted in the district where a defendant is being prosecuted for the crime.

(5) ***Limitations on Relief.*** A victim may move to reopen a plea or sentence only if:

(A) the victim asked to be heard before or during the proceeding at issue, and the request was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 10 days after the denial, and the writ is granted; and

(C) in the case of a plea, the accused has not pleaded to the highest offense charged.

(6) ***No New Trial.*** A failure to afford a victim any right described in these rules is not grounds for a new trial.

Rule 61. Title

These rules may be known and cited as the Federal Rules of Criminal Procedure.

II. B.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 5. Initial Appearance

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(d) Procedure in a Felony Case.

* * * * *

(3) ***Detention or Release.*** The judge must detain or release the defendant as provided by statute or these rules. In making that decision, the court must consider any statute or rule that protects a victim from the defendant.

COMMITTEE NOTE

Subdivision (d)(3). This amendment draws attention to a factor that the courts are required to consider under

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

both the Bail Reform Act and the Crime Victims Rights Act. In determining whether a defendant can be released on personal recognizance, unsecured bond, or conditions, the Bail Reform Act requires the court to consider "the safety of any other person or the community." *See* 18 U.S.C. § 3142(b) & (c). In considering proposed conditions of release, 18 U.S.C. § 3142(g)(4), requires the court to consider "the nature and seriousness of the danger to any person in the community that would be posed by the person's release." In addition, the Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(1), states that victims have the "right to be reasonably protected from the accused."

Rule 12.3. Notice of a Public-Authority Defense

* * * *

(4) ***Disclosing Witnesses.***

(C) *Government's Reply*. Within 7 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name~~,~~ ~~address, and telephone number~~ of each witness--and the address and telephone number of each witness other than a victim--that the government intends to rely on to oppose the defendant's public-authority defense.

(D) *Victim's Address and Telephone Number.* If the government intends to rely on a victim's testimony to oppose the defendant's public-authority defense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows for preparing the defense and also protects the victim's interests.

* * * *

(b) Continuing Duty to Disclose.

(1) *In General.* Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of any additional witness and the address, and telephone number of any additional witness other than a victim if:

(A) the disclosing party learns of the witness before or during trial; and

(B) the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had known of the witness earlier.

(2) ***Address and Telephone Number of an Additional Victim-Witness.*** The address and telephone number of an additional victim-witness must not be disclosed except as provided in Rule 12.3(a)(4)(D).

COMMITTEE NOTE

Subdivisions (a) and (b). The amendment implements the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when a public authority defense is raised. If a defendant

establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests.

In the case of victims who will testify concerning a public authority claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

Rule 21. Transfer for Trial

* * * *

(b) For Convenience. Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for after considering the convenience of the parties, any victim, and the witnesses, and ~~in~~ the interests of justice.

Committee Note

Subdivision (b). This amendment requires the court to consider the convenience of victims – as well as the convenience of the parties and witnesses and the interests of justice – in determining whether to transfer all or part of the proceeding to another district for trial. The Committee recognizes that the court has substantial discretion to balance any competing interests.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Forfeiture Rules Published for Notice and Comment**

DATE: **March 31, 2007**

Amendments to three rules relating to forfeiture (Rules 7, 32, and 32.2) were published for notice and public comment in August 2007.

No public comments were received on Rules 7 and 32, and one comment was received on Rule 32.2. The style consultant suggested a few minor changes, which were adopted after consultation with the Department of Justice and Mr. David Smith, a member of the NACDL who advised the forfeiture subcommittee throughout the drafting process. The most significant such change was to use the term "property" consistently throughout the rule, rather than switching back and forth between "assets" and "property." Both Mr. Smith and the forfeiture specialists in the Department of Justice agreed that there was no difference between these terms. Additionally, at the suggestion of the Department of Justice (and after consultation with Mr. Smith) two minor changes were made in the Committee Note to Rule 32.2.

One public comment was received concerning Rule 32.2. Judge Lawrence Piersol opposed the requirement under Rule 32.2(b)(2)(B) that the court "enter a preliminary forfeiture order sufficiently in advance of sentencing to permit the parties to suggest modifications." He noted that the presentence report may not contain all of the necessary information, and the court may need to take evidence at the time of sentencing. He expressed concern that the amendment might delay sentencing. As published, however, the amendment takes account of the fact that there will be cases in which the court cannot make a determination in advance of sentencing. It provides that a court must enter a preliminary order in advance of sentencing "[u]nless doing so is impractical." This limitation seems adequate to avoid any need to delay sentencing, allowing the judge to hear evidence relevant to forfeiture at the sentencing hearing in appropriate cases. Where it is practical to do so, however, the amendment requires that a preliminary order be entered in advance of sentencing, so that any necessary corrections can be made.

This matter is on the agenda for the April meeting in Washington, D.C.

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE

Rule 7. The Indictment and the Information

. . . . .

(c) Nature and Contents.

. . . . .

~~**(2) Criminal Forfeiture**. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.~~

~~(3)~~ (2) **Citation Error.** Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.

Committee Note

The provision regarding forfeiture is obsolete. In 2000 the same language was repeated in subdivision (a) of Rule 32.2, which was intended to consolidate the rules dealing with forfeiture.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the proposed amendment to Rule 7.

SUMMARY OF PUBLIC COMMENTS

No comments were received regarding this rule.

Rule 32. Sentence and Judgment

* * * * *

(d) Presentence Report.

* * * * *

(2) Additional Information. The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and

(F) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a); and

(G) specify whether the government seeks forfeiture pursuant to Rule 32.2 and any other provision of law.

Committee Note

Subdivision (d)(2)(G). Rule 32.2 (a) requires that the indictment or information provide notice to the defendant of the government's intent to seek forfeiture as part of the sentence. The amendment provides that the same notice be provided as part of the presentence report to the court. This will ensure timely consideration of the issues concerning forfeiture as part of the sentencing process.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the proposed amendment to Rule 32.

SUMMARY OF PUBLIC COMMENTS

No comments were received regarding this rule.

Rule 32.2. Criminal Forfeiture

(a) Notice to the Defendant. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information. The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.

(b) Entering a Preliminary Order of Forfeiture

(1) ~~***In General.***~~ ***Forfeiture Phase of the Trial.***

(A) *Forfeiture Determinations.* As soon as practical after a verdict or finding of guilty--or after a plea of guilty or nolo contendere is accepted--on any count in an indictment or information on which criminal

forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.

(B) *Evidence and Hearing.* The court's determination may be based on evidence already in the record, including any written plea agreement, ~~or~~ and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If ~~if~~ the forfeiture is contested, on either party's request the court must conduct a hearing ~~on~~

~~evidence or information presented by the parties at a hearing~~ after the verdict or finding of guilt.

(2) ***Preliminary Order.***

(A) *Contents.* If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, ~~or~~ directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria.~~without regard to any third party's interest in all or part of it~~. The order must be entered without regard to any third party's interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(B) *Timing.* Unless doing so is impractical, the court must enter the preliminary order of forfeiture sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4).

(C) *General Order.* If, before sentencing, the court cannot identify all the specific property subject to forfeiture or calculate the total amount of the money judgment, the court may enter a forfeiture order that:

(i) lists any identified property;

(ii) describes other property in general terms; and

(iii) states that the order will be amended under Rule 32.2(e)(1) when additional specific

property is identified or the amount of the money judgment has been calculated.

(3) ***Seizing Property.*** The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third party rights. ~~At sentencing – or at any time before sentencing if the defendant consents – the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and be included in the judgment.~~ The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(4) ***Sentence and Judgment.***

(A) *When Final.* At sentencing–or at any time before sentencing if the defendant consents–the preliminary order of forfeiture becomes final as to the defendant. If the order directs the defendant to forfeit specific property, it remains preliminary as to third parties until the ancillary proceeding is concluded under Rule 32.2 (c).

(B) *Notice and Inclusion in the Judgment.* The district court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing. The court must also include the order of forfeiture, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36.

(C) *Time to Appeal.* The time for a party to file an appeal from the order of forfeiture, or from the district court's failure to enter an order, begins to run when judgment is entered. If the court later amends or declines to amend an order of forfeiture to include additional property under Rule 32.2(e), a party may file an appeal regarding that property under Federal Rule of Appellate Procedure 4(b). The time for that appeal runs from the date when the order granting or denying the amendment becomes final.

(~~4~~ 5) ***Jury Determination***.

(A) *Retaining the Jury.* ~~Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must~~ In any case tried before a jury, if the indictment or information states that the government is seeking forfeiture, the court must determine before the jury

begins deliberating whether either party requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict.

(B) *Special Verdict Form.* If a party timely requests to have the jury determine forfeiture, the government must submit a proposed Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

(6) *Notice of the Order of Forfeiture.*

(A) *Publishing and Sending Notice.* If the court orders the forfeiture of specific property, the government must publish notice of the order and send notice to any person who reasonably appears to be a potential

claimant with standing to contest the forfeiture in the ancillary proceeding.

(B) *Content of the Notice.* The notice must describe the forfeited property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and state the name and contact information for the government attorney to be served with the petition.

(C) *Means of Publication.* Publication must take place as described in Supplemental Rule G(4)(a)(iii) of the Federal Rules of Civil Procedure, and may be by any means described in Supplemental Rule G(4)(a)(iv). Publication is unnecessary if any exception in Supplemental Rule G(4)(a)(I) applies.

(D) *Means of Sending the Notice.* The notice may be sent in accordance with Supplemental Rules G(4)(b)(iii)-(v) of the Federal Rules of Civil Procedure.

(7) ***Interlocutory Sale.*** At any time before entry of a final order of forfeiture, the court, in accordance with Supplemental Rule G(7) of the Federal Rules of Civil Procedure, may order the interlocutory sale of property alleged to be forfeitable.

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Committee Note

Subdivision (a). The amendment responds to some uncertainty regarding the form of the required notice that the government will seek forfeiture as part of the sentence, making it clear that the notice should not be designated as a separate count in an indictment or information. The amendment also makes it clear that the indictment or information need only provide general notice that the government is seeking forfeiture, without identifying the specific property being sought. This is consistent with the 2000 Committee Note, as well as many lower court decisions.

Although forfeitures are not charged as counts, the ECF system should note that forfeiture has been alleged so as to assist the parties and the court in tracking the subsequent status of forfeiture allegations.

The court may direct the government to file a bill of particulars to inform the defendant of the identity of the property that the government is seeking to forfeit or the amount of any money judgment sought [if necessary] to enable the defendant to prepare a defense [or to avoid unfair surprise]. *See, e.g., United States v. Moffitt, Zwerdling, & Kemler, P.C.,* 83 F.3d 660, 665 (4th Cir. 1996) (holding that the government need not list each asset subject to forfeiture in the indictment because notice can be provided in a bill of particulars); *United States v. Vasquez-Ruiz,* 136 F. Supp.2d 941, 944 (N.D. Ill. 2001) (directing the government to identify in a bill of particulars, at least 30 days before trial, the specific items of property, including substitute assets, that it claims are subject to forfeiture); *United States v. Best,* 657 F. Supp. 1179, 1182 (N.D. Ill. 1987) (directing the government to provide a bill of particulars apprising the defendants as to the time periods during which they obtained the specified classes of property through their alleged racketeering activity and the interest in each of these properties that was allegedly obtained unlawfully). *See also United States v. Columbo,* 2006 WL 2012511 * 5 & n.13 (S.D. N.Y. 2006) (denying motion for bill of particulars and noting that government proposed sending letter detailing basis for forfeiture allegations).

Subdivision (b)(1). Rule 32.2(b)(1) sets forth the procedure for determining if property is subject to forfeiture. Subparagraph (A) is carried forward from the current Rule without change.

Subparagraph (B) clarifies that the parties may submit additional evidence relating to the forfeiture in the forfeiture phase of the trial, which may be necessary even if the forfeiture is not contested. Subsection (B) makes it clear that in determining what evidence or information should be accepted, the court should consider relevance and reliability. Finally, subsection (B) requires the court to hold a hearing when forfeiture is contested. The Committee foresees that in some instances live testimony will be needed to determine the reliability of proffered information. [Cf. Rule 32.1(b)(1)(B)(iii) (providing the defendant in a proceeding for revocation of probation or supervised release with the opportunity, upon request, to question any adverse witness unless the judge determines this is not in the interest of justice).]

Subdivision (b)(2)(A). Current Rule 32.2(b) provides the procedure for issuing a preliminary order of forfeiture once the court finds that the government has established the nexus between the property and the offense (or the amount of the money judgment). The amendment makes clear that the preliminary order may include substitute assets if the government has met the statutory criteria.

Subdivision (b)(2)(B). This new subparagraph focuses on the timing of the preliminary forfeiture order, stating that the court should issue the order "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final." Many courts have delayed entry of the preliminary order until the time of sentencing. This is undesirable because the parties have no opportunity to advise the court of omissions or errors in the order before it becomes final as to the defendant (which occurs upon oral announcement of the sentence and the entry of the criminal judgment). Once the sentence has been announced, the rules give the

sentencing court only very limited authority to correct errors or omissions in the preliminary forfeiture order. Pursuant to Rule 35(a), the district court may correct a sentence, including an incorporated order of forfeiture, within seven days after oral announcement of the sentence. During the seven day period, corrections are limited to those necessary to correct "arithmetical, technical, or other clear error." *See United States v. King*, 368 F. Supp. 2d 509, 512-13 (D. S.C. 2005). Corrections of clerical errors may also be made pursuant to Rule 36. If the order contains errors or omissions that do not fall within Rules 35(a) or 36, and the court delays entry of the preliminary forfeiture order until the time of sentencing, the parties may be left with no alternative to an appeal, which is a waste of judicial resources. The amendment requires the court to enter the preliminary order in advance of sentencing to permit time for corrections, unless it is not practical to do so in an individual case.

Subdivision (b)(2)(C). The amendment explains how the court is to reconcile the requirement that it make the order of forfeiture part of the sentence with the fact that in some cases the government will not have completed its post-conviction investigation to locate the forfeitable property by the time of sentencing. In that case the court is authorized to issue an order of forfeiture describing the property in "general" terms, which order may be amended pursuant to Rule 32.2(e)(1) when additional specific property is identified.

The authority to issue a general forfeiture order should be used only in unusual circumstances and not as a matter of course. For cases in which a general order was properly employed, see *United States v. BCCI Holdings (Luxembourg)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (ordering forfeiture of all of a large, complex corporation's assets in the United States, permitting the government to continue

discovery necessary to identify those assets); *United States v. Saccoccia*, 898 F. Supp. 53 (D.R.I. 1995) (ordering forfeiture of up to a specified amount of laundered drug proceeds so that the government could continue investigation which led to the discovery and forfeiture of gold bars buried by the defendant in his mother's back yard).

Subdivisions (b)(3) and (4). The amendment moves the language explaining when the order of forfeiture becomes final as to the defendant to new subparagraph (b)(4)(A), where it is coupled with new language explaining that the order is not final as to third parties until the completion of the ancillary proceedings provided for in Rule 32.2(c).

New subparagraphs (B) and (C) are intended to clarify what the district court is required to do at sentencing, and to respond to conflicting decisions in the courts regarding the application of Rule 36 to correct clerical errors. The new subparagraphs add considerable detail regarding the oral announcement of the forfeiture at sentencing, the reference to the order of forfeiture in the judgment and commitment order, the availability of Rule 36 to correct the failure to include the order of forfeiture in the judgment and commitment order, and the time to appeal.

Subparagraph (b)(5)(A). The amendment clarifies the procedure for requesting a jury determination of forfeiture. The goal is to avoid an inadvertent waiver of the right to a jury determination, while also providing timely notice to the court and to the jurors themselves if they will be asked to make the forfeiture determination. The amendment requires that the court determine whether either party requests a jury determination of forfeiture in cases where the

government has given notice that it is seeking forfeiture and a jury has been empaneled to determine guilt or innocence. The rule requires the court to make this determination before the jury retires. Jurors who know that they may face an additional task after they return their verdict will be more accepting of the additional responsibility in the forfeiture proceeding, and the court will be better able to plan as well.

Although the rule permits a party to make this request just before the jury retires, it is desirable, when possible, to make the request earlier, at the time when the jury is empaneled. This allows the court to plan, and also allows the court to tell potential jurors what to expect in terms of their service.

Subparagraph (b)(5)(B) explains that "the government must submit a proposed Special Verdict Form listing each property subject to forfeiture." Use of such a form is desirable, and the government is in the best position to draft the form.

Subdivisions (b)(6) and (7). These provisions are based upon the civil forfeiture provisions in Supplemental Rule G of the Federal Rules of Civil Procedure, which are also incorporated by cross reference. The amendment governs such mechanical and technical issues as the manner of publishing notice of forfeiture to third parties and the interlocutory sale of property, bringing practice under the Criminal Rules into conformity with the Civil Rules.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The proposed amendment to Rule 32.2 was modified to use the term "property" throughout. As published, the proposed amendment used the terms property and asset(s) interchangeably. No difference in meaning was intended, and in order to avoid confusion, a single term was used consistently throughout. Other small stylistic changes (such as the insertion of "the" in subpart titles) were also made to conform to the style conventions.

Additionally, two changes were made to the Committee Note: a reference to the use of the ECF system to aid the court and parties in

tracking the status of forfeiture allegations, and an additional illustrative case.

SUMMARY OF PUBLIC COMMENTS

One comment was received concerning the proposed amendment to Rule 32.2.

Judge Lawrence Piersol expressed concern about the requirement under Rule 32.2(b)(2)(B) that the court "enter a preliminary forfeiture order sufficiently in advance of sentencing to permit the parties to suggest modifications," because the presentence report may not contain all of the necessary information, and the court may need to take evidence at the time of sentencing. He suggested that this requirement might delay sentencing.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Nancy J. King, Special Reporter**

RE: **Rule 41**

DATE: **April 2, 2008**

This memorandum reports the recommendations of the ESI (electronically stored information) subcommittee. Judge Battaglia chairs the subcommittee, which also includes Justice Edmunds, Leo Cunningham, and the Department of Justice representative.

The proposed amendments to Rule 41 concerning searches for electronically stored information were published for public comment in 2007. One public comment was received, which subcommittee discussed in March 2008. The Jordan Center for Criminal Justice and Penal Reform opposed the amendment, objecting that by authorizing the seizure of electronic storage media rather than particular stored information, the Rule as amended disregarded the particularity requirement of the Fourth Amendment, and would allow the seizure of electronic information despite a lack of probable cause as to that information. Second, the Center objected to the absence of controls preventing the government from using copied information for "general intelligence or other unauthorized or illicit purposes." Finally, the Center argued that the rule should include a set time period within which the government must return seized materials.

The subcommittee agreed to recommend a small change to the text of the proposed amendment, as well as three changes to the proposed Committee Note. The words "copying or" were added to the last line of Rule 41(e)(2)(B) to clarify that copying as well as review may take place off-site. The Committee Note was amended to reflect the change to the text and to clarify that the amended Rule does not speak to constitutional questions concerning warrants for electronic information. Issues of particularity and search protocol under the Fourth Amendment are presently working their way through the courts. Compare United States v. Carey, 172 F.3d 1268 (10th Cir. 1999) (finding warrant authorizing search for "documentary evidence pertaining to the sale and distribution of controlled substances" to prohibit opening of files with a .jpg suffix) and United States v. Fleet Management, Ltd., 521 F.Supp.2d 436 (E.D. Pa. 2007) (warrant invalid when it "did not even attempt to differentiate between data that there was probable cause to seize and data that was completely unrelated to any relevant criminal activity");

with United States v. Comprehensive Drug Testing, Inc., 513 F.3d 1085 (9th Cir. 2008) (the government had no reason to confine its search to key words; "computer files are easy to disguise or rename, and were we to limit the warrant to such a specific search protocol, much evidence could escape discovery simply because of [the defendants'] labeling of the files"); United States v. Brooks, 427 F.3d 1246 (10th Cir. 2005) (rejecting requirement that warrant describe specific search methodology). The version of the amendment reproduced below includes these recommended changes.

Also included in the version below are style changes to the text of Rule 41(e)(2)(B), specifically the omission of the terms "storage" and "electronically stored" where they appeared redundant.

The subcommittee agreed these very minor changes do not warrant re-circulation of the proposed amendment for public comment.

This item is on the agenda for the April meeting.

Rule 41. Search and Seizure

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(e) Issuing the Warrant.

* * * * *

(2) ***Contents of the Warrant.***

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(B) *Warrant to Search for Electronically Stored Information.* A warrant may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes later review of the media or information consistent with the warrant. The time for the executing the warrant in Rule 41(e) and (f) refers to the seizing or on-site copying of the media or information, and not to any later off-site copying or review.

(~~B~~C) *Warrant for a Tracking Device.* A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must

command the officer to:

* * * * *

(f) Executing and Returning the Warrant.

(1) ***Warrant to Search for and Seize a Person or Property.***

* * * * *

(B)*Inventory.* An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to a description of the physical storage media that was seized or copied. The officer may maintain a copy of the electronically stored information that was seized or copied.

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Committee Note

Subdivision (e)(2). Computers and other electronic storage media commonly contain such large amounts of information that it is often impractical for law enforcement to review all of the information during execution of the warrant at the search location. This rule acknowledges the need for a two-step process: officers may seize or copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant.

The term "electronically stored information" is drawn from Rule 34(a) of the Federal Rules of Civil Procedure, which states that it includes "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained." The 2006 Advisory Committee Note to Rule 34(a) explains that the description is intended to cover all current types of computer-based information and to encompass future changes and developments. This same broad and flexible description is intended under Rule 41.

In addition to addressing the "two step process" inherent in searches for electronically stored information, the Rule limits the 10 [14][1] day execution period to the actual execution of the warrant and the on-site activity. While consideration was given to a presumptive national or uniform time period within which any subsequent offsite copying or review of the media or electronically stored information would take place, the practical reality is that there is no basis for a "one size fits all" presumptive period. A substantial amount of time can be involved in the forensic imaging and review of information. This is due to the sheer size of the storage capacity of media, difficulties created by encryption and booby traps, and the workload of the computer labs. The rule does not prevent a judge from imposing a deadline for the return of the storage media or access to the electronically stored information at the time the warrant is issued. However, to arbitrarily set a presumptive time period for the return could result in frequent petitions to the Court for additional time.

It was not the intent of the amendment to leave the property owner without an expectation of the timing for return of the property, excluding contraband or instrumentalities of crime, or a remedy. Current Rule 41(g) already provides a process for the "person aggrieved" to seek an order from the Court for a return of the property, including storage media or electronically stored information, under reasonable circumstances.

Where the "person aggrieved" requires earlier access to the storage media or the electronically stored information than anticipated by law enforcement or ordered by the Court, the Court on a case by case basis can fashion an appropriate remedy taking into account the time needed to image and search the data, and any prejudice to the aggrieved party.

The amended rule does not address the specificity of description that the Fourth Amendment may require in a warrant for electronically stored information, leaving this and the application of other constitutional standards to ongoing case law development.

Subdivision (f)(1). Current Rule 41(f)(1) does not address the question of whether the inventory should include a description of the electronically stored information contained in the media seized. Where it is impractical to record a description of the electronically stored information at the scene, the inventory may list the physical storage media seized. Recording a description of the electronically stored information at the scene is likely to be the exception, and not the rule, given the

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[1]The ten day period under Rule 41(e) may change to 14 days under the current proposals associated with the time computation amendments to Rule 45.

large amounts of information contained on electronic storage media, and the impracticality for law enforcement to image and review all of the information during the execution of the warrant. This is consistent with practice in the "paper world." In circumstances where filing cabinets of documents are seized, routine practice is to list the storage devices, i.e. the cabinets, on the inventory, as opposed to making a document by document list of the contents.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The words "copying or" were added to the last line of Rule 41(e)(2)(B) to clarify that copying as well as review may take place off-site.

The Committee Note was amended to reflect the change to the text and to clarify that the amended Rule does not speak to constitutional questions concerning warrants for electronic information. Issues of particularity and search protocol are presently working their way through the courts. Compare United States v. Carey, 172 F.3d 1268 (10th Cir. 1999) (finding warrant authorizing search for "documentary evidence pertaining to the sale and distribution of controlled substances" to prohibit opening of files with a .jpg suffix) and United States v. Fleet Management, Ltd., 521 F.Supp.2d 436 (E.D. Pa. 2007) (warrant invalid when it "did not even attempt to differentiate between data that there was probable cause to seize and data that was completely unrelated to any relevant criminal activity"); with United States v. Comprehensive Drug Testing, Inc., 513 F.3d 1085 (9th Cir. 2008) (the government had no reason to confine its search to key words; "computer files are easy to disguise or rename, and were we to limit the warrant to such a specific search protocol, much evidence could escape discovery simply because of [the defendants'] labeling of the files"); United States v. Brooks, 427 F.3d 1246 (10th Cir. 2005) (rejecting requirement that warrant describe specific search methodology).

SUMMARY OF PUBLIC COMMENTS

One comment was received from the Jordan Center for Criminal Justice and Penal Reform. The Center opposed the amendment, objecting that in authorizing the seizure of electronic storage media rather than particular stored information, it disregarded the particularity requirement of the Fourth Amendment, and would allow the seizure of electronic information despite a lack of probable cause as to that information. Second, the Center objected to the absence of controls preventing the government from using copied information for "general intelligence or other unauthorized or illicit purposes." Finally, the Center argued that the rule should include a set time period within which the government must return seized materials.

II. E.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Time Computation Rules**

DATE: **March 31, 2008**

The rules published for notice and public comment included a proposed amendment to Rule 45, as well as related amendments to the time periods stated in 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, 59, and Rule 8 of the Rules Governing § 2254 Cases, and Rule 8 of the Rules Governing § 2255 Cases. These proposed amendments are part of the comprehensive project to reform time computation under all of the procedural rules.

No comments were received that were directed exclusively to the proposed criminal rule amendments. There were many comments concerning the general approach to time computation taken in Rule 45 and the parallel amendments proposed by the Civil, Bankruptcy, and Appellate Rules Committees. These comments are discussed in a memorandum prepared by Judge Marilyn Huff and Professor Catherine Struve. Their comments apply to Rule 45, as well as the parallel amendments to the other rules. After consideration of the comments, the Time Computation Committee recommended that the proposed time computation rules, including Rule 45, be approved as published.

The memorandum prepared by Judge Huff and Professor Struve and the proposed amendment to Rule 45 and the related timing rules are attached. A separate memorandum discusses a closely related matter, the identification of statutes that would need amendment if the rules are adopted.

This item is on the agenda for the April meeting in Washington.

MEMORANDUM

DATE: March 13, 2008

TO: Judge Lee H. Rosenthal
Standing Committee on Rules of Practice and Procedure
Reporters and Advisory Committee Chairs

CC: John K. Rabiej

FROM: Judge Marilyn L. Huff
Catherine T. Struve

RE: Time-Computation Project

We write on behalf of the Time-Computation Subcommittee to summarize the Subcommittee's reactions to the comments submitted concerning the proposed time-computation amendments.

Part I of this memo summarizes the Time-Computation Subcommittee's recommendations and requests. Part II summarizes developments in the Project since the Standing Committee's June 2007 meeting. Part III provides more detail concerning the Subcommittee's views on each outstanding issue.[1] Part IV lists and summarizes the comments submitted on the time-computation project.[2] Part IV includes not only the issues highlighted in Part III, but also a number of comments that seem more properly directed to a particular Advisory Committee than to this Subcommittee.

I. Summary of recommendations

The Subcommittee makes the following recommendations, the reasons for which are discussed in Part III of this memo. As explained in Part III, the Subcommittee also discussed at length two

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[1] Part III omits discussion of comments that seem more appropriate for consideration by one or more of the Advisory Committees outside the context of the time-computation project than for consideration at this time by the Subcommittee. (Such comments concern, inter alia, proposals to change the "three-day rule"; proposals to eliminate backward-counted deadlines; and criticisms of particular deadlines or proposed changes to deadlines within a given set of Rules.) Part III is organized thematically.

[2] In the interest of brevity, Part IV does not list comments directed solely to the bankruptcy appeal deadlines contained in Bankruptcy Rule 8002, because such comments are numerous and are more properly addressed by the Bankruptcy Rules Committee than by the Time-Computation Subcommittee.

possible changes to the proposed text and note of the time-computation rules.[3] Because each of those possible changes ultimately failed to gain the support of a majority of Subcommittee members, the Subcommittee recommends no change in the language of the proposals as published.

Approval and timing of project. The Subcommittee recommends that the Advisory Committees move forward to finalize the proposed time-computation rules. As discussed in Part III.B, questions have been raised about the timing of the project, and it may be the case that in the future the Standing Committee should consider the possibility of delaying the project's progress or the effective date of the proposed amendments. But for the moment, the Subcommittee recommends proceeding on the assumption that the project will continue on track to take effect December 1, 2009.

Compilation of list of statutory deadlines for amendment. The Subcommittee asks each Advisory Committee to compile – and approve at its spring meeting – a list of the statutory time periods that fall within its area of expertise and that should be lengthened in order to offset the shift in time-computation approach.[4] The project's timing will depend in part on how soon the Advisory Committees are able to compile those lists. In particular, there is a pressing need to obtain the list of provisions affecting criminal practice, in order to seek input from affected groups.

II. Recent developments in the time-computation project

As you know, the Time-Computation Subcommittee is tasked with examining the time-computation provisions found in the Appellate, Bankruptcy, Civil, and Criminal Rules, with a view to simplifying those provisions and eliminating inconsistencies among them. The Subcommittee, in consultation with the Advisory Committees and the Standing Committee, drafted a proposed template for an amended time-computation rule. The template's principal simplifying

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[3] Those two possible changes can be summed up as follows:

Note to subdivision (a). The Subcommittee discussed whether to recommend adding the following sentences to the first paragraph of the Note to subdivision (a) of the time-computation rules:

> Thus, for example, a local rule should not set a time period in "business days," because subdivision (a) directs that one "count every day, including intermediate Saturdays, Sundays, and legal holidays." A local rule providing that "[r]eply papers shall be filed and served at least three business days before the return date" should be amended. Until then, it should be applied, under subdivision (a), as though it refers to "three days" instead of "three business days."

New language for subdivision (a)(6). The Subcommittee discussed whether to recommend splitting subdivision (a)(6)(B) into two provisions as follows:

> (B) any other day declared a holiday by the President or Congress; and
>
> (C) for periods that are measured after an event, any other day declared a holiday by the state [etc.]

[4] Some participants in the Subcommittee's conference calls are of the view that the goal should be to make a short list of those statutory time periods which are most in need of such amendment. But one Subcommittee member has suggested that the goal should be to amend *all* affected statutory deadlines (unless they are controversial and therefore might derail or delay the entire project).

innovation is its adoption of a "days-are-days" approach to computing all periods of time, including short time periods.

Versions of the template rule were published for comment as proposed amendments to Appellate Rule 26(a), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a). Also published for comment were proposed amendments to numerous deadlines set by the Appellate, Bankruptcy, Civil and Criminal Rules; the goal of those amendments is to offset the effect of the change in time-counting approach by lengthening most short rule-based deadlines.

In publishing the time-computation proposals for comment, we drew the attention of the bench and bar to three issues in particular. First, we solicited input on the proposed time-computation rules. Second, we noted that the shift to a days-are-days approach will be almost entirely offset – as to rule-based periods – by amendments that lengthen most short rule-based deadlines. Third, we pointed out that the new time-computation rules will govern a number of statutory deadlines that do not themselves provide a method for computing time, and we solicited input concerning key statutory deadlines that the Standing Committee should recommend that Congress lengthen in order to offset the change in time-computation approach.

We received a total of some 22 comments that are relevant to the time-computation project as a whole. Those comments are summarized in Part IV of this memo. The public comment period closed February 15, 2008. The Time-Computation Subcommittee held two conference calls in February 2008 to discuss the comments. As to a few issues (such as those discussed in Part III.C.1) the Subcommittee continued its deliberations by email.

III. Discussion of Subcommittee recommendations

This Part discusses issues raised by the comments on the time-computation project, and summarizes the Subcommittee's reactions to those issues.

A. Overall advisability of project

The following commentators commented favorably on the time-computation project overall:

- Chief Judge Frank H. Easterbrook.
- Walter W. Bussart.
- Jack E. Horsley.
- Public Citizen Litigation Group.
- The State Bar of California's Committee on Appellate Courts.

The following commentators commented unfavorably.

- The Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York ("EDNY Committee").

- The Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York ("ABCNY Bankruptcy Committee").

  - The Committee focuses its opposition on the time-computation proposal for Bankruptcy Rule 9006. With respect to the time-computation proposals for the other sets of Rules, the Committee cites with approval the comments of the EDNY Committee.

- Professor Alan N. Resnick opposes adoption of a days-are-days time-computation approach in Bankruptcy Rule 9006.

- Richard Levin writes on behalf of the National Bankruptcy Conference ("NBC"), which "strongly endorses and supports" the comments submitted by Professor Alan Resnick.[5]

Commentators who oppose the project predict that the proposed change in time-computation approach will cause disruption, given the great number of affected deadlines that are contained in statutes, local rules, and standard forms. They believe that the current time-counting system works well.[6] They note that as to short time periods set by the Rules, the proposed amendments mitigate the effect of no longer skipping weekends, but do not offset the fact that under the new approach holidays will no longer be skipped either.

Subcommittee members reviewed with care the arguments leveled against the time-computation proposals. Members observed, however, that these were the same objections that had been made – and rejected – during the Advisory Committees' earlier consideration of the proposed template. The Subcommittee's consensus was that it makes sense to proceed with the project, subject to the considerations discussed in Part III.B. below.

B. Statutory deadlines, local rules deadlines, and the timing of project's implementation

Several commentators (1) urge strongly that statutory and local rules deadlines must be adjusted in order to offset the shift to a days-are-days approach, and (2) also urge that the new time-computation rules' effective date must be delayed until those tasks are accomplished.[7]

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[5] The NBC also warns that the proposed changes to various bankruptcy-relevant time periods could result in unintended consequences; it thus suggests "that the Advisory Committee delay incorporation of the 7, 14, 21, and 28 day time period changes into the Bankruptcy Rules until the impact of those changes [is] studied further ...."

[6] To the extent that some litigants have difficulty computing time under the current approach, the EDNY Committee suggests that one could build into the electronic case filing software a program that could perform the necessary computations.

[7] Alexander J. Manners proffers several suggestions for guiding the local rules amendment process. He suggests that the district courts be given "an implementation guide and timeline for district courts to follow in order to ensure their local and judges' rules are amended correctly and in time to coincide with the adoption of the new Federal

1. Statutory and local rules deadlines

Craig S. Morford, Acting Deputy Attorney General, writes on behalf of the Department of Justice to express support for the goals of the time-computation project, but also to express strong concerns "about the interplay of the proposed amendment with both existing statutory periods and local rules." The DOJ argues that "changes should be addressed in relevant statutory and local rule provisions before a new time-computation rule is made applicable." Otherwise, the DOJ fears that the purposes of some statutes "may be frustrated." The DOJ argues that exempting statutory time periods from the new time-counting approach would be an undesirable solution since it would create "confusion and uncertainty" to have two different time-counting regimes (one for rules and one for statutes). Mr. Morford does not specifically state the DOJ's position on which of the statutory time periods should be lengthened to offset the change in time-computation approach. His letter does refer to the Committee's identification of "some 168 statutes ... that contain deadlines that would require lengthening."

The EDNY Committee argues strongly that if the new time-counting approach is to be adopted then Congress must be asked to lengthen all affected statutory time periods. Likewise, the EDNY Committee notes that steps must be taken to lengthen all affected time periods set by local rules, standing orders, and standard-form orders.

The Subcommittee takes seriously the comments that stress the necessity for changes in periods set by statute or by local rule. The Subcommittee asks each Advisory Committee to compile and approve a list of the statutory time periods that will require amendment. Subcommittee members did not reach complete consensus on the approach that should be taken in compiling the list. At least one Subcommittee member stressed the importance of including all affected statutory time periods (except for any that might be deemed controversial). Other participants in the conference call, however, took the view that the goal should be to compile a relatively short list of the provisions that are most likely to cause problems if not lengthened to offset the shift in time-computation approach.

2. Timing of project's implementation

As noted above, the DOJ urges that the time-computation amendments not be allowed to take effect unless and until (1) Congress enacts legislation to lengthen all relevant statutory periods, (2) the local rulemaking bodies have had the opportunity to amend relevant local-rule deadlines, and (3) the bench and bar have had time to learn about the new time-counting rules. Likewise, Robert M. Steptoe, Jr., a partner at Steptoe & Johnson, urges that the time-computation proposals "not be implemented unless and until the Standing Committee is sure that it will receive the necessary cooperation from Congress and the local rules committees to meet the desired objective of simplification."' Similarly, Alex Luchenitser of Americans United for Separation of Church and State urges that "local district and appellate courts should be given a specific time frame to adopt

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Rules." That guide should, he argues, encourage local rulemakers to lengthen affected short time periods (taking account, inter alia, of any relevant state holidays) and to use multiples of 7 days (where possible) when doing so.

revisions to their rules after the new federal rules are approved. And the new federal rules should not go into effect until after the deadline for local courts to adopt changes to their rules passes."

The Subcommittee agrees that the effective date of the Rules should be chosen so as to allow time for the necessary statutory and local rules changes.

3. Timing possibilities

The Subcommittee discussed possible ways to adjust the time-computation project's timing to address these concerns. The further progress of the package of time-computation amendments depends upon the understanding that Congress will pass legislation lengthening a number of statutory deadlines. If the time-computation project were to go forward as planned, the Rules amendments would be on track to take effect December 1, 2009. Because the ability to stay on the December 1, 2009 track depends in part on events that have not yet occurred (including the need to compile and obtain input on the list of short statutory time periods that require amendment), the Subcommittee discussed two alternate possibilities. One would be to ask the Standing Committee to hold the package of time-computation amendments until June 2009. Another would be to include effective date provisions that make the time-computation rule amendments not effective until some time after Congress passes appropriate legislation or until December 1, 2010 (so as to afford more time for conforming legislation and local rule changes).

The Supreme Court's orders customarily provide that amendments "shall take effect on December 1, [year], and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending." See, e.g., Order of April 12, 2006, 234 F.R.D. 221. But that pattern is not required by statute. As to the Civil, Criminal, and Appellate Rules, 28 U.S.C. § 2074 provides:

> The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law. The Supreme Court may fix the extent such rule shall apply to proceedings then pending, except that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies.

Section 2075, concerning the Bankruptcy Rules, provides simply that "[t]he Supreme Court shall transmit to Congress not later than May 1 of the year in which a rule prescribed under this section is to become effective a copy of the proposed rule. The rule shall take effect no earlier than December 1 of the year in which it is transmitted to Congress unless otherwise provided by law." 28 U.S.C. § 2075.

The Subcommittee did not discuss the alternative timing options in detail. (For example, the Subcommittee did not discuss the extent to which the Enabling Act provisions would permit the use

of an effective date in a later year than the year when the proposed amendments are transmitted to Congress.[8]) Instead, the Subcommittee concluded that the best approach, for the moment, is to move ahead on the assumption that the project will stay on track to take effect December 1, 2009.

C. Substantive issues relating to the project's implementation

As noted above, the Subcommittee recommends no changes to the language of the proposals as published. Before reaching that conclusion, the Subcommittee discussed two possible changes which some members of the Subcommittee would have supported; those possible changes are discussed in Part III.C.1. Other suggestions made by commentators, and rejected by clear consensus of the Subcommittee, are discussed in Part III.C.2.

1. Possible changes discussed, but ultimately not adopted, by the Subcommittee

Alternate time-counting methods set by local rules. The EDNY Committee observes that some local rules contain periods counted in business days, and argues that any change in the time-counting rules should be tailored so as not to change such periods to calendar days. The Subcommittee disagrees with the EDNY Committee's recommendation, and believes that the national time-computation rules should trump contrary time-computation approaches in the local rules.

The ABCNY Bankruptcy Committee suggests, among other problems, that "some local courts might decide to retain the present computational approach through the promulgation of local rules," which would compound the resulting confusion. The Subcommittee's discussion of this comment

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[8] One interpretation of Section 2074 might be that the effective date must be within the year in which the rules were transmitted to Congress (though of course no earlier than December 1 of that year). That interpretation takes account of the first sentence of Section 2074, which prescribes that the rules must be transmitted to Congress "not later than May 1 of the year in which" the rules will become effective. One reason for such a reading can be illustrated with a hypothetical: If the Court transmitted a rule to Congress on November 1, 2009, and set the rule's effective date at January 1, 2010, this would run counter to the statute's seven-month waiting period requirement – yet as a technical matter it might be claimed that there had been compliance because the transmittal occurred before May 1, 2010 (complying with the first sentence of 2074(a)) and the effective date was no earlier than December 1, 2009 (complying with the second sentence). To prevent such a misreading of the statute, one might conclude that the transmittal and effective date must take place within the same calendar year.

One possible response, however, might be that the statute should be construed in the light of its purpose, which was to have "the proposed rules 'lay over' for a period of at least seven months," H.R. Rep. 99-422, at 26 – a purpose which is not thwarted in instances where transmittal occurs by May 1, 2009 and the effective date is set for 2010 or later (but which would foreclose the misinterpretation described in the preceding paragraph – transmittal 11/1/09, effective date 1/1/10).

Admittedly, research has disclosed no precedent for the rulemakers' setting a delayed effective date (though there are instances in which Congress delayed the effective date). But it does not seem clear that the statute bars such a delayed effective date. Indeed, to the extent that one of the aspects of post-1988 rulemaking is caution (on the part of the rulemakers) concerning the use of the supersession authority, and to the extent that the time-computation rules package might affect some aspects of statutory deadlines through that supersession authority, it might be thought salutary to tie the effective date of the rules package to the effective date of the legislation.

underscored participants' view that it is important that the Committee Note make clear the national rules' effect on local time-counting provisions.

The Note already states that local rules "may not direct that a deadline be computed in a manner inconsistent with" the national time-computation rules. The Subcommittee discussed whether it would be useful to provide further clarification. At least one Subcommittee member feels that such clarification would be useful. However, the Subcommittee was not able to formulate clarifying language that would not itself raise additional problems. The language first considered by the Subcommittee is shown below (new material is underlined; Appellate Rule 26(a) is used here for illustrative purposes):

> **Subdivision (a).** Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a statute that does not specify a method of computing time, a Federal Rule of Appellate Procedure, a local rule, or a court order. In accordance with Rule 47(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). Thus, for example, a local rule should not set a time period in "business days," because subdivision (a) directs that one "count every day, including intermediate Saturdays, Sundays, and legal holidays." A local rule providing that "[r]eply papers shall be filed and served at least three business days before the return date" should be amended. Until then, it should be applied, under subdivision (a), as though it refers to "three days" instead of "three business days."

During the Subcommittee's discussion of this possible addition, a participant voiced unease with the proposed change. He noted that "[t]he new sentences target a transitional problem that should be eliminated soon," and that "Committee Notes are permanent and do not ordinarily refer to transitional problems, whose permanent status might only confuse a future reader when all the local rules have been amended." He cautioned:

> [M]y major concern with the three additional sentences is the implication that the rules committees have the authority to construe a local rule in a certain way, e.g., until the local rules are changed they should be read to mean "three days." The rules committees have no authority to interpret local rules. The circuit judicial councils determine whether a local rule is consistent with the federal rules (28 U.S.C. section 331(d)(4).) When we renumbered the rules, we faced a similar issue with requiring parallel local rules. But in that case, we amended the rule directly to provide that local rules must conform with the renumbering system. We could do that here, but I believe that is unnecessary as the courts will amend their local rules to comply with the law.
>
> The last sentence of the original Committee Note seems clear and sufficient to me. "In accordance with Rule 47(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a)." I do not believe that the next three sentences are necessary, particularly because we will send a notice to every court advising them of the new rule and their responsibility to amend the local rules consistent with the law. We will monitor their actions and send follow-up notices, if necessary. The added three sentences carry no more weight than these notices and may be viewed by some in the wrong light. If

we believe that the "business day" issue must be addressed, I would suggest adding something like the following in lieu of the three sentences: "The rule is intended to make clear that time periods cannot be counted using "business days," because subdivision (a) directs that "one count every day, including intermediate Saturdays, Sundays, and legal holidays." Even this revised sentence may not be necessary, because our notices to the courts will make the point clear.

In the light of this input, and because a majority of Subcommittee members failed to voice support for the proposed change to the note to subdivision (a)(1), the Subcommittee is not recommending such a change.

State holidays. Alexander Manners, a vice president of CompuLaw LLC, proposes that Civil Rule 6(a)(6)'s definition of the term "legal holiday" be changed so that (a)(6)(B) reads "any other day declared a holiday by the President, Congress, or the state where the district court is located and officially noticed as a legal holiday by the district court." He makes this suggestion out of concern that, otherwise, litigants will be confused as to whether a state holiday counts as a "legal holiday" for time-computation purposes in instances when the federal district court fails to close on that day, or when it closes only for some purposes, or when it closes but fails to give timely notice of the closure.

The fact that the federal courts do not always close on state holidays has been discussed in the Advisory Committees' consideration of the time-computation proposals; despite the fact that federal courts do not always close, it was deemed important to count state holidays as legal holidays, given that – among other things – state and local government offices (including those of state and local government lawyers) are likely to be closed on state holidays. Under the clear text of the proposed Rule (and also under the text of the current Rule), state holidays count as legal holidays.

The Subcommittee discussed the fact that with respect to forward-counted deadlines, including state holidays within the definition of "legal holiday" serves as a safe harbor: A party who assumes the state holiday *is* a legal holiday will be protected from missing a deadline, while the worst that happens to a party who doesn't know the state holiday counts as a legal holiday is that the party thinks their deadline is a day earlier than it really is.

However, the Subcommittee noted that with respect to backward-counted deadlines, the state-holiday provision as currently drafted could pose a trap for the unwary. Imagine a case in which the backward-counted period (e.g., a requirement that a litigant file or serve reply papers five days before a hearing) ends on a state holiday on which the federal courts do not close. In such an instance the unwary practitioner may file or serve on the state holiday, not realizing that because that day counts as a legal holiday for time-counting purposes, the backward-counted deadline actually fell the day *before* the state holiday. In the light of the arcane nature of some state holidays, the Subcommittee thought it might be worthwhile to eliminate this potential trap. The Subcommittee therefore discussed the possibility of amending subdivision (a)(6)'s definition of "legal holiday." The blacklined excerpt below shows the possible alteration compared to the published version (using Appellate Rule 26(a)(6) for illustrative purposes):

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; ~~and~~

(B) any other day declared a holiday by the President~~;~~ or Congress;~~or~~ and

(C) for periods that are measured after an event, any other day declared a holiday by the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office. (In this rule, 'state' includes the District of Columbia and any United States commonwealth, territory, or possession.)

The Note to subdivision (a)(6) would then be expanded to explain the significance of subdivision (a)(6)(C). The first attempt at drafting such an expanded Note is shown below:

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Appellate Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are "declared a holiday by the President." For two cases that applied this provision to find a legal holiday on days when the President ordered the government closed for purposes of celebration or commemoration, *see Hart v. Sheahan*, 396 F.3d 887, 891 (7th Cir. 2005) (President included December 26, 2003 within scope of executive order specifying pay for executive department and independent agency employees on legal holidays), and *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1098 (D.C. Cir. 2003) (executive order provided that "[a]ll executive branch departments and agencies of the Federal Government shall be closed and their employees excused from duty on Monday, December 24, 2001").

For forward-counted periods – i.e., periods that are measured after an event – subdivision (a)(6)(C) includes certain state holidays within the definition of legal holidays. However, state legal holidays are not recognized in computing backward-counted periods. Take, for example, Monday, April 21, 2008 (Patriots' Day in the relevant state). If a filing is due 10 days after an event, and the tenth day is April 21, then the filing is due on Tuesday, April 22 because Monday, April 21 counts as a legal holiday. But if a filing is due 10 days before an event, and the tenth day is April 21, the filing is due on Monday, April 21; the fact that April 21 is a state holiday does not make April 21 a legal holiday for purposes of computing this backward-counted deadline. But note that if the clerk's office is inaccessible on Monday, April 21, then subdivision (a)(3) extends the April 21 filing deadline forward to the next accessible day that is not a Saturday, Sunday or legal holiday -- no earlier than Tuesday, April 22.

Subdivision (a)(6)(C) defines the term "state" – for purposes of subdivision (a)(6) – to include the District of Columbia and any commonwealth, territory or possession of the United States. Thus, for purposes of subdivision (a)(6)'s definition of "legal holiday," "state" includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

Two attorney members of the Subcommittee voiced unease with this approach. As one of them commented:

> I appreciate the risk that, instead of being a safe harbor as it is for forward-counting rules, [the treatment of state holidays with respect to backward-counted deadlines] could be a trap for the unwary. But I wonder how often that will come up, especially because out-of-state lawyers probably will have local counsel who will be aware of the situation. And if it does, I wonder whether judges can take care of it on a case-by-case basis where a party seeks an extension nunc pro tunc .... On the other hand, I worry that the difference between state holidays for forward- and backward-counting rules will simply be, and appear to be, too complicated, particularly in the context where the whole concept of backward-counting time computations is new and has proven to be less than completely intuitive.
>
> I'm reinforced in that concern by the proposed committee note .... [T]he example is that Patriot's Day "counts as a legal holiday" [for forward-looking rules], but "the fact that [Patriot's Day] is a state holiday does not make [it] a legal holiday for purposes of computing this backward-counting deadline." Huh? I think most people, and even most lawyers, would scratch their heads -- the same day either is or is not a legal holiday under the Rules. This complexity ... gives the appearance of a Rube Goldberg contraption.

Likewise, during a discussion of the time-computation project by the Appellate Rules Committee's Deadlines Subcommittee, at least one member of that Subcommittee voiced strong agreement with these concerns about the complexity of this proposed change.

Notwithstanding these concerns, one Time-Computation Subcommittee member continues to feel that the change is worth attempting. As he explains:

> [T]here is a good reason for distinguishing between forward-counting and backward counting in the treatment of non-federal holidays: avoiding traps for the unwary. By excluding the holiday if it falls on the last day of a forward-counted deadline, we give an extra day to the practitioner who may have thought that the federal courts were closed that day. By including the holiday in a backward-counted deadline, we allow a practitioner--knowing that the federal courts are in fact open on a state holiday--to file timely on the holiday itself rather than the day before. This rationale, which I find compelling, makes the counting rule as now proposed both consistent and intelligible.

This member suggested changing the proposed additional Note language to make this rationale more explicit, as follows:

For forward-counted periods--i.e., periods that are measured after an event--subdivision (a)(6)(C) includes certain state holidays within the definition of legal holidays. However, state legal holidays are not recognized in computing backward-counted periods. In each situation, the rule protects those who may be unsure of the effect of state holidays. For forward-counted deadlines, treating state holidays the same as federal holidays extends the deadline. Thus, someone who thought that the federal courts might be closed on a state holiday, would be safeguarded against an inadvertent late filing. In contrast, for backward-counted deadlines, not giving state holidays the treatment of federal holidays allows filing on the state holiday itself rather than the day before. Since the federal courts will indeed likely be open on state holidays, there is no reason to require the earlier filing.

In short, thoughtful considerations were voiced on both sides. But the net result of the discussion is that a majority of Subcommittee members failed to voice support for the proposed change to subdivision (a)(6). Accordingly, the Subcommittee is not recommending such a change.

2. Other comments as to which the Subcommittee recommends no change

End of "last day": 11:59 p.m. versus 12:00 midnight. Stephen P. Stoltz argues that the time-counting rules should define the "last day" as ending "at 11:59:59 p.m." rather than "at midnight." He suggests this because "[m]ost people today would agree that a day begins at midnight and ends at 11:59:59 p.m. local time." He warns that if the time-counting rules provide that the "last day" of a period ends "at midnight," there will be confusion and courts may conclude that a "deadline is actually the day (or evening) before the particular day."

Similarly, the ABCNY Bankruptcy Committee suggests that "'[m]idnight' is often defined as 12:00 a.m., or the beginning of a given day." Thus, the Committee "believes that the intent of the proposal was to permit filings up to and including 11:59 p.m., or the end of a given day."

It is unclear whether these commentators are correct in assuming that most people believe that days begin at midnight and end at 11:59 p.m.[9] – as opposed to believing that days begin at 12:01 a.m. and end at midnight. The Oxford Reference Dictionary of Weights, Measures, and Units does provide some support for the "11:59 p.m." view; it defines "p.m." as follows:

> PM, p.m. [post meridian, i.e. after meridian] time Indicative of a time after noon, i.e. after the Sun has nominally crossed the meridian, so the time is after the meridian. Thus 12:30 p.m. identifies the moment 30 minutes after noon. Similarly 12:30 a.m. identifies the moment 30 minutes after midnight. Technically 12:00 can be neither a.m. nor p.m.; it should be qualified as midnight else as noon, when the number can be just 12. (The 24-hour clock avoids all qualification, whether by a.m. else p.m., or by noon else midnight. Its ambivalence

[9] Mr. Stoltz advocates the use of the term "11:59:59 p.m.," evidently to make the counting unit seconds rather than minutes. For purposes of simplicity, this memo will refer to "11:59 p.m."

is whether to have midnight as 24:00 in the day it ends, else 00:00 in the day it initiates; the latter is preferable.) ....[10]

On the other hand, a number of districts' local rules concerning electronic filing provide evidence for the contrary view, in the sense that they refer to requirements that filings be made "prior to [or before] midnight" *on the due date* – evincing a view that midnight on the due date means the middle-of-the-night hour that *concludes* (rather than *commences*) the day of the due date.

Subcommittee members considered the argument for changing "midnight" to "11:59:59 p.m.," and concluded that such a change is not worthwhile. To find subdivision (a)(4)'s references to "midnight" confusing, a reader would have to read subdivision (a)(4) as stating that (for electronic filers) the "last day" of a period ends at the very moment it begins – which would seem to be a facially absurd reading.

End of "last day": non-electronic filings. Judge Philip H. Brandt, a U.S. Bankruptcy Judge in the Western District of Washington, argues that proposed Bankruptcy Rule 9006(a)(4)'s definition of the end of the "last day" "would eliminate 'drop-box' filings, and would advantage electronic filers over debtors and other parties representing themselves, and over attorneys who practice infrequently in bankruptcy court and are not electronic filers." The root of his concern is that (a)(4) sets a default rule that the end of the day is midnight for e-filers, but sets a default rule that the end of the day falls at the scheduled closing of the clerk's office for non-e-filers. He urges that 9006(a)(4) be amended to state "simply ... that the time period 'ends at midnight in the court's time zone'" for all filers.

Both the text and Note of the proposed rule permit the adoption of local rules that permit the use of a drop-box up to midnight. Subcommittee members believe this adequately addresses the concern identified by Judge Brandt.

Exclusion of date-certain deadlines. Carol D. Bonifaci correctly observes that the proposed Committee Note makes clear that a deadline stated as a date certain (e.g., "no later than November 1, 2008") is not covered by the proposed time-computation rules. She suggests that this should also be stated in the text of the proposed Rules.

The Subcommittee's view is that no change in the Rule text is needed. The proposed time-counting rules, like the existing time-counting rules, refer to "computing" periods of time, and no computation is needed if the court has set a date certain. Admittedly there is (as the proposed Committee Note observes) a circuit split on this question, but the circuit split is addressed (and laid to rest) in the Note.

Backward-counted deadlines. Ms. Bonifaci expresses confusion concerning the proposed time-computation rules' treatment of backward-counted and forward-counted deadlines. Ms. Bonifaci believes that if a backward-counted deadline falls on a weekend, the time-computation proposals

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[10] A Dictionary of Weights, Measures, and Units (Donald Fenna ed., Oxford University Press 2002) (emphasis added), available at <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t135.e1103>.

would direct one to reverse direction and count *forward to Monday*; in actuality, the proposals direct that one continue counting in the same direction – i.e., *back to Friday.*

The Subcommittee's view is that Ms. Bonifaci's comment on backward-counted time periods does not require a change in the proposal.

Time periods counted in hours. Thomas J. Wiegand writes on behalf of the Seventh Circuit Bar Association's Rules and Practice Committee. He reports that the Bar Association sponsored a lunchtime discussion of the proposed Rules amendments this past December. One topic of discussion was whether the proposed time-computation rules' directive to "count every hour" when computing hour-based time periods will alter the application of Civil Rule 30(d)(2)'s presumptive seven-hour limit on the length of a deposition. He suggests that "the Committee might desire to make clear whether any change is intended for calculating the 7-hour period in Rule 30(d)(2)." The lunchtime participants evidently wondered whether the new time-counting provision might be read to change either the practice of not counting breaks as part of the seven hours or the practice under which the deposition takes place during a single day. He notes: "On the assumption that changing how to calculate the 7-hour period is outside of this year's proposed changes to the Civil Rules, some members believe that changing either the 7-hour duration in Rule 30(d)(2), or how to calculate it, should be considered by the Committee in the future."

The Subcommittee feels that these comments are best considered by the Civil Rules Committee rather than by the Time-Computation Subcommittee.[11]

IV. Listing and summary of time-computation comments

This section summarizes the comments we have received relating to the time-computation project.[12] This listing focuses on comments relevant to over-arching issues concerning the time-computation project; comments directed solely to a particular issue concerning a particular set of Rules, such as Bankruptcy Rule 8002, are generally not included.[13]

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[11] It is not clear that the proposal for calculating hour-based periods would change the practice of presumptively limiting a deposition to a single day. Nor is it evident that the time-counting proposals would affect the practice of not counting breaks as part of the seven hours. As Mr. Wiegand notes, the 2000 Committee Note to Civil Rule 30 explains that the seven-hour limit "contemplates that there will be reasonable breaks during the day for lunch and other reasons, and that the only time to be counted is the time occupied by the actual deposition." Based on that Committee Note, one might reason that the time-counting rules apply only when counting the time that Rule 30's Note says is "to be counted" – i.e., only when counting non-break time.

[12] This section is organized by docket number: It first lists all the consecutively-numbered comments in the Appellate Rules comment docket; then all the comments in the Bankruptcy Rules comment docket not already listed above; and then all comments in the Civil Rules docket not already listed above. (All time-computation comments in the Criminal Rules docket are encompassed in those first three categories.)

[13] The Bankruptcy Rules Committee specifically requested comment on whether the ten-day deadline for taking an appeal from a bankruptcy court to a district court or a BAP should be extended, either to 14 days or to 30 days. Many respondents opposed a 30-day period, and some also opposed any extension at all (even to 14 days). Some respondents, however, favor a 14-day period, while a handful favor a 30-day period. These comments seem directed

07-AP-001; 07-CV-001: Americans United for Separation of Church and State. Alex Luchenitser of Americans United for Separation of Church and State writes that Appellate Rule 26(c) should be amended so that its three-day rule tracks the three-day rule in Civil Rule 6(e). In fact, the package of Appellate Rules proposals currently out for comment includes a proposed amendment to Appellate Rule 26(c) intended to do what Mr. Luchenitser suggests.

In a follow-up comment, Mr. Luchenitser urges that "local district and appellate courts should be given a specific time frame to adopt revisions to their rules after the new federal rules are approved. And the new federal rules should not go into effect until after the deadline for local courts to adopt changes to their rules passes."

07-AP-002; 07-BK-004; 07-CR-002; 07-CV-002: Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York ("EDNY Committee"). The EDNY Committee writes in general opposition to the time-computation proposals, but supports certain of the Civil Rules Committee's proposals to lengthen specific Civil Rules deadlines.[14] The EDNY Committee also makes some suggestions for improving the project if it goes forward.

- Overall cost/benefit analysis. The EDNY Committee predicts that the proposed change in time-computation approach will cause much disruption, given the great number of affected deadlines that are contained in statutes, local rules, and standard forms. The EDNY Committee believes that the current time-counting system works well. To the extent that some litigants have difficulty computing time under the current approach, the EDNY Committee suggests that one could build into the electronic case filing software a program that could perform the necessary computations.

- Incompleteness of offsetting changes. The EDNY Committee notes that as to short time periods set by the Rules, the proposed amendments mitigate the effect of no longer skipping weekends, but do not offset the fact that under the new approach holidays will no longer be skipped either. The EDNY Committee argues strongly that if the new time-counting approach is to be adopted then Congress must be asked to lengthen all affected statutory time periods. Likewise, the EDNY Committee notes that steps must be taken to lengthen all affected time periods set by local rules, standing orders, and standard-form orders.

- Business-day provisions in local rules. The EDNY Committee observes that some local rules contain periods counted in business days, and argues that any change in the time-counting rules should be tailored so as not to change such periods to calendar days.

- Backward-counted time periods. The EDNY Committee warns that the proposed amendments, by clarifying the way to compute backward-counted time periods, would effectively shorten the response time allowed under rules that count backwards. Moreover,

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toward matters within the particular expertise of the Bankruptcy Rules Committee rather than this Subcommittee.

[14] This memo does not treat in detail the EDNY Committee's views concerning the lengthening of specific Civil Rules deadlines, since that is a matter primarily for the Civil Rules Committee rather than the Time-Computation Subcommittee.

the EDNY Committee notes that the proposed time-computation template (like the existing rules) does not provide for a longer response time when motion papers are served by mail. The EDNY Committee proposes that the best solution to the backward-counting problem is to eliminate backward-counted periods; as an example, the EDNY Committee points to the Local Civil Rule 6.1 which is in use in the Eastern and Southern Districts of New York.

07-AP-003; 07-BR-015; 07-CR-003; 07-CV-003: Chief Judge Frank H. Easterbrook. Chief Judge Easterbrook writes in support of the time-computation proposals. He suggests that in addition to the proposed changes, the three-day rule contained in Appellate Rule 26(c) should be abolished. He argues that the three-day rule is particularly incongruous for electronic service, and that adding three days to a period thwarts the goal served by our preference for setting periods in multiples of seven days.

07-AP-004; 07-BK-007; 07-BR-023; 07-CR-004; 07-CV-004: Walter W. Bussart. Mr. Bussart states generally that the proposed amendments are helpful and that he supports their adoption.

07-AP-005; 07-BK-008; 07-CR-006; 07-CV-006: Jack E. Horsley. Overall, Mr. Horsley views the proposed amendments with favor.

With respect to one or more of the time periods in Appellate Rule 4 which the proposed amendments would lengthen from 10 to 14 days, Mr. Horsley proposes a further lengthening so that the period in question would be 21 days. This suggestion seems more appropriate for consideration in the first instance by the Appellate Rules Committee rather than the Time-Computation Subcommittee.

Mr. Horsley also suggests amending Appellate Rule 26(c) to clarify how the three-day rule works when the last day of a period falls on a weekend or holiday. This suggestion is already accounted for by another proposed amendment to FRAP 26(c) that is currently out for comment. Mr. Horsley's suggestion in this regard can thus be taken as providing general support for the latter proposal.

07-AP-006; 07-BK-010; 07-CR-007; 07-CV-007: Stephen P. Stoltz. Mr. Stoltz generally supports the time-computation proposals. He argues, however, that the time-counting rules should define the "last day" as ending "at 11:59:59 p.m." rather than "at midnight." He suggests this because "[m]ost people today would agree that a day begins at midnight and ends at 11:59:59 p.m. local time." He warns that if the time-counting rules provide that the "last day" of a period ends "at midnight," there will be confusion and courts may conclude that a "deadline is actually the day (or evening) before the particular day."

07-AP-007; 07-BK-011; 07-CR-008; 07-CV-008: Robert J. Newmeyer. Mr. Newmeyer is an administrative law clerk to Judge Roger T. Benitez of the U.S. District Court for the Southern District of California. Mr. Newmeyer stresses that the 10-day period set by 28 U.S.C. § 636(b)(1) must be lengthened to 14 days. This statute will presumably be on the list of statutory periods that Congress should be asked to lengthen, so this suggestion is in line with the Project's current scheme.

Mr. Newmeyer further suggests that it would be worthwhile to consider setting an even longer period for filing objections to case-dispositive rulings by magistrate judges. This suggestion seems to fall within the Civil Rules Committee's jurisdiction rather than that of the Time-Computation Project.

Mr. Newmeyer also expresses confusion as to whether the Civil Rule 6(a) time-computation proposals affect the "three-day rule." As you know, the time-computation project does not propose to change the three-day rule, and it seems unlikely that there will be confusion on this score in the event that the time-computation proposals are adopted (Mr. Newmeyer's confusion probably springs from the fact that the time-computation rules as published include only provisions in which a change is proposed, and thus omit Civil Rule 6(d)). In any event, Mr. Newmeyer suggests that the three-day rule should be deleted. This suggestion, like Chief Judge Easterbrook's suggestion, is one that the Advisory Committees may well wish to add to their agendas, but is not one that seems appropriate for resolution in connection with the time-computation project itself.

07-AP-008; 07-BK-012; 07-CR-009; 07-CV-009: Carol D. Bonifaci. Ms. Bonifaci, a paralegal at a Seattle law firm, expresses confusion concerning the proposed time-computation rules' treatment of backward-counted and forward-counted deadlines. Ms. Bonifaci believes that if a backward-counted deadline falls on a weekend, the time-computation proposals would direct one to reverse direction and count forward to Monday.

Ms. Bonifaci observes that the proposed Committee Note makes clear that a deadline stated as a date certain (e.g., "no later than November 1, 2008") is not covered by the proposed time-computation rules, and she suggests that this should also be stated in the text of the proposed Rules.

07-AP-010; 07-CV-010: Public Citizen Litigation Group. Brian Wolfman writes on behalf of Public Citizen Litigation Group to express general support for the proposed days-are-days time-counting approach. Public Citizen suggests, however, that the deadlines for certain post-trial motions (and for the tolling effect – under Appellate Rule 4(a) – of Civil Rule 60 motions) be lengthened only to 21 rather than 30 days. Public Citizen argues that a 30-day period is unnecessarily long and will cause unwarranted delays. Public Citizen (like Howard Bashman) argues that it is awkward for the post-trial motion deadline to fall on the same day as the deadline for filing the notice of appeal. As noted below with respect to Mr. Bashman's suggestion, this seems a matter better suited to consideration by the Civil Rules and Appellate Rules Committees than by the Time-Computation Subcommittee.

07-AP-012; 07-BK-014; 07-CR-011; 07-CV-011: Robert M. Steptoe, Jr. Mr. Steptoe, a partner at Steptoe & Johnson, expresses concern "that the proposed time-computation rules would govern a number of statutory deadlines that do not themselves provide a method for computing time," and that the proposed rules "may cause hardship if short time periods set in local rules are not adjusted." Therefore, he urges that the time-computation proposals "not be implemented unless and until the Standing Committee is sure that it will receive the necessary cooperation from Congress and the local rules committees to meet the desired objective of simplification."

07-AP-015; 07-BK-018; 07-CR-014; 07-CV-016: FDIC. Richard J. Osterman, Jr., Acting Deputy General Counsel of the Litigation Branch of the Federal Deposit Insurance Corporation, writes to urge that Congress *not* be asked to amend the time periods set in certain provisions of the Federal Deposit Insurance Act. He explains that banking agencies such as the FDIC already "employ calendar days in their computations of time to respond to regulatory and enforcement decisions" – thus indicating that no adjustment is necessary or appropriate in connection with the time-computation project. Since no participant in the time-computation project has suggested that the FDIA provisions should be included on the list of statutory periods that Congress should be asked to change in light of the time-computation project, it seems fair to say that Mr. Osterman's suggestion accords with the approach that the project is already taking.

Mr. Osterman also suggests that Civil Form 3 be amended to "include a paragraph that references federal defendants, who have a full 60 days to respond as opposed to the standard 21 days you are proposing. This language is absent from the current summons form." This suggestion concerns the Civil Rules Committee rather than the Time-Computation Subcommittee. (The version of Form 3 that is currently in effect does include an italicized parenthetical that states: "(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)")

07-AP-016; 07-BK-019; 07-CR-015; 07-CV-017: DOJ. Craig S. Morford, Acting Deputy Attorney General, writes on behalf of the Department of Justice to express support for the goals of the time-computation project, but also to express strong concerns "about the interplay of the proposed amendment with both existing statutory periods and local rules." The DOJ argues that "changes should be addressed in relevant statutory and local rule provisions before a new time-computation rule is made applicable." Otherwise, the DOJ fears that the purposes of some statutes "may be frustrated." The DOJ argues that exempting statutory time periods from the new time-counting approach would be an undesirable solution since it would create "confusion and uncertainty" to have two different time-counting regimes (one for rules and one for statutes).

Mr. Morford does not specifically state the DOJ's position on which of the statutory time periods should be lengthened to offset the change in time-computation approach. His letter does refer to the Committee's identification of "some 168 statutes ... that contain deadlines that would require lengthening."

The DOJ urges that the time-computation amendments not be allowed to take effect unless and until (1) Congress enacts legislation to lengthen all relevant statutory periods, (2) the local rulemaking bodies have had the opportunity to amend relevant local-rule deadlines, and (3) the bench and bar have had time to learn about the new time-counting rules.

07-AP-017: The State Bar of California – Committee on Appellate Courts. Blair W. Hoffman writes on behalf of the State Bar of California's Committee on Appellate Courts to express support for the time-computation project. He states that the simplification of the time-counting rules is desirable.

07-AP-018; 07-BR-036; 07-CV-018: Rules and Practice Committee of the Seventh Circuit Bar Association. Thomas J. Wiegand writes on behalf of the Seventh Circuit Bar Association's Rules and Practice Committee. He reports that the Bar Association sponsored a lunchtime discussion of the proposed Rules amendments this past December. One topic of discussion was whether the proposed time-computation rules' directive to "count every hour" when computing hour-based time periods will alter the application of Civil Rule 30(d)(2)'s presumptive seven-hour limit on the length of a deposition. He suggests that "the Committee might desire to make clear whether any change is intended for calculating the 7-hour period in Rule 30(d)(2)." He also notes: "On the assumption that changing how to calculate the 7-hour period is outside of this year's proposed changes to the Civil Rules, some members believe that changing either the 7-hour duration in Rule 30(d)(2), or how to calculate it, should be considered by the Committee in the future."

07-BR-026; 07-BK-009: Alan N. Resnick. Professor Resnick previously served as first the Reporter to and then a member of the Bankruptcy Rules Committee. Of particular relevance to the overall Time-Computation Project, Professor Resnick opposes adoption of a days-are-days time-computation approach in Bankruptcy Rule 9006. He points out that a days-are-days approach would result in "the shortening of some state and federal statutory time periods."

Professor Resnick raises additional points that are less closely tied to the overall Time-Computation Project and are thus more appropriate for initial consideration by the Bankruptcy Rules Committee. Professor Resnick stresses that if time periods set by the Bankruptcy Rules and the Civil Rules are altered, care must be taken to adjust the Bankruptcy Rules so that newly-lengthened Civil Rules time periods are not inappropriately incorporated into the Bankruptcy Rules. In particular, Professor Resnick notes that the Bankruptcy Rules Committee should consider altering Bankruptcy Rule 9023's incorporation of Civil Rule 59's provisions if Civil Rule 59 is amended to change current 10-day time limits to 30 days. Professor Resnick also adds his voice to those that oppose the lengthening of Bankruptcy Rule 8002's ten-day appeal period. But if Rule 8002's ten-day period is lengthened, then Professor Resnick points out other time periods in the Bankruptcy Rules that he argues should be corresponding lengthened.

07-BK-013; 07-BR-029: Judge Philip H. Brandt. Judge Brandt, a U.S. Bankruptcy Judge in the Western District of Washington, argues that proposed Bankruptcy Rule 9006(a)(4)'s definition of the end of the "last day" "would eliminate 'drop-box' filings, and would advantage electronic filers over debtors and other parties representing themselves, and over attorneys who practice infrequently in bankruptcy court and are not electronic filers." The root of his concern is that (a)(4) sets a default rule that the end of the day is midnight for e-filers, but sets a default rule that the end of the day falls at the scheduled closing of the clerk's office for non-e-filers. He urges that 9006(a)(4) be amended to state "simply ... that the time period 'ends at midnight in the court's time zone'" for all filers.

Judge Brandt also raises points about Bankruptcy Rules 8002 and 9023; but those points are directed more toward the Bankruptcy Rules Committee than toward the Time-Computation Subcommittee.

07-BK-015; 07-CV-014; 07-BR-033: Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York. The Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York ("ABCNY Bankruptcy Committee") writes in opposition to the time-computation proposals. The Committee focuses its opposition on the time-computation proposal for Bankruptcy Rule 9006. With respect to the time-computation proposals for the other sets of Rules, the Committee cites with approval the comments of the Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York ("EDNY Committee").

The ABCNY Bankruptcy Committee's objections to the time-computation proposals are very similar to those stated by the EDNY Committee; in sum, the ABCNY Bankruptcy Committee believes that the costs of the time-computation proposals strongly outweigh their benefits. This summary highlights those aspects of the ABCNY Bankruptcy Committee's comments that differ from those of the EDNY Committee. The ABCNY Bankruptcy Committee suggests, among other problems, that "some local courts might decide to retain the present computational approach through the promulgation of local rules," which would compound the resulting confusion. The ABCNY Bankruptcy Committee also suggests that "'[m]idnight' is often defined as 12:00 a.m., or the beginning of a given day." Thus, the Committee "believes that the intent of the proposal was to permit filings up to and including 11:59 p.m., or the end of a given day."

07-BK-022; 07-CV-019: National Bankruptcy Conference. Richard Levin writes on behalf of the National Bankruptcy Conference ("NBC"), which "strongly endorses and supports" the comments previously submitted by Professor Alan Resnick. The NBC also warns that the proposed changes to various bankruptcy-relevant time periods could result in unintended consequences; it thus suggests "that the Advisory Committee delay incorporation of the 7, 14, 21, and 28 day time period changes into the Bankruptcy Rules until the impact of those changes [is] studied further ...."

07-CV-005: Patrick Allen. Mr. Allen writes in opposition to the proposed extension of certain ten-day periods in Civil Rules 50, 52 and 59. Among other things, he notes that under current Civil Rule 6, 10-day time periods are computed by skipping intermediate weekends and holidays. He does not discuss the time-computation proposal to change to a days-are-days approach. This comment seems directed toward matters within the particular expertise of the Civil Rules Committee rather than this Subcommittee.

07-CV-013: Alexander J. Manners. Mr. Manners, a vice president of CompuLaw LLC, supports proposed Civil Rule 6(a)(5)'s treatment of backward-counted deadlines.

With respect to Civil Rule 6(a)(6)'s definition of the term "legal holiday," Mr. Manners proposes that proposed Rule 6(a)(6)(B) be changed to so as to read "any other day declared a holiday by the President, Congress, or the state where the district court is located and officially noticed as a legal holiday by the district court." He makes this suggestion out of concern that, otherwise, litigants will be confused as to whether a state holiday counts as a "legal holiday" for time-computation purposes in instances when the federal district court fails to close on that day, or when it closes only for some purposes, or when it closes but fails to give timely notice of the closure.

Mr. Manners observes that under a "plain reading" of the three-day rule as it is stated in current Civil Rule 6, the three-day rule does not apply to backward-counted deadlines since in those instances "the party is not required to act within a specified time after service." Mr. Manners argues that this can lead to unfairness. He suggests that Civil Rule 6's three-day rule should be amended to apply the three-day rule to backward-counted deadlines (or else that each backward-counted deadline be modified to take account of this problem). Mr. Manners is not the only commentator to observe this problem with respect to the interaction of the three-day rule and backward-counted deadlines; the EDNY Committee suggests eliminating backward-counted deadlines for that reason among others. This suggestion, like other commentators' suggestions concerning the three-day rule, seems best addressed as a new agenda item for the relevant Advisory Committees rather than as part of the time-computation project.

Mr. Manners proffers several suggestions for guiding the local rules amendment process. He suggests that the district courts be given "an implementation guide and timeline for district courts to follow in order to ensure their local and judges' rules are amended correctly and in time to coincide with the adoption of the new Federal Rules." That guide should, he argues, encourage local rulemakers to lengthen affected short time periods (taking account, inter alia, of any relevant state holidays) and to use multiples of 7 days (where possible) when doing so.

Mr. Manners also proposes an alteration to Civil Rule 6(c)'s treatment of motion paper deadlines, a matter that seems more appropriate for consideration by the Civil Rules Committee.

07-CV-015: U.S. Department of Justice. Jeffrey S. Buchholtz, Acting Assistant Attorney General, Civil Division, writes on behalf of the Department of Justice to comment on the proposed amendment to Civil Rule 81 that would define the term "state," for purposes of the Civil Rules, to "include[], where appropriate, the District of Columbia and any United States commonwealth, territory [, or possession]." The Department supports the definition's inclusion of commonwealths and territories, but opposes the inclusion of "possession." The Department is "concern[ed] that the term 'possession' might be interpreted – incorrectly – to include United States military bases overseas."

Howard Bashman's Law.com article. Mr. Bashman wrote a column on the time-computation proposals which can be accessed at http://www.law.com/jsp/article.jsp?id=1201918759261 . Mr. Bashman's main comment in his column concerns the Civil Rules proposal to extend certain post-trial motion deadlines. As has been noted, extending those deadlines from 10 to 30 days will mean that those deadlines fall on the same day as the Rule 4(a) deadline for taking an appeal in cases that do not involve U.S. government parties. Mr. Bashman's concern is that this will (1) prevent a potential appellant from knowing whether any post-trial motions will be filed prior to the deadline for taking an appeal and thus (2) increase the number of appeals that are filed only to be suspended pending the resolution of a timely post-trial motion.

Like Public Citizen's comment to the same effect, this comment falls more within the jurisdiction of the Civil Rules Committee and the Appellate Rules Committee than of the Time-Computation Subcommittee.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

~~Rule 45. Computing and Extending Time~~

~~**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:~~

~~**(1)** ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period.~~

~~**(2)** ***Exclusion from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.~~

~~**(3)** ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is~~

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

~~not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.~~

~~(4) ***"Legal Holiday" Defined.*** As used in this rule, "legal holiday" means:~~

~~(A) the day set aside by statute for observing:~~

~~(i) New Year's Day;~~

~~(ii) Martin Luther King, Jr.'s Birthday;~~

~~(iii) Washington's Birthday;~~

~~(iv) Memorial Day;~~

~~(v) Independence Day;~~

~~(vi) Labor Day;~~

~~(vii) Columbus Day;~~

~~(viii) Veterans' Day;~~

~~(ix) Thanksgiving Day;~~

~~(x) Christmas Day; and~~

~~(B) any other day declared a holiday by the President, the Congress, or the state where the district court is held.~~

~~**(b) Extending Time.**~~

~~**(1) *In General.*** When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made:~~

~~(A) before the originally prescribed or previously extended time expires; or~~

~~(B) after the time expires if the party failed to act because of excusable neglect.~~

~~**(2) *Exception.*** The court may not extend the time to take any action under Rule 35, except as stated in that rule.~~

~~**(c) Additional Time After Service.** When these rules permit or require a party to act within a specified period~~

~~after a notice or a paper has been served on that party, 3 days are added to the period if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D).~~

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Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period Stated in Hours.*** When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday. Sunday, or legal holiday.

(3) ***Inaccessibility of the Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 45(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 45(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a statute that does not specify a method of computing time, a Federal Rule of Criminal Procedure, a local rule, or a court order. In accordance with Rule 57(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). In making these time computation rules applicable to statutory time periods, subdivision (a) is consistent with Civil Rule 6(a). It is also consistent with the language of Rule 45 prior to restyling, when the rule applied to "computing any period of time." Although the restyled Rule 45(a) referred only to time periods "specified in these rules, any local rule, or any court order," some courts nonetheless applied the restyled Rule 45(a) when computing various statutory periods.

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of a date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, 18 U.S.C. § 3142(d) (excluding Saturdays, Sundays, and holidays from 10 day period). In addition, because the time period in Rule 46(h) is derived from 18 U.S.C. §§ 3142(d) and 3144, the Committee concluded that Rule 45(a) should not be applied to Rule 46(h).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. *See, e.g.*, Rule 35(b)(1). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 45(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 45(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: if the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is

provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, the new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change the meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.*, Rules 29(c)(1), 33(b)(2), 34, and 35(a).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Criminal

Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish

a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule CR49.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may, for example, address the problems that might arise if a single district has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and

orders." A corresponding provision exists in Rule 56(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Criminal Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.*, Rule 59(b) (stating that a court may correct an arithmetic or technical error in a sentence "[w]ithin 7 days after sentencing"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 47(c) (stating that a party must serve a written motion "at least 5 days before the hearing date"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31. If the clerk's office is inaccessible on August 31, then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday, or legal holiday–no earlier than Tuesday, September 4.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Criminal Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are "declared a holiday by the President." For two cases that applied this provision to find a legal holiday on days when the President ordered the government closed for purposes of celebration or commemoration, see *Hart v. Sheahan*, 396 F.3d 887, 891 (7th Cir. 2005) (President included December 26, 2003 within scope of executive order specifying pay for executive department and independent agency employees on legal holidays), and *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.2d 1094, 1098 (D.C. Cir. 2003) (executive order provided that "[a]ll executive branch departments and agencies of the Federal Government shall be closed and their employees excused from duty on Monday, December 24, 2001").

Rule 5.1. Preliminary Hearing

* * * * *

(c) Scheduling. The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than ~~10~~ 14 days after the initial appearance if the defendant is in custody and no later than ~~20~~ 21 days if not in custody.

* * * * *

Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Committee Note to Rule 45(a).

Rule 7. The Indictment and the Information

* * * * *

(f) Bill of Particulars. The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within ~~10~~ 14 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 12.1. Notice of an Alibi Defense

(a) Government's Request for Notice and Defendant's Response.

* * * * *

(2) ***Defendant's Response.*** Within ~~10~~ 14 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state:

(A) each specific place where the defendant claims to have been at the time of the alleged offense; and

(B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.

(b) Disclosing Government Witnesses.

* * * * *

(2) ***Time to Disclose.*** Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within ~~10~~ 14 days after the defendant serves notice of an

intended alibi defense under Rule 12.1(a)(2), but no later than ~~10~~ 14 days before trial.

* * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 12.3. Notice of a Public-Authority Defense

(a) Notice of the Defense and Disclosure of Witnesses.

* * * * *

(3) *Response to the Notice.* An attorney for the government must serve a written response on the defendant or the defendant's attorney within ~~10~~ 14 days after receiving the defendant's notice, but no later than ~~20~~ 21 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

(4) ***Disclosing Witnesses.***

(A) *Government's Request.* An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than ~~20~~ 21 days before trial.

(B) *Defendant's Response.* Within ~~7~~ 14 days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name,

address, and telephone number of each witness.

(C) *Government's Reply*. Within ~~7~~ 14 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name, address, and telephone number of each witness the government intends to rely on to oppose the defendant's public-authority defense.

* * * * *

Committee Note

The times set in the former rule at 7, 10, or 20 days have been revised to 14 or 21 days. See the Committee Note to Rule 45(a).

Rule 29. Motion for a Judgment of Acquittal

* * * * *

(c) After Jury Verdict or Discharge.

(1) ***Time for a Motion***. A defendant may move for a judgment of acquittal, or renew such a motion, within ~~7~~ 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

* * * * *

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period—including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a)—sets a more realistic time for the filing of these motions.

Rule 33. New Trial

* * * * *

(b) Time to File.

* * * * *

(2) *Other Grounds.* Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within ~~7~~ 14 days after the verdict or finding of guilty.

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period—including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a)—sets a more realistic time for the filing of these motions.

Rule 34. Arresting Judgment

* * * * *

(b) Time to File. The defendant must move to arrest judgment within ~~7~~ 14 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere.

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period—including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a)—sets a more realistic time for the filing of these motions.

Rule 35. Correcting or Reducing a Sentence

(a) Correcting Clear Error. Within ~~7~~ 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

* * * * *

Committee Note

Former Rule 35 permitted the correction of arithmetic, technical, or clear errors within 7 days of sentencing. In light of the increased complexity of the sentencing process, the Committee concluded it would be beneficial to expand this period to 14 days, including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a). Extension of the period in this fashion will cause no jurisdictional problems if an appeal has been filed, because Federal Rule of Appellate Procedure 4(b)(5) expressly provides that

the filing of a notice of appeal does not divest the district court of jurisdiction to correct a sentence under Rule 35(a).

Rule 41. Search and Seizure

* * * * *

(e) Issuing the Warrant.

* * * * *

(2) ***Contents of the Warrant.***

(A) *Warrant to Search for and Seize a Person or Property.* Except for a tracking-device warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(i) execute the warrant within a specified time no longer than ~~10~~ 14 days;

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 47. Motions and Supporting Affidavits

* * * * *

(c) **Timing of a Motion.** A party must serve a written motion — other than one that the court may hear ex parte — and any hearing notice at least 5 7 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application.

* * * * *

Committee Note

The time set in the former rule at 5 days, which excluded intermediate Saturdays, Sundays, and legal holidays, has been expanded to 7 days. See the Committee Note to Rule 45(a).

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(g) Appeal.

* * * * *

(2) ***From a Magistrate Judge's Order or Judgment.***

(A) *Interlocutory Appeal.* Either party may appeal an order of a magistrate judge to a district judge within ~~10~~ 14 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a notice with the clerk specifying the order being appealed and must serve a copy on the adverse party.

(B) *Appeal from a Conviction or Sentence.* A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within ~~10~~ 14 days of its entry.

To appeal, the defendant must file a notice with the clerk specifying the judgment being appealed and must serve a copy on an attorney for the government.

* * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 59. Matters Before a Magistrate Judge

(a) Nondispositive Matters. A district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may serve and file objections to the order within ~~10~~ 14 days after being served with a copy of a written order or after

the oral order is stated on the record, or at some other time the court sets. The district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous. Failure to object in accordance with this rule waives a party's right to review.

(b) Dispositive Matters.

* * * * *

(2) Objections to Findings and Recommendations. Within ~~10~~ 14 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may serve and file specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the

magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

* * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

PROPOSED AMENDMENT TO RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

* * * * *

Rule 8. Evidentiary Hearing

* * * * *

(b) Reference to a Magistrate Judge. A judge may, under 28 U.S.C. § 636(b), refer the petition to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within ~~10~~ 14 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Federal Rules of Criminal Procedure 45(a).

PROPOSED AMENDMENT TO RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

* * * * *

Rule 8. Evidentiary Hearing

* * * * *

(b) Reference to a Magistrate Judge. A judge may, under 28 U.S.C. § 636(b), refer the motion to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within ~~10~~ 14 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Federal Rules of Criminal Procedure 45(a).

II. F.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Proposed Amendments Concerning Certificates of Appealability in §§ 2254 and 2255 Proceedings Published for Notice and Comment (Memo)**

DATE: **April 2, 2008**

At its April 2007 meeting, the Criminal Rules Committee approved for publication proposed amendments to Rule 11 of the Rules Governing §§ 2254 and 2255 proceedings. The proposed amendments made two distinct changes. One part of the Committee's proposal, regarding certificates of appealability, was approved by the Standing Committee for publication. The Standing Committee remanded for further study the Committee's other proposal, which was designed to create an exclusive means for seeking reconsideration of a ruling in §§ 2254 and 2255 cases, replacing application of Civil Rule 60(b) with a provision designed for this purpose.

The writ subcommittee, chaired by Mr. McNamara and advised by Special Reporter Nancy King, has conferred repeatedly by teleconference to discuss both proposals. A report from Professor King will address both proposals. Her report will be included in part III of the agenda book or provided separately.

This item is on the agenda for the April meeting in Washington.

III. A.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Statutes Affected By Time Computation Rules**

DATE: **April 2, 2008**

As you know, each of the Rules Committees has been asked to review the statutes that include time periods that would be affected by the proposed revision in the method of time computation, and to identify a small number of such statutory time periods that would be the top priorities for legislative action to offset the effects of the new computation methods.

A large number of statutes relating to aspects of the criminal process provide for periods of less than 10 days. To winnow these down, each member of the Rules Committee was asked to rate each statute on a three point scale. The time computation subcommittee, chaired by Mr. Cunningham, reviewed and discussed the results of that balloting at two meetings held by teleconference. Professor Struve, who serves as reporter for the whole Time Computation Project, assisted our subcommittee and participated in its second conference call.

The materials that follow include (1) the list of statutes that the subcommittee has identified as the highest priorities for statutory amendment; (2) the results of the balloting (which took place before the Department of Justice completed its internal discussions and does not include its views); and (3) a letter identifying the Department's priorities.

This item is on the agenda for the April meeting in Washington.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Subcommittee Report on Time Computation

DATE: April 2, 2008

The time computation subcommittee recommends that the following statutes should be priorities for legislative amendment as part of the overall time computation project.

Objections to Reports or Findings of Magistrate Judge

The subcommittee agreed with the Civil Rules Committee that the requirement under **28 U.S.C. § 636(b)** that a party may file written objections to the findings and recommendations of a magistrate "within **ten days** after being served with a copy" of the magistrate's report should be extended to **14 days**.

Statutes Dealing With Period Between Arraignment and Preliminary Hearing

The subcommittee recommends that all of the timing provisions applicable to the period between the initial appearance and the preliminary hearing be extended to 14 days. 18 U.S.C. § 3060(b) and Rule 5.1(c) currently provide that the preliminary hearing must be held within 10 days of arraignment, and a number of other timing provisions related to that preliminary phase of the prosecution are also set at 10 days. These provisions should remain synchronized and all be extended to 14 days. This recommendation is consistent with the Committee's proposed amendment to Rule 5.1(c), which extends that period to 14 days. The relevant statutes are:

-18 U.S.C. § 3060(b) preliminary examinations, except in certain circumstances, "shall be held . . . no later than the **tenth day** following the date of the initial appearance of the arrested person."

-18 U.S.C. § 983(j)(3); a temporary restraining order with respect to property against which no complaint has yet been filed "shall expire not more than **10 days** after the date on which it is entered."

-18 U.S.C. § 1467(c); a temporary restraining order with respect to property against which no indictment has yet been filed "shall expire not more than **10 days** after the date on which it is entered."

-18 U.S.C. § 1514(a)(2)(C); a temporary restraining order "prohibiting harassment of a victim or witness in a Federal criminal case" shall not remain in effect more than "**10 days** from issuance."

-18 U.S.C. § 1963(d)(2); a restraining order, injunction, or "any other action to preserve the availability of property . . . shall expire not more than **ten days** after the date on which it is entered."

-21 U.S.C. § 853(e)(2); "a temporary restraining order under this subsection . . . shall expire not more than **ten days** after the date on which it is entered."

Statutes Providing Very Short Periods For Interlocutory Appeals in Certain National Security and Classified Information Procedure Act Cases

The statutes in this group require that appellate courts hear arguments or render decisions within **4 days** in certain cases involving material support and the Classified Information Procedure Act (CIPA). Although these statutes reflect a Congressional determination that expedited treatment is essential, the subcommittee felt that the new calendar days approach could cause significant problems if the 4 day statutory period encompasses a weekend or holiday. Accordingly, the subcommittee favors seeking legislation that would specify that the following time periods **exclude Saturdays, Sundays, and legal holidays**. The subcommittee concluded that this would be preferable to seeking a different and longer time period.

-18 U.S.C. § 2339B(f)(5)(B)(iii)(I); if an appeal is taken under 18 U.S.C. § 2339B (statute against providing material support or resources to designated foreign terrorists), "the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals-- **(I)** shall hear argument . . . not later than **4 days** after the adjournment of the trial; . . . ."

-18 U.S.C. § 2339B(f)(5)(B)(iii)(III); if an appeal is taken under 18 U.S.C. § 2339B (statute against providing material support or resources to designated foreign terrorists), "the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals--**(III)** shall render its decision not later than **4 days** after argument on appeal . . . ."

-18 U.S.C. App. 3 § 7(b)(1); in an appeal pursuant to the CIPA statute, "the court of appeals shall hear argument . . . within **four days** of the adjournment of the trial."

-18 U.S.C. App. 3 § 7(b)(3); in an appeal pursuant to CIPA statute, the court of appeals "shall render its decision within **four days** of argument on appeal."

Dissolution of a Temporary Restraining Order

18 U.S.C. § 1514(a)(2)(E) provides that "if on **two days** notice to the attorney for the Government . . . the adverse party appears and moves to dissolve or modify [a] temporary restraining order, the court shall proceed to hear and determine such motion . . . ." The subcommittee felt that the approach of **excluding Saturdays, Sundays, and holidays** would also be appropriate here for similar reasons.

Other CIPA Appeals

The subcommittee was less certain that legislative action would be required for another provision of CIPA, **18 U.S.C. App. 3 § 7(b)**, which provides that an interlocutory "appeal shall be taken within **ten days** after the decision . . . appealed from and the trial shall not commence until the appeal is resolved." Professor Struve noted that until 2002 this period had been computed under the Appellate Rules without excluding weekends and holidays, and subcommittee members requested further information from the Department of Justice at the April meeting regarding the need for a statutory extension.

Victim Mandamus

The time for a victim's motion for a writ of mandamus in the court of appeals to reopen a plea or sentence is **10 days** under **18 U.S.C. § 3771(d)**. There was support for extending this to **14 days**. Under the proposed amendment to FRAP 4, the defendant's time to appeal would also be extended from 10 to 14 days, so there would be no conflict between the two periods.

Other Statutory Periods

The subcommittee also supports the extension of several other time periods:

18 U.S.C. § 3509(b)(1)(A) provides that a person seeking an order for a child's testimony to be taken via 2-way closed circuit video "shall apply for such an order at least **5 days** before the trial date." The subcommittee favored extending this period to **7 days** to permit adequate time for the party against whom the child would testify to file any objections, and for the court to rule on the request.

Under **18 U.S.C. § 2252A(c)** a defendant seeking to utilize select affirmative defenses against charges of child pornography must notify the court "in no event later than **10 days** before the commencement of the trial." The subcommittee favored extending the time for notification to **14 days** to conform to the times provided for notice of other defenses. The committee has proposed extending the period for such notice under Rule 12.1 (alibi defense) and Rule 12.3 (public-authority defense) to 14 days.

Under **18 U.S.C. § 3432** "a person charged with treason or other capital offense shall at least **three entire days** before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial." The time computation rules should not diminish the procedural rights of a person facing a charge of treason or a capital crime. The subcommittee supported an extension of this period, but was uncertain what form of legislative relief should be sought. There was some support for an extension of seven days, but it would also be possible to exclude Saturdays, Sundays, and holidays from the three days. The subcommittee felt that the full committee should consider both approaches.

Please rate each statute using the following scale:

1 *Critical that statute be amended if rule is adopted. Failure to amend casts doubt on advisability of amending rule.*
2 *Desirable to amend, but not critical.*
3 *Unnecessary to amend.*

Statutes that provide time frames for courts to complete certain actions:

-18 U.S.C. § 2339B(f)(5)(B)(iii)(I), (III); if an appeal is taken under 18 U.S.C. § 2339B (statute against providing material support or resources to designated foreign terrorists), "the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals-- **(I)** shall hear argument . . . not later than **4 days** after the adjournment of the trial; **(III)** shall render its decision not later than **4 days** after argument on appeal . . . ."

4	3	1
1	2	3

-18 U.S.C. § 3060(b) preliminary examinations, except in certain circumstances, "shall be held . . . no later than the **tenth day** following the date of the initial appearance of the arrested person."

4	4	2
1	2	3

-18 U.S.C. § 3174(d)(1); judicial council's written report "setting forth in sufficient detail the reasons for granting" a 3174(a) or (c) application must be submitted "within **ten days**" of the application's approval.

0	5	4
1	2	3

-18 U.S.C. § 3174(e); "within **ten days**" of a temporary suspension of a district's time limits by that district's chief judge, "the [district] chief judge shall apply to the judicial council of the circuit for a suspension pursuant to subsection (a)."

1	3	5
1	2	3

-18 U.S.C. § 3552(d); "the court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least **ten days** prior to the date for sentencing . . ."

4	2	4
1	2	3

-18 U.S.C. § 3771(d)(3); a petition for a writ of mandamus in pursuant of the rights described in 18 U.S.C. § 3771(a) shall be taken up and decided by the court of appeals "within **72 hours** after the petition has been filed."

4	2	3
1	2	3

-18 U.S.C. App. 3 § 7(b)(1); in an appeal pursuant to this statute, "the court of appeals shall hear argument . . . within **four days** of the adjournment of the trial."

3	5	1
1	2	3

-18 U.S.C. App. 3 § 7(b)(3); in an appeal pursuant to this statute, the court of appeals "shall render its decision within **four days** of argument on appeal."

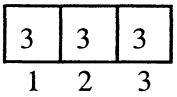
3	5	1
1	2	3

Please rate each statute using the following scale:

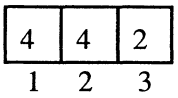
1 *Critical that statute be amended if rule is adopted. Failure to amend casts doubt on advisability of amending rule.*
2 *Desirable to amend, but not critical.*
3 *Unnecessary to amend.*

Statutes that have time restrictions on the time to appeal from a court decision or order:

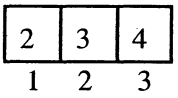
-18 U.S.C. App. 3 § 7(b) (the Classified Information Procedures Act); an interlocutory "appeal shall be taken within **ten days** after the decision . . . appealed from and the trial shall not commence until the appeal is resolved."



-28 U.S.C. § 636(b); any party may file written objections to the findings and recommendations of a magistrate "within **ten days** after being served with a copy." of the magistrate's report.

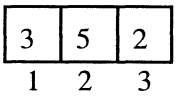


-28 U.S.C. § 1292(b); "if application is made to [the Court of Appeals] within **ten days** after the entry of [an interlocutory] order . . ." in a civil action, the Court of Appeals may, "in its discretion, permit an appeal to be taken from such order."

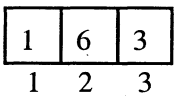


Statutes that place time restrictions on court filings and motions:

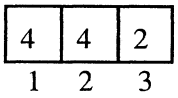
-18 U.S.C. § 3509(b)(1)(A); a person seeking an order for a child's testimony to be taken via 2-way closed circuit video "shall apply for such an order at least **5 days** before the trial date."



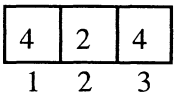
-18 U.S.C. § 3771(d); in order for a victim to motion to reopen a plea or sentence is, "the victim [shall] petition[] the court of appeals for a writ of mandamus within **10 days**."



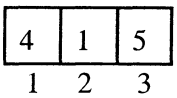
-18 U.S.C. § 4244(a); a motion for a hearing regarding the mental state of a convicted defendant who hasn't been sentenced yet must be made "within **ten days** after the defendant is found guilty."



-28 U.S.C. § 1867(a); "within **seven days** after the defendant discovered or could have discovered . . . the grounds therefor . . . the defendant may move to dismiss the indictment or stay the proceedings against him . . . ."



-28 U.S.C. § 1867(b); "within **seven days** after the Attorney General of the United States discovered or could have discovered . . . the grounds therefor . . . the Attorney General may move to dismiss the indictment or stay the proceedings . . "



Please rate each statute using the following scale:

1 *Critical that statute be amended if rule is adopted. Failure to amend casts doubt on advisability of amending rule.*
2 *Desirable to amend, but not critical.*
3 *Unnecessary to amend.*

Statutes that set time restrictions for giving notice to litigants or other entities:

-18 U.S.C. § 1514(a)(2)(E); "if on **two days** notice to the attorney for the Government . . . the adverse party appears and moves to dissolve or modify [a] temporary restraining order, the court shall proceed to hear and determine such motion . . . ."

3	3	4
1	2	3

-18 U.S.C. § 2252A(c); a defendant seeking to utilize select affirmative defenses against charges of child pornography must notify the court "in no event later than **10 days** before the commencement of the trial."

3	5	2
1	2	3

-18 U.S.C. § 3432; "a person charged with treason or other capital offense shall at least **three entire days** before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial."

5	4	1
1	2	3

-18 U.S.C. § 3492(a); "the testimony of any witness in a foreign country may be taken either on oral or written interrogatories . . . after **five days'** notice in writing by the applicant party . . . to the opposite party . . . ." In addition, "selection fo foreign counsel shall be made by the party whom such foreign counsel is to represent within **10 days** prior to the taking of testimony."

4	2	4
1	2	3

-18 U.S.C. § 3552(d); "the court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least **ten days** prior to the date for sentencing . . . "

5	2	3
1	2	3

-18 U.S.C. § 3612(b)(2); "not later than **ten days** after entry of the judgment or order, the court shall transmit a certified copy of the judgment or order to the Attorney General."

2	2	6
1	2	3

-18 U.S.C. § 4114(a); if an offender is transferred to the United States in violation of United States laws or treaties, "the offender may be returned to the country from which he was transferred to complete the sentence" if that country requests the offender's return, provided that "the Attorney General . . . notify the appropriate authority of the country . . . within **ten days** of a final decision of a court of the United States ordering the offender released."

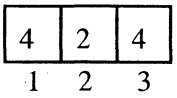
4	2	4
1	2	3

Please rate each statute using the following scale:

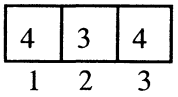
1 *Critical that statute be amended if rule is adopted. Failure to amend casts doubt on advisability of amending rule.*
2 *Desirable to amend, but not critical.*
3 *Unnecessary to amend.*

Statutes that place time restrictions on government actions:

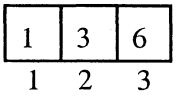
-18 U.S.C. § 2518(5); an order authorizing interception of "wire, oral, or electronic communication" begins "on the earlier of the day on which the investigating or law enforcement officer first begins to conduct an interception under the order, or **ten days** after the order is entered."



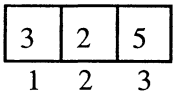
-18 U.S.C. § 2518(7)(b); any investigative or law enforcement officer authorized under this subsection "may intercept . . . wire, oral, or electronic communication if an application for an order approving the interception is made . . . within **forty-eight hours** after the interception has occurred, or begins to occur."



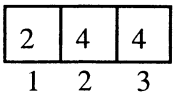
-18 U.S.C. § 2704(a); requirements for acquiring stored electronic communications include "notice to the subscriber or customer" which "shall be made by the governmental entity within **three days** after receipt of such confirmation."



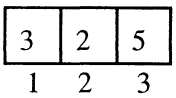
-18 U.S.C. § 3125(a)(2); any investigative or law enforcement officer authorized under this subsection "may have installed and use a pen register or trap and trace device if, within **forty-eight hours** after the interception has occurred, or begins to occur, an order approving the installation or use is issued."



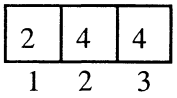
-18 U.S.C. §3161(h)(1)(H); "delay resulting from transportation of any defendant" is not included in computing some specified time requirements unless transportation"time consumed [is] in excess of **ten days** from the date [of] . . . an order directing such transportation."



-18 U.S.C. § 3664(d)(5); the government shall inform the court "if the victim's losses are not ascertainable by the date that is **10 days** prior to sentencing."



-18 U.S.C. § 4246(g); if the director of a facility certifies that a patient who is under the Attorney General's custody has a mental condition and that "release would create a substantial risk of bodily injury" to others, the individual shall nevertheless be released from the facility and the Attorney General's custody "not later than **ten days** after" said certification by the facility director unless federal charges are pending or a valid State (as determined by this statute) is willing to accept custody of the person and initiate civil commitment proceedings.



Please rate each statute using the following scale:

1 *Critical that statute be amended if rule is adopted. Failure to amend casts doubt on advisability of amending rule.*
2 *Desirable to amend, but not critical.*
3 *Unnecessary to amend.*

Statutes that place time restrictions on non-government parties:

-18 U.S.C. § 607(b); political contributions received by officials' staff members inside "a room or building occupied in the discharge of official duties by an officer or employee of the United States" must be "transferred within **seven days** of receipt to a political committee."

1	3	6
1	2	3

-28 U.S.C. § 1864(a); a juror qualification form shall be filled out, signed, sworn, and returned "to the clerk or jury commission by mail within **ten days**."

1	2	7
1	2	3

Statutes that place time restrictions on temporary restraining orders:

-18 U.S.C. § 983(j)(3); a temporary restraining order with respect to property against which no complaint has yet been filed "shall expire not more than **10 days** after the date on which it is entered."

4	4	2
1	2	3

-18 U.S.C. § 1467(c); a temporary restraining order with respect to property against which no indictment has yet been filed "shall expire not more than **10 days** after the date on which it is entered."

4	4	2
1	2	3

-18 U.S.C. § 1514(a)(2)(C); a temporary restraining order "prohibiting harassment of a victim or witness in a Federal criminal case" shall not remain in effect more than "**10 days** from issuance."

4	4	2
1	2	3

-18 U.S.C. § 1963(d)(2); a restraining order, injunction, or "any other action to preserve the availability of property . . . shall expire not more than **ten days** after the date on which it is entered."

3	5	2
1	2	3

-18 U.S.C. § 3771(d)(3); proceedings by a court of appeals on a petition for a writ of mandamus regarding a victim's asserted rights shall not "be stayed or subject to a continuance of more than **five days**."

3	4	3
1	2	3

-21 U.S.C. § 853(e)(2); "a temporary restraining order under this subsection . . . shall expire not more than **ten days** after the date on which it is entered."

3	3	3
1	2	3

MEMORANDUM

TO: Professor Sara Sun Beale
Reporter, Advisory Committee on the Criminal Rules

FROM: Jonathan J. Wroblewski
Director, Office of Policy and Legislation
Criminal Division, U.S. Department of Justice

SUBJECT: Pending Time-Computation Rules Amendments

DATE: March 29, 2008

In my prior memorandum to you concerning the pending time computation rules amendments, dated September 5, 2007, the Department of Justice identified a number of criminal and related statutory provisions that may be materially affected by the proposed Rule 45. We explained that each of the listed statutes should be reviewed by the Advisory Committee to determine how it would be affected by the proposed Rule 45 amendment. Last week, in our Time Subcommittee conference call , Subcommittee members reviewed and discussed many of the statutory provisions included in the September 5th memorandum.

The Subcommittee requested the Department of Justice to submit a list of "priority" criminal statutory provisions that the Department believes should receive the highest priority in terms of securing Congressional action to adjust the time periods. This memorandum sets forth the "priority" criminal statutory provisions identified by the Department of Justice. My understanding is that the Subcommittee intends to discuss the Department's priority provisions during an April 2, 2008, conference call.

As we previously explained, while the Department of Justice generally supports the ongoing time computation project, we remain concerned about the interplay of the proposed rules amendments with both existing statutory time periods and local rules. Just as the pending amendments to the Criminal Rules would lengthen many time periods in the Rules of less than 11 days to compensate for the proposed change in the time computation rule, similar changes should be considered in relevant statutory and local rule provisions before the new time computation rule is made applicable to these provisions.

As we previously noted, if the proposed amendment is enacted without adjusting the relevant statutory provisions, we believe (1) the purposes and policies underlying at least some of the relevant statutes may be frustrated and (2) litigants, government lawyers and agencies, and the courts themselves will face confusion, non-culpable procedural errors, and undue hardship that would otherwise be avoidable. As Acting Deputy Attorney General Craig S. Morford stated in his February 15, 2008 letter to Peter McCabe, the Department "ultimately would hope that any change in the Rules is conditioned on first securing Congressional action that adjusts statutory time periods," and that the Department "support[s] the Committee's goals but we believe that the

time-computation provisions should not be amended absent corresponding legislation. Absent corresponding legislation, we would likely favor retaining the status quo."

We welcome any comments and look forward to discussing these issues with you and the Committee.

Priority Criminal Related Statutory Provisions Identified By The Department of Justice

-18 U.S.C. § 2339B(f)(5)(B)(iii)(I); if an appeal is taken under 18 U.S.C. § 2339B (statute against providing material support or resources to designated foreign terrorists), "the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals-- **(I)** shall hear argument . . . not later than **4 days** after the adjournment of the trial; . . . ."

-18 U.S.C. § 2339B(f)(5)(B)(iii)(III); if an appeal is taken under 18 U.S.C. § 2339B (statute against providing material support or resources to designated foreign terrorists), "the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals--**(III)** shall render its decision not later than **4 days** after argument on appeal . . . ."

-18 U.S.C. § 3060(b) preliminary examinations, except in certain circumstances, "shall be held . . . no later than the **tenth day** following the date of the initial appearance of the arrested person."

-18 U.S.C. App. 3 § 7(b)(1); in an appeal pursuant to this statute, "the court of appeals shall hear argument . . . within **four days** of the adjournment of the trial."

-18 U.S.C. App. 3 § 7(b)(3); in an appeal pursuant to this statute, the court of appeals "shall render its decision within **four days** of argument on appeal."

-18 U.S.C. App. 3 § 7(b) (the Classified Information Procedures Act); an interlocutory "appeal shall be taken within **ten days** after the decision . . . appealed from and the trial shall not commence until the appeal is resolved."

-28 U.S.C. § 636(b); any party may file written objections to the findings and recommendations of a magistrate "within **ten days** after being served with a copy" of the magistrate's report.

-18 U.S.C. § 3509(b)(1)(A); a person seeking an order for a child's testimony to be taken via 2-way closed circuit video "shall apply for such an order at least **5 days** before the trial date."

-18 U.S.C. § 3771(d); in order for a victim to motion to reopen a plea or sentence is, "the victim [shall] petition[] the court of appeals for a writ of mandamus within **10 days**."

-18 U.S.C. § 4244(a); a motion for a hearing regarding the mental state of a convicted defendant who hasn't been sentenced yet must be made "within **ten days** after the defendant is found guilty."

-28 U.S.C. § 1867(a); "within **seven days** after the defendant discovered or could have discovered . . . the grounds therefore . . . the defendant may move to dismiss the indictment or stay the proceedings against him . . . ."

-28 U.S.C. § 1867(b); "within **seven days** after the Attorney General of the United States discovered or could have discovered . . . the grounds therefore . . . the Attorney General may move to dismiss the indictment or stay the proceedings . . . ."

-18 U.S.C. § 1514(a)(2)(E); "if on **two days** notice to the attorney for the Government . . . the adverse party appears and moves to dissolve or modify [a] temporary restraining order, the court shall proceed to hear and determine such motion . . . ."

-18 U.S.C. § 2252A(c); a defendant seeking to utilize select affirmative defenses against charges of child pornography must notify the court "in no event later than **10 days** before the commencement of the trial."

-18 U.S.C. § 3432; "a person charged with treason or other capital offense shall at least **three entire days** before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial."

-18 U.S.C. § 983(j)(3); a temporary restraining order with respect to property against which no complaint has yet been filed "shall expire not more than **10 days** after the date on which it is entered."

-18 U.S.C. § 1467(c); a temporary restraining order with respect to property against which no indictment has yet been filed "shall expire not more than **10 days** after the date on which it is entered."

-18 U.S.C. § 1514(a)(2)(C); a temporary restraining order "prohibiting harassment of a victim or witness in a Federal criminal case" shall not remain in effect more than "**10 days** from issuance."

-18 U.S.C. § 1963(d)(2); a restraining order, injunction, or "any other action to preserve the availability of property . . . shall expire not more than **ten days** after the date on which it is entered."

-21 U.S.C. § 853(e)(2); "a temporary restraining order under this subsection . . . shall expire not more than **ten days** after the date on which it is entered."

III. B.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Nancy J. King, Special Reporter**

RE: **Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings**

DATE: **April 7, 2008**

In 2006, the Department of Justice proposed several changes to the rules that would affect challenges to criminal judgments:

- A new Rule 37 that would (1) subject coram nobis actions to timing, successive petition, and other limitations similar to those applicable to § 2255 actions, and (2) prohibit the use of other writs to challenge a criminal judgment;

- Changes to the Rules Governing § 2254 and §2255 Cases that would require a district judge to rule on the certificate of appealability at the same time the final order is entered [hereinafter the "COA provisions"]; and

- Changes to the same Rules that would create an exclusive procedure for seeking reconsideration in the district court of a final order in §§ 2254 and 2255 cases, replacing motions under Civil Rule 60(b) and incorporating the distinction drawn in Gonzalez v. Crosby, 545 U.S. 524 (2005), between Rule 60(b) motions that must be treated as second or successive habeas petitions subject to AEDPA's limitations on successive petitions, and Rule 60(b) motions that did not trigger AEDPA's limits. [hereinafter the "relief-from-final-order provisions"]

The Advisory Committee considered these proposed changes in 2006 and 2007. At its April 2007 meeting, the Committee rejected the first change – proposed Rule 37 prohibiting use of the ancient writs -- but approved revised versions of the COA provisions and the relief-from-final-order provisions, which were then forwarded to the Standing Committee. At its June 2007 meeting, the Standing Committee approved for publication the portion of the Committee's proposed amendment concerning the COA provisions, but remanded the relief-from-final-order provisions back to the Committee.

While the COA provisions were out for public comment, the Committee at its October 2007 meeting considered the relief-from-final-order provisions that had been remanded by the Standing Committee. The Committee discussed several concerns including whether there was sufficient justification for an amendment, whether the language proposed accurately reflected the Court's decision in Gonzalez, whether the 30-day time limit was appropriate, and whether claims presently available under Fed. R. Civ. P. 52, 59, and 60(a) were adequately addressed by the proposal. The Committee decided to refer the matter back to the Writ Subcommittee for further consideration.

The Writ Subcommittee, with Mr. McNamara as chair, joined by Justice Edmunds, Judge Keenan, Ms. Brill, and Mr. Wroblewski of the Department of Justice, met several times to discus the relief-from-final-order provisions, and, once the public comments had been received, the COA provisions. A majority of the members of the subcommittee approved for referral to the Committee a revised version of both the COA provisions and the relief-from-final-order provisions. The revised amendments are included in this memorandum, immediately following the summary below of the subcommittee's deliberations. An alternative version of both the COA provisions and the relief-from-final-order provisions favored by a minority of subcommittee members is included at the end of this memorandum, together with documents considered by the subcommittee during the revision process these past few months.

The Certificate of Appealability Provisions

When published for public comment, this proposal generated five comments, all opposing the amendment. The comments argued that by requiring the judge to rule on the COA when entering the final order, the proposed rule would be unfair to petitioners and burdensome for district judges. The amendment, it was argued, denies to petitioners an opportunity to (1) brief to the district judge why the COA should issue; (2) raise new developments in the law or ongoing factual investigation; or (3) raise precedent from other circuits that would be important to the COA ruling, but may not have been considered by the judge when ruling on the final order. The arguments that a petitioner would raise in support of a COA, the comments argued, may differ depending upon the specific reasoning articulated by the district judge for denying or dismissing the claim. Under the proposed amendment, district judges must rule on the COA for every claim in every case, they objected, even in cases where the petitioner may never appeal, or may choose to narrow the claims raised on appeal. Two of the comments suggested that delay in COA rulings could be addressed more appropriately by imposing a set time period after the final order during which the petitioner could seek a COA.

After considering the comments, the subcommittee concluded the proposal should be revised. Two versions were considered. One version, suggested by the comments and preferred by a minority of subcommittee members, would have changed the proposal so that any request for a COA would have to be filed within 14 days of the final order.

The other version, which was approved by majority of subcommittee members, retained simultaneous rulings as the preferred procedure by keeping the language that the "judge must issue or deny a certificate of appealability at the same time the judge enters a final order adverse to the

applicant," but added the clause "unless the judge directs the parties to submit arguments on whether or not a certificate should issue." This change allows a court the discretion in complex cases, such as death penalty cases with numerous claims, to solicit briefing that might narrow the issues for appeal.

To respond to the concern that petitioners would have no opportunity to tailor the COA request to the specific grounds stated in the final order, the version approved by the subcommittee majority also added a clause that states, "If the certificate is issued or denied upon entry of the final order, a party may move for reconsideration of the decision on the certificate not later than 14 days after the entry of the order."

Finally, the subcommittee added a sentence clarifying for petitioners that a denial of a motion for reconsideration under this subdivision may not be appealed, but a certificate may be sought from the circuit court under F. R. App. P. 22. See Greenawalt v. Stewart, 105 F.3d 1268, 1272 (9th Cir. 1997) (holding that the denial of a certificate of probable cause is not an appealable order).

If these recommended changes are approved, the subcommittee suggests that those provisions be circulated again for public comment. If the relief-from-final-order provisions are also approved, it would be best if the two sets of amendments could be released for public comment together, because they are somewhat interrelated.

The Relief-from-Final-Order Provisions

This second set of proposed changes to the Rules Governing § 2254 Cases and the Rules Governing § 2255 cases are premised on the need to 1) clarify the standards and procedures for litigants who want the district court to reconsider its final order in §§ 2254 and 2255 proceedings; and 2) replace the multiple and sometimes lengthy time periods available under other rules presently used to seek reconsideration of a final order with a uniform time period that would better fit the AEDPA/appellate framework.

Over a series of meetings, the subcommittee reconsidered the language of the proposed amendments that had been remanded by the Standing Committee, and all of the comments, concerns, and suggestions that had been received about that language. Based on these deliberations, the subcommittee resubmits these provisions to the Committee for approval, after making five changes, summarized below.

Changes to the version of Rule 11(b) amendments previously approved by the Committee but remanded by the Standing Committee

First, the subcommittee changed the title of the new procedure from "motion for reconsideration" to "motion for relief from final order." This change is intended to distinguish the procedure created by subdivision (b) of Rule 11 from the reconsideration request added to the COA provision, in subdivision (a). To avoid any confusion that might have otherwise resulted from the use of the word "reconsideration" in both parts of the amended rule, the subcommittee recommends that the Committee approve this more specific and descriptive title.

Second, the subcommittee agreed the amendment previously approved by the Committee but remanded by the Standing Committee contained too narrow a definition of the grounds that would be allowed as a basis for relief from a final order. That definition would have permitted only motions that "assert a defect in the integrity of the § 2255 proceeding." The subcommittee concluded that this language could have barred motions in the district court that Gonzalez permits. Gonzalez and AEDPA continue to allow a petitioner to assert in a motion for reconsideration, without running afoul of the successive petition bar, that the district court erred in dismissing a claim without reaching the merits. A Rule 60(b) motion asking the court to reconsider its decision finding an application time barred, defaulted, or unexhausted, for example, would not be treated as a successive petition under Gonzalez. The subcommittee majority therefore revised the amendment to permit a petitioner to assert either a "defect in the integrity . . ." *or* "an error in a ruling in the § 2255 proceeding which precluded a determination of a claim on the merits." The revised version continues to bar "new claims of error in the movant's conviction or sentence," or "attack[s on] the district court's previous resolution of such a claim on the merits."

Third, the subcommittee concluded that the new subdivision (b) establishing the motion for relief from final order should expressly state that it supplants in §§ 2254 and 2255 cases the use of not only Fed. R. Civ. P. 60(b) to seek relief from a final order, but also Fed. R. Civ. R. 52(b) and 59. Civil Rule 52(b) permits a motion to amend or make additional findings; Civil Rule 59 permits a motion for new trial "for any of the grounds for which rehearings have been granted in suits in equity," and a "motion to alter or amend a judgment."

Fourth, the subcommittee added a sentence clarifying for petitioners that no separate certificate of appealability is required under subdivision (b). Because a timely Rule 11(b) motion will toll the time for filing a notice of appeal under the amendment to Fed. R. App. P. 4(a)(4)(A) (this suggested conforming amendment is discussed below), only one notice of appeal is necessary for the entire case – the initial final order as well as a subsequent ruling on any motion for relief from that order – to advance to the Court of Appeals. This revision was proposed by those familiar with practice in the Ninth Circuit, where case law presently requires a separate notice of appeal, and a separate COA, in order to appeal from the denial of a Fed. R. Civ. P. 60(b) motion filed outside the time limits of Fed R. App. P. 4(a)(4)(A)(vi). See also Gonzalez, 545 U.S. at 535 n. 7 (collecting other authority discussing the need for a COA to review Rule 60(b) rulings in §§ 2254 cases). Even though the revised rule would no longer permit motions for relief from a final order in the district

court to be filed after the time for appeal has expired, this change would clarify the law and eliminate the need to remand the appeal for the limited purpose of asking the district court to rule on a second COA.

Finally, the subcommittee recommends adding language stating that a timely notice of appeal must be filed even if the district court issues a certificate of appealability under subsection (a). This language is added to Rule 11(c) of the § 2255 Rules, and as a new subdivision (c) of Rule 11 in the § 2254 Rules. This is needed because many pro se petitioners have lost the chance to appeal based on a mistaken belief that the district court's grant of a COA eliminated the need to file a notice of appeal.

The Committee Notes have been revised to reflect the changes to the text of the rules listed above. Also added to the Note is a sentence clarifying that a motion to correct clerical error under Rule 60(a) would not be barred by the proposed rule.

Position of Subcommittee Minority, Issue by Issue

The decision to approve this revised version of subdivision (b) was strongly contested in the subcommittee by two members who preferred no amendment concerning relief from final orders, or, if a rule was required, the alternative version that appears at the end of this memorandum. The arguments against the proposal are laid out in the document at the end of this memo. The points of difference are summarized below. The minority concluded:

1) **Not needed.** There is no need for the change. Any litigation over motions for reconsideration of final orders in these cases after Gonzalez is not unduly burdensome for courts, and there is no confusion about the application of Rule 60(b) in these cases post-Gonzalez.

The subcommittee majority concluded that a rule change would clarify and regularize the procedure available for seeking relief from a final order, and favored setting a single, limited time period for invoking that procedure.

2) **Filing period too short.** Limiting the time during which all reconsideration motions must be filed to 30 days shrinks significantly the time available to file some motions under Rule 60(b) under present law, with no adequate justification. Rule 60(b) presently provides that a motion must be made within a reasonable time, and, when made for the reasons identified in subsections (1), (2), and (3), not more than one year after the judgment or order was entered. The Court in Gonzalez did not address the time for filing these motions, so the proposed restriction of the time for filing is not supported by that case. The minority's alternative version requires only that a motion for relief from a final order be filed within 1 year after the order is entered.

The subcommittee majority concluded that a more limited time period for seeking relief in the district court after a final order was appropriate. As the only means other than an appeal to attack a *civil* judgment on a wide variety of grounds, Rule 60 appropriately sets generous time periods

during which to raise those grounds for relief from judgment in a civil case. But the judgments under attack in a § 2254 or § 2255 case are *criminal*, the final orders resolve *collateral* attacks on those judgments, and Rule 60 plays a different role. Sections 2254 and 2255 already provide a period of one year in which to raise grounds for invalidating the criminal conviction or sentence. For federal defendants, Rules 33, 34, 35, and 36 already provide for specified challenges to the conviction or sentence in the district court following a criminal judgment. The subcommittee also considered a 60-day period, but to avoid potential confusion in § 2254 cases where the appeal period is 30 days after entry of order, and to keep the time for filing the motion within the time for filing an appeal and uniform for both § 2255 and § 2254 applicants, the 30-day period was retained.

3) **Bars grounds for relief available after *Gonzalez*.** Even with the expanded description of grounds for challenging a final order in the district court without triggering the successive petition bar, the revised amendment continues to define those grounds too narrowly. The amendment continues to preclude other grounds for relief that may survive Gonzalez as permissible grounds for Rule 60(b) relief in these cases. For example, the Supreme Court has yet to examine after AEDPA a case in which an applicant argued in a Rule 60(b) motion that the district court should reconsider a final order because the offense does not include the conduct for which he was convicted (e.g, a mail fraud conviction for conduct that exceeded the scope of fraud as defined in McNally). This claim would not fall within the description of permissible grounds for relief from a final order in the proposed rule. However, at least one district court has held that a Bailey claim may be pursued under Rule 60(b), since Gonzalez. See Peterson v. United States, 2007 WL 2120309 (M.D. Fla. 2007). The minority cited several other examples where district courts, even after Gonzalez, have granted motions to reconsider on grounds that would be prohibited under the proposed rule.[1] The minority members also argued that if there was to be a new procedure, the rule defining it should simply specify the types of grounds that are clearly *excluded* without attempting the more speculative task of describing the grounds that are *included*. The alternative version would state that a "motion for reconsideration, filed under Federal Rule of Civil Procedure 60(b) may be used for obtaining relief in the district court from a final order. However, such a motion may not be used to raise a claim on the merits."

The subcommittee majority rejected the minority's reading of Gonzalez and current law. After Gonzalez, an assertion that the applicant's offense does not include the conduct for which the applicant was convicted based on a change in *substantive* law may either be raised as an initial

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[1] Devino v. Duncan, 215 F. Supp.2d 414 (S.D.N.Y. 2002) (granting Rule 60(b) motion where based on intervening change in law where failure to do so would require dismissal of petition and work manifest injustice); Wiley v. Epps, 2007 WL 628387 (D. Miss. 2007) (court reconsiders need to hold evidentiary hearing where merits determination already reached); Figueroa v. Fischer, 2003 WL 1701997 (S.D.N.Y. Mar. 31, 2003) (failure to apply intervening change in law would "call into serious question correctness of court's judgment"); Paramore v. Filion, 293 F. Supp. 2d 285 (S. D. N.Y. 2003) (court corrects opinion on mistaken standard for appeal); United States v. Battle, 272 F. Supp. 2d 1354 (N.D. Ga. 2003) (court modifies date of execution in order to allow time for taking appeal).

application under § 2254 or § 2255, e.g., Bousley v. United States, 523 U.S. 614, 619-21 (1998); Fiore v. White, 531 U.S. 225, 228-29 (2001) (both cited in Gonzalez), or in a petition under 28 U.S.C. § 2241, but may not be raised in a Rule 60(b) motion.[2] A claim of relief based on an intervening change in *procedural* law raised in a motion filed in the district court after a final order would not be permitted under Rule 60(b) either, but would instead be considered a successive petition under § 2244(b).

4) **Eliminates other remedial routes for petitioners in district court.** By expressly stating that Rules 52, 59, and 60(b) are no longer available to petitioners in these cases and that "the *only* procedure for obtaining relief in the district court from a final order" is the new motion, the new rule would not simply change the timing of motions seeking relief in the district court from a final order, but would also cut off remedies that are preserved under current law. Rules 52 and 59 were not specifically addressed in Gonzalez. These rules give the district courts the opportunity to correct significant errors of fact or law that are brought to their immediate attention. Under the proposed rule a litigant would have to appeal to the Court of Appeals rather than bring a clear error of fact or law to the attention of the district court, resulting in a waste of judicial resources.

The subcommittee majority concluded that the 30-day period in the proposed amendments is more generous than 10-day periods allowed for filing a motion under Rules 52 and 59, and that substituting the new motion for relief from final order for Rules 52 and 59 creates no disadvantage for petitioners. The majority was persuaded that after AEDPA, petitioners may no longer use Rules 52 and 59 to ask the district court to reconsider the merits in these cases.

5) **Policy change not appropriate for Committee.** The "proposed amendments implicate important policy issues, such as whether habeas corpus petitioners should be precluded from raising challenges to district court judgments that all other litigants may pursue. Such policy changes would have significant and wide-ranging implications on litigants as well as the functioning of the courts.

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[2] The leading case on this point, followed by other circuits, is Triestman v. United States,124 F.3d 361, 372-80 (2d Cir. 1997) (Bailey claim cannot be raised in a second or successive § 2255 motion, but can be raised in a § 2241 petition). On the availability of Rule 60(b) for this purpose, see Gonzalez, 545 U.S. at 531-32:

> [A] motion might contend that a subsequent change in substantive law is a "reason justifying relief,"from the previous denial of a claim. . . . Virtually every Court of Appeals to consider the question has held that such a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly.. . . We think those holdings are correct. . . Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction – even claims couched in the language of a true Rule 60(b) motion – circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts.

Considering the magnitude of these considerations, these issues should not be resolved in this Committee. Rather, they should be resolved in a forum that is better suited to collecting the necessary information to make a reasoned and well-founded judgment as to the potential impact that these changes would have on the orderly and appropriate litigation of claims in §§ 2254 and 2255 proceedings."

The subcommittee majority concluded that the changes do not limit the grounds that petitioners may raise in the district court following a final order any further than current law already has, but instead affect procedural matters, specifically the timing and description of motions seeking relief from a final order.

Suggested Conforming Amendments to the Appellate Rules

If the COA provisions are adopted, the subcommittee recommends conforming amendments be made to Rule 22(b) of the Federal Rules of Appellate Procedure. If the relief-from-final-order provisions are adopted, the subcommittee recommends conforming amendments be made to Rule 4(a)(4)(A). Suggested changes to these appellate rules are included in this memorandum following the subcommittee's recommended changes to the § 2254 and § 2255 Rules.

Proposed Amendment to Rules Governing Section 2255 Proceedings for the United States District Courts

Rule 11. Certificate of Appealability; Motion for Relief from Final Order ; ~~Time to~~ Appeal

(a) Certificate of Appealabilty. The judge must issue or deny a certificate of appealability at the same time the judge enters a final order adverse to the applicant, unless the judge directs the parties to submit arguments on whether or not a certificate should issue. If the certificate is issued or denied upon entry of the final order, a party may move for reconsideration of the decision on the certificate not later than 14 days after the entry of the order. If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). A denial of a motion for reconsideration under this subdivision may not be appealed, but a certificate may be sought from the circuit court under Federal Rule of Appellate Procedure 22.

(b) Motion for Relief from Final Order. The only procedure for obtaining relief in the district court from a final order is through a motion for relief from the order. The motion must be filed within 30 days after the order is entered.

The motion may only assert a defect in the integrity of the § 2255 proceeding, or an error in a ruling in the § 2255 proceeding which precluded a determination of a claim on the merits. The motion may not raise new claims of error in the movant's conviction or sentence, or attack the district court's previous resolution of such a claim on the merits. Federal Rules of Civil Procedure 52(b), 59, and 60(b) may not be used in § 2255 proceedings. No separate certificate of appealability is required under subdivision (b).

(c) ~~Time to~~ **Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability under subsection (a). These rules do not extend the time to appeal the original judgment of conviction.

Committee Note

Subdivision (a). As provided in 28 U.S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 unless a judge issues a certificate of appealability, which must identify the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2255 Proceedings

in the District Courts. Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A.R. 22.2, 111.3, unless the judge requests argument on the certificate from the parties. This will ensure prompt decision making when the issues are fresh, rather than postponing consideration of the certificate until after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). A party may not appeal a district court's ruling on a certificate, but if the ruling was entered at the same time as the final order, a party has a limited period of time in which to ask the district court to reconsider that ruling. A motion for reconsideration under Rule 11(a) will not toll the time for filing notice of appeal from a final order. These changes will expedite proceedings, avoid unnecessary remands, and help to inform the moving party's decision whether to file a notice of appeal.

Subdivision (b). The Rules Governing § 2255 Proceedings have not previously provided a mechanism by which a litigant can seek reconsideration of the District Court's ruling on a motion under 28 U.S.C. § 2255. Some litigants have resorted to Civil Rule 60(b) to provide such relief. However, as the Supreme Court observed in Gonzalez v. Crosby, 545 U.S. 524, 529-33 (2005), "Using Rule 60(b) to present new claims for relief," to present "new evidence in support of a claim already litigated," or to raise "a purported change in the substantive law," "circumvents AEDPA's requirement" limiting second and successive petitions. The Supreme Court in Gonzalez attempted a "harmonization" of Rule 60(b) and the AEDPA requirements for state prisoners by holding that Rule 60(b) motions can be treated as successive habeas petitions if they "assert, or reassert, claims of error in the movant's state conviction," but can proceed if they attack "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." 545 U.S. at 531 & n.4, 538.

Rule 11 is amended to clarify the appropriate mechanism for seeking relief from a final order in the district court by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings. Under the amendment, the sole method of seeking reconsideration by the district court of a § 2255 order

is the procedure provided by Rule 11 of the Rules Governing § 2255 Proceedings, and not any other provision of law, including Rule 60(b). The amended Rule 11 provides disappointed § 2255 litigants with an opportunity to seek relief from a final order using the standard set forth by the Supreme Court in Gonzalez, but within an appropriate and definitive time period.

The amended Rule 11 is intended to incorporate what the Supreme Court in Gonzalez ruled were the permissible and impermissible uses for such a motion. On the one hand, the amended rule incorporates Gonzalez's ruling that the motion may be used to attack "some defect in the integrity of the federal habeas proceedings." 545 U.S. at 532. Thus, the example given in Gonzalez, namely "fraud on the federal habeas court," as well as "lack of subject-matter jurisdiction," are among the permitted bases for a motion under the amended rule. See id. at 532 n.5, 534. The amended rule also incorporates Gonzalez's ruling that the motion may be used to assert "that a previous ruling which precluded a merits determination was in error." Id. at 532 n.4; see id. at 538 (allowing a motion that "challenges only the District Court's failure to reach the merits"). Thus, the examples given in Gonzalez, namely a denial of a habeas corpus motion based on "failure to exhaust, procedural default, or statute-of-limitations bar," as well as "a default judgment mistakenly entered," are among the permitted bases for a motion for relief from final order under the amended rule. Id. at 532-36 & n.4. On the other hand, the amended rule incorporates Gonzalez's ruling that the motion cannot be used "to present new claims for relief from the [federal] court's judgment of conviction," Id. at 531, 532 , nor may it attack "the federal court's previous resolution of the claim *on the merits*," that is, the court's "determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. § [2255]." Id. at 532 & n.4; see id. at 534 (motion may not seek "to revisit the federal court's denial *on the merits* of a claim for relief") (all emphasis by Court). Thus, "presenting new evidence in support of a claim already litigated" or asserting "a purported change in the substantive law governing the claim" are among the forbidden bases for a motion under the amended rule. Id. at 531-32. Under the amended rule, as under Gonzalez, motions may not "assert, or

reassert, claims of error in the movant's [federal] conviction" even if they are "couched in the language of a true Rule 60(b) motion" such as "excusable neglect"; further, "an attack based on the movant's own conduct or his habeas counsel's omissions ordinarily" may not be brought in such a motion. Id. at 531, 532 n.5. [A motion is permissible under Gonzalez and the amended rule only "[i]f neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's [federal] conviction." Id. at 533.]

Because Rule 11(b) incorporates all the permissible grounds for relief that Gonzalez allows to be raised in a motion under Civil Rule 60(b), resort to Rule 60(b) is no longer needed. Use of Rule 60(b) is thus expressly forbidden in § 2255 proceedings. Similarly, the amended Rule 11 removes any need for resort to Civil Rules 52 and 59, and their use is expressly forbidden in § 2255 proceedings. Indeed, like Rule 60(b) these rules are poorly designed for use in § 2255 proceedings. Civil Rule 52(b), addressing amendments of findings entered after civil trials, is a poor fit for a § 2255 proceeding which is not a trial. For the same reason Civil Rule 59(a) is a poor fit because it addresses motions for new trials, which in any event are already addressed in criminal cases by Criminal Rule 33. Civil Rule 59(e)'s motion to alter or amend a judgment is designed for amending the original judgment, not the ruling on a motion to vacate under § 2255, which itself serves many of the same purposes as these civil rules. Under the reasoning of Gonzalez, Civil Rules 52 and 59 rules would not be available to "circumvents AEDPA's requirement[s]." Moreover, the amended Rule 11 provides a longer time period during which to raise a challenge than is provided by Rules 52 and 59. See Rules 52(b), 59(b), 59(e).

By contrast, Civil Rule 60(a), which permits "[c]lerical mistakes" to be corrected "at any time," is a narrow provision which cannot be used to raise claims that circumvent AEDPA's requirements, and remains available to serve its limited purposes.

Subdivision (c). The amendment is designed to make it clear that the district court's grant of a certificate of

appealability does not eliminate the need to file a notice of appeal.

Rules Governing Section 2254 Proceedings in the United States District Courts

Rule 11. Certificate of Appealability; Motion for Reconsideration

(a) The judge must issue or deny a certificate of appealability at the same time the judge enters a final order adverse to the applicant, unless the judge directs the parties to submit arguments on whether or not a certificate should issue. If the certificate is issued or denied upon entry of the final order, a party may move for reconsideration of the decision on the certificate not later than 14 days after the entry of the order. If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). A denial of a motion for reconsideration under this subdivision may not be appealed, but a certificate may be sought from the circuit court under Federal Rule of Appellate Procedure 22.

(b) Motion for Relief from Final Order. The only procedure for obtaining relief in the district court from a final order is through a motion for relief from the order. The

motion must be filed within 30 days after the order is entered. The motion may only assert a defect in the integrity of the § 2254 proceeding, or an error in a ruling in the § 2254 proceeding which precluded a determination of a claim on the merits. The motion may not raise new claims of error in the movant's conviction or sentence, or attack the district court's previous resolution of such a claim on the merits. Federal Rules of Civil Procedure 52(b), 59 and 60(b) may not be used in § 2254 proceedings. No separate certificate of appealability is required under subdivision (b).

(c) Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability under subsection (a).

Committee Note

Subdivision (a). As provided in 28 U.S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2254 unless a judge issues a certificate of appealability, which must specify the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2254 Proceedings in the District Courts. Rule 11(a) also requires the district

judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A.R. 22.2, 111.3, unless the judge requests argument on the certificate from the parties. This will ensure prompt decision-making when the issues are fresh rather than postponing consideration of the certificate until after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). A party may not appeal a district court's ruling on a certificate, but if the ruling was entered at the same time as the final order, a party has a limited period of time in which to ask the district court to reconsider that ruling. A motion for reconsideration under Rule 11(a) will not toll time for filing notice of appeal from a final order. These changes will expedite proceedings, avoid unnecessary remands, and help to inform the moving party's decision whether to file a notice of appeal.

Subdivision (b). The Rules Governing § 2254 Proceedings have not previously provided a mechanism by which a litigant can seek reconsideration of the District Court's ruling on a motion under 28 U.S.C. § 2254. Some litigants have resorted to Civil Rule 60(b) to provide such relief. However, as the Supreme Court observed in Gonzalez v. Crosby, 545 U.S. 524, 529-33 (2005), "Using Rule 60(b) to present new claims for relief," to present "new evidence in support of a claim already litigated," or to raise "a purported change in the substantive law," "circumvents AEDPA's requirement" limiting second and successive petitions. The Supreme Court in Gonzalez attempted a "harmonization" of Rule 60(b) and the AEDPA requirements for state prisoners by holding that Rule 60(b) motions can be treated as successive habeas petitions if they "assert, or reassert, claims of error in the movant's state conviction," but can proceed if they attack "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." 545 U.S. at 531 & n.4, 538.

Rule 11 is amended to clarify the appropriate mechanism for seeking relief from a final order in the district court by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings. Under the amendment, the sole method of seeking reconsideration by the district court of a § 2254 order is the procedure provided by Rule 11 of the Rules Governing

§ 2254 Proceedings, and not any other provision of law, including Rule 60(b). The amended Rule 11 provides disappointed § 2254 litigants with an opportunity to seek relief from a final order in the district court using the standard set forth by the Supreme Court in Gonzalez, but within an appropriate and definitive time period

The amended Rule 11 is intended to incorporate what the Supreme Court in Gonzalez ruled were the permissible and impermissible uses for such a motion. On the one hand, the amended rule incorporates Gonzalez's ruling that the motion may be used to attack "some defect in the integrity of the federal habeas proceedings." 545 U.S. at 532. Thus, the example given in Gonzalez, namely "fraud on the federal habeas court," as well as "lack of subject-matter jurisdiction,"are among the permitted bases for a motion under the amended rule. See id. at 532 n.5, 534. The amended rule also incorporates Gonzalez's ruling that the motion may be used to assert "that a previous ruling which precluded a merits determination was in error." Id. at 532 n.4; see id. at 538 (allowing a motion that "challenges only the District Court's failure to reach the merits"). Thus, the examples given in Gonzalez, namely a denial of a habeas corpus motion based on "failure to exhaust, procedural default, or statute-of-limitations bar," as well as "a default judgment mistakenly entered," are among the permitted bases for a motion for relief from final order under the amended rule. Id. at 532-36 & n.4. On the other hand, the amended rule incorporates Gonzalez's ruling that the motion cannot be used "to present new claims for relief from the [federal] court's judgment of conviction." Id. at 531, 532 , nor may it attack "the federal court's previous resolution of the claim *on the merits*," that is, the court's "determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. § 2254." Id. at 532 & n.4; see id. at 534 (motion may not seek "to revisit the federal court's denial *on the merits* of a claim for relief") (all emphasis by Court). Thus, "presenting new evidence in support of a claim already litigated," or asserting "a purported change in the substantive law governing the claim," are among the forbidden bases for a motion under the amended rule. Id. at 531-32. Under the amended rule, as under Gonzalez, motions may not "assert, or reassert, claims of error in the movant's [federal] conviction"

even if they are "couched in the language of a true Rule 60(b) motion" such as "excusable neglect"; further, "an attack based on the movant's own conduct or his habeas counsel's omissions ordinarily" may not be brought in such a motion. Id. at 531, 532 n.5. [A motion is permissible under Gonzalez and the amended rule only "[i]f neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's [federal] conviction." Id. at 533.]

Because Rule 11(b) incorporates all the permissible grounds for relief that Gonzalez allows to be raised in a motion under Civil Rule 60(b), resort to Rule 60(b) is no longer needed. Use of Rule 60(b) is thus expressly forbidden in § 2254 proceedings. Similarly, the amended Rule 11 removes any need for resort to Civil Rules 52 and 59, and their use is expressly forbidden in § 2254 proceedings. Indeed, like Rule 60(b) these rules are poorly designed for use in § 2254 proceedings. Civil Rule 52(b), addressing amendments of findings entered after civil trials, is a poor fit for a § 2254 proceeding which is not a trial. For the same reason Civil Rule 59(a) is a poor fit because it addresses motions for new trials. Civil Rule 59(e)'s motion to alter or amend a judgment is designed for amending the original judgment, not the ruling on a motion to vacate under § 2254, which itself serves many of the same purposes as these civil rules. Under the reasoning of Gonzalez, Civil Rules 52 and 59 rules would not be available to "circumvents AEDPA's requirement[s]." Moreover, the amended Rule 11 provides a longer time period during which to raise a challenge than is provided by Rules 52 and 59. See Rules 52(b), 59(b), 59(e).

By contrast, Civil Rule 60(a), which permits "[c]lerical mistakes" to be corrected "at any time," is a narrow provision which cannot be used to raise claims that circumvent AEDPA's requirements, and remains available to serve its limited purposes.

Subdivision (c). The new subdivision is designed to direct parties to the appropriate rule governing the timing of the notice of appeal and make it clear that the district court's grant of a certificate of appealability does not eliminate the need to file a notice of appeal.

Rule 12 ~~11~~. Applicability of the Federal Rules of Civil Procedure. . . .

CHANGES MADE TO CERTIFICATE OF APPEALABILITY PROVISIONS (Rule 11(a)) RELEASED FOR PUBLIC COMMENT

The subcommittee (1) added the clause "unless the judge directs the parties to submit arguments on whether or not a certificate should issue" in order to allow a court in complex cases, such as death penalty cases with numerous claims, to solicit briefing that might narrow the issues for appeal; (2) added the clause, "If the certificate is issued or denied upon entry of the final order, a party may move for reconsideration of the decision on the certificate not later than 14 days after the entry of the order."; and (3) added a sentence clarifying for petitioners that a denial of a motion for reconsideration under this subdivision may not be appealed, but a certificate may be sought from the circuit court under F. R. App. P. 22.

SUMMARY OF PUBLIC COMMENTS

Commonwealth of Massachusetts Office of the Attorney General urged the Committee to reject the amendments. First, it would be burdensome for district judges to rule on the COA in cases where the petitioner may never appeal. Second, that judges making these rulings would do so without any opportunity for input from petitioners or their counsel that in the District of Massachusetts often narrows the claims on which the court must consider a certificate.

Joseph Luby, Acting Executive Director of the Public Interest Litigation Clinic objected that the proposed rule denies the petitioner an opportunity to be heard on why the COA should issue, to narrow the claims on which a COA is sought, to raise post-petition developments in the law or factual investigation, or to address the specific reasoning used by the court. These concerns could be addressed by setting a time limit after the final order for seeking a COA.

Gene Vorobyov, Attorney argued that allowing the COA issue to be decided after the final order instead of at the same time would allow the judge to come at it with a fresh eye and permit additional research by the petitioner, the petitioner should not have to request a COA before the district judge has ruled, and the existing rule works just fine.

Paul R. Bottei, Assistant Federal Public Defender, Middle District of Tennessee objected that the proposed rule denies the petitioner the opportunity to meet his or her burden of showing entitlement to a COA, because there is no opportunity to brief how the court's denial is wrong or debatable. This issue, Mr. Bottei argued depends upon not only the precedent in that district, but also that from other districts and circuits, and may differ depending upon the ground for denial or dismissal. Providing the first opportunity to brief these points in the court of appeals is inefficient, because the appellate court is less familiar with the case. He proposed an alternative rule providing the petitioner be allowed a time certain after the entry of a final order in which to ask for a certificate.

The Jordan Center for Criminal Justice and Penal Reform objected that requiring a COA ruling be contemporaneous with the final order deprives the parties the opportunity to be heard on the issue.

SUGGESTED CONFORMING AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

Rule 22. Habeas Corpus and Section 2255 Proceedings

* * * * *

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, ~~the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The~~ the district clerk must send [the/any] certificate [or statement] to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

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Committee Note

Subdivision (b)(1). The second sentence of Rule 22(b)(1) has been amended to reflect the movement of the requirement governing consideration of a certificate of appealability by the district courts to the Rules Governing Proceedings Under 28 U.S.C. §§ 2254 or 2255, and that a judge need not wait until a notice of appeal is filed before ruling on the certificate.

Rule 4. Appeal as of Right--When Taken

(a) Appeal in a Civil Case.

* * * * *

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure or the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

. . .

(v) for a new trial under Rule 59;

~~or~~

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered~~.~~ ; or

(vii) for relief from final order under Rule 11(b) of the Rules Governing §§ 2254 or 2255 Proceedings.

* * * * *

Committee Note

Subdivision (a)(4)(A). Rule 11(b) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 now provide a procedure for a party to seek relief from a final order in such proceedings in the district court. Subsection (viii) is added to delay the running of the time for appeal until entry of the order ruling on a motion filed under Rule 11(b).

ALTERNATIVE VERSION OF RULE 11 CHANGES PREFERRED BY MINORITY OF SUBCOMMITTEE:

Rule 11. Certificate of Appealability; Motion for Reconsideration Pursuant to Federal Rule of Civil Procedure 60(b); Appeal

(a) Certificate of Appealabilty. A motion for certificate of appealability must be filed within 14 days of a final order adverse to the applicant. If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).

(b) Motion for Reconsideration. A motion for reconsideration, filed under Federal Rule of Civil Procedure 60(b) may be used for obtaining relief in the district court from a final order. However, such a motion may not be used to raise a claim on the merits. The motion must be filed within 1 year after the order is entered.

. . .

SUPPORTING MEMORANDA CONSIDERED BY SUBCOMMITTEE (after October 2007 meeting)

(1) MEMO from Friedman and McNamara to Writs Subcommittee Members dated 2/14/08

(2) MEMO on Rule 60(b) cases from Friedman and McNamara to Writs Subcommittee Members dated 2/14/08

(3) MEMO from DOJ to McNamara dated 2/20/2008

(4) Email from McNamara to J. Tallman and Subcommittee members dated 2/25/08

MEMORANDUM

To: Writs Subcommittee Members
Fr: Ruth Friedman and Thomas McNamara
Re: Questions Raised at December and December Calls
Dt: February 14, 2008

This memo briefly addresses a few of the important issues that have emerged from our previous discussions on the proposal to amend Rule 11 of the Habeas Corpus Rules. We hope that this attempt to answer these questions, with explanation, will prove of some use to the Subcommittee during the next scheduled conference call.

Does the proposal actually codify *Gonzalez v. Crosby,* 545 U.S. 524 (2005)?
No. The *Gonzalez* case addressed the narrow question of whether a motion brought under Fed. R. Civ. P. 60(b) by a state prisoner always constitutes a successive habeas petition (and thus an attempted "end run" around the AEDPA). In an opinion authored by Justice Scalia, the Supreme Court distinguished between motions that raise claims on the merits, which are effectively successor petitions and thus cannot be brought under Rule 60(b), and those that challenge the judgment on other grounds (here, the district court's ruling on the statute of limitations), which are properly made pursuant to the rule.

The proposal under consideration by the Subcommittee thus differs from the Supreme Court's opinion in *Gonzalez* in several ways. First, where Justice Scalia's opinion held that "Rule 60(b) has an unquestionably valid role to play in habeas cases," 545 U.S. at 534, the proposal would eliminate its use altogether (and would consequently overrule part of the decision). Second, where *Gonzalez* addressed only Rule 60(b) and not Rules 52, 59 or 60(a), the proposal would also eliminate the ability of the habeas litigant to rely on those rules. Third, the proposal would preclude habeas petitioners from raising a number of important challenges to court's judgments that are currently allowed all litigants.

Will the proposal limit or preclude litigants from pursuing legitimate concerns currently allowed by the use of Rules 52, 59 and 60?
Yes. One major change would be the elimination of a litigant's ability to point out where the district court was wrong on the facts or the law. For example, under Rules 52(b) and 59(e), the petitioner or the state can move the court to amend its findings or make additional findings. Under the proposal, however, litigants would be prevented from "attack[ing] the district court's previous resolution of ... a claim on the merits," and could raise challenges under only limited circumstances. Thus, unlike other litigants, the parties in habeas could not show the district court that its resolution of a claim is incorrect because of flawed fact-finding, or that the resolution rests on the wrong legal test or standard of review.

Such legitimate challenges to a judgment pursuant to Rules 52 and 59, which were never addressed in *Gonzalez,* would be unnecessarily precluded under this rule change. If the proposed change is

made, a litigant would have to appeal to the circuit rather than bring a clear error of fact or law to the attention of the district court. This would amount to a needless waste of judicial resources. *See, e.g., Gonzalez v. Terhune*, 2006 WL 1795121 (N.D. Cal. 2006) (rejecting the notion that Rule 59(e) motions addressed to the merits constitute successive petitions per *Gonzalez* because "[o]ne of the purposes of Rule 59(e) is to provide district courts the opportunity to correct significant errors of fact or law that are brought to their immediate attention, and thus spare the parties and appellate courts the burden of unnecessary appeals."); *Petru v. City of Berwin*, 872 F.2d 1359, 1361 (7th Cir. 1989).

Moreover, the proposed restrictions would limit the ability of habeas litigants to seek reconsideration on other grounds now allowed under these rules, including Rule 60. The addition of a few phrases in the Department's amended proposal does not cure this problem. For example, the denial of an evidentiary hearing does not fall neatly into either the "defect in the integrity" or "precluded a merits determination" provisions. *See, e.g., Wiley v. Epps*, 2007 WL 628387 (D. Miss. 2007) (the district court found that the death row prisoner was not mentally retarded, but then granted a motion to reconsider on the ground that it might have erred in refusing to hold a hearing on the issue which could have led to a different determination). As is often true in habeas cases, the grounds for reconsideration are often complex and will not fall neatly into a single category. *See, e.g., Devino v. Duncan*, 215 F. Supp. 2d 414 (S.D.N.Y. 2002) (granting Rule 60(b) motion although based on intervening change in law where failure to do so would require dismissal of petition and work manifest injustice). The very purpose of Rule 60(b) is to do "substantial justice" in a range of situations that cannot be easily anticipated. The Department's proposal would do away with such protections – a result in no way contemplated by the Supreme Court in *Gonzalez v. Crosby*.

Would the proposed 30-day time period preclude meritorious claims deserving of relief?
Yes. Under current law, the district courts have straightforwardly applied Rule 60(b) in habeas corpus proceedings to grant Rule 60(b) relief in limited and extraordinary cases in which a federal judgment should be vacated in the interest of fundamental justice. For instance, where habeas relief was originally denied on the basis of procedural bar, but subsequent events established there was no such bar, relief has been granted under Fed.R.Civ.P. 60(b)(6).[1] Similarly, where a district court dismissed a petition as time-barred but intervening case law demonstrated this to be patent error, district courts have granted 60(b)(6) relief and reinstated previously dismissed petitions.[2] Also, where petitions were dismissed "without prejudice" to allow exhaustion, but intervening case law then established that a newly filed petition would be barred by the habeas limitations period, district

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[1] *Ruiz v. Quarterman*, 504 F.3d 523 (5th Cir. 2007); *See also In Re Abdur'Rahman*, 392 F.3d 184 (6th Cir. 2004)(en banc), *vacated* 545 U.S. 1151 (2005), *remanded Abdur'Rahman v. Bell*, 6th Cir. Nos. 02-6547, 02-6548 (6th Cir. Jan. 18, 2008)(Order).

[2] *Robles v. Senkowski*, 1999 U.S.Dist.Lexis 11565 (S.D.N.Y. 1999); *Tal v. Miller*, 1999 U.S.Dist.Lexis 652 (S.D.N.Y. 1999); *Reinoso v. Artuz*, 1999 U.S.Dist.Lexis 7768 (S.D.N.Y. 1999); *Liberatore v. McGuiness*, 1998 U.S.Dist.Lexis 22842 (S.D.N.Y. 1998).

courts have granted 60(b) relief allowing the reinstatement of a prior petition or equitably tolling.[3] At least one habeas judgment has been vacated under Fed.R.Civ.P. 60(b)(4).[4]

Proposed Rule 11, however, would have precluded relief in each of these exceptional cases, given its strict 30-day time limitation. Indeed, meritorious 60(b) motions (including those filed by the state) were invariably filed within the year following judgment (though after 30 days),[5] and in some cases, years afterwards.[6] Each of these judgments – *fully acknowledged by federal courts to have been inequitable* – would now fail to qualify for relief under new Rule 11. Proposed Rule 11 would only allow remediation of inequitable habeas judgments in a rare case in which an event (or evidence) demonstrating an error cognizable under *Gonzalez* comes to light within 30 days of judgment. As case law indicates, intervening events which might otherwise establish grounds for relief under *Gonzalez* rarely occur within 30 days of judgment. If evidence of fraud, or misconduct, or misrepresentation were not discovered until the 31st day or afterwards, it clearly appears that Rule 11 would provide no remedy, and there would be no way to raise the issue in the court of appeals. Under the proposal, misconduct would be insulated from a remedy, so long as the misconduct were concealed until after the 30th day post-judgment. However, as even the Fourth Circuit has recognized, "Motions attacking a judgment as void under Rule 60(b)(4) have no time limit. A void judgment does not acquire validity merely by the passage of time." *Jackson v. United States*, 245 Fed.Appx. 258, 260 (4th Cir. 2007) (internal citation omitted).

Is there sufficient evidence of confusion regarding the existing rules to warrant the proposal? No. The stated reason for the proposed rule change is a need to clarify the standards and procedures for litigants in §§ 2254 and 2255 proceedings. In support of that claim, the Department of Justice sent an e-mail, dated January 10, 2008, which compiled a list of 43 cases, from an original pool of

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[3] *Devino v. Duncan*, 215 F.Supp.2d 414 (S.D.N.Y. 2002); *Figueroa v. Fischer*, 2003 U.S. Dist.Lexis 4993 (S.D.N.Y. 2003)

[4] *Jackson v. United States*, 245 Fed.Appx. 258 (4th Cir. 2007).

[5] *Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987)(state's meritorious 60(b) motion filed 5 months after issuance of appellate mandate); *Pham v. Ryan*, 2007 U.S.Dist.Lexis 80984 (S.D.Cal. 2007)(10 months), *following remand in Pham v. Ryan*, 203 Fed.Appx. 769 (9th Cir. 2006); *Devino v. Duncan*, 215 F.Supp.2d 414 (S.D.N.Y. 2002)(7 months); *Robles v. Senkowski*, 1999 U.S.Dist. Lexis 11565 (S.D.N.Y. 1999)(6 months); *Tal v. Miller*, 1999 U.S.Dist.Lexis 652 (S.D.N.Y. 1999)(6 months); *Reinoso v. Artuz*, 1999 U.S.Dist.Lexis 7768 (S.D.N.Y. 1999)(6 months).

[6] *Ruiz v. Quarterman*, 504 F.3d 523 (5th Cir. 2007) (meritorious 60(b)(6) motion filed 23 months after initial judgment); *Jackson v. United States,* 245 Fed.Appx. 258 (4th Cir. 2007)(meritorious 60(b)(4) motion filed 7 years after judgment); *Figueroa v. Fischer*, 2003 U.S.Dist.Lexis 4993 (S.D.N.Y. 2003)(60(b) relief granted 32 months following original erroneous judgment); *Liberatore v. McGuiness*, 1998 U.S.Dist.Lexis 22842 (S.D.N.Y. 1998)(24 months between dismissal of original petition and grant of 60(b) relief).

450 cases, in which courts purportedly found that a Rule 60(b) motion was actually a successive petition. A straight-forward analysis of the list of cases – set forth in greater detail in an accompanying memorandum – revealed that, in fact, only 28 of the cases provided constituted cases in which a Rule 60(b) motion was deemed improper. In other words, only a fraction of the original pool of 450 cases were instances in which a Rule 60(b) motion advanced no legally cognizable claims, and therefore was found to be a successive petition. The available evidence thus disputes the notion that litigants are abusing the system by filing frivolous or non-meritorious Rule 60(b) motions. Moreover, in each of the cases provided by the Department, the deciding court demonstrated no confusion about how to adjudicate a Rule 60(b) motion in light of the Supreme Court's decision in *Gonzalez*. In short, there is no need to "clarify" the existing rules, as there is no evidence that the courts are being overwhelmed by frivolous Rule 60(b) motions, or that the courts are unable to properly and efficiently dispose of such motions post-*Gonzalez*.

The Justice Department has also pointed to two aspects of Rule 60(b) which it identifies as "troublesome": (1) the determination of which section of Rule 60(b), and thus which time period, is applicable in a particular context; and (2) the determination of the scope of the "extraordinary circumstances" required to invoke Rule 60(b)(6). Yet the *Gonzalez* opinion itself noted that the "extraordinary circumstances" referenced by Rule 60(b)(6) "will rarely occur in the habeas context," 545 U.S. at 535, a point which is regularly acknowledged by lower courts. The Court went on to note that it would be "relatively simple" to determine whether a Rule 60(b) motion advances proper or improper grounds.[7] Indeed, of the 43 cases submitted by the Department, not a single opinion indicated confusion by the lower courts as to the applicable time period or the scope of the "extraordinary circumstances" required to invoke Rule 60(b).

Would the proposed change be likely to generate confusion?
Yes. As evidenced by the last Subcommittee discussion as well as email exchanges between several law professors and the Department of Justice, there is wide disagreement on what the proposed language would actually do. Professor Yackle, in a memorandum previously submitted to the Subcommittee, has an interpretation of the proposal that differs from the Justice Department's regarding what kinds of issues could be raised, and foresees numerous problems with the application of the proposed amendment. Professor Meltzer has also identified the difficulty in drafting a new rule that does not preclude claims currently available to litigants. The Subcommittee has not reached any consensus on the meaning or scope of the "defect in the proceedings" provision in the amendment. These provisions could themselves spawn litigation.

If the purpose of the proposal is actually to limit the ability of litigants to pursue the kinds of legitimate issues currently available under Rules 52, 59 and 60, this should be openly stated and

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[7] Notably, the *pro se* petitioner in *Gonzalez* mislabeled his motion in that case as a Rule 59(e) motion, but the Supreme Court had no trouble determining that "the substance of the motion made clear that petitioner sought relief under Rule 60(b)(6)." 545 U.S. at 527 n.1. The ease with which the Court was able to understand the nature of the motion filed further undercuts the notion that there is any confusion under the existing scheme.

debated. If it is not, then the proposal needs to be re-evaluated given the considered judgment of a number of habeas experts that it would have such unintended consequences.

Does the use of Rules 52, 59 and 60 conflict with the AEDPA?
No. The *Gonzales* Court wrote that Rule 60(b) serves a function "legitimate in habeas cases as in run-of-the-mine civil cases." 545 U.S. at 534. Indeed, Justice Scalia specifically addressed the question of whether the use of Rule 60(b) is inconsistent with the AEDPA, and noted that if neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the petitioner's conviction, "allowing the motion to proceed as denominated creates *no inconsistency* with habeas statute or rules." 545 U.S. at 533 (emphasis added).

Moreover, the use of Rule 60 does not run contrary to the time periods established by the AEDPA for filing habeas petitions. As *Gonzalez* made clear, Rule 60(b) motions *cannot* be used to raise claims for relief, so the use of such motions *cannot* extend the time for filing § 2254 and § 2255 claims. Rather Rule 60, as well as Rules 52 and 59, allow for the re-examination of the habeas judgment on important grounds that no court wants to go uncorrected: identifying fraud, mistakes in statutes of limitations, lack of jurisdiction, clerical errors, etc. In fact, the Supreme Court specifically noted in *Gonzales* that the "whole purpose" of these rules "is to make an exception to finality." 545 U.S. at 529. In other words, even under the AEDPA, it is sometimes necessary to revisit district court judgments.

Does *Gonzalez* apply to motions filed pursuant to Rules 52 and 59?
No. A key distinction between motions filed pursuant to Rules 52 and 59 and those filed pursuant to Rule 60 is that the former suspend the finality of the district court's judgment, while the latter do not. As the Federal Rules of Civil Procedure Advisory Committee recognized in its notes to the 1946 Amendment to Rule 60(b), "a motion under Rule 60(b) does not affect the finality of the judgment, but a motion under Rule 59, made within 10 days, does affect finality and the running of the time for appeal."

This difference illustrates why, under *Gonzalez*, AEDPA's restrictions on second or successive petitions could not apply to Rule 52 and 59 motions. The question presented in *Gonzalez* was whether a Rule 60(b) motion seeking to reopen a final judgment denying relief on a habeas corpus petition was subject to 28 U.S.C. §2244(b)'s restrictions concerning second or successive habeas petitions. As the *Gonzalez* Court explained, the answer turned on whether "a Rule 60(b) motion filed by a habeas petitioner is a 'habeas corpus application' as [28 U.S.C. §2244] uses that term." *Id.* at 530. The Court held that, where a Rule 60(b) motion advances one or more claims, it is effectively a "habeas corpus application" within the meaning of 28 U.S.C. § 2244. *See id.* at 530-31. Therefore, as a second or successive habeas corpus application, such Rule 60(b) motions are subject to § 2244's restrictions on the filing of second or successive petitions. *See id.* at 531-32.

Unlike Rule 60(b) motions, motions filed pursuant to Rules 52 and 59 are plainly not "habeas corpus applications" because a district court's judgment with respect to the petitioner's first habeas corpus application is not final and cannot be appealed until the district court disposes of motions filed under

Rule 52 or Rule 59. *See Acosta v. La. Dep't of Health and Human Resources*, 478 U.S. 251, 254 (per curiam) (1986) ("a notice of appeal is ineffective unless filed after entry of judgment on a Rule 59 motion or any of the other motions to which [Fed. R. App. 4(a)(4)] applies [including Rule 52(b)]"). Because Rule 52 and 59 motions, unlike Rule 60(b) motions, are not "habeas corpus applications" (either literally or effectively), they are not subject to 28 U.S.C. § 2244(b)'s limitations on second or successive applications. *Gonzalez*, 545 U.S. at 530-31.

Is this Committee the proper forum in which to make such substantive policy changes?
No. As noted above, the proposal does not, in fact, codify *Gonzalez*. Indeed, the proposed amendments go beyond the limited issue raised and resolved in *Gonzalez* and implicate important policy issues, such as whether habeas corpus petitioners should be precluded from raising challenges to district court judgments that all other litigants may pursue. Such policy changes would have significant and wide-ranging implications on litigants as well as the functioning of the courts. Considering the magnitude of these considerations, these issues should not be resolved in this Committee. Rather, they should be resolved in a forum that is better suited to collecting the necessary information to make a reasoned and well-founded judgment as to the potential impact that these changes would have on the orderly and appropriate litigation of claims in §§ 2254 and 2255 proceedings.

MEMORANDUM

To: Writs Subcommittee Members
Fr: Ruth Friedman and Thomas McNamara
Re: Statistical analysis of post-*Gonzalez* decisions provided by DOJ in support of rule change
Dt: February 14, 2008

On January 10, 2008, the Department of Justice provided the Writs Subcommittee with a list of cases "where Rule 60(b) motions were declared successive petitions by a habeas court." See E-mail from Jonathan Wroblewski, 1/10/2008. According to the e-mail accompanying the list, from an initial pool of 450 cases since August 1, 2007 in which Rule 60(b) was referenced, the Department identified 77 cases in which both Rule 60(b) and *Gonzalez v. Crosby* were referenced. Within that subset of 77 cases, the Department identified 43 cases in which a court held that a Rule 60(b) motion was actually a successive petition per *Gonzalez*. The Department offered these cases as evidence in support of its claim that there is sufficient confusion among the courts and litigants about the role of Rule 60(b) in habeas cases to require a change in the rules governing §§ 2254 and 2255 proceedings.

We have now had an opportunity to conduct a detailed examination of the list provided by the Department, and our examination disputes the claim that there is sufficient confusion with respect to Rule 60(b) to warrant a change in the habeas rules. Our analysis reveals that of the 43 cases provided, only 28 constitute cases in which a Rule 60(b) motion was found to be entirely improper and deemed to be a successive petition.[1] In an additional seven cases, the courts ruled that the Rule 60(b) motion included, in part, properly raised issues, but the motion was denied on the merits.[2] In other words, these were cases in which Rule 60(b) motions served a proper role in the litigation, even though the motions contained some arguments which were not legally cognizable under *Gonzalez*. In the remaining eight cases, it appears that these decisions were misidentified, as they are not instances in which a court held that a Rule 60(b) motion constituted a successive petition.[3]

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[1] 20 of those cases involve § 2255 proceedings, and 8 involve § 2254 proceedings.

[2] Schwamborn v. U.S., 507 F.Supp.2d 229 (E.D.N.Y. 2007); Scott v. Quinn, 2007 WL 4111382 (W.D. Wash. 2007); Turner v. Howerton, 2007 WL 3082138 (11th Cir. 2007); Pitera v. U.S., 2007 WL 3005791 (E.D.N.Y. 2007); Sunday v. Lee County Circuit Court Alabama, 2007 WL 2853400 (M.D. Ala. 2007); Williams v. Chatman, 2007 WL 3307463, *published at* 2007 WL 4440358 (11th Cir. 2007); Harbison v. Bell, 503 F.3d 566 (6th Cir. 2007).

[3] In four cases, the decision did not even involve a ruling on a Rule 60(b) motion. *See* U.S.

(continued...)

From the original pool of 450 cases that the Department identified as referencing Rule 60(b), only 28 constituted cases in which such a motion, in its entirety, rested on claims that were not legally cognizable – i.e., 6.2% of the cases involved improperly filed motions. Contrary to the position of the Department, this evidence does not support its claim that there is widespread confusion about the role that Rule 60(b) is supposed to play in habeas litigation, or that the courts are being overwhelmed by improperly filed Rule 60(b) motions.[4]

Moreover, there is no evidence to support the claim that lower courts are laboring under any confusion regarding how to properly adjudicate a Rule 60(b) motion. None of the 43 opinions cited by the Department reflect any misunderstanding on the part of the courts with respect to the Supreme Court's holding in *Gonzalez*, or any confusion in the application of *Gonzalez* to Rule 60(b) motions. Indeed, as many of these decisions note: "In most cases, determining whether a Rule 60(b) motion advances one or more 'claims' will be relatively simple." Pearson v. U.S., 2007 WL 2774215 at * 1(M.D. Fla. 2007); *see also* Underwood v. U.S., 2007 WL 2953934 at *2 (W.D. Ky. 2007); Sunday v. Lee County Circuit Court Alabama, 2007 WL 2853400 at * 3 (M.D. Ala. 2007). In the wake of the Supreme Court's decision in *Gonzalez*, the available evidence suggests that lower courts are well-equipped to differentiate between properly and improperly filed 60(b) motions, and to rule accordingly.

To the extent that there is any confusion on the part of the litigants filing these motions, such confusion will always be a feature of any system that permits *pro se* litigation. After all, these litigants do not have any formal legal training, so no amount of revision to the habeas rules will ever

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[3](...continued)
v. Carter, 500 F.3d 486 (6th Cir. 2007); U.S. v. Johnson, 2007 WL 3459286 (N.D. Fla. 2007); Devon v. Wynder Warden S.C.I.D., 2007 WL 2493694 (E.D. Pa. 2007); Davis v. Polk, 2007 WL 3355358 (W.D.N.C. 2007).

In two cases, although *Gonzalez* was referenced in the opinion, the Rule 60(b) motion was denied on other grounds. *See* U.S. v. Alexander, 2007 WL 2693422 (5th Cir. 2007); U.S. v. Crawford, 2007 WL 2669483 (D. Minn. 2007).

In one case, Lopez v. U.S., 2007 WL 3102146 (M.D. Ga. 2007), the district court relied on the 11th Circuit's *en banc* decision in *Gonzalez v. Sec'y of Dept. of Corr.*, 366 F.3d 1253 (11th Cir. 2004), to reach its decision. The United States Supreme Court, however, vacated the *en banc* decision in *Gonzalez*, and rejected the 11th Circuit's ruling regarding properly cognizable Rule 60(b) claims as too narrow. Notably, the district court's opinion fails to cite to the Supreme Court opinion.

In one case, a decision on a Rule 60(b) motion was counted twice. The Department's list cites both Rogers v. Artuz, 2007 WL 4209423 (E.D. N.Y. 2007) and Rogers v. Artuz, 2007 WL 2815692 (E.D.N.Y. 2007). These two cases represent a single instance in which a Rule 60(b) motion was deemed successive per *Gonzalez*, and therefore should not be counted twice, as they currently are in the Department's list.

[4] Indeed, even taking the Department's initial estimate of 43 cases at face value, that would only constitute 9.6% of the pool of 450 cases in which Rule 60(b) was referenced.

completely prevent the filing of improper motions, be they pursuant to Rule 60(b) or any other civil, criminal or habeas rule. However, even in light of that fact, the available evidence does not suggest that any such confusion among litigants is widespread, or that it is resulting in a significant number of frivolous or non-meritorious filings. Moreover, it bears mentioning that *Gonzalez* was only recently decided in June of 2005, and that it is to be expected that, as with any other newly-decided case, its holding will become more widely known and followed by litigants over time. Indeed, it should be noted that in at least four of the 43 cases provide by the Department, the *pro se* litigant filed a Rule 60(b) motion prior to the published decision in *Gonzalez,* and therefore did not have the benefit of the Supreme Court's guidance prior to filing.[5]

In sum, the available evidence does not suggest that a change to habeas rules is necessary post-*Gonzalez.* The number of improperly filed Rule 60(b) motions is small, and there is no evidence that the courts are unable to adequately and efficiently adjudicate these motion pursuant to the Supreme Court's ruling in *Gonzalez.*

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[5] Harris v. U.S., 2007 WL 4171194 (D.D.C. 2007); Hourani v. U.S. 2007 WL 2302374 (E.D. Mich. 2007); U.S. v. Carter, 500 F.3d 486 (6th Cir. 2007); U.S. v. Taylor, 2007 WL 2462007 (N.D. Fla. 2007).

U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

February 20, 2008

MEMORANDUM

TO: Mr. Thomas McNamara
Chair, Subcommittee on Writs

FROM: Jonathan J. Wroblewski
Director, Office of Policy and Legislation

Kathleen A. Felton
Deputy Chief, Appellate Section

SUBJECT: Proposal to Amend Rule 11 of the Rules Governing Section 2254 and Section 2255 Proceedings

We appreciate the opportunity to respond to the February 14, 2008, submissions of Ruth Friedman and Thomas McNamara ("the defense"). Because we have set forth the reasons supporting the proposed Rule 11 at length in earlier letters and memoranda, and because the Subcommittee has covered the issues thoroughly in several conference calls, we will not repeat all of those reasons here, but rather offer a few comments on the defense submissions.

First, although the defense persists in stating that the proposed Rule 11(a) does not codify *Gonzalez*, the defense is unable to identify any type of Civil Rule 60(b) claim that *Gonzalez* permits that Rule 11(a) does not permit. During the drafting and redrafting process over the last two years, we have done everything we can to address concerns raised by members of the Subcommittee, the Standing Committee, various professors, and the reporters who have worked on this issue. Both the language of the draft Rule and the Committee Note have been amended to address any ambiguity and/or possible inconsistency with *Gonzalez*. We believe because the proposed Rule 11(a) faithfully replicates *Gonzalez*, the defense claim that the proposed rule creates confusion is baseless.

Second, the defense criticizes the 30-day time limit in Rule 11(a), noting that Rule 60(b) motions have been filed years after the resolution of the § 2254/§ 2255 petition, and that such delays allow intervening changes of law to occur. This defense rationale is troubling in

numerous ways. First, it treats judicial decisions on § 2254 and § 2255 motions as deserving of little if any finality. Second, it ignores the fact that Rule 60(b)'s time limits of one year or a reasonable time after judgment were designed for civil cases where Rule 60(b) is the *only* form of collateral relief. By contrast, in criminal cases, defendants already have many opportunities to challenge their convictions: the initial one-year period after *appeal* to file a § 2254 or § 2255 motion; a *three-year* period after verdict to raise newly discovered evidence under Criminal Rule 33; and a one-year period after *discovery* to raise newly-discovered evidence showing innocence, and a one-year period after *issuance* to raise new rules of constitutional law issued and made retroactive by the Supreme Court, in second and successive motions under § 2254 and § 2255.

In addition, the defense rationale shows no respect for AEDPA, which was designed to end the unlimited, repetitive, and endless collateral review process, and to restrict filings after the initial § 2254 and § 2255 motions to the above-mentioned claims of the greatest magnitude. Furthermore, *Gonzalez* limited Rule 60(b) motions to claims that generally will be apparent at the time of the § 2254/§ 2255 ruling: that there was "some defect in the integrity of the federal habeas proceedings," or that the "ruling which precluded a merits determination was in error." 545 U.S. at 532 & n.4. The proposed Rule 11(a) imposes a 30-day time limit that (a) respects AEDPA and does not compete with its existing methods of collateral review, (b) respects the limited role *Gonzalez* left to Rule 60(b) motions, and (c) fits within the 60-day period for appeal, rather than creating the prospect of district and appellate courts reviewing the same § 2254/ § 2255 order simultaneously.

Third, the defense argues that Civil Rules 52 and 59 should remain available to attack the district court's resolution of the merits of the § 2254/§ 2255 motion, without being able to offer any reason why such argument would not conflict with *Gonzalez*. In *Gonzalez*, the Supreme Court held that "[a] habeas petitioner's filing that seeks vindication of such a claim is, if not in substance a 'habeas corpus application,' at least similar enough that failing to subject it to the same requirements would be 'inconsistent with' the statute," *i.e.*, AEDPA. *Gonzalez*, 545 U.S. at 531 (2005). The Court then applied that holding to Rule 60(b), holding that the civil rule could not be used to "attack[] the federal court's previous resolution of a claim *on the merits*," even if based on "new evidence" or "a purported change in the substantive law governing the claim," because that impermissibly circumvents AEDPA's requirements for second and successive motions, including "the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar." 545 U.S. at 531-32 (emphasis by Court), *citing* 28 U.S.C. § 2244(b)(1)-(2); *accord* 28 U.S.C. § 2253(c), § 2255 ¶ 8. The Supreme Court's holding is based on AEDPA's statutory requirements, and both under law and logic equally applies to any attempt by § 2254/§ 2255 petitioners to use other civil rules in contravention of AEDPA's requirements.[1] The Supreme Court also rejected the defense

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[1] "Although the motion at issue in *Gonzalez* was brought under Rule 60(b), the definitions used by the Supreme Court can be applied equally to other post-judgment motions, including those brought under Rule 59(e)." *Davis v. Polk*, 2007 WL 3355358, *2 (W.D.N.C. 2007); *accord Ellis v. Endicott*, 2007 WL 3348597, *1 (E.D. Wis. 2007); *Howard v. United*

argument that a court should be allowed to reconsider the merits of its § 2254 decision, because AEDPA does not permit "a revisitation *of the merits*" except by appeal. 545 U.S. at 533-34 (emphasis by Court).[2]

The defense argues that "[a] key distinction between motions filed pursuant to Rules 52 and 59 and those pursuant to Rule 60 is that the former suspend the finality of the district court's judgment, but the latter do not." In fact, motions under Rule 52(b), 59, and 60(b) all suspend the time for appeal if filed within 10 days after entry of judgment, Fed. R. App. P. 4(a)(4)(A) – but that did not prevent the Supreme Court from holding that Rule 60(b) could never be used to challenge the merits of a § 2254/§ 2255 ruling, because it would conflict with AEDPA's requirements for second or successive petitions. The defense states that appeal will result in a waste of judicial resources, but AEDPA's precertification requirement prevents most such cases from turning into full-blown appeals on the merits. 28 U.S.C. § 2244(b)(3), § 2253(c).

Finally, the defense examination of the cases concedes that in at least 35 of the 77 post-*Gonzalez* opinions on Westlaw in which Rule 60(b) and *Gonzalez* were both cited, the petitioners filed Rule 60(b) motions that were wholly or partially improper under *Gonzalez*. That is almost 50%, and evidences substantial confusion by the petitioners.[3] This confusion is understandable, because a petitioner now cannot look to any rule telling him what claims he can or cannot raise. Instead, he must consult a civil rule not designed for § 2255/2254 cases – a rule which on its face allows claims that are improper in § 2254/§ 2255 cases. He must also find and understand a substantial 2005 Supreme Court opinion which lacks the brevity or directness of a rule. Rather than leaving the topic unaddressed in the habeas rules and consigning often *pro se* litigants to hunt for a misleading civil rule and then hunt for the case that limits it, the proposed Rule 11(a) puts the governing law in a brief, clear rule where habeas rules should be – in the Rules Governing § 2254/ § 2255 proceedings. Providing such guidance to litigants is the central purpose of the rules. The Committee should provide such guidance here.

States, 2007 WL 708618, *2 & n.3 (S.D. Ohio 2007); *Evans v. United States*, 2007 WL 682567, *2 (N.D. Ohio 2007); *see, e.g.*, *United States v. Pedraza*, 466 F.3d 932, 934 (10th Cir. 2006); *Williams v. Norris*, 461 F.3d 999, 1004 (8th Cir. 2006); *United States v. Hicks*, 2007 WL 173885, *2 (S.D. Cal. 2007); *Milovanovic v. United States*, 2006 WL 334209, *1 (M.D. Fla. 2006).

[2] The case the defense cites, *Gonzales v. Terhune*, 2006 WL 1795121 (N.D. Cal. 2006), is thus contrary to the Supreme Court's decision, as well as contrary to the other cases addressing the issue, see note 1 *supra*.

[3] The defense cites a lower percentage by comparing the improper cases with all 450 post-*Gonzalez* cases citing Rule 60(b).

----- Message from "Thomas McNamara" <Thomas_McNamara@fd.org> on Mon, 25 Feb 2008 07:56:27 -0500 -----

To: "Judge Tallman" <Judge_Tallman%USCOURTS@fd.org>, "John F Keenan" <John_F_Keenan%USCOURTS@fd.org>, <redmunds@sc.state.nc.us>, <rabrill@gmail.com>, <RuthinDC@aol.com>, <Jonathan.Wroblewski@usdoj.gov>, <George.Leone@usdoj.gov>, <Kathleen.Felton@usdoj.gov>, <meltzer@law.harvard.edu>, <mmtamiso@law.harvard.edu>, "King, Nancy" <nancy.king@Law.Vanderbilt.Edu>, <sun@law.duke.edu>, <John_Rabiej@ao.uscourts.gov>, <Peter_McCabe@ao.uscourts.gov>, <Timothy_Dole@ao.uscourts.gov>

Subject: Criminal Rules Writs Subcommittee: Brief Defense Reply

MEMORANDUM

To: Writs Subcommittee Members

Fr: Ruth Friedman and Thomas McNamara

Re: Defense Reply to Department of Justice Memo

Dt: February 25, 2008

In further preparation for today's conference call, the defense submits a brief response to the Department of Justice's Memo dated February 20, 2008. I apologize for the lateness of our reply.

• The proposed 30-day time period is not a codification of Gonzalez v. Crosby.

The 30-day time period which the DOJ proposes is sui generis. There is no support for it in the Gonzalez decision. The DOJ's proposal to change the existing time period, therefore, does not represent a codification of Gonzalez.

• The existing time period for filing a Rule 60(b) motion is not inconsistent with AEDPA.

> There is nothing in either the text of the AEDPA, or its legislative history, that indicates that the existing time periods set out by Rule 60(b) are inconsistent with the AEDPA. The DOJ's premise that "finality" trumps all other considerations was specifically rejected by the Gonzalez court. Gonzalez v. Crosby, 545 U.S. 524, 528-9 (2005) ("[W]e give little weight to respondent's appeal to the virtues of finality. That policy consideration, standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality."); see also Jackson v. United States, 245 Fed. Appx. 258, 259-60 (4th Cir. Aug. 17, 2007) (vacating decision below and directing district court to grant a Rule 60(b)(4) motion filed nearly seven years after the district court's disposal of petitioner's § 2255 motion; further noting that the Government conceded that the district court had erred).

• The pre-certification requirement is not a vehicle by which the district court can correct mistakes of law and/or fact in its ruling.

> One main purpose of Rule 52/59 motions is to give district courts the opportunity to correct significant errors of fact or law that are brought to their immediate attention, and thus spare the parties and appellate courts the burden of unnecessary appeals. There is no policy or purpose of the

AEDPA that would be furthered by depriving judges of the ability to correct manifest errors of law or fact that are promptly brought to their attention within 10 days of the disposition of the action. Pre-certification deals only with the appellate court's review of constitutional violations. The DOJ's proposal will leave the circuit courts incorporating uncorrected error into their analyses.

• Rule 52 and 59 motions cannot be successive because they suspend the finality of the judgment.

The DOJ's argument that motions under Rules 52, 59 and 60 "all suspend the time for appeal" misunderstands the defender memorandum. Suspending the time period in which an appeal must be filed has nothing to do with the issue of suspending the finality of a judgment. The relevant issue is whether or not the motion filed represents an action taken from a final order. For that very reason, a Rule 52/59 motion cannot be deemed "successive" because there is no final order in place that it is succeeding.

• The Department simply has not shown widespread abuse or confusion with respect to Rule 60(b).

By the DOJ's own analysis, there are 450 post-Gonzalez cases in which Rule 60(b) motions were at issue. Those 450 cases represent the total universe against which any claims of systematic confusion or abuse must be made. The DOJ has noted

that in 35 of those 450 cases, a Rule 60(b) motion was deemed improper by a court and denied. In other words, in the vast majority of Rule 60(b) motions that have been filed post-Gonzalez – i.e., 415 cases – the Rule 60(b) motion in question raised legally cognizable claims and was either granted or denied on the merits. Thirty-five cases are a drop in the bucket among the cases the 95 federal judicial districts consider.

• Criminal defendants to do not have extra opportunities to challenge their convictions.

The DOJ's contention that criminal defendants have undue opportunities to challenge their convictions is misplaced. Every litigant, whether in a civil or criminal matter, can appeal a trial verdict. Rule 33 motions are not available to §2254 litigants, whose convictions are from state court, nor can they be filed as part of a § 2255 proceeding, because habeas proceedings are separate and distinct from the underlying criminal proceeding that resulted in conviction. Finally, the DOJ's highlighting of successor petitions is disingenuous, as the procedural barriers to filing a successive petition are all but insurmountable, and the "great writ" of habeas corpus has never been limited to showings of innocence. The AEDPA eliminated successive petitions, and the Gonzalez Court addressed the only provision in the habeas rules that could conceivably have allowed a second application.

• Many cases will indeed be omitted from the truncated version of the rule proposed.

The Department's response simply ignores the examples cited in the defender memorandum of cases which could not be filed under this proposal but where district courts granted motions to reconsider under the current rules. See Devino v. Duncan, 215 F. Supp. 2d 414 (S.D.N.Y. 2002) (granting Rule 60(b) motion where based on intervening change in law where failure to do so would require dismissal of petition and work manifest injustice); Wiley v. Epps, 2007 WL 628387 (D. Miss. 2007) (court reconsiders need to hold evidentiary hearing where merits determination already reached). A quick look brings up others. See, e.g., Figueroa v. Fischer, 2003 WL 1701997 (S.D. N.Y. Mar. 31, 2003) (failure to apply intervening change in law would "call into serious question correctness of court's judgment"); Paramore v. Filion, 293 F. Supp. 2d 285 (S. D. N.Y. 2003) (court corrects opinion on mistaken standard for appeal); United States v. Battle, 272 F. Supp. 2d 1354 (N.D. Ga. 2003) (court modifies date of execution in order to allow time for taking appeal).

The very purpose of these rules is to allow district courts to correct unforeseen mistakes that could hurt the rights of the litigants. These errors cannot be easily squeezed into two categories. This proposal is unwise and should be rejected.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 6(f)

DATE: April 1, 2008

At its October meeting, the Rules Committee discussed Judge Battaglia's proposal to amend Rule 6(f) to allow courts to receive the return of a grand jury indictment by video conference. After discussion, the Committee requested further study of the matter.

Two issues were raised in the discussion. The first was whether to make a more fundamental change and eliminate the requirement that the indictment be returned in "open court." Although there was some support for the elimination of this requirement, other members expressed the view that the "open court" requirement serves as a vital safeguard against the old Star Chamber procedures. Other members questioned what showing should be made to allow the use of video conference.

Judge Battaglia was appointed to chair a subcommittee to consider these issues, and he describes the subcommittee's work in the memorandum that follows. His report notes the evolution from the early view that errors in the grand jury process deprived the courts of jurisdiction to the current view that such errors are generally subject to harmless error analysis. In addition, the Supreme Court has indicated that it does not regard the historical practice regarding the return of indictments at the time of the Fifth Amendment as binding in all respects. When the grand jury clause was adopted, the entire grand jury was required to return the indictment in open court. This provided an opportunity for the individual grand jurors to be polled to determine whether a sufficient number supported each indictment, and also created a record that the defendant had been indicted. By 1912, however, the Supreme Court indicated that Congress need not be bound by this historical practice, and thus might choose to modify the requirement that the grand jury appear as a body. *United States v. Breese*, 226 U.S. 1 (1912).[1] Although the Court was addressing

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[1]The Court stated: "The reasons for the requirement, if they ever were very strong, have disappeared, at least in part, and we have no doubt that Congress, like the state of North Carolina, could have done away with it, if it had seen fit to do so instead of remaining silent."

the case in which the grand jury did not as a body present the indictment in open Court, the opinion provides additional support for the authorities cited in Judge Battaglia's memorandum.

This item is on the agenda for the April meeting in Washington.

United States District Court
Southern District Of California
U.S. Courts Building
940 Front Street
Room 1145
San Diego, California 92101-8927

Anthony J. Battaglia
United States Magistrate Judge

Phone: (619) 557-3446
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MEMORANDUM

TO: Hon. Richard C. Tallman
Sara Sun Beale

FROM: Judge Battaglia

RE: Rule 6(f) Subcommittee Report

DATE: April 7, 2008

In October 2007, the Advisory Committee on Criminal Rules considered a proposed amendment to Rule 6(f) that would allow judges to take grand jury returns by video teleconferencing in order to avoid unnecessary cost or delay. This was prompted by a memo from Judge Battaglia dated July 6, 2007.

The July 6 memo identified the problem the "open court" requirement causes when no judge is present in a courthouse where a grand jury sits. In those situations, a judge must travel from some distant location to take the return. A survey of courts found the problem particularly acute in courthouses in the following districts: Eastern California, Northern West Virginia, Southern Iowa, Southern Florida, Alaska and Arizona. The one-way distances in the surveyed courts ranged from 145 to 260 miles. Travel was often through remote and mountainous areas, where the perils of travel increased exponentially during weather.

While a grand jury return only takes a moment, it is a time sensitive proceeding under the Speedy Trial Act, 18 U.S.C. § 3161(b), and must occur within thirty days of an arrest.

It was pointed out that utilizing video teleconference technology would eliminate an inconvenient and inefficient practice and the perils of travel to judges, while maintaining the requirements of the Speedy Trial Act.

The amendment proposed was:

(f) Indictment and Return. A grand jury may indict only if at least 12 jurors concur. The grand jury-or its foreperson or deputy foreperson-must return the indictment to a magistrate judge in open court. Where good cause exists, the judge may take the return by video teleconference to the court where the grand jury sits.

At the October Committee meeting, the proposal was forwarded to a subcommittee to review in greater detail and focus on the necessity of the "open court" requirement from a historical standpoint, as well as alternate language for the proposed "good cause" standard in the proposed rule. "Good cause" was generally seen as "too strenuous" a standard.

A subcommittee chaired by Judge Battaglia, and composed of Justice Edmonds, Jonathan Wroblewski, Rachael Brill and Sara Sun Beale was created.

The subcommittee commenced its work and its research, tracing the historical significance of the "open court" requirement, and proposing alternate language for the amendment dealing with something less than "good cause" as the justification to vary from the historical open court requirement. A proposed Committee Note was also drafted.

On the "open court" requirement, the research found:

The taking of a Grand Jury return "in open court" has historically been substantively significant. It has been held to confer jurisdiction on the court to try the accused. *Renigar v. United States*, 172 F. 646 (4th Cir. 1909). The *Renigar* case preceded the advent of the Federal Rules, and was based on case precedent.

In *Renigar*, the Grand Jury foreperson handed an indictment of the defendant to the Clerk of Court at his desk in the courtroom, while the judge and counsel on another case were engaged in discussions in the judge's chambers. The trial court denied the motion to dismiss the indictment on the basis that it was not returned in "open court", finding no prejudice to the defendant. The Court of Appeal reversed. In so doing, the Court in *Renigar* surveyed the legal literature at the time of the decision and tracked the historical significance of the delivery of indictments publically in open court. The *Renigar Court* cited *Ex parte Bain*, 121 U.S. 1 (1887), and adopted, with approval, the decision in *Jones v. Robbins*, 8 Gray (Mass.) 329 (1857), which stated that the Grand Jury was valuable in securing individual citizens' rights against innocent, hasty, malicious and oppressive public prosecutions by affording open and public accusations of crime. The *Jones* Court traced this right back to the *Magna Carta* and other fundamental acts of the English Parliament. *Id*, at 343 (Citing 2 Kent Com 6th Ed.12).

Since the early twentieth century, we have migrated from this early stance to a point where an indictment not physically presented to the judge in open court has become subject to a harmless error analysis. *U.S. v. Lennick*, 18 F.3d. 814 (9th Cir. 1994). The court in *Lennick*, built upon the Supreme Court decision in *Bank of Novia Scotia (BNS) v. U.S.*, 487 U.S. 250 (1988), which held that a district court may not dismiss an indictment for errors in Grand Jury proceedings, unless such error is a prejudice to the defendant. In *BNS* the Court found that the District of Montana's practice of the Grand Jury foreman handing indictments to the court clerk when the court was not in session violated Rule 6(f), but was not fundamentally unfair and did not warrant dismissal.

Through email communications, the rule language options and Committee Note was further refined, and lead to a telephonic meeting on February 7, 2008.

At the February 7, 2008 meeting, the subcommittee reached the following consensus:

1. That the open court requirement of Rule 6 has historical meaning which should be maintained and that the open court requirement should remain the preferred practice because it promotes the public's confidence and the integrity and solemnity of a federal criminal proceeding;

2. That the amendment is designed to address situations where a court can avoid unnecessary cost or delay, and that the terms "unnecessary cost or delay" should be the defining circumstance where a court might use the video conference alternative.

A final proposal of the rule and Committee Note were then drafted and are presented herewith for consideration by the Committee in its April 2008 meeting.

III. D.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: **Proposed Amendment to Rule 12**

DATE: April 1, 2008

Rule 12(b)(3)(B) requires motions alleging defects in an indictment to be raised before trial, and Rule 12(b)(e) treats failure to raise such a defect in a timely fashion as a waiver of the defect unless the court grants relief from the waiver for good cause shown. Rule 12(b)(3)(B) contains an exception, however, allowing the court "at any time the case is pending" to "hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense." (Emphasis added.)

The Department of Justice has proposed that Rule 12(b)(3)(B) be amended to require that challenges for failure to state an offense be raised before trial. Judge Tallman referred the proposal to a subcommittee made up of Judge Mark Wolf (chair), Mr. McNamara, Mr. Leipold, and a representative of the Department of Justice. Special Reporter Nancy King has assisted the subcommittee.

The subcommittee has conferred in several teleconferences. Although there is considerable sympathy for the Department's argument that it would be desirable for defects of this nature to be identified and corrected before trial, the subcommittee has identified a number of issues that will arise if the proposal is adopted. Because it was not possible to explore all of these issues in time for the April agenda book and meeting, the subcommittee will continue working and present its recommendations at the October meeting.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Rule 15, Deposition Outside Defendant's Physical Presence**

DATE: **April 3, 2008**

At the Committee's October 2007 meeting, Assistant Attorney General Fisher summarized the Department's proposed amendment to Rule 15 to permit the deposition of a witness outside the physical presence of the defendant, where it would be impractical or impossible to conduct the deposition otherwise. She explained that it is needed in national security cases, as well as other kinds of prosecutions, and that the Department had designed the proposal to respond to confrontation clause issues and meet the objections raised by Justice Scalia's in chambers opinion when the Court rejected a similar amendment several years ago. The Department's letter of September 5, 2007, which reviews the justifications for the proposal, is included at the end of this section of the agenda book.

During the October discussion, committee members raised a number of questions, including whether the rule should refer specifically to defense witnesses, who would bear the burden of proof, and what the standard of proof would be. The amendment was referred to a subcommittee chaired by Judge Keenan, which also included Professor Leipold, Mr. Cunningham, and a representative from the Department of Justice.

The Department revised its proposed amendment, and the subcommittee held two teleconferences to discuss the proposal. It voted unanimously to recommend the amendment to the full committee, while bracketing one portion of the rule -- subpart (3)(B)-- about which several members had concerns.

The key changes from the version presented in October 2007 are:

- The Rule has been expressly limited to cases in which the witness is outside the United States. Although occasional cases may occur where it will be impossible to bring the defendant to a deposition in the United States, international cases are the main reason for the amendment. The subcommittee felt that it was very important to limit the amendment to focus on international cases, in order to establish the public policy justification required by *Maryland v. Craig*, 497 U.S. 836 (1990).

- The Rule no longer distinguishes between government and defense witnesses in proposed subpart (3)(A). The Rule and the Note recognize the same principles apply

whether the witness involved is a government witness (and the defendant's confrontation clause rights may be implicated) or a defense witness (and any co-defendant's confrontation clause rights may be implicated). However, proposed subpart (3)(B) provides that a defendant has no right to be present at the deposition of his own witness outside the United States. In cases covered by this subpart, the confrontation clause is not applicable. Several members of the subcommittee expressed the view that it might be preferable to omit subpart (3)(B). The subcommittee bracketed this subpart, which is discussed further below.

- The Rule (in subpart (3)(A)(ii)) uses the standard for witness unavailability distilled from existing caselaw.

- The Rule now makes it clear in subpart (3)(A)(iii) that a deposition outside the United States at which the defendant cannot be present is authorized only when it is not possible to secure the witness's presence for a deposition in the United States.

- The Note spells out the burden of proof applicable under the Rule and cites to case law supporting the preponderance standard.

- The Note states that the amendment does not supercede 18 U.S.C. § 3509, authorizing depositions outside the defendant's physical presence in certain cases involving child victims and witnesses, or any other provision of law.

The subcommittee was divided on the desirability of including subpart (3)(B). Some members felt that the deposition of a defendant's own witness (as well as witnesses to be called by co-defendants) would be subject to new subpart (3)(A), and that this should be sufficient. The Department expressed concern that this might be problematic, because a defendant might wish to depose a witness outside the United States even if he could not be present at the deposition yet could not meet all elements of subpart (3)(A). The subcommittee asked the Department to provide further information about cases in which such problems have arisen. The subcommittee felt that further discussion of this issue in the full committee would be helpful, particularly with the benefit of this additional information. The Department has agreed to provide an additional memorandum addressing this issue, which will be distributed separately if it is not available in time for inclusion in the agenda book.

Following the preference of the Standing Committee, the draft Committee Note has been kept relatively short. The paragraph in brackets is not essential. If it is omitted, this material could go in the report to the Standing Committee (and ultimately to the Supreme Court) to make clear the committee's attempt to address the Supreme Court's previous concerns.

This item is on the agenda for the April meeting in Washington.

Rule 15. Depositions

* * * * *

(c) Defendant's Presence.

(1) Defendant in Custody. Except as provided in paragraph (3), ~~T~~the officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

"(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) Defendant Not in Custody. Except as provided in paragraph (3), ~~A~~ a defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant – absent good cause – waives

both the right to appear and any objection to the taking and use of the deposition based on that right.

(3) Limited Authority to Hold Depositions Outside the Defendant's Presence

(A) Generally. A deposition of a witness who is outside the United States may take place without the defendant's physical presence if the court makes case-specific findings of all of the following:

(i) the deposition involves a witness whose testimony could provide substantial proof of a material fact;

(ii) there is a substantial likelihood the witness's attendance at trial cannot be attained;

(iii) it is not possible to obtain the witness's presence in the United States for a deposition;

(iv) the defendant cannot be present at a deposition outside

the United States because the secure transportation to and continuing custody of an in-custody defendant at the witness's location cannot be assured, no reasonable set of conditions will assure an out-of-custody defendant's appearance at the deposition or thereafter at trial or sentencing, or the country in which the witness is located will not permit the defendant to attend the deposition; and

(iv) reasonable means will permit the defendant to meaningfully participate in the deposition.

[(B) A Defendant's Own Witness. A defendant has no right to be present at a deposition of his/her own witness that takes place outside the United States.]

Committee Note

This amendment addresses the growing frequency of cases in which important witnesses–government and defendant

witnesses both–live in, or have fled to, countries where they cannot be reached by the court's subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the Rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness's attendance at trial cannot be attained, and at the same time where it would be impossible to securely transport the defendant or a co-defendant to the witness's location for a deposition.

Recognizing that important witness confrontation principles and vital law enforcement and public safety interests are involved in these instances, the amended Rule authorizes a deposition outside of a defendant's physical presence only in very limited circumstances, where case-specific findings are made by the trial court of significant need and public policy justification. New Rule 15(c) delineates these circumstances and the specific findings a trial court must make before permitting parties to depose a witness outside the defendant's presence. Several courts of appeals have authorized depositions of witnesses without the defendant being present in such limited circumstances. *See, e.g., United States v. Salim*, 855 F.2d 944, 947 (2d Cir. 1988); *United States v. Gifford*, 892 F.2d 263, 264 (3d Cir. 1989), *cert. denied*, 497 U.S. 1006 (1990); *United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998).

[In 2002, the Committee proposed an amendment to Rule 26 to address this issue. That amendment would have permitted a court to receive the video transmission of an absent witness if certain conditions were met. In a statement accompanying the Supreme Court's 2002 decision rejecting the proposal, Justice Scalia noted that "[i]n *Maryland v. Craig*, 497 U. S. 836 (1990), the Court held that a defendant can be denied face-to-face confrontation during live testimony at trial only if doing so is 'necessary to further an important public policy,' *id.* at 850, and only 'where there is a case-specific finding of [such] necessity,' *id.* at 857–858 (internal quotation marks omitted)." The Court allowed the witness in *Craig* to testify via one-way video transmission because doing so had been found "necessary to protect a child witness from trauma." Id. at 857. Justice Scalia noted that the amendment to Rule 26 "does not limit the use of testimony via video transmission to instances where there has been a 'case-specific finding' that it is 'necessary to further an important public policy.'" The current proposal, on the other hand, requires precisely the case-specific findings the Court in *Craig* – and in the 2002 statement – demanded.]

The party requesting the deposition shoulders the burden of proof – by a preponderance of the evidence – as to the elements that must be shown. Courts have long held that when a

criminal defendant raises a constitutional challenge to proffered evidence, the government must show, by a preponderance of the evidence, that the evidence is constitutionally admissible. *See, e.g., Idaho v. Wright*, 497 U.S. 805, 816 (1990); *U.S. v. Arnold*, 486 F.3d 177 (6th Cir. 2007). Here too, the party requesting the deposition, whether it be the government or a defendant requesting a deposition outside the physical presence of a co-defendant, bears the burden of proof. Moreover, if the witness's presence for a deposition in the United States can be secured, thus allowing defendants to be physically present for the taking of the testimony, this would be the preferred course over taking the deposition overseas and requiring the defendants to participate in the deposition by other means.

Finally, this amendment does not supercede the relevant provisions of 18 U.S.C. § 3509, authorizing depositions outside the defendant's physical presence in certain cases involving child victims and witnesses, or any other provision of law.

III. F.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Rule 32.1 and Rule 46, Revoking Probation or Supervised Release & Revoking Pretrial Release**

DATE: **March 30, 2008**

At the October meeting in Park City, the Committee voted to send the proposed amendments to Rules 32.1 and 46 after any changes requested by the style consultant. Consideration of a committee note was deferred to the April meeting.

While work on the Committee note was underway, a related issue came to light, and as a result further consideration of the rules and committee notes will be deferred until the October meeting of the Rules Committee. The Office of Probation and Pretrial Services favors providing probation officers with the authority to seek warrants, and the Criminal Law Committee is considering the question whether an amendment to Rule 41 might be appropriate. We will return to the issues raised by Rules 32.1 and 46 when we have received the input of the Criminal Law Committee and Probation and Pretrial Services.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 32.1(a)(6)

DATE: March 30, 2008

At the October meeting in Park City, the Committee discussed Magistrate Judge Robert Collings' suggestion that it amend Rule 32.1(a)(6) to clarify the rule's incorporation of 18 U.S.C. § 3143(a), and to specify that the burden of proof is clear and convincing evidence. The provision in question authorizes the magistrate judge to release or detain a person charged with a violation of probation or supervised release, pending further proceedings.

Although there was support for the idea of clarifying a provision that has required courts to fight their way through an interpretative thicket, there were questions about whether the burden of proof should be (as Judge Collings proposed) clear and convincing evidence, and whether the specification of a standard of proof would be substantive, and thus beyond the power of the rule making process under the Rules Enabling Act. Further discussion was deferred until the April meeting to permit further research on these questions.

A proposed amendment and committee note are attached. Judge Battaglia volunteered to assist in researching these issues, and his extremely helpful memorandum follows.

This item is on the agenda for the April meeting in Washington.

Rule 32.1. Revoking or Modifying Probation or Supervised Release.

(a) Initial Appearance.

* * * * *

(6) Release or Detention. The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a)(1) pending further proceedings. ~~The burden of establishing~~ The person will have the burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community ~~rests with the person~~.

Committee Note

This amendment is designed to end confusion regarding the applicability of 18 U.S.C. § 3143(a) to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion regarding the applicability of § 3143(a) arose because several subsections of the statute are ill suited to proceedings involving the revocation of probation or supervised release. *See United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

The rule provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger, but does not specify the standard of proof that must be met. The

amendment incorporates into the rule the standard of clear and convincing evidence, which has been established by the case law. *See, e.g.*, *United States v. Loya*, 23 F.3d 1529, 1532 (9th Cir. 1994); *United States v. Giannetta*, 695 F. Supp. 1254, 1256 (D. Me. 1988).

United States District Court

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Anthony J. Battaglia
United States Magistrate Judge

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MEMORANDUM

TO: Judge Tallman

CC: Sara Sun Beale

FROM: Judge Battaglia

RE: Proposed Amendment to Rule 32.1(a)(6) (Regarding Burden of Proof)

DATE: April 7, 2008

By letter of April 17, 2007, Judge Bob Collings (D. Mass.) proposed an amendment to Rule 32.1(a)(6) to state the appropriate burden of proof (clear and convincing evidence) for a person subject to revocation proceedings with regard to their probation or supervised release. The issue came out of the published decision authored by Judge Collings in the case of *United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007).

Judge Collings suggests a proposed amendment as follows:

> The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a)(1) pending further proceedings. ~~The burden of establishing~~ The person will have the burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community.

Based on the reasoning in the *Mincey* decision, Judge Collings states "this proposal would make clear what the defendant's burden is, i.e., "by clear and convincing evidence." It would also make only section 3143(a)(1) applicable to persons arrested for violation of supervised release and/or probation, not the whole of section 3143(a). The need for the clarification arises from the fact that 3143(a) deals substantially with granting release pending a motion for acquittal or a new trial, something inapplicable to the case of one arrested for an alleged violation of supervised release or probation. Clarification would assist judges and others by providing a ready reference. It is notable that the recently published *Benchbook for U.S. District Court Judges, Fourth Edition* (Federal Judicial Center, September2007,) is silent on this issue.

At the October 2007 Advisory Committee meeting in Park City, Utah, two questions arose. These questions were:

1. Is clear and convincing evidence the appropriate burden?

2. Would such an amendment be substantive in nature?

Brief Answer

The burden of clear and convincing evidence is the generally accepted case law standard in probation and supervised release violation proceedings regarding release on bail pending the revocation hearing. *United States v. Loya*, 23 F.3d at 1532 (9th Cir. 1994). In *Loya*, the Ninth Circuit discussed the rule in depth and noted that the burden of proof for violations of probation is equated to a defendant who has been convicted and awaiting imposition of sentence, because in both cases the defendant's liberty had been revoked. As a result, the clear and convincing standard does apply. *See, also, U.S. v. Giannetta*, 695 F. Supp. 1254, 1256 (D. Me. 1988).

As to the matter of whether the proposed amendment would be a substantive change in the law, while the burden of proof is a substantive matter, the substantive law has already been established. An amendment to this type would conform the rule to existing law, and provide procedural guidance. Such an amendment to Rule 32.1(a)(6) would not violate the spirit or the intent of the Rules Enabling Act (28 U.S.C. § 2072, *et seq.*,) by abridging, enlarging or modifying any substantive right. Instead, as stated, it would conform the rules to the substantive law set by the courts and provide clear procedural guidance in this regard. This would be analogous to many aspects of the amendments the Advisory Committee has been involved in of late. (See, for example, the proposed amendments to the Crime Victims' Rights Act.)

Discussion

Revocation of probation or supervised release is covered by 18 U.S.C. § 3143. This provision equates the probationary situation to that of a defendant convicted and awaiting imposition of sentence. Section 3143(a) provides that the probationer shall be detained, unless a judicial officer finds, by clear and convincing evidence, that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c). *United States v. Giannetta*, 695 F. Supp. 1254, 1256 (D. Me. 1988). The problem is that 18 U.S.C. § 3143(a) generally deals with, and is titled "release or detention pending sentence." In *Mincey*, Judge Collings dealt with the analysis of interpreting the standard for release on bail pending a revocation hearing from this statute. He pointed out the confusion that arises since 3143(a) deals with other unrelated topics. His proposal to simplify the process for courts and others, is to amend Rule 32.1(a)(6) to specifically include 3143(a)(1) to focus on the burden of proof and eliminate future confusion.

The jurisprudence associated with the burden of proof in violation proceedings started with the decision in *United States v. Kenney*, 603 F. Supp. 936, 938-39 (D. Me. 1985). This was the year following the 1984 enactment of the Bail Reform Act, 18 U.S.C. 3142, *et seq.* In its earliest origins, courts were citing 3143(a)(1) as the

appropriate burden for release on bail pending a probation revocation hearing. Most courts have followed, See, *United States v. Dimauro*, 614 F. Supp. 461, 463. (D. Me. 1985). *See U.S. v. Giannetta*, 695 F. Supp. 1254 (D. Me. 1988); *U. S. v. Loya*, 23, F.3d 1529 (9th Cir. 1994); *U.S. v. Magruder*, 2001 U.S. Dist. LEXIS 2848 (D. D.C. 2001); *U.S. v. Edwards*, 2001 WL 175420 (N.D. N.Y. 2001); *U.S. v. Malmsberry*, 222 F. Supp. 2d 1345 (M.D. Fla. 2002); *U.S. v. Porter*, 2007 U.S. Dist. LEXIS 81244 (E.D. N.Y. 2007). Finally, we have Judge Collings' analysis in *Mincey*.

Conclusion

The Committee should proceed to advance this amendment to the Standing Committee, for publication for public comment, with an eye toward providing additional procedural guidance in this area. A proposed note for the amendment could be as follows:

Note

This amendment is designed to conform the Rule 32.1 to existing law as regards the burden of proof for release pending a probation or supervised release revocation proceedings. The burden of clear and convincing evidence is the generally accepted standard by case law, however, 18 U.S.C. § 3143(a) deals substantially with granting release pending a motion for acquittal or a new trial, leading courts to question its applicability to the revocation circumstance. This is pointed out in *U.S. v. Mincey*, 207 W.L. 1113688 (D. Mass. 416 2007).

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 32(h)

DATE: March 30, 2008

At its October meeting in Park City the Committee discussed the Committee's proposed post-Booker amendment to Rule 32(h) which was remanded by the Standing Committee for further consideration. Because the members who served on the subcommittee that drafted the amendment are no longer members of the Rules Committee, Judge Tallman appointed a new subcommittee, chaired by Judge Molloy, to continue discussions.

Subsequently, however, the Supreme Court granted certiorari in Irizarry v. United States, No. 06-7517, to resolve a conflict in the circuits on the question whether Rule 32(h) now requires a district court to give the parties advance notice before imposing a sentence outside the advisory Sentencing Guidelines range based on the factors in 18 U.S.C. 3553(a), when the grounds for the non-Guidelines sentence are not identified in the presentence report or the parties' sentencing memoranda.

In light of the Court's action, consideration of an amendment has been deferred.

IV.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Proposal to Amend Rule 7**

DATE: **April 1, 2008**

Judge Battaglia has proposed amending Rule 7 to allow the defendant to waive indictment by video teleconference. He has provided a memorandum setting forth his rationale and providing draft language for the amendment and accompanying note.

In brief, Judge Battaglia concludes that an amendment to Rule 7 is justified by the same factors that persuaded the Committee in 2002 to amend Rules 5 (initial appearance) and 10 (arraignment) by permitting video teleconference when the defendant consents to that procedure. I have provided the relevant portions of the Committee Notes from these amendments, which do an excellent job describing the cost and benefits of using video teleconferencing. Judge Battaglia concludes that in the case of waiver of indictment, as in the case of initial appearance and arraignment, the benefits of permitting the use of video teleconferencing outweigh the disadvantages.

This item is on the agenda for initial discussion at the April meeting in Washington, D.C.

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Anthony J. Battaglia
United States Magistrate Judge

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MEMORANDUM

TO: Hon. Richard Tallman

FROM: Hon. Anthony J. Battaglia

RE: Proposed Amendment to Rule 7(Video Waiver of Indictment)

DATE: December 3, 2007

Thank you for agreeing to place the issue of a proposed amendment to Rule 7 on the April 2008 agenda. I would propose that we amend Rule 7 to allow the taking of a waiver of indictment by video conference.

In 2002, amendments were made to allow the use of video for initial appearances (Rule 5) and arraignments (Rule 10). Each requires a defendant's consent to proceed in that fashion[2]. In the notes to the 2002 amendments for Rule 5, the Committee took into account the high volume of criminal proceedings in some districts and the potential delays in others where travel time from one location to another (either by the judge or the participants) was required. The benefit of conducting a video teleconference proceeding was seen as a way to eliminate lengthy and sometimes expensive travel or delay, and provided the option for a court to utilize video teleconferencing with the defendant's consent. Rule 7 was not amended to include a video option with these other preliminary proceedings at that time. Like the pre-2002 version of Rule 10, a waiver of indictment under Rule 7(b) still must proceed in "open court."

The same problems confronting courts with initial appearances and arraignments exist with the waiver of indictment procedure. While many courts take the waiver of indictment concurrently with the taking of a guilty plea, the practice in many other courts is for a judge, and most often a magistrate judge, to take the waiver of indictment at some point in the preliminary proceedings in the case and set the matter for a later plea hearing. This happens to be the practice in the Southern District of California. The waiver of indictment itself is a fairly brief proceeding. As judges all know, the defendant is advised

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[2] Rule 10 also limits video arraignments to situations where the defendant will plead not guilty, preserving the in court requirement for guilty pleas under Rule 11.

of his right to be prosecuted in a felony case through the issuance of an indictment, and the fact that by waiving indictment, the predicate grand jury review is eliminated. It takes several minutes, at best.

The Southern District of California is not unique. Districts with a high volume of criminal cases, geographically large districts, and districts with limited numbers of judges utilize the waiver of indictment device. Using waivers of indictment relieves the strain on overburdened grand juries[3] and is usually coupled with a plea bargain leading to an early disposition. The waiver of indictment is typically tendered at a preliminary hearing (Rule 5.1) before a magistrate judge.

It would seem logical and consistent with Rule 10, to have a video option for the Rule 7 waiver. As long as the video appearance occurs with the defendant's consent, it should be given the same sanctity as a video conferenced initial appearance or arraignment.

I took the liberty of surveying the magistrate judges in the United States, by e:mail[4], in this regard. I posed two questions:

1. Would these judges favor such an amendment?

2. Where any courts using video for initial appearances and/or arraignments with the defendant's consent under the 2002 amendments?

The survey request drew sixty nine responses, fifty nine written, ten verbal. Sixty four supported such an amendment. Only five opposed. Those five indicated they would not use video even for the initial appearance or arraignment despite the fact that it is authorized.

Interestingly, eight districts responded that they do use video hearings under the 2002 rules. Seven, regularly for initial appearance and arraignment, along with detention hearings, and OSCs on supervised release violations. These courts were the Eastern District of Texas, Northern District of Iowa, Southern District of Florida, Northern District of New York, District of North Dakota, District of Vermont, and the Eastern District of Washington. The District of Montana indicates that it has used video, but only rarely. The judges in these districts would welcome the proposed amendment.

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[3] A waiver of indictment within thirty days of the date of arrest satisfies the initial requirement of establishing probable cause under the speedy Trial Act, 18 U.S.C. § 3161(b).

[4] The survey responses are available for review.

I think the survey establishes two things. First that magistrate judges who are engaged in taking the waiver of indictments on a regular basis favor a video option. Secondly, a growing number of districts are utilizing video appearances in preliminary proceedings to reduce delay and expense and logistical problems. Adding the ability to take the waiver of indictment by video will enhance this practice for them, and would open up overall case management options for others.

By way of practical example, you can have a scenario where a defendant in a remote location has agreed to waive indictment and will need to be arraigned for purposes of a not guilty plea on an information. Under the current rules, the defendant would have to be transported to the location where the judge is sitting (or a judge would have to travel to the defendants locale) for the waiver of indictment portion of the process. The defendant could have been arraigned by video for purposes of a not guilty plea without any transport. Providing the option for the video waiver of indictment would have allowed this hypothetical defendant to attend to both matters in the case without delay or transit to the location where the judge sits or vice versa.

I submit this would be a useful amendment to avoid such circumstances and would be consistent with the premises associated with the 2002 amendments, the elimination of lengthy and sometimes expensive travel or delay for courts and parties.

The amendment language could be borrowed from Rule 10 as follows:

> Rule 7. The Indictment and the Information
>
> * * *
>
> (b) An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant - in open court and after being advised of the nature of the charge and of the defendant's rights - waives prosecution by indictment. Video teleconferencing may be used to take the waiver of indictment if the defendant consents.

I would propose that the Committee note could be as follows:

Note

In 2002 amendments allowing the use of video teleconferencing for initial appearances (Rule 5) and arraignment (Rule 10) were made. These recognized the growing use of video conferencing for preliminary appearances in criminal cases in the state court and the need to provide for this practice to eliminate delay and unnecessary travel for courts and parties in federal courts. The 2002 amendments did not address Rule 7, the waiver of indictment. A waiver of indictment is often part and parcel of

proceedings at initial appearances or arraignment. It seems only logical to allow the defendant, with consent, to waive indictment at the same time they are being arraigned for purposes of a not guilty plea by a video conference. Without this change, a situation might arise where a defendant wishing to be arraigned on an information by video conference would have to be delayed until transportation to the court could occur so that the concurrent waiver of indictment could proceed under the current requirements of Rule 7. Delay in this situation could implicate Speedy Trial Act concerns of 18 U.S.C. § 3161 (b).

Excerpt from Committee Note, 2002 Amendments to Rule 5, Initial Appearance

* * * * *

Read together, Rules 10 and 43 require the defendant to be physically present in court for the arraignment. *See, e.g., Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990) (Rules 10 and 43 are broader in protection than the Constitution). The amendments to Rule 10 create two exceptions to that requirement. The first provides that the court may hold an arraignment in the defendant's absence when the defendant has waived the right to be present in writing and the court consents to that waiver. The second permits the court to hold arraignments by video teleconferencing when the defendant is at a different location. A conforming amendment has also been made to Rule 43.

In amending Rule 10 and Rule 43, the Committee was concerned that permitting a defendant to be absent from the arraignment could be viewed as an erosion of an important element of the judicial process. First, it may be important for a defendant to see and experience first-hand the formal impact of the reading of the charge. Second, it may be necessary for the court to personally see and speak with the defendant at the arraignment, especially when there is a real question whether the defendant actually understands the gravity of the proceedings. And third, there may be difficulties in providing the defendant with effective and confidential assistance of counsel if counsel, but not the defendant, appears at the arraignment.

The Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment in the defendant's absence. The question of when it would be appropriate for a defendant to waive an appearance is not spelled out in the rule. That is left to the defendant and the court in each case.

A critical element to the amendment is that no matter how convenient or cost effective a defendant's absence might be, the defendant's right to be present in court stands unless he or she waives that right in writing. Under the amendment, both the defendant and the defendant's attorney must sign the waiver. Further, the amendment requires that the waiver specifically state that the defendant has received a copy of the charging instrument.

If the trial court has reason to believe that in a particular case the defendant should not be permitted to waive the right, the court may reject the waiver and require that the defendant actually appear in court. That might be particularly appropriate when the court wishes to discuss substantive or procedural matters in conjunction with the arraignment and the court believes that the defendant's presence is important in resolving those matters. It might also be appropriate to reject a requested waiver where an attorney for the government presents reasons for requiring the defendant to appear personally.

The amendment does not permit waiver of an appearance when the defendant is charged with a felony information. In that instance, the defendant is required by Rule 7(b) to be present in court to waive the indictment. Nor does the amendment permit a waiver of appearance when the defendant is standing mute (see Rule 11(a)(4)), or entering a conditional plea (see Rule 11(a)(2)), a nolo contendere plea (see Rule 11(a)(3)), or a guilty plea (see Rule 11(a)(1)). In each of those instances the Committee believed that it was more appropriate for the defendant to appear personally before the court.

It is important to note that the amendment does not permit the defendant to waive the arraignment itself, which may be a triggering mechanism for other rules.

The major substantive change is in new Rule 5(f), which permits video teleconferencing for an appearance under this rule if the defendant consents. This change reflects the growing practice among state courts to use video teleconferencing to conduct initial proceedings. A similar amendment has been made to Rule 10 concerning arraignments.

In amending Rules 5, 10, and 43 (which generally requires the defendant's presence at all proceedings), the Committee carefully considered the argument that permitting a defendant to appear by video teleconferencing might be considered an erosion of an important element of the judicial process. Much can be lost when video teleconferencing occurs. First, the setting itself may not promote the public's confidence in the integrity and solemnity of a federal criminal proceeding; that is the view of some who have witnessed the use of such proceedings in some state jurisdictions. While it is difficult to quantify the intangible benefits and impact of requiring a defendant to be brought before a federal judicial officer in a federal courtroom, the Committee realizes that something is lost when a defendant is not required to make a personal appearance. A related consideration is that the defendant may be located in a room that bears no resemblance whatsoever to a judicial forum and the equipment may be inadequate for high-quality transmissions. Second, using video teleconferencing can interfere with counsel's ability to meet personally with his or her client at what, at least in that jurisdiction, might be an important appearance before a magistrate judge. Third, the defendant may miss an opportunity to meet with family or friends, and others who might be able to assist the defendant, especially in any attempts to obtain bail. Finally, the magistrate judge may miss an opportunity to accurately assess the physical, emotional, and mental condition of a defendant--a factor that may weigh on pretrial decisions, such as release from detention.

On the other hand, the Committee considered that in some jurisdictions, the court systems face a high volume of criminal proceedings. In other jurisdictions, counsel may not be appointed until after the initial appearance and thus there is no real problem with a defendant being able to consult with counsel before or during that proceeding. The Committee was also persuaded to adopt the amendment because in some jurisdictions delays may occur in travel time from one location to another--in some cases requiring either the magistrate judge or the participants to travel long distances. In those instances, it is not unusual for a defense counsel to recognize the benefit of conducting a video

teleconferenced proceeding, which will eliminate lengthy and sometimes expensive travel or permit the initial appearance to be conducted much sooner. Finally, the Committee was aware that in some jurisdictions, courtrooms now contain high quality technology for conducting such procedures, and that some courts are already using video teleconferencing--with the consent of the parties.

The Committee believed that, on balance and in appropriate circumstances, the court and the defendant should have the option of using video teleconferencing, as long as the defendant consents to that procedure. The question of when it would be appropriate for a defendant to consent is not spelled out in the rule. That is left to the defendant and the court in each case. Although the rule does not specify any particular technical requirements regarding the system to be used, if the equipment or technology is deficient, the public may lose confidence in the integrity and dignity of the proceedings.

The amendment does not require a court to adopt or use video teleconferencing. In deciding whether to use such procedures, a court may wish to consider establishing clearly articulated standards and procedures. For example, the court would normally want to insure that the location used for televising the video teleconferencing is conducive to the solemnity of a federal criminal proceeding. That might require additional coordination, for example, with the detention facility to insure that the room, furniture, and furnishings reflect the dignity associated with a federal courtroom. Provision should also be made to insure that the judge, or a surrogate, is in a position to carefully assess the defendant's condition. And the court should also consider establishing procedures for insuring that counsel and the defendant (and even the defendant's immediate family) are provided an ample opportunity to confer in private.

Excerpt from Committee Note, 2002 Amendments to Rule 10, Arraignment

* * * * *

Rule 10(c) addresses the second substantive change in the rule. That provision permits the court to conduct arraignments through video teleconferencing, if the defendant waives the right to be arraigned in court. Although the practice is now used in state courts and in some federal courts, Rules 10 and 43 have generally prevented federal courts from using that method for arraignments in criminal cases. See, e.g., Valenzuela-Gonzales v. United States, supra (Rules 10 and 43 mandate physical presence of defendant at arraignment and that arraignment take place in open court). A similar amendment was proposed by the Committee in 1993 and published for public comment. The amendment was later withdrawn from consideration in order to consider the results of several planned pilot programs. Upon further consideration, the Committee believed that the benefits of using video teleconferencing outweighed the costs of doing so. This amendment also parallels an amendment in Rule 5(f) that would permit initial appearances to be conducted by video teleconferencing.

In amending Rules 5, 10, and 43 (which generally requires the defendant's presence at all proceedings), the Committee carefully considered the argument that permitting a defendant to appear by video teleconferencing might be considered an erosion of an important element of the judicial process. Much can be lost when video teleconferencing occurs. First, the setting itself may not promote the public's confidence in the integrity and solemnity of a federal criminal proceeding; that is the view of some who have witnessed the use of such proceedings in some state jurisdictions. While it is difficult to quantify the intangible benefits and impact of requiring a defendant to be brought before a federal judicial officer in a federal courtroom, the Committee realizes that something is lost when a defendant is not required to make a personal appearance. A related consideration is that the defendant may be located in a room that bears no resemblance whatsoever to a judicial forum and the equipment may be inadequate for high-quality transmissions. Second, using video teleconferencing can interfere with counsel's ability to meet personally with his or her client at what, at least in that jurisdiction, might be an important appearance before a magistrate judge. Third, the defendant may miss an opportunity to meet with family or friends, and others who might be able to assist the defendant, especially in any attempts to obtain bail. Finally, the magistrate judge may miss an opportunity to accurately assess the physical, emotional, and mental condition of a defendant--a factor that may weigh on pretrial decisions, such as release from detention.

On the other hand, the Committee considered that in some jurisdictions, the courts face a high volume of criminal proceedings. The Committee was also persuaded to adopt the amendment because in some jurisdictions delays may occur in travel time from one location to another--in some cases requiring either the magistrate judge or the participants to travel long distances. In those instances, it is not unusual for a defense counsel to recognize the benefit of conducting a video teleconferenced proceeding, which will eliminate lengthy and sometimes expensive travel or permit the arraignment to be conducted much sooner. Finally, the Committee was aware that in some jurisdictions, courtrooms now contain high quality technology for conducting such procedures, and that some courts are already using video teleconferencing--with the consent of the parties.

The Committee believed that, on balance and in appropriate circumstances, the court and the defendant should have the option of using video teleconferencing for arraignments, as long as the defendant consents to that procedure. The question of when it would be appropriate for a defendant to consent is not spelled out in the rule. That is left to the defendant and the court in each case. Although the rule does not specify any particular technical requirements regarding the system to be used, if the equipment or technology is deficient, the public may lose confidence in the integrity and dignity of the proceedings.

The amendment does not require a court to adopt or use video teleconferencing. In deciding whether to use such procedures, a court may wish to consider establishing clearly articulated standards and procedures. For example, the court would normally want to insure that the location used for televising the video teleconferencing is conducive to

the solemnity of a federal criminal proceeding. That might require additional coordination, for example, with the detention facility to insure that the room, furniture, and furnishings reflect the dignity associated with a federal courtroom. Provision should also be made to insure that the judge, or a surrogate, is in a position to carefully assess the condition of the defendant. And the court should also consider establishing procedures for insuring that counsel and the defendant (and even the defendant's immediate family) are provided an ample opportunity to confer in private.

Although the rule requires the defendant to waive a personal appearance for an arraignment, the rule does not require that the waiver for video teleconferencing be in writing. Nor does it require that the defendant waive that appearance in person, in open court. It would normally be sufficient for the defendant to waive an appearance while participating through a video teleconference.

The amendment leaves to the courts the decision first, whether to permit video arraignments, and second, the procedures to be used. The Committee was satisfied that the technology has progressed to the point that video teleconferencing can address the concerns raised in the past about the ability of the court and the defendant to see each other and for the defendant and counsel to be in contact with each other, either at the same location or by a secure remote connection.

V.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Limiting Disclosure About Plea Agreements and Cooperating Defendants**

DATE: **April 1, 2008**

At the October meeting of the Criminal Rules Committee, there was discussion of problems that have arisen in connection with internet access to plea agreements that contain information about cooperating defendants.

The Committee on Court Administration and Case Management has continued to pursue this issue. The attached memorandum from James Duff describes CACM's decision not to recommend the adoption of a national policy at this time, but instead to allow the courts to develop their own procedures.

This is on the agenda as an information item for the April meeting in Washington.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

March 20, 2008

MEMORANDUM

To: Chief Judges, United States Courts of Appeals
Judges, United States District Courts
United States Magistrate Judges

From: James C. Duff

RE: PUBLIC INTERNET ACCESS TO PLEA AGREEMENTS
(ACTION REQUESTED)

For the past year, the Judicial Conference Committee on Court Administration and Case Management (CACM), in conjunction with the Committee on Criminal Law, has been considering the implications of websites such as www.whosarat.com, whose purpose is to identify undercover officers, informants, and defendants who provide information to law enforcement. A small number of the posted documents on this website are from federal criminal case files, some of which were scanned from clerks' offices' paper copies, while others were electronic documents retrieved from the Judiciary's Public Access to Court Electronic Records (PACER) system.

In November 2006, the chairs of the CACM and Criminal Law Committees sent a memorandum to all district court judges, requesting that they "consider sealing documents or hearing transcripts in accordance with applicable law in cases that involve sensitive information or in cases in which incorrect inferences may be made." The two chairs also wrote a letter to the Department of Justice, asking for its comment on the Conference's privacy policy as it pertains to Internet access to criminal case files. In December 2006, the Department provided its response, requesting changes to the policy. Among other things, it suggested a uniform policy of eliminating public Internet access through PACER to all plea agreements.

After reviewing the Department's comments, the CACM Committee decided to solicit public comment on the suggestion to remove plea agreements from PACER. A request for public comment was published in the *Federal Register* in September 2007 and

sent to all courts, as well as to other interested groups.[1] The comment period was open for six weeks, and during that time 68 comments were submitted.[2] While some comments came from within the Judiciary, many more were from private citizens and attorneys. The comments, by a margin of four-to-one, overwhelmingly favored retaining public Internet access to plea agreements.

At its meeting in December 2007, the Committee discussed the proposal and the public comments received. The Committee noted, as a preliminary point, that there was no evidence that anyone had been harmed as a result of the disclosure of information from a federal court case file. It also reasoned that the Department of Justice proposal would be an inadequate solution to the perceived problem, in that it would prohibit public Internet access to all plea agreements, most of which do not disclose cooperation, while simultaneously leaving all plea agreements (including those that contain cooperation information) available to the public in clerks' offices. Additionally, the Committee noted that several districts have developed solutions that work locally but – given the variations in circuit case law – would not be appropriate as national policy. For these reasons, the Committee declined to endorse the Department of Justice proposal.

Therefore, instead of recommending that the Conference adopt a national policy, the Committee is asking each court to consider adopting a local policy that protects information about cooperation in law enforcement activities but that also recognizes the need to preserve legitimate public access to court files.[3]

To this end, your court might want to consider the following suggestions received by the Committee during the public comment period:

- Ask the parties to convey cooperation information to the judge in a document other than the plea agreement, which could be held outside of the clerk's office's case file. For example, this process could include a government exhibit at the plea hearing (returned to counsel at the end of the hearing), as a letter in the judge's chambers file or in the probation officer's

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[1] To ensure that the appropriate persons were aware of the comment period, the request was posted on www.uscourts.gov, mailed to public interest organizations involved in privacy issues, and e-mailed to every district judge, magistrate judge, clerk of court, and appellate court chief judge.

[2] The comments are posted at http://www.privacy.uscourts.gov/2007comments.htm

[3] The Committee emphasized that many of the comments received expressed appreciation for the high levels of electronic access the Judiciary provides to its case files, and how such access has strengthened their understanding of and appreciation for the judicial process.

file. The cooperation document could be filed and included in the clerk's office file at a time when the fact of cooperation is no longer a sensitive matter in the case or never filed.

- Seal plea agreements, consistent with circuit case law – keeping in mind that having a sealed entry on the docket sheet near the plea agreement may indicate cooperation.

- Enter a court order restricting Internet access to the plea agreement to the parties on a case-by-case basis.

- Order the parties to perform additional redaction, under Fed. R. Crim. 49.1(e)(1) to remove information regarding cooperation from the publicly available version of the plea agreement, with the unredacted plea agreement being filed under seal.

- Restructure the court's practices to make each case appear identically on PACER. For example, in the District of North Dakota, this was accomplished by filing all plea agreements as public [unsealed] documents, sanitized by the drafter of any references to cooperation. All pleas are accompanied by a sealed document, "plea supplement." The sealed plea supplement contains either a cooperation agreement or a statement that no agreement exists. To the public, every plea in that court will be displayed in identical form: a plea agreement devoid of any cooperation language and a sealed plea supplement.

- Delay the publication of any plea agreement that includes cooperation information, perhaps until after sentencing.

For more information on these suggestions, please contact Susan Del Monte of the Court Administration Policy Staff at (202) 502-1560 or via email at *Susan Del Monte/DCA/AO/USCOURTS*, who, as a member of the staff to the CACM Committee, will be gathering local court policies and information about how courts are handling the issue. The CACM Committee plans to monitor the development of local court policies and may revisit this issue in the future to determine if there is a need for a national policy.

cc: Federal Public/Community Defenders
District Court Executives
Clerks, United States District Courts
Chief Probation Officers
Chief Pretrial Services Officers

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Issues Arising Under Rule 49.1**

DATE: **April 1, 2008**

As noted in the attached e-mail, the Administrative Office is receiving a variety of queries from clerks of courts that arise from the implementation of our E-Government privacy rule, Rule 49.1.

This is an information item on the agenda for the April meeting in Washington.

>>> <John_Rabiej@ao.uscourts.gov> 3/14/2008 1:52 PM >>>

Judge Tallman and Professor Beale:

The AO continues to receive questions from the clerks of court on the implementation of the E-Government privacy rules, e.g., Rule 49.1. The most recent questions come from clerks who ask why complaints may contain personal identifiers, including names of minors who are crime victims, while all subsequent papers filed in the court must exclude such information. Why go through the work of redacting such information in all papers, if the information can be found in the complaint? We get the same kind of questions with arrest and search warrants. At one time, the Department was thinking about agreeing to redact personal identifiers from either the arrest or search warrant once the warrant was executed. I do not know the status of their thinking at this time.

I do not believe anything is necessary now, but I will keep you posted of developments.

Thanks.

John

JAMES C. DUFF
Director

JILL C. SAYENGA
Deputy Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee
Support Office

Office of Judges Programs

April 3, 2008

MEMORANDUM TO ADVISORY COMMITTEE ON CRIMINAL RULES

SUBJECT: *Agenda Item on Draft Revisions of Civil and Criminal AO Forms*

Last year, the Forms Working Group of judges, clerks, and AO staff reviewed all the AO forms for compliance with the new federal privacy rules. It is now rewriting them in simple, modern English in light of the restyling of the Federal Rules of Civil Procedure that took effect last December and the earlier restyling of the Federal Rules of Criminal Procedure. Joe Spaniol, Style Consultant for the Standing Committee, has been advising the Working Group on this project.

The first batch of 33 draft restyled civil and criminal AO forms is included here and has been posted for comment as an exposure draft on the Judiciary's intranet, at http://jnet.ao.dcn/Memos/Drafts_for_Comment/Current/Restyled_Forms_Batch1.html . Any views of the committee and its members will be conveyed to the Working Group, which will meet this July to consider all comments received.

AO-0085	Notice, Consent, and Reference of a Civil Case to a Magistrate Judge [cf. Civil Rules Forms 80, 81, and 82]
AO-0085A	Notice and Consent to a Magistrate Judge's Consideration of a Dispositive Motion [cf. Civil Rules Forms 80, 81, and 82]
AO-0088	Subpoena to Appear and Testify at a Hearing or Trial in a Civil Action
AO-0088A	Subpoena to Testify at a Deposition in a Civil Case or Permit the Inspection of Property [proposed new form]
AO-0089	Subpoena to Testify in a Criminal Case
AO-0090	Subpoena to Testify at a Deposition in a Criminal Case
AO-0091	Criminal Complaint
AO-0093	Warrant for a Search and Seizure
AO-0093A	Warrant for a Search and Seizure on Oral Testimony
AO-0106	Application for a Search Warrant
AO-0108	Application for a Warrant to Seize Property Subject to Forfeiture
AO-0110	Subpoena to Testify Before a Grand Jury

AO-0115	Petition for a Change in Name by an Applicant for Citizenship
AO-0156	Jury Verdict
AO-0190	Record of the Number of Grand Jurors Concurring in an Indictment
AO-0191	Report of a Grand Jury's Failure to Concur in an Indictment
AO-0240A	Order to Proceed Without Prepaying Fees or Costs
AO-0245A	Judgment of Acquittal in a Criminal Case
AO-0249	Drug Offender's Reinstatement of Federal Benefits
AO-0398	Notice of a Lawsuit and Request to Waive Service of a Summons [cf. Civil Rules Form 5]
AO-0399	Waiver of the Service of Summons [cf. Civil Rules Form 6]
AO-0440	Summons in a Civil Action
AO-0441	Summons on a Third-Party Complaint
AO-0442	Arrest Warrant
AO-0443	Warrant for Arrest of a Witness in a Criminal Case
AO-0450	Judgment in a Civil Case [cf. Civil Rules Forms 70 and 71]
AO-0455	Waiver of an Indictment
AO-0456	Notice of a Trial or Hearing
AO-0458	Appearance of Counsel
AO-0466B	Election to Have a Preliminary Hearing Held in the Charging District and to Waive the Time Requirement
AO-0467	Order Requiring a Defendant to Appear in the District Where Charges are Pending and Transferring Bail
AO-0468	Waiver of Preliminary Hearing
AO-0470	Order Scheduling a Detention Hearing

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____	)	
Plaintiff	)	
v.	)	Civil Action No.
_____	)	
Defendant	)	

Notice, Consent, and Reference of a Civil Case to a Magistrate Judge

Notice of a magistrate judge's availability. A United States magistrate judge of this court is available to conduct all proceedings in this civil case (including a jury or nonjury trial) and to order the entry of a final judgment. The judgment may then be appealed directly to the United States court of appeals like any other judgment of this court. A magistrate judge may exercise this authority only if all parties voluntarily consent.

You may consent to have your case referred to a magistrate judge, or you may withhold your consent without negative consequences. The name of any party withholding consent will not be revealed to any judge who may otherwise be involved with your case.

Consent to a magistrate judge's authority. The parties consent to have a United States magistrate judge conduct all proceedings in this case including trial, the entry of final judgment, and all post-trial proceedings.

Parties' printed names	*Signatures of parties or attorneys*	*Dates*
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Reference Order

It is ordered that this case is referred to United States Magistrate Judge _____ _____ to conduct all proceedings and order the entry of a final judgment in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73.

Date: _____

_____
District judge's signature

_____
Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____	)	
Plaintiff	)	
v.	)	Case No.
_____	)	
Defendant	)	

Notice and Consent to a Magistrate Judge's Consideration of a Dispositive Motion

Notice of a magistrate judge's availability. A United States magistrate judge of this court is available to conduct all proceedings and enter a final order dispositive of each motion. A magistrate judge may exercise this authority only if all parties voluntarily consent.

You may consent to have your motions referred to a magistrate judge, or you may withhold your consent without negative consequences. The name of any party withholding consent will not be revealed to any judge who may otherwise be involved with your case.

Consent to a magistrate judge's consideration of a dispositive motion. The parties consent to have a United States magistrate judge conduct any and all proceedings and enter a final order as to each motion identified below *(identify each motion by document number and title)*.

MOTION(S): _____

_____

Parties' printed names	*Signatures of parties or attorneys*	*Dates*
_____	_____	_____
_____	_____	_____
_____	_____	_____

Reference Order

It is ordered that the motion(s) are referred to United States Magistrate Judge _____ to conduct all proceedings and enter a final order on the motions identified above in accordance with 28 U.S.C. § 636(c).

Date: _____

_____
District judge's signature

_____
Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____ Plaintiff	)	
v.	)	Civil Action No.
_____ Defendant	)	

Subpoena to Appear and Testify at a Hearing or Trial in a Civil Action

To: _____

You are commanded to appear in the United States district court at the time, date, and place identified below to testify at a hearing or trial in this civil action. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place:	Courtroom No.:
	Date and Time:

You must also bring with you the following documents or objects *(blank if not applicable)*:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Fed. R. Civ. P. 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: _____

_____
Name of clerk of court

_____
Deputy clerk's signature

This subpoena has been issued on application of an attorney, whose name, address, e-mail, and telephone number are:

_____

Proof of Service

This subpoena was received by me on *(date)* _____ and was:

❒ personally served by me on this witness _____ at *(place)* _____ on _____ ; or

❒ on *(date)* _____ left at the witness's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there; and a and a copy was mailed to the witness's last known address; or

❒ returned unexecuted.

My fees are $ _____ for travel and $ _____ for services, for a total of $ _____ .
I have tendered to the witness the statutory fees and mileage in the amount of $ _____ .

I declare under penalty of perjury that this information is true.

Date: _____ _____
Server's signature

_____
Server's address

Additional information:

FEDERAL RULE OF CIVIL PROCEDURE 45 (C), (D), AND (E)

(c) Protecting a Person Subject to a Subpoena.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____ Plaintiff	)	
v.	)	Civil Action No.
_____ Defendant	)	(If the action is pending in another district, state where: _____ District of _____)

Subpoena to Testify at a Deposition in a Civil Case or Permit the Inspection of Property

To: _____

You are commanded to appear at the time, date, and place shown below to testify at a deposition to be taken in this civil action. If you are an organization that is not a party to this action, you may send officers, directors, managing agents, or others who are qualified to testify about each of the following matters, or those set out in an attached document, and who agree to do so:

Place:	Date and Time:

You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection and copying *(blank if not applicable)*:

If you are the owner or legal occupant of the following described property, you must permit an inspection of it on *(date)* _____ at this hour: _____ . The property's description and location are:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: _____

_____
Issuing officer's signature

_____
Printed name and title

Proof of Service

This subpoena was received by me on *(date)* _____ and was:

❒ personally served by me on this witness _____ at *(place)* _____ on *(date)* _____ ;or

❒ on *(date)* _____ left at the witness's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there; and and a copy was mailed to the witness's last known address; or

❒ returned unexecuted.

My fees are $ _____ for travel and $ _____ for services, for a total of $ _____ .
I have tendered to the witness the statutory fees and mileage in the amount of $ _____ .

I declare under penalty of perjury that this information is true.

Date: _____ _____
Server's signature

_____
Server's address

FEDERAL RULE OF CIVIL PROCEDURE 45 (C), (D), AND (E)

(c) Protecting a Person Subject to a Subpoena.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America)
v.)
) Case No.
_____)
Defendant)

Subpoena to Testify in a Criminal Case

To:

You are commanded to appear in the United States district court at the time, date, and place shown below to testify in this criminal case. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place of Appearance:	Courtroom No.:
	Date and Time:

You must also bring with you the following documents or objects *(blank if not applicable)*:

Date: _____

_____
Name of clerk of court

_____
Deputy clerk's signature

This subpoena has been issued on application of an attorney, whose name, address, e-mail, and telephone number are:

Proof of Service

This subpoena was received by me on *(date)* _____ and was:

❒ personally served by me on this witness _____ in *(city and state)* _____ on *(date)* _____ ; or

❒ on *(date)* _____ left at the witness's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, and a copy was mailed to the witness's last known address; or

❒ returned unexecuted.

My fees are $ _____ for travel and $ _____ for services, for a total of $ _____ .
I have tendered to the witness the statutory fees and mileage in the amount of $ _____ .

I declare under penalty of perjury that this information is true.

Date: _____ _____
Server's signature

_____
Server's address

Additional Information:

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America)
v.)
) Case No.
_____)
Defendant)

Subpoena to Testify at a Deposition in a Criminal Case

To: _____

You are commanded to appear at the time, date, and place set out below to testify at a deposition in a criminal case. If you are an organization that is *not* a party in this case, you may send an officer, director, managing agent, or other person who is qualified and agrees to testify about the following matters, or those set out in an attachment:

Place:	Courtroom No.:
	Date and Time:

You must also bring with you to this deposition the following documents or objects *(blank if not applicable)*:

Date: _____

_____
Issuing officer's signature

_____
Printed name and title

This subpoena has been issued on application of an attorney whose name, address, e-mail and telephone number are:

_____

Proof of Service

This summons was received by me on *(date)* _____ and was:

❒ personally served by me on this witness _____ in *(city and state)* _____ on *(date)* _____ ; or

❒ on *(date)* _____ left at the witness's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, and a copy was mailed to the witness's last known address; or

❒ returned unexecuted.

My fees are $ _____ for travel and $ _____ for services, for a total of $ _____

I have tendered to the witness the statutory fees and mileage in the amount of $ _____ .

I declare under penalty of perjury that this information is true.

Date returned: _____ _____

Server's signature

_____

Printed name and title

Additional Information:

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America)
v.)
) Case No.
)
_____)
Defendant

Criminal Complaint

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date of _____ in the county of _____ in the _____ District of _____ , the defendant violated ____ U. S. C. § _____ , an offense described as follows:

This criminal complaint is based on these facts:

❒ Continued on the attached sheet.

_____
Complainant's signature

_____
Printed name and title

Sworn to before me and signed in my presence.

Date: _____

_____
Judge's signature

City and state: _____

_____
Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

In the Matter of the Search of *(Briefly describe the property to be searched or identify the person by name and address)*	))))))	Case No.

Warrant for a Search and Seizure

To: The United States marshal or any authorized United States law-enforcement officer

I have received an affidavit, or have recorded oral testimony, from *(name the officer)* _____ _____ , who has reason to believe that a certain person or specified personal property is concealed in the _____ District of _____ at this location:

The person or personal property believed to be concealed is *(name the person or describe the property)*:

I am satisfied that the affidavit, or any recorded testimony, establishes probable cause to believe that the person named or the property described is concealed at this location and establishes grounds to issue the warrant.

You are commanded to search, on or before *(date)* _____ *(not to exceed 10 days)*, the person or property named above, and arrest the person named or seize the property described. You must conduct the search between the hours of 6:00 a.m. and 10:00 p.m. unless a search at any time during the day or night is authorized below.

If this paragraph is initialed by me, you may conduct the search at any time during the day or night _____ .
Judge's initials

You must also prepare an inventory of any property seized, leave the original warrant and the inventory at the place of seizure, and return this warrant and the inventory to United States Magistrate Judge _____ .

Date: _____

_____
Judge's signature

Time issued: _____

_____
Printed name and title

City and state: _____

Return		
Date warrant received:	Date and time warrant executed:	Copy of warrant and inventory left with:
Inventory made in the presence of :		
Inventory of the property taken and name of any person arrested:		

Certification

I declare under penalty of perjury that this inventory is correct.

_____
Signature of officer executing warrant

_____
Printed name and title

Sworn to and signed before me on this date.

Date: _____

_____
Judge's signature

_____
Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

In the Matter of the Search of *(Briefly describe the property to be searched or identify the person by name and address)*	)	Case No.

Warrant for a Search and Seizure on Oral Testimony

To: The United States marshal or any authorized United States law-enforcement officer

I have received, and recorded electronically or by hand-writing, sworn testimony communicated to me by *(name the officer)* _____, who has reason to believe that a certain person or specified personal property is concealed in the _____ District of _____ at this location:

The person or personal property believed to be concealed is *(name the person or describe the property)*:

I am satisfied that circumstances make it reasonable to dispense with a written affidavit and that the oral testimony establishes probable cause to believe that the person named, or the property described, is concealed at this location and establishes grounds to issue the warrant.

You are commanded to search, on or before *(date)* _____ *(not to exceed 10 days)*, the person or property named above, and arrest the person named or seize the property described. You must conduct the search between the hours of 6:00 a.m. and 10:00 p.m. unless a search at any time during the day or night is authorized below.

If this paragraph is initialed by me, you may conduct the search at any time during the day or night _____.
Judge's initials

You must also prepare an inventory of any property seized, leave the original warrant and the inventory at the place of seizure, and return this warrant and the inventory to United States Magistrate Judge _____.

Date: _____

_____
Judge's signature

Time issued: _____

City and state: _____

_____
Printed name and title

Return

Date warrant received:	Date and time warrant executed:	Copy of warrant and inventory left with:

Inventory made in the presence of :

Inventory of the property taken and name of any person arrested:

Certification

I declare under penalty of perjury that this inventory is correct.

Signature of officer executing warrant.

Printed name and title

Sworn to and signed before me on this date.

Date _____

Judge's signature

Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

In the Matter of the Search of *(Briefly describe the property to be searched or identify the person by name and address)*	)))))))	Case No.

Application for a Search Warrant

I, a federal law-enforcement officer or an attorney for the government, state under penalty of perjury that I have reason to believe that there is now concealed at the following location a person who is subject to search or arrest, or property that is subject to search *(name the person and the address or location of the property to be searched)*:

The search is related to a violation of ____ U. S. C. § _____ , briefly described as follows:

The basis for the search under Fed. R. Crim. P. 41(c) is:

- ❒ evidence of a crime;
- ❒ contraband, fruits of crime, or other items illegally possessed;
- ❒ property designed for use, intended for use, or used in committing a crime;
- ❒ a person to be arrested or a person who is unlawfully restrained.

The person to be arrested or the property to be seized is *(name or describe the person to be arrested, or describe the property to be searched)*:

This application is based on these facts:

❒ Continued on the attached sheet.

_____
Affiant's signature

_____
Printed name and title

Sworn to before me and signed in my presence.

Date: _____ _____
Judge's signature

City and state: _____ _____
Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

In the Matter of the Seizure of *(Briefly describe the property to be seized)*	))))))	Case No.

Application for a Warrant to Seize Property Subject to Forfeiture

I, a federal law-enforcement officer and the affiant in this case, state under penalty of perjury that because of a violation of ____ U.S.C. § _____, I have reason to believe that the following property is subject to forfeiture to the United States of America *(describe the property)*:

This application is based on these facts:

❒ Continued on the attached sheet.

_____
Affiant's signature

_____
Printed name and title

Sworn to before me and signed in my presence.

Date: _____

_____
Judge's signature

City and State: _____

_____
Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

Subpoena to Testify Before a Grand Jury

To: _____

You are commanded to appear in this United States district court at the time, date, and place shown below to testify before the court's grand jury. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place:	Courtroom No.:
	Date and Time:

You must also bring with you the following documents or objects *(blank if not applicable)*:

Date: _____

_____
Name of clerk of court

By: _____
Deputy clerk's signature

This subpoena has been issued on application of the United States attorney, or an assistant United States attorney, whose name, address, e-mail, and telephone number are:

Proof of Service

This subpoena was received by me on *(date)* _____ and was:

❒ personally served by me on this witness _____ at *(place)* _____ on *(date)* _____ ; or

❒ on *(date)* _____ left at the witness's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, and a copy was mailed to the witness's last known address; or

❒ returned unexecuted.

My fees are $ _____ for travel and $ _____ for services, for a total of $ _____

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Server's address

Additional Information:

UNITED STATES DISTRICT COURT

for the

_____ District of _____

Petition for a Change in Name by an Applicant for Citizenship

Instructions to the Applicant for Citizenship:

The Immigration and Nationality Act authorizes a United States district court to change the name of an applicant for citizenship at the same time that the court administers the oath of allegiance. The naturalization certificate will then show your new name. If you wish to change your name at the time of the naturalization ceremony, provide the following information:

(1) My full name now is: _____.

(2) My place of residence is: _____.

(3) My country of birth is: _____.

(4) My date of birth is: _____.

(5) My alien registration number is: _____.

Petition to the Court:

I certify that I am not seeking a change in name for any unlawful purpose, such as to avoid debt or evade law enforcement. I ask the court to change my name to:

_____

Date: _____ _____

Petitioner's signature

Certification of Name Change

I certify that the court granted this change in name on _____.

Date

Date: _____ _____

Printed name of clerk of court

By _____

Deputy clerk's signature

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____	)	
Plaintiff	)	
v.	)	Case No.
_____	)	
Defendant	)	

Jury Verdict

We, the jury, find that:

Date: _____

_____
Foreperson's signature

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America)
v.)
) Case No.
)
_____)
Defendant

Record of the Number of Grand Jurors Concurring in an Indictment

As the foreperson of the grand jury of this court at a session held at _____ on _____, I certify that *(specify number)* _____ grand jurors concurred in the indictment in this case. Under Fed. R. Crim. P. 6(c), this record is being filed with the court clerk and is *not* to be made public unless the court orders otherwise.

Date: _____

_____
Foreperson's signature

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America)
v.)
) Case No.
)
_____)
Defendant

Report of a Grand Jury's Failure to Concur in an Indictment

As the foreperson of the grand jury of this court at a session held at _____ on _____, I report that 12 or more grand jurors did not concur in finding an indictment in this case. Under Fed. R. Crim. P. 6(c), this record is being filed with the court clerk and is *not* to be made public unless the court orders otherwise.

Date: _____ _____
Foreperson's signature

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____	)	
Plaintiff	)	
v.	)	Case No.
_____	)	
Defendant	)	

Order to Proceed Without Prepaying Fees or Costs

It is ordered that the plaintiff's application under 28 U.S.C. § 1915 to proceed without prepaying fees or costs is:

❒ Granted:

The clerk is ordered to file the complaint and issue a summons. The United States marshal is ordered to serve the summons with a copy of the complaint and this order on the defendant(s) as the plaintiff directs. The United States will advance the costs of service.

❒ Denied:

This application is denied for these reasons:

Date: _____

_____
Judge's signature

_____
Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America)
v.)
) Case No.
_____)
Defendant)

Judgment of Acquittal in a Criminal Case

This defendant has been found not guilty of all criminal charges in this case. Therefore, it is ordered that the defendant is discharged from custody and any appearance bond is exonerated.

Date: _____

_____
Judge's signature

_____
Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America
v.
_____
Defendant

Case No.

Sentencing Date:

Drug Offender's Reinstatement of Federal Benefits

It is ordered, under 21 U.S.C. §862(c), that the defendant's federal benefits suspended by this court on a conviction for the possession of a controlled substance are reinstated. The defendant has successfully completed a drug treatment and testing program, or has in good faith tried to gain admission to such a program but was unable to do so because of its cost or inaccessibility, or has otherwise been rehabilitated.

Date: _____

_____
Judge's signature

_____
Printed name and title

City and state of defendant's residence: _____

Last four digits of SSN: _____

Year of birth: _____

The clerk of court is responsible for sending a copy of this form to:

U.S. Department of Justice - Office of Justice Programs
Attn: Denial of Federal Benefits Program
810 Seventh Street, NW
Washington, D.C. 20531

UNITED STATES DISTRICT COURT

for the

_____ Plaintiff	)	
v.	)	Civil Action No.
_____ Defendant	)	

Notice of a Lawsuit and Request to Waive Service of a Summons

To: _____

(Name of the defendant or - if the defendant is a corporation, partnership, or association - an officer or agent authorized to receive service)

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within ____ days (*give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States*) from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

Date _____

_____
Signature of the attorney or unrepresented party

_____
Printed name

_____
Address

_____
E-mail address

_____
Telephone number

UNITED STATES DISTRICT COURT

for the

_____ Plaintiff	)	
v.	)	Civil Action No.
_____ Defendant	)	

Waiver of the Service of Summons

To: _____
(Name of the plaintiff's attorney or unrepresented plaintiff)

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from _____, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date _____

_____
Signature of the attorney or unrepresented party

_____
Printed name

_____
Address

_____
E-mail address

_____
Telephone number

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____	)	
Plaintiff	)	
v.	)	Civil Action No.
_____	)	
Defendant	)	

Summons in a Civil Action

To: *(Defendant's name and address)*

A lawsuit has been filed against you.

Within ___ days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, whose name and address are:

If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

_____
Name of clerk of court

Date: _____

_____
Deputy clerk's signature

(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)

Proof of Service

I declare under penalty of perjury that I served the summons and complaint in this case on _____, by:

(1) personally delivering a copy of each to the individual at this place, _____ _____; or

(2) leaving a copy of each at the individual's dwelling or usual place of abode with _____ who resides there and is of suitable age and discretion; or

(3) delivering a copy of each to an agent authorized by appointment or by law to receive it whose name is _____; or

(4) returning the summons unexecuted to the court clerk on _____; or

(5) other *(specify)* _____ _____ _____.

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____ Plaintiff	)	
v.	)	Civil Action No.
_____ Defendant, Third-party plaintiff	)	
v.	)	
_____ Third-party defendant	)	

Summons on a Third-Party Complaint

To: *(Third-party defendant's name and address)*

A lawsuit has been filed against defendant _____, who as third-party plaintiff is making this claim against you to pay part or all of what the defendant may owe to the plaintiff _____.

Within ___ days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff and on the defendant an answer to the attached third-party complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the defendant's attorney, whose name and address are:

It must also be served on the plaintiff's attorney, whose name and address are:

If you fail to do so, judgment by default will be entered against you for the relief demanded in the third-party complaint. You also must file the answer or motion with the court and serve it on any other parties.

A copy of the plaintiff's complaint is also attached. You may – but are not required to – respond to it.

Date: _____

_____
Name of clerk of court

_____
Deputy clerk's signature

(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)

Proof of Service

I declare under penalty of perjury that I served the summons and complaint in this case on _____, by:

(1) personally delivering a copy of each to the individual at this place, _____ _____; or

(2) leaving a copy of each at the individual's dwelling or usual place of abode with _____ who resides there and is of suitable age and discretion; or

(3) delivering a copy of each to an agent authorized by appointment or by law to receive it whose name is _____; or

(4) returning the summons unexecuted to the court clerk on _____; or

(5) other *(specify)* _____ _____ _____.

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America)
v.)
) Case No.
_____)
Defendant)

Arrest Warrant

To: The United States marshal or any authorized law-enforcement officer

You are commanded to arrest and bring before a United States magistrate judge without unnecessary delay
(name of person to be arrested) _____ ,
who is charged with violating the court imposed conditions of pretrial release or supervision, or of violating ____ U.S.C. § _____ . This offense is briefly described as follows:

This charge is based on the following document filed with the court:

❒ Indictment ❒ Information ❒ Complaint ❒ Order of court

❒ Pretrial Release Violation Petition ❒ Probation Violation Petition ❒ Supervised Release Violation ❒ Violation Notice

Date: _____ _____
Issuing officer's signature

Location: _____ _____
Printed name and title

Return

This warrant was received on *(date)* _____ , and the person was arrested on *(date)* _____
at *(city and state)* _____ .

Date: _____ _____
Arresting officer's signature

_____
Printed name and title

This second page contains personal identifiers provided for law-enforcement use only and therefore should not be filed in court with the executed warrant unless under seal.

(Not for Public Disclosure)

Defendant's name: _____

Alias: _____

Last known residence: _____

Last known employment: _____

Place of birth: _____

Date of birth: _____

Social Security number: _____

Height: _____ Weight: _____

Sex: _____ Race: _____

Hair: _____ Eyes: _____

Scars, tattoos, other distinguishing marks: _____

_____

_____

FBI number: _____

Complete description of auto: _____

_____

Investigative agency and address: _____

_____

_____

_____

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America)
v.) Case No.
)
)
)
)

Warrant for the Arrest of a Witness in a Criminal Case

To: The United States marshal or other authorized law-enforcement officer

You are commanded to arrest and bring before this court *(name of person to be arrested)* _____ _____ , a witness who has been served with a subpoena to appear in this case and has failed to do so.

You are further commanded to detain this witness until this court orders discharge from custody.

Date: _____ _____
Name of clerk of court

City and state: _____ _____
Deputy clerk's signature

Arresting Officer's Return

This warrant was received on _____ and the person was arrested at _____ on _____ .

Date: _____ _____
Arresting officer's signature

_____
Printed name and title

This second page contains personal identifiers provided for law-enforcement use only and therefore should not be filed in court with the executed warrant unless under seal.

(Not for Public Disclosure)

Witness's name: _____

Alias: _____

Last known residence: _____

Last known employment: _____

Place of birth: _____

Date of birth: _____

Social Security number: _____

Height: _____ Weight: _____

Sex: _____ Race: _____

Hair: _____ Eyes: _____

Scars, tattoos, other distinguishing marks: _____

_____

_____

FBI number: _____

Complete description of auto: _____

_____

Investigative agency and address: _____

_____

_____

_____

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____	)	
Plaintiff	)	
v.	)	Civil Action No.
_____	)	
Defendant	)	

Judgment in a Civil Case

This action was *(check one)*:

❒ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

❒ tried by Judge _____ without a jury and the following decision was reached.

It is ordered that *(check one)*:

❒ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____) with prejudgment interest at the rate of _____ % and postjudgment interest at the rate of _____ %, along with costs.

❒ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ _____ recover costs from the plaintiff *(name)* _____ _____ .

Date: _____

_____
Signature of clerk of court

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America)
v.) Case No.
)
_____)
Defendant)

Waiver of an Indictment

I understand that I have been accused of violating _____ U.S.C. § _____, an offense that is punishable by imprisonment for more than one year. I was advised in open court of my rights and the nature of the proposed charges against me.

After receiving this advice, I waive my right to prosecution by indictment and consent to prosecution by information.

Date: _____

_____
Defendant's signature

_____
Defense counsel's signature

_____
Defense counsel's printed name

_____
Judge's signature

_____
Judge's printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____	)	
Plaintiff	)	
v.	)	Case No.
_____	)	
Defendant	)	

Notice of a Trial or Hearing

To: The parties

A trial or hearing in this case has been set (or reset) at the place, date, and time set forth below:

Place	Courtroom No.:
	Date and Time:

Type of Proceeding: _____

Date: _____ _____

Name of judge or clerk of court

By: _____

Deputy clerk's signature

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____	)	
Plaintiff	)	
v.	)	Case No.
_____	)	
Defendant	)	

Appearance of Counsel

To: The clerk of this court and all parties of record

I am authorized to practice in this court, and I appear in this case as counsel for:

_____.

Date: _____

_____
Counsel's signature

_____
Printed name and bar number

_____
Address

_____
E-mail address

_____
Telephone Number

_____
FAX Number

❒ I do not wish to receive electronic notices.

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America)
v.) Case No.
)
_____) Charging district: _____
Defendant) Case No.

Election to Have a Preliminary Hearing Held in the Charging District and to Waive the Time Requirement

I elect to have the preliminary hearing held in the district where the charges against me are pending, and I waive my right under Fed. R. Crim. P. 5.1(b) to have the hearing held within 10 days of the initial appearance if I am in custody or within 20 days if I am not in custody.

I understand that I am required to appear in that district as directed.

Date: _____

_____
Defendant's signature

_____
Defense counsel's signature

_____
Defense counsel's printed name

_____
Judge's signature

_____
Judge's printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America	)	
v.	)	Case No.
	)	
_____	)	Charging district:
Defendant	)	Case No.

Order Requiring a Defendant to Appear in the District Where Charges are Pending and Transferring Bail

After a hearing in this court, the defendant is released from custody and ordered to appear in the district court where the charges are pending to answer those charges. If the time to appear in that court has not yet been set, the defendant must appear when notified to do so. Otherwise, the time and place to appear in that court are:

Place	Courtroom No.
	Date and Time

The clerk is ordered to transfer any bail deposited in the registry of this court to the clerk of the court where the charges are pending.

Date: _____

_____
Judge's signature

_____
Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America	)	
v.	)	
	)	Case No.
_____	)	
Defendant	)	

Waiver of a Preliminary Hearing

I understand that I have been charged with a crime in a criminal complaint filed in this court, or charged with violating the terms of probation or supervised release in a petition filed in this court. A magistrate judge has explained my right to a preliminary hearing under Fed. R. Crim. P. 5, or to a preliminary hearing under Fed. R. Crim. P. 32.1.

After receiving this explanation, I agree to waive my right to a preliminary hearing under Fed. R. Crim. P. 5 or Fed. R. Crim. P. 32.1.

Date: _____

_____
Defendant's signature

_____
Defense counsel's signature

_____
Printed name of counsel and bar number

_____
Address

_____
E-mail Address

_____
Telephone Number

_____
FAX Number

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America)
v.) Case No.
)
_____)
Defendant)

Order Scheduling a Detention Hearing

A detention hearing in this case is scheduled as follows:

Place:	Courtroom No.:
	Date and Time:

Pending the hearing, it is ordered that the defendant be detained in the custody of the United States marshal, or another law-enforcement officer whose name and title are:

It is further ordered that the custodian bring the defendant to the hearing at the time, date, and place set out above.

Date: _____

_____
Judge's signature

_____
Printed name and title