ADVISORY COMMITTEE
ON
CRIMINAL RULES

Washington, DC
November 4-5, 2014

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NOVEMBER 4-5, 2014
WASHINGTON, D.C.

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Members	Position	District/Circuit	Start Date	End Date
Reena Raggi Chair	C	Second Circuit	2011	2015
Carol A. Brook	FPD	Illinois (Northern)	2011	2017
James C. Dever III	D	North Carolina (Eastern)	2014	2017
Morrison C. England, Jr.	D	California (Eastern)	2008	2015
Gary Scott Feinerman	D	Illinois (Northern)	2014	2017
Mark Filip	ESQ	Illinois	2013	2015
David E. Gilbertson	CJUST	South Dakota	2010	2016
Orin S. Kerr	ACAD	Washington, DC	2013	2016
Raymond M. Kethledge	C	Sixth Circuit	2013	2016
David M. Lawson	C	Michigan (Eastern)	2009	2015
Mythili Raman*	DOJ	Washington, DC	----	Open
Timothy R. Rice	M	Pennsylvania (Eastern)	2009	2015
John S. Siffert	ESQ	New York	2012	2015
Sara Sun Beale Reporter	ACAD	North Carolina	2005	Open

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Liaison for the Advisory Committee on Appellate Rules	**Gregory G. Garre, Esq.**	***(Standing)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Roy T. Englert, Jr., Esq.**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Neil M. Gorsuch**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules		***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

April 7-8, 2014, New Orleans, Louisiana

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met in New Orleans, Louisiana, on April 7-8, 2014. The following persons were in attendance:

Judge Reena Raggi, Chair
Carol A. Brook, Esq.
Judge Morrison C. England, Jr.
Mark Filip, Esq.
Chief Justice David E. Gilbertson
Judge John F. Keenan
Professor Orin S. Kerr
Judge David M. Lawson
Judge Donald W. Molloy
Judge Timothy R. Rice
John S. Siffert, Esq.
Jonathan Wroblewski, Esq.
David A. O'Neil, Assistant Attorney General for the Criminal Division
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter

Judge Jeffrey S. Sutton, Standing Committee Chair
Professor Daniel R. Coquillette, Standing Committee Reporter
Judge Amy J. St. Eve, Standing Committee Liaison

The following persons were present to support the Committee:

Laural L. Hooper, Esq.
Jonathan C. Rose, Esq.
Benjamin J. Robinson, Esq.(by phone)
Julie Wilson, Esq.

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Raggi introduced new member Professor Orin S. Kerr, and new Standing Committee Liaison Judge Amy St. Eve.

B. Review and Approval of Minutes of April 2013 Meeting

A motion to approve the minutes of the April 2013 Committee meeting in Durham, North Carolina, having been seconded:

The Committee unanimously approved the April 2013 meeting minutes by voice vote.

C. Proposed Amendments Approved by the Supreme Court for Transmittal to Congress

Judge Sutton reported that the proposed amendments to the following Criminal Rules were approved by the Supreme Court and transmitted to Congress and will take effect on December 1, 2014, unless Congress acts to the contrary:

Rule 5. Initial Appearance
Rule 6. Grand Jury.
Rule 12. Pleadings and Pretrial Motions
Rule 34. Arresting Judgment
Rule 58. Initial Appearance

Judge Sutton thanked the Committee in particular for its cooperative work on Rule 12, as did Judge Raggi.

III. CRIMINAL RULES ACTIONS

A. Proposed Amendments to Rule 4

Judge Raggi asked Judge Lawson, Chair of the Rule 4 Subcommittee, to report on the Subcommittee's proposal to amend Rule 4. The proposal responds to a request by the Department of Justice to address the difficulty posed by the requirement in the current rule that service be mailed to an address within the United States, in cases where a corporate defendant has no such address. The Subcommittee's proposed amendment, Judge Lawson reported, eliminates the requirement of a separate mailing except when specified by statute, notes that required mailings need not be to an address in the judicial district, and provides for service outside the United States by means roughly analogous to the methods authorized under the Civil Rules. The amendment also notes that the court may impose those sanctions authorized by law should a corporate defendant fail to appear.

As to means of service outside the district, the amendment permits service (1) by delivery

to an officer, managing or general agent, or other agent legally authorized; (2) by stipulation; (3) undertaken by a foreign authority, using letters rogatory, or under request authorized by international agreement and (4) by any means not prohibited by an international agreement. Judge Lawson noted the Subcommittee rejected alternative language that would have allowed service possibly in violation of the foreign jurisdiction's law if authorized by court order.

Professor Beale added that there was agreement on the Subcommittee that an amendment was needed, noting there was no good policy reason to allow certain foreign corporations to evade service because they chose not to have a mailing address in the United States. The discussion in the Subcommittee had focused on the "other means" of service. The proposed amendment does not involve a court order authorizing such service. It does allow a defendant to raise challenges to adequate notice later.

Judge Raggi added that in rejecting the civil rule's language authorizing other means of service when ordered by the court, the Subcommittee recognized that when a person appears in court, the court generally does not question how the party got there, and considers instead whether there was adequate notice. The Subcommittee decided that it would be best to retain this approach to avoid involving courts in ordering action that might violate another nation's laws.

Judge Raggi solicited comments from members of the Subcommittee.

A Subcommittee member noted that one factor supporting the Subcommittee's decision was that the Department has procedures for approving international service, and he asked if the Department planned to include in its procedures review by a Deputy Attorney General or equivalent, rather than just the Office of International Affairs.

Assistant Attorney General O'Neil responded the Department is committed to providing an appropriate level of approval, given the potential impact on foreign relations, and that the Office of International Affairs would give this much thought and consult with appropriate Departments.

Another Subcommittee member reiterated that the Subcommittee's discussion centered on the catch-all means of service at the end of the proposed amendment.

Assistant Attorney General O'Neil expressed gratitude for the Committee's attention to the issue and stated that it was not a theoretical but a very pressing issue for the Department.

Judge Raggi mentioned that the Subcommittee had also addressed what steps might be taken if a corporation did not appear after being served. She mentioned that the Department had

related that corporations do often appear now to contest service because it is in their interest to do so, as they may be involved in other proceedings. She noted that the Department submitted a memorandum included in the materials in the Agenda Book listing the type of actions that might be taken against a corporation that does not appear, including forfeiture. The proposed amendment includes general language on this point, without specifying any particular remedy.

The Subcommittee's recommendation to approve and forward to the Standing Committee an amendment to Rule 4(a) that would add the word "individual" (specifying that the existing language applies to an individual defendant), and a provision referencing actions in response to an organization's failure to appear was moved and seconded. Discussing the motion, a member expressed support for the proposal, noting that she had experience with one of these cases in which the charges had to be dropped as a result of the corporation's objection to service.

The motion to approve the proposed amendment to Rule 4(a) and transmit it to the Standing Committee passed unanimously.

The Subcommittee's recommendation to approve and forward to the Standing Committee language amending Rule 4(c)(2) to add a sentence "A summons may also be served at a place not within a judicial district of the United States under subdivision (c)(3)(D)" was moved and seconded. Without further discussion,

The motion to approve the proposed amendment to Rule 4(c)(2) and transmit it to the Standing Committee passed unanimously.

Turning to the manner of service, the Subcommittee's recommendation to approve and forward to the Standing Committee language amending Rule 4(c)(3)(C), limiting this subsection to service on organizations in the United States, limiting the mailing requirement to mailings required by statute, and eliminating the mailing requirement to the organization's last known address or place of business within the United States, was moved and seconded. Without further discussion,

The motion to approve the proposed amendment to Rule 4(c)(3)(C) and transmit it to the Standing Committee passed unanimously.

Discussion proceeded on the Subcommittee's recommendation to approve and forward the proposed amendments to Rule 4(c)(3)(D). Judge Sutton questioned why the introductory language to (D)(ii) does not read ". . . that gives notice, and that is not prohibited by an applicable international agreement." Professor King and Subcommittee members responded that the means of service could be prohibited by an applicable international agreement but the parties could still agree to it. Another member expressed the view that service should never be in

violation of a treaty. Judge Raggi noted that a court would have jurisdiction over an individual defendant even if he were kidnapped and brought to court, and here the issue is the appropriate rule for a foreign corporate entity. She asked the Department of Justice to clarify whether there are situations in which the United States has an international agreement with another country, but the other country is not honoring that agreement, or perhaps giving "super protection" to their own corporations beyond what is recognized by international law. She expressed her concern about providing more protection in the rules for corporations than for human beings.

Mr. Wroblewski noted, for example, that sometimes a corporation or organization is state-owned, and the state may not enforce an international agreement that is in place. The proposal recognizes such circumstances may arise, and leaves it to the State Department to determine how to proceed. It is appropriate to put in the rule something that references an applicable international agreement. The proposal also notes that service by other means occurs without prior judicial approval, so that a defendant can later come in and raise concerns or constitutional objections. The proposal also parallels the civil rules, he noted, which have a similar provision, though it requires prior court approval.

Professor Beale stated that the Subcommittee also considered a concern about the Rules Enabling Act: could a rule authorize service contrary to a treaty? The Subcommittee decided that the proposed language struck the appropriate balance, by listing any other means consistent with an applicable agreement, recognizing the Department's position that a treaty might have been abrogated, and not precluding later arguments by defendants. It recognizes that a court would not have to bless such service in advance when it would not have heard arguments by both sides.

A member stated that the Subcommittee did not want the rule to effectively authorize the Department to ignore applicable treaties. Another member noted that the word "applicable" allowed the Executive Branch to determine whether the treaty was applicable in the circumstances, or whether it had been abrogated by conduct. Judge Raggi added that the Subcommittee wanted to avoid providing a basis for a defendant to come to court and invoke a treaty and say you haven't served me correctly, noting that the Supreme Court has already expressed concern about Rules of Criminal Procedure giving rights to defendants under foreign treaties.

Judge Sutton pointed out that the list of possible means of service started with "including" so it was already a non-exclusive list.

When Professor Coquillette asked the Department if this proposal had been vetted with the State Department, Mr. Wroblewski indicated that they had many discussions with colleagues in the Executive Branch. The Department also provided written assurance relating this

consultation to the Subcommittee. Those consulted are comfortable with the process. He explained that the United States Attorneys' Manual already provides that whenever prosecutorial steps may implicate foreign policy, such as a foreign deposition, attorneys must consult with the Office of International Affairs.

Discussion turned to the proposed language in (D)(ii)(a) regarding stipulated means of service. Judge Lawson suggested that the word "stipulation" is generally interpreted to be a more formal agreement in writing, and that the style change to the verb "stipulate" may not carry that meaning. Professor Beale noted that the reporters' research found that the noun "stipulation" and the verb "to stipulate," along with the term "agreement," were used throughout the Federal Rules, and do not always signify that writing is required. If the Committee wished to limit the stipulation to a written record, perhaps the words "in writing" should be added. A member suggested that counsel will agree, and that this will not be an issue. Discussion continued on whether either a corporation or the court would benefit if a written stipulation were required. Judge Raggi noted that this could come up if the corporation is not there as well as when the corporation appears.

Without resolving the concern raised about the language referring to stipulated means of service, the discussion returned to the structure of proposed (D)(ii). A member suggested that in response to Judge Sutton's remarks, the proposal be rewritten to require both notice and compliance with international agreement, but also permit the stipulation to trump the international agreement. Another member suggested making notice and applicable international agreement into a catch all. A third member asked for and received clarification that the parties referenced in the stipulation language are the Department of Justice and the indicted defendant.

Judge Raggi postponed further consideration of the proposal until the Subcommittee had a chance to work on new language.

B. Proposed Amendments to Rule 41

Judge Raggi asked Judge Keenan, Chair of the Rule 41 Subcommittee, to introduce the proposal to amend Rule 41. She noted that the Committee had received a detailed memo from the ACLU, which had been distributed by email prior to the meeting.

Judge Keenan explained that this proposal was also initiated by the Justice Department, and involved two aspects of Rule 41: the territorial requirement and the notice requirement. The Subcommittee considered several versions. The revised version it was recommending to the Committee, after styling, was dated April 3. It was circulated before the meeting and was not in the agenda book. The proposal would amend the Rule 41 to add new subdivision (b)(6):

> A magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district.

This amendment would authorize a magistrate to issue a warrant to search allowing officers to remotely search and seize information on a computer, even if that computer is located outside the magistrate's district, so long as criminal activity has occurred within that district. Rule 41 generally limits warrants to searches and seizures within the district, but it already provides authority for a judge to issue a warrant for a search or seizure outside the district in four other situations, including the use of tracking devices. The amendment seeks only to refine the territorial limits; it does not alter the constitutional constraints, such as the particularity requirement. Any constitutional restriction should be addressed by each magistrate with each warrant request.

As to the notice requirement, Judge Keenan continued, the proposed amendment reads:

> For a warrant to use remote access to search electronic storage media and seize or copy electronically stored information, the officer must make reasonable efforts to serve a copy of it on the person whose property was searched or whose information was seized or copied. Service may be accomplished by any means, including electronic means, reasonably calculated to reach that person.

This amendment would clarify that officers must make reasonable efforts to provide notification of the search or seizure.

Judge Keenan reported that the Subcommittee held four telephone conferences and considered several memoranda, which are included in the agenda book. The materials also include sample warrants. In the fourth conference call, the Subcommittee approved the version of the proposed amendment that was identical to the version before the Committee, except for a few style changes. Judge Keenan noted that Judge Kethledge, who could not be at this meeting, served as a member of the Subcommittee, had indicated approval of the proposal, and that one member dissented from the Subcommittee's proposed amendment. Finally, he recognized that some Committee members may not have had time to read and analyze the memorandum from the American Civil Liberties Union.

Judge Raggi asked the Department of Justice to speak to the proposal.

Assistant Attorney General O'Neil said the proposal is meant to address three scenarios. The first is to provide authority for a magistrate to issue a warrant to search with remote access

for the location of a computer whose location is unknown, possibly in another district. The second is to provide authority for a judge to issue a warrant to search multiple computers in known locations outside the district. The third is to provide authority for a judge to issue a warrant to conduct a remote access search in a district outside the district where the warrant is being sought, as an ancillary request to a physical search request.

Assistant Attorney General O'Neil emphasized that the proposal does not provide authority for the government to conduct any new kind of search or to use any new tools. It does not change anything about the substantive standards that the government must satisfy in order to obtain a warrant or address the substantive requirements of particularity or probable cause. All it does, he explained, is address the venue question–the question of which judge can issue a warrant that, as the law develops, the Fourth Amendment allows.

Assistant Attorney General O'Neil spoke to two concerns raised by the proposal. As to forum or judge shopping, he said that the same concern was raised by the Electronic Communications Privacy Act (ECPA), which already allows a judge in one district to issue a warrant in another district. Congress nevertheless approved this scheme, and the Department was not aware of any complaints about this problem under the ECPA. The second concern he noted was that the proposal could be used to circumvent ECPA or as an alternative means that is less protective than ECPA. The Department did not think that was a problem. The same standards of particularity and probable cause apply to both ECPA and warrants under the proposed Rule 41 remote access searches. Also, prosecutors can already obtain warrants for remote access searches under the present rule. The only question is whether the judge who is most familiar with the facts of an investigation can issue a warrant for information stored outside that judge's district.

Mr. Wroblewski stated that when investigators don't know where the computer is, it is very important to be able to learn that information. He recognized that the ACLU has argued that there ought to be oversight of the code that the government uses to do this, that there ought to be more transparency, and that the code has potential to do harm. The Department recognizes those concerns, he explained, but this Committee is not the place to address them. Some of the issues are Constitutional and will be addressed by magistrate judges one warrant at a time. Some of them will ultimately be addressed by Congress in determining what is and is not permissible. What this proposal tries to address are the three practical realities summarized earlier and in the memos included in the materials.

On the first of those scenarios, Mr. Wrobleski continued, there was agreement in the Subcommittee there should be a rule change. The ACLU also suggested that the second scenario involving the botnets should be addressed and that the government should take steps to respond to this important practical reality. Their concern was the proposal would change practice beyond these two particular circumstances, he said, and the Department disagrees.

Mr. Wroblewski stated that there have been concerns that the Department might use a search warrant issued pursuant to the proposed amendment to secretly search for information, rather than proceeding pursuant to ECPA. That won't happen, he argued, because the Department needs to cooperate constantly with the internet service providers. It will be the rare circumstance, he argued, where agents would get a search warrant rather than an ECPA warrant, possibly in a case involving a business, when a stored communications site is open and available, or when the government already has the credentials to obtain access. The proposal seeks the authority the government already has under ECPA to go to the magistrate judge in the district where the crime is being investigated and ask for a warrant. It only identifies the magistrate who can consider the warrant application. There is a practical enforcement problem on the ground that needs to be addressed, he concluded, and the proposed amendment will address it.

Judge Keenan added that the proposal will also allow a magistrate to issue a warrant that would authorize investigators to search computers in several districts simultaneously.

Judge Raggi observed that the Subcommittee at times used the word "hacking" to discuss remote access searches. To the extent it suggests illegality, it is unfortunate, because the proposal is talking about what judges would authorize. She also noted that the Subcommittee's discussion considered concerns about the government's satisfaction of its Fourth Amendment requirements wherever these warrants were sought, whether under the present rule or under an expanded venue rule. That's why the Committee Note says the proposal is not intended to in any way affect the government's obligations under the Fourth Amendment.

Experts joined some of the Subcommittee's phone conferences to try to explain these remote access searches, she said, and judges would have to be educated about what to ask when the government seeks these warrants. She said she spoke to the Federal Judicial Center about possibly providing judges with more relevant information. For example, to the extent that these searches would involve transmittals, should the judge be asking about Title III? She reiterated that these concerns are with us now already under the present rule, and the question before the Committee is whether to expand the venue and change the notice requirement.

One member raised various concerns with the proposal, noting that he opposed the current version because it is far broader than the reasons that have been proposed to justify it. The first scenario, when the location of a computer is not known, is the strongest case the government has for a change in the rule because the alternative is that the government may not be allowed to obtain any warrant. Warrants to obtain information from computers of unknown location have been obtained, he stated, so it may be premature to conclude from a single magistrate judge's opinion rejecting this authority that the government cannot obtain such a warrant under the existing rule. But accepting that one opinion as correct, he thought there is a very good case for changing the rule to address this problem.

The second scenario, the member continued, involves sending many communications to computers around the world that are infected as part of a botnet, remotely taken over by hackers. There could be thousands of these affected computers. The warrant applications provided to the Subcommittee authorize obtaining limited information from those computers affected by that botnet and then sending it back to the government. But as far as he is aware there has never been a judicial opinion stating that a warrant is required in that situation. There may be no reasonable expectation of privacy in this information or the government may argue that reason for the search is to protect the victim-owner of the infected device. Accordingly there are various exceptions that might authorize obtaining this information without a warrant. It is premature to act on the assumption that a warrant is required, he argued.

The third scenario is when the government executes a warrant at one place, and then finds there are servers elsewhere with information relevant to the investigation. The member said it would be helpful to have precedent on how Rule 41 applies to this situation before amending the rule. This same concern arises with physical searches, he said, so it is not clear why an amendment is needed for on-line searches and not physical searches. For example, if the government searches a business and discovers there is a warehouse in another district where more records are stored off site, the government would ordinarily go to the other district and obtain a second warrant to search the warehouse. Why shouldn't the venue requirements for Rule 41 should be eliminated for all such searches, so that the first warrant would support the second search as well? The arguments for and against the venue requirements are the same off-line as online, so it is not clear why Rule 41 should authorize the second search under one warrant in the online setting but not in the physical setting.

Finally, he said he feared that the language as drafted has much broader implications than these three scenarios. On its face the draft allows remote access for all searches. Even if the government does not plan on using these more broadly, he warned, it could. The government might get a warrant, he suggested, to search a person's physical places and virtual places all at once. The drafted language would seem to allow that dramatic shift in practice. He noted that the Department said it has no intent to engage in that practice, but he stated his preference for a version of the rule that on its face does not appear to authorize that possibility. He recognized that the Justice Department has a good relationship with major providers now, but that ten years from now it is difficult to know how the rule might be used.

The member explained that there are narrower options to respond to this problem. One would be allowing case law to develop to see if the current rule will be interpreted to allow the practices the government is seeking, or if the Fourth Amendment requires warrants in all of these situations. Another option would be to propose language that would address the unknown location problem. A slightly broader version of that would be to say if data is in multiple districts, a warrant could be issued to reach that.

The member concluded by raising a concern about the proposed language defining the district in which the warrant could be sought: "where activity related to a crime may occur." This phrase is used earlier in Rule 41, but if it is an effort to identify where there would be venue, the venue in computer crimes cases is tremendously uncertain. He mentioned a case in which the government is asserting that there is effectively universal venue for computer-related crime. He was concerned about using a phrase with an unknown meaning.

Judge Keenan noted that the key aspects of the proposal are contained in the memo from the Department on p. 261 of the agenda book, dated March 5, stating the three scenarios. He asked that if there is agreement on scenario number one, perhaps the Committee could move to scenario number two. He asked the Department to explain why an amendment was needed to address scenario number two.

Mr. Wroblewski responded, stating that he agreed that it is possible courts will decide no warrant is required for scenarios one or two, but the Department thinks the better practice is to get the warrants.

Responding to concern about changing the venue rule for online searches but not physical searches, Mr. Wroblewski noted that Congress has already recognized this in several different aspects, including ECPA. Congress already authorized one judge to issue a warrant in one district for searches for electronic information in another district. There are valid concerns about particularity and universal venue, and how many locations can be identified in a particular warrant, but they aren't something this amendment will impact. All this amendment will determine is which judge can be asked to issue the warrant.

Assistant Attorney General O'Neil added that a botnet (which he defined as a collection of computers infected by the same malware, remotely controlled and commanded by a criminal) will usually affect computers in all 94 districts. The question is whether one prosecutor investigating the case can get a warrant from one judge rather than many going to judges in 94 different districts. On scenario three, he said, the fundamental difference between physical searches and searches for electronic evidence is that electronic information can be destroyed instantaneously. If investigators are conducting a search in one district and want to obtain electronic evidence, they need to do that without going all the way to a district on the other side of the country, educating the judge, and obtaining the warrant, he explained. By the time they could do that the digital evidence may be destroyed.

Another member expressed gratitude for all of the work that has been done and sympathy for the Justice Department's need to disable botnets, which are used to commit crimes and attack businesses by disrupting service. He took the Department's representations about their intent to use this authority sparingly at good faith, but remained troubled by some of the concerns raised

by the ACLU. He suggested that Congress will be interested in the resolution of these issues, which reminded him of the controversy about the Justice Department's practice in the attorney client privilege area. He noted some of the ACLU's concerns (such as judge shopping) were not troubling or were far afield from the Committee's work. But there is the possibility that the authority in Rule 41 will be transformed over time to do things that are not intended. He supported the proposal because it is important to get public comment to confirm whether a limited fix is possible, and the Committee can't wait several years.

Another member expressed his agreement that the proposal is modest. He stated that he was surprised at the suggestion that the rule should not be amended because scenarios two and three may not even require a warrant. In his view, anytime judicial review of searches and seizures can be encouraged that is a good thing. He was concerned about the risk of doing nothing given the reality that computers are how people do business and communicate on the most basic levels. He said this amendment addresses a venue question and a notice issue, it has been unfairly demonized, and a lot of red herrings have been thrown into the debate.

Judge Keenan moved to approve the Subcommittee's recommendation to forward the proposed amendment to Rule 41 to the Standing Committee, the motion was seconded, and discussion on the motion continued.

A member expressed appreciation for the importance of the issue and the work that has been done, but she argued that the proposal was premature and she expressed strong opposition to adopting any amendment. Noting that the Committee has identified only one relevant judicial opinion, she suggested waiting a year or two. Also, she argued, the proposal is too broad, with ramifications that can't be anticipated. She observed that the Committee has been asked to wait on the Rule 53 tweeting proposal to allow more information to develop, but stated that she found the need for more information and law to develop is even more acute in the Rule 41 context. Finally, the member believed the proposal will make what is now the exception–ECPA– into the rule. If Congress wants that to be the rule, it should make it the rule. Congress is the appropriate forum for resolving these conflicting concerns.

Judge Raggi asked the member to specify where the proposal is too broad. The member explained that whatever is intended when something is passed, it almost inevitably gets bigger and bigger and bigger over time. The government may choose a judge far away making it difficult to defend, and they'll be allowed to pick in a way they can't now, because the "may have occurred language" is very broad.

Another member said he was in favor of seeking public comments now. He explained there is not likely to be more case law developing, because notices of searches aren't given right way when there is ongoing criminal activity, and once it is unsealed the issue is seldom whether there was probable cause. He noted that the government already gets to choose where to bring

the case even if it is inconvenient for the defendant. He explained that concerns about privacy are understandable, but that shouldn't matter when the government can show that there is probable cause to believe there is evidence of a crime at a particular place. He also didn't see how the right of a second person on a shared site could cause the government to lose its rights to search a computer when it had probable cause for the search. A valid warrant to search a home is not defeated if one of the owners objects. Although he has confidence in the current administration's good will, we would be giving them a tool that we don't entirely understand, with a standard that is not explained. Judges may not know what questions to ask. If there was a way to publish a rule to seek comment but not a rule we approve, that would be good.

Another member asked the Department if it was really having problems with this. He noted a case in which the destruction of electronic evidence occurred but investigators were able to find a copy of the information from a foreign source. The member also expressed concern that the proposed changes to the territorial authority of magistrates were substance not merely procedure.

Mr. Wroblewski responded that use of anonymizing sites, which transmit information disguising the real addresses, is increasing. The government cannot trace the source without the authority to send something back through the anonymizing site. This is a real problem. He explained that it might be possible to litigate and hope the courts will create an exception to a rule that on its face does not work with these realities. But the better approach is to come to the Committee and change the rule that is creating the issue.

Another member explained that he was opposed to the proposal because it introduced a concept not before mentioned in the rules, that is, using remote access to search electronic media. He said the proposal untethers the venue provision, the former limiting principle governing searches, without replacing it with another principle. This idea is similar conceptually to the problem that arose after the Supreme Court's *Katz* decision, which eventually spawned Title III. Congress should address this problem. Maybe Article III judges should have the authority to approve remote access searches, and there are other issues that the Committee cannot address. Releasing an amendment for comment does not solve the problem. The process authorized by the amendment is complex, raises genuine issues of privacy, and is largely ex parte, without the advantage of adversarial argument. Limits have to be firmly in place before authority is granted, and even a focused rule poses the risk of unintended consequences.

Judge Raggi remarked that the limiting principle under both the old and proposed rule is the probable cause requirement, and a venue change won't leave Rule 41 with no limiting principle. If the overlap with Title III became a sticking point, we could add language to the Committee Note that the Committee is not expressing any view as to Title III as well as the Constitution.

Judge Raggi asked if the reporters would comment.

Professor Beale spoke to the comparison of the Rule 41 and Rule 53 proposals earlier in the discussion. She argued that the proposals are very different and can be distinguished. She stated Rule 41 appears to be a much more serious problem than Rule 53, and is a problem that is caused by the language of the rule. The government is reporting that they are being hampered or at least there is uncertainty about investigations in an important and growing class of cases because of language in Rule 41, while the Rule 53 proposal is based on reporters who want to tweet from the courtroom. The need for us to figure out whether reporters can tweet from the courtroom is on a different scale than whether the government can get access when anonymizing software is used, and where botnets are used in attacks. The present Rule 41 creates the problem, at least scenario one.

Second, she responded to the concern that changing the territorial restriction on magistrate warrant authority might violate the Rules Enabling Act. She noted that Rule 41(b) already contains other narrow exceptions to the territorial authority to issue warrants, and concluded this aspect of the proposal is not a substantive change that would violate the Act.

Third, she noted that there seemed to be agreement that scenario one is a problem, caused by the text of the rule. For scenario two, the Committee has always preferred that a warrant be sought. On scenario three, it does not seem premature to start the three-year rules amendment process now, she concluded.

Professor King agreed with Professor Beale and added that in her view the Committee should not forward a proposed rule to the Standing Committee for publication simply to generate public comment, there needs to be some consensus behind an amendment in order to send it on.

Judge Raggi asked Judge Sutton to comment generally on the rule-making process. Judge Sutton explained that if the Committee cannot agree on all aspects of a proposal, but can agree on some of it, one option would be to limit the proposed amendment to the part the Committee endorses, and ask questions for comment about other aspects on which there is no agreement. When the Civil Rules Committee sent out Rule 37, they were unanimous about some aspects, but they weren't sure about others. So they put five questions at the end of the proposal to try to focus public comments on these issues.

Judge Raggi reminded members that if the Committee were to approve a proposed amendment at the meeting, even if everything goes smoothly, it will be a three-year process. She suggested taking the package apart to attempt to identify where there was agreement and where there wasn't.

Turning to the situation in which the government doesn't know where the computer is, she said that declining to modify the rule leaves the government without a way to get a warrant. One issue is whether the rules should require the government to make a showing that they don't know where the computer is. One member suggested that the proposal require such a showing, while the government sees this as an undue burden.

Judge Raggi asked the Department to comment its opposition to a preliminary showing. Mr. Wroblewski indicated that the Department is concerned that depending upon how it is crafted this requirement could lead to litigation over how much the government knew or could learn, but he noted that it might be possible to draft language that referred to the type of technology.

Judge Raggi asked for an explanation of the rationale for requiring a preliminary showing. A member said that adding language that "the location cannot reasonably be ascertained" would respond to Magistrate Smith's opinion, and would operate like other judicial assessments that a judge makes in the warrant process, none of which form the basis for later litigation. It is not a constitutional argument so there could be no basis for suppression, nor is suppression a remedy for violation of the rule.

Another member pointed out that there are limited resources the government can use to track down the location of a computer that had been disguised by anonymizing software. If there is a showing required, it should be clear that the NSA and CIA need not get involved. The entire federal government shouldn't have to gear up to prove this for each warrant.

Mr. Wroblewski commented that language that does not turn on the government's knowledge but rather on the type of technology used would avoid these concerns. Assistant Attorney General O'Neil suggested that something like "an investigation involving the use of technological means to conceal identity" might work.

A member asked those supporting a preliminary showing why this would be unlike Title III, where the failure to comply with procedural requirements forms the basis for defense litigation. A member favoring a preliminary showing responded that this assessment would be the same as other judicial assessments under the current rule concerning the property's location, which are not currently litigated because suppression is not a remedy for violations of the rule.

A member expressed continuing concern that a rule is not the correct means of authorizing remote access to electronic storage media. Does it authorize eavesdropping on digital communications? The seizure of intellectual property that is already in existence?

Judge Raggi asked the Department to explain why remote access searches do not fall under Title III. Mr. Wroblewski responded that remote access searches are happening under the

rule now, and the amendment concerns only the venue for judicial approval. Rule 41(e)(2)(b), the provision governing warrants seeking electronically stored information, authorizes the seizure of electronic storage media *or* the seizure or copying of electronically stored information. He emphasized that warrants under Rule 41(e)(2) do not authorize the interception of communications, but rather the search and then seizure or copying of previously stored information. Assistant Attorney General O'Neil agreed that the Department is already using remote access searches to seize or copy electronically stored information.

There was further general discussion of remote electronic searches and Title III. A member commented that the means authorizing remote access ought to be prescribed by legislation like Title III, rather than the Rules process. Judge Keenan suggested that something could be added to the Committee Note indicating that there is no intent to affect the limitations imposed by Title III. The first member agreed, offering that the Note could say that the amendment authorizes no more than what is already authorized by Rule 41(e)(2)(b).

Judge Raggi asked for discussion of any concerns about the language defining the district in which a warrant could be sought: "where activities related to a crime that may have occurred." A member expressed concern about the breadth of the language, though she agreed the Committee should not wait to address scenario one. She asked how the government would know where activities related to the crime may have occurred.

Mr. Wroblewski responded with an example that was included in the agenda book. In that case, someone made a threat against a building in Philadelphia. No one knew where the perpetrator was, only the victim's location was known, because the perpetrator was using anonymizing software.

The reporters pointed out that the language in question is already in Rule 41 in the other exceptions to the venue limitation, i.e., Rule 41(b)(3) and (5). Professor Beale noted that departing from that language would generate questions about why this exception is different than the others.

Mr. Wroblewski observed that there are other possible ways to express this idea. ECPA § 2703 refers to "a court with jurisdiction over the offense under investigation," and the concept is the same. A member offered that he had looked for judicial precedent explaining or interpreting the language in question and couldn't find any.

Judge Raggi adjourned the meeting for lunch.

After lunch, Judge Raggi noted that discussion among the members suggested that agreement might be reached on language tailored to meet the problem of anonymizing software,

though the Department of Justice needed time to consult its experts about appropriate language. Accordingly, further discussion on that issue would be deferred until Friday.

Discussion then focused on the second scenario, the botnet investigation, in which the Department seeks authority to get a single warrant rather than separate warrants in many districts. Judge Raggi asked members what concerns this part of the proposal raised.

A member stated that if courts have ruled that a warrant is required in this scenario and also that such warrants are permitted, then it makes sense as a matter of policy to allow a single warrant to be issued in one district. He asked if the Department knew of any instances in which the application for such a warrant in one district had been denied. Mr. Wroblewski responded that he was not aware of such a denial. The member who raised the issue commented that perhaps an amendment is not yet needed.

Judge Raggi noted that the Committee was aware of concerns about the need to require probable cause and particularity to protect privacy interests, and she emphasized that the rule does not address these constitutional considerations. She asked the Committee to focus on the question whether in principle the venue requirements for warrant applications should be amended in the specific situations where technology has been used to disguise the district and there are multiple computers in many districts, as in the case of a botnet investigation.

A member asked whether the government is seeking to disable malware in a botnet investigation, and, if so, what is it "searching" for. Mr. Wroblewski responded that the government may seek to disable malware inserted on many victim computers, but it may also search for and copy information, such as the IP address, from the victim computers. In response to the question whether a warrant is needed to remediate by removing malware, Mr. Wroblewski stated that this is an open question. The Department would like to be able to obtain warrants in these cases and to act under the supervision of the courts. He noted that the ACLU says that such remediation does raise Fourth Amendment concerns, though these interests are not as heightened as they would be if the government were seeking evidence of a crime.

Professor Beale noted that the current draft refers to the authority to issue a warrant to search, seize, and copy; it does not mention remediation. Mr. Wroblewski agreed.

Mr. Wroblewski then described the third scenario, where the government conducts a physical search of a business, the computers are on, and it finds that some files are stored in the cloud on a server in a different district. Because the machines are on and access is available at the moment, the government wants to be able to get the files by remote access from the cloud. Under ECPA, in contrast, the government must go back to the district court, and then obtain and serve an ECPA warrant on the provider. The proposal here is in limited circumstances to continue the search on site and access the data remotely and directly.

Discussion then turned to the relationship between the proposal and ECPA. Concerns have been expressed that allowing a remote search in the government's third scenario would permit evasion of ECPA and also effectively reduce the probable cause requirement.

Mr. Wroblewski argued that in some circumstances it is important not to delay the search of material stored remotely on the cloud, because it can be destroyed or encrypted if there is a delay. He also noted that within the Department there is a debate about whether ECPA already permits the procedure the government recommends. As the ACLU has argued, ECPA itself allows law enforcement to send a preservation request immediately. Mr. Wroblewski stated that this procedure is not always practical. The ECPA process is not instantaneous, and there can be delay in getting a provider to preserve. Accordingly, the government is seeking the authority to immediately access and copy the electronically stored information to prevent its destruction.

A member observed that if there were reasonable grounds to believe a third party would delete the information from a cloud there are exigent circumstances and no warrant would be required. Thus the proposed amendment seems to be addressed to cases in which such a showing could not be made in advance, but the government fears that destruction might occur during the process of seeking an ECPA warrant.

Another member noted that as a practical matter there has to be probable cause to search the second server on which the material in the cloud is actually being stored. Members discussed the question whether that means a second warrant is constitutionally required. Mr. Wroblewski stated that of course probable cause is required for any search or seizure, and this does not change when there are computers in more than one district. The main point for the government, he emphasized, is to be able to get the initial warrant and any subsequent related warrant from a single judge.

Judge Raggi noted that if the government is authorized to extend its search from the physical computer to information stored on a server based in another district it will still have to satisfy the probable cause and particularity requirements. Many warrants now allow a search of more than one location. Similarly, a court might conclude that probable cause had been shown to search one computer and others linked to it as to which probable cause had also been shown. But all seem to agree that the government must show probable cause and meet the particularity requirement for any search of a new device. A member responded that the case law is fluid on the application of the particularity requirement, in some cases allowing a search of all laptops or desktop computers in person X's home.

Another member observed that the third scenario was the most difficult part of the current proposal. Because of the increasing use of cloud computing, we no longer have separate devices that are analogous to individual locked chests.

Mr. Wroblewski noted that from the government's perspective the problem is that when its investigators remove the storage media (computers) they leave the people behind, and those people can go to a different computer and quickly access and destroy or encrypt any information stored elsewhere. Information stored on the cloud is simply stored in another computer, which is often located in a different judicial district. What the government seeks is the authority to go back to the same magistrate judge, who is familiar with the facts, if it needs an second warrant.

Judge Raggi noted that the Committee Note could even more strongly emphasize that the proposed amendment is addressed only to venue, and not to probable cause or particularity. Professor Coquillette agreed that committee notes can properly be used to emphasize the limited nature of an amendment in order to prevent courts from reading in something that is not there.

These issues were referred back to the Subcommittee with the request that it report back to the Committee later in the meeting.

C. Further Discussion of Proposed Amendments to Rule 4

Judge Raggi asked the Committee to return to the issues raised by Rule 4.

The Rule 4 Subcommittee presented two alternative approaches to proposed Rule 4(c)(3)(D)(ii). The first would shorten the text of the rule by moving the illustrative list of means of service to the Committee Note. The text would refer only to "any other means that gives notice." The second alternative would retain the illustrative list of means of service but rephrase the last, about which Judge Sutton had raised questions. Rather than using a double negative, it would recognize service by a means "permitted by an applicable international agreement."

Subcommittee members spoke in favor of each version. One member stated that he preferred the second option because the rule itself (not merely the note) should give guidance, and inclusion in the text implicitly states the listed means of service are good (if not the only) ways to proceed. This would encourage prosecutors to employ the listed means, and their inclusion would also signal our adherence to the rule of law. He later referred to this as a matter of "optics," urging we are best served by rules that clearly emphasize compliance with international processes and laws. Speaking for the Department of Justice, Mr. Wroblewski disagreed. Illustrations belong in a note, not the rule, and putting them into the text suggests that the list is not merely illustrative. If any means that give notice are permitted, then the text of the rule should not hint otherwise.

Judge Raggi observed that in the case of corporate prosecutions there are special concerns about collateral consequences if the corporation fails to appear. No one suggests that any defendant (human or corporate) can be prosecuted without appearing before the court. The

cases involving individual defendants hold that the courts' jurisdiction is not affected by the means used to bring an individual before the court, and she is reluctant to think that a corporate defendant should have more due process rights than an individual. On the other hand, the government might someday seek to forfeit the assets of a foreign corporation that it says received sufficient notice but did not appear. This raises the question whether we should be satisfied if the government can act in such a case without complying with U.S. treaty obligations.

Discussion turned to what other means of service the government might use. Mr. Wroblewski suggested, for example, that the government might use electronic service, or it might be able to serve a person with a strong relationship to the entity when that person was present in a third country.

Professor Beale noted that as a matter of logic there is no difference between the two versions. But professors often see students read in more than is there in language, and courts and litigants may do the same. Here, the intuition is that enumeration may slightly constrain how the rule would be applied and interpreted. A member noted that the Subcommittee had discussed whether there was any priority or need to exhaust the listed means, and he wondered if the option enumerating certain means of service might suggest that.

Professor King took up the question how the proposal compares to the Civil Rule. On the one hand, the proposed amendment expressly requires that any means of service must give notice. This feature is absent from the residual clause of the Civil Rule. On the other hand, the residual clause in the Civil Rule requires that the court approve service by other means in advance, a requirement that the Subcommittee had considered and rejected.

After brief expressions of support for the second alternative, Judge Raggi asked for a motion. Judge Rice moved that the Committee approve the second alternative for amending Rule 4(c)(3)(D)(ii), containing the non-exhaustive list of means by which service can be made.

The motion to was seconded and it passed unanimously.

Judge Lawson then moved that the Subcommittee's proposal, as amended, be transmitted to the Standing Committee with the recommendation that it be published for public comment.'

The motion to transmit the revised proposal to amend Rule 4 to the Standing Committee with the recommendation that it be published passed unanimously.

Judge Sutton complimented the Committee on its work on the proposed amendment.

D. Proposal to Study an Amendment to Rule 53

Judge Raggi then asked Judge England to present the recommendation of the Rule 53 Subcommittee, which he chaired. Judge England explained that as originally adopted Rule 53 banned "radio broadcasting" of judicial proceedings from the courtroom, but in the restyling of the Criminal Rules this was shortened to "broadcasting." In one case brought to the Subcommittee's attention a magistrate judge concluded that the term broadcasting includes Twitter, and accordingly he denied a reporter's request to Tweet from the courtroom. Tweets are limited to 140 characters, and they are a live method of providing information. The reporter sought to use this method to provide quick reports from inside the courtroom. Judge England noted that except for limited pilot programs the federal courts prohibit radio or television broadcasts from the courtroom. In contrast, in the California state court on which he previously served each judge had discretion to decide what to allow, including multiple cameras, a pool camera, and limitations on what could be recorded (excluding for example any views of witnesses or jurors). His view and that of the Subcommittee is that we do not have enough information at this point to consider revising Rule 53 to take account of new technologies, and we should wait for more experience to develop.

Judge Raggi stated that unless there is a need for a one-size-fits-all rule, she did not favor an amendment that would tell judges how to run their courtrooms. She asked if any members felt that there was such a need.

A member noted one aspect of Twitter that might be relevant: since one can subscribe to a Twitter account, a juror might have subscribed to a reporter's Twitter account and receive messages posted from the courtroom. This poses a slightly different problem than jurors seeking out news accounts.

Professor Beale noted that there is also a significant overlap with traditional forms of reporting, since reporters generally Tweet to their broadcaster's or paper's news site. Judge England noted that in high profile cases we already have the problem of making sure jurors do not read about the case.

Discussion turned to the current practice in various courts. A member reported that in the Northern District of Illinois individuals can bring their phones into the courtroom and there is an executive order permitting individual judges to determine whether Twitter is permitted from their courtroom. In other courts, phones are not permitted without the court's permission. A member noted that in South Dakota's Supreme Court all reporters may Tweet. At the trial level, it is up to the individual judge. If they allow Tweeting, the judges give specific instructions that cover subscribers. There have been no problems with these policies in South Dakota.

Other members stated that they favored taking no action at this time. One commented that although there has been one ruling from a magistrate judge that Rule 53 bars Tweeting, other judges have read the rule differently. Thus the matter is not settled. Another member

noted that if the Committee were to take up the matter, it should coordinate with Committee on Court Administration and Case Management (CACM).

Judge Lawson moved that the Committee not further pursue an amendment to Rule 53, and the motion passed unanimously.

E. Proposed Amendment to Rule 45

Discussion then turned to the proposal to amend Rule 45, which is the first action item coming from the work of a special subcommittee established by the Standing Committee to consider changes in the rules related to the CM/ECF system. The CM/ECF Subcommittee is chaired by Judge Michael Chagares, and is composed of all reporters as well as liaison members from all of the Advisory Committees. Judge Molloy is our liaison.

Professor Beale explained that when the rules initially authorized electronic service there were concerns that it might be problematic for a variety of reasons, such as difficulty in opening attachments. Accordingly, all of the rules (including Criminal Rule 45) provided for an additional three days to act whenever service was made electronically. The CM/ECF Subcommittee concluded that the concerns that justified the additional three days were no longer applicable. Moreover, the simplified rules for time computation–which converted all times for action to 7, 14, 21, and 28 days without excluding weekends and holidays–also counsel against adding three days when service is made electronically. Accordingly, the CM/ECF Subcommittee requested that all of the Advisory Committees consider elimination of the three-days-added rules at their spring meetings. Parallel amendments and committee notes are being considered by each Advisory Committee. The Civil Rules Committee approved the proposed change at its fall meeting, and its proposed amendment was approved for publication by the Standing Committee in January. The proposed amendment to Rule 45 tracks the change in the Civil Rule.

The Committee voted unanimously to transmit the proposed amendment to Rule 45 to the Standing Committee with the recommendation that it be published for public comment.

F. Other Suggestions for Possible Amendments

The Committee next turned to suggestions received from members of the public and the judiciary for amendments.

Professor Gabriel Chin proposed a change in the timing of the disclosure of presentence reports to make them available in advance of a guilty plea. As the reporters' memorandum in the agenda book explains, this might be accomplished by amendments to Rule 32 (and perhaps Rule 11). After a brief discussion of the procedures now followed it various districts, the burden

on parole officers, and other potential problems, Judge Raggi asked if any member wished to move to place this issue on the Committee's agenda for more study. Since no member made such a motion, the matter will not be pursued at this time.

Judge Jon Newman wrote to urge consideration of an amendment to Rule 52 that would increase the availability of appellate review of sentencing errors. After a brief discussion in which members expressed interest in further consideration, Judge Raggi stated that she would appoint a subcommittee to study the proposal in depth, in coordination with the Appellate Rules Committee. Judge Raymond Kethledge will chair the subcommittee.

Jared Kneitel wrote to propose an amendment to Rule 29 to provide a procedure for making a motion for a judgment of acquittal in a bench trial. After a brief discussion, there was a consensus that there was no pressing need for an amendment at this time.

Judge Raggi then adjourned the meeting for the day.

G. Further Discussion of Proposed Amendments to Rule 41

On Friday morning, Judge Keenan presented the Rule 41 Subcommittee's revised recommendations. He thanked the Department of Justice representatives, the other subcommittee members, and the reporters for what he called yeoman work to develop a revised proposal.

The Subcommittee unanimously agreed that an amendment is warranted in two kinds of cases: those where anonymizing technologies have been used to mask the district in which a computer is located, and botnet investigations in which victim computers are located in a very large number of districts. The revised proposal is tailored to respond to these two problems: subdivision (a) of the proposal deals with the first problem, and subdivision (b) the second. The redrafted amendment is intended to clearly identify for the Standing Committee and general public the limited purpose and effect of the proposed change.

Mr. Wroblewski explained that in botnet investigations a large number of computers have been infected with malware. The language in proposed amendment focuses on these cases in several ways. The proposal is limited to investigations of violations of 18 U.S.C. § 1030(a)(5) where the media to be searched is a protected victim computer. Professor Beale briefly summarized Section 1030(a)(5), which criminalizes various forms of conduct–unauthorized transmission of programs, information, codes or commands as well as intentional access without authorization–that causes damage to protected computers. The proposal is limited to investigations under § 1030(a)(5) in which warrants are sought in five or more districts, where the burden of seeking separate warrants would be very substantial.

A member spoke in favor of the proposal's targeted approach. He termed it sensible in proposed subsection (6)(a) to allow cross-district remote searches when the district has been deliberately concealed. He thought that proposed subsection (b) was a good effort to draft narrow language. The media to be searched must be "protected computers that have been damaged without authorization" by a violation of § 1030(a)(5). This would cover what is popularly called hacking, when a computer has been harmed by the insertion of code or taken off line. He noted the possibility that (6)(b) it might apply to some investigations that did not involve a botnet, and stated that the particularity requirement is likely to be the real limitation. In his view, if a warrant is constitutionally required, there will be a question whether it can be obtained.

Professor King noted that the terms "damage" and "protected computer" are defined in §§ 1030(e)(2) and (8). An addition to the Committee Note could make clear that the rule is adopting the statutory definitions.

A member expressed strong support for the proposal, which he saw as a very sound approach to real problems. He found the Department of Justice's flexibility very helpful, noting the strong public interest and importance of being clear about what the government is doing and why.

Judge Keenan moved to approve the Subcommittee's revised proposal to the Standing Committee with the recommendation that it be published for public comment. Discussion followed.

A member questioned whether it would be better to use the term "electronic search" rather than "remote access." Judge Raggi and the reporters responded that focus of the proposal was not on all electronic searches, but only those authorizing remote access searches outside the district in which the warrant would be issued. This is proposed as a narrow exception to the general rule that a magistrate judge has authority to issue warrants only within the district.

The member also expressed concern about limiting proposed (6)(a) to cases in which "the district ... has been concealed," because that suggests that the entire district has somehow been hidden. Judge Raggi and others noted that because the focus of the provision is on the authority to issue warrants to search outside the district, the rule needed to refer to the concealment of the district, not merely the location.

The member questioned whether the proposal could be modified to limit the use of remote searches only to the situations specified in (6)(a) and (b). The reporters and other members emphasized that remote searches are now authorized by Rule 41(e)(2)(B), provided that they occur within the district in which the warrant has been issued. Remote electronic searches are not new, and are not being authorized by this proposal. Rather, the proposed

language in (6)(a) and (b) seeks *only* to authorize magistrate judges to issue warrants for remote electronic searches *outside the issuing district* in two narrowly defined situations. Another member commented that warrants for remote electronic searches within the issuing district are routinely issued now.

Other members raised various questions about the language of the proposal and suggested alternative phrasing. Judge Raggi requested that the Committee focus first on the substance of the proposal. She noted that if the proposal were adopted it would be subject to review for style, and there would be a further opportunity for members to comment on the language. Professor Beale noted that the committee note would also require revision to refer to the newly tailored language, and Judge Raggi stated that the proposed note language would be circulated.

A member noted that he had not initially thought it would be possible for the Committee to reach agreement on this proposal. He praised the Committee's collaborative effort and expressed support for the approach of narrowing the language to focus on the enforcement of an important statute.

With the proviso that the proposal was subject to review for style and the note would require revision, the Committee unanimously approved the Subcommittee's revised proposal to amend Rule 41(b) for transmission to the Standing Committee.

Discussion then turned to the proposed amendment to Rule 41(f)(1)(C), which requires service of a copy of the warrant and a receipt for property that has been seized.

Noting that the Subcommittee's proposal required service "on the person whose property was searched *or* whose information was seized," a member proposed that the service should be required on both (changing "or" to "and"). Judge Raggi responded that in the case of a physical search of a home, investigators now leave only one notice, even if they seize property belonging to multiple individuals. The member suggested that remote searches are different because they are generally surreptitious, and in the case of cloud computing they take place away from the owner. Thus the owner would not naturally be aware of the search. If only one party is to receive notice, he thought it should be the person whose information was seized or copied. The reporters noted some parallel situations under present law. Professor King noted that the notice of a warrant for a tracking device under Rule 41(f)(2)(C) uses "or." Professor Beale noted that if a warrant were served on Duke University today for a search of information on its servers, Duke would receive notice, not all of the faculty, staff, and students whose digital files and information on university servers was searched, seized, or copied. Similarly, Judge Raggi noted that in the case of a physical search of a storage unit facility investigators would normally leave a single copy of the warrant and receipt. Mr. Wroblewski noted that under ECPA service is made only on the provider, such as Google, not the subscriber. As a matter of policy, however,

many providers provide notice to their subscribers. Professor Beale agreed that in her hypothetical Duke would probably provide notice to its faculty and students.

Judge Raggi observed that whether to expand the existing requirements for providing notice of a search is a policy question. This could be taken up separately, but is not a part of the current proposal.

Discussion turned to the question whether the language of concern to the member (which specified who would receive notice of a remote electronic search) was a necessary part of the proposal. Professor King noted that as drafted the new language in (f)(1)(C) encompassed all remote electronic searches. Mr. Wroblewski explained that although the proposal did not seek to alter *who* should receive notice; in that respect it parallels the current provisions in (f)(1)(C) as well as the notice provisions of ECPA. However, it does seek to change *how* notice would be provided. The current language–which refers to the "premises" where the search is conducted– is not adapted to remote electronic searches. Because there are no premises where a notice may be left, the proposal allows service by "any means, including electronic means, reasonably calculated to reach" the person who must receive notice.

In response to another member's view that the proposal should require service on both the person whose property has been searched "and" the person whose information has been seized or copied, Judge Raggi noted that when the government is investigating the hacking of a provider, this might require the government to notify thousands of account holders. From a practical perspective, this may be too great a burden to impose on the government.

A member expressed support for requiring notice to the target whose information has been seized. More fundamentally, he argued, a remote electronic search is a different animal than a physical search. In his view, a separate rule or statute should deal comprehensively with remote electronic searches, which raise distinctive concerns about technology and privacy that should inform the approach to a range of issues concerning seizure, notice, and copying. The public is sensitized to these issues, and it needs to be reassured that the government is acting to protect privacy while pursuing criminal activity.

Judge Raggi observed that the constitutional requirement of probable cause for the issuance of a warrant is the primary protection for privacy interests.

A member stated that he supported the language proposed by the Subcommittee. It is helpful to be specific about how notice should be given for remote electronic searches. Especially in cases under proposed Rule 41(b)(6), the government may have very little information about whose property it is. It's very hard to be specific here about how notice must be given, but still helpful to have language that does not refer to leaving notice on the "premises." Another member agreed that a new provision on notice is needed. In an

investigation of the intrusion at Target that affected thousands of customer accounts, there is nowhere to go to give notice.

Judge Raggi adjourned the meeting to permit the Rule 41 Subcommittee to consider the issues raised in the discussion. Following this recess, Judge Keenan reported the Subcommittee's recommendations concerning the proposed amendment to Rule 41(e)(1)(C). First, the Subcommittee agreed to delete the bracketed language Professor Kimble viewed as redundant. However, the Subcommittee disagreed with another style suggestion. It recommended that the proposed amendment require "reasonable efforts to serve *a copy of the warrant*" (not of "it"). The amendment itself refers to copying in a different sense (seizure or copying of electronically stored information). To avoid confusion, it is necessary to refer to service of a copy of the warrant. This is substance, not a matter of style. Finally, he asked a member of the Subcommittee to summarize the reasons for requiring service on the person whose property was searched "or" the person whose information was seized or copied.

The member explained there were three reasons for the Subcommittee's recommendation for "or" (rather than "and"):

First, the Subcommittee thought it appropriate to follow the precedent for physical searches. In the non-electronic search world the approach recommended by the Subcommittee has long been the rule. If the government had searched the New York Stock Exchange in the 1950s and seized the records of individual accounts, it would have given notice only to the Exchange, and not to individuals whose records might have been seized. The second reason was practicality. It would impose too great a burden to require notifications of all putative victims in a botnet case, which could be 1,000, or 100,000, or more. Finally, it would be possible in some cases only to search and not to seize or copy information, and accordingly the requirement for providing notice should be disjunctive.

Judge Keenan moved the approval of the Subcommittee's proposal to amend Rule 41(f)(1)(C).

A member who had argued in favor of "and" rather than "or" stated that he intended to vote in favor of the proposal. He explained that in the case of a remote electronic search what is really being searched is intellectual property. Once it has been viewed, it has been seized. By this reasoning, the person whose property has been searched is the same as the person whose property has been seized or copied.

The motion to transmit the Subcommittee's revised proposal to amend Rule 41(f)(1)(C) to the Standing Committee for publication passed unanimously.

Before the meeting concluded, Judge Raggi acknowledged the many contributions of Judge Keenan and Judge Molloy, noting this was their last meeting as members of the Committee.

TAB 1B

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of May 29–30, 2014
Washington, D.C.
Draft Minutes as of September 22, 2014

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Thursday and Friday, May 29 and 30, 2014. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Susan P. Graber
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Larry D. Thompson, Esquire
Judge Richard C. Wesley
Judge Jack Zouhary

Deputy Attorney General James M. Cole was unable to attend. Stuart Delery, Esq., Assistant Attorney General for the Civil Division, Elizabeth J. Shapiro, Esq., Theodore Hirt, Esq., Allison Stanton, Esq., Rachel Hines, Esq., and J. Christopher Kohn, Esq., represented the Department of Justice at various times throughout the meeting.

Professor R. Joseph Kimble, the committee's style consultant, participated. Judge Jeremy D. Fogel, Director of the Federal Judicial Center, also participated. Judge Michael A. Chagares, member of the Appellate Rules Committee and chair of the CM/ECF Subcommittee, also participated. Judge John G. Koeltl, member of the Civil Rules Committee and chair of that committee's Duke Subcommittee, participated in part of the meeting by telephone.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Jonathan C. Rose	The committee's secretary and Rules Committee Officer
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman	Chief Counsel to the Rules Committees
Tim Reagan	Senior Research Associate, Federal Judicial Center
Emery G. Lee, III	Senior Research Associate, Federal Judicial Center
Catherine Borden	Research Associate, Federal Judicial Center
Scott Myers	Attorney in the Bankruptcy Judges Division
Bridget M. Healy	Attorney in the Bankruptcy Judges Division
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Steven M. Colloton, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter

Professor Nancy J. King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair

Professor Daniel J. Capra, Reporter to the Evidence Rules Committee, was unable to attend.

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by welcoming everyone and thanking the Rules Office staff for arranging the logistics of the meeting and the committee dinner. Judge Sutton reported that all of the rules proposals that were before the Supreme Court were approved in April, including the proposed amendment to Criminal Rule 12, which had been modified as agreed at the January Standing Committee meeting. The proposals to amend the Bankruptcy Rules to respond to *Stern v. Marshall* were withdrawn for the time being, while the committee waits to see what the Supreme Court does in *Executive Benefits Insurance Agency v. Arkison*, which may address an issue involved in the *Stern* proposals.

Judge Sutton also noted that the term of Chief Justice Wallace Jefferson, the committee's state court representative, was coming to a close. He said that Chief Justice Brent Dickson, of the Indiana Supreme Court, would succeed Chief Justice Jefferson as the state court representative. Judge Sutton thanked Chief Justice Jefferson for his wonderful service to the committee, described some of Justice Jefferson's outstanding contributions to the committee's work and some of his accomplishments outside the committee, and presented him with a plaque signed by Judge John Bates, Director of the Administrative Office, and by Chief Justice John G. Roberts. Chief Justice Jefferson expressed his thanks to the committee for a terrific experience and for doing such good work for the nation.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee unanimously approved the minutes of the last meeting, held on January 9–10, 2014.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set out in Judge Campbell's memorandum and attachments of May 2, 2014 (Agenda Item 2).

Amendments for Final Approval

DUKE RULES PACKAGE
(FED. R. CIV. P. 1, 4, 16, 26, 30, 31, 33, 34, AND 37)

Judge Campbell reported that the Civil Rules Committee had a final proposed package of amendments to implement the ideas from the Civil Litigation Conference held at Duke Law School in May 2010 ("Duke Conference"). He noted that the Duke Conference was intended to look at the Civil Rules generally and whether they are working and what needs to be improved. The conclusion from that Conference, he said, was that the rules generally work well, but that improvement was needed in three areas: (1) proportionality; (2) cooperation among counsel; and (3) early, active judicial case management. The advisory committee had eventually narrowed the list of possible amendments to address these areas and had published its proposals for public comment in August 2013. Judge Campbell reported that there was great public interest in the proposals, with the public comment period generating over 2,300 comments and over 40 witnesses at each of three public hearings. Judge Campbell believed that the response of the bar and the public demonstrated the continuing vitality of the Rules Enabling Act process, and he stated that the comments the committee received were very helpful in refining the proposals. He also expressed gratitude to the reporters for their excellent work in reviewing and summarizing all of the testimony and comments.

Judge Campbell next explained that the advisory committee had made a number of changes to the published proposals to address issues raised during the public comment period. In addition, the advisory committee had decided not to recommend for final adoption the published proposals to place presumptive limits on certain types of discovery devices.

Judge Campbell and Professor Cooper reported that the advisory committee proposed a few changes to some committee note language that appeared in the Standing Committee agenda materials. First, the advisory committee proposed to take out some language in the committee note for Rule 26. The proposed revised committee note would remove the language in the committee note appearing in the agenda book at page 85, lines 277 to 289. The deleted matter provided additional background on the 2000 amendment to Rule 26 that had moved subject-matter discovery from party-controlled discovery to court-managed discovery. Professor Cooper explained that the deleted language was unnecessary. Second, a paragraph was added after line 262 on page 84 of the agenda materials, to encourage courts and parties to consider computer-assisted searches as a means of reducing the cost of producing electronically stored information, thereby addressing possible proportionality concerns that might arise in ESI-intensive cases.[1] Third, Judge Campbell reported

[1] The added language stated:

> The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored

that the proposal to amend Rule 1, which will emphasize that the court and the parties bear responsibility for securing the just, speedy, and inexpensive resolution of the case, now includes some added committee note language that was not in the agenda materials. The added language would make it clear that the change was not intended to create a new source for sanctions motions. The proposed added language would state: "This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules."

A member commented that the Duke package is "awesome" and that the advisory committee had done a marvelous job. He added that the problems being addressed are intractable, difficult problems, complicated by the commitment to transsubstantivity. He said that the advisory committee had invited as much participation as possible and he believed the proposals could make a real difference in meeting the goals of Rule 1. He added that the committee would need to continue to evaluate the rules to make sure the system is working well. He congratulated Judge Koeltl (the chair of the Duke Subcommittee), Judge Campbell, Judge Sutton, and the reporters for putting together a great package. Other members added their gratitude and commended the good work and extraordinary effort.

A member asked whether a portion of the proposal to amend Rule 34(b)(2)(B)—that "The production must then be completed no later than the time for inspection stated in the request or another reasonable time stated in the response"—would allow a responding party to simply state that it would produce documents at a reasonable time without providing a specific date. Another member suggested a friendly amendment that would revise the proposal to state: "If production is not to be completed by the time for inspection stated in the request, then the response must identify another date by which production will occur." After conferring with the reporters, Judge Campbell reported that the idea was to make the provision in Rule 34(b)(2)(B) parallel Rule 34(b)(1)(B), which states that a request "must specify a reasonable *time* . . . for the inspection . . ." (emphasis added). For that reason, it was necessary to retain "time" in the proposed revision to Rule 34(b)(2)(B), instead of substituting "date." However, the advisory committee changed its proposal to refer to "specified" instead of "stated," to emphasize that it would not be sufficient to generally state that the production would occur at a reasonable time. He noted that the proposed advisory committee note already stated that "[w]hen it is necessary to make the production in stages the response should specify the beginning and end dates of the production." A motion was made to change "stated" to "specified" in the proposal, so that it would read: "The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response." The motion passed unanimously.

The Duke package of proposed amendments passed by a unanimous vote. Judge Sutton thanked Judge Koeltl for his tireless work on the Duke Conference and on this very promising set of proposed amendments, as well as Judge Campbell and the rest of his team.

The committee unanimously approved the Duke package of proposed amendments to

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information become available.

the Civil Rules, revised as stated above, to be submitted for final approval by the Judicial Conference.

FED. R. CIV. P. 37(e)

Judge Campbell reported on the proposed amendment to Rule 37(e), which is intended to give better guidance to courts and litigants on the consequences of failing to preserve information for use in litigation. He said that comments on the version that was published for public comment were extensive, and the advisory committee had substantially revised the rule to address issues raised by the comments. The subcommittee and the advisory committee decided that the following guiding principles should be implemented in the revised proposal: (1) It should resolve the circuit split on the culpability standard for imposing certain severe sanctions; (2) It should preserve ample trial court discretion to deal with the loss of information; (3) It should be limited to electronically stored information; and (4) It should not be a strict liability rule that would automatically impose serious sanctions if information is lost. Judge Campbell explained that the rule text and committee note had been revised after publication in line with these principles.[2]

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[2] Judge Campbell also noted that the advisory committee's final proposal revised the committee note that was included in the agenda materials for the Standing Committee's meeting. Specifically, the paragraphs on pages 322–23, lines 170–91 were revised as follows:

> Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.
>
> Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.
>
> Courts should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.
>
> ~~Subdivision (e)(2) does not include an express requirement that the court find prejudice to the party deprived of the information. The adverse inference permitted under this subdivision can itself satisfy the prejudice requirement: if a court or jury infers the lost information was unfavorable to the party that lost it, the same inference suggests that the opposing party was prejudiced by the loss.~~

The committee engaged in discussion on the proposal. After considering some suggestions and discussing them with the reporters, the advisory committee agreed to make a suggested change to delete "may" in line 9 on page 318 of the agenda materials, and to add "may" on line 10 before "order," and on line 13 after "litigation." Judge Campbell stated that he and the reporters agreed that this change adds more emphasis to the word "only" on line 12, underscoring the intent that (e)(2) measures are not available under (e)(1).

A member commented that, in looking at this proposal from multiple perspectives, it is going to be very helpful and is clearly needed. He added his congratulations to the advisory committee for their terrific work.

The committee unanimously approved the proposed amendment to Rule 37(e), revised as stated above, to be submitted for final approval by the Judicial Conference.

FORMS
(FED. R. CIV. P. 84 AND 4 AND APPENDIX OF FORMS)

Judge Campbell reported on the proposal to abrogate Rule 84 and the Appendix of Forms. He said that there were relatively few comments on this proposal and that the advisory committee remained persuaded after reading the comments that the forms are rarely used and that the best course is abrogation. Professor Cooper added that Forms 5 and 6 on waiver of service would be incorporated into Rule 4.

A member suggested that he thought the sense of the committee was that forms can be and are extremely important in helping lawyers and pro se litigants, but that the advisory committee should no longer bear responsibility for them. He added that he favored abrogation, but the advisory committee should continue to have a role in shaping the forms, perhaps by participating in a group at the Administrative Office (AO) that can handle the forms, helping to draft model forms, and/or having a right of first refusal on forms drafted by the AO. Judge Sutton agreed that forms are very useful and that this proposal is simply about getting them out of the Rules Enabling Act process. He added that there are many options in terms of how civil forms are handled if the abrogation goes into effect and suggested that the advisory committee consider what it thinks its role should be in shaping the forms going forward. He suggested that the advisory committee present its suggestion in that regard for discussion at the next Standing Committee meeting in January.

The committee unanimously approved the proposed amendments to abrogate Rule 84 and the Appendix of Forms, and to amend Rule 4 to incorporate Forms 5 and 6, to be submitted for final approval by the Judicial Conference.

~~In addition, there may be rare cases where a court concludes that a party's conduct is so reprehensible that serious measures should be imposed even in the absence of prejudice. In such rare cases, however, the court must still find the intent specified in subdivision (e)(2).~~

Judge Sutton congratulated and praised Judge Campbell, the reporters, and the subcommittee chairs for all their hard work and terrific leadership and insight in bringing the Duke proposals, the Rule 37(e) amendments, and the Rule 84 amendment to the Standing Committee. He added that all three sets of proposals were done through consensus, which is a credit to the chairs of the subcommittees and the chair of the advisory committee. He also said that many of these proposals started with former Civil Rules Committee and Standing Committee chairs Judge Lee H. Rosenthal and Judge Mark R. Kravitz. This package of amendments, he said, was a wonderful tribute to Judge Kravitz's memory. Judge Sutton added that the way to thank the chairs and reporters for all of their work on these proposals is to make sure they make a difference in practice. He said that in the near future, the Standing Committee should discuss these amendments in terms of broader reform, including pilot projects and judicial education efforts, to make sure that they are making a difference on the ground. Judge Campbell expressed his thanks to Judge Grimm, for his tireless efforts on Rule 37, and to Judge Sutton for all of his insight and time in overseeing the work on these proposals.

FED. R. CIV. P. 6(d)

Professor Cooper reported that the advisory committee had also published an amendment to Rule 6(d) that would revise the rule to provide that the three added days provided for actions taken after certain types of service apply only after being served, not after "service" more generally. Few comments were received and no changes were made after publication. Judge Campbell said that the advisory committee recommended approving this proposal, but not sending it on to the Judicial Conference yet, so that it can be presented together with another proposed amendment to Rule 6(d), which would remove the three added days for electronic service and which was being proposed for publication.

The committee unanimously approved the proposed amendment to Rule 6(d), to be submitted for final approval by the Judicial Conference at the appropriate time.

FED. R. CIV. P. 55(c)

Professor Cooper reported that the final proposal that was published for public comment in 2013 was a proposal to amend Rule 55(c) to make explicit that only a final default judgment could be set aside under Rule 60(b).

The committee unanimously approved the proposed amendment to Rule 55(c) to be submitted for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CIV. P. 82

Professor Cooper reported that at its January 2014 meeting, the Standing Committee had approved for publication at a suitable time an amendment to Rule 82 to reflect enactment of a new

venue statute for civil actions in admiralty. Since January, further reflection had led the advisory committee to believe that a cross-reference in the rule to 28 U.S.C. § 1391 should be deleted and that the text should be further revised to reflect the language of new § 1390. The advisory committee renewed its recommendation to publish the proposal, as revised.

The committee unanimously approved publication of the proposed amendment to Rule 82.

FED. R. CIV. P. 4(m)

Professor Cooper reported on the recommendation to publish a clarifying amendment to Rule 4(m) to ensure that service abroad on a corporation is excluded from the time for service set by Rule 4(m).

The committee unanimously approved publication of the proposed amendment to Rule 4(m).

REPORT OF THE INTER-COMMITTEE CM/ECF SUBCOMMITTEE

Judge Chagares presented the report of the CM/ECF Subcommittee, as set out in his memorandum of May 5, 2014 (Agenda Item 3).

Amendments for Publication

FED. R. APP. P. 26(c), FED. R. BANKR. P. 9006, FED. R. CIV. P. 6, FED. R. CRIM. P. 45

Judge Chagares reported that the subcommittee had been working with the advisory committees for the Appellate, Bankruptcy, Civil, and Criminal Rules on proposals to remove the provisions in each set of rules that currently provide three extra days for acting after electronic service. Each advisory committee recommended an amendment to its set of rules for publication. The subcommittee had unanimously supported the recommendation of the advisory committees to publish these amendments for public comment. The amendments to eliminate the "three-day rule" as applied to electronic service would be to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45.

Judge Sutton noted that a Standing Committee member had asked at the last Standing Committee meeting whether other types of service should be removed from the three-day rule. Judge Chagares said that question would take some study and for the time being the only recommendation of the subcommittee was to take electronic service out of the three-day rule. Judge Sutton added that the advisory committees would each study that question separately.

A member suggested removing "in" before "widespread skill" in the last sentence of the second paragraph of each of the draft committee notes. The reporters all agreed to make that change.

The committee unanimously approved publication of the proposed amendments to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45, with the change to the committee notes described above.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professors Beale and King presented the report of the advisory committee, as set out in Judge Raggi's memorandum and attachments of May 5, 2014 (Agenda Item 4).

Amendments for Publication

FED. R. CRIM. P. 4

Judge Raggi reported that the advisory committee recommended publication of an amendment to Rule 4 to address service of summons on organizational defendants who are abroad. The proposed amendment would: (1) specify that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons, filling a gap in the current rule; (2) for service of a summons on an organization within the United States, eliminate the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but require mailing when delivery has been made on an agent authorized by statute, if the statute requires mailing to the organization; and (3) authorize service on an organization at a place not within a judicial district of the United States, prescribing a non-exclusive list of methods for service.

A member suggested making it clearer in the proposed additional sentence in Rule 4(c)(2) that the reference to the summons under Rule 41(c)(3)(D) is to summons to an organization. Judge Raggi agreed to change the sentence to: "A summons to an organization under Rule 41(c)(3)(D) may also be served at a place not within a judicial district of the United States."

Another member asked about the phrase "authorized by law" in the proposed amendment to Rule 4(a), asking whether it clarifies what actions a judge can take if an organizational defendant fails to appear in response to a summons. The committee discussed whether to add "United States" before "law," and decided to include that addition in the version published for public comment, noting that including it would be more likely to elicit comments on whether it was helpful.

Another member suggested that, in the illustrative list of means of giving notice in proposed Rule 4(c)(3)(D)(ii), "stipulated by the parties" be changed to "agreement of the organization" or that the list add "agreed to by the party." Judge Raggi explained that a stipulation implied a certain level of formality and that the list was merely illustrative. She said she could not agree to this change without going back to the advisory committee. The member stated that his suggestion could just be considered the first comment of the public comment period.

The member also suggested that on page 492, line 58, in proposed Rule 4(c)(3)(D)(i),

"another agent" be changed to "an agent" to avoid implying that foreign law always authorizes officers and managing or general agents to receive notice. Judge Raggi agreed to accept that suggestion, noting that it reflected the advisory committee's intent.

The committee unanimously approved publication of the proposed amendment to Rule 4, revised as noted above.

FED. R. CRIM. P. 41

Judge Raggi reported that the advisory committee recommended publishing an amendment to Rule 41, to provide that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when the media or information is or may be located outside of the district. Judge Raggi explained that this proposal came about because the Department of Justice had encountered special difficulties with Rule 41's territorial venue provisions—which generally limit searches to locations within a district—as applied to investigating crimes involving electronic information.

The current limits on where a warrant application must be made make it difficult to secure a search warrant in two specific situations: First, when the location of the storage media or electronic information to be searched, copied, or seized is not known because the location has been disguised through the use of anonymizing software, and second, when a criminal scheme involves multiple computers located in many different districts, such as a "botnet" in which perpetrators obtain control over numerous computers of unsuspecting victims. Judge Raggi explained that proposed new subparagraph (b)(6)(A) addresses the first scenario. It would provide authority to issue a warrant to use remote electronic access to search electronic storage media and to seize or copy electronically stored information within or outside the district when the district in which the media or information is located has been concealed through technological means. Proposed (b)(6)(B) addresses the second scenario. It would eliminate the burden of attempting to secure multiple warrants in numerous districts and allow a single judge to issue a warrant to search, seize, or copy electronically stored information by remotely accessing multiple affected computers within or outside a district, but only in investigations of violations of 18 U.S.C. § 1030(a)(5), where the media to be searched are "protected computers" that have been "damaged without authorization" (terms defined in 18 U.S.C. § 1030(e)(2) & (8)) and are located in at least five different districts. Judge Raggi added that the proposed amendments affect only the district in which a warrant may be obtained and would not alter the requirements of the Fourth Amendment for obtaining warrants, including particularity and probable cause showings.

She noted that the proposal also includes a change to Rule 41(f)(1)(C), to ensure that notice that a search has been conducted will be provided for searches by remote access as well as physical searches. The rule now requires that notice of a physical search be provided "to the person from whom, or from whose premises, the property was taken" or left "at the place where the officer took the property." The proposed addition to the rule would require that when the search is by remote

access, reasonable efforts must be made to provide notice to the person whose information was seized or whose property was searched.

The committee unanimously approved publication of the proposed amendment to Rule 41.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Struve presented the report of the advisory committee, as set out in Judge Colloton's memorandum and attachments of May 8, 2014 (Agenda Item 5).

Amendments for Publication

Judge Colloton reported that the advisory committee had five proposals it recommended for publication. The first, the proposed amendment to Rule 26(c) to eliminate the three-day rule for electronic service, was already addressed during the CM/ECF Subcommittee's report.

INMATE FILING RULES
(FED. R. APP. P. 4(c)(1) AND 25(a)(2)(C), FORMS 1 AND 5, AND NEW FORM 7)

Judge Colloton reported that the advisory committee recommended publishing a set of amendments designed to clarify and improve the inmate-filing rules. The amendments to Rules (4)(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions, but that the use of an institution's legal mail system is not. The amendments clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as a postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration that would satisfy the rule. Forms 1 and 5 (suggested forms of notices of appeal) are revised to include a reference alerting filers to the existence of Form 7.

Professor Struve noted that a few stylistic changes had been made to the proposals in the Standing Committee's agenda materials. First, in Rule 4(c)(1)(B), on page 560, lines 3–4, "meets the requirements of" was changed to "satisfies." A similar change was made to Rule 25(a)(2)(C)(ii), on page 562, lines 9–10. In Rule 25(a)(2)(C)(i), subdivisions (a) and (b), on pages 561 and 562, would become bullet points. As a result, in Rule 25(a)(2)(C)(ii), the cross-reference to Rule 25(a)(2)(C)(i)(a) would refer only to Rule 25(a)(2)(C)(i).

A member noted that in Rule 4(c)(1)(A)(ii), the "it" on page 559, line 20, referred to the "notice" referenced quite a bit earlier in the rule. Judge Colloton agreed to make revisions to clarify the reference. In Rule 4(c)(1)(A)(ii), "it" was changed to "the notice." A corresponding change was made to Rule 25(a)(2)(C)(i), changing "it" to "the paper" on page 562, line 5. Finally, the advisory committee agreed to change "and" to "or" in Rule 25(a)(2)(C)(i), on page 562, line 4, and in Rule 4(c)(1)(A)(ii), page 559, line 20, so that evidence such as a postmark or a date stamp would suffice.

Professor Struve said that, at the suggestion of a committee member, the advisory committee would consider whether to change the references in Rule 4(c)(1)(B) and Rule 25(a)(2)(C)(ii) from "exercises its discretion to permit" to simply "permits." She said that the committee would also consider a member's suggestion that the rules need not suggest the option of getting a notarized statement when a declaration would suffice. She said these suggestions would be brought to the advisory committee for consideration as it works through the comments on the published draft.

The committee unanimously approved publication of the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C), revised as noted above, and to Appellate Forms 1 and 5, and proposed new Form 7.

FED. R. APP. P. 4(a)(4)

Judge Colloton reported that the advisory committee recommended publishing a proposed amendment to Rule 4(a)(4) to address a circuit split on whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4) if a court has mistakenly ordered an "extension" of the deadline for filing the motion. The proposal is to adopt the majority approach, which is that postjudgment motions made outside the deadlines set by the Civil Rules are not "timely" under Rule 4(a)(4).

The committee unanimously approved publication of the proposed amendment to Rule 4(a)(4).

LENGTH LIMITS
(FED. R. APP. P. 5, 21, 27, 28.1, 32, 35, AND 40, AND FORM 6)

Judge Colloton reported that the advisory committee recommended publishing a set of proposals to address length limits. The proposed amendments to Rules 5, 21, 27, 35, and 40 would impose type-volume limits for documents prepared using a computer, and would maintain the page limits currently set out in the rules for documents prepared without the aid of a computer. They would also employ a conversion ratio of 250 words per page for these rules. The proposed amendments also shorten Rule 32's word limits for briefs to reflect the pre-1998 page limits multiplied by 250 words. The word limits set by Rule 28.1 for cross-appeals are correspondingly shortened. Finally, the proposals add a new Rule 32(f), setting out a list of items that can be excluded when computing a document's length.

A member asked why it was necessary to have line limits in addition to word limits. Judge Colloton agreed that the advisory committee would examine that question in the future, but he said that it would require careful consideration and the advisory committee recommended publishing the current proposals for now.

The committee unanimously approved publication of the proposed amendments to

Appellate Rules 5, 21, 27, 28.1, 32, 35, and 40, and to Form 6.

FED. R. APP. P. 29

Judge Colloton reported that the advisory committee recommended publishing an amendment to Rule 29, addressing amicus filings in connection with rehearing. The amendment would re-number the existing rule as Rule 29(a) and would add Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing.

Judge Colloton noted that two stylistic changes were made to the version that appeared in the Standing Committee's agenda materials. First, on page 584, line 14, in proposed Rule 29(b)(2), "Rule 29(a)(2) applies" was changed to "Rule 29(a)(2) governs the need to seek leave." Second, on page 584, line 16, in proposed Rule 29(b)(3), "the" was changed to "a."

The committee discussed whether Rule 29(b)(2) should incorporate any of the language of Rule 29(a)(2). Some members noted that some appellate courts do not allow the filing of amicus briefs without leave of court, because a practice had developed of filing amicus briefs in order to force recusals. Judge Colloton agreed, on behalf of the advisory committee, to borrow some of the language from Rule 29(a)(2) for use in Rule 29(b)(2). The proposed amendment to Rule 29(b)(2) would read: "The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court." Judge Sutton noted that Rule 29(a), which allows filing amicus briefs by consent during initial consideration of a case on the merits, may be in tension with some circuits' practice, and suggested that the advisory committee consider whether it should be changed in the future. Judge Colloton agreed that the advisory committee would add Rule 29(a) to its agenda.

The committee unanimously approved publication of the proposed amendment to Rule 29, revised as stated above.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater presented the report of the advisory committee, as set out in his memorandum and attachment of April 10, 2014 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Informational Items

Judge Fitzwater reported that, in connection with its spring meeting, the advisory committee had worked with the University of Maine School of Law to host a symposium on the challenges of electronic evidence. He said that no concrete rules proposals came out of the symposium, but that it set the stage for issues that the advisory committee will need to monitor going forward.

Judge Fitzwater said that the advisory committee is examining a possible amendment to Rule

803(16), the hearsay exception for "ancient documents," and that it will discuss the matter further at its fall meeting.

The Standing Committee's liaison to the Evidence Rules Committee commented that Judge Fitzwater's term as chair was drawing to a close and that he had greatly admired Judge Fitzwater's leadership. He expressed his personal gratitude for Judge Fitzwater's exceptional leadership and reported that Judge Bill Sessions would serve as the next chair. Judge Sutton echoed the praise and gratitude.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professors Gibson and McKenzie presented the report of the advisory committee, as set out in Judge Wedoff's memorandum and attachments of May 6, 2014 (Agenda Item 7).

Amendments for Final Approval

OFFICIAL FORMS 17A, 17B, AND 17C

Professor Gibson reported that an amendment to Form 17A and new Forms 17B and 17C had been published for comment in connection with the revision of the bankruptcy appellate rules. Form 17A and new Form 17B would implement the provisions of 28 U.S.C. § 158(c)(1) that permit an appellant and an appellee to elect to have an appeal heard by the district court in districts for which appeals to a bankruptcy appellate panel have been authorized. New Form 17C would be used by a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text. Professor Gibson reported that no comments had been received, that the advisory committee had unanimously approved the proposals, and that the advisory committee recommended them to be approved and take effect in December of this year. Professor Gibson noted that there was a typographical error on page 702 of the agenda materials, and that the reference to "U.S.C. § 158(c)(1)" should say "28 U.S.C. § 158(c)(1)."

The committee unanimously approved the proposed amendments to Form 17A and new Forms 17B and 17C, with the revision stated above, for submission to the Judicial Conference for final approval.

OFFICIAL FORMS 3A AND 3B

Judge Wedoff reported that the advisory committee recommended amending Forms 3A and 3B to eliminate references to filing fees, because those amounts are subject to periodic changes by the Judicial Conference that can render the forms inaccurate. Judge Wedoff said that since the amendments were technical in nature, publication was not needed.

The committee unanimously approved the proposed amendments to Forms 3A and 3B for submission to the Judicial Conference for final approval without publication.

OFFICIAL FORMS 22A-1, 22A-1 SUPP, 22A-2, 22B, 22C-1, AND 22C-2

Judge Wedoff reported that the advisory committee recommended approval of the amendments to the modernized "means test" forms that were originally published in 2012 and then republished in 2013. Judge Wedoff said that the comments on the republished drafts were generally favorable, but that the advisory committee had made several changes after publication to take account of some of the suggestions made during the public comment period.

The committee unanimously approved the proposed amendments to Forms 22A-1, 22A-1 Supp, 22A-2, 22B, 22C-1, and 22C-2 for submission to the Judicial Conference for final approval.

MODERNIZED INDIVIDUAL FORMS
(OFFICIAL FORMS 101, 101A, 101B, 104, 105, 106SUM, 106A/B,
106C, 106D, 106E/F, 106G, 106H, 106DEC, 107, 112, 119, 121, 318, 423, AND 427)

Professor Gibson reported that the advisory committee recommended approving the modernized forms for individual-debtor cases that were published in 2013. She explained the process used by the subcommittee and the advisory committee to carefully review the comments and make changes as needed. She added that some of the comments had made suggestions outside the scope of the modernization project, and that the advisory committee had noted those for consideration at a later date. Professor Gibson said that the advisory committee recommended approving the forms, but making their effective date correspond with the non-individual modernized forms recommended for publication this summer, making the earliest possible effective date December 1, 2015.

The committee unanimously approved the proposed amendments to the modernized forms for individual-debtor cases for submission to the Judicial Conference for final approval at the appropriate time, likely in 2015.

Amendments for Publication

MODERNIZED FORMS FOR NON-INDIVIDUALS
(OFFICIAL FORMS 11A, 11B, 106J, 106J-2, 201, 202, 204, 205,
206SUM, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E)

Professor Gibson reported that the nearly final installment of the Forms Modernization Project consisted primarily of case-opening forms for non-individual cases, chapter 11-related forms, the proof of claim form and supplements, and orders and court notices for use in all types of cases. The advisory committee also sought to publish two revised individual debtor forms and the

abrogation of two official forms.

At the suggestion of a committee member, Judge Wedoff agreed to revise the instructions at the top of Form 106J-2 to make it clear that the form requests only expenses personally incurred, not those that overlap with the expenses reported on Form 106J.

The committee unanimously approved publication of the modernized forms for non-individuals, described above and with the revision described above.

CHAPTER 13 PLAN FORM AND RELATED AMENDMENTS
(OFFICIAL FORM 113 AND FED. R. BANKR. P. 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, AND 9009)

Judge Wedoff reported that the chapter 13 plan form had been published for comment in August 2013, that the advisory committee had revised the form in response to public comments, and that it now recommended republication in August 2014. Judge Wedoff noted that one improvement in the revised form is that it adds an instruction that clarifies that the form sets out options that may be appropriate in some cases, but the presence of an option on the form does not indicate that the option is appropriate in all circumstances or that it is permissible in all judicial districts. A member asked whether that should be done on all of the forms to avoid needing to tweak forms every time a decision changes the applicability of some aspect of a form. Judge Wedoff said that the advisory committee would consider whether it might be appropriate to amend Rule 9009 to state that the presence of an option on a form does not mean that it is always applicable. But he said that such an amendment should be pursued separately from the current proposal to amend the chapter 13 plan form.

Judge Wedoff explained that because of the significant changes to the proposed form, the advisory committee recommended republication. As to the related rule amendments that were published in 2013, Judge Wedoff said that republication was probably not necessary, but that the advisory committee recommended republication of the rule amendments so that they could remain part of the same package as the plan form. He said that republication of the rules would delay the package by a year because, under the Rules Enabling Act, the rules would not go into effect until at least 2016 if they are republished this year. But, he said, the advisory committee did not think it wise to put the rule amendments into effect without the related form that was the driving force behind the amendments. Professor McKenzie described the proposed rule amendments and the changes made after publication, most of which were minor. He said the request for comment would seek input as to whether the rule amendments should go into effect even if the advisory committee were to decide not to proceed with the plan form.

The committee unanimously approved publication of the revised chapter 13 plan form and related amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009.

FED. R. BANKR. P. 3002.1

Judge Wedoff reported that the advisory committee recommended proposed amendments to Rule 3002.1, which applies in chapter 13 cases and requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and trustee certain information about the mortgage while the bankruptcy case is pending. The proposed amendments would clarify when the rule applies and when its requirements cease.

The committee unanimously approved publication of the proposed amendment to Rule 3002.1.

OFFICIAL FORM 410A

Judge Wedoff reported that the advisory committee recommended publication of amendments to Official Form 410A (currently Form 10A), the Mortgage Proof of Claim Attachment that is required to be filed in an individual debtor case with the proof of claim of a creditor that asserts a security interest in the debtor's principal residence. The advisory committee recommended publication of a revised form that would replace the existing form with one that requires a mortgage claimant to provide a loan payment history and other information about the mortgage claim, including calculations of the claim and the arrearage amounts. Judge Wedoff noted that there was one typographical error in the draft in the Standing Committee's agenda materials. On page 1103, the reference to Rule 3001(c)(2)(A) should be to the Federal Rules of Bankruptcy Procedure, not the Federal Rules of Civil Procedure.

The committee unanimously approved publication of the proposed amendments to Official Form 410A, with the revision noted above.

CHAPTER 15 FORM AND RULES AMENDMENTS
(OFFICIAL FORM 401 AND FED. R. BANK. P. 1010, 1011, 1012, AND 2002)

Professor McKenzie reported that the advisory committee recommended publication of an official form for petitions under chapter 15, which covers cross-border insolvencies. The proposed form grew out of the work of the Forms Modernization Project. Professor McKenzie said that the advisory committee also recommended publishing amendments to the Bankruptcy Rules to improve procedures for international bankruptcy cases. The proposals would: (1) remove the chapter 15-related provisions from Rules 1010 and 1011; (2) create a new Rule 1012 to govern responses to a chapter 15 petition; and (3) augment Rule 2002 to clarify the procedures for giving notice in cross-border proceedings.

The committee unanimously approved publication of proposed Official Form 401, the proposed amendments to Rules 1010, 1011, and 2002, and proposed new Rule 1012.

Informational Items

Professor Gibson reported that the advisory committee had withdrawn its proposed amendment to Rule 5005, which was published in 2013 and which would have replaced local rules on electronic signatures and permitted the filing of a scanned signature page of a document bearing the signature of an individual who is not a registered user of the CM/ECF system. The amendment would have allowed the scanned signature to have the same force and effect as the original signature and would have removed any requirement of retaining the original document with the wet signature. Professor Gibson said that the advisory committee had been persuaded by the public comments that the amendment was not needed and could be problematic.

Judge Wedoff said that his term as chair of the advisory committee was coming to a close and that Judge Sandra Ikuta would be taking over as chair. He added that he had very much appreciated the opportunity to serve as chair.

Judge Sutton said that Judge Wedoff had done amazing work, together with the reporters and the subcommittees. He added that Judge Wedoff's enthusiasm was infectious and that he was a national treasure for the Bankruptcy Rules. Judge Sutton said the committee was grateful for Judge Wedoff's service and his leadership.

REPORT OF THE ADMINISTRATIVE OFFICE

Julie Wilson and Ben Robinson provided the report of the Administrative Office. Ms. Wilson said that the Rules Office had been watching legislation that would attempt to address issues related to patent assertion entities. She said that a bill did pass in the House in December, but that recent developments indicated that the legislation was not moving forward in the Senate for now. She said that the Rules Office would continue to monitor the legislation.

Judge Sutton thanked the Rules Office for all its great work on the preparations for the committee's meeting.

NEXT COMMITTEE MEETING

The committee will hold its next meeting on January 8–9, 2014, in Phoenix, Arizona.

Respectfully submitted,

Andrea L. Kuperman
Chief Counsel

Jonathan C. Rose
Secretary

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TAB 2

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TAB 2A

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Rule 12. Pleadings and Pretrial Motions

* * * * *

(b) Pretrial Motions.

(1) ***In General.*** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits. Rule 47 applies to a pretrial motion.

(2) ~~***Motions That May Be Made Before Trial.*** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.~~***Motions That May Be Made at Any Time***. A motion that the court lacks jurisdiction may be made at any time while the case is pending.

(3) ***Motions That Must Be Made Before Trial***. The following defenses, objections, and requests must

be raised by pretrial motion ~~before trial~~if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) ~~a motion alleging~~ a defect in instituting the prosecution~~;~~, including:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to a speedy trial;

(iv) selective or vindictive prosecution; and

(v) an error in the grand-jury proceeding or preliminary hearing;

(B) ~~a motion alleging~~ a defect in the indictment or information, including:

(i) joining two or more offenses in the same count (duplicity);

(ii) charging the same offense in more than one count (multiplicity);

(iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense;

~~-- but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense;~~

(C) ~~a motion to~~ suppression of evidence;

(D) ~~a Rule 14 motion to sever~~severance of charges or defendants under Rule 14; and

(E) ~~a Rule 16 motion for~~ discovery under Rule 16.

(4) ***Notice of the Government's Intent to Use Evidence*.**

(A) *At the Government's Discretion*. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) *At the Defendant's Request*. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence

that the defendant may be entitled to discover under Rule 16.

(c) ~~Motion Deadline.~~ Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.

(1) *Setting the Deadline.* The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set one, the deadline is the start of trial.

(2) *Extending or Resetting the Deadline*. At any time before trial, the court may extend or reset the deadline for pretrial motions.

(3) *Consequences of Not Making a Timely Motion Under Rule 12(b)(3).* If a party does not meet the deadline for making a Rule 12(b)(3) motion,

the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause.

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(e) [Reserved]~~Waiver of a Defense, Objection, or Request.~~ ~~A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.~~

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Committee Note

Rule 12(b)(1). The language formerly in (b)(2), which provided that "any defense**,** objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial, has been relocated here. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue." No change in meaning is intended.

Rule 12(b)(2). As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.

Rule 12(b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is "then reasonably available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can – and should – be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The "then reasonably available" language is intended to ensure that a

claim a party could not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(3). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. Just as in (b)(1), the more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue." No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims are not overlooked. The Rule is not intended to and does not affect or supersede statutory provisions that establish the time to make specific motions, such as motions under the Jury Selection and Service Act, 18 U.S.C. § 1867(a).

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned any jurisdictional justification for the exception in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction").

Rule 12(c). As revised, subdivision (c) governs both the deadline for making pretrial motions and the consequences of failing to meet the deadline for motions that must be made before trial under Rule 12(b)(3).

As amended, subdivision (c) contains three paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made, and adds a sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start of trial, so that motions may be ruled upon before jeopardy attaches. Subdivision (e) of the present rule contains the language "or by any extension the court provides," which anticipates that a district court has broad discretion to extend, reset, or decline to extend or reset, the deadline for pretrial motions. New paragraph (c)(2) recognizes this discretion explicitly and relocates the Rule's mention of it to a more logical place – after the provision concerning setting the deadline and before the provision concerning the consequences of not meeting the deadline. No change in meaning is intended.

New paragraph (c)(3) governs the review of untimely claims, previously addressed in Rule 12(e). Rule 12(e) provided that a party "waives" a defense not raised within the time set under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee

decided not to employ the term "waiver" in new paragraph (c)(3).

New paragraph 12(c)(3) retains the existing standard for untimely claims. The party seeking relief must show "good cause" for failure to raise a claim by the deadline, a flexible standard that requires consideration of all interests in the particular case.

Rule 12(e). The effect of failure to raise issues by a pretrial motion has been relocated from (e) to (c)(3).

Changes Made After Publication and Comment

Language that had been deleted from Rule 12(b)(2) as unnecessary was restored and relocated in (b)(1). The change begins the Rule's treatment of pretrial motions with an appropriate general statement and responds to concerns that the deletion might have been perceived as unintentionally restricting the district courts' authority to rule on pretrial motions. The references to "double jeopardy" and "statute of limitations" were dropped from the nonexclusive list in (b)(3)(A) to permit further debate over the treatment of such claims. New paragraph (c)(2) was added to state explicitly the district court's authority to extend or reset the deadline for pretrial motions; this authority had been recognized implicitly in language being deleted from Rule 12(e). In subdivision (c), the cross reference to Rule 52 was omitted as unnecessarily controversial. In subparagraph (c)(3), the current

language "good cause" was retained for all claims and subparagraph (c)(3)(B) was omitted. Finally, the Committee Note was amended to reflect these post-publication changes and to state explicitly that the rule is not intended to change or supersede statutory deadlines under provisions such as the Jury Selection and Service Act.

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Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if the court does not have jurisdiction of the charged offense.~~if:~~

~~(1) the indictment or information does not charge an offense; or~~

~~(2) the court does not have jurisdiction of the charged offense.~~

* * * * *

Committee Note

Rule 34(a). This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

Changes Made After Publication and Comment

No changes were made after publication and comment.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 5. Initial Appearance

* * * * *

(d) Procedure in a Felony Case.

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

* * * * *

(D) any right to a preliminary hearing; ~~and~~

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

(F) that a defendant who is not a United States citizen may request that an attorney for the

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

government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested — but that even without the defendant's request, a treaty or other international agreement may require consular notification.

* * * * *

Committee Note

Rule 5(d)(1)(F). Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice.

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that U.S.

treaty obligations are fulfilled, and to create a judicial record of that action. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not create any such rights or remedies.

Changes Made After Publication and Comment

In response to public comments the amendment was rephrased to state that the information regarding consular notification should be provided to all defendants who are arraigned. Although it is anticipated that ordinarily only defendants who are held in custody will ask the government to notify a consular official of their arrest, it is appropriate to provide this information to all defendants at their initial appearance. The new phrasing also makes it clear that the advice should be provided to every defendant, without any attempt to determine the defendant's citizenship. A conforming change was made to the Committee Note.

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Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(b) Pretrial Procedure.

* * * * *

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

* * * * *

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

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

(H) that a defendant who is not a United States citizen may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested — but that even without the defendant's request, a treaty or other international agreement may require consular notification.

* * * * *

Committee Note

Rule 58(b)(2)(H). Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice.

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that U.S. treaty obligations are fulfilled, and to create a judicial record of that action. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not create any such rights or remedies.

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In response to public comments the amendment was rephrased to state that the information regarding consular notification should be provided to all defendants who are arraigned. Although it is anticipated that ordinarily only defendants who are held in custody will ask the government to notify a consular official of their arrest, it is appropriate to provide this information to all defendants at the initial appearance. The new phrasing also makes it clear that the advice should be provided to every defendant, without any attempt to determine the defendant's

citizenship. A conforming change was made to the Committee Note.

Rule 6. The Grand Jury

* * * * *

(e) Recording and Disclosing the Proceedings.

* * * * *

(3) ***Exceptions.***

* * * * *

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § ~~401a~~3003), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the

performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

* * * * *

Committee Note

Rule 6(e)(3)(D). This technical and conforming amendment updates a citation affected by the editorial reclassification of chapter 15 of title 50, United States Code. The amendment replaces the citation to 50 U.S.C. § 401a with a citation to 50 U.S.C. § 3003. No substantive change is intended.

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TAB 2B

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 4. Arrest Warrant or Summons on a Complaint

(a) Issuance. If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If an individual defendant fails to appear in response to a summons, a judge may, and upon request of an attorney for the government must, issue a warrant. If

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

an organizational defendant fails to appear in response to a summons, a judge may take any action authorized by United States law.

* * * * *

(c) Execution or Service, and Return.

(1) ***By Whom.*** Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons.

(2) ***Location.*** A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest. A summons to an organization under Rule 4(c)(3)(D) may also be served at a place not within a judicial district of the United States.

(3) ***Manner*****.**

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the original or a duplicate original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the original or a duplicate original warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

(i) by delivering a copy to the defendant personally; or

(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address.

(C) A summons is served on an organization in a judicial district of the United States by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. ~~A copy~~If the agent is one authorized by statute and the statute so requires, a copy must also be mailed to the organization~~organization's last known address within the district or to~~

~~its principal place of business elsewhere in the United States~~.

(D) A summons is served on an organization not within a judicial district of the United States:

(i) by delivering a copy, in a manner authorized by the foreign jurisdiction's law, to an officer, to a managing or general agent, or to an agent appointed or legally authorized to receive service of process; or

(ii) by any other means that gives notice, including one that is:

(a) stipulated by the parties;

(b) undertaken by a foreign authority in response to a letter rogatory, a letter of request, or a request

submitted under an applicable international agreement; or

(c) permitted by an applicable international agreement.

* * * * *

Committee Note

Subdivision (a). The amendment addresses a gap in the current rule, which makes no provision for organizational defendants who fail to appear in response to a criminal summons. The amendment explicitly limits the issuance of a warrant to individual defendants who fail to appear, and provides that the judge may take whatever action is authorized by law when an organizational defendant fails to appear. The rule does not attempt to specify the remedial actions a court may take when an organizational defendant fails to appear.

Subdivision (c)(2). The amendment authorizes service of a criminal summons on an organization outside a judicial district of the United States.

Subdivision (c)(3)(C). The amendment makes two changes to subdivision (c)(3)(C) governing service of a summons on an organization. First, like Civil Rule 4(h), the amended provision does not require a separate mailing to the organization when delivery has been made in the United States to an officer or to a managing or general agent. Service of process on an officer, managing, or general agent is in effect service on the principal. Mailing is required when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the entity.

Second, also like Civil Rule 4(h), the amendment recognizes that service outside the United States requires separate consideration, and it restricts Rule 4(c)(3)(C) and its modified mailing requirement to service on organizations within the United States. Service upon organizations outside the United States is governed by new subdivision (c)(3)(D).

These two modifications of the mailing requirement remove an unnecessary impediment to the initiation of criminal proceedings against organizations that commit domestic offenses but have no place of business or mailing address within the United States. Given the realities of today's global economy, electronic communication, and federal criminal practice, the mailing requirement should not shield a defendant organization when the Rule's core objective—notice of pending criminal proceedings—is accomplished.

Subdivision (c)(3)(D). This new subdivision states that a criminal summons may be served on an

organizational defendant outside the United States and enumerates a non-exhaustive list of permissible means of service that provide notice to that defendant.

Although it is presumed that the enumerated means will provide notice, whether actual notice has been provided may be challenged in an individual case.

Subdivision (c)(3)(D)(i). Subdivision (i) notes that a foreign jurisdiction's law may authorize delivery of a copy of the criminal summons to an officer, to a managing or general agent. This is a permissible means for serving an organization outside of the United States, just as it is for organizations within the United States. The subdivision also recognizes that a foreign jurisdiction's law may provide for service of a criminal summons by delivery to an appointed or legally authorized agent in a manner that provides notice to the entity, and states that this is an acceptable means of service.

Subdivision (c)(3)(D)(ii). Subdivision (ii) provides a non-exhaustive list illustrating other permissible means of giving service on organizations outside the United States, all of which must be carried out in a manner that "gives notice."

Paragraph (a) recognizes that service may be made by a means stipulated by the parties.

Paragraph (b) recognizes that service may be made by the diplomatic methods of letters rogatory and letters of request, and the last clause of the paragraph provides for service under international agreements that obligate the

parties to provide broad measures of assistance, including the service of judicial documents. These include crime-specific multilateral agreements (e.g., the United Nations Convention Against Corruption (UNCAC), S. Treaty Doc. No. 109-6 (2003)), regional agreements (e.g., the Inter-American Convention on Mutual Assistance in Criminal Matters (OAS MLAT), S. Treaty Doc. No. 105-25 (1995)), and bilateral agreements.

Paragraph (c) recognizes that other means of service that provide notice and are permitted by an applicable international agreement are also acceptable when serving organizations outside the United States.

As used in this rule, the phrase "applicable international agreement" refers to an agreement that has been ratified by the United States and the foreign jurisdiction and is in force.

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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:

* * * * *

(6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if:

(A) the district where the media or information is located has been concealed through technological means; or

(B) in an investigation of a violation of 18 U.S.C. § 1030(a)(5), the media are protected computers that have been damaged without authorization and are located in five or more districts.

* * * * *

(f) Executing and Returning the Warrant.

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

* * * * *

(C) *Receipt.* The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property. For a warrant to

use remote access to search electronic storage media and seize or copy electronically stored information, the officer must make reasonable efforts to serve a copy of the warrant on the person whose property was searched or whose information was seized or copied. Service may be accomplished by any means, including electronic means, reasonably calculated to reach that person.

* * * * *

Committee Note

Subdivision (b)(6). The amendment provides that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

First, subparagraph (b)(6)(A) provides authority to issue a warrant to use remote access within or outside that district when the district in which the media or information is located is not known because of the use of technology such as anonymizing software.

Second, (b)(6)(B) allows a warrant to use remote access within or outside the district in an investigation of a violation of 18 U.S.C. § 1030(a)(5) if the media to be searched are protected computers that have been damaged without authorization, and they are located in many districts. Criminal activity under 18 U.S.C. § 1030(a)(5) (such as the creation and control of "botnets") may target multiple computers in several districts. In investigations of this nature, the amendment would eliminate the burden of attempting to secure multiple warrants in numerous districts, and allow a single judge to oversee the investigation.

As used in this rule, the terms "protected computer" and "damage" have the meaning provided in 18 U.S.C. §1030(e)(2) & (8).

The amendment does not address constitutional questions, such as the specificity of description that the Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

Subdivision (f)(1)(C). The amendment is intended to ensure that reasonable efforts are made to provide notice

of the search, seizure, or copying to the person whose information was seized or copied or whose property was searched.

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Rule 45. Computing and Extending Time; Time for Motion Papers

* * * * *

(c) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a specified time after service and service is made under Federal Rule of Civil Procedure 5(b)(2)(C) (mailing), (D) (leaving with the clerk), ~~(E),~~ or (F) (other means consented to), 3 days are added after the period would otherwise expire under subdivision (a).

Committee Note

Subdivision (c). Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). Rule 45(c)—like Civil Rule 6(d)—is amended to remove service by electronic means under Rule 5(b)(2)(E) from the forms of service that allow 3 added days to act after being served. The amendment also adds clarifying parentheticals identifying the forms of service for which 3 days will still be added.

Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3

added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means of delivery" under subparagraph (F).

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TAB 3

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TAB 3A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 11 (14-CR-C)

DATE: October 10, 2014

Chief Judge Claudia Wilkin of the Northern District of California has proposed an amendment to Rule 11 permitting judicial participation in criminal settlement conferences with appropriate safeguards (Tab B). After brief discussion at the Committee's April meeting, Judge Raggi referred the proposal to a subcommittee for further study.

The Rule 11 Subcommittee is chaired by Judge Morrison England. Its members are Carol Brook, Judge James Dever, Judge David Lawson, Judge Timothy Rice, and Jonathan Wroblewski representing the Department of Justice. To assist the Subcommittee, the Reporters prepared a background memorandum (Tab C). Additionally, in response to Judge England's invitation to Subcommittee members to provide initial views in writing, Mr. Wroblewski submitted a letter (Tab D) outlining the views of the Department of Justice.

The Subcommittee has held two teleconferences. In the first call, members discussed questions and concerns raised by the proposal. In the second call, the Subcommittee invited Judge Wilkin to provide more information about the reasons she favored an amendment and answer questions.

At the conclusion of the second call, Subcommittee members decided that further study and discussion of the proposal would be beneficial. The Subcommittee discussed other means of gathering additional information. This might, for example, include a Federal Judicial Center study of the experience in multiple districts.

At the October meeting, Judge England will report on the work of the Subcommittee and invite discussion by the full Committee of the proposal itself and what further steps might be desirable.

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TAB 3B

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
1301 CLAY STREET
OAKLAND, CALIFORNIA 94612-5212

14-CR-C

CLAUDIA WILKEN
CHIEF JUDGE

April 10, 2014

Hon. Reena Raggi
Chair, Advisory Committee on Criminal Rules
Emanuel Celler Federal Building
225 Cadman Plaza East, Room 620N
Brooklyn, N.Y. 11201

Re: Requested Amendment to Federal Rule of Criminal Procedure 11

Dear Judge Raggi:

I write to ask the Advisory Committee on Criminal Rules to amend Federal Rule of Criminal Procedure 11 to allow a federal trial judge to refer criminal cases, upon consent and with appropriate safeguards, to another judge for a criminal settlement conference. The consensus of our district and magistrate judges--including those with special expertise, such as Senior Judge Lowell Jensen, former chair of your committee, Senior Judge Charles Breyer, serving on the United States Sentencing Commission, and Judge Jeremy Fogel, Director of the Federal Judicial Center--join me in this request.

As you may know, prior to United States v. Davila, 133 S. Ct. 2139 (2013), our Court had, for many years, provided a mechanism for voluntary settlement conferences in criminal cases. A copy of our Criminal Local Rule 11-1 is attached. In Davila, based on a rather egregious set of facts, the Supreme Court found that Rule 11 bars settlement conferences in criminal cases. Notably, no constitutional or ethical bar was found.

Our settlement conferences provided an invaluable opportunity for criminal defendants, defense counsel and prosecutors to meet face-to-face under the guidance of a judge, other than the trial judge, to explore the possibility of voluntary settlement. As set out in our Local Rule, the Court put in place safeguards to protect defendants' due process rights and ensure that any plea agreements that resulted from the conferences were voluntary.

For example, our local rule required a joint request by both the prosecution and defense for referral to a judge for a settlement conference. Moreover, any party could unilaterally withdraw its request for a settlement conference at any time.

Although settlement judges could not do anything to influence a defendant's decision whether to plead guilty, many defendants valued the opportunity to hear about the possible outcomes of their cases from the perspective of the prosecutor and a judge, along with their own counsel, as well as the opportunity to express their concerns and perspectives on their cases to those individuals. These opportunities allowed defendants to conduct a reasonable assessment of the likely outcomes if they plead guilty, pursued motions or proceeded to trial. Indeed, the most common scenario was one in which a defendant did not fully trust his court-appointed counsel and was reassured to hear certain facts confirmed by another participant in the process. Settlement conferences were very much the exception rather than the rule, used in the most difficult or time-consuming cases. Settlement conferences were particularly useful in multi-defendant cases in which the government sought a "package deal," offering a plea agreement only if all the defendants accepted.

When settlement conferences led to voluntary plea agreements, there were clear and significant cost savings to the Court, the United States Attorney's office and, in relevant cases, the Federal Defender's office. Even where settlement conferences did not lead to plea agreements, there were potential cost savings if a defendant elected not to pursue a motion such as a motion to suppress following a settlement conference or the government decided not to pursue certain charges.

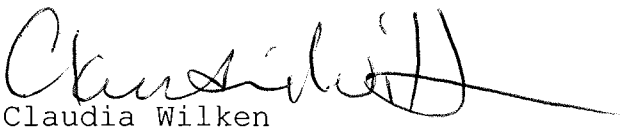
Many states, including California, provide for judicially supervised settlement proceedings as a matter of course. In addition, several other federal district courts have offered judicially supervised criminal settlement conferences. These include the District of Arizona, the Central District of California, the District of Idaho, the District of Montana, the District of Oregon and the Western District of Washington. Chief Judges Raner Collins, George King and Ann Aiken can provide information regarding how the program worked in their districts.

An amendment to Rule 11 would allow these districts and ours to return to our practice of offering voluntary settlement conferences. An example of such an amendment is: "Nothing in this Rule is intended to prevent a trial judge from referring

criminal cases, upon consent and with appropriate safeguards, for a settlement conference with a judge who will not be the trial judge."

Our Court is eager to have this option restored. Our Federal Public Defender Steven Kalar can provide further information. In addition, any of our judges, especially those mentioned above, would be happy to provide more information to the committee.

Very truly yours,



Claudia Wilken
Chief Judge
United States District Court
Northern District of California

cc:
Hon. John D. Bates
Director
Administrative Office of the United States Courts

Jonathan C. Rose
Rules Committee Officer
Administrative Office of the United States Courts

11-1. Voluntary Settlement Conference

(a) Joint Request for Referral. At any time prior to the final pretrial conference, the attorney for the government and the attorney for a defendant, acting jointly, may request that the assigned Judge refer the case to another Judge or Magistrate Judge to conduct a settlement conference. In a multiple defendant case, all defendants need not join in the request in order for the assigned Judge to refer for settlement conference the case pending against a requesting defendant.

(b) Order of Referral. Upon a request made pursuant to Crim. L.R. 11-1(a), the assigned Judge may, in his or her discretion, refer the case to another Judge or Magistrate Judge available to conduct the settlement conference. In conjunction with the referral, the assigned Judge may order the pretrial services officer of the Court to provide a report of any prior criminal proceedings involving the defendant to the parties and the settlement Judge.

(c) Conduct of Settlement Conference. The role of the settlement Judge is to assist the parties in exploring a voluntary settlement in a criminal case. The settlement Judge shall schedule a conference taking into consideration the trial schedule in the case. The attorney for the government and the principal attorney for the defendant shall attend the conference. The defendant need not be present at the conference, but shall be present at the courthouse for consultation with defense counsel, unless the defendant's presence is excused by the settlement judge. At least 7 days before the settlement conference, the Deputy Clerk for the settlement Judge shall notify the marshal to bring a defendant who is in custody to the courthouse to be available for consultation with his or her defense counsel. The settlement conference shall not be reported, unless the parties and the settlement judge agree that it should be on the record. Neither the settlement Judge, nor the parties nor their attorneys shall communicate any of the substance of the settlement discussions to the assigned Judge or to any other person. No statement made by any participant in the settlement conference shall be admissible at the trial of any defendant in the case. If a resolution of the case is reached which involves a change in the plea, the settlement Judge shall not take the plea.

(d) Withdrawal of Request for Referral. Participation in a settlement conference is voluntary. Any party may unilaterally withdraw its request for a settlement conference at any time.

TAB 3C

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MEMORANDUM

To: Rule 11 Subcommittee
From: Professors Sara Sun Beale and Nancy King, Reporters
Date: August 27, 2014
Re: Background for September 9, 2014 conference call

We are providing this memorandum to assist in the Subcommittee's consideration of Chief Judge Claudia Wilken's proposal to amend Rule 11 to allow federal trial judges to refer criminal cases, upon consent and with appropriate safeguards, to another judge for a criminal settlement conference. Judge Wilken notes that a consensus of the judges in the Northern District of California (including Judge Lowell Jensen, a former chair of the Criminal Rules Advisory Committee and Judge Jeremy Fogel, Director of the Federal Judicial Center) joined her in making the request.

Rule 11(c)(1) states (emphasis added):

> **(1)** ***In General.*** An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. *The court must not participate in these discussions.*

The local rules in Judge Wilken's district (and similar rules in other districts) authorize district judges to refer a criminal case to another judge for a judicially supervised settlement conference. As discussed in Section 3 *infra*, the courts that adopted this procedure had until 2013 interpreted Rule 11 as barring only the participation of the presiding judge, not another judge to whom the case might be referred for settlement discussions.

In light of the Supreme Court's decision in *United States v. Davila*,[1] this interpretation of the existing Rule is no longer sustainable. Judge Wilken seeks an amendment to Rule 11 that

[1] 133 S. Ct. 2139 (2013).

would allow districts to return to their practice of permitting judicially authorized settlement conferences. She suggests that Rule 11 might be amended to state: "Nothing in this rule is intended to prevent a trial judge from referring criminal cases, upon consent and with appropriate safeguards, for a settlement conference with a judge who will not be the trial judge."[2]

This memorandum begins with a brief description of Judge Wilken's proposal and the Supreme Court's decision in *Davila*. It then discusses the history of the relevant provisions in Rule 11, the ABA Criminal Justice Standards and the Uniform Code of Criminal Procedure, and state practice. It concludes with a summary of the major arguments made for and against judicial participation in settlement discussions and some of the issues that would arise if the Committee were to pursue the proposed amendment.

1. **Judge Wilken's Proposal**

Judge Wilken seeks an amendment to Rule 11 that would allow judges to conduct judicially supervised criminal settlement conferences. This procedure is authorized by local rule in the Northern District of California[3] and several other districts in the Ninth Circuit.[4] Judge

[2] Letter from the Honorable Claudia Wilken, Chief Judge, United States District Court for the Northern District of California, to the Honorable Reena Raggi, Chair, Advisory Committee on Federal Rules of Criminal Procedure 2–3 (April 10, 2014).

[3] N.D. CAL. CRIM. L.R. 11-1 ("Voluntary Settlement Conference"). Local Rule 11-1 provides:

> (a) Joint Request for Referral. At any time prior to the final pretrial conference, the attorney for the government and the attorney for a defendant, acting jointly, may request that the assigned Judge refer the case to another Judge or Magistrate Judge to conduct a settlement conference. In a multiple defendant case, all defendants need not join in the request in order for the assigned Judge to refer for settlement conference the case pending against a requesting defendant.
> (b) Order of Referral. Upon a request made pursuant to Crim. L.R. 11-1(a), the assigned Judge may, in his or her discretion, refer the case to another Judge or Magistrate Judge available to conduct the settlement conference. In conjunction with the referral, the assigned Judge may order the pretrial services officer of the Court to provide a report of any prior criminal proceedings involving the defendant to the parties and the settlement Judge.
> (c) Conduct of Settlement Conference. The role of the settlement Judge is to assist the parties in exploring a voluntary settlement in a criminal case. The settlement Judge shall schedule a

Wilken notes that this procedure has been advantageous for defendants who "valued the opportunity to hear about possible outcomes of their cases from the perspective of the prosecutor and a judge, along with their own counsel, as well as the opportunity to express their concerns and perspectives on their cases to those individuals."[5] It was particularly useful when the defendant did not trust his or her court-appointed attorney. In her district settlement conferences were the exception rather than the rule, "used in the most difficult and time-consuming cases," and especially in cases in which the government offered a "package deal" which required acceptance by all defendants.[6]

Although the Northern District's local rule does not define the judge's role, it does provide several safeguards. It provides that the judge assigned to try the case will refer the case to another judge for the settlement conference, and prohibits the settlement judge, the parties, and their attorneys from informing the sentencing judge about the "substance of the settlement

---

> conference taking into consideration the trial schedule in the case. The attorney for the government and the principal attorney for the defendant shall attend the conference. The defendant need not be present at the conference, but shall be present at the courthouse for consultation with defense counsel, unless the defendant's presence is excused by the settlement judge. At least 7 days before the settlement conference, the Deputy Clerk for the settlement Judge shall notify the marshal to bring a defendant who is in custody to the courthouse to be available for consultation with his or her defense counsel. The settlement conference shall not be reported, unless the parties and the settlement judge agree that it should be on the record. Neither the settlement Judge, nor the parties nor their attorneys shall communicate any of the substance of the settlement discussions to the assigned Judge or to any other person. No statement made by any participant in the settlement conference shall be admissible at the trial of any defendant in the case. If a resolution of the case is reached which involves a change in the plea, the settlement Judge shall not take the plea.
>
> (d) Withdrawal of Request for Referral. Participation in a settlement conference is voluntary. Any party may unilaterally withdraw its request for a settlement conference at any time.

Id.

[4] Judge Wilken's letter mentions the District of Arizona, the Central District of California, the District of Idaho, the District of Montana, the District of Oregon, and the District of Washington. *See* Letter from the Honorable Claudia Wilken, *supra* note 2, at 2. All are in the Ninth Circuit.

[5] *Id.*

[6] *Id.*

discussions."[7] Additionally, the rule provides that a conference will be held only when jointly requested by the defense and prosecution and it permits unilateral withdrawal.[8] Judge Wilken states that plea agreements arising from the settlement conferences have led to "clear and significant cost savings to the Court, the United States Attorney's Office, and, in relevant cases, the Federal Defender's Office."[9]

Judge Wilken writes that in *Davila* "the Supreme Court found that Rule 11 bars settlement conferences in criminal cases," and accordingly she advocates an amendment to permit the courts to restore this option.[10]

2. The Supreme Court's Decision in ***United States v. Davila***

Although the Supreme Court did not focus on settlement conferences, its analysis in *United States v. Davila*[11] is inconsistent with reading Rule 11's prohibition against the "court['s]" participation in plea discussions as applicable to only the sentencing judge, and not to another judge to whom the case might be referred for a settlement conference. On the other hand, the Court also recognized that the relevant portion of the rule is not required by the constitution.[12] This supports the view that Rule 11 could be revised to permit a degree of judicial involvement with appropriate safeguards.

The question before the Supreme Court in *Davila* was whether the remedy for a violation

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[7] N.D. CAL. CRIM. L.R. 11-1(c).

[8] *Id.*, (a), (d).

[9] Letter from the Honorable Claudia Wilken, *supra* note 2, at 2.

[10] *Id.* at 1–3.

[11] 133 S. Ct. 2139 (2013).

[12] *See id.* at 2149 ("Rule 11(c)(1) was adopted as a prophylactic measure . . . not one impelled by the Due Process Clause or any other constitutional requirement.").

of Rule 11's prohibition against judicial participation in plea discussions required automatic reversal or was subject to the harmless and plain error standards in Rule 52.[13] The Supreme Court concluded that the violation did not require automatic reversal, and remanded for a determination of the remaining issues.[14] In *Davila*, there had been no judicially supervised settlement conference.[15] Instead, during an in camera hearing before a magistrate judge on the defendant's request for new court-appointed counsel, the judge made several remarks alleged to have violated Rule 11.[16] For example, the magistrate judge cautioned that to get a reduction for acceptance of responsibility Davila would have to "come to the cross," and "tell it all."[17] The defendant later plead guilty and was sentenced by the district judge who had referred the case to the magistrate for consideration of the motion for new counsel.[18]

The Supreme Court – and the government – assumed that Rule 11's prohibition against judicial participation in plea discussions was applicable not only to the sentencing judge, but also to the magistrate judge who conducted the earlier hearing.[19] Noting that the Government had conceded that the magistrate judge's comments violated Rule 11(c)(1), the Supreme Court agreed that there was "no room for doubt on that score," because "the repeated exhortations to Davila to 'tell it all' in order to receive a more favorable sentence were indeed beyond the pale."[20] Instead of asking whether Rule 11's prohibition was applicable to only the judge who

[13] *Id.* at 2145.

[14] *Id.* at 2150.

[15] *Id.* at 2143–44.

[16] *Id.*

[17] *Id.* at 2144.

[18] *Id.* at 2144–45.

[19] *Id.* at 2147–48.

[20] *Id.* at 2148 (citation omitted).

accepted the plea and sentenced the defendant, the Court held that there had been a violation of Rule 11 and treated the later entry of the guilty plea before a different judge as one of the facts bearing on the question of the proper remedy.[21]

The Court also described the history and function of the prohibition on judicial participation in plea bargaining. The Court noted that the prohibition was first introduced in 1974, at a time when the Advisory Committee found that judicial participation was a "'common practice.'"[22] Citing the Advisory Committee Note, the Court observed that "the prohibition was included out of concern that a defendant might be induced to plead guilty rather than risk displeasing the judge who would preside at trial," and moreover that "barring judicial involvement in plea discussions would facilitate objective assessments of the voluntariness of a defendant's plea."[23] The Court described Rule 11(c)(1) as "a prophylactic measure, not one impelled by the Due Process Clause or any other constitutional requirement."[24]

3. The History of Rule 11 and the Advisory Committee's Prior Consideration of Judicially Supervised Settlement Conferences

On three occasions the Advisory Committee has considered and declined to accept proposals to amend Rule 11 to permit judicial participation in plea discussions. It appears that there are several districts in Ninth Circuit where the practice of referring cases for settlement conferences is well established and valued, and that at least since 2002 the Advisory Committee

[21] *See id.* at 2150 (stating that automatic vacatur by the court of appeals "kept the court from reaching case-specific arguments raised by the parties, including the Government's assertion that Davila was not prejudiced by the Magistrate Judge's comments, and Davila's contention that the extraordinary circumstances his case presents should allow his claim to be judged under the harmless-error standard of Rule 52(a) rather than the plain-error standard of Rule 52(b)").

[22] *Id.* at 2146 (citing Advisory Committee's 1974 Note on Federal Rule of Criminal Procedure 11(e)(1) [hereinafter 1974 Advisory Committee Note]).

[23] *Id.*

[24] *Id.* at 2149.

has tolerated but not endorsed the practice.

The Committee rejected the first proposal during its initial consideration of the prohibition against judicial participation in plea discussions in the early 1970s. As the Supreme Court noted in *Davila*, the prohibition was added in 1974, when Rule 11 was revised to deal more explicitly with plea bargaining. The new provisions in Rule 11 were "designed to prevent abuse of plea discussions and agreements by providing adequate and appropriate safeguards."[25] The minutes of the Advisory Committee's meeting on January 15, 1972 indicate that the Committee discussed a proposal by a member (Judge Leland C. Nielson of the Southern District of California) to strike the sentence stating that a judge "shall not participate in" any plea discussions.[26] The provision was not stricken; the minutes state that "[t]he Committee was generally against direct participation, but felt that it might be needed to resolve some cases."[27]

The 1974 Committee Note, from which the Court quoted extensively in *Davila*, described a variety of reasons for prohibiting judicial involvement:

> Subdivision (e)(1) prohibits the court from participating in plea discussions. This is the position of the ABA Standards Relating to Pleas of Guilty § 3.3(a) (Approved Draft, 1968).
>
> . . . There are valid reasons for a judge to avoid involvement in plea discussions. It might lead the defendant to believe that he would not receive a fair trial, were there a trial before the same judge. The risk of not going along with the disposition apparently desired by the judge might induce the defendant to plead guilty, even if innocent. Such involvement makes it difficult for a judge to objectively assess the voluntariness of the plea. See ABA Standards Relating to Pleas of Guilty § 3.3(a), Commentary at 72-74 (Approved Draft, 1968); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 891-892 (1964); Comment, Official Inducements to Plead

[25] 1974 Advisory Committee Note, *supra* note 22.

[26] Minutes of the Advisory Committee on the Federal Rules of Criminal Procedure 22 (January 14–15, 1972).

[27] *Id.* The minutes also state that Judge Gesell "wanted to make sure that the judge would not get involved in bargaining," because "[i]t is undesirable to 'sell the judge every day.'" *Id.*

> Guilty: Suggested Morals for a Marketplace, 32 U.Chi.L.Rev. 167, 180-183 (1964); Informal Opinion No. 779 ABA Professional Ethics Committee ("A judge should not be a party to advance arrangements for the determination of sentence, whether as a result of a guilty plea or a finding of guilt based on proof."), 51 A.B.A.J. 444 (1965). As has been recently pointed out:
>
> The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. *United States ex rel. Elksnis v. Gilligan*, 256 F.Supp. 244, 254 (S.D.N.Y.1966).[28]

The issue was raised again in 1995 by Judge D. Lowell Jensen, Northern District of California, then Chair of the Advisory Committee.[29] A memorandum from the Reporter to the Advisory Committee states that Judge Jensen learned at a Ninth Circuit Judicial Conference that courts in the Southern District of California were referring criminal cases to another judge for settlement conferences.[30] The reporter also noted that in *United States v. Torres*,[31] the Ninth Circuit found no violation of Rule 11 because the sentencing judge had not participated in the negotiations, which had been hammered out with the assistance another judge.[32] Following discussion at the October 1995 meeting, in which Judge Jensen stated that "the question is what is meant by the term 'court,'" the Committee voted to appoint a subcommittee.[33] At the April

[28] 1974 Advisory Committee Note, *supra* note 22.

[29] Judge Wilken's letter notes that Judge Jensen supports the current proposal. *See* Letter from the Honorable Claudia Wilken, *supra* note 2, at 1.

[30] Memorandum from Professor Dave Schlueter, Reporter, to Members, Criminal Rules Advisory Committee, Re: Rule 11(e); Provision Barring Participation by Court in Plea Agreement Discussions (Sept. 7, 1995).

[31] 999 F.2d 376 (9th Cir. 1993).

[32] *Id.* at 378.

[33] Minutes of the Advisory Committee on the Federal Rules of Criminal Procedure 3–4 (Oct. 16–17, 1995). The relevant portion of the Committee minutes, which are attached, reflect a range of initial views on the proposal.

1996 meeting the Committee voted unanimously to accept the subcommittee's recommendation that no action be taken to amend the rules.[34] The minutes state only that the subcommittee had solicited the views of both government and defense attorneys, and that the Southern District of California had discontinued the practice that gave rise to its consideration of the issue.

Finally, the issue surfaced for the third time in 1999 when Rule 11 was being revised to conform its structure to the practice of taking pleas and considering plea agreements. The minutes state that "there was some discussion of whether to address the practice in some courts of using judges to facilitate plea agreements."[35] The Committee decided to make no change in the rule, but to address the issue in the Committee Note.[36] The Advisory Committee Note accompanying the 2002 amendments to Rule 11 states:

> The Committee considered whether to address the practice in some courts of using judges to facilitate plea agreements. The current rule states that "the court shall not participate in any discussions between the parties concerning such plea agreements." Some courts apparently believe that that language acts as a limitation only upon the judge taking the defendant's plea and thus permits other judges to serve as facilitators for reaching a plea agreement between the government and the defendant. *See, e.g., United States v. Torres*, 999 F.2d 376, 378 (9th Cir. 1993) (noting practice and concluding that presiding judge had not participated in a plea agreement that had resulted from discussions involving another judge). The Committee decided to leave the Rule as it is with the understanding that doing so was in no way intended either to approve or disapprove the existing law interpreting that provision.[37]

[34] Minutes of the Advisory Committee on the Federal Rules of Criminal Procedure 5–6 (April 29, 1996).

[35] Minutes of the Advisory Committee on the Federal Rules of Criminal Procedure 4 (June 21-22, 1999).

[36] *Id.* The minutes state that the Committee was advised that some courts believe that Rule 11's prohibition on "the court" participating "acts as a limitation only upon the judge taking the defendant's plea and thus permit [sic] other judges to serve as facilitators for reaching a plea agreement." *Id.* They conclude, "[f]ollowing discussion, the Committee decided to leave the Rule as it is, including continued use of the term 'court.' The Committee also asked that the Reporter include a reference in the Committee Note to the effect that it intended to make no change in existing law interpreting the provision." *Id.*

[37] Advisory Committee's 2002 Note on Fed R. Crim. P. 11(c)(1).

4. The A.B.A.'s Criminal Justice Standards and the Uniform Rules of Criminal Procedure

As noted above, the 1974 Advisory Committee Note states that the prohibition on judicial participation is consistent with the A.B.A.'s Standards for guilty pleas.[38] The Standards have been amended twice, and the ABA's position on judicial participation has evolved. Although the second edition of the Standards for Pleas of Guilty permitted the judge to serve as a "moderator," the ABA deleted this provision on the grounds that direct judicial involvement in plea discussions tends to be coercive and should be prohibited. The Uniform Rules, adopted in 1987, are generally based on the second edition of the ABA Standards, but they do not provide for the judge to act as a moderator or mediator in plea discussions.

The 1968 version cited in the Committee Note provided that "[t]he trial judge should not participate in plea discussions," though it permitted the judge to advise the parties whether he would concur in a tentative plea.[39] The Commentary explained that judicial participation "is undesirable," and it noted four reasons for "keeping the trial judge out of negotiations":

> (1) judicial participation in the discussions can create the impression in the mind of the defendant that he would not receive a fair trial were he to go to trial before this judge; (2) judicial participation in the discussions makes it difficult for the judge objectively to determine the voluntariness of the plea when it is offered; (3) judicial participation to the extent of promising a certain sentence is inconsistent with the theory behind the use of the presentence investigation report; and (4) the risk of not going along with the disposition apparently desired by the judge may seem so great to the defendant that he will be induced to plead guilty even if innocent.[40]

The Commentary rejects the option of allowing the judge to be an active participant and referring the case for trial before a different judge if the defendant rejects the judge's proposal. Noting

[38] 1974 Advisory Committee Note, *supra* note 22.

[39] ABA STANDARDS RELATING TO PLEAS OF GUILTY § 3.3(a) & (b) (Approved Draft, 1968).

[40] *Id.* § 3.3(a) cmt.

that it had carefully considered this option, the Commentary states that the benefits would not outweigh "the risks which are inherent in judicial participation in plea discussions and plea agreements."[41] The Commentary notes that even if the trial judge were not aware of details, he would know that the defendant had declined a plea agreement tendered by another judge.[42] The Commentary distinguishes this prohibition on active judicial involvement with the procedure – which the Standards permit – of the court allowing the parties to inform it of their tentative agreement, and then indicating whether the court would concur.

Thereafter, the ABA flip flopped, first allowing the judge to serve as "a moderator" when the parties have been unable to reach agreement in the second edition, but turning in the third edition to the position that the judge should not participate in plea discussions. Standard 14-3.3(c) & (f) of the second edition provided:

> (c) When the parties are unable to reach a plea agreement, if the defendant's counsel and prosecutor agree, they may request to meet with the judge in order to discuss a plea agreement. If the judge agrees to meet with the parties, the judge shall serve as a moderator in listening to their respective presentations concerning appropriate charge or sentence concessions. Following the presentations of the parties, the judge may indicate what charge or sentence concessions would be acceptable or whether the judge wishes to have a preplea report before rendering a decision. The parties may thereupon decide among themselves, outside the presence of the court, whether to accept or reject the plea agreement tendered by the court.
> . . .
> (f) . . . Except as otherwise provided in this standard, the judge should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.[43]

[41] *Id.*

[42] *Id.*

[43] ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, PLEAS OF GUILTY § 14-3.3(c), (f) (2d ed. 1978).

Noting the change from the 1968 Standards, the Commentary emphasizes that "the type of judicial presence in plea negotiations contemplated by these standards differs markedly from the kind that has so often been criticized," because the court would serves as a "moderator" and not an "active bargainer."[44] The Commentary also drew attention to the prohibition against any direct or indirect suggestion by the court that a plea agreement should be accepted or a guilty plea entered. Given that prohibition, it concluded: "Surely a judge who is faithful to this principle exerts considerably less pressure on the defendant to plead guilty than the prosecutor, who is free to exert overt pressure in virtually every criminal case."[45]

In the third edition, published in 1999, the ABA deleted the provision allowing the judge to serve as a moderator in a settlement conference, returning to the position that judicial participation in plea discussions is undesirable. Standard 14-3.3(c) and (d) provides:

> (c) The judge should not through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.
>
> (d) A judge should not ordinarily participate in plea negotiation discussions among the parties. Upon the request of the parties, a judge may be presented with a proposed plea agreement negotiated by the parties and may indicate whether the court would accept the terms as proposed and if relevant, indicate what sentence would be imposed. Discussions relating to plea negotiations at which the judge is present need not be recorded verbatim, so long as an appropriate record is made at the earliest opportunity. For good cause, the judge may order the record or transcript of any such discussions to be sealed.[46]

The Commentary explains the change from the second edition:

> . . . While there is some evidence that judicial participation in plea negotiations is common in some state courts, this is not a salutary development.

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[44] *Id.*

[45] *Id.*

[46] ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-3.3(c), (d) (3rd ed. 1999).

> These standards reflect the view that direct judicial involvement in plea discussions with the parties tends to be coercive and should not be allowed.
>
> Providing an active role for judges in the plea negotiation process, even at the parties' request, is ill-advised, particularly where that judge will preside at trial or at evidentiary hearings should the plea negotiations fail. Such a role is fundamentally in tension with the basic principle that the court "should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered."[47] …

The Uniform Rules of Criminal Procedure, adopted in 1987, provide for a plea agreement conference based upon the second edition of the ABA Standards. Rule 443(b) provides that when the parties cannot reach an agreement, at their request the court may order a plea agreement conference.[48] The proposed rule does not, however, contain any reference to the court acting as a moderator. Instead, it provides for a hearing at which the court may call witnesses (and may permit the defendant to testify) before it specifies what it considers to be an acceptable plea agreement.

5. **State Practice**

Although judges participate in settlement discussion in many states, practices vary widely from state to state. We have not attempted a 50 state survey, but we note that in 2006 one researcher found that at least nine states, and the District of Columbia, prohibit judicial participation in plea bargaining.[49] A nationwide study of more than 3,000 judges in 1979 found that 31% attended plea negotiations, and 69% did not attend and only ratified in open court

[47] *Id.* § 14-3.3 cmt. (footnote omitted).

[48] UNIF. R. CRIM. P. 443(b).

[49] Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 202 n.6 (2006).

dispositions previously agreed to by the parties.[50] Of those who attended, 7% said they regularly recommended a disposition, 20% said they ordinarily reviewed the parties' recommendations, and 4% said they attended but did not participate.[51] However, many who stated that they merely "reviewed" the parties' agreement did so actively, often rejecting or modifying the parties' agreement.[52] Not surprisingly, judicial participation was affected by state rules of criminal procedure: judges were more likely to participate in states whose rules permitted or did not prohibit judicial participation.[53]

Where judicial participation is not precluded entirely, state court rules and judicial decisions vary considerably in the nature of the participation that is permitted. In some jurisdictions, such as Florida, the court's role appears to be limited to providing information, stating on the record the sentence which appears to be appropriate for the charged offense based upon the information then available to the judge.[54] This provides the defendant with baseline information that may be useful in determining whether to accept a proffered plea agreement, and it is consistent with the current ABA Standards. The judge may not otherwise participate in plea discussions, and is not a mediator or moderator in settlement negotiations.

In other states, such as Connecticut, the court is permitted to take a more active role to facilitate settlement. Connecticut judges serve as active moderators or mediators.[55] The judge

[50] John Paul Ryan & James J. Alfini, *Trial Judges' Participation in Plea Bargaining: An Empirical Perspective*, 13 LAW & SOC'Y REV. 479, 486 (1979).

[51] *Id.*

[52] *Id.* at 487.

[53] *Id.* at 487–90.

[54] Turner, *supra* note 49, at 238–47 (describing Florida practice based on review of case law and interviews with prosecutors and defense counsel).

[55] *Id.* at 247–56 (describing Connecticut practice based on case law and interviews with prosecutors and defense counsel).

listens to the prosecution and defense present their positions, and then may "'suggest to either side that they are being unreasonable and tell them things they should consider.'"[56] At the conclusion of the parties' presentations and discussion, the judge "states the expected sentence after a plea."[57] In some but not all districts in Connecticut, "virtually all plea discussions are conducted in the judge's chambers."[58] And in some districts, judicially supervised settlement conferences are public: multiple attorneys are invited to attend and observe the sessions, which is seen as lending credibility to the process as well as informing the bar of the expected sentence in various circumstances.[59]

Settlement conferences have a long history in Arizona, where judges seem to provide information and also play a more active role in facilitating settlement. Maricopa County (Phoenix) began experimenting with criminal settlement conferences in 1996 to deal with a backlog of cases,[60] and the Arizona Supreme Court adopted a procedural rule permitting the conferences in 1999.[61] Conferences in Arizona have three purposes: (1) informing the defendant

[56] *Id.* at 249 (quoting a state prosecutor).

[57] *Id.*

[58] *Id.* at 248.

[59] *Id.* at 250.

[60] R.L. Gottsfield & Bob James, *Criminal Settlement Conferences on Demand–Worth It?*, 97 JUDICATURE 292 (2014).

[61] *See* R.L. Gottsfield & Mitch Michkowski, *Viewpoint: Settlement conferences help resolve criminal cases*, 90 JUDICATURE 196, 197 (2007) (discussing Arizona Rule of Criminal Procedure 17.4). Rule 17.4(a) provides:

> a. Plea Negotiations. The parties may negotiate concerning, and reach an agreement on, any aspect of the case. At the request of either party, or sua sponte, the court may, in its sole discretion, participate in settlement discussions by directing counsel having the authority to settle to participate in a good faith discussion with the court regarding a non-trial or non-jury trial resolution which conforms to the interests of justice. Before such discussions take place, the prosecutor shall afford the victim an opportunity to confer with the prosecutor concerning a non-trial or non-jury trial resolution, if they have not already conferred, and shall inform the court and counsel of any statement of position by the victim. If the defendant is to be present at any such settlement discussions, the victim shall also be afforded the opportunity to be present and to state his or her position with respect to a non-trial or non-jury trial settlement. The trial judge shall only participate in settlement discussions with the consent of the parties.

of the charge and sentencing range; (2) informing the defendant of the evidence the prosecution intends to offer at trial, and (3) examining the plea offer, considering pros and cons, and contrasting it to the sentencing range if the defendant is found guilty after trial.[62] Judges generally tell defendants they will answer their questions, and if asked some judges will "give their opinion whether it is a tough case to defend."[63] The parties may request a settlement conference, but the court may also order one sua sponte.[64] If the defendant is to be present, the victim may also be present and is afforded an opportunity to state his or her position.[65] Proponents argue that a more balanced outcome can be achieved when judges point out weaknesses and strengths of cases.[66] Although initially many settlement conferences took 30 to 45 minutes, the average time in 2014 is now 10 to 30 minutes.[67] Approximately 56% of settlement conferences result in a plea agreement.[68]

California, like Florida, allows the court to provide the parties with information about the sentence that the court deems appropriate based on the information then available. The California courts have recognized, however, that even this procedure raises concerns about conflicts between judicial and executive authority. On the one hand, sentencing is a judicial function, and the trial court has authority to state in advance of sentencing what it believes to be the

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> In all other cases, the discussions shall be before another judge or a settlement division. If settlement discussions do not result in an agreement, the case shall be returned to the trial judge.

ARIZ. R. CRIM. P. 17.4(a).

[62] Gottsfield & Michkowski, *supra* note 61, at 198.

[63] *Id*

[64] ARIZ. R. CRIM. P. 17.4(a).

[65] *Id.*

[66] Gottsfield & Michkowski, *supra* note 61, at 235.

[67] Gottsfield & James, *supra* note 60, at 293.

[68] *Id.* at 295.

appropriate punishment for this defendant if he is convicted by a plea or after a trial. On the other hand, it is the executive's function to conduct plea negotiations. In *People v. Clancey*,[69] the California Supreme Court stated:

> The prospect of prosecutorial intransigence and judicial overreaching circumscribe a trial court's discretion to indicate its sentence in several important ways.
>
> First, in order to preserve the executive's prerogative to conduct plea negotiations, a trial court generally should refrain from announcing an indicated sentence while the parties are still negotiating a potential plea bargain. . . .
>
> Second, a trial court should consider whether the existing record concerning the defendant and the defendant's offense or offenses is adequate to make a reasoned and informed judgment as to the appropriate penalty. . . .
>
> Third, "a court may not offer any inducement in return for a plea of guilty or nolo contendere. It may not treat a defendant more leniently because he foregoes his right to trial or more harshly because he exercises that right." Because an indicated sentence is merely an instance of "sentencing discretion wisely and properly exercised," the indicated sentence must be the same punishment the court would be prepared to impose if the defendant were convicted at trial. An indicated sentence, properly understood, is not an attempt to induce a plea by offering the defendant a more lenient sentence than what could be obtained through plea negotiations with the prosecuting authority. When a trial court properly indicates a sentence, it has made no *promise* that the sentence will be imposed. Rather, the court has merely disclosed to the parties at an early stage—and to the extent possible—what the court views, on the record then available, as the appropriate sentence so that each party may make an informed decision.
>
> . . .
>
> Fourth, a trial court may not bargain with a defendant over the sentence to be imposed.[70]

[69] 299 P.3d 131 (2013).

[70] *Id.* at 138–39 (citations omitted).

6. **Arguments For and Against Judicial Participation**

In addition to the commentary to the ABA Standards and the Committee's prior discussion of proposals, various scholars have also discussed the advantages and disadvantages of allowing judges to participate in plea discussions.[71] We note briefly here the principal arguments made by the proponents and opponents of judicial participation to provide a background for the Subcommittee's discussions. Of course the type of participation affects both the advantages and disadvantages.

A. Advantages of Judicial Participation

Proponents argue that allowing judicial participation makes plea negotiations more efficient, transparent, and fair. Even if the court's participation is limited to providing information, it will be useful to the defendant in evaluating the concessions offered by the prosecution, may prompt greater disclosure by the prosecution to the defense, and may also allay concerns the defendant may have about accepting the advice of court-appointed counsel. This can significantly increase the efficiency of the plea negotiation process, saving scarce judicial, prosecutorial, and defense resources. If the court takes a more active role as a mediator, judicial comments on the merits can provide a neutral assessment that will help the parties achieve a fairer agreement. A neutral judicial assessment also provides a safeguard against prosecutorial overreaching and may encourage an overconfident or suspicious defendant to accept a reasonable offer.

[71] *See, e.g.*, Turner, *supra* note 49, at 214–69 (comparing German, Connecticut, and Florida practices and advocating active role by judge in plea bargaining); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining*, *Part I*, 76 COLUM. L. REV. 1059, 1123–34 (1976) (providing an influential argument in favor of judicial rather than prosecutorial control of the plea bargaining process, cited extensively in the commentary accompanying the second edition of the ABA Standards, which authorized judges to serve as moderators in settlement conferences).

Procedural rules can reduce or eliminate concerns about judicial coercion and lack of adequate information. They can require that the settlement conference be conducted by a judge not involved in other aspects of the defendant's case, prohibit the parties from disclosing information about the settlement conference to the judge responsible for the other aspects of the defendant's case, and require that the conference be recorded in order to facilitate effective judicial review of (and deter) allegations that the settlement judge acted improperly. Rules may limit what the settlement judge may say about expected sentences and regulate what information must be made available to the settlement judge (e.g., criminal history, guidelines score) prior to the conference. The procedural rules can also provide an opportunity for victim participation if that is seen as desirable.

B. Disadvantages of Judicial Participation

Opponents of judicial participation express three major concerns. First, they argue that the court's participation – and especially its active participation – will inevitably have a coercive effect on defendants, who will be reluctant to reject plea concessions endorsed (or even suggested) by any judge. These concerns are reduced but not eliminated when the case is referred to a second judge. Moreover it will be extremely difficult to draw the line between judicial comments that are permitted, and those that cross the line and are coercive; prohibiting all discussion obviates this problem. Second, opponents maintain that active participation in the process of negotiations and horse trading is difficult to reconcile with the judge's role as an impartial arbiter. Additionally, they point out that the judge may not know enough about the case to participate effectively.

Some commentators have expressed other concerns. Judicial efforts to increase

efficiency by encouraging settlements may raise concerns that courts may sacrifice fairness or efficiency to move their dockets. And active judicial participation may unduly interfere with prosecutorial functions.

7. **Conclusion**

In this memorandum we sought to provide background information to assist the Subcommittee in determining its interest in pursuing an amendment to Rule 11. If the Subcommittee decides to pursue an amendment authorizing settlement conferences, it would probably need to consider the following issues:

- Would magistrate judges as well as district judges be permitted to serve as settlement judges?
- Would the consent of both parties be required before a settlement conference could take place? Could a judge order a settlement conference, for example, over the objection of the prosecution?
- What authority should the settlement judge be given? Should the rule authorize the judge only to provide information about the likely sentence under the Guidelines? Or should the judge be authorized to act as a mediator? If the judge may act as a mediator, should the rule impose limits, such as prohibiting commentary on whether the deal is favorable or not? Should it provide guidance regarding what comments would be impermissible or coercive?
- Would the parties be permitted to consent to allowing the settlement judge to take the defendant's plea or conduct further proceedings? To waive other aspects of the Rule?
- What role, if any, would victims play?
- Should a verbatim recording be made?
- Should the Rule require the preparation of portions of the presentence report prior to a settlement conference?

TAB 3D

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U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

August 29, 2014

MEMORANDUM

TO: Chief Judge Morrison C. England, Jr.
Chair, Subcommittee on Rule 11

FROM: Jonathan J. Wroblewski, Director
Office of Policy and Legislation

SUBJECT: Proposed Amendment to Rule 11 of the Federal Rules of Criminal Procedure to Permit Judicial Involvement in Plea Negotiations

Rule 11(c) of the Federal Rules of Criminal Procedure prohibits courts from participating in plea negotiations.[1] Pending before the Subcommittee is a proposed amendment to Rule 11 to expressly permit a "federal trial judge to refer criminal cases, upon consent and with appropriate safeguards, to another judge for a criminal settlement conference."[2] The Department opposes the proposal for a number of reasons.

First, we believe the proposed rule change – and judicial involvement in plea negotiations generally – would undermine the perception of judicial neutrality for which the federal courts are prized. The 1974 Advisory Committee Notes to the current rule emphasize, for example, that if a judge could participate in plea discussions, "[i]t might lead the defendant to believe that he would not receive a fair trial, were there a trial before the same judge." A defendant might also feel pressure because of the judge's authority to impose a sentence in excess of that proposed in a plea agreement the judge favors. *Id.* And a judge's objectivity in assessing the voluntariness of the plea may be impaired or at least be perceived as impaired. *Id.* Certainly, these concerns are lessened when, as under the proposal, the parties must jointly acquiesce in the settlement conference referral to a magistrate judge, but they are certainly not eliminated.

Under the proposal, the presiding judge would refer the case to the settlement judge to begin the settlement conference process. That referral alone constitutes judicial action that both

[1] Fed. R. Crim. P. 11(c)(1). *See also, United States v. Davila*, 133 S. Ct. 2139, 2143 (2013).
[2] Letter of Judge Claudia Wilken to Judge Reena Raggi, Chair, Advisory Committee on the Criminal Rules (April 10, 2014).

the defendant and the government would naturally perceive as encouraging a plea, and suggesting to some potential reprisal if none results. Accordingly, we believe the policies underlying the judicial-participation bar are implicated by the settlement-judge approach, even if not as strongly as when the same judge both facilitates settlement and would preside over any trial and impose sentence. As evidenced in *Davila*, a magistrate judge's participation in criminal settlement can exert significant influence on certain defendants and raises voluntariness concerns on appeal.[3] In *Davila,* the Supreme Court had no difficulty asserting that the actions of a magistrate judge who sought to encourage a plea agreement were plain violations of Rule 11(c), even though that magistrate judge would not have had any further role in the case, and the district court that took the plea and imposed sentence seemingly had no knowledge of the magistrate judge's action.

Second, the rule change would result in a practice which could exert undue influence on both the defendant and the government. As the 1974 Advisory Committee Notes indicate, "[t]he risk of not going along with the disposition apparently desired by the judge might induce the defendant to plead guilty, even if innocent." Defense counsel and Assistant U.S. Attorneys will be appearing before the presiding judge and magistrate judge on other matters in the future, and will not want to be perceived as uncooperative. We are concerned that counsel and defendants will be needlessly and inappropriately pressured when settlement conferences do not initially result in a plea agreement.

The limitation in the proposal, that the settlement conferences would be referred only "upon consent," is insufficient. Because of the relationship between the court and counsel, counsel will feel pressure to consent to the settlement conferences when the court wishes to move forward with one. A refusal to participate in a settlement conference could be viewed by the court as an unreasonable position.

Our anecdotal experience also suggests that defense attorneys may sometimes favor the settlement-conference procedure because it leads stubborn defendants to accept a plea. Presumably, the settlement process does so only because a defendant may buckle when a seemingly neutral judge joins defense counsel and the prosecutor in supporting an admission of guilt. This use of judicial prestige and influence undermines – or will be perceived to undermine – the stance of judicial neutrality for which the federal courts are well known. It will simultaneously intrude the court into the defendant-counsel relationship and may pressure a reluctant defendant to accept a plea, thus raising voluntariness concerns.

At the same time, some defendants may seek settlement conferences in the belief "that a judge might extract a better deal from the government." Bringing the court's pressure to bear in plea negotiations in this is way is, at a minimum, in tension with separation-of-powers principles. The principles leave the selection of the charges and whether to engage in plea negotiations at all in the hands of the prosecution, without judicial oversight, absent demonstrably unconstitutional action. *See, e.g., In re United States,* 503 F.3d 638, 642-643 (7th Cir. 2007). The Supreme Court has recognized that, so long as the prosecutor has probable cause to believe the defendant has committed a criminal offense, and so long as the case would not been brought for an

[3] *United States v. Davila*, 133 S. Ct. 2139 (2013). Although the government was not present when the discussions took place in *Davila*, the discussions concerned whether to accept the government's offer.

unconstitutional reason,[4] the prosecutor has discretion to file charges and to prosecute the case.[5] The Court has further explained that the factors that go into the decision to prosecute, such as general deterrence, other enforcement priorities, the government's overall enforcement strategy, and even the strength of the case, are ill suited to judicial review, and that judicial review would entail costs to the criminal justice system overall, resulting in delay, and possibly chilling law enforcement.[6] The proposed change to Rule 11 would expose the government to just such judicial review. While this concern may appear to be formally alleviated when settlement conferences may proceed only with the consent of both parties, practically and candidly speaking, that is not the case.

The Department is also concerned that settlement conferences might have an effect opposite to that anticipated, making the system less efficient, resulting in the kind of extended negotiation that occurs in the civil context and that may be inappropriate in the criminal context. The government's obligation in plea negotiations is to make plea offers that are fair and just and consistent with the Principles of Federal Prosecution. The government's offer will consider not only the nature and circumstances of the offense, but also the government's strategic law enforcement objectives and overall priorities. We believe the proposal would intrude on and upset this delicate process and potentially cause unnecessary delays.

Settlement conferences would also undercut the value of other offers given in other related cases and unrelated future cases alike. For example, when settlement conferences occur after the government's offer terminates, as they inevitably would, should the rule be adopted, defendants and counsel will recognize that the government's initial offer will not necessarily be its last and that they may very well get a second chance at negotiations with the imprimatur of the judiciary. And finally, we are concerned that settlement conferences will necessarily reflect the practices and temperament of the local bench, resulting in a further erosion of the consistency of sentences and sentencing practices across the country.

- - -

According to the most recent statistics released by the U.S. Sentencing Commission, 96.9% of federal cases were resolved by guilty pleas in fiscal year 2013.[7] This compares with about 85% in 1990. In the Northern District of California, the home district of Judge Wilken,

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[4] The government's discretion is not absolute – it cannot be used for demonstrably unconstitutional action: "Exercises of prosecutorial discretion may be overseen only to ensure that the prosecutor does not violate the Constitution or some other rule of positive law." *In re United States*, 503 F.3d 638, 642 (7th Cir. Ill. 2007), quoting *Wayte,*470 U.S. 598, 607 (1985).

[5] "[So] long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Wayte,* 470 U.S. at 607, quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

[6] "This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Id.*

[7] U.S. Sentencing Commission, *2013 Sourcebook of Federal Sentencing Statistics*, Figure C (2014).

who proposed the amendment, 96.3% of cases were resolved by guilty pleas in FY 2013. This high guilty plea rate has come under significant criticism[8] and suggests there is little need for additional steps to encourage guilty pleas.

Moreover, it is noteworthy that the American Bar Association's Criminal Justice Section's Standards on Pleas of Guilty state that "[a] judge should not ordinarily participate in plea negotiation discussions among the parties." ABA Standards Relating to Pleas of Guilty § 14-3.3 (1997).[9] The commentary to the Standards echo many of the concerns we have.

> Standard14-3.3(c) provides that the judge "should not through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered." This standard is important because it protects the constitutional presumption of innocence, and avoids placing judicial pressure on the defendant to compromise his or her rights.
>
> * * *
>
> Providing an active role for judges in the plea negotiation process, even at the parties' request, is ill-advised, particularly where that judge will preside at trial or at evidentiary hearings should the plea negotiations fail. Such a role is fundamentally in tension with the basic principle that the court "should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered." Exposure to the facts and tactical considerations revealed during guilty plea negotiations may unduly color the judge's view of the evidence, and predispose the judge in his or her legal rulings.

We think for all of the reasons discussed above, the subcommittee should not adopt the proposed amendment to Rule 11 of the Federal Rules of Criminal Procedure.

We look forward to our discussion of the proposal in the coming weeks.

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[8] *See, e.g.,* Gary Fields and John R. Emshwiller, *Federal Guilty Pleas Soar As Bargains Trump Trials*, Wall Street Journal (September 23, 2012).

[9] Available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_toc.html.

TAB 4

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TAB 4A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 52

DATE: October 10, 2014

On January 4, 2014, Judge John Newman wrote to Judge Raggi as Chair of the Committee proposing an amendment to Rule 52 (Tab B). He urged an amendment that would require reviewing courts to correct sentencing error to which no objection was made in the district court whenever that error was prejudicial, exempting it from plain error review. At the Committee's April meeting, Judge Raggi appointed a subcommittee to consider the proposal, with Judge Raymond Kethledge as Chair and Judge Lawson, Judge Feinerman, John Siffert, Mark Filip, and Jonathan Wroblewski as members. Because Judge Newman also sent his proposal to the Appellate Rules Committee, Professor Cathie Struve, the Appellate Rules Reporter, was asked to serve as a liaison. Professor Struve participated in each of the Subcommittee's telephone conferences.

At its first telephone conference, the Subcommittee discussed several issues raised by the proposal, including those noted in a background memorandum written by the Reporters (Tab C), and in a memorandum by the Department of Justice opposing the proposal (Tab D). The Subcommittee invited Judge Newman to speak to the proposal and answer questions during its second conference call. Prior to that call, Judge Newman provided the Subcommittee with a memorandum responding to the concerns raised by the memos from the Reporters and the Department of Justice and suggesting revised language for an amendment (Tab E).

Following its discussion with Judge Newman, the Subcommittee continued its deliberations, considering:

> (1) the scope of the problem, i.e., how many cases involve unraised sentencing error that is prejudicial (non-harmless) but nevertheless would fail plain error review either because the error was not "plain," or because denying relief would not "seriously affect the fairness, integrity or public reputation of judicial proceedings";
>
> (2) what type of sentencing error should be included in a proposed exception and what type of sentencing error should continue to be reviewed for plain error;

(3) the potential effect of an exception on the frequency with which sentencing error is raised and corrected in the district court; and

(4) the potential burdens such an exception might raise for district courts, appellate courts, and victims.

The Subcommittee unanimously concluded that the Committee should take no further action on the proposal. Members generally agreed that the application of Rule 52(b) to sentencing errors has not been not sufficiently problematic to warrant an amendment at this time. They also discussed concerns about other issues, including the difficulty of determining the proper scope of any exemption from Rule 52(b), and the likelihood that even a narrowly crafted exemption would generate significant litigation.

TAB 4B

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The Honorable Reena Raggi
Chair, Advisory Committee on Federal Rules of Criminal Procedure

Dear Judge Raggi:[1]

I write to propose a change in appellate review of claimed sentencing errors. My proposal is that a sentencing error to which no objection was made in the district court should be corrected on appeal without regard to the requirements of "plain error" review, unless the error was harmless.

Rule 52(b) of the Federal Rules of Criminal Procedure provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." The Supreme Court has stated the strict requirements of "plain error" review. See United States v. Olano, 507 U.S. 725, 732-38 (1993). These requirements are entirely appropriate for trial errors to which no objection was made. A retrial to correct a trial error imposes substantial burdens on the judicial system. A new jury must be empaneled, witnesses must be returned to the courtroom, with the risk of diminished recollections, and considerable time and expense are consumed. Correcting a sentencing error, however, involves no comparable burdens.[2] A resentencing usually consumes less than an hour, requires no jury, and normally requires no witnesses.

Even under advisory sentencing guidelines, a sentencing judge is required to calculate an applicable guideline range, see United States v. Crosby, 397 F.3d 103, 111-12 (2d Cir. 2005), a complicated process in which errors can easily occur, some of which may understandably escape the notice of even experienced defense counsel. An uncorrected guideline miscalculation can add many months and sometimes years of unwarranted prison time to a sentence. There is no justification for requiring a defendant to serve additional time in prison just because defense counsel failed to object to a guideline miscalculation.

The Supreme Court has recognized that the jury trial is the context in which the rigor of the "plain error" doctrine is to be applied. "[F]ederal courts have consistently interpreted the plain-error doctrine as requiring an appellate court to find that the claimed error not only seriously affected 'substantial rights,' but that it had an unfair prejudicial impact on the jury's deliberations." United States v. Young, 470 U.S. 1, 16 n.14 (1985) (emphasis added). When the Advisory Committee Note to Rule 52(b) stated that the rule is "a restatement of existing law," the two decisions it cited both concerned claims of jury trial error. See Wiborg v. United States, 163 U.S. 632, 559-60 (1896), and Hemphill v. United States, 112 F.2d 505 (9th Cir.), rev'd, 312 U.S. 729 (1941), conformed, 120 F.2d

[1] I am sending this proposal to the chairs of both the Advisory Committee on Criminal Rules and the Advisory Committee on Appellate Rules (as well as the chair of the Standing Committee) because the proposal concerns appellate review of sentencing errors and might be within the jurisdiction of both committees.

[2] See United States v. Leung, 40 F.3d 577, 586 n.1 (2d Cir. 1994); United States v. Baez, 944 F.2d 88, 90 n.1 (2d Cir. 1991).

115 (9th Cir. 1941).

Because Rule 52(b) makes no distinction between trial errors and sentencing errors, it is understandable that the Supreme Court has stated (or assumed) that "plain error" review applies to sentencing errors. In United States v. Cotton, 535 U.S. 625, 631-34 (2002), the Court, reviewing for plain error, declined to reject a sentencing enhancement claimed to be erroneous because drug quantity, on which the enhancement was based, was not alleged in the indictment. In United States v. Booker, 543 U.S. 220, 268 (2005), the Court stated, with respect to sentencing guideline errors, "[W]e expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." In Puckett v. United States, 556 U.S. 129, 143 (2009), the Court applied "plain error" review to an unobjected to breach of a plea agreement. See also Henderson v. United States, 133 S. Ct. 1121 (2013) (acting on premise that "plain error" review applies to sentencing errors, Court rules that whether error is plain is determined at time of review, not time of error).[3]

Most of the circuits apply "plain error' review to unobjected to sentencing errors, see, e.g., United States v. Eversole, 487 F.3d 1024 (6th Cir. 2007); United States v. Traxler, 477 F.3d 1243, 1250 (10th Cir. 2007); United States v. Dragon, 471 F.2d 501, 505 (3d Cir. 2006); United States v. Knows His Gun III, 438 F.3d 913, 918 (9th Cir. 2006). The First and Second Circuit's have sometimes applied a lenient form of "plain error" review to unobjected to sentencing errors, see United States v. Cortes-Claudio, 312 F.3d 17, 24 (1st Cir. 2002); United States v. Sofsky, 287 F.3d 122, 125 (2d Cir. 2002).

To implement my suggestion, the following addition to Rule 52 might be considered, although various other formulations could be devised:

Proposed Rule 32(c) of the Federal Rules of Criminal Procedure:

> A claim of error in connection with the imposition of a sentence, not brought to the court's attention, may be reviewed on appeal whether or not the error was plain, if (a) the error caused the defendant prejudice, and (b) correction of the error will not require a new trial.

Sincerely,

Jon O. Newman
U.S. Circuit Judge

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[3] In two cases decided before the adoption of Rule 52(b), the Supreme Court corrected a sentencing error not complained of because the error was deemed "plain." See Pierce v. United States, 255 U.S. 398, 405-06 (1921) (plain error to allow interest on a criminal fine until a judgment had been entered against shareholders of the defendant corporation); Weems v. United States, 217 U.S. 349, 380 (1910) (imposition of punishment deemed cruel and unusual set aside as plain error).

TAB 4C

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MEMORANDUM

To: Rule 52 Subcommittee, Hon. Raymond Kethledge, Chair
From: Professors Sara Beale and Nancy King, Reporters
Date: August 22, 2014
Re: Background for September 5, 2014 Subcommittee Call

We are providing this memo to assist the Subcommittee's consideration of Judge Newman's proposal to amend the Rules to exempt unpreserved sentencing error from the plain error test of Rule 52(b). After a brief summary of Judge Newman's proposal, this memo surveys the treatment of unraised sentencing error in the Rules and by the Supreme Court. The memo concludes with a summary of issues raised by the proposal. We note that the Rules Office has not found any prior proposal to the Advisory Committee that addresses appellate review of sentencing error.

I. Judge Newman's Proposal.

Judge Newman has proposed that the Committee consider an amendment to the Rules that would provide that a sentencing error to which no objection was made in the district court will be corrected on appeal without regard to the requirements of "plain error" review, unless the error was harmless. He suggests one possible version of an amendment that would accomplish this:

Proposed Rule 52(c) of the Federal Rules of Criminal Procedure:

> A claim of error in connection with the imposition of a sentence, not brought to the court's attention, may be reviewed on appeal whether or not the error was plain, if (a) the error caused the defendant prejudice, and (b) correction of the error will not require a new trial.[1]

[1] Letter from the Honorable Jon O. Newman, U.S. Circuit Judge, to the Honorable Reena Raggi, Chair, Advisory Committee on Federal Rules of Criminal Procedure (Jan. 4, 2014) (formatted).

In his letter, Judge Newman makes four arguments to support his suggestion.

Efficiency. He asserts that the efficiency rationale for restricting review of unraised error is not as strong when the error affects sentence and not trial. He argues that sentencing errors, unlike trial errors, require little time and effort to correct. "A resentencing usually consumes less than an hour, requires no jury, and normally requires no witnesses."[2]

Complexity. He also suggests that sentencing errors are particularly complicated and therefore more likely to elude defense counsel. He states: "[C]alculat[ing] an applicable guideline range [is] a complicated process in which errors can easily occur, some of which may understandably escape the notice of even experienced defense counsel."[3]

Prejudice. Also, he argues that the prejudice that can result from sentencing error is significant, and "can add many months and sometimes years of unwarranted prison time to a sentence."[4]

Uncertain remedy for attorney mistakes. In addition he states "There is no justification for requiring a defendant to serve additional time in prison just because defense counsel failed to object to a guideline miscalculation."[5] A defendant who is unable to obtain relief on appeal under restricted review standards for some unraised sentencing errors may subsequently attempt to demonstrate in a motion for relief under Section 2255 that his attorney's failure to raise a timely objection denied him the effective assistance of counsel.[6] Judge Newman's statement reflects the view that such a claim is unlikely to produce relief.

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[2] Letter from the Honorable Jon O. Newman, *supra* note 1, at 1.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Presently courts of appeals are divided over whether errors in applying the career offender enhancement are cognizable under Section 2255. *See* Spencer v. United States, 727 F.3d 1076 (11th Cir. 2014), *rehearing en banc*

II. Plain Error Review under the Rules

Rule 52(b) regulates the authority of federal courts to "consider" errors "not brought to the court's attention." The Rule has remained substantially the same since its enactment in 1944.[7] The Advisory Committee Note from 1944 states that the provision "is a restatement of existing law," and observes that the Rules of the Supreme Court and several courts of appeals included "similar provisions." The Note cited two cases, and, as Judge Newman points out in his letter, neither of them involved error at sentencing.[8]

Sentencing appeals were actually unusual at the time the Rule was adopted and for several decades following adoption. Constitutional regulation of the sentencing process was minimal, as was statutory regulation.[9] Even after the Court's criminal procedure revolution during the 1950s, 60s, and 70s, most new constitutional procedural protections were not

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granted March 7, 2014; Whiteside v. United States, 748 F.3d 541 (4th Cir. 2014), *rehearing en banc granted* July 10, 2014.

[7] It has been amended just once, in 2002. At that time the Rule was restyled and the words "or defect" were omitted. The Committee Note stated: "As noted by the Supreme Court, the language "plain error or defect" was misleading to the extent that it might be read in the disjunctive. *See* United States v. Olano, 507 U.S. 725, 732 (1993) (incorrect to read Rule 52(b) in the disjunctive); United States v. Young, 470 U.S. 1, 15 n. 12 (1985) (use of disjunctive in Rule 52(b) is misleading)." Before this amendment, the Rule read: "(b) Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

[8] One was an 1896 Supreme Court case in which the Court declared that "although this question [improper jury instruction at trial] was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it." Wiborg v. United States, 163 U.S. 632, 658 (1896). The other was a Ninth Circuit case in which the court refused to exercise its discretion to provide relief for an evidentiary error at trial to which the defendant did not object. Hemphill v. United States, 112 F.2d 505, 507 (9th Cir. 1940) ("we have the right under our rules, should we choose to exercise it, to notice plain error, unassigned or unnoticed in the trial court, to prevent a miscarriage of justice in an exceptional case, where the error is particularly harmful"), *reversed on other grounds*, 312 U.S. 657 (1941).

Judge Newman also mentions in a footnote that plain error review was applied to sentences before Rule 52 was adopted. "In two cases decided before the adoption of Rule 52(b), the Supreme Court corrected a sentencing error not complained of because the error was deemed "plain." *See* Pierce v. United States, 255 U.S. 398, 405-06 (1921) (plain error to allow interest on a criminal fine before a judgment had been entered against shareholders of the defendant corporation); Weems v. United States, 217 U.S. 349, 380 (1910) (punishment deemed cruel and unusual set aside as plain error)."

[9] *See generally* LaFave, Israel, King & Kerr, 6 Criminal Procedure § 26.3(g) (3d ed. & 2013 Supp.) (on Westlaw as database CRIMPROC) (citing, among other sources, a symposium on the appellate review of federal sentences held at the Second Circuit's Judicial Conference in 1962 including statements by Judges Kaufman, Sobeloff, and Walsh, and Professor Herbert Weschler).

extended to the sentencing phase. Appellate review of federal sentences remained constrained until the Sentencing Reform Act of 1984. As the Reporter for the ALI's new MPC Sentencing provisions has stated, "In the federal system, a 'doctrine of non-reviewability' prevailed from 1891 until 1987, when the Federal Sentencing Guidelines became effective."[10] In the early 1990s, the number of sentencing appeals increased dramatically under the new statutes, Guidelines, and revised Rule 32 provisions.[11] This led in turn to the widespread adoption and enforcement of terms expressly waiving the right to appeal sentencing error in plea bargains. [12]

At about this time the Court announced its four-step test for applying Rule 52(b) in *United States v. Olano,*[13] and in *Johnson v. United States*.[14] That test permits a court to grant relief for unpreserved error if the party seeking relief shows (1) error, (2) that is "plain," (3) that "affect[s] substantial rights," and (4) that " ' "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." ' " *Olano* held that the first prong excludes errors that are "waived" and includes only errors that are "forfeited." As discussed below, the second step was expanded by the Court last year to include errors clear or obvious at the time of review.[15] The third requirement places the burden of showing prejudice on the party seeking relief from error, unlike harmless error analysis for preserved error, which requires the party opposing relief to show harmlessness.[16] The fourth requirement contemplates that a court need only correct the

[10] Kevin R. Reitz, Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences, 91 Nw. U. L. Rev. 1441, 1444 (1997).

[11] Nancy King & Michael O'Neill, Appeal Waivers and the Future of Sentencing Policy, 55 Duke L. J. 209, 227 (2005) ("the rate of appeals per conviction peaked in 1994 at about double the rate prior to 1987 (when the Sentencing Reform Act became effective)").

[12] *Id.*

[13] 507 U.S. 725, 732 (1993).

[14] 520 U.S. 461 (1997).

[15] *See* Henderson v. United States, 133 S.Ct. 1121 (2013).

[16] *See*, *e.g.*, United States v. Davila, 133 S.Ct. 2139, 2147 (2013).

worst prejudicial errors and may choose to leave error uncorrected even when it is plain and has harmed the objecting party.

As authority for its four-part test, the *Olano* Court noted that Rule 52(b) "codified" the "standard laid down in" *United States v. Atkinson*.[17] *Atkinson* was a five-paragraph decision affirming a civil judgment and rejecting a claim of instructional error by the government that government attorneys had not raised at trial. The Court there stated:

> The verdict of a jury will not ordinarily be set aside for error not brought to the attention of the trial court. This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact… *In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings*.[18]

III. Supreme Court Decisions Related to Review of Unpreserved Sentencing Error

Since appellate review of sentencing error became routine beginning in the late 1980s, the Supreme Court has in many cases either applied plain error review to sentencing error or stated that it is applicable.

The Court's most recent application of plain error to an error in a federal sentencing was in *Henderson v. United States*.[19] The District Judge in that case accepted the defendant's plea to being a felon in possession of a firearm and sentenced him to an above-Guidelines prison term of 60 months to "try to help" the defendant by qualifying him for an in-prison drug rehabilitation program. Defense counsel did not object. After sentencing, the Supreme Court decided *Tapia v.*

[17] 297 U.S. 157, 160 (1936).

[18] 297 U.S. at 159-60 (emphasis added).

[19] 133 S. Ct. 1121 (2013).

United States,[20] and held that it is error under 18 U.S.C. § 3582(a) for a court to "impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation."

The issue in *Henderson* was whether under Rule 52(b) a sentencing error is "plain" if it is clear at the time of appeal but not at the time of sentencing. The majority,[21] in an opinion by Justice Breyer, held that it was. The Court reasoned that it shouldn't matter whether the error was clear or not in the trial court, so long as it was clear by the time of appeal.[22]

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[20] 131 S.Ct. 2382, 2393 (2011).

[21] Justices Scalia, Alito and Thomas dissented. Their arguments would be equally applicable to this proposal. *See* Henderson v. United States, 133 S. Ct. 1121, 1134 (2013) (Scalia, J., dissenting):

> The happy-happy thought that counsel will not "deliberately forgo objection" is not a delusion that this Court has hitherto indulged, worrying as it has (in an opinion joined by the author of today's opinion) about counsel's " 'sandbagging the court' " by "remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." *Puckett v. United States, 556 U.S. 129, 134, 129 S. Ct. 1423, 173 L.Ed.2d 266 (2009).* In any event, sandbagging is not the only evil to be feared. What is to be feared even more is a lessening of counsel's diligent efforts to identify uncertain points of law and bring them (or rather the defendant's version of them) to the court's attention, *so that error will never occur*. It is remarkably naïve to disbelieve the proposition that lessening the costs of noncompliance with Rule 51(b) diminishes the incentives to be diligent in objecting. *See* Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L.Rev. 1128, 1135 (1986). Meant to apply only in "exceptional circumstances," *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555 (1936), Rule 52(b) today has been transformed into an end-run around the consequences of claim forfeiture.

[22] 133 S. Ct. at 1127-28:

> Imagine three virtually identical defendants, each from a different circuit, each sentenced in January to identical long prison terms, and each given those long sentences for the same reason, namely to obtain rehabilitative treatment. Imagine that none of them raises an objection. In June, the Supreme Court holds this form of sentencing unlawful. And, in December, each of the three different circuits considers the claim that the trial judge's January-imposed prison term constituted a legal error. Imagine further that in the first circuit the law in January made the trial court's decision clearly lawful as of the time when the judge made it; in the second circuit, the law in January made the trial court's decision clearly unlawful as of the time when the judge made it; and in the third circuit, the law in January was unsettled.
>
> To apply Rule 52(b)'s words "plain error" as of the time of appellate review would treat all three defendants alike. It would permit all three to go on to argue to the appellate court that the trial court error affected their "substantial rights" and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Olano, supra*, at 732, 113 S.Ct. 1770 (internal quotation marks omitted). To interpret "plain error" differently, however, would treat these three virtually identical defendants differently, allowing only the first two defendants, but not the third defendant, potentially to qualify for Rule 52(b) relief. All three defendants suffered from legal error; all three failed to object; and all three would benefit from the new legal interpretation. What reason is there to give two

In *Puckett v. United States*,[23] the Court applied plain error review to a claim that the government breached the plea agreement at sentencing by requesting that the judge not grant the defendant credit for acceptance of responsibility under U.S.S.G. § 3E1.1. The focus of the case was whether relief was required despite the defendant's failure to object at sentencing to a determination that a particular guideline did not apply. The Court rejected arguments that once a breach is established, relief is required under plain error just as it is under harmless error. It held that the plain error test of *Olano* under Rule 52(b) applies, and explained, "the question with regard to prejudice is not whether Puckett would have entered the plea had he known about the future violation. …. When the rights acquired by the defendant relate to sentencing, the ' "outcome" ' he must show to have been affected is his sentence."[24]

In *Booker*, the Court expressed its assumption that the application of the plain error standard in Rule 52(b) would screen sentencing challenges and keep them from overburdening courts, stating: "Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test. It is also because, in cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine."[25]

> of these three defendants the benefits of a new rule of law, but not the third? . . . There is no practical ground for making this distinction.

[23] 556 U.S. 129, 131 (2009).

[24] 556 U.S. at 142 n.4.

[25] United States v. Booker, 543 U.S. 220, 268 (2005). That particular portion of the *Booker* decision has been cited in over 14,000 cases, according to Westlaw.

The Court has also applied plain error review to unraised errors in death sentencing proceedings when only resentencing was required:

> While Rule 30 could be read literally to bar any review of petitioner's claim of error, our decisions instead have held that an appellate court may conduct a limited review for plain error. [citing Rule 52(b); *Johnson, Olano*, and two other cases]. Petitioner, however, contends that the Federal Death Penalty Act creates an exception. . . . This argument rests on an untenable reading of the Act. The statute does not explicitly announce an exception to plain-error review, and a congressional intent to create such an exception cannot be inferred from the overall scheme. …[26]

IV. Court of Appeals Application of Plain Error Review to Sentencing Errors

As Judge Newman observes, the courts of appeals also apply plain error review to sentencing error. He notes, however, that the First and Second Circuits have "sometimes applied a lenient form of 'plain error' review to unobjected to sentencing errors."[27] The First Circuit case that he cites recognized that "a post-sentence objection is not necessarily required to preserve the issue for appeal if the defendant could not reasonably have anticipated the issue would arise until after the court ruled."[28] Some decisions in the Second Circuit appear to bypass plain error

[26] Jones v. United States, 527 U.S. 373, 388-89 (1999). *See also* Tapia v. United States, 131 S. Ct. 2382, 2393 (2011) ("Consistent with our practice, . . . , we leave it to the Court of Appeals to consider the effect of Tapia's failure to object to the sentence when imposed. *See* Fed. Rule Crim. Proc. 52(b). . . ."). Judge Newman lists *Cotton* as another example of the Court's application of plain error to sentencing; that case involved the failure to allege an an element in an indictment.

[27] Letter from the Honorable Jon O. Newman, *supra* note 1, at 2.

[28] United States v. Cortes-Claudio, 312 F.3d 17, 24 (1st Cir. 2002). *See also* United States v. Gallant, 306 F.3d 1181, 1188 (1st Cir. 2002) ("Gallant had no real reason to think this was at issue until after the court ruled. We generally do not require objections to be made to hypothetical outcomes which neither party anticipated.").

This principle was cited in a Sixth Circuit case as authority for rejecting defendant's claim that only plain error review should apply to an error the government failed to raise. United States v. Williams, 97 F. App'x 613, 614-15 (6th Cir. 2004) ("we have previously held that where a party has no meaningful opportunity to object to a district court's decision at sentencing, that error is not considered waived. . . . In the case at bar, the district court announced the sua sponte downward departure and immediately pronounced sentence; in such a case, 'a post-sentence objection is not necessarily required to preserve the issue for appeal if [a party] could not reasonably have anticipated the issue would arise until after the court ruled.'") (quoting *Cortes-Claudio*).

review even without examining the adequacy of the defendant's opportunity to object on time.[29] Expressions of dissatisfaction with the rigid application of plain error to sentencing error can also be found in other recent opinions as well.[30]

[29] *See* United States v. Confredo, 528 F.3d 143, 149 (2d Cir. 2008) (Newman, C.J.) ("Even if the loss claim was not properly asserted in the District Court, we will entertain the claim under all the circumstances on the somewhat relaxed application of plain error review that we and other courts have on occasion deemed appropriate for unpreserved sentencing errors," citing *Cortes-Claudio* and United States v. Sofsky, 287 F.3d 122, 125 (2d Cir. 2002)). In *Sofsky*, Judge Newman wrote for the court:

> As to unobjected to errors occurring at sentencing, we have stated that plain error review applies, see United States v. Keppler, 2 F.3d 21, 23 (2d Cir.1993), and have often applied such review, see, *e.g.*, United States v. Thomas, 274 F.3d 655, 666-72 (2d Cir.2001 (in banc)); United States v. Martinez-Rios, 143 F.3d 662, 675-76 (2d Cir.1998). On occasion, however, we have reviewed unobjected to sentencing errors without rigorous application of plain error standards. In United States v. Pico, 966 F.2d 91 (2d Cir.1992), we noticed and corrected an unobjected to sentencing error concerning supervised release with only the most conclusory compliance with Rule 52(b). *Id.* at 92 (merely noting that the error was "clear"). We have entertained on an appeal by the Government an unobjected to sentencing error without any consideration of plain error standards because the Government had no prior notice that the challenged aspect of the sentence would be imposed. See United States v. Alba, 933 F.2d 1117, 1120 (2d Cir.1991) (entertaining challenge to the sentencing judge's reliance on two allegedly impermissible factors in making a downward departure). We have also noted that noticing unobjected to errors that occur at trial precipitates an entire new trial that could have been avoided by a timely objection, whereas correcting a sentencing error results in, at most, only a remand for resentencing, or, as in this case, for a modification of the allegedly erroneous condition of supervised release. See United States v. Leung, 40 F.3d 577, 586 n. 2 (2d Cir.1994); United States v. Baez, 944 F.2d 88, 90 n. 1 (2d Cir.1991). Accordingly, although the Government is correct that plain error review applies, it appears that in the sentencing context there are circumstances that permit us to relax the otherwise rigorous standards of plain error review to correct sentencing errors.

287 F.3d at 125.

[30] *See* United States v. Flores-Mejia, ___F.3d ___, 12-3149, 2014 WL 3450938 (3d Cir. July 16, 2014) (Greenaway, C.J., dissenting, joined by Judges Smith, Shwartz, Sloviter, and Fuentes) ("requiring procedural reasonableness objections may facilitate speedier resolution of errors in certain circumstances, sparing everyone the lengthy process of appellate review. If alacrity be our keystone, I shall step aside, but in the grand scheme of our criminal justice system, judicial economy should not and cannot rule our considerations"); United States v. Woodruff, 735 F.3d 445, 452 (6th Cir. 2013) (Stranch, C.J., dissenting in part):

> . . . I would hold that the error in using the facilitation offense as a "controlled substance offense" to set Mr. Woodruff's base offense level was "clear or obvious" when the district court sentenced him in early 2012. Because Mr. Woodruff will have to serve 24 months longer than he would have if the offense level had been calculated correctly, I would also hold that the error substantially affected his rights and seriously affected the fairness, integrity or public reputation of the judicial proceeding. . . .
>
> Obviously, the difficulty presented here is due to the applicable plain error standard of review. Had Mr. Woodruff's attorney preserved an objection to counting the facilitation offense in setting the base offense level, we would be determining that "the sentence was imposed ... as a result of an incorrect application of the sentencing guidelines," and remanding the case for resentencing. 18 U.S.C. § 3742(f). . . .

See also United States v. Sevilla-Oyola, 753 F.3d 309, 326 (1st Cir. 2014) (Torruella, C.J., dissenting) (arguing against "overly rigid application of plain-error review" to sentencing error).

A recent en banc decision of the Third Circuit, *United States v. Flores-Meji,*[31] rejected the modified preservation rule of the First Circuit. The arguments of the majority and dissenting opinions debating the merits of applying plain error review to sentencing error are noted in this memo below, in Part V.

The Eighth Circuit also has expressly rejected relaxed rules for preserving sentencing error, stating that it chose to "adhere to our traditional, limited review of unpreserved errors consistent with Federal Rule of Criminal Procedure 52(b)."[32] It explained:

> We agree with the First Circuit that the timing of a sentencing court's pronouncement of sentence makes correction of "last minute" errors difficult. Nonetheless, Federal Rule of Criminal Procedure 35(a) permits a court to correct clear sentencing errors within seven days of sentencing. Thus, even if the timing of the error makes a contemporaneous objection impractical, a defendant's timely Rule 35 motion would alert the sentencing court to the error in the first instance and provide it the opportunity to correct itself.

V. Potential Issues Raised by the Proposal.

A. Scope and Definition of Error Affected

If the Subcommittee were to recommend an exemption from plain-error rules, it would have to determine whether that exemption would include all sentencing error--Guideline application errors, constitutional errors,[33] statutory errors,[34] errors under Rules 32, 32.1, 32.2,

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[31] United States v. Flores-Mejia, ___F.3d ___, 12-3149, 2014 WL 3450938 (3d Cir. July 16, 2014) (en banc) (in order to preserve for appeal a procedural objection to district court's failure to meaningfully consider defendant's sentencing arguments, and to avert plain error review, defendant must object after the sentence is pronounced; until sentence is imposed, the error has not been committed, abrogating *United States v. Sevilla,* 541 F.3d 226). The dissenting judges argued: "Because Flores-Mejia "sought" the District Court to "consider" § 3553(a) factors, his claim was preserved under Rule 51, regardless of whether the District Court ruled upon his request. What the majority calls an "objection" is in reality an "exception," which Rule 51(a) expressly declared as "unnecessary.""

[32]United States v. Leppa, 469 F.3d 1206, 1208 (8th Cir. 2006) (citing United States v. Ellis, 417 F.3d 931, 933 (8th Cir. 2005)) (holding a claim of sentencing error was preserved when defendant first raised it by way of a Rule 35(a) motion).

[33] Potential constitutional errors at sentencing include those defined in *Brady* (suppression of favorable evidence); *Pearce* (vindictive sentencing); *Apprendi, Southern Union, Booker,* and *Alleyne* (jury and proof beyond reasonable

and 35, and sentencing in death and misdemeanor cases as well as sentences imposed under the Guidelines--or only a narrower subset of sentencing error. By its terms, Judge Newman's proposal extends to all sentencing error, as it refers to "error in connection with the imposition of a sentence."[35] Although most of the reasons he presents for the proposal encompass any error affecting a sentence,[36] the argument based in complexity focuses on a specific type of sentencing error: an error in calculating the recommended sentencing range under the federal Sentencing Guidelines.[37]

Regardless of the scope selected, crafting language that would define that scope would present challenges. "Sentencing error" is not a well-defined concept. For example, would it Procedural errors in revocation proceedings? Challenges to the constitutionality of a statute that defines the punishment for an offense? If the proposal was limited to "Guidelines application errors," would that include Ex Post Facto challenges to the use of the wrong set of Guidelines?[38]

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doubt); *Alexander, Bajakajian, Miller* (Eighth Amendment limits); *Mitchell* (self-incrimination); *Custis* and *Tucker* (reliance on uncounseled prior conviction and other unreliable evidence); as well as denial of an impartial judge, denial or interference with effective counsel, invalid waivers of the right to counsel, double jeopardy violations, racial discrimination, reliance on conduct or beliefs protected by the First Amendment, imposition of unconstitutional conditions on release, incompetency, and delay, closure of, or exclusion from the sentencing proceeding. *See also* United States v. Gonzalez-Castillo, 562 F.3d 80 (1st Cir.2009) (the sentencing court committed plain error when it imposed a sentence based, in part, on a fact not supported by the record—the fact was a prior unlawful entry conviction, which he did not in fact have); United States v. Wilson, 614 F.3d 219 (6th Cir. 2010) ("basing a criminal sentence on a non-existent material fact threatens to compromise the fairness, integrity, or public reputation of [judicial] proceedings").

[34] Statutory error could include the various provisions of the Sentencing Reform Act and the Crime Victims' Rights Act; statutes defining the punishment range for an offense, or regulating probation, alternative sentences, supervised release, forfeiture, fines, or restitution; statutes regulating judicial recusal, presentence investigations, interpreters, and substitution of counsel.

[35] Letter from Honorable Jon O. Newman, *supra* note 1, at 2.

[36] *See id*. at 1 ("that an error "can add many months and sometimes years of unwarranted prison time to a sentence" or that "[t]here is no justification for requiring a defendant to serve additional time in prison just because defense counsel failed to object . . .").

[37] *See id.* ("calculating an applicable guideline range is a complicated process in which errors can easily occur, some of which may understandably escape the notice of even experienced defense counsel.").

[38] Peugh v. United States, —— U.S. ——, 133 S.Ct. 2072, 2082–84 (2013) (the Constitution's *ex post facto* clause is violated when a court sentences a defendant using a post-offense version of the Guidelines that produces a higher sentencing range than the version in effect at the time of the defendant's crime). *See, e.g.,* In re Sealed Case, 573

Constitutional challenges to the validity of prior offenses used in calculating the range? Procedural challenges to the way in which Guidelines sentencing ranges were explained to the defendant by the judge? If the amendment was also limited, as Judge Newman's proposed language suggests, to cases in which no "retrial" is required to correct the error, would that include jury sentencing proceedings for forfeiture? *Apprendi* errors?

Finally, plain error review is often applied to government claims of error during sentencing as well as to defendants' claims.[39] The proposal raises the question whether an exception to plain error review for sentencing error should be limited to errors claimed by defendants, as Judge Newman proposes, or should apply without regard to the party raising the error.

B. How and in Which Types of Cases Would the New Standard Make a Difference?

Another major issue raised by the proposal is whether changing the standard of review for some or all unpreserved sentencing error would make a meaningful difference, and, if so, in what sorts of cases it would have an impact. Judge Newman's proposed standard appears to retain the prejudice inquiry of the current test for plain error (for more on this see IV.D. below),

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F.3d 844 (D.C.Cir. 2009) (it was plain error for district court to impose longer prison term in order to promote rehabilitation when statute precluded this); United States v. Woodard, 744 F.3d 488, 497 (7th Cir. 2014) (granting relief for plain error *ex post facto* violation, stating "When the court utilized the 2011 version of the Sentencing Guidelines, it calculated Woodard's total offense level at 30, making the applicable Guidelines range 97 to 121 months. If the 2007 version of the Sentencing Guidelines had been applied, Woodard's total offense level would have been 24, making the applicable Guidelines range 51 to 63 months. Such a disparity in the Guidelines range impacted the integrity of the judicial proceedings.").

[39] *See, e.g.*, United States v. Gordon, 291 F.3d 181 (2d Cir. 2002) ("While the government should have pursued other possible grouping options below even in the absence of case precedent specifically highlighting the potential application of § 3D1.2(d), the damage done by allowing an inappropriate sentence to stand in Gordon's case while refusing other similarly situated defendants the opportunity to fall within § 3D1.2(c) and § 3D1.3(a)'s less burdensome confines is too great to allow the error to remain uncorrected. This is especially true given the relative ease of correcting the sentencing error on remand, thus accentuating the potential unfairness of allowing the district court's error to stand. This Court vacates and remands for resentencing under § 3D1.2(d)."). *See also* Greenlaw v. United States, 554 U.S. 237, 248 (2008) (noting Rule 52(b) did not disturb Congressional delegation of decision whether to appeal to Department of Justice officials).

but abandon step two of the *Olano* test requiring that the error be "plain," as well as step four, requiring that a reviewing court exercise its discretion to correct only those prejudicial, plain, unwaived errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings."

The Court in *Henderson* recently expanded second step of the *Olano* test so that an error would be considered "plain" if it was clear by the time of review, regardless of whether or not it was obvious at the time of sentencing. Nevertheless, the Court emphasized that step two should continue to support a decision to deny relief for some claims.[40] After *Henderson*, courts of appeals continue to deny relief for sentencing error under step two when the claimed error is not sufficiently established by precedent.[41] Presumably, these cases could come out differently under the proposed amendment.

As for step four, the Court in several decisions has emphasized that this step should preclude relief for even prejudicial errors.[42] Although many lower court cases grant relief for

[40] Henderson v. United States, 133 S. Ct. 1121, 1130 (2013) ("The Rule's requirement that an error be 'plain' means that lower court decisions that are questionable but not *plainly* wrong (at time of trial or at time of appeal) fall outside the Rule's scope.").

[41] *E.g.*, United States v. Carthorne, 726 F.3d 503, 516 (4th Cir. 2013) ("[N]either the Supreme Court nor this Circuit has yet addressed the particular question before us involving the residual clause of Section 4B1.2(a)(2), and the other circuits that have considered the question remain split on the issue. When 'we have yet to speak directly on a legal issue and other circuits are split, a district court does not commit plain error by following the reasoning of another circuit.' . . . We therefore conclude that the district court's error was not plain under these circumstances."); United States v. Woodruff, 735 F.3d 445, 448–51 (6th Cir. 2013) ("According to the PSR, Woodruff's base offense level was twenty-four because he had two prior felony convictions of either a crime of violence or a controlled-substance offense. *See* U.S. Sentencing Guidelines Manual § 2K2.1(a)(2) (2010). . . . Because Woodruff did not object to classification of his conviction for facilitation as a controlled-substance offense, plain-error review applies. . . . We conclude that the district court did err in its conclusion that facilitation under Tennessee law is a controlled-substance offense because, in light of our definitive holding, it is not. Its error was not plain, however, because the state of the law was both uncertain and not obvious at the time of its decision and at the time of appellate review.").

[42] For example, it stated in *Henderson*:

> Even where a new rule of law is at issue, Rule 52(b) does not give a court of appeals authority to overlook a failure to object unless an error not only "affect[s] substantial rights" but also "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

sentencing error once prejudice in the form of a longer sentence has been found, concluding that keeping a person incarcerated longer than authorized by the law meets the fourth step as well as the third,[43] decisions in which courts cite the fourth step as the reason for denying relief for sentencing error continue to be handed down.[44] Some of these cases might come out differently under the proposed amendment.

> . . . Pointing out that Rule 52 "is permissive, not mandatory," we added (4) that "the standard that should guide the exercise of remedial discretion under Rule 52(b)" is whether "the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"

133 S. Ct at 1126–27 (citations omitted) (quoting United States v. Olano, 507 U.S. 725, 732, 735 (1993)). The Court later noted:

> [T]here are other reasons for concluding that our holding will not open any "plain error" floodgates. As we have said, the Rule itself contains other screening criteria. The error must have affected the defendant's substantial rights and it must have seriously affected the fairness, integrity, or public reputation of judicial proceedings. When courts apply these latter criteria, the fact that a defendant did not object, despite unsettled law, may well count against the grant of Rule 52(b) relief.

Id. at 1130 (citation omitted) (quoting *Olano*, 507 U.S. at 732); *see also* United States v. Cotton, 535 U.S. 625, 632–33 (2002) (rejecting plain error relief for failure to allege element of greater offense in indictment, stating "we need not resolve whether respondents satisfy this element of the plain-error inquiry, because even assuming respondents' substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.").

[43] *E.g.*, United States v. Ortiz, 741 F.3d 288, 294–95 (1st Cir. 2014) ("The fourth element of the plain error standard need not detain us. A sentence grounded in part upon a criminal history score that includes a vacated conviction would seriously impair the fairness and public perception of judicial proceedings. Due process 'guarantees every defendant a right to be sentenced upon information which is not false or materially incorrect.' . . . Where, as here, such erroneous information materially influences the sentencing calculus, the error threatens the basic integrity of the sentencing process."); United States v. Bane, 720 F.3d 818, 830 (11th Cir. 2013) (granting relief for error under *Southern Union*, stating "we have little trouble concluding that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. We have previously held that a district court's improper characterization of a prior conviction as a serious drug offense, so that the statutory maximum penalty for the defendant's offense increased, satisfies this requirement. . . . Here, the district court's error seriously affects the fairness, integrity, or public reputation of judicial proceedings at least as much."); United States v. Lara–Ruiz, 721 F.3d 554, 558–60 (8th Cir. 2013) (reversing and remanding for resentencing, because *Alleyne* error substantially affected the defendant's Sixth Amendment rights and seriously affected the fairness, integrity, or public reputation of judicial proceedings); United States v. Culbertson, 712 F.3d 235, 244–45 (5th Cir. 2013) ("[W]hile we conclude that Culbertson's objection was insufficient to preserve the specific error alleged on appeal, he did object to a sentence three times higher than his guideline range. . . . [W]e are not satisfied here that there is other record evidence showing that Culbertson's sentence is 'fair,' or that the 'integrity or public reputation' of the judicial proceeding was protected despite the district court's erroneous consideration of Culbertson's need for rehabilitation in determining the length of his sentence. . . . [T]he district court's repeated emphasis on Culbertson's need for prison time 'to get clean and sober' and 'to get [himself] stabilized' affected the 'fairness, integrity, or public reputation' of the sentencing proceeding. . . Culbertson's sentence was three times in excess of his advisory range. . . . We therefore conclude that we should exercise our discretion to recognize this error.").

[44] *See, e.g.*, United States v. Kirklin, 727 F.3d 711, 717–19 (7th Cir. 2013) (assuming without deciding that *Alleyne* error affected the defendant's substantial rights, but denying relief under fourth step); United States v. McKinley,

C. Assessing the Proposal in Light of the Reasons for Restricting Review of Unraised Error.

1. Efficiency and Cost Differential as a Reason for Separate Treatment

One of the major rationales for restricting relief for unraised errors is cost. Specifically, raising error promptly in the trial court is considered more efficient because it is cheaper to address and potentially avoid error than to it is correct error after it occurs.[45] Judge Newman argues that this rationale does not support restricting the review of unraised sentencing error, because resentencing imposes less of a burden on district courts than reconviction.[46] This argument has also been raised as a reason to support more generous collateral review of sentencing error, along with the argument that additional resources are saved when sentencing error is reviewed because the correction of sentencing error leads to shorter terms of incarceration.[47]

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732 F.3d 1291, 1297 (11th Cir. 2013) (assuming for the sake of argument that the alleged error affected his substantial rights, but finding defendant was "not entitled to correction of the alleged error because he has not satisfied the fourth prong of plain error review," because Supreme Court explained in *Cotton* "that where the evidence of a statutory element of an offense is overwhelming and essentially uncontroverted, there is no basis for concluding the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings."); United States v. Osborne, 673 F.3d 508, 513–14 (6th Cir. 2012) (denying relief for error when requirement that sale be within 1000 feet from school not proven to jury, relying on step four: "If the element was 'essentially uncontroverted' in *Johnson*, the proximity element was *entirely* uncontroverted here.").

[45] Puckett v. United States, 556 U.S. 129, 134 (2009) ("In the case of an actual or invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome.").

[46] The two cases Judge Newman cites in his letter as authority for this argument both include the argument in a footnote. United States v. Baez, 944 F.2d 88, 90 n.1 (2d Cir. 1991); United States v. Leung, 40 F.3d 577, 586 n.2 (2d Cir. 1994). *Baez,* however, affirms the sentence despite the error, explaining "counsel raised no objection to the District Judge's statement that the multi-count analysis yielded an offense level of 22. In fact, counsel suggested sentencing at an offense level of 23 or 24. Though sentencing issues may sometimes be reviewed on appeal despite lack of objection at trial, such consideration is not assured . . . ." 944 F.2d at 90 (citations omitted). In *Leung*, the court ordered resentencing because of unobjected-to remarks that could have been interpreted as ethnic slurs. 40 F.3d at 586–87. *Leung* did not discuss *Olano* or Rule 52(b). *See id.*

[47] *See* Douglas Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 165–76 (2014); Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 145–56 (2012).

Resentencing, however, may in many cases place significant burdens on district courts, as well as victims, probation staff, witnesses, and the government. Moreover, even with sentencing appeal waivers, the volume of cases that require the correction of sentencing error on remand is probably much larger than the volume of overturned convictions that require retrial, as all but a tiny fraction of convictions follow guilty pleas. Taking the volume of cases into account, it is not clear that the total costs of resentencing would be less than the total costs of retrial. Finally, any cost analysis of relaxed standards of review must include not only the cost of resentencing or retrial should relief be ordered, but also any added costs of appellate review. If the existing plain error standard reduces the overall amount of error by incentivizing prompt objection,[48] or requires fewer resources per appeal than would a more relaxed standard, the proposal could raise the costs of reviewing sentencing error.

Should the Subcommittee decide that the reduced cost of correction is an important reason to exempt particular error from plain error review, it might consider whether it would make sense to exempt other errors in proceedings apart from trial that share this feature, such as errors in plea proceedings.

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[48] *E.g.*, United States v. Flores-Mejia, No. 12-3149, 2014 WL 3450938, at *3–4 (3d Cir. July 16, 2014) (citing United States v. Merced, 603 F.3d 203, 214 (3d Cir 2010); *Puckett*, 556 U.S. at 134 (2009)) ("Objecting when sentence is pronounced permits the quick resolution of such errors."). In *Merced*, the Third Circuit noted that "the sentencing judge, not the court of appeals, is in a superior position to find facts and judge their import under § 3553(a) in the individual case." 603 F.3d at 214. The Third Circuit went on to explain in *Flores-Mejia*:

> By encouraging defendants to make objections before the court which is best equipped to resolve the errors efficiently and effectively, we are promoting better sentencing practices.
>
> . . . Sentencing is a complex process, and a district judge at sentencing must meet numerous requirements. An objection at sentencing, even if sometimes time-consuming, serves the important purpose of reminding the judge of these requirements and allowing the judge to immediately remedy omissions or clarify and supplement inadequate explanations. . . . The burden of sitting through an objection at sentencing pales in comparison to the time and resources required to correct errors through a lengthy appeal and resentencing. Our strong interest in judicial economy, heightened in these times of fiscal restraint and judicial budgetary concerns, weighs heavily in favor of a rule under which the defendant must contemporaneously object to concerns regarding the procedural reasonableness of a sentence.

2014 WL 3450938, at *3–4.

2. Accuracy and Opportunity for Response

Apart from efficiency and resources, plain error rules limiting relief absent prompt objection have been justified as promoting more accurate decisions because judges in the best position to decide can obtain the information that they need at the time.[49] The dissenting judges in *Flores-Mejia,* however, suggested that plain error rules may increase accuracy at the trial level but decrease accuracy on appellate review if the assurance that a sentence will be upheld removes an important incentive for district judges to comply with rules requiring them to make a sufficient record for appellate review.[50]

Plain error rules also encourage fairness to opposing parties who would otherwise lack the opportunity to present additional argument or evidence.[51] In the context of sentencing, those responding to claims of error raised by defendants may include victims. The Subcommittee may wish to discuss whether these reasons for limiting relief for unraised error cut in favor or against treating sentencing error differently than other types of error.

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[49] *E.g.*, *Puckett*, 556 U.S. at 134 ("This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute.").

[50] *Flores-Mejia*, 2014 WL 3450938, at *10–11 (Greenaway, J., dissenting) ("Under the plain error review adopted by the majority today, our hands will be tied when the district court fails to produce enough of a record for meaningful procedural review, for we will have no basis to ascertain whether a potential error could have 'affected the outcome of the district court proceedings.'").

[51] *E.g.*, United States v. Atkinson, 297 U.S. 157, 159 (1936) (noting that the refusal to provide relief for unraised error "is founded upon considerations of fairness to the court *and to the parties* and of the public interest in bringing litigation to an end *after fair opportunity has been afforded to present all issues of law and fact*") (emphasis added).

This reasoning continues to influence courts today reviewing unraised sentencing error. *E.g.*, United States v. Ramirez-Flores, 743 F.3d 816, 824 (11th Cir. 2014) ("We require objections to the PSI to be made with 'specificity and clarity' in order to alert the government and the district court to the mistake of which the defendant complains. . . . This requirement is not gratuitous; rather, it ensures that the government has an opportunity to address or correct the alleged error. In this case, for example, the government could have obtained further documentation from the state court proceeding—*e.g.*, the plea agreement or the transcript of the plea colloquy—had it known that it needed to clarify whether Ramirez-Flores burglarized a residence or a secondary structure.").

3. Sandbagging, Complexity, and Attorney Error

Another reason the Court has invoked for restricting relief for unraised error more narrowly than relief for preserved error is a concern about strategic behavior often termed "sandbagging." Theoretically, a party could choose not to object to an error when it occurs, saving it for later should the proceeding turn out unfavorably.[52] Presently the Court appears divided over whether this possibility should guide rules governing appellate review of sentencing error. A majority of justices in *Henderson* rejected sandbagging concerns as a reason to limit the reach of the second ("plain") step of the *Olano* test. The Court stated that

> counsel normally has other good reasons for calling a trial court's attention to potential error—for example, it is normally to the advantage of counsel and his client to get the error speedily corrected. And, even where that is not so, counsel cannot rely upon the "plain error" rule to make up for a failure to object at trial. After all, that rule will help only if (1) the law changes in the defendant's favor, (2) the change comes after trial but before the appeal is decided, (3) the error affected the defendant's "substantial rights," and (4) the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S., at 732, 113 S.Ct. 1770 (internal quotation marks omitted). If there is a lawyer who would deliberately forgo objection *now* because he perceives some slightly expanded chance to argue for "plain error" *later*, we suspect that, like the unicorn, he finds his home in the imagination, not the courtroom.[53]

But the three dissenting justices in *Henderson* pointed to numerous invocations of this concern in past decisions, including *Puckett*, which involved the failure to object to an error during sentencing.[54]

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[52] United States v. Pielago, 135 F.3d 703, 709 (11th Cir. 1998) (defining "sandbagging" as "saving an issue for appeal in hopes of having another shot at trial if the first one misses").

[53] Henderson v. United States, 133 S. Ct. 1121, 1128–29 (2013).

[54] *Id.* at 1131–36 (Scalia, J., dissenting); *Puckett*, 556 U.S. at 140. The Court in *Puckett* held:

> [O]f course the contemporaneous-objection rule prevents a litigant from "'sandbagging'" the court—remaining silent about his objection and belatedly raising the error only if the case does not

Other rationales for limiting relief for unraised error, such as the need to maximize accuracy and efficiency, also assume that the behavior of parties will be affected by the scope of relief, that is, that parties will be more likely to raise objections contemporaneously with such limits in place than without them. The *Henderson* Court's dismissal of "sandbagging" seems to assume the plain error rules have no effect on what parties do during sentencing.

Court of appeals judges are divided on their views of the matter as well. In *Flores-Mejia*, for example, the majority of judges of the Third Circuit stated "requiring that the procedural objection be made at the time of sentencing prevents 'sandbagging' of the court by a defendant who remains silent about his objection to the explanation of the sentence, only to belatedly raise the error on appeal if the case does not conclude in his favor."[55] The five dissenting judges countered:

> [P]arties already have an incentive to bring errors to the district court's attention even when a claim is preserved. This is because they have a better shot at correcting errors there than before an appellate court that must review under a deferential, reasonableness standard. . . . [T]he majority's approach does not explain why an abuse of discretion standard cannot deter parties from "playing possum."[56]

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conclude in his favor. Cf. *Wainwright v. Sykes*, 433 U.S. 72, 89, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); see also *United States v. Vonn*, 535 U.S. 55, 72, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002).

. . . So why demand the futile objection?

For one thing, requiring the objection means the defendant cannot "game" the system, "wait[ing] to see if the sentence later str[ikes] him as satisfactory," *Vonn*, 535 U.S., at 73, 122 S.Ct. 1043, and then seeking a second bite at the apple by raising the claim. For another, the breach itself will not always be conceded. In such a case, the district court if apprised of the claim will be in a position to adjudicate the matter in the first instance, creating a factual record and facilitating appellate review. Thirdly, some breaches may be curable upon timely objection—for example, where the prosecution simply forgot its commitment and is willing to adhere to the agreement. And finally, if the breach is established but cannot be cured, the district court can grant an immediate remedy (*e.g.*, withdrawal of the plea or resentencing before a different judge) and thus avoid the delay and expense of a full appeal.

Id. at 134–40 (footnote omitted).

[55] 2014 WL 3450938, at *3 (citing *Pucket*, 556 U.S. at 134).

[56] *Id.* at *8 (Greenaway, J., dissenting) (footnote omitted). Indeed the dissenting judges went further:

The dissenters echo Judge Newman's argument that even experienced attorneys unintentionally and understandably miss Guideline errors because the Guidelines are so complicated, and defendants shouldn't have to pay the consequences.

The extent to which a defendant must suffer the consequences of his attorney's failure to comply with rules for raising an error is an issue that arises under any standard of review that restricts relief for untimely claims, including Rule 12 and Rule 52(b), various statutes providing that late claims are "waived," and limits on late or successive appeals and applications for relief under § 2255. Rule 52(b) presently does not distinguish between claims or errors that are particularly unlikely to be the subject of sandbagging, or that are particularly complex and thus likely to be overlooked by counsel, or that are particularly difficult to sustain as the basis for an ineffective assistance of counsel claim. The proposal raises the question whether attorney oversight in the context of sentencing error is sufficiently unique to warrant an exemption from plain error review.

D. The Standard for Harmlessness or Prejudice

Judge Newman's proposal uses two separate phrases to describe the harm that would be required before relief would be available for an unraised sentencing error: (1) relief "unless the error was harmless" and (2) "the error caused the defendant prejudice."[57] What standard would be appropriate under such a proposal? Would prejudice be assessed the same way in which step

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> Sentencing proceedings are highly charged and fraught with emotion, particularly after the sentence is imposed. It is unwise to burden counsel with the additional obligations to engage in a reasoned analysis of the district court's sentencing explanation and then interpose an objection that was already asserted, all while attending to an emotional client and raising residual issues, like surrender dates and place of incarceration.

Id. at *10.

[57] Letter from the Honorable Jon O. Newman, *supra* note 1.

three of the *Olano* analysis is assessed now[58] or would it entail a different analysis? Would the burden of showing harm remain with the defendant as it does under Rule 52(b), or would the burden of showing harmlessness rest on the government as under Rule 52(a)?

E. Relevance of Prior Attempts to Create Exception to Rule 12 Review Standard

The Committee's recent proposal to designate a separate standard of review for particular claims under Rule 12 caused concern at the Supreme Court, leading the Committee to withdraw that particular aspect of its proposal. Similar concerns might be raised about designating a separate standard of review for particular claims, different from the standard specified under Rule 52.

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[58] Courts of appeals have created various approaches. See, for example, United States v. Garcia-Carrillo, 749 F.3d 376 (5th Cir. 2014):

> If the correct and incorrect sentencing ranges overlap and the defendant has been sentenced within this overlap, "we do not assume, in the absence of additional evidence, that the sentence affects a defendant's substantial rights." Garcia–Carrillo . . . was sentenced within the overlap between the two sentences. . . . In such cases, "we have shown considerable reluctance in finding a reasonable probability that the district court would have settled on a lower sentence." Because of this overlap and because of Garcia–Carrillo's failure to otherwise show a reasonable probability of a different result, any error that may have occurred regarding § 3E1.1(b) did not affect his substantial rights."

Id. at 379 (footnotes omitted). Compare United States v. Currie, 739 F.3d 960 (7th Cir. 2014):

> *Paladino* established our framework for deciding whether a district court's mistake in treating the Guidelines as binding constituted plain error. . . . Here the district court was similarly mistaken as to the limits of its sentencing authority. Rather than being bound by a ten-year statutory minimum, the court was instead bound by a significantly lower five-year minimum. In assessing whether Currie was prejudiced by the error, such that he is entitled to relief under the plain error doctrine, we apply the *Paladino* model. . . . . We therefore order a limited remand so that the district judge may consider, and state on the record, whether she would have imposed the same sentence on Currie knowing that he was subject to a five-year rather than a ten-year statutory minimum term of imprisonment.

Id. at 964–67.

The Court has indicated its opposition to carving out exceptions to Rule 52. For example, in *Puckett*, the Court rejected the argument that breaches of agreements at sentencing should be treated differently from other error under Rule 52(b). It stated:

> We have repeatedly cautioned that "[a]ny unwarranted extension" of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice, see *Young, supra,* at 15, 105 S.Ct. 1038; and that the creation of an unjustified exception to the Rule would be "[e]ven less appropriate," *Johnson v. United States*, 520 U.S. 461, 466, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). The real question in this case is not *whether* plain-error review applies when a defendant fails to preserve a claim that the Government defaulted on its plea-agreement obligations, but rather what conceivable reason exists for disregarding its evident application. Such a breach is undoubtedly a violation of the defendant's rights, see *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), but the defendant has the opportunity to seek vindication of those rights in district court; if he fails to do so, Rule 52(b) as clearly sets forth the consequences for that forfeiture as it does for all others.[59]

[59] 556 U.S. at 135; *see also* United States v. Marcus, 560 U.S. 258, 266 (2010). Rejecting the Second Circuit rule that would apply more generous plain error review to ex post facto violations, the Court in *Marcus* stated:

> [T]he rule that permits courts to recognize a "plain error" does not "remove" "seriou[s]" errors "from the ambit of the Federal Rules of Criminal Procedure." *Johnson*, *supra*, at 466, 117 S.Ct. 1544. Rather, the "plain error" rule, as interpreted by this Court, sets forth criteria that a claim of error not raised at trial must satisfy. The Second Circuit's rule would require reversal under the "plain error" standard for errors that do not meet those criteria. We can find no good reason to treat respondent's claim of error differently from others. See *Puckett*, 556 U.S., at ——, 129 S.Ct., at 1433 (reviewing the Government's violation of a plea agreement for "plain error"); *Cotton*, *supra*, at 631–632, 122 S.Ct. 1781 (reviewing an indictment's failure to charge a fact that increased defendant's statutory maximum sentence for "plain error"); *Johnson*, *supra*, at 464, 117 S.Ct. 1544 (reviewing the failure to submit an element of the crime to the jury for "plain error").

560 U.S. at 266.

TAB 4D

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U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

August 25, 2014

MEMORANDUM

TO: Judge Raymond M. Kethledge
Chair, Subcommittee on Rule 52

FROM: Jonathan J. Wroblewski, Director
Office of Policy and Legislation

SUBJECT: Proposed Amendment to Rule 52 of the Federal Rules of Criminal Procedure to Limit the Reach of the Plain Error Rule

Pending before the Subcommittee is a proposed amendment to Rule 52 of the Federal Rules of Criminal Procedure to cut back on the plain error rule and increase the availability of appellate review for alleged sentencing errors. The proposed amendment would allow sentencing errors to which no objection was made in the district court to be corrected on appeal without regard to the requirements of plain error review. In *United States v. Sofsky*, 287 F.3d 122, 125 (2d Cir. 2002) (Newman, J.), a panel of the Second Circuit adopted this view and applied a "relaxed" form of plain error review to an un-objected to sentencing error.[1] The proposal would codify the *Sofsky* holding by adding a new section to Rule 52 that would allow an appellate court to correct sentencing errors raised for the first time on appeal even if those errors did not meet the plain error standard under current Rule 52(b).

The Department of Justice opposes the proposed amendment for several reasons. First, the policies underlying the plain error rule apply to sentencing errors in much the same way they apply to trial errors. Second, as the proposal itself notes, the Supreme Court has stated repeatedly that it favors plain error review for sentencing errors. Third, a new rule is unnecessary to correct prejudicial guideline calculation errors but would lead to many unnecessary remands and resentencings in cases where a district court did not "fully" explain its sentence. And finally, the proposal runs contrary to congressional intent in the Sentencing

[1] Notably, however, not all judges on the Second Circuit share this view. *See United States v. Villafuerte*, 502 F.3d 204 (2d Cir. 2007) (applying "full" plain error review to claims that a district court failed to consider § 3553(a) factors and that the court failed to provide a sufficient explanation for the sentence imposed).

Reform Act to limit sentencing appeals when a judge sentences within or below the applicable sentencing guidelines.

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The policies underlying the plain error rule as applied to trial errors are similarly sound as applied to sentencing errors. If a criminal defendant believes a procedural error has occurred to his detriment during a court proceeding, he should be required to object in order to preserve the issue. "No procedural principle is more familiar . . . than that a . . . right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States,* 321 U.S. 414, 444 (1944). Requiring such an assertion gives the trial court the opportunity to consider the claim and rectify it in a timely way so that it cannot possibly affect the ultimate outcome of the case.

While a resentencing is certainly not the same as a new trial, it is a substantial court proceeding. The district court must return the case to its docket, have the defendant transported back to court, reexamine factual and legal issues relevant to the case, and often face new issues as well, such as the common claim of post-sentencing rehabilitation. *See Pepper v. United States*, 131 S. Ct. 1229 (2011) (holding that a court at a resentencing proceeding may consider post-sentencing rehabilitation as a basis for a downward variance). The resentencing proceedings may also be burdensome on witnesses and law enforcement authorities, and particularly harmful to victims of crime, who must relive the circumstances of the case yet again. All of these considerations suggest that the interests in finality which underlie the plain error rule are fully applicable here, and that a sentencing court should not be directed to repeat a sentencing proceeding unless there is a very good reason; or in other words, unless the requirements of the plain error test are met.

Moreover, the proposal glosses over the explicit view of the Supreme Court favoring the application of the plain error rule to sentencing errors. Professors Beale and King's August 22, 2014, memorandum discusses this at greater length. Notably, though, in *Puckett v. United States*, 556 U.S. 129 (2009), the Supreme Court held that a claim on appeal that the government breached a plea agreement through its sentencing advocacy is subject to plain error review if no such claim was presented in the district court. The Court declared: "If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed. There is good reason for this; 'anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal.'" *Id.* at 134, quoting *United States v. Padilla*, 415 F.3d 211, 224 (1st Cir. 2005) (*en banc*) (Boudin, C.J., concurring).

As the Court further explained:

> This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute. In the case of an actual or invited procedural error, the district

> court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome. And of course the contemporaneous-objection rule prevents a litigant from "'sandbagging'" the court – remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.
>
> * * *
>
> We have repeatedly cautioned that "[a]ny unwarranted extension" of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice, . . . and that the creation of an unjustified exception to the Rule would be "[e]ven less appropriate." The real question in this case is not whether plain-error review applies when a defendant fails to preserve a claim that the Government defaulted on its plea-agreement obligations, but rather what conceivable reason exists for disregarding its evident application. Such a breach is undoubtedly a violation of the defendant's rights, *see Santobello v. New York*, 404 U.S. 257, 262 [] (1971), but the defendant has the opportunity to seek vindication of those rights in district court; if he fails to do so, Rule 52(b) as clearly sets forth the consequences for that forfeiture as it does for all others.

Puckett, 556 U.S. at 134-36 (citations omitted).[2]

In the sentencing context, the potential for sandbagging is as real – or even more so – than in the trial context. Relaxed plain error review would encourage a defendant not to press issues at the initial sentencing, knowing that he will have a second chance at the issue if he gets an adverse sentence and *in addition* have an opportunity to argue for a reduced sentence on account of post-sentence rehabilitation. And because of the vindictiveness doctrine, a defendant is essentially guaranteed that his sentence will not go up on resentencing, creating a significant incentive for wanting two (or more) chances to argue for leniency.

It is also important to note that pursuant to the Federal Rules of Criminal Procedure, defense counsel is given significant time to review and object to the relevant presentence report. Objections by both the defense and the government determine the disputes that require resolution by the district court and are a key component of the sentencing procedure framed by the rules. Because there is a factual component to almost any sentencing claim, it is particularly important

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[2] The proposal itself cites other Supreme Court precedent endorsing plain error review for sentencing errors. "In *United States v. Cotton*, 535 U.S. 625, 631-34 (2002), the Court, reviewing for plain error, declined to reject a sentencing enhancement claimed to be erroneous because drug quantity, on which the enhancement was based, was not alleged in the indictment. In *United States v. Booker*, 543 U.S. 220, 268 (2005), the Court stated, with respect to sentencing guideline errors, '[W]e expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test.' In *Puckett v. United States*, 556 U.S. 129, 143 (2009), the Court applied 'plain error' review to an unobjected to breach of a plea agreement. *See also Henderson v. United States*, 133 S. Ct. 1121 (2013) (acting on premise that 'plain error' review applies to sentencing errors, Court rules that whether error is plain is determined at time of review, not time of error)." The proposal also notes that "[i]n two cases decided before the adoption of Rule 52(b), the Supreme Court corrected a sentencing error not complained of because the error was deemed 'plain.' *See Pierce v. United States*, 255 U.S. 398, 405-06 (1921) (plain error to allow interest on a criminal fine until a judgment had been entered against shareholders of the defendant corporation); *Weems v. United States*, 217 U.S. 349, 380 (1910) (imposition of punishment deemed cruel and unusual set aside as plain error)."

that issues be litigated and resolved first in the district court. Reviewing all sentencing claims under any relaxed form of the plain error standard could undermine that important goal by reducing the need to identify all sentencing issues before sentence is imposed. Therefore, the rules should encourage in every way the district judge and the parties to take sentencing in the district court seriously in an effort to get it right the first time. Continued application of the plain error rule to sentencing claims will promote that goal.

Interestingly, in three of the cases cited in the proposed amendment, the courts of appeals either found no error, *United States v. Eversole,* 487 F.3d 1024 (6th Cir. 2007); *United States v. Dragon,* 471 F.2d 501, 505 (3d Cir. 2006); or no prejudice, *United States v. Traxler,* 477 F.3d 1243, 1250 (10th Cir. 2007). In the fourth case, *United States v. Knows His Gun III,* 438 F.3d 913, 918 (9th Cir. 2006), the Ninth Circuit held that it was not plain error for the district court to fail to consider additional factors or information that the defendant did not raise or mention below. *Knows His Gun III* serves as a good example of why the plain error rule makes sense in the sentencing context. The defendant sought a remand in order to introduce evidence of his background, character and conduct that he did not introduce at the initial sentence. We think it is good policy that if a defendant has information germane to his plea for leniency, he has to put it in the record at the initial proceeding. It would be quite extraordinary to excuse without limitation the failure of a defendant to tell the judge about some sympathetic, mitigating aspect of his life. Of course, if the defendant received ineffective assistance of counsel in making his presentation, he may be able to prevail under *Strickland v. Washington,* 466 U.S. 668 (1984), but again, only if he can show prejudice.

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Although the proposed amendment to Rule 52 purports to limit relaxed plain error review to "prejudicial" errors, this limitation will likely prove hollow. To the extent the limitation is meant to protect against prejudicial guideline calculation errors, a new rule is unnecessary. Existing case law in circuits across the country has held that even under a rigorous plain error review, a defendant who has been prejudiced by a guideline calculation error receives a new sentencing hearing. *See, e.g., United States v. Langford,* 516 F.3d 205, 215 (3d Cir. 2008) ("[G]iven the importance of a correct Guidelines calculation both to the sentencing that district courts are required to conduct and to our ability to carry out reasonableness review, the use of an erroneous Guidelines range will typically require reversal under 18 U.S.C. § 3742(f)."). As a result, we believe this proposal would have no real impact on clear guideline calculation errors.

However, the proposal would have a significant impact on the more routine sentencing complaints raised on appeal. The typical sentencing error alleged on appeal is a procedural claim that the district court failed to consider an argument, or failed to adequately explain the reasons for the sentence imposed. A relaxed plain error requirement for these types of claims would have two effects.

First, it would provide a powerful incentive to counsel not to contemporaneously object to a district court's failure to explain its sentence, where such a failure could be easily corrected. The defense attorneys would almost never object to a faulty sentencing explanation, because there would be no advantage to doing so. In fact, there would be a great advantage not to object.

As a result, errors that could be very easily corrected by the district court at the time of sentencing would not be raised.

Second, a relaxed plain error standard would lead to many unnecessary remands and reversals on appeal. In the more common sentencing appeals wherein it is alleged that the district court did not sufficiently consider factors or failed to adequately explain a sentence, it is unlikely that an appellate court will on its own conclude that such an error is not "prejudicial;" that is, upon finding that a district court did not mention an issue, take it upon itself to resolve how the issue affects the overall sentencing calculus, a determination within the expertise of the sentencing judge. Thus, adoption of the amendment would inevitably result in more reversals and remands, most of them unnecessary, offending the rule of finality expressed in the plain error rule.

The plain error rule strikes a careful balance between the government's (and the court's) interest in finality and "judicial efficiency" and the defendant's interest in "the redress of injustice." *Puckett*, 556 U.S. at 135. Appeals are a way to ensure fair proceedings. They are not a search for procedural errors so that there can be unlimited reviews of a particular case. That the appealing party did not even appreciate an error is a strong indicator that the proceeding was fair, even if not perfect. While there can be exceptions, which is what plain error review is for, the objection requirement is critical to determining whether an alleged error was thought to have affected the fairness of the proceeding as it was actually taking place or was merely the belated brain child of the appellate lawyer. This is equally true for trial or sentencing. Because this balance between finality and the redress of errors is important for both trials and sentencings, we respectfully oppose the proposal to modify plain error review for sentencing errors.

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It is also important for the subcommittee to keep in mind that prior to *Booker*, every appellate court interpreting 18 U.S.C. § 3742 held that a defendant could not appeal the reasonableness of a within- or below-guideline sentence, where the defendant sought a downward departure but the court exercised its discretion not to grant it. *See, e.g., United States v. Richmond*, 120 F.3d 434, 436 (3d Cir. 1997) ("the applicable statute that lists the grounds upon which a defendant may appeal a final sentence does not include abuse of discretion in imposing a sentence within the guideline range. . . . We will therefore dismiss this appeal without reaching the merits."). The Supreme Court affirmed this interpretation in *United States v. Ruiz*, 536 U.S. 622 (2002), holding that section 3742(a) did not "authorize" an appeal of an otherwise lawful within-guideline sentence "where the ground for appeal consists of a claim that the district court abused its discretion in refusing to depart." *Id.* at 627. These rulings reflect congressional intent, embodied in the Sentencing Reform Act, to limit appellate jurisdiction of sentencing appeals when lower courts sentence a defendant to a within- or below-guideline sentence.

After *Booker*, the Department conceded in courts across the country that because of the nature of the *Booker* remedy, any sentence – even a within-guideline sentence – is subject to review for reasonableness, and all appellate courts have agreed with this view. The result has been a significant increase in defense appeals of within- and below-guideline sentences, almost uniformly without success. Out of many thousands of appeals, there have been only a few

handfuls of within- or below-guideline sentences reversed on defense appeal as unreasonable. Those few that do succeed – *e.g., United States v. Olhovsky*, 562 F.3d 530 (3d Cir. 2009) – typically hinge on unique facts and provide little, if any, meaningful guidance to sentencing courts.

While we believe defense appeals of within- and below-guideline sentences are required by *Booker* – and that the plain error doctrine poses no impediment to full reasonableness review in the appellate courts – we see no reason to *expand* the number of appeals to those involving unpreserved claims of procedural error that do not meet the plain error test. We think it is not only bad policy, but contrary to the intent of Congress and the structure of sentencing procedure set out in the Sentencing Reform Act.

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For all of these reasons, we think the subcommittee should not adopt the proposed amendment to Rule 52 of the Federal Rules of Criminal Procedure.

We look forward to our discussion of the proposal in the coming weeks.

TAB 4E

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MEMORANDUM

To: Rule 52 Subcommittee, Hon. Raymond Kethledge, Chair
From: Judge Jon O. Newman
Date: September 16, 2014
Re: September 29, 2014 Subcommittee Conference Call

In anticipation of the Subcommittee's September 29 conference call to consider my proposal to exempt some sentencing errors from the plain error test of Rule 52(b), I submit this Memorandum to comment on the August 22, 2014, Memorandum from your Reporters and the August 25, 2014, Memorandum from the Department of Justice.

I. Reporters' Memorandum

A. Scope of the proposal. The Reporters' Memorandum ((Reps. Mem.") makes the entirely valid point that my proposal potentially has a broad scope and might create uncertainties in its application. Reps. Mem. 10-12. I had thought that requiring a showing of prejudice, as my original draft rule does, would substantially limit the effect of my proposal, but I am persuaded that a clearer limitation is needed. It was always my thought that relief from the current strictness of plain error review, as applied to sentencing errors, should be available only in a case where an unobjected-to sentencing error increased a defendant's sentence. This would eliminate all concerns about routine procedural complaints, for example,

that the sentencing judge did not adequately consider various factors or did not adequately explain the reasons for the sentence. Although such errors have the potential to increase a sentence (or, to put it another way, correction of such errors has the potential to decrease the sentence imposed), my proposal seeks to exempt from the strictness of plain error review only errors that in fact increase a sentence.

To make this limitation on scope clear, I now suggest that my proposal be implemented with the following Rule 52(c):

> **Proposed Rule 52(c) of the Federal Rules of Criminal Procedure:**
>
> A sentencing error not brought to the trial court's attention that increases a defendant's sentence may be reviewed on appeal whether or not the error meets the plain-error standards unless correction of the error would require a new trial.

To meet the Reporters' concern that the new trial exemption might not cover "jury sentencing proceedings for forfeiture" or "Apprendi errors," Reps. Mem. 12, the "unless" clause could be broadened to add the words "or any proceedings requiring a jury."

B. Cost of the proposal. The Reporters question the cost of the proposal. See Reps. Mem. 16. The limitation of the proposal to errors that actually increase a sentence substantially eliminates their concerns. Furthermore, their

argument, even as applied to all sentencing errors, contends only that "it is not clear" that resentencing would cost less than retrials. See id. Yet there can really be no doubt that retrying entire cases whenever error has occurred would be far more costly than the resentencing procedure needed to correct the few errors that actually have increased a sentence.

C. Opportunity for response. The Reporters express concern that unobjected-to errors deny the opposing party an opportunity to respond in the district court. Reps. Mem. 17. However, the opposing party has a full opportunity to respond in the court of appeals on any issue of law, and, if in a rare case the opposing party was put to the burden of responding on the facts on remand, that cost does not outweigh the burden of requiring a defendant to serve added months or years in prison.

D. Risk of "sandbagging." The Reporters raise the possibility that the proposal will encourage lawyers to withhold sentencing objections and save them for appeal. Reps. Mem. 18. I cannot imagine a lawyer who would withhold a claim of sentencing error in a district court, where it could be corrected within the broad authority of a sentencing judge, and take the chance that an appellate court, with its tightly

circumscribed authority to review a sentence, would grant relief. The majority in Henderson v. United States, 133 S. Ct. 1121 (2013), said it best:

> If there is a lawyer who would deliberately forgo objection now because he perceives some slightly expanded chance to argue for "plain error" later, we suspect that, like the unicorn, he finds his home in the imagination, not the courtroom.

Id. at 1129 (emphases in original).

E. Supreme Court view on Committee's prior proposal. Finally, the Reporters raise a caution in light of the history of the Committee's experience with the Rule 12/52 issue. Reps. Mem. 21-22. Although I have no detailed familiarity with that episode, I simply point out that it did not concern the issue I seek to remedy: the erroneous imposition of extra prison time for lack of a defense lawyer's trial court objection.

II. DOJ Memorandum

The Department of Justice advances several arguments in opposition to my proposal. Before commenting on them individually (although not in the order presented), I note preliminarily that it is not surprising that the Department is opposed. The Department is invariably opposed to any change that creates the prospect of even an occasional sentence reduction, no matter how meritorious.

A. Proposal is unnecessary. The Department contends that to the extent the proposal concerns Guidelines calculation errors, the proposal is unnecessary because "even under a rigorous plain error review" such errors now result in a new sentencing hearing. See DOJ Memorandum ("DOJ Mem.") 4. For support, the Department cites United States v. Langford, 516 F.3d 205, 216 (3d Cir. 2008). See id.

This is a surprising citation. Langford is not a plain error case. The error was the assignment of a criminal history point to a discontinued criminal proceeding, and the defendant's counsel explicitly argued in the District Court that the disputed point should not have been added and that the Criminal History Category should have been III, rather than IV. See id. at 208. The Appellant's brief cites to his objection in the District Court. See Brief of Appellant, United States v. Langford, 2007 WL 6373251 ("Preservation and ruling on this issue"). Furthermore, despite the objection at sentencing, the Government opposed resentencing. See Langford, 516 F.2d at 215.

Although the Department's citation of Langford (preceded by "e.g.") incorrectly suggests that all unobjected-to Guidelines miscalculation errors result in a remand, the fact

is that remands sometimes occur and sometimes do not. I set forth below cases in both categories.

In the following cases, a Guidelines miscalculation resulted in a remand, on plain error review:

First Circuit: United States v. Ortiz, 966 F.2d 707, 717-18 (1st Cir. 1992);
Second Circuit: United States v. Warnick, 691 F.3d 108, 117-18 (2d Cir. 2012); United States v. Gamez, 577 F.3d 394. 400-01 (2d Cir. 2009);
Third Circuit: United States v. Knight, 266 F.3d 203, 207-09 (3d Cir. 2001)
Fourth Circuit: United States v. Agyepong, 3212 Fed. Appx. 566, 568-69 (4th Cir. 2009); United States v. McCrary, 887 F.2d 485, 489 (4th Cir. 1989);
Sixth Circuit: United States v. Mosley, 550 F.3d 277, 283 (6th Cir. 2014) (explained in concurring opinion);
Ninth Circuit: United States v. Noel-Rodriguez, __ Fed. Appx. __, 2014 WL 2085354 (9th Cir. 2014); United States v. Bonilla-Guizar, 729 F.3d 1179, 1187-88 (9th Cir. 2013); United States v. Castillo-Marin, 684 F.2d 914, 927 (9th Cir. 2012);
Tenth Circuit: United States v. Rosales-Miranda, 755 F.3d 1253, 1259-65 (10th Cir. 2014).

However, in the following cases, on plain error review, an unobjected-to Guidelines or sentence miscalculation did not result in a remand:

Second Circuit: United States v. Lindsay, 506 Fed. Appx. 58, 59-60 (2d Cir. 2012) (sentencing range one month above correct Guidelines range);
Fourth Circuit: United States v. Carthorne, 726 F.3d 503, 515-17 (4th Cir. 2013) (sentence of 300 months above correct Guidelines range of 181-211 months);
Fifth Circuit: United States v. Blocker, 612 F.3d 413, 416 (5th Cir. 2010) (sentencing range of 78 to 97 months above correct Guidelines range of 70 to 87 months);
Sixth Circuit: United States v. Woodruff, 735 F.3d 445, 451 (6th Cir. 2013) (erroneous classification of offense as

controlled substance offense raised Guidelines range by an unspecified amount);

Eighth Circuit: United States v. Bossany, 678 F.3d 603, 606-07 (8th Cir. 2012) (90-month sentence exceeded 60-month statutory maximum but not prejudicial because of other valid sentence);

Eleventh Circuit: United States v. Daffin, 2014 WL 4412296, at *1 (11th Cir. 2014) (sentence for revocation of supervised release above correct Guidelines range).

Moreover, despite the Department's assurance that Guidelines miscalculations result in a remand under plain error review as has sometimes, but not always, occurred, it is noteworthy that the Government opposed a remand in Ortiz, 966 F.2d at 717; Wernick, 691 F.3d at 114-17; Gamez, 577 F.3d at 398-400; Knight, 266 F.3d at 207; McCrary, 887 F.2d at 489; Mosley, 550 F.3d at 282-83 (concurring opinion); Bonilla-Guizar, 729 F.3d at 1188; Castillo-Marin, 684 F.3d at 925; Rosales-Miranda, 755 F.3d at 1261, thus putting in doubt how Guidelines miscalculations that increase sentences will be treated in subsequent cases.

Furthermore, it is clear that even under the post-Booker regime of advisory Guidelines, an incorrect Guidelines calculation can unfairly increase a sentence because a Guidelines calculation must be the starting point for selection of a non-Guidelines sentence. See Peugh v. United States, 133 S. Ct. 2072, 2080 (2013); Gall v. United States

552 U.S. 38, 49 (2007).

B. Plain error policies are the same for trial and sentencing errors. The Department contends that the policies for plain error review of trial errors apply to sentencing errors. DOJ Mem. 2. The fundamental difference, of course, is that remedying trial errors requires a new trial, a cost that must be considered in determining whether unobjected-to errors should be corrected, whereas sentencing errors are normally corrected expeditiously. The Department's fears of burdens on witnesses and victims are unfounded. The Department cites no instance where witnesses or victims have been called in a proceeding to correct a sentencing error.

C. The proposal would lead to many "unnecessary" remands. The Department contends the proposal would lead to many "unnecessary" remands. See DOJ Mem. 5. The Department refers to claims that a sentencing judge failed to sufficiently explain a sentence. See id. The revision to my proposal, set forth above in my comments on the Reporters' Memorandum, should substantially eliminate this objection.

A defendant who receives an increased sentence because of a sentencing error would not consider a remand "unnecessary," and my concern is only to make sure that unobjected-to

sentencing errors do not result in an increased sentence.

D. The proposal will lead to lawyer "sandbagging." The Department contends that the proposal will provide a "powerful incentive" for lawyers to withhold sentencing claims, see DOJ Mem. 4-5, thereby "sandbagging" the sentencing judge, see id. 3. I have responded to the claim in Point I(D) above.

E. The Supreme Court favors a plain error standard for sentencing errors. The Department contends that the Supreme Court favors application of the plain error standard to sentencing errors. See DOJ Mem. 2. However, what the Supreme Court has said about unobjected-to sentencing errors was said in the context of the existing plain error rule. See United States v. Booker, 543 U.S. 220, 268 (2005). The Court has understandably cautioned against creating judicial exceptions to the plain error rule. The Court has not had occasion to express any view about a properly promulgated modification of the plain-error rule that would exempt unobjected-to errors that increase a sentence.

* * * * *

I greatly appreciate the Committee's consideration of my proposal, hopefully improved by the revision in this memo, and look forward to the September 29 conference call.

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TAB 5

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TAB 5A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 5, Rules Governing § 2254 Cases (14-CR-D)

DATE: October 10, 2014

Judge Michael Baylson has written to the Committee requesting that it review the issues presented in Rodriguez v. Florida Department of Corrections, 748 F.3d 1073 (11th Cir. 2014). Judge Baylson's letter is Tab B.

The Rodriguez case held that the state is required to serve a habeas petitioner with the exhibits included in the Appendix and referenced in its answer. Rule 5(a) states that the respondent "is not required to answer the petition unless a judge so orders," and the rule does not explicitly require service of the answer on the habeas petitioner. However, as the court noted, the Advisory Committee Notes state that Rule 5 "necessarily implies that [the answer] will be mailed to the petitioner (or to his attorney if he has one)." The Rodriguez majority held that the answer and "all documents referenced in the State's answer and filed with the court must be served on the habeas petitioner." 748 F.3d at 1077. The court noted that its decision was consistent with the conclusion of the only other circuits to decide the issue, citing Thompson v. Greene, 427 F.3d 263, 270 (4th Cir. 2005), and Sixta v. Thaler, 615 F.3d 569, 572 (5th Cir. 2010).

Judge Baylson concurred in the result, but declined "to join the broad ruling of the majority, particularly requiring that, when an answer is filed to a habeas petition, all exhibits and items 'referenced' in the answer, must *always* be served on the petitioner." 748 F.3d at 1082. In his view, this broad ruling "ignores the reality of how habeas cases are usually managed in the district courts." Judge Baylson advocates "a judicially controlled scheme to provide a petitioner with portions of the record only when the judge requires it to be furnished." Id. at 1087. After noting situations in which service might be unnecessary and might burden the courts, he called for the Advisory Committee to study a revision of Habeas Rule 5, gathering empirical evidence, reviewing local practices, and eventually seeking public comment as well as review by the Judicial Conference. Id. at 198.

This proposal is included on the October Agenda for discussion of how the Committee wishes to address this suggestion.

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TAB 5B

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
3810 United States Courthouse
Sixth and Market Streets
Philadelphia, Pennsylvania 19106-1741
E-mail: Chambers_of_Judge__Michael_Baylson@paed.uscourts.gov

Chambers of
Michael M. Baylson
United States District Judge

Telephone (267) 299-7520
Fax (267) 299-5078

April 15, 2014

Honorable David G. Campbell
Arizona District Court
Sandra Day O'Connor United States Courthouse
401 West Washington Street, Suite 623
Phoenix, AZ 85003-2156

Re: Civil Rules Committee

Dear David:

I recently had the pleasure of sitting with the 11th Circuit, and I am enclosing a copy of one of the decisions involving interpretation of the habeas rules in which I wrote a concurrence. I respectfully request your Committee undertake a review of the issues presented at your convenience.

Please call if you have any questions or comments.

Best personal regards.

Sincerely yours,

Michael M. Baylson

MMB:jbb
Enclosure

cc: Honorable Gene E.K. Pratter
Honorable Paul Diamond

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Info. Copy of Opinion

Panel: BBM, AJ, MMB(vj)
Writing Judge: BBM

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 12-10887

D.C. Docket No. 2:11-cv-14085-DLG

MOISE RODRIGUEZ,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(April 7, 2014)

Before MARTIN and JORDAN, Circuit Judges, and BAYLSON,* District Judge.

MARTIN, Circuit Judge:

Moise Rodriguez is a Florida state prisoner who is serving a thirty-year term of imprisonment. He appeals from the District Court's denial of his motion to

* Honorable Michael M. Baylson, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

reconsider the denial of his 28 U.S.C. § 2254 petition. Mr. Rodriguez's appeal concerns the Florida Attorney General's failure to serve him with the appendix of exhibits it filed separately from its answer ("Appendix"), and the District Court's refusal to compel service of those exhibits referenced in the Appendix. Mr. Rodriguez argues that the District Court abused its discretion in this regard. After a careful review of the record, and with the benefit of oral argument, we conclude that the State was procedurally required to serve Mr. Rodriguez with the exhibits included in the Appendix and referenced in its answer. It was therefore an abuse of discretion for the District Court to deny Mr. Rodriguez's motion for reconsideration, which he filed in an effort to get these documents.

I.

In 2007, Mr. Rodriguez was convicted and sentenced to a thirty-year term of imprisonment in Florida state court. In 2011, after exhausting his state post-conviction remedies, Mr. Rodriguez filed a petition to vacate his sentence pursuant to 28 U.S.C. § 2254. The District Court referred the case to a magistrate judge, who ordered the State to show cause why Mr. Rodriguez's petition should not be granted. The magistrate judge's order also directed the State to file a comprehensive appendix with copies of various pleadings, transcripts, briefs, motions, and other records from previous state court proceedings.

The State filed its answer on May 5, 2011, arguing that Mr. Rodriguez's § 2254 petition should be denied. Throughout its answer, the State referred to specific numbered exhibits. A week after filing its answer, the State filed these exhibits with the District Court as its Appendix.

Although the State served Mr. Rodriguez with a copy of its answer, it never served him with a copy of any of the exhibits it had referred to in that answer. Rather, the State served a "Notice of Conventional Filing of Appendix" on Mr. Rodriguez "w/o attachments." In an effort to get the State's exhibits before filing his reply, Mr. Rodriguez filed a motion to compel service of the referenced exhibits, which the magistrate judge denied. The magistrate judge also denied Mr. Rodriguez's motion for reconsideration of the denial of his motion to compel.

The magistrate judge filed his Report and Recommendation on September 30, 2011, recommending that Mr. Rodriguez's petition be denied altogether. In the Report, the magistrate judge referred to the State's exhibits, which Mr. Rodriguez had yet to receive. On October 20, 2011, the District Court entered an order adopting the Report in its entirety and denying Mr. Rodriguez's petition on the merits.

Mr. Rodriguez objected to the magistrate judge's Report and moved for reconsideration of the District Court's denial of his petition, reiterating that he had never been given copies of the exhibits referred to by the State and the Court. He

argued the State's failure to give him the exhibits violated procedural rules and his constitutional rights. The District Court rejected both arguments and denied Mr. Rodriguez's motion for reconsideration.

On appeal, the primary question before us is simply whether Mr. Rodriguez was procedurally entitled to service of the exhibits included in the State's Appendix and referenced in its answer.[1] The answer to that question, we conclude, is yes.

II.

We review a District Court's order denying a motion for reconsideration for abuse of discretion. Richardson v. Johnson, 598 F.3d 734, 740 (11th Cir. 2010). A District Court abuses its discretion when it "applies the wrong law, follows the wrong procedure, bases its decision on clearly erroneous facts, or commits a clear error in judgment." United States v. Brown, 415 F.3d 1257, 1266 (11th Cir. 2005). A District Court's misinterpretation or misapplication of a procedural rule constitutes an abuse of discretion. See Richardson, 598 F.3d at 738–40.

At issue in this appeal is whether the Attorney General was obliged to serve Mr. Rodriguez with the exhibits included in the Appendix filed one week after, but cited throughout, the State's answer to his § 2254 petition. Mr. Rodriguez argues

[1] Mr. Rodriguez's motion to compel, the denial of which formed the basis of the motion for reconsideration we now review, only requested service of the twelve exhibits referenced in the State's answer. We therefore do not consider whether the procedural rules would require service of the remaining two exhibits included in the Appendix but not referenced in the answer.

that the procedural rules governing § 2254 actions required service of at least the exhibits in the Appendix referenced in the State's answer. On that basis, he says that the District Court committed legal error in denying his motion to compel service of these exhibits, and repeated and compounded this error when it denied his motion for reconsideration. In response, the Attorney General argues that service of this type of filing is never required, or alternatively that it was not required in this particular case.

After careful consideration, we conclude that a state is required to serve a petitioner with its answer to a § 2254 petition. Most important to this case, we also conclude that any exhibits or documents that are referenced in the answer and filed with the Court are part of the answer, whether the filings are made together or at different times. This being the case, service of these exhibits, like the answer itself, is procedurally required.[2] The Appendix in this case is a collection of fourteen documents filed with the court, twelve of which are referenced in the State's answer. Those referenced exhibits trigger a service requirement the State did not meet and that the District Court failed to enforce. On this record, and in

[2] The Concurrence recognizes several times that our holding requires service of those exhibits filed with the District Court and referenced in the answer. See Concurring Op. at 21, 38. But more often the Concurrence says that we are adopting a "broad" rule that would require service of the entire record filed with the District Court regardless of whether every document in the record is referenced in the answer. See id. at 23, 31, 32, 33, 34–35. Our opinion today does not go so far as the Concurrence sometimes suggests.

light of the procedural error we have described, the District Court abused its discretion when it denied Mr. Rodriguez's motion for reconsideration.

A.

We are mindful at the outset that there are two sources of procedural rules in § 2254 proceedings. The primary source is the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules"). However, if the Habeas Rules do not fully delineate the proper procedure, or if the requirements under these Rules are not clear, courts may turn to the Federal Rules of Civil Procedure ("Civil Rules") to fill in any procedural gaps and resolve lingering ambiguities. See Rules Governing § 2254 Cases, Rule 12 ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules."); Fed. R. Civ. P. 81(a)(4) ("These rules apply to proceedings for habeas corpus . . . to the extent that the practice in those proceedings . . . is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases . . . ."). Because the Civil Rules relevant to the resolution of this case are not inconsistent with the Habeas Rules or any other statutory provision, we draw on both sources in making our decision, just as our sister Circuits that have considered this question have also done. See Sixta v. Thaler, 615 F.3d 569, 572 (5th Cir. 2010) (relying on Civil Rules 5(a), 7, and 10(c) to conclude that "the rules plainly

require that the respondent serve both the answer and any exhibits attached thereto on the habeas petitioner"); Thompson v. Greene, 427 F.3d 263, 268–69 (4th Cir. 2005) (relying on Civil Rules 5(a) and 10(c) to reach the same conclusion).

B.

First, we consider whether service of a state's answer to a § 2254 habeas petition is procedurally required.

The Habeas Rules do not explicitly require service of the answer on a habeas petitioner. See Rules Governing § 2254 Cases, Rule 5; see also Thompson, 427 F.3d at 268. But the Advisory Committee Notes, which are "a reliable source of insight into the meaning of a rule," United States v. Vonn, 535 U.S. 55, 64 n.6, 122 S. Ct. 1043, 1049 n.6 (2002), confirm that Habeas Rule 5 "necessarily implies" that service of the answer on the petitioner or his attorney is a procedural requirement. Rules Governing § 2254 Cases, Rule 5 Advisory Committee's Note, 1976 Adoption.

The complementary Civil Rules are even more definitive. Under the Civil Rules, any pleading must be served on every party, and there is no question that an answer to a complaint, such as a state's answer to a § 2254 petition, is a pleading for purposes of this service requirement. See Fed. R. Civ. P. 5(a)(1)(B), 7(a)(2). Thus, the procedural rules governing § 2254 proceedings "mandate that an answer in a habeas corpus proceeding . . . must be served on a petitioner." Thompson, 427

F.3d at 269; see also Sixta, 615 F.3d at 572 (agreeing with the decision in Thompson, and noting that in that case the Fourth Circuit "rejected the respondent's argument that the applicable rules do not require service of even the answer").

We next ask whether documents filed separate from the answer, but referred to in it, are considered part of the answer and are therefore also subject to the service requirement. The answer to this question under the Civil Rules is clearly yes. The Civil Rules provide that any "written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Fed. R. Civ. P. 10(c). Because the Civil Rules require service of all pleadings, it follows that the exhibits to the pleading must also be served, regardless of whether they were filed at the same time. None of the Habeas Rules are inconsistent with this Civil Rule service requirement. What is more, we can conceive of no reason that these requirements, which cement "an elementary step in litigation in our judicial system," see Thompson, 427 F.3d at 268, should not apply with equal force in the habeas context. See Rules Governing § 2254 Cases, Rule 12; see also Sixta, 615 F.3d at 572 ("Considered together, the rules plainly require that the respondent serve both the answer and any exhibits attached thereto on the habeas petitioner.").

As we have said, we are not alone in finding that all documents referenced in the State's answer and filed with the Court must be served on the habeas petitioner.

Both the Fourth and the Fifth Circuits—the only other Circuit Courts of Appeals that have considered this question—reached the same conclusion we reach today relying on the very same procedural rules. Thompson, 427 F.3d at 265, 270 (requiring service of exhibits, which the Attorney General had "relied on" in his answer); Sixta, 615 F.3d at 572 ("When the respondent does, in fact, attach exhibits to the answer, there can be little dispute that those exhibits must be served together with the answer itself on the habeas petitioner."); see also id. at 572–73 (treating the fact that the answer did not cite to the attachments or exhibits filed in the appendix as a salient factor leading to its conclusion that the State had not attached any exhibits to its answer within the meaning of the procedural rules).

The situation in which the Fourth Circuit's Mr. Thompson found himself is remarkably similar to that of Mr. Rodriguez here. In Thompson, the State filed an answer to a habeas petition that attached twenty exhibits. 427 F.3d at 265. In that answer, the Attorney General "relied on the Exhibits for his contentions on why Thompson was not entitled to habeas corpus relief." Id. But the State did not serve these exhibits on Mr. Thompson, instead serving only the answer's text and "an index of the various Exhibits." Id. (quotation marks omitted). Mr. Thompson asked for the exhibits several times, maintaining that "his ability to respond to the Answer was materially hindered by the Attorney General's failure and refusal to serve the Exhibits." Id. at 266. The District Court, in a single order, dismissed Mr.

Thompson's habeas claims and denied his motion to compel production of the State's exhibits. Id. The Fourth Circuit found this to be not only repugnant to the Habeas and Civil Rules, but also inconsistent with the Due Process Clause of the United States Constitution as well as the basic tenants of our adversarial system. Id. at 268–69 & n.7.

The reasoning in Thompson persuaded our colleagues on the Fifth Circuit who decided Sixta.[3] It persuades us, too. So today, we join our sister Circuits in recognizing that, even in the § 2254 context, a party referencing filed exhibits in a pleading must provide copies of those exhibits to the other parties. This bedrock principle promotes both efficiency and fairness in civil litigation.

C.

The State's Attorney General nevertheless argues that service of the Appendix, in whole or in part, was not required here because it was neither an attachment nor an exhibit to the answer under Habeas Rule 5 or Civil Rule 10(c). Rather, the State insists that the Appendix was entirely separate from and independent of the answer, and therefore not subject to any service requirements. This argument strains credulity. The documents included in the Appendix are

[3] The Concurrence is right that Sixta's conclusion that "the rules plainly require that the respondent serve both the answer and any exhibits attached thereto on the habeas petitioner" was not necessary to decide that case because no exhibits were in fact attached to the answer. 615 F.3d at 572–73; see also Concurring Op. at 36 n.4. But the Fifth Circuit clearly accepted the service requirement acknowledged by the Fourth Circuit, however unnecessary it might have been to the result ultimately reached.

labeled "Exhibits." Twelve of these "Exhibits" are then cited throughout the State's answer. The Attorney General referred to these documents because they were relevant to her argument. The answer thus depends on the Appendix's referenced documents to support and lend meaning to the arguments it presents. This being the case, this collection of documents can only be an attachment or exhibit to the pleading within the meaning of the governing procedural rules.

The Attorney General, in an effort to avoid treating the documents in the Appendix that are referenced in the answer as attachments or exhibits to the answer, points to the Fifth Circuit's holding in Sixta. In that case, the Fifth Circuit held that a comprehensive appendix filed before the answer did not have to be served on the petitioner. 615 F.3d at 572–73. The timing of the filing of the appendix is not, in our view, determinative of the duty to serve. In any event, the Fifth Circuit's result relied on the fact that the answer in that case had no attachments or exhibits and "only cite[d] to the state court record."[4] Id. at 573. By contrast, the State's answer here cited extensively to the documents provided in the Appendix filed with the District Court. On this record, it simply cannot be that

[4] We emphasize that neither we nor the Fifth Circuit hold that a state can avoid the Habeas Rule 5 requirement to attach relevant record excerpts to the answer simply by citing directly to the state court record. See Sixta, 615 F.3d at 573 ("[W]e do not address the nature of the respondent's duty and discretion under the Habeas Rule 5(c) to attach those portions of the transcript that he 'deems relevant.'"). Indeed, failure to attach any cited documents would likely violate the explicit requirements of Habeas Rule 5. But only the duty to serve attached and referenced exhibits, not the duty to attach in the first instance, is relevant to our resolution of this case.

"[t]he respondent here never purported to attach the state court record, or any portions of it, as an exhibit to the answer," as was the case in Sixta. Id. at 572. Although the Attorney General may wish to avoid labeling the collection of documents in the Appendix as an attachment of exhibits to the answer, the argument exalts form over substance. We decline the Attorney General's invitation to recast the Appendix as something other than what it is.

The Attorney General's remaining arguments urging us to affirm the District Court's denial of Mr. Rodriguez's motion for reconsideration mirror those the Attorney General made in Thompson, which the Fourth Circuit summarily dismissed as "border[ing] on the frivolous." 427 F.3d at 271. The Fourth Circuit was right.

First, the Attorney General argues that we should rule against Mr. Rodriguez because he failed to allege that he did not have the cited documents or explain which documents he needed and why. Said another way, the Attorney General would have us require a habeas petitioner to make a particularized showing of need before he is entitled to service of the referenced exhibits. Although the District Court found this argument persuasive, we are not persuaded. First, Mr. Rodriguez did explain what documents he needed in his motion to compel: "the Exhibits Referenced in [the State's] Response." This is certainly within the realm of documents the procedural rules require the State to provide. One might expect it

could go without saying, but a procedural requirement is precisely that—a requirement. Nowhere do the Habeas or Civil Rules suggest that the service requirement is triggered only by a demonstration of particularized need, and we will not take it upon ourselves to read that unsupported precondition into them. Thus, "[i]t is irrelevant whether a petitioner can demonstrate need to the court, or whether he already has the documents." Thompson, 427 F.3d at 271.

The Attorney General goes on to urge us not to place this service burden on the State because of the costs of providing such documents. The governing federal procedural rules, however, generally do not bend to the financial burden of compliance. The State cannot abdicate its legal responsibility to provide the documents by arguing that the current "economic climate" is such that we should excuse its responsibility under the law and as a matter of law.

The State's argument that it should be excused from the burden of service because Mr. Rodriguez theoretically could have filed in forma pauperis and obtained the records from the District Courts is similarly misguided. The federal rules place the burden of serving a pleading and the exhibits to it on the filing party, not on the court adjudicating the dispute. Again, the fact that Mr. Rodriguez conceivably could have gotten these documents in other ways does not change the fact that he was procedurally entitled to get them from the State.

D.

We write next to respond to some of the points made in the Concurrence. To begin, we read the Concurrence to say that service of all or part of the State's filed exhibits is required only when the District Court has decided that it needs to reach the merits of the habeas petition. Concurring Op. at 21–22, 29. However, careful consideration of this proposal shows it to be impractical. At the same time, it makes a distinction between habeas petitioners who must overcome procedural impediments, and those disputing the merits of their case, that is nowhere called for by the Habeas or Civil Rules.

First, we know that when a District Court decides to dismiss a petition because of an obvious defect, it will likely do so without requiring an answer from the State at all. Rules Governing § 2254 Cases, Rule 5(a) ("The respondent is not required to answer the petition unless a judge so orders."). In this scenario, service of exhibits will never come up.

In our experience, where the District Court does require an answer from the State, it will generally wait until it gets the answer and the petitioner's reply before fully considering jurisdictional and procedural issues. Then if necessary, it will consider the merits. With this in mind, it is simply not practical to require a busy District Court to first review the pleadings and the record; think about whether it is going to rule on the merits of the petition; then if it thinks it may reach the merits,

issue an order requiring the State to provide the petitioner with the documents it had referred to in its answer. Exacerbating this elaborate system is the fact that the District Court would then be obliged to give the petitioner—who would likely have already been called upon to file his reply without the necessary tools to adequately respond—another opportunity to respond to the State's answer. See Concurring Op. at 29; cf. Day v. McDonough, 547 U.S. 198, 210, 126 S. Ct. 1675, 1684 (2006) (noting that a District Court deciding a habeas petition on timeliness grounds not raised by either party "must accord the parties fair notice and an opportunity to present their positions"). If the petitioner then raises arguably meritorious points, the District Court would necessarily, and yet again, have to review the arguments and the record to reevaluate its preliminary position. We see nothing in the rules that calls for such a time consuming and onerous process.

And in any event, a habeas petitioner whose claims are thrown out on a procedural or jurisdictional ground deserves just as much of an opportunity to respond to the State's answer as the petitioner whose claims are dismissed on the merits. See Rules Governing § 2254 Cases, Rules 5, 6 (establishing rules governing the filing and contents of pleadings as well as discovery without drawing any distinction based on the grounds on which a claim is likely to be decided). The rule called for in the Concurrence would extend a full and fair

opportunity to respond only to those petitioners lucky enough to have the merits of their claims reached.

This distinction ignores the very real possibility—indeed, the probability—that the District Court would base even a jurisdictional or procedural ruling on documents filed alongside the State's answer (for example, trial transcripts showing that a claim is procedurally defaulted due to lack of a contemporaneous objection). If the State points to a document that purports to show that the petitioner did not exhaust his claim, or that it is procedurally defaulted, why should that petitioner not have a meaningful opportunity to review the document and explain to the District Court why the State's position is wrong? If we were to deny petitioners this opportunity, we would do so in the face of our experience that has repeatedly demonstrated that a petitioner must have a meaningful opportunity to challenge the propriety of rulings on procedural grounds. These cases often present close calls which are subject to debate. See, e.g., Conner v. Hall, 645 F.3d 1277, 1289–92 (11th Cir. 2011) (disagreeing with and reversing the District Court's determination that Mr. Conner's claim was procedurally defaulted).

The same result holds whether the documents proffered by the State lead the District Court to reject the petitioner's claim on the merits or instead on jurisdictional or procedural grounds. And this is important. Federal habeas corpus proceedings are the last chance a petitioner has to present arguable constitutional

violations and errors to a court capable of correcting them. Therefore much rides on having an adversarial process structured in a way that best equips the District Court to get it right. See Lonchar v. Thomas, 517 U.S. 314, 324, 116 S. Ct. 1293, 1299 (1996) ("Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty."). Neither the text of the Habeas nor the Civil Rules reveal to us any reason to deviate from traditional service requirements so as to create, as the Concurrence suggests, a hierarchy of habeas petitioners, by giving some the tools necessary to respond to all of the State's arguments but not others.

It bears mention that the Fourth Circuit has, at least implicitly, rejected the Concurrence's suggestion that service should depend on the way in which the District Court decides the petition. In Thompson, the Fourth Circuit noted that the District Court had "ordered Thompson to respond to the Attorney General's assertion that certain of his habeas corpus claims had been procedurally defaulted, but it did not authorize Thompson to address the Answer's contentions on the merits of his claim." 427 F.3d at 266. The District Court went on to dispose of some of Mr. Thompson's claims on procedural grounds and others on the merits. Id. But nothing in the Fourth Circuit's opinion suggests that Mr. Thompson should have been served with only those documents that related to the State's position on

the merits of his claim. Neither did the Fourth Circuit imply that the District Court's decision to reach the merits of some of Mr. Thompson's claims was at all relevant to its decision on the service requirement. Even though the facts of the case clearly presented the Fourth Circuit with the opportunity to draw the line the Concurrence urges upon us, it declined to do so.[5] Rather, the Fourth Circuit was clear in its requirement that the State serve its answer "along with all of its exhibits" in every single case in which a party is "not in default." Id. at 269. The Fourth Circuit's ruling counsels against making the service requirement dependent on the basis for the District Court's ultimate resolution of the claim.

Neither do we see how our holding is going to require the State to engage in the "expensive" and "time-consuming and detailed task" of "searching for transcripts, exhibits and other documents from state court stenographers, reporters, and clerks," Concurring Op. at 31, beyond what it will already have done in preparing its answer to the petition. If the State has already cited to or referenced a document in its answer, it has certainly already found that document in the process of coming to rely upon it. Our ruling no more requires the State to search through the record of a case than Habeas Rule 5(c) already does. Rules Governing § 2254

[5] The Fifth Circuit also did not seize on a similar opportunity in Sixta, although unlike in Thompson, it was not apparent from the Fifth Circuit's description of the case. But a review of the decision on Mr. Sixta's petition reveals that the District Court disposed of some claims on the merits and others on procedural grounds. Sixta v. Quarterman, No. H-07-0118, 2007 WL 3270394, at *3–8 (S.D. Tex. Nov. 2, 2007).

Cases, Rule 5(c) ("The respondent must attach to the answer parts of the transcript that the respondent considers relevant.").

Finally, we emphasize that providing records to a petitioner at one time or another during his state prosecution and direct appeal by no means assures that he will have those records at the critical moment the State files its answer to his habeas petition and references specific documents. For starters, it will often be difficult for a District Court to figure out whether a petitioner got the records. We also know that a prisoner's papers are often lost, damaged, or destroyed during his incarceration. And civil service requirements were not designed only to provide those documents a party can show it no longer has. Fed. R. Civ. P. 5(a), 10(c). If a civil litigant attaches a document to a pleading, it must provide that document to the other party, even if he might already have it. Nothing in the Habeas Rules counsels against importing this same clear, consistent, and unwavering requirement to the habeas context.

For these reasons, we cannot acquiesce in the Concurrence's proposal. The relevant procedural rules, the principles underlying our adversarial system, and fundamental fairness require the rule we have adopted today. It is one that should have been applied to Mr. Rodriguez's case, and one that must be applied from here on.

III.

In substance, the State's filed Appendix is made up of several documents that are attachments or exhibits to the State's answer. Mr. Rodriguez was procedurally entitled to the documents in the Appendix that are referenced in the answer filed by the State. Because the District Court and the magistrate judge erred in interpreting the procedural rules, and because this error infected the proceedings against Mr. Rodriguez, it was an abuse of discretion for the District Court to deny his motion for reconsideration over his objections to the underlying procedural violations. See Brown, 415 F.3d at 1266; Richardson, 598 F.3d at 740.

We **REVERSE** the District Court's denial of Mr. Rodriguez's motion for reconsideration. This case is **REMANDED** with instructions that the State serve Mr. Rodriguez with the twelve documents in the Appendix to which he is procedurally entitled so that he may be allowed to amend his reply to the State's answer. After that amended reply is filed, the District Court should adjudicate the merits of the fully briefed habeas corpus petition.

Baylson, District Judge, concurring:

I concur in the result, but I decline to join the broad ruling of the majority, particularly requiring that, when an answer is filed to a habeas petition, all exhibits and items "referenced" in the answer, must always be served on the petitioner.

I agree with the majority that the factual record in this case requires a reversal. The district court should have required that the Florida Attorney General provide to petitioner a copy of the appendix to its answer. This is the correct result in this case, but not because the appendix to the answer had been filed with the district court. More importantly, the district court decided (correctly), to consider the petition on the merits and extensively relied on and quoted from testimony and exhibits in the appendix, in deciding to deny the petition. Without the full record, petitioner was unable to meaningfully participate.

Although it is well established by Habeas Rule 12, that the Federal Rules of Civil Procedure may be applied in construction of the habeas rules, this application is not mandatory. Rules Governing § 2254 Cases, Rule 12 ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.").

In my view, a proper construction of Habeas Rule 5 would not require service of exhibits to an answer unless a district court specifically so orders,

usually after it determines it has jurisdiction, the petition is timely, the petitioner has exhausted state court remedies, and a review of the substantive merits of the petition will follow.

A. This Case

In this case, the district court had jurisdiction, the petition was timely and petitioner had exhausted his state court remedies. Therefore, the Magistrate Judge was obliged to make a detailed review of the allegations of the petition, the state's response, and the factual record.

In this case, the responding state law enforcement agency, as part of its answer to the habeas petition, had filed the state court trial record in a detailed appendix. Because the district court found it appropriate to rely on and cite to the contents of the appendix in its adjudication of the habeas petition on the merits, fundamental fairness requires that the petitioner should have received a copy of the answer and appendix in sufficient time to allow for review, and to submit argument and/or evidence to the district court.

The record shows petitioner had some parts of the trial record, but there is no showing he had access to all the materials in the appendix on which the respondent and the Magistrate Judge relied. Petitioner's motion to compel service of the appendix should have been granted. Alternatively, petitioner's motion for

reconsideration should have been granted. The denial of these motions was an abuse of discretion in this case.

After the filing of a Report and Recommendation that his petition be denied, petitioner filed objections, which were overruled by the District Judge without opinion. Petitioner contends that access to the full appendix would have aided him in requesting leave to amend the petition, file a reply brief and/or making more detailed objections to the Report and Recommendation. We do not have to determine that petitioner would have necessarily been successful; his lack of a full appendix was prejudicial.

The majority's broad holding, requiring not only service of an answer, but also the record filed with the answer, and items "referenced" in the answer, in every habeas case, is not required to decide this case. Further, it is a result not required under any rule or legal precedent. I further believe it is a bad precedent and ignores the reality of how habeas cases are usually managed in district courts.

B. Habeas Rules 4 and 5

The language and structure of the Habeas Rules does not require the broad ruling by the majority.

Initially, separate rules exist for habeas cases because they are a unique type of civil litigation. Their disposition is not governed by any common law rule, but

by a specific statute, the Antiterrorism and Effective Death Penalty Act ("AEDPA"), enacted by Congress in 1996, 28 USC § 2254. Adjudication of federal habeas petitions from state court convictions is important to the administration of criminal justice, for principles of federalism, as well as to the petitioners and prosecutors. See generally Martinez v. Ryan, __ U.S. __, 132 S. Ct. 1309, 1316, 182 L. Ed. 2d 272 (2012) ("Federal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism."). The very limited review of state court criminal convictions under Section 2254 was recently emphasized by the United States Supreme Court in Burt v. Titlow, __ U.S. __, 134 S. Ct. 10 (2013).

The consideration of a Section 2254 petition by a federal district court (often referred to a Magistrate Judge for a Report and Recommendation) is a step-by-step process:

(1) The Clerk must serve a copy of the petition and any order on the respondent and appropriate state officer under Habeas Rule 4. Under Habeas Rule 5 "a respondent is not required to answer the petition unless a judge so orders."

Habeas Rule 4 further states:

> If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

Thus, the court determines whether, after reviewing the petition, an answer should be required from the responding state law enforcement agency, often the state attorney general or a local district attorney.

(2) If the court requires an answer, then Rule 5 requires the respondent state law enforcement agency to "attach to the answer parts of the transcript that the respondent considers relevant" and must indicate what transcripts are available, and what recorded proceedings have not yet been transcribed. Prior state appellate court briefs, opinions, and dispositive orders must also be filed with the answer.[1]

[1] Although the majority is correct that in non-habeas civil cases, an exhibit "attached" to a pleading must be served, along with the pleading, there are good reasons for not following this rule in habeas cases, until the district court has need to review the state court record. The absence of any service requirement in Rule 5 allows an exception to the normal civil rules. Requiring service of an answer, itself, is not burdensome on the state court prosecutors. However, the majority's opinion also requires service of any item "referenced" in the pleading, and there is no requirement in the civil rules to support this.

As Rule 5(b) provides, the state must also, in its answer, indicate whether the claim is barred for reasons such as the statute of limitations or for reasons such as failure to exhaust state remedies, procedural bars, non-retroactivity, or a second or successive petition. Even if the district court determines that an answer should be filed, it may still determine the habeas petition must be dismissed on one or more of these grounds. If so, the district court has likely not considered any record submitted by the respondent, but has likely ruled, based on the contents of the petition itself, and relevant state court opinions. The detailed trial transcripts and trial exhibits are not likely to be relevant for consideration of dismissal on any of these grounds.

(3) The district court then determines either after step (1) or after steps (1) and (2), whether the petition is timely and whether the petitioner has exhausted his state court remedies. If not, the court is obliged to dismiss the petition. If the petition is not timely, the dismissal will likely be with prejudice. If petitioner has not exhausted state court remedies, the dismissal will likely be without prejudice so petitioner can return to state court for exhaustion purposes, and then refile in federal court. With some exceptions, the district court will also dismiss for lack of jurisdiction if it finds the petition is a "second or successive" petition. 28 U.S.C. § 2244(b).

(4) If the district court finds the petition is not barred by any of the reasons set forth above, then the district court must undertake a full examination of the merits of the petition.

Habeas Rule 5 allows the district court judge discretion as to when to require that respondent, or the state court itself, supply additional portions of the record. At this point, the answer and any portions of the record filed by the respondent with the answer, or subsequently, should be served on the petitioner. Once the district court determines review of the habeas petition on its merits is appropriate, fundamental fairness requires that the petitioner shall have the answer and record as filed. As in the case, without the answer and record, the petitioner cannot appropriately participate in the adjudication of the petition on the merits, by seeking to move to amend the petition, file a reply brief as allowed by Rule 5(e), and/or file detailed objections if the report and recommendation is adverse to petitioner.[2]

Prior to stage (4), the district court has, in all likelihood, not reviewed the record in any detail, but has only made a preliminary examination, most likely

[2] Except in death penalty cases, petitioners in Section 2254 cases are not entitled to appointment of counsel unless the court decides to appoint counsel. 28 U.S.C. § 2254(h). Criminal Justice Act funds are not generally available for appointment of counsel for habeas petitioners in non-capital cases, unless a court holds an evidentiary hearing, Habeas Rule 8(c), or "if necessary for effective discovery." Habeas Rule 6, As most petitioners are therefore proceeding pro se, the petitioner does not have counsel on whom to rely for assistance.

from the petition itself, the answer, and the state court opinions and briefs (also required to be filed with the answer by the respondent), to determine whether the petition is timely and petitioner has exhausted state court remedies.

Most importantly, Rule 5(b), recognizes the sequential nature of habeas review when it specifies that the respondent itself need only file portions of the record it considers "relevant." If the respondent believes that the petitioner is not entitled to review on the merits, the attached record may be limited to that issue. However, the judge need not accept the respondent's determination of what is relevant, after full review of the petition and the answer, and order respondent to file any additional portions of the record at the judge's discretion.

Although Habeas Rule 5(e) provides for a reply brief, it may only be filed "within a time fixed by the judge." This language confirms the step-by-step approach detailed above and acknowledges the need for individual judicial management of each particular habeas case, rather than a broad rule that will apply in all cases.

The reason for this structure is obvious. In reviewing the petition, if it plainly appears from the petition, with or without an answer and/or attached record of prior proceedings, that the petition should be dismissed because of legal principles relating to jurisdiction, timeliness or exhaustion, without further inquiry

into the merits, the district court may do so, thus obviating detailed review of the petitioner's substantive claims.

These legal principles result in frequent dismissals of Section 2254 petitions. If the defect can be remedied, the dismissal will be without prejudice.

If the district court determines that the petition deserves consideration on the merits, then, at that time, the district court, by whatever means is appropriate, (a court order, letter to the prosecutor, etc.) should require service on the petitioner, and provide the petitioner with time to review the answer and the record, and an opportunity to either amend the petition, file a reply brief in opposition to the state's response (as provided in Habeas Rule 5(e)), or file objections if a magistrate judge has issued a report and recommendation that the petition be denied.

The majority notes that 28 U.S.C. § 2250, which entitles indigent petitioners to secure documents from the clerk without cost, is an insufficient solution to the disposition of this case. I agree Section 2250 is not an efficient remedy, because the clerk can only copy what has already been filed in the district court. Magistrate judges can more easily secure the record, as described in Habeas Rule 5, and require a respondent to serve it on the petitioner. However, the language of Section 2250 supports my view that management of habeas cases requires a

judicially-controlled scheme to provide a petitioner with portions of the record only when the judge requires it to be furnished:

> If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office *as may be required by order of the judge before whom the application is pending*.

28 U.S.C. § 2250 (emphasis added).

One of the leading commentaries on federal habeas practices, Federal Habeas Corpus Practice and Procedure, discusses the structure of the initial stages of habeas corpus practices. After some history on this topic, the authors write: "After the petition is filed, there are several points at which the question may arise whether the court should dismiss the pleading (the petition) summarily because the grounds for relief asserted are facially lacking in merit." 1 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 15.2[a] (6th ed. 2011). The treatise then discusses in some detail, with supporting footnotes, some of the procedural steps noted above. Although the authors contend that Rule 5 "necessarily implies" that the "answer" will be mailed to the petitioner (or to his

attorney if he has one), the treatise says nothing about service of the record itself. Id. at § 16.1[b].

C. Reasons Why the Majority's Rule is Problematic and Burdensome

Requiring service of an answer and the record whenever filed, in each and every Section 2254 case, no matter how groundless, untimely or premature the habeas petition may be, puts an expensive burden on state court prosecutors. Obviously, compliance with these provisions can be a very time-consuming and detailed task by the responding state agency, sometimes requiring a great deal of searching for transcripts, exhibits and other documents from state court stenographers, reporters, and clerks. In terms of volume of paper, a lengthy state court trial, direct appeals and state post-conviction proceedings, can result in a multi-volume set of proceedings, encompassing hundreds or even thousands of pages.

In addition to the burden imposed on state prosecutors, this broad rule is also likely to impose burdens on federal judicial officers. Many petitioners do not fully understand the substantial procedural hurdles the court must "jump over" before considering a Section 2254 petition on the merits. Petitioners may view the receipt of an answer with exhibits and the state court record as an opportunity to further advocate the merits of their petition. The majority's rule may result in this increased volume of paper—habeas petitioners do not use electronic filing—which

is of naught until and unless the court determines review on the merits is appropriate.

I believe that the language in the majority's opinion which requires, in every habeas case, service of factual materials that are attached or merely "referenced" in an answer would have unintended adverse consequences. The ruling may invite state law enforcement agencies in this Circuit to file very general answers, without any attachments or references to factual materials, just to avoid serving them on the petitioner. Prosecutors arguably have this right because Rule 5(c) gives discretion to the prosecutor to determine what is "relevant." They will be naturally inclined to adopt a very narrow view of what is "relevant."[3] The unintended consequence of language broader than necessary to decide this case will likely make the state's answers to petitions much less useful to district court judicial officers.

A useful booklet recently published by the Federal Judicial Center, Section 2254 for Capital Habeas Cases: A Pocket Guide For Judges, specifically notes that the treatment of habeas cases is often framed by local practice and culture: "The

[3] As the Rule gives discretion to respondent—usually the state's attorney general or a local prosecutor—at this stage to determine what portions of the record are relevant, respondent must exercise the professional responsibility expected of a prosecutor. Presumably, if the prosecutor believes in good faith that the petition should be dismissed without any further proceedings, it will file only those portions of the record that support its position.

approach utilized by district court to manage a first-time habeas petition often revolves around local practice and culture, as well as specific issues presented by an individual case." Kristine M. Fox, Section 2254 for Capital Habeas Cases: A Pocket Guide For Judges 17 (2012). Although this practical publication is mostly devoted to management of capital habeas cases, the above quotation reflects the truism of how habeas cases are often managed.

However, I do not believe that the majority's broad, circuit-wide rule, requiring service of the answer and record each and every time they are filed in the district court, should be binding on all habeas cases within the Eleventh Circuit.

D. Applicable Law and Practice Does Not Require the Majority's Broad Ruling

We should also take into account the holding of McBride v. Sharpe, 25 F.3d 962 (11th Cir. 1994) (en banc), which considered the impact of Habeas Rule 8 in the context of a motion for summary judgment, and the provisions of Rule 56(c), which at that time required ten day notice to the moving party if the Court was going to consider evidence outside the record. Petitioner McBride contended that the ten-day notice requirement of Rule 56 should be applied in every habeas case in which the respondent had moved for summary judgment. Id. After discussion of prior Eleventh Circuit cases reviewing the habeas procedural rules and decisions

from the Fifth Circuit, this Court *en banc* rejected the petitioner's arguments and concluded the following:

> We find Rule 56(c) notice inconsistent with a Habeas Rule 8(a) disposition when the parties do not raise issues requiring a factual inquiry outside the record and the district court does not rely on material outside the record in disposing of the petition. Thus, we hold that the ten-day notice requirement of Rule 56(c) does not apply to such a disposition pursuant to Habeas Rule [12].

Id. at 973. I respectfully believe that the holding of McBride counsels against a broad, circuit-wide rule based on Habeas Rule 5, making service of an answer and the record mandatory in all cases.

There are at least two situations in which the majority's expansive, circuit-wide interpretation of Rule 5 may be unnecessary.

The first is where, by state or local practice, a defendant who has been convicted of a crime is provided with a copy of the trial transcript and exhibits as a matter of course. This could occur after the trial itself, or pursuant of any direct appeal in the state appellate courts, or through a state post-conviction remedy procedure. In some states, a local government protocol, a rule of court or local practice may require defense counsel, or the prosecutor itself, to provide the defendant with a copy of the trial record, including exhibits. There has been no information provided to this court on this topic. Requiring service of the answer

and record in every case may impose unnecessary costs of duplication and waste paper.

The second situation would arise where a responding state agency files the full record with district court as a matter of course in every Section 2254 case. However, if the state contends (or the court *sua sponte* concludes) that the petition should be denied on legal grounds, such as timeliness or failure to exhaust, and the district court agrees, then the court has not considered the merits and presumably, did not consult or rely on the record. If the district court has not considered the record at all, the mere fact that it was filed with the court is irrelevant, and the lack of service on the petitioner does not result in any fundamental breach of fairness.

I also respectfully suggest that since this case is apparently the first opportunity for this court to determine the scope of Habeas Rule 5, a broad, circuit-wide rule is not necessary. If the majority had limited its holding to the facts of this case, district court judges within this circuit would recognize their obligation to carefully determine those habeas cases which need to be decided on the merits, and then require service of the answer and record on petitioner. The majority's broad, circuit-wide rule requiring automatic service of the answer and record in every case they are filed is not necessary, and will increase the burden and expenses on local prosecutors.

Although, as the majority points out, the Fourth Circuit in Thompson v. Greene, 427 F.3d 263, 268 (4th Cir. 2005), adopted a broad reading of Habeas Rule 5, the facts of Thompson revealed a very arbitrary state attorney general practice of not serving exhibits to a petitioner when there were more than five exhibits. The Florida Attorney General does not employ such an arbitrary practice. However, in both Thompson and this case, the district court relied heavily on the exhibits in denying the petitioner's Section 2254 petition. In such circumstances, a petitioner does not have the ability to adequately respond unless petitioner has had full access to the trial record; the judicial officer embarking on a detailed examination of the trial record and adjudicating a Section 2254 petition on the merits should require that petitioner have a copy of the record as filed in the district court. As noted, many petitions are dismissed before the court reviews the merits.

Moreover, Thompson, is the only reported decision making such a broad based holding on Habeas Rule 5.[4] Prior Eleventh Circuit cases[5] and other district court cases[6] have declined to construe Rule 5 as the majority has here.

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[4] Cf. Sixta v. Thaler, 615 F.3d 569, 572 (5th Cir. 2010) (upholding the district court's ruling because the government's response did not include any exhibits, but in dictum agreeing that Rule 5 requires attachments to be served when filed).

[5] Hill v. Linahan, 697 F.2d 1032, 1034-35 (11th Cir. 1983) ("Hill was entitled to notice that the state's request for a Rule 9(a) dismissal would be treated as a motion for summary judgment and an opportunity to offer evidence in opposition to the motion."); Allen v. Newsome, 795 F.2d 934 (11th Cir. 1986) (finding the district court could take judicial notice of the first petition because

In commenting on this concurrence, the majority cites two Supreme Court cases, both of which strongly support my approach. In Day v. McDonough, 547 U.S. 198, 210 (2006), the Court affirmed this Court's approval of a *sua sponte* dismissal of a habeas petition as time-barred. Id. at 210. Justice Ginsburg concluded that Habeas Rule 4 does not preclude *sua sponte* findings and procedural defaults, unlike the corresponding Federal Rule of Civil Procedure 8(c), which treats them as waivable affirmative defenses. Id. at 209. Day supports a step-by-step approach to habeas petitions, and emphasizes the greater judicial discretion to manage pleadings in habeas cases than under the civil rules. The Court in Lonchar v. Thomas, a death penalty case, concluded this Court erred in

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petitioner was aware of its contents, and in that circumstance it was proper to dismiss the second petition as a barred successive petition without complying with Rule 56(c)).

[6] Davis v. McDonough, 804-CV-0989-T-27TGW, 2007 WL 3306772 at *2 (M.D. Fla. Nov. 6, 2007) (finding the petitioner was not entitled to a copy of the exhibits because "Rule 5, Rules Governing Section 2254 Cases, does not explicitly require service of the exhibit); Norris v. Crosby, 8:06-CV-163-T27TBM, 2007 WL 128822 at*1 (M.D. Fla. Jan. 12, 2007) ("Petitioner's reliance on the Fourth Circuit's opinion in Thompson in support of his argument is unpersuasive. As the Thompson court noted, Rule 5, Rules Governing Section 2254 Cases (2006), does not explicitly require service of the exhibits."); Taylor v. McNeil, 8:08-CV-774-T-30MAP, 2008 WL 5235113, at * 1 (M.D. Fla. Dec. 15, 2008) (finding the petitioner was not entitled to copies of the record, because the application of the civil rules to the habeas rules is not mandatory and the petitioner did not file for leave to proceed in forma pauperis); Beauclair v. Goddard, 10-3128-SAC, 2012 WL 763103 (D. Kan. Mar. 6, 2012) ("Petitioner does not proceed in forma pauperis in this matter, has not demonstrated any specific need for copies of the state court record in part or in whole, and has not pursued discovery as provided under habeas rules."); Foss v. Martel, 2:09-CV-3551-JAM-JFM, 2011 WL 2414512 (E.D. Cal. June 10, 2011) ("While Thompson and Pindale both relied on the Federal Rules of Civil Procedure to reach their conclusion, the court notes that pursuant to Rule 12 of the Rules Governing Section 2254 Cases, the Federal Rules of Civil Procedure 'may be applied' to a habeas proceeding. . . [but] this is a permissive rather than mandatory rule.").

denial of a habeas petition for generalized "equitable reasons." 517 U.S. 314, 329 (1996). Justice Breyer discusses at length the discretion the Habeas Rules afford to district courts "to tailor the proceedings to dispose quickly, efficiently, and fairly of first habeas petitions that lack substantial merit, while preserving more extensive proceedings for those petitions raising serious questions." Id. at 325.

Thus, contrary to the majority's concern that this multi-step process would burden district courts, Day and Lonchar support an interpretation of the Habeas Rules which envision a post-answer expansion of the record when needed.

Because the varying court opinions have resulted in some controversy, I will recommend to the Advisory Committee on Civil Rules that it study a revision of Habeas Rule 5 and make a specific provision as to when the answer and record should be served on the petitioner. The Advisory Committee can gather empirical evidence and review local practices that may vary from district to district, and circuit to circuit, and recommend revisions which will be followed by the opportunity for public comment and review by the Judicial Conference. The goal is to achieve fairness and justice, but not to overly complicate the obligations of busy prosecutors and judges. Also, I believe that review by the Advisory Committee is a superior way of addressing the issues presented in this case, rather than a blanket uniform rule requiring service of the answer and record "attached" or "referenced" in every case.

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Items on CM/ECF Subcommittee Agenda

DATE: October 10, 2014

In 2013 the Standing Committee created a Subcommittee on CM/ECF to consider the impact of electronic filing and transmission of documents on the various sets of federal rules. Its membership consists of members of each of the rules advisory committees and their reporters. Judge Michael Chagares (3rd Cir.) serves as the Subcommittee chair, and Professor Dan Capra is its reporter. Judge David Lawson and the reporters now represent this Committee on the CM/ECF Subcommittee. Judge Donald Molloy previously served as this committee's judicial representative.

There are three issues currently on the Subcommittee's agenda that each of the rules advisory committees has been asked to consider. One issue, prompted by possible action by the Civil Rules Committee, is whether each committee should endorse a national rule mandating the use of electronic filing, subject to certain exceptions. A related issue is whether each committee should endorse national rule allowing electronic service of documents after the summons and complaint without obtaining the consent of the person served. The third issue for consideration is whether each set of rules should contain a definitional rule that would provide that references to paper documents and physical transmission include electronically stored information and electronic transmission.

This memorandum briefly presents the issues for initial discussion to determine whether the Committee is interested in pursuing them at this time.

I. Required Electronic Filing

Rule 49(e) of the Federal Rules of Criminal Procedure currently provides:

> **(e) Electronic Service and Filing.** A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is written or in writing under these rules.

Subsection (e), which became effective in 2011, was modeled on Civil Rule 5(d)(3).[1]

At its fall 2014 meeting, the Civil Rules Committee will discuss whether to amend Civil Rule 5(d)(3) to require electronic filing subject to certain exceptions, rather than leaving the issue to local rules. A preliminary draft for discussion states:

> *Electronic Filing, Signing, or Verification*. All filings must be made, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. Paper filing must be allowed for good cause, and may be allowed for other reasons by local rule.

The proposed amendment responds to the universal acceptance of electronic filing. An Administrative Office survey found that all district courts now have an e-filing rule and 85 districts require electronic filing.[2] A national rule could provide uniformity, though the current draft would still allow local rules to create exceptions.

If the Civil Rules Committee proposes an amendment of Rule 5(d)(3) to mandate electronic filing, we expect that each of the advisory committees will take up the question whether to propose parallel amendments. The fundamental issue is the desirability of having a national rule that reflects the actual practice of mandatory electronic filing and, if such a national rule is adopted, whether exceptions should still be subject to local rulemaking.

II. Electronic Service Without Consent

The Civil Rules Committee will also consider at its fall meeting whether to amend Civil Rule 5(b)(2)(E) to eliminate the consent requirement for the use of electronic service and to amend Rule 5(d)(1) to allow the substitution of a notice of electronic filing for a certificate of service. Because Criminal Rule 49(b) provides that "service must be made in the manner provided for a civil action," any change in the Civil Rules governing service would require the Advisory Committee on Criminal Rules to determine whether the new civil rule would be appropriate in criminal proceedings as well.

The current preliminary draft of an amendment to Civil Rule 5(b)(2)(E) would not mandate the use of electronic service by the serving party; alternative methods of service would remain in subparagraphs (A) – (D) and (F). The amendment being considered would instead eliminate the requirement that the party being served must consent in writing to the receipt of electronic service and replace it with "good cause" and local rule exemptions:

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[1]Bankruptcy Rule 5005(a)(2) and Appellate Rule 25(a)(2)(D) differ from the criminal and civil rules by stating in the first sentence that local rules may "permit or require" documents to be filed, signed, or verified electronically. The remainder of the two rules is largely the same as the civil and criminal rules. For adversary proceedings in bankruptcy, Rule 7005 makes Civil Rule 5 applicable in its entirety.

[2]Although the first sentence of Civil Rule 5(d)(3) merely authorizes local rules to allow electronic filing, the second sentence authorizes local rules to require it electronic filing if there are reasonable exceptions.

(b) Service: How Made.

* * * * *

(2) *Service in General.* A paper is served under this rule by:

* * * * *

(E) sending it by electronic means—unless the person shows good cause to be exempted from such service or is exempted from electronic service by local rule—in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served;

* * * * *

This proposal reflects the view that a party should generally not be permitted to prevent another party from taking advantage of the convenience of electronic service (even though consent now usually results from registration for CM/ECF), but that some exemptions should be allowed. As with the proposal for electronic filing, the national rule giving permission to serve electronically would be subject to local variations.

Along with the change to Rule 5(b)(2)(E), the Civil Rules Committee will also discuss the possibility of amending Rule 5(d)(1) regarding certificates of service. The Committee on Court Administration and Case Management has suggested to the Standing Committee that the various advisory committees consider rule amendments that would allow a notice of electronic filing to be used in place of a certificate of service. The Civil Rules Committee reporter has sketched out alternative revisions of Rule 5(d)(1) that would either (1) require a certificate of service only for a "party that was not served by means that provided a notice of electronic filing" or (2) continue to require the filing of a certificate of service but provide that "notice of electronic filing is a certificate of service on any party served through the court's transmission facilities." The reporter has raised a question about whether the rule should also require that a certificate of electronic service or notice of electronic filing be served on anyone who was served by conventional means.

III. Electrons = Paper

The final issue that the CM/ECF Subcommittee raises for consideration is whether the various federal rules should be amended to have them more fully reflect the ubiquity of electronic filing and transmission of court documents. Each of the reporters on the Subcommittee compiled a list of their respective rules that have terms or provisions that might need updating to encompass e-filing and e-transmission. Our list of Criminal Rules consisted of dozens of references to the terms "papers," "writing," "copies," "mail," and "deliver." (The lists were similar for the civil, bankruptcy, and appellate rules.)

Discussions among the reporters led to the view that, rather than engaging in wholesale rewrites of most of the federal rules to make terms technology-neutral or e-friendly, adoption of a universal definitional rule for each set of rules would be preferable. Professor Capra drafted the

following template for consideration by the advisory committees:

> **Rule ___. Information in Electronic Form and Action by Electronic Means**
>
> **a) Information in Electronic Form:** In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.
>
> **b) Action by Electronic Means:** In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

This has been dubbed the "electrons = paper" rule.

The proposed template is just a starting point. For each set of rules, consideration would have to be given to whether exceptions are needed—for example, for service of a summons and complaint—and whether in subdivision (b) terms in addition to "filing" and "sending" should be included. As noted above, Criminal Rule 49(e) now provides that "A paper filed electronically in compliance with a local rule is written or in writing under these rules." The other sets of rules have a similar provision. *See* Civil Rule 5(d)(3); Appellate Rule 25(a)(2)(D); Bankruptcy Rule 5005(a)(2) ; *see also* Evidence Rule 101(b)(6).[3] The Advisory Committee may want to consider whether the current provision in Rule 49(e) is sufficient or whether it should be expanded as in subdivision (a) of the template to cover documents that are not filed, or expanded, as in subdivision (b) of the template, to cover other actions referred to in the rules.

[3] All of the cited rules other than the Evidence Rule are, like Bankruptcy Rule 5005(a)(2), limited to papers or documents filed electronically. Evidence Rule 101(b)(6) more broadly provides that "a reference to any kind of written material or any other medium includes electronically stored information."