ADVISORY COMMITTEE
ON
CRIMINAL RULES

New Orleans, LA
April 7-8, 2014

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APRIL 7, 2014
NEW ORLEANS, LOUISIANA

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Morrison C. England, Jr.	D	California (Eastern)	2008		2014
Mark Filip	ESQ	Illinois	2013		2015
David E. Gilbertson	CJUST	South Dakota	2010		2016
John F. Keenan	D	New York (Southern)	2007		2014
Orin S. Kerr	ACAD	Washington, DC	2013		2016
Raymond M. Kethledge	C	Sixth Circuit	2013		2016
David M. Lawson	C	Michigan (Eastern)	2009		2015
Donald W. Molloy	D	Montana	2007		2014
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 Evidence Rules	**Judge Judith H. Wizmur**	***(Bankruptcy)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
April 25, 2013, Durham, North Carolina

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met in at Duke Law School in Durham, North Carolina on April 25, 2013. The following persons were in attendance:

Judge Reena Raggi, Chair
Carol A. Brook, Esq.
Judge Morrison C. England, Jr.
Kathleen Felton, Esq.
Mark Filip, Esq. (by telephone)
Chief Justice David E. Gilbertson
James N. Hatten, Esq.
Judge John F. Keenan
Judge David M. Lawson
Professor Andrew D. Leipold
Judge Donald W. Molloy
Judge Timothy R. Rice
John S. Siffert, Esq.
Jonathan Wroblewski, Esq.
Judge James B. Zagel
Professor Sara Sun Beale, Reporter
Professor Nancy King, Reporter

Judge Jeffrey Sutton, Standing Committee Chair
Professor Daniel Coquillette, Standing Committee Reporter
Judge Marilyn L. Huff, Standing Committee Liaison
Judge Richard C. Tallman, Former Advisory Committee Chair

The following persons were present to support the Committee:

Laural L. Hooper, Esq.
Jonathan C. Rose, Esq.
Benjamin J. Robinson, Esq.

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Raggi introduced new members Mark Filip (who participated by telephone) and John S. Siffert. She also thanked Judge Richard Tallman, the former chair of the Committee, for attending. Judge Tallman played a critical role in the development of the proposed amendment

to Rule 12.

Judge Raggi noted that the Department of Justice recently conferred significant honors on Jonathan Wroblewski and Kathleen Felton. Mr. Wroblewski received the John C. Keeney award for Exceptional Integrity and Professionalism. Ms. Felton received the most prestigious award given by the Criminal Division, the Henry E. Peterson Memorial Award, in recognition of her "lasting contribution to the Division." Judge Raggi congratulated Mr. Wroblewski and Ms. Felton, and thanked them for their exceptional contributions to the Committee's work. Judge Raggi also noted with regret Ms. Felton's plan to retire before the next meeting of the Committee.

B. Review and Approval of Minutes of April 2012 Meeting

A motion to approve the minutes of the April 2012 Committee meeting in San Francisco, California, having been moved and seconded:

The Committee unanimously approved the April 2012 meeting minutes by voice vote.

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

Judge Raggi reported that the following proposed amendments, approved by the Supreme Court and transmitted to Congress, will take effect on December 1, 2013, unless Congress acts to the contrary:

Rule 11. Advice re Immigration Consequences of Guilty Plea.

Rule 16. Government Disclosure: Proposed technical and conforming amendment.

III. CRIMINAL RULES ACTIONS

A. Proposed Amendments to Rules 12 and 34

Judge Raggi noted that the main work before the Committee was consideration of Rules 12 and 34. Because the proposed amendments have such a lengthy history and the materials in the agenda book were voluminous, Judge Raggi asked the Reporters to begin with a summary of the history of the proposal.

Professors Beale and King stated that following the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), in 2006 the Department of Justice asked the Criminal

Rules Committee to consider amending Rule 12(b)(3)(B) to require defendants to raise *before trial* any objection that the indictment failed to state an offense by eliminating the provision that required review of such a claim even when raised for the first time after conviction. (In the remainder of these minutes, failure to state an offense will be referred to as FTSO.) At the urging of members of the Advisory Committee and at the Standing Committee, the proposal evolved and expanded over the course of eight years to address other features of Rule 12's treatment of pretrial motions in general.

As published, the proposed amendment:

- stated that the requirement that certain claims and defenses be raised before trial applies only if the basis for the motion is "reasonably available" before trial;

- enumerated the common types of motions that courts have found to constitute defects "in instituting the prosecution" and "in the indictment or information" that must be raised before trial;

- included FTSO among the defects "in the indictment or information" that must be raised before trial; and

- clarified the general standard for relief from the rule that late-filed claims may not be considered, resolving confusion created by the non-standard use of the term "waiver" to reach situations in which there was no intentional relinquishment of a known right.

Judge Raggi noted that she had encouraged the defense bar to review the published amendment, and that the Committee had received thoughtful extended comments that were extremely helpful. The Reporters then drew the Committee's attention to the various issues raised in the public comments, particularly the concerns raised by the defense bar.

To consider the issues raised in the public comments the Rule 12 Subcommittee met in person in San Francisco and held numerous additional meetings by telephone. Judge Raggi thanked the Subcommittee for its extraordinary efforts, and asked Judge England, the Subcommittee chair, to give an overview of the Subcommittee's proposal for amendment as revised following publication.

Judge England prefaced his presentation by noting that, in contrast to earlier proposals for amendment of Rule 12, which had passed the Subcommittee by divided votes, the proposal he would now present had been approved by the Subcommittee unanimously. The proposed amendment would increase the clarity of guidance provided by Rule 12 to both courts and practitioners by listing the common motions that must be raised before trial and delineating the standard of review for late-raised claims. For claims other than FTSO, the proposed standard

was cause and prejudice. For FTSO, the recommended standard was prejudice alone. The Subcommittee also concluded that the district courts needed to have significant discretion to handle claims in the period before trial, and it added language to make that clearer. Finally, at the urging of Judge Raggi, the Subcommittee reconsidered features of the proposed rule that applied the standards for late-raised claims to appellate courts. The Subcommittee ultimately agreed it was best not to try to tie the hands of the appellate courts. Accordingly, it agreed to delete from the proposed rule the statement that Rule 52 does not apply. This would allow the appellate courts to determine whether to apply the standards specified in Rule 12(c) or the plain error standard specified in Rule 52 when untimely claims are raised for the first time on appeal.

When Judge England completed his presentation of the Subcommittee proposal, Judge Raggi agreed that the proposed rule provides greater clarity in identifying motions that must be filed before trial. She also noted that proposed 12(c)(2) gives district judges the needed flexibility to consider untimely motions and claims raised before jeopardy attaches, which could have the practical advantage of minimizing later claims of ineffective assistance of counsel. The proposed amendments also clarify that if the circumstances giving rise to a claim or defense identified in Rule 12(b)(3) are not known before trial, no pretrial motion is required. At that point, Judge Raggi invited Subcommittee members to add their views.

Speaking individually, Subcommittee members agreed that the proposed amendment reflected compromise. Nevertheless, the proposed rule was a considerable improvement over the current one. A defense representative noted that some features of the proposed rule might not benefit defendants in particular cases, but she voiced strong support for retaining the prejudice-only standard for late-raised FTSO claims and the abundant discretion afforded to trial judges. A judge characterized the Subcommittee proposal as a "delicate but exquisite compromise," and he noted that like Civil Rule 12 it "clears the decks before trial" and affords the trial judge abundant discretion to do substantial justice. Representatives of the Department of Justice noted that they began with a narrow policy-based proposal to require FTSO claims to be raised before trial, so that errors would be raised promptly and rectified. However, if the charging document did not give the defendant notice, and he could show prejudice, the Department has always agreed that relief should be afforded. The current proposal also clarifies what claims must be raised before trial, provides substantial discretion to the district judge before the jury is sworn, eliminates the term "waiver," and bifurcates the standard for late-raised claims, providing for cause and prejudice (a clarification of what the law currently is) for all claims except FTSO, for which prejudice alone is sufficient. In resolving conflicts that had developed in the lower courts, the proposal used terms that had been litigated and defined in the case law.

Judge Raggi noted that the proposal raises two different standard of review questions, because it:

(1) changes "good cause" to "cause and prejudice" in order to reflect the interpretation given by most courts, and

(2) provides a different standard, "prejudice," for late raised FTSO claims.

Following *Cotton*, many appellate courts are now applying plain error to FTSO claims raised for the first time on appeal, and Judge Raggi said she had urged the Subcommittee to consider whether it was desirable to mandate the prejudice standard for late-raised FTSO claims on appeal.

Judge Raggi then opened the floor for general discussion by all committee members. A member asked the purpose of limiting the motions that must be raised before trial to those where the basis is "*reasonably* available." The Reporters and Subcommittee members explained that "available" appears to be a binary factual concept: information was or was not available. In contrast, "reasonably available" includes both this factual component and a qualitative judgment. For example, if the information necessary to raise the motion was included on one page of a massive data dump only one day before the date for filing pretrial motions, it might be deemed available in a factual sense, but not reasonably available. The requirement that a motion "must" be raised before trial applies only if the basis for the motion was "then reasonably available." This allows the defense to argue that, given the circumstances, it was not reasonable to expect a claim or defense to be raised. If the court determines that the basis for the motion was not reasonably available, then proposed Rule 12(b)(3) does not require the motion to be raised before trial. Therefore a later motion would <u>not</u> be untimely under Rule 12(c), and there would be no need to show good cause.

A defense member expressed a variety of concerns with the proposed amendment. First, he argued, the proposal shifts the burden of proof/burden of production by requiring the defense to raise certain "defenses" before trial. But the law generally permits the defense to remain silent and not to assert defenses before trial. For example, in the Third Circuit a statute of limitations defense is timely whether raised before trial, during trial, or at the time of jury instructions. The defendant can wait until the government rests, and then raise its claim that the government has not proven conduct that occurred within the limitations period. In the member's view, requiring this issue to be raised before trial would be a radical change. It would alert the prosecution to the problem. The proposal may also work a change for other claims or defenses. For example, even if some circuits require venue to be raised before trial, the matter may be open in other circuits. In some cases, it may also be to the advantage of the defense not to raise selective or vindictive prosecution before trial, because the government might change its presentation of the case. The member noted that requiring such defenses to be raised before trial may be efficient, but efficiency is not the concern of the defense. In some cases it might also be problematic for the defense to raise multiplicity before trial. These are not merely procedural issues. They are defenses. A defendant has a constitutional right to remain silent, and the government has the

burden of proof. Finally, he expressed concern about the uncertainty created by the new standard "reasonably available." There will be substantial litigation about what the defendant should have known. What if the defendant gets a gigabyte of data one year before trial? The member proposed as an alternative that claims must be raised before trial only when the defense has "actual knowledge." And even that would not solve the problem with shifting the burden of proof, especially for venue and statute of limitations.

Judge Raggi asked the member who first raised the issue of "reasonably available" if he was satisfied with the explanations. He responded that he now understood the rationale for including the word and the issues it would generate.

Judge Raggi then asked for any other concerns about the rule, so that the Subcommittee could respond to all of the issues. One member asked what kind of error could occur in a preliminary hearing, and given grand jury secrecy, how would a defendant know before trial that an error had occurred. Another participant asked why the Subcommittee proposed to substitute "cause and prejudice" for the traditional "good cause." Judge Raggi noted that Judge Sutton had also raised that issue, and asked him for his comments on the proposed amendment.

Judge Sutton noted that he was relatively new to Rule 12. He thanked the Committee for its extensive work on the proposal and expressed his sense that after eight years it was very important to complete the project. He identified a number of strengths of the proposal. First, it is valuable to clarify what issues must be raised before trial. Second, it is imperative to get rid of the term "waiver" in Rule 12(e). The current language was drafted before the Supreme Court clarified the distinction between waiver and forfeiture, and it makes no sense now. Giving district judges more flexibility before trial is very important. It's becoming clearer that this is a rule addressed to the district courts, which he characterized as positive.

Judge Sutton also provided perspective on the Supreme Court's role in the rulemaking process. Although the Court has the authority to approve rules over the dissent of a justice, under Chief Justice Roberts unanimity has been required. So rules must, in effect, be approved by all nine justices. With that in mind, Judge Sutton agreed that it was appropriate to omit double jeopardy from the non-exhaustive list of claims that must be raised before trial. But given the agreement that the word "waiver" should be eliminated, why not substitute "forfeiture"? Finally, he predicted that there would be a lot of push back on the proposed change from "good cause" to "cause and prejudice." "Good cause" is a well established concept, and it gives the court wide discretion. Prejudice is part of that traditional enquiry. But when you codify a standard, it ordinarily carries with it the meaning it has developed. Because "cause and prejudice" is now the standard in habeas litigation, its meaning in that context (including the exception for actual innocence) could carry over to Rule 12.

Judge Tallman explained that you could say the original rule was drafted, at least in part,

on the erroneous assumption that failure to state an offense was a jurisdictional error. *Cotton* then made it clear that failure to state an offense is not jurisdictional. In response to the concerns raised by the defense member, Judge Tallman noted that the proposal does reflect a policy judgment that the rules should discourage sandbagging. It does attempt to flush out issues that could be dispositive, which from the court's perspective should be raised early for effective case management. It may require the defense to play a card earlier than it wishes, but it does not require the defense to come forward with evidence. As an appellate judge, he shared some of the concerns that using "cause and prejudice" in Rule 12 could import some of the habeas case law. But trial judges understand "good cause." Finally, he noted that all of the issues raised at the meeting had been thoroughly vetted on multiple occasions. He commended the latest proposal as a very good rule and one that was a significant improvement over current Rule 12. The Supreme Court has now clarified the distinction between jurisdictional issues and merits claims, and there's no reason to allow sandbagging on non-jurisdictional issues.

Judge Raggi noted that the speakers had raised concerns about four main aspects of the Subcommittee's proposed rule:

(1) "then reasonably available";
(2) items on the enumerated list of claims (particularly statute of limitations);
(3) substituting "forfeiture" for "waiver"; and
(4) substituting "cause and prejudice" for "good cause."

She declared a break in the meeting and asked the Subcommittee to use the time to consider its response to these concerns and report back to the full Committee.

Following the break, Judge England announced the Subcommittee's views on the issues identified by Judge Raggi. In all cases, the Subcommittee was unanimous.

(1) The Subcommittee reaffirmed its strong support for "then reasonably available."
(2) The Subcommittee agreed that it would be acceptable to remove statute of limitations from the list of claims that must be raised before trial.
(3) The Subcommittee rejected the proposal to substitute "forfeiture" for "waiver" in subdivision (e).
(4) The Subcommittee agreed to retain "good cause" rather than "cause and prejudice."

He noted if the Committee as a whole endorsed this approach, it would be necessary to rework the language to incorporate "good cause." Members then explained the Subcommittee's views.

(1) <u>"then reasonably available"</u>

The Subcommittee was unanimous in the view that the qualifier "then *reasonably*

available" should be retained. The mandate of the rule (and the potential sanction) should be restricted to cases in which the court finds the basis of the defense was "reasonably" available. This is very important from the defense perspective, and it gives appropriate flexibility to the court.

A question arose as to whether the Committee Note could be used to clarify the meaning of "reasonably" in this context. Professor Coquillette reminded everyone that Committee Notes cannot be used to change the meaning of the rule. Professor Beale noted that as published the proposed Committee Note included the following:

> 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) and (4). Cf. 28 U.S.C. § 1867(a) & (b) (requiring claims to be raised promptly after they were "discovered or could have been discovered by the exercise of due diligence").

She stated that the Cf. citation had been added only to provide an illustration of the kind of analysis that courts might undertake. Although the note could not properly be used to narrow or restrict the rule itself, there was general agreement that it would be beneficial to delete the Cf. citation.

Discussion focused on the effect of including the word "reasonably." A member stated that even if the word reasonably were omitted courts might nonetheless read in the same concept. Another member responded that it was nonetheless desirable to include the word in the text. Judge England observed that on the facts of any given case courts might disagree about what is reasonable, but that's inevitable. A member commented that judges already disagree about when a witness is "available." On his court, for example, the judges disagree about whether soldiers serving in Afghanistan are "available," depending on their view of the efficacy of video technology. The Reporters noted that inclusion of the "reasonably available" criteria is important because it short circuits the analysis: unless the basis for a late-filed motion was reasonably available, there is no need to show either cause or prejudice. Professor King also pointed out that inclusion of the word "reasonably" had been praised by defense commentators, and its deletion might be understood to make the rule significantly harsher. On this view, deletion might require republication.

A member sought clarification of who bore the burden of establishing that the basis for a motion was reasonably available. Several members expressed the view that the government would have this burden because it would be seeking to bar the claim or defense as untimely. In contrast, if the basis for the motion was reasonably available and the motion was thus untimely, the defense would have the burden of showing good cause. The chair and members discussed the possibility of adding a discussion of this issue to the Committee Note, but no action was taken

on this point.

(2) changes to the list of enumerated claims

Professor King explained the Subcommittee's willingness to delete statute of limitations from the list of claims which must be raised before trial. The Subcommittee had previously agreed to remove double jeopardy from the list, and it agreed to treat statute of limitations in the same way. Professor King noted that the 1944 Committee Note had described both double jeopardy and statute of limitations as defenses that need not be raised before trial. The Subcommittee's preference was to add both to the list of defenses that must be raised before trial with the understanding that other aspects of the rule – the limitation to motions for which the basis was "then reasonably available" which "can be determined without a trial on the merits" – would respond to the relevant concerns. However, the Subcommittee was amenable to deleting statute of limitations from the list of claims. The list is illustrative, not exhaustive. Many but not all courts now treat both double jeopardy and statute of limitations as defects in the indictment or institution of the prosecution that must be raised before trial, and deleting these claims from the rule simply allows the case law to continue to develop. Although the Subcommittee would prefer to clarify the law and bring about uniformity, the members agreed to delete both double jeopardy and statute of limitations in the interest of achieving the broadest support for the proposed amendment.

The member who had previously enquired about the inclusion of errors in the grand jury and preliminary hearing indicated that he was satisfied that there were rare instances in which such claims could be raised and determined before trial.

(3) substitution of "forfeiture" for "waiver"

The Subcommittee unanimously rejected the suggestion to substitute "forfeiture" for "waiver" in subdivision (e). Judge Raggi noted that she had discouraged the use of the term "forfeiture" because it was the language of appellate courts, and the rule was principally directed at the district courts. Looking ahead to the question how this might be viewed by the Supreme Court, she observed that the portion of the rule that included the "waiver" language when the Court decided *Cotton* was being eliminated. The new provisions on relief were part of a comprehensive revision of Rule 12. Judge Sutton stated he was satisfied with the explanation that "forfeiture" was principally an appellate standard, and it was not desirable to import that into the rule. Judge Tallman indicated that the disagreement in the application of forfeiture in the appellate cases was another reason not to import that phrase into the rule. Finally, Judge Raggi noted that forfeiture is generally associated with the plain error standard, not the good cause/cause and prejudice standards.

(4) retention of "good cause"

The Subcommittee also agreed to retain "good cause" (the term in the present rule) rather than "cause and prejudice" (the phrase substituted in the amendment published for public comment). The Subcommittee concluded that retaining the familiar "good cause" standard would assuage concerns that habeas case law would be imported into Rule 12, garner support in the Standing Committee, and avoid problems when the proposal is transmitted to the Supreme Court. Again, in a cost benefit calculus, the benefit of clarification was outweighed by the problems that might be caused. The Subcommittee noted, however, this change would require some additional revisions to the text. Judge Raggi deferred discussion of any changes in the language to accommodate "good cause." If the Committee approved the proposed rule in concept, she suggested, then the Subcommittee could use the lunch hour to draft the necessary language.

In light of the Subcommittee's resolution of the issues that had been raised for discussion, and with no member seeking further discussion, Judge Raggi then called for a vote on the proposed amendment to Rule 12 as modified in the following respects:

(1) eliminating statute of limitations defenses from (b)(3)(A),
(2) specifying that a court may consider an untimely claim if the party shows "good cause," and
(3) deleting the Cf. reference in the Committee Note accompanying (b)(3).

With the understanding that specific language to incorporate "good cause" into (c)(3) would be submitted for review, the Committee voted unanimously to transmit Rule 12, as amended following publication, to the Standing Committee.

By voice vote, the Committee also unanimously approved transmitting the conforming amendment to Rule 34.

Following the lunch break, the Subcommittee presented the following revised language for proposed Rule 12(c)(3):

(3) ***Consequences of Not Making a Timely Motion Under Rule 12(b).*** If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. In such a case, a court may consider the defense, objection, or request if:

(A) the party shows good cause; or
(B) for a claim of failure to state an offense, the defendant shows prejudice.

Judge Raggi called for discussion. A member asked why (A) referred to the "party" and (B) to the "defendant." Professor Beale explained that only a defendant can raise a claim of failure to state an offense, but the prosecution as well as the defense may raise other pretrial motions governed by Rule 12.

After time for review of the proposed language, Judge Raggi asked whether there were any further concerns. Hearing none, she declared that the morning vote approving Rule 12 for transmission to the Standing Committee would stand with the inclusion of the new language for Rule 12(c)(3). The Reporters would make the necessary changes to the Committee Note to incorporate the other changes made by the Committee. The revised rule would also be subject to restyling. Judge Raggi assured members that any restyling changes that might be significant would be referred to the Rule 12 Subcommittee and, if necessary, to the Committee.

Judge Sutton asked for the Committee's view on the need for republication. Judge Raggi stated that in her view none of the post-publication changes warranted republication, as they did not change the balance among the parties. Professor Beale observed that certain controversial features supported by the Department of Justice had been deleted, but the Department had agreed to those changes as part of an overall agreement to move the rule forward. No member of the Committee supported republication.

B. Proposed Amendments to Rules 5 and 58

This is the Committee's second effort to amend Rules 5 and 58 to provide for advice concerning consular notification. The first proposed amendments were published for public comment and subsequently approved by the Advisory Committee, the Standing Committee, and the Judicial Conference. However, in April 2012 the Supreme Court returned the Rule 5(d) and Rule 58 amendments to the Advisory Committee for further consideration. In response, the Committee revised the language of the proposed amendments, which were approved for publication by the Standing Committee in August 2012.

Rules 5 and 58 govern the procedure for initial appearances in felony and misdemeanor cases. Both provide, inter alia, that the judge must inform the defendant of various procedural rights (including the right to retain counsel or request that counsel be appointed for him, any right to a preliminary hearing, and the right not to make incriminating statements). Parallel amendments to Rules 5 and 58 were proposed by the Department of Justice to facilitate the United States' compliance with Article 36 of the Vienna Convention on Consular Relations ("the Vienna Convention"), which provides for detained foreign nationals to be advised of the opportunity to contact the consulates of their home country. Various bilateral agreements also contain consular notification provisions.

As published in 2012, the proposed rules require the court to inform non-citizen defendants at their initial appearance that (1) they may request that a consular officer from their country of nationality be notified of their arrest, and (2) in some cases international treaties and agreements require consular notification without a defendant's request. The proposed rules do not, however, address the question whether treaty provisions requiring consular notification may

be invoked by individual defendants in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36 of the Vienna Convention. More particularly, as the Committee note emphasizes, the proposed rules do not themselves create any such rights or remedies.

Opening the discussion, Judge Raggi noted that, in twice proposing amendments to Rules 5 and 58, the Committee had carefully considered the policy question of whether the judiciary should be involved in the executive's efforts to satisfy its consular notification requirements under various treaties. The Committee had answered that question in the affirmative, albeit not unanimously. Further, the Committee's 2012 redrafting of the amendment in response to the Supreme Court's remand had been approved for publication by the Standing Committee. Thus, the immediate issue before the Committee was the comments received in response to publication.

Professor Beale described the public comments, which urged changes in the introductory clause of the proposed rules providing that the advice must be given "if the defendant is held in custody and is not a United States citizen." The Federal Magistrate Judges Association (FMJA) recommended that the quoted language be deleted and that the advice requirement apply to all defendants. Two reasons informed the recommendation. First, the FMJA expressed concern that the amendment could be interpreted to require that the arraigning judge determine whether a defendant is a U.S. citizen before providing the advice regarding consular notification. An inquiry of this nature would be undesirable, because defendants might make incriminating statements. Professor Beale endorsed the FMJA's suggestion that it would be better to rephrase the new provisions to parallel proposed Rule 11(b)(1)(O), which is being transmitted from the Supreme Court to Congress. Proposed Rule 11(b)(1)(O) requires the court to give warnings to all defendants about the possible collateral immigration consequences of a guilty plea. The Committee Note explains:

> 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.

Second, the FMJA submitted that the proposed advice requirement should not be limited to defendants "in custody" at the time of their initial appearance.[1] After consultation with the

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[1] There was some disagreement between the Department of State and the FMJA concerning the scope of the obligation under Article 36, but it was not necessary for the Committee to resolve this disagreement. The FMJA noted that Article 36 of the Vienna Convention covers any national who is "arrested or committed to prison or to custody pending trial or is detained in any other manner." Because all defendants who are brought to the court for an initial appearance are arrestees, the FMJA concludes that the proposed amendment should provide for all

Department of State, the Department of Justice had no objection to removing the "in custody" language in the proposed rule if the Committee considers that appropriate. The National Association of Criminal Defense Attorneys also expressed concern with the "in custody" language, though for other reasons.

Professor Beale noted that the revised language now proposed had been agreed to by the Department of Justice after consultation with the Department of State, and vetted by the Style Consultant.

Judge Raggi stated that the key post-publication change was expanding the notification to all defendants, not only those in custody. Although there is always a concern about adding to the long list of information judges are already required to provide, she explained that in this instance there was a practical reason to provide the required advice to all defendants at their initial appearance. Specifically, a defendant who was not in custody at the time of his first appearance might later be remanded for various reasons, such as violation of the conditions of bail. It would be more efficient to provide the warning to all defendants at the first appearance, rather than try to ensure that advice is given later under the varying circumstances that might occur in individual cases.

Professor Coquillette questioned the inclusion in the Committee Note of a reference to the Code of Federal Regulations governing consular advice by arresting officers. He noted that if the regulations were altered it would not be possible to change the Note to update the citation. The Committee agreed to delete the citation and explanatory parenthetical.

A member asked what the consequence would be if a judge does not provide the advice. The proposed rule does not provide for a right or a remedy. Judge Raggi noted that the

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defendants to receive advice concerning consular notification irrespective of their custodial status at arraignment.

Although the Department of Justice had no objection to removing the "in custody" language in the proposed rule if the Committee considers that appropriate, as noted in the March 25, 2013 letter from Ms. Felton and Mr. Wroblewski, the Department of State does not agree with the FMJA's reading of the Vienna Convention. As reflected in U.S. DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS at 17 (3rd ed. 2010) http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf , the Department construes the Vienna Convention to cover only situations in which a foreign national's ability to communicate with or visit consular officers is impeded as a result of actions by government officials limiting the foreign national's freedom. (For example, the Department of State would not consider a "detention" to include a brief traffic stop or similar event in which a foreign national is questioned and then allowed to resume his or her activities.) In light of the magistrates' concern, however, the Department saw no harm in offering this advice to every arrestee at the first appearance if the Committee considers that appropriate.

Departments of State and Justice see value in incorporating this advice into the rules as part of the effort to satisfy our treaty obligations, even absent a remedial provision. Speaking on behalf of the Justice Department, Ms. Felton noted that there is often no record of advice given by arresting officers; providing the warning at the initial appearance would create a record of compliance with treaty obligations. Additionally, the federal rule may provide a model for similar state rules and thus indirectly bring about more widespread compliance with Article 36.

By voice vote, the Committee unanimously agreed that Rule 5, as modified after publication, be transmitted to the Standing Committee.

By voice vote, the Committee unanimously agreed that Rule 58, as modified after publication, be transmitted to the Standing Committee.

IV. NEW PROPOSAL FOR DISCUSSION

Judge Raggi asked Mr. Wroblewski to provide an introduction to the Department of Justice proposal to amend Rule 4.

Mr. Wroblewski explained that Rule 4 has become an obstacle to the prosecution of foreign corporations that commit offenses in the United States but cannot be served because they have no known last address or principal place of business in the U.S. Some courts have held that efforts to serve by other means were insufficient even if they would provide notice. He stated that this issue is now coming up with some frequency.

Judge Raggi noted that the next step would be the appointment of a subcommittee, but that some initial discussion might be helpful. She asked how the provision sought by the Department would work in practice. What if the foreign corporation were served, but it entered no appearance. Did the Department contemplate that it would be able to prosecute without an appearance, and, if not, what would be the benefit of the change?

Mr. Wroblewski said he was not prepared to answer all facets of the question, but he drew attention to several points. First, to date foreign corporations have not generally ignored service. They have appeared but contested the adequacy of service. Additionally, even if a corporation has not entered an appearance, effective service would have other beneficial consequences, such as asset forfeiture, regardless of whether the government could proceed with the prosecution.

Judge Raggi noted that these were among the issues to be considered by a Subcommittee. She announced that Judge David Lawson had agreed to chair the Rule 4 Subcommittee, and that Judge Rice, Mr. Siffert, and representatives of the Department of Justice would serve as

members. She asked the Subcommittee to report at the October meeting.

V. STATUS REPORT ON CRIMINAL RULES

Mr. Robinson stated that in response to the trial of Senator Ted Stevens, hearings were held in Congress to consider disclosure obligations of Federal Prosecutors. The Administrative Office worked with Judge Raggi to prepare a voluminous submission that contained all of the Committee's work on Rule 16. Informally we heard that staff found our materials very helpful.

Ms. Brook stated that she had testified at the hearing as a Federal Defender, not as a member of the Committee. She provided written testimony, was questioned extensively, and then provided written comments.

VI. INFORMATION ITEMS

Judge Raggi reported to the Committee that the FJC's Benchbook Committee had acted on the Criminal Rules Committee's suggestion that a discussion of Brady/Giglio obligations be included in the next edition of the Benchbook. A copy of the new Benchbook's detailed and comprehensive section on Brady/Giglio was included in the Committee's agenda book. Judge Raggi expressed her gratitude to the Benchbook Committee for allowing her to participate in its discussions leading to the preparation of this new section.

Judge Lawson, who served as a liaison to the Synonym Subcommittee, was asked to comment on the Subcommittee, whose report was included in the Agenda Book. He noted that the Subcommittee report includes a chart detailing a very large number of words and phrases that appear in more than one set of rules. At this point, no action to standardize these many terms is contemplated.

Judge Raggi announced that the Committee's next meeting would be held October 17-18, 2013, in Salt Lake City, where the Committee will be hosted by the University of Utah School of Law.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 9-10, 2014
Phoenix, Arizona
Draft Minutes as of March 13, 2014

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 9 and 10, 2014. The following members were present:

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. Elizabeth J. Shapiro, Esq., represented the Department of Justice.

Professor Geoffrey C. Hazard, Jr., consultant to the committee, and Professor R. Joseph Kimble, the committee's style consultant, participated. Judge Jeremy D. Fogel, Director of the Federal Judicial Center, also participated.

Professor Daniel R. Coquillette, the committee's reporter, chaired a panel discussion on the political and professional context of rulemaking with the following panelists: Judge Lee H. Rosenthal, former chair of the committee; Judge Diane P. Wood, former member of the committee; Judge Marilyn L. Huff, former member of the committee; Judge Anthony J. Scirica (by telephone), former chair of the committee; Peter G. McCabe, Esq., former secretary to the committee.

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
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 (by telephone)
Advisory Committee on Bankruptcy Rules —
Judge Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter (by telephone)
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 (by telephone)
Professor Nancy J. King, Associate Reporter (by telephone)
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by welcoming everyone and thanking the Rules Office staff for arranging the logistics of the meeting, including a very economical rate for the hotel.

Committee Membership Changes

Judge Sutton announced that the terms of Judges Huff and Wood had ended on October 1, 2013. He thanked them for their distinguished service on the committee, described their many contributions to the committee's work, and presented each with a plaque. Judge Sutton also announced that Mr. McCabe, who had served as secretary to the committee for 21 years, had recently retired from the Administrative Office. Judge Sutton noted that Mr. McCabe had been the longest serving employee of the Administrative Office and had dedicated 49 years to government service. Judge Sutton thanked Mr. McCabe for his extraordinary service to the committee and the courts. He also noted that the committee would be losing three great musicians, as Judges Huff and Wood and Mr. McCabe were all talented musicians.

Judge Sutton introduced the new committee members, Judge Graber and Judge St. Eve, and he summarized their impressive legal backgrounds.

Judge Sutton noted that the representatives from the Civil Rules Committee were at the courthouse holding a hearing on the proposals that are currently out for public comment, but that they would be joining the second day of the meeting.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee, without objection and by voice vote, approved the minutes of the last meeting, held on June 3–4, 2013.

REPORT OF THE ADMINISTRATIVE OFFICE

Judge Sutton reported that the rules committees had been engaged with Congress recently. He said that last June Congress had introduced legislation to deal with patent assertion entities. He said the first draft from the House was aggressive in attempting to

preempt the Rules Enabling Act process. He reported that he and Judge Campbell had met several times with congressional staffers, that the original draft legislation had been modified, that there were several bills under consideration, and that discussions are continuing.

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 December 16, 2013 (Agenda Item 3). Judge Colloton reported that the advisory committee's fall meeting had been cancelled due to the lapse in appropriations during the government shutdown and that it had no action items to present.

Informational Items

Judge Colloton highlighted a few items that the advisory committee currently has on its agenda.

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

Judge Colloton reported that a lopsided circuit split has developed concerning whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Appellate Rule 4(a)(4), which provides that the "timely" filing of certain motions tolls the time to appeal. The advisory committee is considering whether and how to amend the rule to answer this question. Civil Rule 6(b) provides that a district court may not extend the time for filing motions under Civil Rules 50, 52, or 59. Nonetheless, district courts sometimes extend the time to file such motions even though Civil Rule 6(b) does not allow it. In other instances, a party files a motion late, the opposing party does not object, and the district court rules on it on the merits. Thus, the question has arisen whether a motion is "timely" under Appellate Rule 4(a)(4) if it is not within the time set in the Civil Rules but is nonetheless considered on the merits by the district court either because of an erroneous extension or the failure of the opposing party to object.

The Sixth Circuit has held that where the non-movant forfeits its objection to the motion's untimeliness, the motion is timely for purposes of Rule 4(a)(4). However, the Third, Seventh, Ninth, and Eleventh Circuits have held to the contrary. The courts holding that such motions are not timely reason that Rule 4(a)(4) was designed to provide a uniform deadline for the named motions in order to set a definite point in time when litigation would come to an end. Making the time for filing these motions depend on developments in the district court introduces a disparity that Rule 4(a)(4) was designed to eliminate. Judge Colloton noted that the Seventh Circuit has commented that the Sixth

Circuit's approach was uncomfortably close to the "unique circumstances" doctrine that was overruled in *Bowles v. Russell*, 551 U.S. 205 (2007). He added that the advisory committee will address these issues at its spring meeting.

A member stated that he supported the minority view that would forgive a late filing if it was done in reliance on a court order. Judge Sutton questioned whether doing so would overrule *Bowles*. The member responded that it would not; the rules could provide that if the deadline is set by rule and the judge purports to extend it in error, then a litigant who has relied on the erroneous extension is excused from the consequences of late filing. Another member noted it is different if the deadline is set by statute.

Another member suggested a wording change to one of the tentative sketches of possible amendments to address this issue, asking if there was a more sensitive way to reference the limits on judicial authority in the phrase: "a court order that exceeds the court's authority (if any) to extend the deadline . . . ." The reporter responded that she understood the concern, but she did not want the rule language to imply that a court had authority to extend deadlines outside the time allowed in the rules, as judges exceeding their authority in this regard is the root of the problem. She said that all suggestions on wording are welcome. Another member suggested instead using language along the lines of: "a court order that extends the deadline beyond that otherwise permitted by the rules . . . ."

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

Judge Colloton reported that the advisory committee has also begun a project to examine Rule 4(c)(1)'s inmate-filing provision for notices of appeal. The advisory committee is considering amendments to the rule that might address, among other things, whether an inmate must prepay postage in order to benefit from the inmate-filing rule; whether and when an inmate must provide a declaration attesting to the circumstances of the filing; whether the inmate must use a legal mail system when one exists in the relevant institution; and whether a represented inmate can benefit from the inmate-filing rule. The project grew out of a 2007 suggestion by Judge Diane Wood, suggesting that the committee consider clarifying whether Rule 4(c)(1)'s inmate-filing rule requires prepayment of postage. Judge Colloton reported that there is ambiguity in the case law on whether prepayment of postage is required; whether inmates must file a declaration; and the meaning of the sentence in the rule that says that if a legal mail system exists, the inmate must use the system. He said that a subcommittee is working on these and related issues.

LENGTH LIMITS

Judge Colloton reported that the Appellate Rules have some length limits set out in type-volume terms and some set out in pages. He said that the advisory committee is considering whether all the limits should be measured by type-volume given the

ubiquitous use of computers, and if so, the best means of appropriately converting current limits that are set in pages to type-volume limits. He noted that when the rules governing the length of briefs were changed to convert to type-volume limits, the rules set a type-volume limit that approximated the conversion from a page limit and provided a shorter safe harbor set in pages. The advisory committee is considering the option of taking a similar approach for other limits that are currently set in pages.

Judge Colloton stated that a safe harbor set in pages must be shorter than the type-volume limit to prevent lawyers from using the safe harbor to get around the type-volume limit, but the shorter page limit can create a hardship for pro se litigants. As a result, another option the advisory committee is considering would differentiate between papers prepared on a computer and papers prepared without the aid of a computer. Judge Colloton noted that it was unlikely that lawyers would switch to using typewriters in order to get around the type-volume limits. Another issue is that there is evidence that when the brief page limit was converted from 50 pages to a type-volume limit of 14,000 words, it resulted in an increase in the permitted length of a brief. The advisory committee is considering whether to adjust that limit to 12,500 or 13,000 words as part of the length-limit project.

AMICUS BRIEFS ON REHEARING

Judge Colloton reported that the advisory committee is also considering the possibility of addressing amicus filings in connection with petitions for panel rehearing and/or rehearing en banc. He stated that the advisory committee had heard that lawyers are frustrated that there is no rule with respect to rehearing that sets out when an amicus brief must be filed or how long it must be. The committee is considering whether there should be a national rule on these topics. Judge Colloton noted that some circuits have no local rule on these matters. However, there is a concern that any rule that addresses amicus briefs on petitions for rehearing might stimulate more such amicus briefs, which some courts do not desire. Judge Colloton noted that some courts even have rules that generally prohibit amicus filings on rehearing, or that only allow them with leave of court. Matters that could be addressed by a proposed rule include length, timing, and other topics that Rule 29 addresses with respect to amicus filings at the merits-briefing stage.

A judge member noted that amicus briefs are usually helpful on rehearing. She stated that sometimes there are sleeper issues that the appellate court may not be aware of and that she favored explicitly clarifying that such amicus briefs are permissible. Judge Colloton noted that the suggestion, if implemented, would not require allowing amicus briefs on rehearing, but instead would set out the procedure to be followed if the circuit allowed such amicus briefs.

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 December 12, 2013 (Agenda Item 4).

Amendment for Final Approval

FED. R. BANKR. P. 1007(a)

Judge Wedoff reported that the advisory committee was seeking approval to make a technical and conforming amendment to Rule 1007(a). Subdivisions (a)(1) and (a)(2) of Rule 1007 require the filing at the outset of a case of the names and addresses of all entities included on "Schedules D, E, F, G, and H." The restyled schedules for individual cases that were published for comment in August 2013 use slightly different designations. Under the new numbering and lettering protocol of the proposed forms, the schedules referred to in Rule 1007(a)(1) and (a)(2) will become Official Forms 106 D, E/F, G, and H—reflecting a combination of what had been separate Schedules E and F into a single Schedule E/F. Judge Wedoff stated that in order to make Rule 1007(a) consistent with the new form designations, the advisory committee was proposing a conforming amendment to subdivisions (a)(1) and (a)(2) of that rule. Judge Wedoff reported that the revised schedules would not go into effect until December 1, 2015, so he asked that the conforming rule change be held back to go into effect on the same date.

The committee, without objection and by voice vote, approved the proposed amendment to Rule 1007(a) for transmission to the Judicial Conference for final approval without publication.

Informational Items

CHAPTER 13 PLAN FORM

Professor McKenzie reported on comments received on the published proposed chapter 13 plan form and related rule amendments. The advisory committee had drafted an official form for plans in chapter 13 cases and had proposed related amendments to nine of the Bankruptcy Rules. Professor McKenzie reported that the form and rule amendments were published in August 2013 and have drawn over 30 comments so far. He said that very few comments expressed opposition to the form, but many were long and detailed. Professor McKenzie reported that since so many comments had already come in, the working group had already begun categorizing and reviewing the comments, although of course its work could not be completed until the comment period closed in February and all the comments were received.

Professor McKenzie said that one common theme that had emerged was what to do when the form provides a number of choices to the debtor even though some choices may not be available in the debtor's district. The advisory committee did not take a position on the differences in these choices between districts, but one concern is that providing the choice of various options on the form might indicate that the committee was stating that both choices are available to a debtor. Professor McKenzie noted that the concern is that this might lead to confusion and increased litigation. Judge Wedoff provided an example. He said one open question is, if the debtor wants to pay a mortgage, whether he can pay the mortgagee directly or instead must pay the trustee. If the payment is to the trustee, there is a fee assessed on the payment, meaning that more has to be paid on the mortgage claim. Some jurisdictions require it to be paid through the trustee, while others allow the debtor to be the payment manager. Judge Wedoff noted that providing both options on the form might imply that both options are available in all jurisdictions. Professor McKenzie added that one way to respond to the comments would be to include a warning on the form that the provision of an option does not mean it is available in the debtor's district. The working group will report to the advisory committee at the spring meeting.

A participant asked whether the advisory committee had gotten feedback that the form will be confusing to pro se debtors. Professor McKenzie responded that so far there had only been a couple of comments on how the form might impact pro se litigants. One comment had said it might attract additional pro se litigants, and the other had said it would be confusing to pro se litigants. The participant asked how the advisory committee could get more input from pro se litigants, since such litigants do not often comment on published proposals. Professor McKenzie stated that the advisory committee hopes to get comments from consumer bankruptcy groups, who often think about the nature of pro se litigation, and he noted that it is very difficult for pro se litigants to get through chapter 13 bankruptcies successfully. He said that one thing the working group is considering is more prominent language about that difficulty. Judge Wedoff noted that providing a plan form might help pro se litigants because it would set out what needs to be done and might allow some debtors to do it on their own without an attorney.

Judge Wedoff noted that as part of its Forms Modernization Project, the advisory committee had been looking closely at whether the forms can be used by pro se debtors. He said one of the goals of that project is to make the forms more user-friendly. Another participant noted that law students use the forms when they represent clients in bankruptcy clinics, and he suggested that the advisors for such clinics might be a good source of information on how the forms might be used by law students, which can be analogized to the pro se context. Judge Wedoff noted that the advisory committee, with the help of the Federal Judicial Center, had been vetting the proposed forms with a group of law students.

ELECTRONIC SIGNATURES

Judge Wedoff reported on the comments received on proposed amendments to Rule 5005 on filing and transmittal of papers, which is designed to address the question of how to deal with electronic signatures by someone other than the attorney who is filing a document in a bankruptcy case. He noted that there is no problem with signatures of attorneys who file documents because they have to have a login and password, which constitutes their signature. To date, the rules have not addressed the signatures of nonfilers, which in bankruptcy is primarily the debtor. Judge Wedoff noted that the typical practice has been for local rules to require the filing attorney to retain the original document signed by the nonfiler for a period of time, usually five years. Attorneys have pointed out that this becomes a problem in terms of storage space. Some bankruptcy firms may generate thousands of case filings a year, making the volume of original documents to retain substantial. In addition, some lawyers have reported that they are uncomfortable retaining documents that might later be used to prosecute a crime against their clients. Further, the prosecutor in a future criminal prosecution will be relying on the attorney's good faith in retaining documents with the original signatures.

The proposal published for comment provides that, instead of requiring the retention of a "wet" signed copy, the original signature could be scanned into a computer readable document and the scanned signature would be usable in lieu of the original for all purposes. Judge Wedoff noted that the published proposal asked for comment on two alternatives. One would have a notary certify that it is the debtor signing and that it is the complete document. The other would deem filing by a registered person equivalent to the person's certification that the scanned signature was part of the original document.

Professor Gibson said that only four comments had been received so far. One expressed confusion about when original documents must be retained under the proposed rule. Another erroneously read the proposal to require the entire document, not just the signature page, to be scanned, which would require much more electronic storage space. She said that two recent comments support the proposed amendment and urge adoption without requiring a notary's certification.

The representative for the Department of Justice noted that the Evidence Rules Committee had been planning to host a symposium on electronic evidence this past fall, which would have included a discussion of this issue of electronic signatures, but that the symposium was cancelled due to the government shutdown. She noted that the scheduling of the symposium had nonetheless prompted the Department to come to some tentative conclusions on this issue. While the Department will be submitting formal comments, the representative previewed the initial views of the Department. She reported that there was resistence in the Department to removing the retention of original signatures. She noted that there was a great amount of work done within the Department

in examining this issue. There was a working group that cut across disciplines and there was a survey conducted of U.S. Attorney's offices. She said that prosecutors overwhelmingly thought there was no problem with the current system. They also reported that taking away the requirement of retaining originals would lead to more cases where signatures were repudiated. The vast majority of survey respondents thought the proposed rule would make it much harder to prove authenticity in situations where the signatures were repudiated. She noted that the FBI has a policy that it will not provide definitive testimony to authenticate a signature without the original document. With an electronic signature, the FBI cannot determine certain characteristics that they would look at in comparing signatures, like pressure points and whether there were tremors. Without having an FBI expert, prosecutors would have to resort to circumstantial evidence to prove authenticity, which would often involve measures such as getting warrants to search computers to show that a document was generated from that computer, conducting forensic analysis, tracing IP addresses, and similar actions that would add burden and expense.

The Department's representative explained that the Department also looked at the tax experience because Evidence Rule 902(10) makes certain types of documents self-authenticating when a statute provides for prima facie presumption of authenticity. The advisory committee note states that the tax statute is one example. However, in looking into the possibility of creating a statutory presumption, the Department found that it would have to be either a generic statute that addressed this subject holistically or a bankruptcy-specific statute. The problem with a bankruptcy-specific statute, she said, was that the Department had found at least 101 different crimes that require the authenticity of the signature to be proven as an element of the crime. If a bankruptcy-specific statute were implemented, she said, there was the possibility of needing to do seriatim statutes because bankruptcy might just be the first area to start doing everything electronically. She said eventually there might need to be dozens of statutes. Yet, the alternative of crafting a generic statute now to address the subject holistically created the concern that it would have unintended consequences if all the possibly affected criminal statutes were not first examined. Thus, she noted, it was premature to start trying to get a statute without knowing all of the ramifications. She also stated that survey respondents felt the tax statute was somewhat unique in that taxpayers are required by law to sign a return and if they repudiate their signature on the return that means they have violated the law by not filing a tax return if there is no other valid tax return with their signature. She noted that Judge Wedoff has explained that there are some parallels in bankruptcy.

The Department participant also stated that the working group did not find persuasive the concerns that have been raised about why the rule should be changed. She stated that publicly-filed documents are not privileged, so an attorney should not be concerned about being called upon to produce a client's documents. Further, professional responsibility rules prohibit an attorney from assisting with a crime or fraud. She said

that while storage can be burdensome, there are retention periods, so there should be recycling of the documents and not an ever-increasing amount of documents needing to be retained. She noted that one possibility raised by Judge Wedoff was that perhaps the whole document could be scanned and saved electronically and only the signature page would need to be kept in its original format, and she noted that this option was something to think about. Finally, the working group was not persuaded by the rationale that there are varying retention periods across the country. The group felt that if that was a concern, then it could be fixed simply by creating a uniform retention period. The prosecutors thought that the varying periods actually hurt them the most because the retention periods are often shorter than the statute of limitations for the crimes being prosecuted. In sum, she said, the Department feels that it is premature to remove the retention requirements. There was a feeling in the Department, she said, that technology is continuing to move forward. It might be that in the near future things like thumb prints and biometrics will serve as signatures, which would solve the problem of authenticating without the need to store lots of documents. The participant stated that the Department would have presented this summary of its views in greater detail at the symposium, and that the Department is committed to working with the committee on this issue.

Judge Wedoff said that the advisory committee will await the formal comment from the Department and expressed gratitude for hearing their initial views in the interim. He noted that the prosecuting community has not had the experience of having to use scanned signatures in lieu of having an FBI expert testify to the validity of a wet signature. Whether scanned signatures would present a problem in persuading the trier of fact is not yet clear. Bankruptcy presents a special circumstance, he said. Even without the change to Rule 5005, he said, every document filed by a debtor's attorney is filed under Civil Rule 11, which requires certifying that the filing is authentic. Rule 5005 would only underline the Rule 11 requirement that the signature is authentic. So, the debtor who asserts that a signature on a filed document is not his own will have to overcome the fact that the signature appears to be his own and will have to assert that his attorney lied when the document was filed. It may be that it is not that difficult to persuade a trier of fact of the legitimacy of a debtor's signature on a bankruptcy document. He also noted that, in this regard, there may be some source of empirical evidence as to the difficulty of not having wet signatures because there is at least one jurisdiction in the country—Chicago—that does not have a requirement for retaining wet signatures for debtors' filings for several years. Any prosecutions that have taken place in that district would have taken place on the basis of the debtor's scanned copy. He stated that there are not a lot of these types of prosecutions that come up and that when they do come up, debtors do not contest the legitimacy of their signature. He noted that he had encountered situations where a United States Trustee had filed a motion to deny the debtor a discharge because the debtor supplied deliberately false information on the debtor's schedules. The debtors defend against those arguments not on the basis that they did not sign the schedules, but by arguing things like they told their attorney about the

matter at issue and the attorney did not put it in the schedule or they did not realize it was required to be put on the schedule. He stated that he had never encountered a case where the debtor denied his own signature. Judge Wedoff reported that the Department of Justice representative had agreed to look into the Department's survey results that had come from Chicago.

A member questioned whether the concern was with ensuring the integrity of the judicial process or collateral consequences and enabling future prosecutions. Judge Wedoff responded that the advisory committee's initial approach was designed to ensure the integrity of the judicial process. We want to make sure, he said, that the documents being filed are legitimately signed by the debtor. The informal feedback from the Department has to do with collateral consequences, and the concern is the potential difficulty in proving malfeasance by the debtor. The member responded that a similar concern may be true in many areas of the law and he wondered whether the rules committees' focus ought to be on the judicial process, not necessarily to make it easier or harder for the Department of Justice to prosecute crimes years later.

Judge Sutton emphasized that this is just now out for publication and the advisory committee is awaiting the formal response from the Department. He asked whether the rescheduled Evidence Rules technology symposium will include this issue. Professor Capra responded that it would not because the original idea had been to get ahead of the public comment and to get the Department's views on this issue, which has already been accomplished. While others were going to participate, they now had the ability to comment during the public comment process, which would be over by the time a new symposium could be scheduled. Professor Capra noted that one thing that came up in putting the original symposium together is that the issue is not forgery, but that the true signature might be improperly attached to the document. He said that is the issue that concerned the CM/ECF Subcommittee—someone could just scan a signature and put it on any document. Judge Wedoff said that this is why the two alternative means of assuring that the signature was authentic and was attached to the proper document were published for public comment. The Department's representative noted that the Department did not think that the option of requiring a notary's signature was a good one.

Judge Wedoff noted that it might be that bankruptcy could serve as an experiment for testing this. There are extra protections in bankruptcy, he said, like the attorney certification, that would not necessarily exist in other areas. He said that the advisory committee would have a better idea of what to do next after the comment period ends. The Department of Justice's representative noted that as a matter of evidence, the attorney's certification could not be introduced because it would be hearsay, so there would still be the need for a witness to testify to the person's signature, which might lead to calling lawyers to testify.

A member noted that the Department's concerns were about collateral prosecutions years down the road, and that he was not sure the judiciary should be too concerned about that. He said the requirements to authenticate the signature might impose a burden in current proceedings for the benefit of possible later collateral proceedings. He added that the advisory committee's concerns should be that this document in this litigation is what it purports to be. A certification by the attorney, as an officer of the court, should normally be sufficient for that purpose, he said. He said he was open to the possibility of the need for further assurances, but that the question should be focused on assuring that the document is authentic for the current litigation, not on assuring its authenticity for use in possible later collateral proceedings.

Professor Coquillette commented that the rules committees have a goal of transsubstantive rulemaking, but bankruptcy is really different in this area because of the factors mentioned by Judge Wedoff, such as attorney certification.

A member asked whether the advisory committee is studying what is going on in Chicago, where there is no requirement to retain wet signatures. Judge Wedoff reported that the Department of Justice had done a survey and was going to see if it could pull out data on prosecutions in Chicago. Judge Wedoff said that he would talk to the local United States Trustee's office to find out their experience. He noted that he is not aware of any criminal prosecutions for bankruptcy fraud in Chicago that raised a question of validity of the debtor's signature. The number of prosecutions for bankruptcy fraud is very small to begin with, he said, and then it would be a very small subset of that small subset that would involve the validity of the debtor's signature. So, he said, there would not be a huge amount of empirical data to gather on this.

Judge Sutton thanked Judge Wedoff for the summary of the issues and thanked the Department's representative for previewing the results of the Department's work on this issue.

FORMS MODERNIZATION PROJECT

Judge Wedoff provided an update on the advisory committee's Forms Modernization Project, a multi-year project to revise many of the official bankruptcy forms. The work began in 2008 and is being carried out by an ad hoc group composed of members of the advisory committee's subcommittee on forms, working with representatives of other relevant Judicial Conference committees. The goals of the project are to improve the official bankruptcy forms by providing a uniform format and using non-legal terminology, and to make the forms more accessible for data collection and reporting. The advisory committee decided to implement the modernized forms in stages in order to allow for fuller testing of the technological features and to facilitate a smoother transition. Judge Wedoff said that the first two phases of the project were

nearly complete: a small number of the modernized forms became effective on December 1, 2013, and the balance of the forms used by individual debtors is currently out for comment. Their effective date will be delayed until December 1, 2015, to coincide with the effective date of the non-individual forms. Judge Wedoff said that, surprisingly, not many comments had been received yet on the individual forms out for public comment. He said the comment period was not yet over, but that so far the revised forms seem to have been met with general acceptance.

The final batch will be non-individual forms, which were separated from individual forms because they ask for different information in many situations, and which would be expected to become effective on December 1, 2015. Judge Wedoff noted that people filling out non-individual forms are likely to have access to a more sophisticated legal understanding of the bankruptcy system. Non-individuals have to be represented by an attorney, and are usually associated with corporations or other entities that are likely to have a better understanding of the information called for on the forms.

Judge Wedoff said the agenda materials provided an example of a non-individual form to show the differences from the individual form. The non-individual form is shorter and uses more technical accounting language than the individual form, but not legalese. He said that this is a preview of what the advisory committee will likely be presenting for approval for publication at the Spring 2014 Standing Committee meeting. When this last batch of forms is approved, he said, the advisory committee will be finished with the complete package of form changes.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of December 6, 2013 (Agenda Item 9).

Amendments for Publication

FED. R. CIV. P. 82

Professor Cooper reported that the advisory committee sought approval to publish at an appropriate time changes to Rule 82 on venue for admiralty or maritime claims to reflect changes Congress had made to the venue statutes. It has long been understood that the general venue statutes do not apply to actions in which the district court exercises admiralty or maritime jurisdiction, except that the transfer provisions do apply. This proposition could become ambiguous when a case either could be brought in the admiralty or maritime jurisdiction or could be brought as an action at law under the "saving to suitors" clause. Rule 82 has addressed this problem by invoking Rule 9(h) to ensure that the Civil Rules do not appear to modify the venue rules for admiralty or

maritime actions. It provides that an admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391–1392. Rule 9(h) provides that an action cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for purposes of Rule 82. It further provides that if a claim for relief is within the admiralty or maritime jurisdiction but also is within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim.

Professor Cooper reported that legislation had added a new § 1390 to the venue statutes and repealed the former § 1392. The reference to § 1392 in current Rule 82 clearly needs to be deleted as a technical amendment, he said. The advisory committee also thought it was appropriate to add a reference to § 1390, but the reason was a little more complicated.

Professor Cooper explained that new § 1390(b) provides that the whole chapter on venue, apart from the transfer provisions, does not apply in a civil action when the district court exercises jurisdiction conferred by § 1333. Section 1333 provides jurisdiction for admiralty and maritime cases, "saving to suitors in all cases all other remedies to which they are otherwise entitled." By referring to § 1333, § 1390(b) removes application of the general venue statutes for cases that can be brought only in the admiralty or maritime jurisdiction and for cases that might have been brought in some other grant of subject-matter jurisdiction but that have been designated as admiralty or maritime claims under Rule 9(h). Since the general venue provisions do not apply when the court is exercising admiralty or maritime jurisdiction, it seems wise to add § 1390 to Rule 82. Doing so would make claims designated as admiralty or maritime claims under Rule 9(h) exempt from the general venue provisions just as those that get admiralty or maritime jurisdiction under § 1333 are so exempt. Professor Cooper noted that the advisory committee had sent the proposed revision to the Maritime Law Association, which had approved of the proposal. Nonetheless, the advisory committee recommended the proposal for publication, not for approval as a technical amendment, because of the complexity of the subject matter.

The committee, without objection and by voice vote, approved the proposed amendment to Civil Rule 82 for publication.

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

Judge Campbell reported that the advisory committee recommended for publication at a suitable time an amendment to Rule 6(d), which currently provides three extra days for responding to certain types of service, including service by electronic means. The proposed amendment would strike the reference in Rule 6(d) to Rule 5(b)(2)(E), which references electronic service. This change would remove the three extra days for electronic service. Judge Campbell said that the Appellate, Bankruptcy,

and Criminal Rules Committees were working through this same issue now with respect to parallel provisions in each set of rules. He stated that, depending on the timing of approval of similar changes to the other sets of rules, they could all be published together, or the Civil Rules change could be published first as a bellwether. He added that the advisory committee also recommended adding parenthetical explanations to Rule 6(d) that would provide brief explanations of the type of service referenced. This would prevent users from having to flip back to the cross-referenced rules to find the types of service that receive the three added days. The committee note, he said, could explain that service via CM/ECF does not constitute service under Rule 5(b)(2)(F), which covers service by other means to which the party being served has consented, and which is subject to the three-day rule.

A member asked whether the advisory committee had considered removing "consent" from the three-day rule as well. Judge Campbell responded that it had not; the issue was just brought to his attention this morning. The member noted that the three-day rule was invented for mail. He questioned the rationale behind applying it to leaving papers with the clerk when no one knows where the party is. He suggested that the advisory committee consider restricting the three-day rule to service by mail. Judge Campbell said that the advisory committee could consider this point. He added that these other methods of service have always been subject to the three-day rule and the advisory committee had not heard of a problem. Clearly, he said, electronic service no longer requires three extra days; the committee could look more broadly at whether three extra days are warranted in other circumstances. Judge Wedoff noted that there is a proposal to remove the added three days as widely as possible in the Bankruptcy Rules. Judge Sutton added that the member's point about whether three extra days were needed in other circumstances was a good one. At least, he said, the question could be raised in publication as to whether to remove other types of service from the three-day rule. He suggested that the advisory committee discuss it at their next meeting.

Judge Campbell said that the advisory committee would consider these issues and that he would want to hear the views of court clerks as well. However, he said, the advisory committee's plate was so full right now with considering the next steps for the proposals that were published last August, that he would prefer not to do that investigation now. One option, he said, would be to publish the proposal to eliminate electronic service from the three-day rule and ask for comment on whether the committee should also eliminate service by leaving the paper with the clerk or by other means consented to. Judge Sutton noted that the simplest route would be to delay publication during the investigation into the other means of service, but he saw no reason to hold off on removing the extra three days for electronic service. The member who had made the suggestion stated that he would not oppose publication, but that he thought it should ask for comment on whether the three-day rule should be abolished altogether. He noted that service by mail is now mostly limited to pro se litigants or people who do not have

computers. He said the committee could publish the proposal to remove electronic service from the three-day rule and ask for comments as to whether it would be wise to restrict it just to service by mail or to abolish it altogether.

Professor Capra noted that the idea of restricting the three-day rule came from the CM/ECF Subcommittee, and the idea was to have a uniform approach. He said all of the advisory committees would be considering this issue, except for the Evidence Rules Committee, but it was unlikely that it would be resolved by the spring.

A member asked whether there should be a separate three-day rule for pro se litigants. She noted that this is an issue primarily affecting pro se litigants, who often only receive service by mail. Judge Campbell noted that some courts do have CM/ECF for pro se litigants, so some do get instantaneous service.

Judge Sutton suggested that the committee could tentatively approve the proposal for publication with a slight variation in the committee note and questions requesting comment on whether the three-day rule should be deleted altogether or limited to service by mail. The hope, he said, would be for publication this summer. Judge Campbell agreed that this sounded like a fine approach.

The committee, without objection and by voice vote, tentatively approved the proposed amendment to Civil Rule 6(d) for publication, with a slight change in the committee note to address service under Rule 5(b)(2)(F), together with questions on whether the three-day rule should be abolished altogether or limited to service by mail. The committee will consider the final proposal again before publication, likely at its spring meeting.

Informational Items

FED. R. CIV. P. 17(c)(2)

Judge Campbell reported that the advisory committee had decided against further action on Rule 17(c)(2), which directs that "[t]he court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action." He stated that in *Powell v. Symons*, 680 F.3d 301 (3d Cir. 2012), the Third Circuit had noted the lack of guidance as to when a court should appoint a lawyer or guardian to assist an unrepresented party. He said that research had revealed that six circuits have adopted standards similar to that of the Third Circuit, which is that there is no obligation to *sua sponte* inquire into competence. Under this view, Rule 17(c)(2) only applies when there is verifiable evidence of incompetence. Judge Campbell said that all circuits agree that there is no obligation to appoint a guardian just because a party exhibits odd behavior.

The advisory committee had concluded that it should not attempt to write a rule in this area. Judge Campbell explained that if judges were obligated to inquire about a guardian whenever they saw something less than full competence, the issue would become unmanageable. Further, he said, there were no resources readily available to pay for guardians. In fact, he said, there were not usually funds available to pay for appointed lawyers either. Judge Campbell said that to write a rule that sets standards for the wide variety of circumstances in which this could arise would be nearly impossible. He added that relevant considerations would include evidence of incompetence, other resources available to assist the person, the merits of the claim, the risk to the opposing party in terms of time and delay, case management steps, and more. The advisory committee concluded that this was best left to the common law. Judge Campbell said the advisory committee felt that these issues need to be decided on a case-by-case basis and that principles will develop over time. As a result, he said the advisory committee recommended no action at this time.

A member stated that he agreed with the advisory committee's conclusion, noting that it is a case-by-case judgment call as to how to handle incompetence. Further, he said, there can be verifiable evidence of incompetence even with lawyers involved.

E-RULES

Judge Campbell reported that the advisory committee, along with the other advisory committees, is in the early stages of addressing the question of what to do with electronic communications under the rules. He said one option is to adopt a rule that says anything that can be done in writing can be done electronically, but that raises all kinds of complications. Another option is to go rule by rule and determine what to do with the issue of electronic communications.

DISCOVERY COST SHIFTING

Judge Campbell stated that the advisory committee's discovery subcommittee is in the early stages of examining the question of whether the rules should expand the circumstances in which a party requesting discovery should pay part or all of the costs of responding. He said that Congress and some bar groups had asked for a review of this issue. The proposals published for comment last August include revision of Rule 26(c) to make explicit the authority to enter a protective order that allocates the costs of responding to discovery. If this proposal is adopted, experience in administering it may provide some guidance on the question of whether more specific rule provisions may be useful. Judge Campbell said the advisory committee is in the early stages of examining this issue and will report on its progress in the future.

CACM PROJECTS

Judge Campbell reported that the Court Administration and Case Management Committee (CACM) has raised a number of topics that may lead to Civil Rules amendments, but that action on all of these topics has been deferred pending further development by CACM.

PUBLISHED PROPOSALS

Judge Campbell reported that the advisory committee had held two of the three scheduled public hearings on the proposals published for comment. He said 40 more witnesses were scheduled for an upcoming hearing in Dallas, with 29 more on the waiting list. He said the advisory committee was not scheduling another hearing because it would be too difficult to fit a fourth hearing in all of the members' schedules, and the advisory committee was committed to reading all of the written submissions. He said 405 submissions had already been received and that the committee will review them all carefully. He noted that the hearings have been very valuable and there is work to do to refine the proposals. He added that the advisory committee will decide what to do at its April meeting and will make a recommendation to the Standing Committee at its May meeting.

A participant asked if that schedule was too expedited. He asked whether the advisory committee would have enough time to do the job by the May meeting. Judge Campbell said he thought there was sufficient time. He noted that the advisory committee had been working on the published proposals for five years. He said the committee's task in April will not be gathering information, but using its best judgment in light of everything it had heard through public comment.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professors Beale and King presented the report of the advisory committee, as set forth in Judge Raggi's memorandum of December 20, 2013 (Agenda Item 5), and her supplemental memorandum of December 30, 2013.

Amendment for Final Approval

FED. R. CRIM. P. 12

Judge Sutton reported that the advisory committee had been considering amendments to FED. R. CRIM. P. 12 on motions that must be raised before trial and the consequences of late-filed motions since 2006. He provided some background on the current proposals. He noted that the Judicial Conference had approved the proposed

amendment to Rule 12 that the committee had approved at its last meeting and had transmitted it to the Supreme Court. The Court had raised several questions about the proposed amendment. Judge Sutton noted that the package of proposals, including Criminal Rule 12, had been submitted to the Court earlier than in years past to give the Court flexibility in terms of timing its review of the proposals. He noted that one benefit of submitting the proposals early is that if the Court had questions, they might be able to be addressed within the same rulemaking cycle. He stated that this was uncharted territory because in the past, when the proposals were submitted to the Court later, if the Court had questions about the proposals, it would simply recommit them to the advisory committee for further consideration. In this case, however, there might be time to propose changes and have them considered by the Court in the same rulemaking cycle.

Judge Sutton noted that the Court had raised several questions about the Rule 12 proposal. First, as transmitted to the Court, the proposed amendment had stated that the court could consider an untimely motion raising a claim of failure to state an offense (FTSO) if the defendant showed prejudice. The Court had asked to whom the required prejudice would be. Judge Sutton noted that the intent of the amendment was that it would be prejudice to the defendant. Second, the Court had asked, if the prejudice is to the defendant, how the defendant would show prejudice before trial. Judge Sutton stated that one form of prejudice is lack of notice, and another occurs if the grand jury did not properly indict under the elements of the crime. Third, the Court had noted the anomaly of having in proposed Rule 12(c)(3)(A) a required showing of "good cause" for relief from the consequences of failing to timely raise most Rule 12(b)(3) motions, while proposed Rule 12(c)(3)(B) would require prejudice for consideration of late-raised FTSO claims. Judge Sutton noted that by requiring "good cause" alone in (A) and "prejudice" alone in (B), the implication was that there was no requirement of showing "prejudice" in (A). That is not what the committee intended. On the other hand, by requiring "good cause" in (A), and only "prejudice" in (B), the committee had intended the negative implication to be that there was no requirement of showing "cause" under (B) for claims of failure to state an offense. Judge Sutton added that it was odd to have language in the same subsection that intended one negative implication but not another negative implication.

Judge Raggi then explained that the advisory committee recommended resolving the third concern raised by the Court by having one standard for relief from failure to timely raise all Rule 12(b)(3) motions — "good cause," the standard currently used in the rule. She noted that there was disquiet, especially among the members of the defense bar on the committee, about making an FTSO claim a required pre-trial motion when for so long it had been viewed as the equivalent of jurisdiction and something that could be raised at any time. She added that, faced with the fact that it is now recognized as something that should be raised early on, some members of the defense bar had suggested that the committee use a different standard for FTSO claims that would be easier to meet

than "good cause." That is why the advisory committee eventually decided to use just "prejudice" for FTSO claims, no matter what the cause for failing to raise it in timely manner. She noted that everyone recognized that it was a bit curious to have two standards for granting relief from the consequences of belatedly filing a required pretrial motion. She said that the advisory committee has now had more time to think about the proposal. The advisory committee did not want to put the Rule 12 proposal in jeopardy by insisting on two standards. The subcommittee had given it enormous thought and decided that pursuing a separate standard for FTSO claims was not worth the risk to the whole proposal and that "good cause" would be adequate for those claims.

Judge Raggi noted that no one stands convicted of a crime unless every element of the crime is proven beyond a reasonable doubt. The proposed rule addresses only those situations where even though a defendant is proven guilty beyond a reasonable doubt on every element, a failure to charge it correctly should for some reason be heard late on a showing of prejudice. But, she asked, what would the prejudice be in that situation? The advisory committee, she said, had asked what they were really putting at risk by insisting on two standards. She stated that it was now the subcommittee's view and the unanimous view of the advisory committee that it was not worthwhile to pursue a separate standard for FTSO claims, and that a "good cause" standard should apply for all late-raised claims that are not jurisdictional.

Judge Raggi noted that, at the suggestion of a member of the advisory committee, the committee note had been revised to explain that "good cause" is "a flexible standard that requires consideration of all interests in the particular case." She said that this language was in brackets, but that it would be part of the text of the committee note, if approved. This language, she said, would make clear that the court should consider cause, consider prejudice, and consider everything that might be relevant. She explained that the reason the words "cause and prejudice" were not used was to avoid confusion with the use of that phrase in the habeas corpus context. Instead, the revised note language is intended to make clear that "good cause" is a holistic inquiry. She stated that it made sense to trust the district judges to understand that.

Judge Raggi requested that the committee approve the revised proposed amendment to Rule 12 and the accompanying committee note. Finally, Judge Raggi noted that the advisory committee was unsure about whether the change could be accomplished in the current rulemaking cycle. One of the questions the advisory committee had raised, she said, was whether this was a change that would require republication. She reported that the advisory committee was not sure and had consulted with Professor Coquillette, who did not think republication was necessary. She noted that if the committee approved the revised proposal, it could potentially go back to the Court and be considered in this year's rulemaking cycle. She said it was the Standing Committee's decision whether to republish.

Professor Coquillette noted that traditionally the committee republishes when anyone would be surprised by the changes after publication and would feel that they did not have a chance to debate the proposal. But, he noted that in this case, the appropriate standard for relief from late-raised FTSO claims had been debated back and forth for the seven year history of this proposal. Everyone had notice that the appropriate standard was at issue and had a chance to comment on that during the public comment period. Judge Sutton also noted that for the past eight years or so, everyone has known that the rule was being changed to require FTSO claims to be brought before trial and the standard for raising such claims late has been on the table the whole time.

A member stated that his initial reaction was to republish, but that he realized that the Court had the authority to make changes to the committee's proposals itself. If the Court wanted to make a change and just wanted to make sure the rules committees agreed, then it would seem to be a procedure contemplated by the Rules Enabling Act. However, if the proposal is really back in the committee's court, then he said he would have to grapple with the republication question. He stated that he tended to think it is better to republish in the case of a "tie."

Judge Sutton stated that the Court could have proceeded in different ways and this is uncharted territory, but that he believed the committee should treat the proposal as if it were back in front of the committee. Another member asked what the procedure would be if the proposal had gone to a vote in the Court and been rejected. Judge Sutton responded that it depends, and that if a subsequent change by the committees had already been fully vetted, it would not be republished. The reason for republication is if the committee thinks it will get new insights or if someone will be surprised by a change. The member noted that the republication question is similar to a court amending an opinion and giving another opportunity for filing a petition for rehearing. She said that if the changes on rehearing are responsive to the comments already received, the courts usually do not give another opportunity for rehearing.

Professor Beale noted that there had been a previous occasion in which the advisory committee had made changes in response to a remand from the Supreme Court and the committee had not republished. Professor Capra noted that the Evidence Rules Committee had not republished when it made changes after a proposed amendment to Evidence Rule 804(b)(3) was returned by the Court.

Judge Raggi noted that not only had the advisory committee heard lots on this subject, but what it is proposing now is to leave the standard in the current rule in place.

Another member stated that he had no views on the need to republish, but questioned whether there is a negative implication in the new proposed committee note language describing "good cause" as a "flexible standard that requires consideration of all

interests in the particular case." The member explained that the existing standard has been interpreted to require showing, among other things, prejudice, and he wondered whether the note language could potentially be understood to relieve a defendant of having to show prejudice.

Judge Raggi responded that she could not foreclose the possibility of the language being read that way, but from a practical perspective, this is how Rule 12 now treats FTSO claims. She added that, up until the time the jury is empaneled and jeopardy attaches, Rule 12, in another section, lets a trial judge entertain any motion. She stated that presumably on appeal, circuit courts will continue to apply a plain error standard to late-raised claims. So, she said, we are talking about what the judge will entertain in the window of time between when jeopardy attaches and when judgment is entered. Judge Raggi stated that she would be surprised if trial judges would entertain such late motions without a showing of prejudice once jeopardy has attached. She added that if the committee were to see that happening in practice, it could consider amending the rule to spell out a prejudice requirement in the rule, but, given that district judges are constrained by this portion of the rule only in the time between jeopardy attaching and judgment, she thought most judges would require a showing of prejudice. The member stated that as a practical matter that is true, but that he was not sure that the new language in the note added anything. He stated that if it does not add anything substantive, it is not needed.

Judge Raggi explained that the note language explaining that "good cause" is a "flexible standard" makes one of the defense bar members supportive of the proposal, which is something that should not be discounted. She stated that all three advisory committee members who represent defendants voted for this rule in part because of this new language in the note. In fact, she said, something even more detailed had been proposed originally by a defense bar member.

Judge Sutton noted that "good cause" suggests flexibility and that to the extent some have concerns about putting FTSO defenses with all other claims required to be raised before trial, emphasizing flexibility is important to make clear that courts might treat different types of late-raised motions differently, depending on the circumstances.

Another member asked if the new note language is a comfort blanket for some members of the advisory committee. Judge Raggi agreed that it was in part, but noted that the language was derived from the fact that some members wanted to ensure that judges would understand that the seriousness of the motion should also be taken into account in deciding the consequences of a late-raised motion, while recognizing that it would not be appropriate to assume that every FTSO motion is more important than every multiplicity motion, for example.

A member questioned whether there are examples of a change like this going through without being republished. Judge Sutton responded that there were, both with respect to Criminal Rules proposals and Evidence Rules proposals, but the fact that there were other instances in which the committee had made changes after remand from the Supreme Court without republishing does not mean that there should never be republication in response to comments from the Court. But here, he noted, the Rule 12 proposed changes seemed more like the instances in which the committees had not republished. Judge Raggi noted that the advisory committee had already made changes to the Rule 12 proposal after publication without republishing. She added that the advisory committee had received many comments from the defense bar on the published proposals and that while there is the possibility that someone might argue that the last version they saw had a separate standard for FTSO claims, she was not sure that the committee was ever obliged to have two different standards as opposed to the one that is there. The cost of republishing, she noted, would be putting off the effective date of the rule change by another two years. She was comforted by the fact that not one of the defense members of the advisory committee had urged republication.

Judge Sutton noted that the advisory committee had made more substantive changes after publication and before sending it back to the Standing Committee than the current proposed change. Judge Raggi agreed, but noted that the changes after public comment had been made in response to comments received during the public comment period. Professor Coquillette noted that the history of this rule proposal did not require republication here, where the defense bar members of the advisory committee did not have concerns and the issues have been fully discussed. He added that none of the defense bar members of the advisory committee had argued that this change would be a surprise.

A member moved to approve the proposed amendment to Rule 12. The member who had questioned the note language seconded the motion, explaining that as a practical matter, district judges will have no problem applying the amendment and note language. The committee unanimously approved the proposed amendment without republication. Judge Sutton noted that if the proposal is approved in the rest of the Rules Enabling Act process, the committees will closely monitor what happens with FTSO defenses and the "good cause" standard. Judge Sutton thanked Professors Beale and King for their hard work on this proposal.

The committee, without objection and by voice vote, approved the proposed amendment to Criminal Rule 12 for transmission to the Judicial Conference for final approval.

Informational Items

Judge Raggi noted that the advisory committee did not meet in the fall because of the lapse in appropriations due to the government shutdown, but that the advisory committee had a full agenda for its spring meeting.

FED. R. CRIM. P. 4

Judge Raggi reported that the advisory committee was considering the Department of Justice's request to amend Rule 4, which deals with service of summons. The Department had suggested that the rule is deficient for serving foreign organizations who have no agent or place of business in the United States, but whose conduct has criminal consequences in the United States. The current rule allows serving organizations at their last known mailing address in the United States, but these foreign entities do not have any such address. Until there is an appearance by the foreign entity, it cannot be prosecuted, but the Department asserted that if there was a way to properly serve such entities, many of them would enter an appearance rather than risk consequences like forfeiture. Judge Raggi noted that the request appeared to be driven by a desire to have a means of service that would either get foreign entities to respond or would permit the Department to begin forfeiture proceedings if the foreign entity did not respond. Judge Raggi noted that whether it is appropriate for forfeiture proceedings to be instituted based on service is a matter for future litigation.

As to what methods a proposed rule might approve for service, Judge Raggi reported that it is clear that the advisory committee will recommend that if there is an applicable treaty that provides for service in a particular manner, such service will suffice. Similarly, she said, compliance with an agreement with a foreign country on the proper means of service will also suffice. Judge Raggi added that the Department also seeks to have a "catch-all" provision that anything that a judge signs off on will suffice, but some members of the advisory committee were uncomfortable with that because a judge might order service by a U.S. official that would violate the foreign country's laws. She noted that if the object of service is a person, it does not matter how he or she got before the court. She said that the proposal has moved towards including a catch-all provision that would instruct the Department to serve in whatever manner it thinks is reasonable and then the court can deal with the issue of due process once the defendant enters an appearance.

The proposed amendment would ensure organizations that are committing domestic offenses are not able to avoid liability through the expedient of declining to maintain an agent, place of business, or mailing address within the United States. A subcommittee has been assigned to consider the proposal and has approved a proposed amendment for discussion by the full advisory committee. The advisory committee will

take it up at its April meeting.

FED. R. CRIM. P. 41

Judge Raggi reported that the Department has also submitted a proposal to amend Rule 41 to enlarge the territorial limits for warrants to search electronic storage media and electronically stored information. The purpose of the proposed amendment is to enable law enforcement to investigate and prosecute botnets and crimes involving Internet anonymizing technologies. Rule 41(b) does not directly address the circumstances that arise when officers seek to execute search warrants, via remote access, over modern communications networks such as the Internet. The proposed amendment is intended to address two increasingly common situations: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown, and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts. The Department reports problems with determining the district in which to seek the warrant when it does not know where the computer to be searched is located.

The proposed amendment would authorize a court in a district where activities related to a crime have occurred to issue a warrant to be executed by remote access for electronic storage media and electronically stored information whether located within or outside the district. Judge Raggi noted that there were potential concerns about the particularity requirements of warrants when the Department does not know exactly what it is searching. Thus, the advisory committee had asked the Department to draft some warrants of the sort that it thinks might need judicial authorization. Judge Raggi added that once the advisory committee sees examples of the types of warrants that might be presented to federal judges, it will have a better idea of how to proceed. She said that the proposal has been referred to a subcommittee, which is expected to report at the advisory committee's April meeting.

OTHER PROPOSALS

Judge Raggi noted that other proposals under consideration were in the agenda materials and did not need an oral report at this time. One such proposal involved the question of whether there is any need to clarify Rule 53, which prohibits "broadcasting" judicial proceedings in order to clarify the rule's application to tweets from the courtroom. Another requests the committee to consider amending Rules 11 and 32 to make presentence reports available in advance of a guilty plea so that all parties will be aware of the potential sentence. Another proposal under consideration would amend Rule 45(c) to eliminate the three extra days currently provided to respond when service is made by electronic means.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum of December 2, 2013 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Informational Items

Judge Fitzwater reported that the proposed amendment to Rule 803(10), the hearsay exception for the absence of public records, which the Standing Committee approved in June 2012, took effect on December 1, 2013.

He noted that four proposals from the advisory committee were pending before the Supreme Court. The proposed amendments to Rules 801(d)(1)(B) and 803(6)–(8) had been approved by the Standing Committee in June 2013, were approved by the Judicial Conference on the consent calendar at its September 2013 meeting, and had been transmitted to the Supreme Court for consideration.

Judge Fitzwater reported that the Fall 2013 meeting, which would have included a technology symposium and which had been cancelled due to the government shutdown, was rescheduled at the same location for Spring 2014. He said the Department of Justice would not be presenting on the electronic signature issue, as had been planned for the original symposium, although the advisory committee would be willing to host them if continuing dialogue would be desirable. Judge Sutton commented that the advisory committee should think about whether it would be useful to bring people together to discuss the electronic signature issue. Judge Fitzwater noted that it does dovetail with the technology symposium that the advisory committee is planning in conjunction with its next meeting. He added that the symposium might examine things like the ancient document exception to the hearsay rule, which may seem anachronistic in the current era of data storage.

Judge Sutton noted that Professor Capra recently appeared on the cover of the *Fordham Lawyer*, a magazine published by the Fordham Law School, and that the complimentary article featured Professor Capra's work for the rules committees.

PANEL DISCUSSION ON THE POLITICAL AND PROFESSIONAL CONTEXT OF RULEMAKING

Professor Coquillette presided over a panel discussion on the political and professional context of rulemaking. The other panelists included Judge Huff, a former committee member; Judge Wood, a former committee member; Judge Rosenthal, former chair of the Standing and Civil Rules Committees; Judge Anthony Scirica (by phone),

former chair of the committee and former chair of the Executive Committee of the Judicial Conference; and Peter G. McCabe, former secretary to the committee. Professor Coquillette introduced each member and stated their relevant background.

PROFESSOR COQUILLETTE

Professor Coquillette provided background on opposition to the rules committees' work. He noted that historically there have been three groups who are suspicious about the rules committees' work, including the traditional formalists, who believed that the judge's role is to decide cases, not to do anything prospective; the rule skeptics, who thought that uniformity through codification, with transsubstantive rules that apply in all types of cases, was not practical; and the political populists, who believe that rulemaking ought to be done by elected representatives of the people. Professor Coquillette noted that while the rules committees could never please these three groups, they should continue to be sensitive to their concerns.

PETER G. MCCABE

Mr. McCabe provided background on the history of the Rules Enabling Act. He discussed changes the rules committees made over time to make the process more open, transparent, and easily accessible. Mr. McCabe also discussed the committees' efforts to make sure there was a strong empirical basis for amendments. He also emphasized the committees' efforts to ensure evenhandedness and the nonpolitical nature of their role. To get a wide range of views, the rules committees take measures such as inviting members of the bar to come to meetings, conducting surveys and miniconferences, and reaching out to congressional members and staff to inform them about the rulemaking process and about pending rule amendments. Mr. McCabe concluded that the rulemaking system is healthy, effective, and credible, but that the challenge of balancing authority between the judicial and legislative branches will continue to exist and will be an area that the committees will continuously need to focus their attention.

JUDGE ANTHONY J. SCIRICA

Judge Scirica spoke about his experience with the Private Securities Litigation Reform Act and the Class Action Fairness Act and their impact on the rules committees' work. He emphasized the benefits of delegating rulemaking authority to the judiciary through the careful process set out in the Rules Enabling Act, but noted that substantive matters are best addressed by Congress.

JUDGE LEE H. ROSENTHAL

Judge Rosenthal discussed how the rules committees can engage with Congress without becoming politicized. She emphasized the importance of effective and energetic

explanation of the careful, transparent, open, and deliberate nature of the Rules Enabling Act and its process, as well as clear explanation of the purpose behind the delegation of authority under that Act. She noted that the rules committees have worked closely with Congress on a number of issues, including the enactment of Evidence Rule 502 and statutory changes to correspond to recent changes to the Appellate Rules and to the recent Time Computation Project. She concluded that the rules committees need to continue to be vigilant in explaining the importance of the rulemaking process under the Rules Enabling Act and in informing Congress of upcoming changes, while remaining distant from political pressures.

JUDGE MARILYN L. HUFF

Judge Huff discussed her experience with the Time Computation Project, which went through each set of rules to make counting time uniform and easier to apply. She said that as part of the project, the committees had examined the federal statutes that would be affected by such changes and that Congress ultimately amended 29 statutes in conjunction with the project. Judge Huff also discussed her experience as the liaison to the Evidence Rules Committee and as a member of the Standing Committee's Style Subcommittee during the project to restyle the Evidence Rules. Finally, Judge Huff discussed her experience serving on the Standing Committee's Forms Subcommittee. She concluded that these examples show that, consistent with the Rules Enabling Act process, there are often workable solutions within the judiciary, with congressional involvement, to some concerns about the litigation process.

JUDGE DIANE P. WOOD

Judge Wood discussed the triggers for rules committee action, and said triggers include legislative changes; Supreme Court decisions; suggestions from judges, academics, and empirical researchers; and examination of state court practices. She discussed instances in which the rules committees should be skeptical of these triggers. She also introduced the idea of a qualification to the generally accepted norm that the rules are transsubstantive, noting that the committees aim for more than transsubstantivity and seek to make rules that have a broad generality that can be applied in every case in federal court. She concluded that the committees now have the challenge of dealing with problems that may change more quickly than the rulemaking process and that the committees may need another model for that type of problem. She noted that some problems are best addressed outside the rulemaking arena.

REPORT OF THE CM/ECF SUBCOMMITTEE

Professor Capra reported on the work of the CM/ECF Subcommittee, as set out in Judge Michael Chagares's memorandum and attachments of December 4, 2013 (Agenda Item 7). He said there are five main items that the subcommittee has been working on,

and that its work would probably move forward in stages. He added that the reporters to the advisory committees had done outstanding work for the subcommittee.

The first issue the subcommittee was working on was electronic signatures, as explained during the Bankruptcy Rules Committee's report. Professor Capra explained that if the Bankruptcy Rules proposal works, other committees will likely follow with similar proposals, and the CM/ECF Subcommittee will oversee the process. He said that the problem the rule is trying to deal with is not forgery, but using a single signature line and putting it on multiple documents.

Professor Capra said that the second step the subcommittee took was for the reporters to look through their respective rules to see where use of CM/ECF may conflict with existing language. He said addressing all of the items found would be a daunting task. For example, he said, there were dozens of places in the Criminal and Bankruptcy Rules that may not accommodate use of CM/ECF.

The third matter the subcommittee looked at was abrogation of the three-day rule. Professor Capra said that he would take the comments received today on the Civil Rules proposal back to the subcommittee. He added that he thought it was likely that the committees could coordinate a uniform committee note and that the goal would be for the rules to be changed in as uniform a manner as possible. He added that the reporters had been working hard on this issue.

Fourth, Professor Capra said that the subcommittee was looking at the proposal for a civil rule requiring electronic filing. He said he thought this was possibly feasible, but that there are issues about what the exceptions should be. He added that one reason it may be desirable to have a requirement of electronic filing in the federal rules is that the local rules already require it almost universally. On the other hand, he said, the local rules have a lot of exceptions and are not uniform in terms of the exceptions, and that is something that needs to be worked through.

Professor Capra reported that the final issue the subcommittee was considering was whether it would be useful and feasible to have a universal rule that would essentially say that "paper equals electrons." The subcommittee is examining whether, instead of going through all of the rules and changing each rule to accommodate electronic filing and information, there is the possibility of a universal fix. Professor Capra noted that there is a proposed template for such an approach in the agenda materials. The first part of the template would say, "In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information." Professor Capra said that this tracks what the Evidence Rules have done, but that there can be problems with this approach. For example, he said, the Criminal Rules would need carve-outs. The second part of the template would state: "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]." He said that there were still a lot of issues and potential problems to think through, including the need for exceptions, as to whether such an approach would work.

Professor Capra said that the subcommittee was working with CACM because the "CM/ECF Next Gen" was being overseen by that committee and it would clearly have implications for the subcommittee's work. He added that the committee does not yet know what Next Gen will do and there is a concern in the subcommittee that the rules committees should be cautious about getting too far out in advance of a problem that does not yet exist. He said that to try to change the rules in advance of Next Gen, when Next Gen might not be what the committees think it is, could create problems. He said that the subcommittee is therefore proceeding with caution.

A member noted that Next Gen is behind schedule and it might be at least two years away from completion. Professor Capra added that there are CACM members on the subcommittee and CACM staff in the Administrative Office who are helping with the subcommittee's work as well.

NEXT COMMITTEE MEETING

Judge Sutton concluded the meeting by thanking the AO staff for the wonderful job in planning the meeting and coordinating all of the logistics. The committee will hold its next meeting on May 29–30, 2014, in Washington, D.C.

Respectfully submitted,

Jonathan C. Rose
Secretary

Andrea L. Kuperman
Chief Counsel

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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

* 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 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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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

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

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

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.~~

* * * * *

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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TAB 2E

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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.

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 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.

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 4**

DATE: **September 20, 2013**

I. Introduction

As explained in detail in an October 2012 letter from Assistant Attorney General Lanny Breuer (included infra), the Department of Justice believes that Rule 4 of the Federal Rules of Criminal Procedure now poses an obstacle to the prosecution of foreign corporations that have committed offenses that may be punished in the United States, but that cannot be served because they have no last known address or principal place of business in the United States. General Breuer's letter brings to the Committee's attention a "new reality": the truly global economy reliant on electronic communications, in which organizations without an office or agent in the United States can readily conduct both real and virtual activities here. General Breuer argues that this new reality has created a "growing class of organizations, particularly foreign corporations" that have gained "'an undue advantage' over the government relating to the initiation of criminal proceedings."

To address this problem, the Department of Justice recommended amendments to Rule 4 that would (1) remove the requirement that a copy of the summons be sent to the organization's last known mailing address within the district or principal place of business within the United States, and (2) designate the means to serve a summons upon an organization located outside the United States.

After a brief discussion of the Department's proposal at the Committee's April meeting, Judge Raggi appointed a subcommittee to study the proposal and report at the October meeting. Judge David Lawson chairs the Rule 4 Subcommittee, and Judge Rice, Mr. Siffert, and representatives of the Department of Justice serve as members.

II. The Subcommittee's Deliberations and Recommendations

The Subcommittee held three teleconferences to discuss the Department's proposal, and it unanimously recommends that Rule 4 be amended. The Subcommittee's proposal makes the following changes:

(1) The proposed amendment specifies 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, the proposed amendment:

- eliminates 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

- requires mailing when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the organization, but the mailing need not be to an address within a judicial district.

(3) The amendment also authorizes 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.

This memorandum discusses the key elements of the Subcommittee's proposal.

The text of the amendment and note appear at the end of the report,[1] followed by the original proposal from the Department of Justice.

III. The Elements of the Subcommittee's Proposal

A. Authorizing the court to impose sanctions if an organizational defendant fails to appear

As a preliminary matter, the Subcommittee identified a gap in the current rule; its proposal remedies that gap. Rule 4(a) presently provides that both individual and organizational defendants may be served with a summons. Although the rule provides for the issuance of an arrest warrant if an individual defendant fails to appear in response to a summons, it is silent on the procedure to be followed if an organizational defendant fails to appear. The Subcommittee concluded that this omission should be addressed, and it proposes that the following sentence be added to the end of paragraph (a):

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

[1]As discussed on the last page of this memo, style changes were recommended between the time the Subcommittee approved the proposed change to the text of the rule and the preparation of this report. The Subcommittee did not have a chance to discuss whether those recommended changes were substantive or merely stylistic. Therefore two versions of the proposed amendment that appear at the end of the report - with and without style changes.

There is little precedent defining the actions that a court may take if an organizational defendant fails to appear. The Department of Justice emphasized that such cases have rarely arisen, and it anticipates that would continue to be the case if the proposed amendment is adopted. Foreign as well as domestic corporations have many incentives to appear and resolve criminal charges once service is made.

Responding to concerns about whether any action could be taken against a foreign organization that failed to appear after service, the Department of Justice also provided the Subcommittee with a memorandum[2] in which it identified limited authority for the following steps that a court might take if an entity failed to appear after service of a summons:

- a contempt order that might subject an organizational defendant to fines, forfeitures or other penalties;

- injunctive relief (such as an order preventing further disclosure of a trade secret);

- appointment of counsel who would then appear for the organization; and

- the imposition of penalties on the organization in a parallel civil action.

Additionally, the Department cited authority for various extrajudicial actions that might be taken by the executive against an entity that had been served but failed to appear. These include suspension or debarment from eligibility for government contracts or federally funded programs, assertion of the fugitive disentitlement doctrine in civil forfeiture proceedings, and imposition of economic and trade sanctions.[3]

Given the paucity of available authority, the Subcommittee concluded it would be premature to attempt any determination of the scope of the courts' authority to employ the sanctions identified by the government. The Subcommittee's proposal does not depend upon or endorse the various sanctions identified by the Department of Justice. By stating that the court has the authority to "take any action authorized by law" the amendment provides a framework for the courts to evaluate the scope of that authority if and when cases arise in which organizational defendants fail to appear after being served.

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[2]See Memorandum from Jonathan J. Wroblewski and Kathleen A. Felton to Judge David M. Lawson, August 23, 2013, at 3-5. This memorandum is reprinted infra, following the October 2012 Letter from Assistant Attorney General Lanny Breuer.

[3]Memorandum from Jonathan J. Wroblewski and Kathleen A. Felton to Judge David M. Lawson, August 23, 2013, at 5-6.

B. Restricting the Mailing Requirement When Delivery Is Made in the United States

The Department's original memorandum identified the current mailing requirement in Rule 4(c)(3)(C) as a major impediment to prosecution of foreign entities, and the Subcommittee agreed that the current requirement is unnecessarily overbroad. At present, in every case involving an organizational defendant, the rule requires not only service on an agent but also mailing to the entity which must be made "to the organization's last known address within the district or its principal place of business elsewhere in the United States." Accordingly, it is not possible to serve a foreign entity – even one that conducts both real and virtual business within the United States – that has neither a principal place of business nor a known address within the district of prosecution.

In contrast, the mailing requirement in Civil Rule 4(h) is much more limited. Mailing is not required if service is made on an officer or a managing or general agent. Mailing is required if service is made on an agent authorized by statute to receive service, but only if the authorizing statute itself requires mailing. Finally, when mailing is required, the civil rule does not include the restriction that the mailing may be made only to a principal place of business within the United States or a known address within the district.

The Subcommittee's proposed amendment follows the approach of the Civil Rules: it restricts the mailing requirement to cases in which service has been made on a statutorily appointed agent when the statute itself requires a mailing as well as personal service. Moreover, the proposed amendment does not restrict the address to which the mailing may be made.

C. Providing for Service of Organizational Defendants Outside the United States

At present, the Federal Rules of Criminal Procedure provides for service only within a judicial district of the United States. Fed. R. Crim. P. 4(c)(2), which governs the location of service, states that a summons may be served "within the jurisdiction of the United States." In contrast, Fed. R. Civ. P. 4(f) authorizes service on individual defendants in a foreign country, and Fed. R. Civ. P. 4(h)(2) allows service on organizational defendants as provided by Rule 4(f).[4]

Given the increasing number of criminal prosecutions involving foreign entities, the Subcommittee agreed that it would be appropriate for the Federal Rules of Criminal Procedure to provide a mechanism for foreign service on an organization, and it proposes the following addition to Rule 4(c)(2), which governs the location of service:

[4]Fed. R. Civ. P. 4(h)(2) provides, however, that service on an entity may not be made under Rule 4(f)(2)(c)(i) (delivery "to the individual personally").

A summons may also be served at a place not within a judicial district of the United States [under subdivision (c)(D)].[5]

This general provision is implemented in the Subcommittee's proposed amendment to Rule 4(c)(3), which governs the manner of service.

The Subcommittee's proposal – like Fed. R. Civ. P. 4 – enumerates a variety of methods of proper service but also provides a more general provision authorizing other methods. In drafting the proposal, the Subcommittee was mindful of several overriding principles. First, the function of rules governing service is providing notice, which is a fundamental requirement of Due Process. Accordingly, the means of service authorized by the rule must be "reasonably calculated to give notice."[6] Second, the public has an interest in the enforcement of the criminal laws, and rules governing service should provide an efficient and effective means for initiating criminal proceedings. Procedural rules imposing unnecessary restrictions on service of process may frustrate the public's interest in the enforcement of the federal criminal laws. Finally, service of process outside the United States requires consideration of both the principles of international law and the respective roles of the executive and judicial branches. As discussed below, the proposed amendment was crafted with these considerations in mind.

1. Enumerated examples of authorized means of service

Proposed subdivision (c)(3)(D) authorizes several forms of service "on an organization not within a judicial district of the United States"[7]:

Three forms of service are listed in (c)(3)(D)(i) and (ii)(a) and (b):

- service pursuant to the law of the foreign jurisdiction by delivery of a copy of the summons to "an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process";

[5]In preparing this report, the Reporters noted that the language adopted by the Subcommittee might be read to apply to service on individual defendants under (c)(3)(B). If the Committee shares this concern, the bracketed language could be added to avoid that possibility.

[6]This phrase, which appears in Fed. R. Civ. P. 4(f)(1) and (2), is drawn from the Supreme Court's analysis in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950).

[7] Fed. R. Civ. P. 4(h) provides for service on a corporation "at a place not within any judicial district of the United States," but the Subcommittee deliberately omitted the reference to service *at a place* outside a judicial district of the United States. Thus the new provision authorizes additional means of service on *organizations* that are not within a judicial district of the United States. Although the authorized means for such service would generally occur outside any U.S. judicial district, in some cases service by stipulation or service under the general catch-all provision might occur within a U.S. judicial district.

- service by stipulated means; and

- service undertaken by a foreign authority "in response to a letter rogatory, a letter of request, or a request submitted under an applicable international agreement."

The Subcommittee viewed these three methods as uncontroversial. They are designed to provide notice to the organizational defendant, they are not unduly burdensome, they pose no special concerns under the principles of international law, and they raise no special issues of institutional competence or separation of powers.

Proposed (c)(3)(D)(i) allowing service authorized by the law of the foreign jurisdiction on an officer, managing or general agent, or an agent appointed or recognized by law to receive service of process parallels the existing provision, Fed. R. Crim. P. 4(c)(3)(C) permitting domestic service on the officers or specified agent of the entity. The remaining means of service are introduced by the express requirement in (c)(3)(D)(ii) that they must "give[] notice." Service by stipulation under subdivision (c)(3)(D)(ii)(a) would guarantee notice to the entity. Subdivision (c)(3)(D)(ii)(b) authorizes service undertaken by the foreign authority in response to letters rogatory, letters of request, and requests submitted under an applicable international agreement. Using these well-developed procedures should ordinarily provide notice to an organizational defendant. However, if notice has not been afforded in an individual case, the Committee Note recognizes that the defendant may later choose to raise a challenge on this basis.

Finally, the Subcommittee concluded that the listed means of service posed neither concerns under the principles of international law nor institutional concerns. Service in a manner authorized by the foreign jurisdiction's law is respectful of that nation's sovereignty. The same is true of service that the foreign sovereign itself undertakes in response to the various types of requests identified in proposed subdivision (c)(3)(D)(ii)(b). Moreover, as described more fully in memoranda prepared for the Subcommittee by the Department of Justice, the Criminal Division's Office of International Affairs will be involved in assisting individual prosecutors in determining which means of service will be most effective in individual cases, and in consulting with the Department of State regarding any special concerns.

2. Other forms of service not prohibited by an applicable international agreement

In addition to the three enumerated means of service in proposed (c)(3)(D)(i) and (ii)(a) and (b), the proposal contains an open-ended provision in (c)(3)(D)(ii)(c) that allows service by other means that give notice and are not prohibited by an applicable international agreement. This provision provides flexibility for cases in which service cannot be made (or made without undue difficulty) by the enumerated means.[8] It imposes only two criteria: the means chosen must (1) give

[8]The Subcommittee considered and rejected a requirement that would permit service under (D)(ii)(c) only when service in a manner authorized by the foreign jurisdiction's law, undertaken by the foreign authority, or by stipulation was unavailable. The Subcommittee concluded that it

notice to the defendant and (2) not be prohibited by an applicable international agreement. (As explained in the Committee note, this refers to an agreement that has been ratified by the United States and the foreign jurisdiction and is in force.)

The Subcommittee drew this language from Fed. R. Civ. P. 4(f)(3), which provides for foreign service on an organization, but rejected an approach that would have more closely tracked that provision word for word. Civil Rule 4(f)(3) authorizes service "by other means not prohibited by international agreement, as the court orders."(emphasis added). Although there might be advantages to requiring judicial approval before service of a criminal summons could be made in a foreign country by other unspecified means, the Subcommittee concluded that this procedure raised difficult questions of international law and the institutional roles of the courts and the executive branch.

These issues would be raised most starkly by a request for judicial approval of service of criminal process in a foreign country without its consent or cooperation, and in violation of its laws. Fed. R. Civ. P. 4(f)(3) appears to permit such a request.[9] Although the records of the approval of that provision are sparse, it appeared to have generated significant concern for that reason. The Committee Note accompanying the change makes an oblique reference to the issue. It states (emphasis added):

> Inasmuch as our Constitution requires that reasonable notice be given, an earnest effort should be made to devise a method of communication that is consistent with due process and minimizes offense to foreign law.

Service of a criminal summons in the territory of another nation without its consent risks not only offense to the law of that nation, but also a violation of international law. It is "a general rule" of international law that "states do not seek to exercise civil or criminal jurisdiction over foreign nationals in foreign states."[10] States may proscribe extraterritorial conduct in certain instances, such as when they prohibit conduct that targets or substantially affects the legislating state.[11] But when

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would be unnecessarily burdensome to require the government to demonstrate that it had tried and failed to effect service in these ways.

[9]Where there is no internationally agreed means of service prescribed, Fed. R. Civ. P. 4(f)(2) then authorizes service by various means, and Fed. R. Civ. P. 4(f)(3) provides for service by "any other means not prohibited by international agreement, as the court orders." Although Fed. R. Civ. P. (f)(2)(C) precludes service "prohibited by the foreign country's law," that restriction is absent from Fed. R. Civ. P. 4(f)(3).

[10]1 OPPENHEIM'S INTERNATIONAL LAW § 139, at 466 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1996) ("OPPENHEIM").

[11]See D.P. CONNELL, INTERNATIONAL LAW 658-59 (1965) ("O'CONNELL"); see generally OPPENHEIM § § 136-40, at 456-79.

it comes to enforcement of the law, "a State may not act within the territory of another State."[12] Thus, "[s]o long as they avoid falling within the territorial jurisdiction of the prescribing State," foreign nationals "remain immune from its enforcement measures."[13] Professor Brownlie of Oxford, in his treatise on international law, states that the international law prohibition on extraterritorial enforcement is broad and it reaches the precise action at issue here: the service of a summons in a foreign country. "Persons may not be arrested, a summons may not be served, police or tax investigations may not be mounted, orders for production of documents may not be executed, on the territory of another state, except under the terms of a treaty or other consent given." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 306 (6th ed. 2003) (emphasis added). In context, the concluding reference to a "treaty" and "consent" appears to mean a treaty entered into or consent given by the foreign jurisdiction.

The Department of Justice noted that any request for approval of service in a foreign nation without its cooperation or consent would be sought only as a last resort, and only after the Criminal Division's Office of International Affairs and representatives of the Department of State had considered the foreign policy and reciprocity implications of such an action. The Department also stressed the Executive Branch's primacy in foreign relations and its obligation to ensure that the laws are faithfully executed. Finally, the Department noted that the federal courts are not deprived of jurisdiction to try a defendant whose presence before the court was procured by illegal means. This principle was reaffirmed in United States v. Alvarez-Machain, 504 U.S. 655 (1992) (holding that abduction of defendant in Mexico in violation of extradition treaty did not deprive court of jurisdiction).

The Subcommittee noted that in cases such as Alvarez-Machain the defendant has been brought before the court by the executive without any prior approval by the judiciary. Under a rule tracking Fed. R. Civ. P. 4(f)(3), in contrast, a court might be asked to give advance approval of service contrary to the law of another state and in violation of international law. Subcommittee members expressed concern that it was inappropriate to place the court in this position, and also questioned whether a rule expressly authorizing an act that arguably violates international law and the law of a foreign country might go beyond the authority granted by the Rules Enabling Act.

Recognizing that Civil Rule 4(f)(3) authorizes the court to order service that may violate the law of a foreign country as long as it is not prohibited by international agreement, the Subcommittee nevertheless decided to omit a requirement of prior judicial approval from its proposed amendment to Criminal Rule 4. In cases that fall under proposed Fed. R. Crim. P. 4(c)(3)(D)(ii)(c), the executive alone will make the determination whether this is the rare case in which the public interest in prosecution outweighs the costs of violating provisions of foreign law or general principles of international law. This provides both notice and the necessary flexibility to achieve service in an

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[12] O'CONNELL at 659.

[13] Id.; see OPPENHEIM at 467 ("states cannot, of course, exercise [criminal] jurisdiction as long as the foreigner concerned remains outside their territory").

efficient and effective manner while respecting the respective institutional roles of the courts and the executive branch.

The Subcommittee noted that eliminating a requirement for prior judicial approval may also be preferable from the defense perspective. A member of the Subcommittee noted that prior judicial approval would place a defendant later challenging the effectiveness of the notice provided in a difficult position. In effect, the defendant would be asking the judge who approved the service to change her mind, rather than to consider a question of first impression.

During the discussion of the possibility that service might be made in another country without its consent, some members of the Subcommittee expressed support for a procedure that would require prior approval of the Attorney General or the Deputy Attorney General. Although it might be desirable for review to occur at the highest levels of the Department of Justice, it is doubtful whether that requirement could be imposed by the Federal Rules of Criminal Procedure. A similar issue was raised during the consideration of the amendment to Rule 15(c)(3) permitting depositions to be taken in foreign countries without the defendant being physically present. In that instance, the Committee concluded that although Congress may require the approval of designated officials, the Rules of Criminal Procedure could not dictate the internal approval process within the Department of Justice.

Style changes to the proposed amendment were received after the Subcommittee completed its deliberations. Professor Kimble recommended omitting the word "applicable" from the phrase "applicable international agreement" in proposed (c)(3)(D)(ii)(c). The reporters believe this change is substantive and therefore have left the word "applicable" in both versions of the proposed amendment attached. The remaining style recommendations affecting (c)(3)(D)(ii) are raised for full Committee discussion.

To facilitate consideration of whether the remaining style recommendations would change the meaning of the proposed amendment, two versions of the proposed amendment are provided, one that incorporates these recommended style changes, and an alternative version that does not.

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TAB 3B

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RULE 4 WITH PROPOSED STYLE CHANGES

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 an organizational defendant fails to appear in response to a summons, a judge may take any action authorized by 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 may also be served at a place not within a judicial district of the United States [under subdivision (c)(D)].[14]

(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

[14]The Subcommittee has not considered the bracketed language here or in the Committee Note. In preparing this report, the Reporters noted that the language approved by the Subcommittee might be read to permit service on individual defendants outside of the United States under (c)(3)(B). If the Committee shares this concern, the bracketed language would address it.

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 another agent appointed or legally authorized to receive service of process; or

(ii) by any other means that gives notice, including one [a means]:

(a) that the parties stipulate to;

(b) that a foreign authority undertakes in response to a letter rogatory, a letter of request, or a request submitted under an applicable international agreement; or

(c) that is not prohibited 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 and 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 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 of 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 of other permissible means of giving service on organizations outside the United States, all of which must be carried out in a manner that "give[s] notice."

Paragraph (a) allows service by a means stipulated by the parties.

Paragraph (b) authorizes service 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 not prohibited 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 U.S. and the foreign jurisdiction and is in force.

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[VERSION REJECTING STYLE CHANGES TO (D)(ii)]

Rule 4. Arrest Warrant or Summons on a Complaint

* * *

(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 another agent appointed or legally authorized to receive service of process; or

(ii) by other means that give notice, including:

(a) a stipulation between the parties;

(b) a means that a foreign authority undertakes in response to a letter rogatory, a letter of request, or a request submitted under an applicable international agreement; or

(c) a means not prohibited by an applicable international agreement.

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TAB 3D

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U.S. Department of Justice

Criminal Division

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

October 25, 2012

The Honorable Reena Raggi
Chair, Advisory Committee on the Criminal Rules
704S United States Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201-1818

Dear Judge Raggi,

The Department of Justice recommends amendments to Rule 4 of the Federal Rules of Criminal Procedure to permit the effective service of a summons on a foreign organization that has no agent or principal place of business within the United States. We view the proposed amendments to be necessary in order to effectively prosecute foreign organizations that engage in violations of domestic criminal law.

First, we recommend that Rule 4 be amended to remove the requirement that a copy of the summons be sent to the organization's last known mailing address within the district or principal place of business within the United States. Second, we recommend that Rule 4 be amended to provide the means to serve a summons upon an organization located outside the United States. The proposed amendments are necessary to ensure that organizations that commit domestic offenses are not able to avoid liability through the simple expedients of declining to maintain an agent, place of business and mailing address within the United States.

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When a person located abroad violates the laws of the United States, that person may be held criminally liable despite the fact the person has never set foot in the United States. *Ford v. United States*, 273 U.S. 593, 623 (1927) (exercising jurisdiction and affirming convictions of British citizens for conspiring to import liquor into United States, where some conspirators had not entered the United States); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 922 (D.C. Cir. 1974) ("[W]hen a malefactor in State *A* shoots a victim across the border in State *B*, State *B* can proscribe the harmful conduct.").

Organizations, such as foreign corporations, are not excepted from this principle. *See, e.g., United States v. Phillip Morris USA, Inc.*, 566 F.3d 1095, 1130-31 (D.C. Cir. 2009) (tobacco company conducted secret nicotine research abroad and participated in international organizations instrumental to perpetuation of wide-scale fraud within the United States);

United States v. Inco Bank & Trust Corp., 845 F.2d 919, 920-21 (11th Cir. 1988) (citing *Ford*). *See also* Restatement (Second) of Conflict of Laws § 50 (1971) ("A state has power to exercise judicial jurisdiction over a foreign corporation which causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of these effects and of the corporation's relationship to the state makes the exercise of such jurisdiction unreasonable."). Nor is there any good reason to create such an exception; organizations, by their very nature, may facilitate collective criminal action among individuals, thereby posing a greater threat than a lone actor. Indeed, the Supreme Court has explained that there is a compelling need to punish the sort of collective criminal action an organization may foster:

> [C]ollective criminal agreement – partnership in crime – presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed.

Callanan v. United States, 364 U.S. 587, 593-94 (1961).

When the Federal Rules of Criminal Procedure entered into force in March 1946, organizations, including corporations, were rarely charged as defendants in and of themselves. Organizations, such as domestic corporations, were established, conducted activities, and expectedly maintained a presence in the United States. Organizational leadership generally included an officer, a managing or general agent, or another agent appointed or legally authorized to receive service of process. Use of mail was ordinary. Rule 4(c) – former Rule 9(c) – regarding serving a summons on an organization reflected these realities and imposed a duty on the government to serve the summons on an individual, such as an officer or agent – the delivery requirement – and to mail the summons to the organization's last known address within the district or its principal place of business in the United States – the mailing requirement. In practice, neither the accused nor the government received "an undue advantage over the other" with the inclusion of the delivery and mailing requirements. New York University School of Law Institute, *Federal Rules of Criminal Procedure, With Notes and Proceedings*, at iv (1946).

The environment that influenced the original drafters of the Federal Rules of Criminal Procedure no longer exists. The economy is global. Electronic communications continue to displace ordinary mail. Organizations can maintain no office or agent in the United States, yet

conduct both real and virtual activities here. This new reality has affected federal criminal practice fundamentally. Indeed, court decisions show that a growing class of organizations, particularly foreign corporations, has gained "an undue advantage" over the government relating to the initiation of criminal proceedings.

While foreign corporations and other organizations may be punished for violations of United States law, even if they have not established a formal presence in the United States, Rule 4 repeatedly has been construed to substantially impair prosecution of foreign organizations – simply because they do not have an agent or maintain a mailing address within the United States. For example, in *United States v. Johnson Matthey Plc*, No. 2:06-CR-169 DB, 2007 WL 2254676, at *1 (D. Utah, Aug. 2, 2007), the defendant organization, Johnson Matthey Plc, was charged with, among other things, conspiring with others to discharge contaminated wastewater at a Salt Lake City facility and concealing this illegal activity.[1] The defendant organization was incorporated under the laws of England and Wales, with a principal place of business in London. *Id.*

In assessing the government's efforts to serve a summons on the defendant organization, the court explained that Rule 4(c)(3)(C) contains two requirements: first, that the summons be served on an officer or agent – a service requirement – and second, that a copy of the summons be mailed to the organization's last known address within the district or its principal place of business in the United States – a mailing requirement. *Johnson Matthey Plc*, 2007 WL 2254676 at *1. The government initially attempted to satisfy the latter requirement by sending the summons to two locations: a refinery as well as an office operated by a U.S.-based wholly-owned subsidiary of the defendant (Johnson Matthey, Inc.). *Id.*

The court decided that the mailing of the summons to both locations was insufficient to satisfy Rule 4 because under established law, service of a summons on a subsidiary does not constitute service on the parent corporation. *Johnson Matthey Plc*, 2007 WL 2254676 at *1.[2] Thereafter, the government renewed its efforts to comply with the summons requirement by, among other things, sending a copy of the summons via Federal Express to defendant Johnson Matthey Plc's legal department in London. *Id.* at *2. Although the government argued that the defendant had "ample notice" that proceedings had been initiated against it, the court explained that "ample notice" simply was not sufficient:

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[1] *See Johnson Matthey Plc*, No. 2:06-CR-169 (D. Utah) [Docket #47].

[2] Several courts have ruled that service of process on a subsidiary is insufficient to constitute service on the parent, if corporate formalities are observed. *E.g.*, *Davies v. Jobs & Adverts Online Gmbh*, 94 F. Supp. 2d 719, 722-23 (E.D. Va. 2000) ("[S]ervice of process on a foreign defendant's wholly owned subsidiary is not sufficient to effect service on the foreign parent so long as the parent and the subsidiary maintain separate corporate identities.").

> While the government has served Johnson Matthey's Salt Lake Refinery; Johnson Matthey, Inc. in Wayne, PA; and to Johnson Matthey PLC's legal department in London, none of those locations qualify under the rule as "the organization's last known address within the district or to its principal place of business elsewhere in the United States." JM Plc has not been shown to be present in the District of Utah and does not now have, nor has it ever had, an address in the District, or a place of business within the United States.

Id. Accordingly, the court granted the defendant's motion to quash the summons. In doing so, the court suggested that service might be accomplished by resorting to the Mutual Legal Assistance Treaty between the United States and the United Kingdom, *id.*, but did not explain how the treaty would enable the United States to comply with Rule 4's requirement that the organization be served at its principal place of business within the United States.[3]

Recently, another court, relying in part upon the reasoning of *Johnson Matthey*, granted a foreign organization's motion to quash a summons. In *United States v. Pangang Group Co. Ltd.*, No. CR 11-00573 JSW, 2012 WL 3010958, at *1 (N.D. Cal., July 23, 2012), four foreign organizations, one of them a state-owned enterprise of the People's Republic of China (collectively, the "Pangang Defendants"), were charged with participating in a conspiracy to commit economic espionage, conspiracy to commit theft of trade secrets, and attempted economic espionage. As in *Johnson Matthey*, the Pangang Defendants appeared specially to challenge the government's service of summons on them. The government attempted to establish, through the submission of various affidavits, that its service of the summons on a United States subsidiary of the Pangang Defendants was sufficient for purposes of Rule 4's first requirement that the summons be served on an authorized agent of the organization. *Id.* at *1-9.[4] However, for all but one defendant, the court found that the government had not proven that the United States subsidiary was, in fact, a general agent of the Pangang Defendants, and therefore the court quashed the summons as to three of the four foreign organizations. *Id.*

Furthermore, the court concluded that the summons as to all Pangang Defendants could be quashed on grounds that the government had failed to comply with Rule 4's mailing

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[3] In a different context, the Third Circuit has rejected an attempt to effectuate service of process via an international treaty when the applicable rule required service to occur within the "forum state." *See DeJames v. Magnifience Carriers, Inc.*, 654 F.2d 280, 287-90 (3d Cir. 1981).

[4] Among other things, the government pointed to evidence demonstrating that the Pangang Defendants (i) used the United States subsidiary to conduct their operations in the United States; (ii) sent employees from China to staff the operations of the United States subsidiary; and (iii) paid the legal fees of employees who became subjects of the government's investigation in the United States. *See United States v. Pangang Group Co., Ltd.*, No. CR 11-0573 JSW (N.D. Cal. Apr. 19, 2012) [Docket #122 at 3-13].

requirement. *Id.* at *9-14. Although the government argued that mailing the summons to a foreign organization's general agent located in the United States was sufficient to comply with Rule 4, in that the foreign organization had ample notice of the legal proceedings, the court rejected this argument because it was "not persuasively supported" by criminal cases considering the application of Rule 4. *Id.* at *10 (citing *Johnson Matthey*). While the court allowed for the possibility that the mailing requirement of Rule 4 might be satisfied by sending the summons to a foreign organization's general agent in the United States, if the general agent was nothing more than the "alter ego" of the foreign organization, the court concluded that the government had not made that showing. *Id.* at *11-13.[5] Similarly unavailing was the government's argument that it could not effectuate service through its Mutual Legal Assistance Agreement with China, based on the government's considered view that China would not effectuate service on any Pangang Defendant pursuant to the terms of the international agreement. *Id.* at *14.[6]

We are concerned that other courts will adopt the reasoning of *Johnson Matthey*, *Pangang Group* and similar cases – reasoning we believe is contrary to sound public policy and the purpose of the rules. Rule 4 can be and has been read to preclude jurisdiction in criminal cases against criminal organizations, even when they are provided with ample notice of the proceedings, merely because the criminal organizations do not have an agent or a postbox in the United States. Indeed, Rule 4 may act as an impediment to prosecution despite the fact that a defendant organization maintains extensive contacts with the United States. In *Johnson Matthey*, the defendant organization conspired to discharge contaminated wastewater in the United States; in *Pangang Group,* the foreign organizations conducted business in the United States through their subsidiary, which they staffed with their own employees. Accordingly, the United States may be faced with the anomalous result that a private civil litigant will be able to pursue an action against an organization while the government remains helpless to vindicate the laws of the United States through a corresponding criminal proceeding.[7]

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[5] The government attempted to rely on the same "alter ego" theory to overcome the hurdles posed by Rule 4 in another case, *United States v. Alfred L. Wolff GmbH,* No. 08 CR 417, 2011 WL 4471383, at *4-8 (N.D. Ill. Sept. 26, 2011), but similarly failed to persuade the court that a United States co-defendant was merely an alter ego of several foreign organizations. Piercing the corporate veil is challenging, because courts have required the government to carry the "heavy burden" of proving that the corporate form is a sham and merely exists as a vehicle for perpetrating a fraud. *Id.* at *4-5 (citations omitted).

[6] The court did not consider whether service of the summons pursuant to this agreement would satisfy Rule 4 in any event. *See* note 3, *supra*.

[7] Another example is provided by a pending case, *United States v. Dotcom*, No. 1:12-CR-3 (E.D. Va. 2012). A grand jury returned an indictment against foreign organization Megaupload Limited and other defendants on racketeering, copyright infringement and money laundering charges. In response, Megaupload Limited – a foreign organization that has an extensive presence in the United States (it allegedly leased more than 1,000 servers in the United States, facilitated the distribution of illegally reproduced works throughout the United States, and has caused damages in excess of $500 million to victims) – has specially appeared and argued that it is immune from prosecution in the United States simply because it does not have an agent or mailing address in the United States: "Megaupload does not have an office in the United States, nor has it had one previously. Service of a criminal

From the Department's perspective, Rule 4(c) should be amended to ensure that the means of service reflects the realities of today's global economy, electronic communication, and federal criminal practice. A defendant organization should no longer find refuge in the mailing requirement, when the Rule's core objective – notice of pending criminal proceedings – is established.

The Department examined the service provisions of the Federal Rules of Civil Procedure to determine to what extent one or more of the provisions might enhance, if at all, federal criminal practice. The Department reviewed the proceedings of the Institute that reviewed the initial set of the Federal Rules of Criminal Procedure, along with myriad civil and criminal cases concerning service. In fashioning the proposed amendments, we decided that elements of the Federal Rules of Civil Procedure could provide a basis for the proposed amendments, but disfavored direct incorporation of those rules. The greater public aims of criminal process – condemnation of specific acts and deterrence – are distinct from those in civil process – private damages. This distinction justifies a higher burden on the government for serving a criminal defendant.

For that reason, the Department continues to favor personal delivery on "an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process" to put an organization – domestic or foreign – on notice that criminal charges have been filed. We propose, however, removing the mailing requirement from the rule. If delivery is not possible on "an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process" of a foreign organization, then our proposal provides five additional options reasonably calculated to give notice to that foreign organization.

Accordingly, we recommend the following changes to Rule 4:

Rule 4. Arrest Warrant or Summons on a Complaint

* * *

(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.

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summons on Megaupload is therefore impossible, which forecloses the government from prosecuting Megaupload." *United States v. Dotcom*, No. 1:12-CR-3 (E.D. Va. 2012) [Docket #115 at 1, 6] (citing *Johnson Matthey*, 2007 WL 2254676, at *2). A similar defense is not available under Rule 4 of the Federal Rules of Civil Procedure.

(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 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 at a place within 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 must also be mailed to the 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 at a place not within a judicial district of the United States:

(i) 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, in a manner authorized under the laws of the foreign jurisdiction where the officer or agent to be served is located, or

(ii) by other means reasonably calculated to give notice, including

a) a stipulated means of service;

b) a means that a foreign authority undertakes in response to a letter rogatory or letter of request;

(c) a means that a foreign authority undertakes in response to a request submitted under an applicable international agreement;

(d) a means otherwise permitted under an applicable international agreement; or

(e) other means upon request of an attorney for the government, as the court orders.

Rule 4(c)(2) would be amended to allow service of a summons outside the United States. In particular, with the amendment, organizations could now be served in the United States or "at

a place not within a judicial district of the United States." This language follows the language for jurisdiction set forth in the Federal Rules of Civil Procedure.

Rule 4(c)(3)(C) would be amended to focus exclusively on an organization at a place within a judicial district of the United States. As noted above, the Department suggests mirroring this jurisdictional language of the Federal Rules of Civil Procedure. Under the amended language, notice involving domestic organization would still require personal service. The amendment would remove the mailing requirement for service of a summons on a domestic organization.

Delivery of the summons on an organization outside the United States – at a place not within a judicial district of the United States – would now be addressed in a new Rule 4(c)(3)(D). The new subsection (D)(i) would provide that a copy of the summons must be delivered to an officer, a managing or general agent, or another agent appointed or legally authorized to receive service of process. Our aim is to preserve personal service to meet notice obligations, if possible. As a result, subsection (D)(i) mirrors the language concerning personal service as expressed in (C), but places an additional obligation to provide service in a "manner authorized under the laws of the foreign jurisdiction" where the individual to be served is located.

The new subsection (D)(ii) would provide five distinct alternatives that are reasonably calculated to provide notice. Subsection (D)(ii)(a) acknowledges that the government and the defendant corporation can stipulate to the means of service. An assumption of the Federal Rules of Civil Procedure is that parties are expected to stipulate to the terms of service, given the presumption of waiver. The Department thinks organizational defendants should have the option to stipulate to service, and therefore we include this option in the proposed amendment. Subsection (D)(ii)(b) focuses on those instances when the United States government may not have an applicable treaty with the country where the defendant corporation is located or conducts business. In those instances, the government may ask the court to issue a letter rogatory or the government may send a letter of request to the foreign government. Subsection (D)(ii)(c) focuses on those instances when the government may have a treaty relationship with the foreign government where the defendant corporation is located or conducts business and the treaty provides for service of process. In either case – (D)(ii)(b) or (c) – it is important to note that the foreign government might in fact provide personal service, the Department's preferred method of service.

Subsection (D)(ii)(d) encompasses those instances when an applicable international agreement may not articulate a basis for service, though a means the government proposes is otherwise permissible under the agreement. As an example, a mutual legal assistance treaty often includes a provision concerning service, though specific modes of service are not identified. These treaties permit the requesting state to propose a mode of service in conformity with its domestic law and, by the terms of the treaty, often obligate the requested state to execute a request as presented unless following the requesting state's law would violate the requested

state's law. This provision is also prospective, acknowledging that future agreements may also permit service.

The final subsection (D)(ii)(e) is intended to permit the government to fashion a mode of service that is reasonably calculated to provide notice and seek the court's endorsement of the mode proposed.

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These amendments to Rule 4 are designed to ensure that foreign organizations do not avoid criminal prosecution in the United States merely because the organization chooses not to keep an agent and mailing address in the United States. Moreover, in those instances where foreign organizations cannot be served within a judicial district, the amendment provides a mechanism for alternate service. These alternate means of service are already available to civil litigants under Rule 4 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 4(f), (h)(2).[8] Accordingly, we believe these procedures are sufficient to give defendant organizations reasonable notice of criminal actions pending against them.

We appreciate your assistance with this proposal and look forward to working with the Committee on this issue.

Sincerely,

Lanny A. Breuer
Assistant Attorney General

cc: Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter

[8] The proposed amendment to Rule 4 would thus update the Federal Rules of Criminal Procedure so that the summons provision once again resembles the summons provision found in the Federal Rules of Civil Procedure. *See* Fed. R. Crim. P. 4 (advisory committee note, 1944 adoption) ("Service of summons under the rule is substantially the same as in civil actions under Federal Rules of Civil Procedure, Rule 4(d)(1) . . . .").

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U.S. Department of Justice

Criminal Division

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

August 23, 2013

MEMORANDUM

TO: Judge David M. Lawson
Chair, Subcommittee on Rule 4

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

Kathleen A. Felton
Deputy Chief, Appellate Section

SUBJECT: Proposed Amendments to Rule 4

I. Introduction

This memorandum responds to the discussion on our August 19th conference call and also to your specific request to address four issues raised by the Subcommittee on the call. You asked us to:

1. Provide a description of what the Department of Justice's approval process would be for the alternate means of service pursuant to Rule 4(c)(3)(D)(ii)(d);

2. Provide a statement for the record that the Departments of Justice and State have considered reciprocity concerns should Rule 4 be amended to permit service of a U.S. summons in a manner that could contravene foreign law;

3. Describe the practical consequences of service pursuant to Rule 4(c)(3)(D)(ii)(d); and

4. Lay out the options that are available to a court when a summons is served on a foreign entity that ignores the order to appear.

After the August 19th conference call, we consulted extensively with our colleagues within the Department of Justice and at the Department of State. We considered further the Subcommittee's latest draft amendment, the proposed addition to Rule 4(c)(3)(D)(ii)(d) to

authorize other means of service *not prohibited by international agreement*, and the other concerns raised on the call.

We would very much like to develop consensus in the Subcommittee for the proposed amendment. In that spirit, we now are prepared to accept the additional language – "not prohibited by international agreement." We believe the language can work to effectuate service, notwithstanding the concerns we expressed on the call, and will also address the concerns raised by other members of the Subcommittee. However, we think two modifications are needed: first, that the language be amended to read "not prohibited by an applicable international agreement," consistent with the language used in Rule 4(c)(3)(D)(ii)(b) and (c); and second, we think it is important to add Committee Note language to address some of the scenarios we discussed on our call. The note language we suggest, modeled on similar note language accompanying Civil Rule 4(f), spells out in greater detail when alternate means of service might be appropriate.

> Paragraph (d) authorizes the court to approve other means of service not prohibited by an applicable international agreement. Some international agreements authorize other unspecified means of service in cases of urgency, when conventional methods will not permit service within the time required by the circumstances. Other means of service may also be justified by the failure of the foreign country's Central Authority to effect service pursuant to a bilateral or multilateral agreement, when there is no international agreement applicable, or when an agreement does not specify the type of legal assistance that can be sought or does not specify the means for serving a judicial document, such as a criminal summons. In such cases, the court, at the request of the attorney for the government, may direct a special means of service not explicitly authorized by international agreement if such means is not prohibited by any valid agreement ratified and in force.

We also believe one additional change to the draft is warranted to effectuate the Subcommittee's intent. Rule 4(c)(3)(D) should be amended to eliminate the phrase "at a place". The provision would then read: "A summons is served on an organization ~~at a place~~ not within a judicial district of the United States by any of the following means that is reasonably calculated to give notice:". In our prior discussions, the Subcommittee has contemplated that the alternate means of service under Rule 4(c)(3)(D)(ii) could take place within the United States, even though the organization is not within the United States. If the phrase "at a place" remains, the possibility of alternative service within the U.S. would arguably be eliminated.

We hope the Subcommittee will find this language acceptable. We look forward to discussing this further with you on our September 3rd conference call.

II. DOJ's Approval Process for the Alternate Means of Service Pursuant to Rule 4(c)(3)(D)(ii)(d)

As we have previously discussed, within the Department of Justice, the Criminal Division's Office of International Affairs (OIA) serves as the Central Authority and clearinghouse for all international criminal matters. Regardless of whether there is a treaty

relationship between the United States and the relevant foreign state, OIA ensures that the necessary steps are taken to effectuate service of a criminal summons on an appropriate representative or agent of that organization in accordance with U.S. and international law and consistent with U.S. foreign policy. OIA is staffed with specialists whose experience and training enable them to assess what process both complies with domestic and international law and will best effectuate service, and they will confer as needed with the State Department.

The U.S. Attorney's Manual and Departmental policy guidance instruct prosecutors on when and how to make a request for approval and assistance from OIA. *See* U.S. Attorneys' Manual, 9-13.500, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/13mcrm.htm#9-13.500 (last visited August 20, 2013). Department policy requires prosecutors to seek approval from OIA when seeking any assistance abroad or taking "any act outside the United States relating to a criminal investigation or prosecution." *Id.*

OIA works with the Executive Office of United States Attorneys to ensure that the U.S. Attorney's Manual captures the Department's expectations about a prosecutor's need to work with and through OIA for all forms of assistance sought and in cases implicating foreign policy, including serving a criminal summons on a foreign organization. The Department is prepared to further amend the U.S. Attorney's Manual to make absolutely clear the need to obtain the approval of OIA before seeking any means of service outside the U.S. or otherwise involving a foreign organization under Rule 4.

III. Reciprocity Concerns if the Rule were Amended to Permit U.S. Service in a Manner that Could Contravene Foreign Law

When serving a criminal summons on a foreign organization at a place not within a judicial district of the United States pursuant to subsection (c)(3)(D) of the proposal, the United States will generally seek to ascertain and comply with the law of the place where service is to be made. The proposed inclusion of subsection (c)(3)(D)(ii)(d) would permit service by a means that "the court orders on request by an attorney for the government," as a last resort when other means are unavailable, which in some cases could result in a manner of service that could be deemed inconsistent with foreign law. However, such service would only proceed after consultations between the Criminal Division's Office of International Affairs and the Department of State. In light of this, Criminal Division Deputy Assistant Attorney General for International Affairs Bruce Swartz, the Criminal Division's Office of International Affairs and representatives of the Department of the State consider this proposal to provide an appropriate opportunity for potential reciprocity or foreign policy implications to be taken into account in the context of particular cases and believe the amendment proposal should proceed.

IV. The Practical Steps that a Court and the Executive Branch Can Take When an Organization Fails to Appear in Response to a Validly Served Summons

As we have discussed with the Subcommittee, we have found little case law addressing the consequences of an organization failing to appear in response to a validly served summons. We believe this is because in most cases, when a summons is properly served, organizations do

appear and have a very strong financial incentive to appear. Interestingly, in recent criminal cases involving foreign corporations contesting service of process under Rule 4, those corporations paid U.S. counsel to "specially appear" and make the argument that service was invalid. *See, e.g. United States v. Kolon Industries, Inc.*--- F.Supp.2d ----, 2013 WL 682896 (E.D.Va., February 22, 2013), *United States v. Dotcom,* 2012 WL 4788433 (E.D. Va., Oct. 5, 2012); *United States v. Pangang Group, Ltd.*, 879 F. Supp. 2d 1052 (N.D. Ca. 2012). These corporations could have simply ignored the criminal case and not paid anyone to appear. Whether it was a concern for the company's international reputation, management's fear of being arrested when attending an overseas business meeting, the desire not to be perceived as a fugitive, or a desire to maintain a sense of honor, these companies all decided it was better to contest service than have the corporation labeled a fugitive.

Anytime an organization has assets in the U.S. or intends to continue doing business in the U.S., there will be a very strong incentive for the organization to appear and address the criminal allegations, for the pending criminal charges could result in actions that would impact the assets or continuing operations. If the organization does not appear, though, there are a number of practical steps that a court and the Executive Branch could take. They include:

Contempt Orders: In response to a foreign organization's decision not to appear following properly initiated criminal charges, a court could enter a contempt order (*e.g.*, under 18 U.S.C. § 401(3)), possibly resulting in significant fines, forfeitures, and/or other penalties. These penalties may be enforced through the imposition of daily fines. *See, e.g., United States v. Darwin Const. Co., Inc.*, 873 F.2d 750 (4th. Cir. 1989) (in civil contempt action, corporation found in contempt for failure to comply with IRS summons was subject to a daily fine of $5,000); *Perfect Fit Indus., Inc. v. Acme Quilting Co., Inc.*, 673 F.2d 53 (2d Cir. 1982) (civil contempt).

The ability to obtain a contempt order is further enhanced by the Committee Note to proposed subsection (a), which states that "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."

Injunctive Relief: A foreign organization's decision not to appear in response to properly initiated criminal charges would be a factor weighing in favor of granting the United States injunctive relief against the foreign organization. Such relief is permitted under various criminal statutes, including the Economic Espionage Act, 18 U.S.C. § 1836, which authorizes the government to file a civil action to "obtain appropriate injunctive relief against any violation of this chapter." Prosecutors commonly seek injunctive relief to prevent further disclosure of a trade secret by the defendant or third parties during a criminal investigation, or as part of the judgment at the end of the case. Depending upon its terms, such an injunction could also limit a foreign corporation's ability to do business in the United States and be used by victims or third-parties to obtain relief abroad.

Appointment of Counsel: There is some authority for the proposition that, in certain circumstances, a court may appoint counsel for a corporation that fails to appear after being properly served, and may proceed with a criminal trial. *See United States v. Rivera*, 912 F. Supp.

634, 638-39 (D. Puerto Rico 1996) (appointing counsel to a corporate defendant that failed to appear at two initial hearings and holding that "[i]nasmuch as a defendant's right to retain counsel of his choice may not interfere with the efficient administration of justice, when confronted with a recalcitrant defendant who refuses to . . . submit to the jurisdiction of the Court, the Court in its discretion may appoint counsel"; fees and expenses to be paid from corporate assets and properties); *United States v. Crosby*, 24 F.R.D. 15, 16 (S.D.N.Y. 1959) (observing that "a corporation may not appear except by counsel" and holding that "[i]t would be idle to provide for summoning a corporation if the court, after so doing, could not render a judgment against it. The court must, therefore, have power to appoint one of its attorneys and officers to appear for the corporation.").

Parallel Proceedings: There is also some authority for the proposition that, in certain circumstances, a court may sanction a party that fails to comply with orders in a criminal action through penalties in a parallel civil action. *See, e.g., United States v. Crawford Enterprises Inc.*, 643 F. Supp. 370, 380 (S.D. Tex. 1986) (court finds a foreign oil company in criminal and civil contempt and holds that the oil company's civil action against a corporation that was a defendant in a separate criminal case should be dismissed for the oil company's failure to comply with the corporation's *subpoena duces tecum* in the criminal case).

Seizure/Forfeiture: A foreign organization's decision not to appear in response to properly initiated criminal charges can result in seizure and forfeiture of the organization's assets, including assets in foreign countries that honor U.S. forfeiture orders, and any assets located in the United States. Under the Civil Asset Forfeiture Reform Act, Congress reinstated what is commonly known as the "fugitive disentitlement doctrine." *See* 28 U.S.C. § 2466. Under the doctrine, a court where a civil forfeiture action is pending may disallow any challenge to the forfeiture if the Government establishes that a related criminal case was initiated against the claimant; that the claimant was notified and has knowledge of the criminal case; and that the claimant deliberately avoided prosecution by leaving or declining to "enter or reenter" the U.S. or was otherwise evading the jurisdiction of the court where the criminal case is pending. Congress has included within the scope of the statute not only claims filed by fugitive individuals, but also claims filed by corporations. *See*, *United States v. $6,976,934.65 Plus Interest*, 478 F. Supp. 2d 30, 43 (D.D.C. 2007) (section 2466(b) creates a presumption that the disentitlement doctrine applies if a fugitive is the corporate claimant's majority shareholder, but even without the presumption, the fugitive's disentitlement may be imputed to the corporation if the court pierces the corporate veil and finds that the corporation is the fugitive's alter ego), *rev'd on other grounds*, 554 F.3d 123 (D.C. Cir. 2009).

Office of Foreign Asset Control: The President has the ability to issue executive orders directing the Treasury Department to administer and enforce economic and trade sanctions based on U.S. foreign policy and national security goals. These sanctions may prevent a foreign corporation from doing business in the United States or through a U.S. bank. The Department of Justice can seek such OFAC sanctions against foreign corporations where certain criteria are met. One factor favoring OFAC sanctions would be a foreign corporation's decision not to appear in response to a properly initiated criminal lawsuit.

Listing and Diplomatic Consequences: Executive Branch agencies such as the Department of Commerce maintain public lists of foreign corporate entities that are being sanctioned because of misconduct. In addition, the fact that a particular country or countries have engaged in a pattern of harboring fugitive corporations may also be an important factor forming or modifying diplomatic, trade or other relationships. For example, a number of recent cases in which Rule 4 process was challenged involve intellectual property issues. A country's pattern of harboring fugitive corporations in that context could be one factor in determining whether to include a country in United States Trade Representative's "Special 301" Report, an annual review of the state of intellectual property rights protection and enforcement in trading partners around world, which the Office of the United States Trade Representative conducts pursuant to section 182 of the Trade Act of 1974 (as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act). The May 2013 report can be found at:
http://www.ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf.

Debarment: The Government may impose other non-penal sanctions that may accompany a criminal charge, such as suspension or debarment from eligibility for government contracts or federally funded programs. Determining whether or not such sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, and is a decision that is made based on the applicable statutes, regulations, and policies. The Federal Acquisition Regulations System codifies these policies as well as applicable procedures for imposing suspension and debarment. The Federal Acquisition Regulation (FAR), *Subpart 9.4—Debarment, Suspension, and Ineligibility,* permits a contracting official to suspend or debar a contractor once charged with a criminal offense. However, there are procedural protections that go along with suspension and debarment, including notice. Such notice would be evidenced in part by service of process in the criminal case.

V. Conclusion

We hope this memorandum and our suggested revisions to the draft amendment and Committee Note are helpful. As we stated earlier, our ultimate objective is to facilitate the efforts of the U.S. Government to hold organizations accountable for criminal conduct, obtain restitution, and otherwise vindicate the interests of the people of the United States. Our specific objective underlying our rule proposal is to amend Rule 4 to authorize the service of process in manners that provide notice to the defendant organization while not placing unnecessary obstacles to the initiation of criminal proceedings.

We look forward to discussing all of this with the Subcommittee soon. Please let us know if there is any further information we can provide to you.

TAB 4

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TAB 4A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Sara Beale and Nancy King, Reporters

RE: Rule 41 proposal

DATE: March 17, 2014

This memorandum presents an amendment to Rule 41 (Tab B) that would permit a court, in a district where activities related to a crime have occurred, to issue a warrant authorizing remote access searches of electronic storage media and electronic information located within *or outside* that district. The Department of Justice requested that the Committee consider this amendment in September of 2013, see Tab C, Letter of Acting Assistant Attorney General Raman to Judge Raggi, September 18, 2013 (hereinafter DOJ Letter 9/18/2013).

Judge Raggi referred the proposal to a Rule 41 Subcommittee chaired by Judge Keenan, whose members are Judge Kethledge, Judge Rice, Mr. Filip, Professor Kerr, and Mr. Wroblewski (representing the Department of Justice). In general, subcommittee members agreed that there are persuasive justifications for an amendment authorizing remote electronic searches outside the authorizing district. The more difficult question was whether to propose a narrow amendment that would reach only a limited subset of cases (described as scenario 1 below), or a more general provision.

After extensive discussion in four meetings by teleconference call, the Subcommittee approved (with one dissent) a slightly revised version of the Department of Justice proposal rather than a more narrowly drawn alternative. [1] Subcommittee members reviewed sample warrants and requested additional information on the Department's goals in proposing the amendment, as well as how it would affect the Department's practices. Following a full airing of the issues, the Subcommittee concluded that the justifications for a broader amendment were sufficiently compelling to justify approval for publication. This conclusion was informed by the fact that the proposed amendment's language speaks directly only to venue, and that the proposed commentary makes clear that the government must satisfy constitutional requirements with respect to any warrant. Although there have not yet been many published opinions dealing with the various scenarios that would be covered by the proposed amendment, these situations are likely to arise more frequently. Members also noted the lengthy nature of the amendment

[1] After consultation with Professor Kimble, additional style changes were made in the draft approved by the Subcommittee.

process and the desirability of a comprehensive approach, rather than one that would make a series of amendments to the same rule. Members noted, however, that they expected to learn more from public comments by various stakeholders if the proposal is approved for publication.

This memorandum first describes the proposed amendment and the justifications for it, and then reviews the issues and concerns discussed by the Subcommittee.

The proposal has two parts. The first change is an amendment to Rule 41(b), which generally limits warrant authority to searches within a district,[2] but permits out-of-district searches in specified circumstances. [3] The amendment would add remote access searches for electronic information to the list of other extraterritorial searches permitted under Rule 41(b). Language in a new subsection 41(b)(6) would authorize a court to issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside *or outside* of the district.

The second part of the proposal is a change to Rule 41(f)(1)(C), regulating notice that a search has been conducted. New language would be added at the end of that provision indicating the process for providing notice of a remote access search.

A. **Reasons for the proposal.**

Rule 41's territorial limitation, limiting searches to locations within a district, creates special difficulties for the Government when investigating crimes involving electronic information. The proposal speaks to three different scenarios impacted by the territorial restriction, each involving remote access searches, in which the government seeks to obtain access to electronic information or an electronic storage device by sending surveillance software over the Internet.

Scenario 1. The proposal would enable investigators to obtain a warrant to search with remote access computers with unknown locations. This situation might arise where a particular computer is likely to contain evidence of crime--a person is using the computer to send pornography by email, for example--but the person using that computer is using anonymizing tools that disguise the computer's true IP address so that agents are unable to identify its location. A warrant for a remote access search would enable investigators to send an email, remotely install software on the device receiving the email, and determine the true IP address or identifying information for that device. Several examples of an affidavit seeking a warrant to conduct such a search are attached, under Tab D. Some judges have reportedly approved such searches,[4] but one judge recently concluded that the territorial requirement in Rule 41 precluded

[2] Rule 41(b)(1) ("a magistrate judge with authority in the district -- or if none is reasonably available, a judge of a state court of record in the district -- has authority to issue a warrant to search for and seize a person or property located within the district").

[3] Currently, Rule 41(b) (2) – (5) authorize out-of-district or extra-territorial warrants for: (1) property in the district when the warrant is issued that might be moved outside the district before the warrant is executed; (2) tracking devices, which may be monitored outside the district if installed within the district; (3) investigations of domestic or international terrorism; and (4) property located in a United States territory or a United States diplomatic or consular mission.

[4] In addition to the examples provided by the Department, a critical assessment noting additional examples appears in Craig Timberg and Ellen Nakashima, "FBI's search for 'Mo,' suspect in bomb threats, highlights use of malware

a warrant for a remote search when the location of the computer was not known, suggesting that the Committee should consider updating the territorial limitation to accommodate advancements in technology. See Tab C, DOJ Letter 9/18/2013, at 2 (citing *In re Warrant to Search a Target Computer at Premises Unknown*, 958 F. Supp. 2d 753 (S.D. Tex. 2013) (noting that "there may well be a good reason to update the territorial limits of that rule in light of advancing computer search technology")); Tab H, DOJ Memo 3/5/2014.

Scenario 2. The proposal would enable investigators to obtain warrants to search computers in many districts simultaneously. It is not unusual for on-line criminal activity to involve multiple computers in several districts. One example is the "botnet"--a collection of computers in several (potentially all) districts, under the remote command and control of a criminal who infects those computers with malicious software so that he may use them to interrupt service, steal data, or distribute more malware. "Under the current Rule 41," the Department argued, "except in cases of domestic or international terrorism, investigators may need to coordinate with agents, prosecutors, and magistrate judges in every judicial district in which the computers are known to be located to obtain warrants authorizing the remote access of those computers." Tab C, DOJ Letter 9/18/2013, at 2-3. Under the proposed amendment, a warrant for a remote search in this situation would enable investigators to remotely install software on a large number of affected computers all at once. When the locations of those computers are known to be in more than one district, this authorization would eliminate the burden of attempting to secure separate warrants in numerous districts. If the locations of the various computers are *not* known, the proposal would permit the government to remotely access multiple devices to obtain identifying information. See, under Tab D, Sample Botnet Affidavit.

Scenario 3. The proposal would permit a judge to authorize a search for electronic information accessible from a computer at a known location when the information is stored remotely in another district. The Department provided this example:

> [S]uppose that officers execute a warrant to search a business located in San Francisco and that, upon entry, they discover that the business stores its documents with a cloud-based server. Under the current version of Rule (assuming the requisite probable cause and particularity requirements are met), a magistrate in the Northern District of California could issue a warrant authorizing agents to search the business and, while they are present at the business, access any cloud-based storage located within the district (such as a DropBox account).

The amendment "would clarify that the magistrate could equally authorize the agents to access such storage in *any* district, including an unknown district." Tab H, DOJ memo 3/5/2014, at 3 (emphasis added). The Department argued that without the authorization in the proposed

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for surveillance," Wash. Post., Dec 6, 2013, *available at* http://www.washingtonpost.com/business/technology/fbis-search-for-mo-suspect-in-bomb-threats-highlights-use-of-malware-for-surveillance/2013/12/06/352ba174-5397-11e3-9e2c-e1d01116fd98_story.html

amendment, "By the time a subsequent warrant could be obtained, the documents may be deleted or encrypted." *Id.*[5]

B. Issues and concerns discussed by the Subcommittee

1. Constitutional Concerns: Particularity under the Fourth Amendment.

During Subcommittee deliberations members discussed the question whether it would be possible to meet the Fourth Amendment's particularity requirement [6] if the government could not articulate the location of the device to be searched or its IP address. A related but somewhat separate concern was voiced about warrants to search multiple computers simultaneously. There is some authority that "search of multiple locations not owned by the same person under a single warrant" is problematic. See WAYNE R. LAFAVE, 2 SEARCH & SEIZURE § 4.5(c) at n.99 (5th ed.) (collecting authority).

The Government responded to these concerns by proposing Committee Note language, drafted in consultation with the Reporters, that would make it clear that the amendment does not address constitutional questions or attempt to influence their resolution. Tab F, DOJ Memo 2/7/2014, at 2. The proposed Committee Note includes the following statement, similar to that found in the 2009 Committee Note to Rule 41(e)(2): "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 electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development."

Although it agreed that the Rule should not and does not address constitutional questions, the Department also made several arguments suggesting that the particularity requirement could be met in remote access cases in which the location of the storage device is not known. The Department analogized its proposal to tracking warrants, where the government seeks information from locations unknown at the time of the application. In *United States v. Karo*, 468 U.S. 705 (1984), the Department argued, the Supreme Court indicated that the particularity requirement "would be excused where the purpose of the search is to discover the very place to be searched."[7] The Department also noted that case law already authorizes a single warrant to search of more than one physical location or piece of property, so long as there is probable cause to search each location. Tab H, DOJ Memo 3/5/2014, at 5. Moreover, it noted (*id.* at 4)

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[5] Although the Subcommittee did not discuss this, we also note the proposed amendment would make express what the Department assumes is implicit under existing language, Tab H, DOJ Memo 3/5/2014, at 3, that the Rule authorizes remote access searches for electronic information stored *within* a district.

[6] Warrants "must particularly describe the things to be seized, *as well as the place to be searched*." *Dalia* v. *United States*, 441 U.S. 238, 255 (1979) (emphasis added). Particularity helps to prevent the issuance of warrants based on vague information, and to protect against the use of general warrants. *Go-Bart Importing Co v. United States*, 282 U.S. 344, 357 (1931).

[7] See Tab H, DOJ Memo 3/5/2014, at 5. The Court in *Karo* stated: "it will still be possible to describe the object into which the beeper is to be placed, the circumstances that led agents to wish to install the beeper, and the length of time for which beeper surveillance is requested. In our view, this information will suffice to permit issuance of a warrant authorizing beeper installation and surveillance. 468 U.S. at 718.

scholarly authority for interpreting the particularity requirement in Internet evidence collection cases to apply person by person rather than account by account. *Id*. at 4 (quoting Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 Stan. L. Rev. 1005, 1045-46 (2010)).

2. Policy Concerns.

The Subcommittee also discussed a number of concerns about changes in law enforcement practices that might result from the proposed change. We briefly review here the main arguments discussed by the Subcommittee.

a. Risk of increased forum shopping, reduced judicial oversight.

Professor Kerr argued that whether the law should require the government to obtain a warrant in separate districts where separate servers are located rather than permit the government to search multiple storage locations from one access point was an important policy issue. He noted that multiple-computer, multi-district searches raise concerns about forum shopping. See Tab E, Kerr Rule 41 Proposal 2/3/2014, at 1-2. He also argued that although Congress authorized multi-district searches under the Electronic Communications Privacy Act (ECPA), there was a specific reason for permitting extraterritorial remote access under that Act– the deregulation of the telecommunications industry leading to the carrying of a single communication by multiple providers. No similar reason supports extraterritorial remote access warrants more generally, he argued. See Tab G, Kerr Memo 2/8/2014, at 3-4. Also, in reducing the number of warrant applications needed, the proposal could also reduce the amount of judicial oversight provided to such investigations and lead to the inclusion of less information in the affidavit. Tab G, Kerr Memo 2/8/2014, at 4-5.

The Department countered that Congress has endorsed multijurisdictional authorization in terrorism and ECPA cases as good public policy, Tab F, DOJ Memo 2/7/14, at 2, and that multiple applications "create serious practical obstacles for law enforcement while also wasting judicial resources." *Id*. Judges in terrorism cases may authorize multi-district searches, and a judge in the district where a crime occurs may issue an order for law enforcement to obtain data stored in another district under the ECPA. *Id.* As to judicial oversight, the Department argued that the proposal would allow the judge who knows most about the investigation to screen all of the warrant applications in the case, creating better judicial oversight, not worse. *Id.*at 2-3.

b. Risk of increased use of delayed notice remote access warrants instead of traditional warrants

Adoption of the proposed amendment, some Subcommittee members suggested, could also lead to the substitution of delayed-notice remote access searches for traditional physical searches of electronic storage media, after which notice is left with the owner. Professor Kerr warned that any "shift from physical searches to remote searches" would necessarily mean "a shift from a standard of notice searches to a standard of delayed notice (aka "sneak and peek" searches)." See Tab G, Kerr Memo 2/8/2014, at 2.

As the Department noted, the amendment does not impact the standard for deciding when notice may appropriately be delayed. Under 18 U.S.C. § 3103a, "The issuing court still must find "reasonable cause to believe that providing immediate notification of the execution of the

warrant may have an adverse result (as defined in section 2705, except if the adverse results consist only of unduly delaying a trial)." See Tab H, DOJ Memo 3/5/2014, at 1-2. A court cannot authorize the seizure of either physical evidence or electronic information pursuant to a delayed-notice warrant without a judicial finding of reasonable necessity. The Department stated (*id.* at 1) that the proposal "is unlikely to substantially impact existing practice with respect to notice" of warrants to search multiple computers whose locations are known. Remote searches of computers known to be within a district are already authorized, and the amendment only makes it clear that the warrant can be sought in the district where the investigation is taking place. *Id*. at 2. The Government explained (*id*. at 3):

> Currently, the Department obtains remote access warrants primarily to combat Internet anonymizing techniques. In such investigations, delayed notice is normally sought because of the nature of the investigation. Where we are trying to identify an online criminal who is taking steps to avoid identification, there will typically be reasonable necessity for delaying notice of the search. On the other hand, if the Department were to use remote access warrants in circumstances that did not involve the same risk of an adverse result such as flight or destruction of evidence, the Department would be less likely to invoke the delayed notice procedures of §3103a. Alternatively, the Department might request a delay of shorter duration, limited to the amount of time necessary to complete the initial, critical stage of a remote operation before a could destroy evidence, modify malicious code, change servers or hosting services, or take other countermeasures.

c. Risk of substitution of remote access warrants for orders under the Electronic Communications Privacy Act.

Professor Kerr also argued that by removing the requirements of separate warrants for each district the remote access warrants authorized by the amendment would provide an easier route to information stored by third-party network providers than is presently offered by 18 U.S.C. § 2703 of the ECPA. See Tab G, Kerr Memo 2/8/2014, at 2-3. Professor Kerr argued that the proposed remote access searches could be used whenever a suspect has multiple accounts with multiple third party providers and that the amendment would provide law enforcement with an attractive alternative to the ECPA:

> [I]f the government wants the remotely stored files of a suspect who has a Dropbox account, a Google Cloud account, and an Amazon Cloud Drive account, the government [under the ECPA] must . . . show that there is probable cause to believe that there is evidence in the Dropbox account; probable cause to believe that there is evidence in the Google Cloud account; and probable cause to believe that there is evidence in the Amazon Cloud Drive account.

But under the proposed amendment, "[t]he only issue would be existence of probable cause somewhere in computers owned and operated by that person, rather than probable cause as to evidence being located in each place . . ." *Id.* at 2.

c. Limiting the amendment to cases in which location cannot be reasonably obtained.

In light of the several concerns described above, Professor Kerr asked the Subcommittee to consider an alternative amendment that would not authorize multiple computer searches, but would permit remote access searches *if* the location of the electronic storage media to be searched cannot reasonably be ascertained.[8] The alternative language he proposed would address the problem raised by the recent *In re Warrant* case (the first of the three scenarios described at the beginning of this memo), but would not attempt to resolve the others. Professor Kerr suggested that the showing of unascertainable location would operate like the good cause showing for night time execution, a requirement that is a statutory, not constitutional, so would not be subject to an exclusionary remedy. Tab G, Kerr Memo 2/8/2014, at 5.

The Department argued this proposed language might require a showing that other investigatory means have been tried and failed or are unlikely to succeed, and "draw courts into a determination of which investigative steps are "reasonable" in a given type of case." Tab F, DOJ Memo 2/7/2014, at 3. It would also preclude use of the new amendment in cases, such as botnet cases, where the location of a computer is actually known to be outside of the district. *Id.*

C. **Subcommittee's Recommendation**

The Subcommittee decided not to pursue the alternative amendment. At its fourth conference call March 12, the Subcommittee approved the Department's revised proposal with one dissenting vote. The Subcommittee concluded that it was appropriate to advance the proposal to publication and to seek public comment.

[8] " (6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant authorizing remote access of electronic storage media to obtain electronically stored information **if the district (if any) in which the electronic storage media is located cannot reasonably be ascertained."** Tab E, Kerr Rule 41 Proposal 2/3/2014, at 3.

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TAB 4B

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Proposed Amendment to Rule 41

* * * * *

(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 electronically stored information located within or outside that district.

* * * * *

(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 electronically stored information, the officer must make reasonable efforts to serve a copy on the person whose property was searched or whose information was seized. Service may be accomplished by any means, including [reliable][*] electronic means, reasonably calculated to reach that person [ALT: any person whose information was seized or whose property was searched].[**] [Upon request of the government, the magistrate may delay notice as provided in Rule 41(f)(3).][***]

COMMITTEE NOTE

Subdivision (b)(6). The amendment is intended to clarify that a magistrate judge with authority in a district where the activities related to a crime may have occurred may issue a warrant to use remote access to search electronic storage media and seize electronically stored information even when that media or information is located outside of the district. 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 electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

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[*]Professor Kimble has suggested the inclusion of "reliable" since that term is used throughout the rules in connection with electronic means. However, the proposed rule itself already requires means "reasonably calculated to reach" the person who must be notified.

[**]The Reporters have suggested the bracketed phrase in response to Professor Kimble's shortened reference to "that person."

[***]Professor Kimble has suggested this provision is unnecessary, since Rule 41(f)(3) provides "of any notice required by this rule if the delay is authorized by statute."

Subdivision (f)(1)(C). The amendment to Rule is intended to ensure that reasonable efforts are made to provide notice of the search or seizure to the person whose information was seized or whose property was searched.

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TAB 4C

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U.S. Department of Justice

Criminal Division

13-CR-B

Assistant Attorney General *Washington, D.C. 20530*

September 18, 2013

The Honorable Reena Raggi
Chair, Advisory Committee on the Criminal Rules
704S United States Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201-1818

Dear Judge Raggi:

The Department of Justice recommends an amendment to Rule 41 of the Federal Rules of Criminal Procedure to update the provisions relating to the territorial limits for searches of electronic storage media. The amendment would establish a court-supervised framework through which law enforcement can successfully investigate and prosecute sophisticated Internet crimes, by authorizing a court in a district where activities related to a crime have occurred to issue a warrant – to be executed via remote access – for electronic storage media and electronically stored information located within or outside that district. The proposed amendment would better enable law enforcement to investigate and prosecute botnets and crimes involving Internet anonymizing technologies, both which pose substantial threats to members of the public.

Background

Rule 41(b) of the Federal Rules of Criminal Procedure authorizes magistrate judges to issue search warrants. In most circumstances, search warrants issue for property that is located within the judge's district. Currently, Rule 41(b) authorizes out-of-district search warrants for: (1) property in the district when the warrant is issued that might be moved outside the district before the warrant is executed; (2) tracking devices, which may be monitored outside the district if installed within the district; (3) investigations of domestic or international terrorism; and (4) property located in a United States territory or a United States diplomatic or consular mission.

Rule 41(b) does not directly address the special circumstances that arise when officers execute search warrants, via remote access, over modern communications networks such as the Internet. Rule 41 should be amended to address two increasingly common situations: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown, and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts.

The first of these circumstances – where investigators can identify the target computer, but not the district in which it is located – is occurring with greater frequency in recent years. Criminals are increasingly using sophisticated anonymizing technologies when they engage in crime over the Internet. For example, a fraudster exchanging email with an intended victim or a child abuser sharing child pornography over the Internet may use proxy services designed to hide his or her true IP address. Proxy services function as intermediaries for Internet communications: when one communicates through an anonymizing proxy service, the communications pass through the proxy, and the recipient of the communications receives the proxy's IP address, rather than the originator's true IP address. There is a substantial public interest in catching and prosecuting criminals who use anonymizing technologies, but locating them can be impossible for law enforcement absent the ability to conduct a remote search of the criminal's computer. Law enforcement may in some circumstances employ software that enables it through a remote search to determine the true IP address or other identifying information associated with the criminal's computer.

Yet even when investigators can satisfy the Fourth Amendment's threshold for obtaining a warrant for the remote search – by describing the computer to be searched with particularity and demonstrating probable cause to believe that the evidence sought via the remote search will aid in a particular apprehension or conviction for a particular offense – a magistrate judge may decline to issue the requested warrant. For example, in a fraud investigation, one magistrate judge recently ruled that an application for a warrant for a remote search did not satisfy the territorial jurisdiction requirements of Rule 41. *See In re Warrant to Search a Target Computer at Premises Unknown,* ___ F. Supp. 2d ___, 2013 WL 1729765 (S.D. Tex. Apr. 22, 2013) (noting that "there may well be a good reason to update the territorial limits of that rule in light of advancing computer search technology").

Second, criminals are using multiple computers in many districts simultaneously as part of complex criminal schemes, and effective investigation and disruption of these schemes often requires remote access to Internet-connected computers in many different districts. For example, thefts in one district may be facilitated by sophisticated attacks launched from computers in multiple other districts. An increasingly common form of online crime involves the surreptitious infection of multiple computers with malicious software that makes them part of a "botnet" – a collection of compromised computers under the remote command and control of a criminal. Botnets may range in size from hundreds to millions of compromised computers, including home, business, and government systems. Botnets are a significant threat to the public: they are used to conduct large-scale denial of service attacks, steal personal and financial data, and distribute malware designed to invade the privacy of users of the host computers.

Effective investigations of these sophisticated crimes often require law enforcement to act in many judicial districts simultaneously. Under the current Rule 41, however, except in cases of domestic or international terrorism, investigators may need to coordinate with agents,

prosecutors, and magistrate judges in every judicial district in which the computers are known to be located to obtain warrants authorizing the remote access of those computers. For example, a large botnet investigation is likely to require action in all 94 districts, but coordinating 94 simultaneous warrants in the 94 districts would be impossible as a practical matter. At a minimum, requiring so many magistrate judges to review virtually identical probable cause affidavits wastes judicial and investigative resources and creates delays that may have adverse consequences for the investigation. Authorizing a court in a district where activities related to a crime have occurred to issue a warrant for electronic storage media within or outside the district would better align Rule 41 with the extent of constitutionally permissible warrants and remove an unnecessary obstruction currently impairing the ability of law enforcement to investigate botnets and other multi-district Internet crimes.

Thus, while the Fourth Amendment permits warrants to issue for remote access to electronic storage media or electronically stored information, Rule 41's language does not anticipate those types of warrants in all cases. Amendment is necessary to clarify the procedural rules that the government should follow when it wishes to apply for these types of warrant.

Language of Proposed Amendment

Our proposed amendment includes two parts. First, we propose adding the following language at the end of subsection (b):

> and (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 be executed via remote access, for electronic storage media or electronically stored information located within or outside that district.

Second, we propose adding the following language at the end of subsection (f)(1)(C):

> In a case involving a warrant for remote access to electronic storage media or electronically stored information, the officer executing the warrant must make reasonable efforts to serve a copy of the warrant on an owner or operator of the storage media. Service may be accomplished by any means, including electronic means, reasonably calculated to reach the owner or operator of the storage media. Upon request of the government, the magistrate judge may delay notice as provided in Rule 41(f)(3).

Discussion of Proposed Amendment

The proposed amendment authorizes a court with jurisdiction over the offense being investigated to issue a warrant to remotely search a computer if activities related to the crime under investigation have occurred in the court's district. In other circumstances, the Rules or federal law recognize that it can be appropriate to give magistrate judges nationwide authority to issue search warrants. For example, in terrorism investigations, the current Rule 41(b)(3) allows a magistrate judge "in any district in which activities related to the terrorism may have occurred" to issue a warrant "for a person or property within or outside that district." This approach is also similar to the current rule for a warrant requiring communication service providers to disclose electronic communications: a court with "jurisdiction over the offense being investigated" can issue such a warrant. *See* 18 U.S.C. §§ 2703(a) & 2711(3)(A)(I); *United States v. Bansal,* 663 F.3d 634, 662 (3d Cir. 2011); *United States v. Berkos*, 543 F.3d 392, 397-98 (7th Cir. 2008). Mobile tracking device warrants may authorize the use of tracking devices outside the jurisdiction of the court, so long as the device was installed in that jurisdiction. Fed. R. Crim. P. 41(b)(4); 18 U.S.C. § 3117(a). In the proposed amendment, the phrase "any district where activities related to a crime may have occurred" is the same as the language setting out the jurisdictional scope of Rule 41(b)(3).

The amendment provides that notice of the warrant may be accomplished by any means reasonably calculated to reach an owner or operator of the computer or – as stated in the amendment, which uses existing Rule 41 language – the "storage media or electronically stored information." In many cases, notice is likely to be accomplished electronically; law enforcement may not have a computer owner's name and street address to provide notice through traditional mechanisms. The amendment also requires that the executing officer make reasonable efforts to provide notice. This standard recognizes that in unusual cases, such as where the officer cannot reasonably determine the identity or whereabouts of the owner of the storage media, the officer may be unable to provide notice of the warrant. *Cf.* 18 U.S.C. § 3771(c)(1) (officers "shall make their best efforts to see that the crime victims are notified of … the rights described in subsection (a)").

In light of the presumption against international extraterritorial application, and consistent with the existing language of Rule 41(b)(3), this amendment does not purport to authorize courts to issue warrants that authorize the search of electronic storage media located in a foreign country or countries. The Fourth Amendment does not apply to searches of the property of non-United States persons outside the United States, *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990), and the Fourth Amendment's warrant requirement does not apply to searches of United States persons outside the United States. *See United States v. Stokes*, ___ F.3d ___, 2013 WL 3948949 at *8-*9 (7th Cir. Aug. 1, 2013); *In re Terrorist Bombings*, 552 F.3d 157, 170-71 (2d Cir. 2008). Instead, extraterritorial searches of United States persons are subject to the Fourth Amendment's "basic requirement of reasonableness." *Stokes*, 2013 WL 3948949 at

*9; *see also In re Terrorist Bombings*, 552 F.3d at 170 n.7. Under this proposed amendment, law enforcement could seek a warrant either where the electronic media to be searched are within the United States or where the location of the electronic media is unknown. In the latter case, should the media searched prove to be outside the United States, the warrant would have no extraterritorial effect, but the existence of the warrant would support the reasonableness of the search.

* * *

We believe that timely and thorough consideration of this proposed amendment by the Advisory Committee is appropriate. We therefore ask that the Committee act at its November meeting to establish a subcommittee to examine this important issue. Criminals are increasingly using sophisticated technologies that pose technical challenges to law enforcement, and remote searches of computers are often essential to the successful investigation of botnets and crimes involving Internet anonymizing technologies. Moreover, this proposal would ensure a court-supervised framework through which law enforcement could successfully investigate and prosecute such crimes.

We look forward to discussing this with you and the Committee.

Sincerely,

Mythili Raman

Mythili Raman
Acting Assistant Attorney General

cc: Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter

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TAB 4D

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U.S. Department of Justice

Criminal Division

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

January 17, 2014

MEMORANDUM

TO: Judge John F. Keenan
Chair, Subcommittee on Rule 41

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

SUBJECT: Proposed Amendment to Rule 41 of the Federal Rules of Criminal Procedure

This memorandum is a follow-up to the Subcommittee's December 16th conference call and the request for examples of warrants that would be covered under the Department's proposal to amend Rule 41 of the Federal Rules of Criminal Procedure. The proposed amendment would authorize a court in a district where activities related to a crime have occurred to issue a warrant, to be executed by remote access, for electronic storage media and electronically stored information located within or outside that district. We have attached three warrant examples to this memorandum: two relate to crime involving the use of Internet anonymizing technologies, and one relates to crime involving the use of a botnet.

The first example is based on a warrant used in an investigation of a series of bomb threats and threats of other violent crimes. In this and similar cases, investigators may know that the suspect has used a particular email address, but because the suspect also uses anonymizing technologies, law enforcement may not be able to identify the suspect without the use of a network investigative technique ("NIT"). The warrant authorizes the government to use the NIT to collect the IP address, MAC address, and other similar identifying information from the computer that is accessing the email account. Ultimately, in the case upon which this warrant is based, investigators were able to use the NIT to identify the individual making the threats. It should be noted that in this case, the court had clear jurisdiction to issue the warrant under Rule 41(b)(3), as the investigation involved hoaxes and threats related to terrorism. The Department's proposal is intended to clarify that the issuance of such a warrant is proper in other criminal investigations as well.

The second example is based on a warrant used in an investigation of a child pornography website operating as a "hidden service" on the Tor network. Tor masks its users' actual IP addresses by routing their communications through a distributed network of relay computers run by volunteers around the world. In this case, law enforcement knew the physical location of the server used to host the hidden service. However, without use of a NIT, investigators could not identify the administrators or users of the hidden service. This warrant would authorize the collection of IP addresses, MAC addresses, and other similar information from users and administrators of the website.

The final example is based on the sort of warrant we anticipate seeking in a botnet investigation. For identified computers in the botnet, the warrant would authorize law enforcement to search for and seize particular information, which would in turn enable law enforcement to gather further evidence about the scope of the botnet and how the botnet might be dismantled.

- - -

We hope these documents are responsive to the Subcommittee's request. We look forward to discussing all of this with the Subcommittee on our call next week. Please let us know if there is any further information we can provide.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

IN THE MATTER OF THE SEARCH OF **COMPUTER THAT ACCESSES CRIMINAL.SUSPECT@EMAIL.NET**	Case No. _____

AFFIDAVIT IN SUPPORT OF AN APPLICATION UNDER RULE 41 FOR A WARRANT TO SEARCH AND SEIZE

I, Jane Smith, being first duly sworn, hereby depose and state as follows:

INTRODUCTION AND AGENT BACKGROUND

1. I make this affidavit in support of an application under Rule 41 of the Federal Rules of Criminal Procedure for a warrant to search the TARGET COMPUTER, further described below and in Attachment A, for the information described in Attachment B. As set forth below, I submit that there is probable cause to believe that evidence of who is committing violations of Title 18, United States Code, Section 1038 (False information and hoaxes) will be found in the location described in Attachment A, which information, described in Attachment B, may be gathered from the computer described in Attachment A by use of the network investigative technique described herein.

2. I am a Special Agent with the Federal Bureau of Investigation and have been since December 28, 2002. I hold both bachelors and masters degrees in criminal justice and am a graduate of the Federal Law Enforcement Training Academy. I have led numerous investigations of the types of offenses being investigated in this application, many of which have involved the collection of evidence from email accounts and computers.

3. The facts set forth in this affidavit are based on my personal knowledge, information obtained from other individuals, including other law enforcement officers, my review of documents, and information gained through my training and experience. This affidavit is intended to show only that there is sufficient probable cause for the requested warrant and does not set forth all of my knowledge about this matter.

IDENTIFICATION OF THE TARGET COMPUTER

4. The TARGET COMPUTER is identified as the computer that will access the e-mail account criminal.suspect@email.net and retrieve an e-mail that will be sent to that account in furtherance of the requested warrant and activate software designed to collect and to make available to investigators the information described in Attachment B. The term TARGET COMPUTER refers to the computer itself and also to any storage media built into or used by the TARGET COMPUTER, any random-access memory (RAM), and any hardware devices attached to the computer.

PROBABLE CAUSE

5. On January 1, 2014, at 9:04 am, the Springfield Police Department in this district received an email message from criminal.suspect@email.net. The emailer demanded the release of a person in the police department's custody, Jerod Miller. The email stated that, if his demands were not met, he would blow up the police station with a particular explosive chemical combination. The emailer stated that he "has plenty of help," boasting that "you can't find all of us and the last man standing will finish the job."

6. Over the next several hours, Officer Tom Manning corresponded with the individual at criminal.suspect@email.net numerous times. During the correspondence, the

emailer repeated several times his intention to use explosives to blow up the Springfield Police Department if Jerod Miller was not released from custody. The emailer went on to say "and it wont [sic] stop there. More people will die until we get what we want."

7. Over the course of several days beginning on January 1, 2014, three airports (District International Airport, Springfield Airport, and Thompson Airfield), two schools (Washington High School and State University) and at least one other public place (Veterans Stadium) received bomb threats from criminal.suspect@email.net. In each threat, the email stated that the location would be blown up using the same particular chemical compound. Several such emails specifically referred to the large number of people who would be killed by such explosions, stating that killing as many people as possible would be a goal of the explosions.

8. Investigators obtained the log in records for the criminal.suspect@email.net account from the email service provider. The logs recorded that the email address was repeatedly accessed, including during the period of January 1, 2014 through January 4, 2014, from IP addresses 192.168.0.1, an IP address belonging to Internet Proxy Service, a proxy service offered on the Internet that routes traffic to and from its users through its own computers in order to hide its users' true IP addresses. Internet Proxy Service advised investigators that it did not possess records that would correlate one of its users with the IP address logging into the criminal.suspect@email.net address.

AUTHORIZATION REQUEST; DELAYED NOTICE

9. This application seeks a warrant authorizing the installation on the TARGET COMPUTER of computer software that, after successful installation, will extract information

from the TARGET COMPUTER and make it available to officers authorized the execute this warrant, likely without the knowledge of the TARGET COMPUTER's users.

10. Thus, the warrant applied for would authorize the copying of electronically stored information under Rule 41(e)(2)(B).

11. I state the following in support of the government's request, under 18 U.S.C. § 3103a(b) and Federal Rule of Criminal Procedure 41(f)(3), that the Court authorize the officer executing the warrant to delay notice until 30 days after the collection authorized by the warrant has been completed:

a. There is reasonable cause to believe that providing immediate notification of the warrant may have an adverse result, as defined in 18 U.S.C. § 2705. Providing immediate notice to the owner or user of the TARGET COMPUTER would seriously jeopardize the ongoing investigation, as such a disclosure would give that person an opportunity to destroy evidence, change patterns of behavior, notify confederates, and flee from prosecution. *See* 18 U.S.C. § 3103a(b)(1).

b. As further specified in Attachment B, which is incorporated into the warrant, the applied-for warrant does not authorize the physical seizure of any tangible property.

c. To the extent that Attachment B describes stored wire or electronic information, there is reasonable necessity for its seizure. *See* 18 U.S.C. § 3103a(b)(2).

12. I further request that the Court authorize execution of the warrant at any time of day or night, as the warrant does not authorize the physical seizure of tangible property.

Respectfully submitted,

Jane Smith
Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me
on January 17, 2014:

Honorable Amy Jones
UNITED STATES MAGISTRATE JUDGE

ATTACHMENT A

This warrant authorizes the use of a network investigative technique described in Attachment B on the TARGET COMPUTER.

The TARGET COMPUTER is identified as the computer that will access the email account criminal.suspect@email.net, retrieve an email that will be sent to that account in furtherance of the requested warrant and activate software designed to collect and to make available to investigators the information described in Attachment B. The term TARGET COMPUTER refers to the computer itself and also to any storage media built into or used by the TARGET COMPUTER, any random-access memory (RAM), and any hardware devices attached to the computer.

ATTACHMENT B

This warrant authorizes the installation on the TARGET COMPUTER of computer software (the "NEW SOFTWARE") and the use of the NEW SOFTWARE to extract the following information from the TARGET COMPUTER and make that information available to officers authorized the execute this warrant:

1. the TARGET COMPUTER's actual IP address, and the date and time that the NIT determines what that IP address is;
2. the type of operating system running on the TARGET COMPUTER, including type (e.g., Windows), version (e.g., Windows 7), and architecture (e.g., x 86);
3. The TARGET COMPUTER's time zone information;
4. the TARGET COMPUTER's Host Name;
5. the TARGET COMPUTER's media access control ("MAC") address;
6. The TARGET COMPUTER's registered computer name and registered company name;
7. The TARGET COMPUTER's current logged-in user name and list of user accounts

all of which is evidence of violations of 18 U.S.C. § 1038.

Provided, however, that all information will be extracted from the TARGET COMPUTER no later than 30 days after the date of this warrant.

This warrant does not authorize the physical seizure of any tangible property. In approving this warrant, the Court finds reasonable necessity for the seizure of stored wire and electronic information as described above. *See* 18 U.S.C. § 3103a(b)(2).

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

IN THE MATTER OF THE SEARCH	)	
OF COMPUTERS THAT ACCESS	)	**Case No.**
"Website A"	)	

AFFIDAVIT IN SUPPORT OF APPLICATION FOR SEARCH WARRANT

I, John Smith, being first duly sworn, hereby depose and state:

INTRODUCTION

1. I make this affidavit in support of an application under Rule 41 of the Federal Rules of Criminal Procedure for a warrant to use a network investigative technique ("NIT") on computers that access Website A, identified by Tor URL example.onion (collectively, TARGET COMPUTERS), as further described in this affidavit and its attachments, in order to search the TARGET COMPUTERS for the information described in Attachment B.

2. I am a Special Agent with the Federal Bureau of Investigation, and have been since December 28, 2002. I have participated in hundreds of criminal investigations involving evidence stored on computers and am familiar with the offenses under investigation, the network investigative technique described herein and the uses of types of evidence sought by the requested warrant.

3. This affidavit is intended to show only that there is sufficient probable cause for the requested warrant and does not set forth all of my knowledge about this matter.

4. The statements contained in this affidavit are based in part on: information provided by other law enforcement agents, including written reports about this and other investigations that I have received; information gathered from the service of subpoenas; the results of physical and electronic surveillance conducted by federal agents; independent investigation and analysis by FBI agents/analysts and computer forensic professionals; my experience, training and background as a

Special Agent with the FBI, and communication with computer forensic professionals assisting with the design and implementation of the NIT.

RELEVANT STATUTES

5. This investigation concerns alleged violations of: 18 U.S.C. § 2252A(g), Engaging in a Child Exploitation Enterprise; 18 U.S.C. §§ 2251(d)(1) and or (e), Advertising and Conspiracy to Advertise Child Pornography; 18 U.S.C. §§ 2252A(a)(2)(A) and (b)(1), Receipt and Distribution of, and Conspiracy to Receive and Distribute Child Pornography; and/or 18 U.S.C. § 2252A(a)(5)(B) and (b)(2), Knowing Access or Attempted Access With Intent to View Child Pornography.

DEFINITIONS OF TECHNICAL TERMS USED IN THIS AFFIDAVIT

6. The following definitions apply to this Affidavit:

a. "Child Pornography," as used herein, is defined in 18 U.S.C. § 2256 (any visual depiction of sexually explicit conduct where (a) the production of the visual depiction involved the use of a minor engaged in sexually explicit conduct, (b) the visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaged in sexually explicit conduct, or (c) the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged in sexually explicit conduct).

b. "Computer," as used herein, is defined pursuant to 18 U.S.C. § 1030(e)(1) as "an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device."

c. "Computer Server" or "Server," as used herein, is a computer that is attached to a dedicated network and serves many users. A web server, for example, is a computer which hosts the data associated with a website. That web server receives requests from a user and delivers information from the server to the user's computer via the Internet. A DNS (domain name system) server, in essence, is a computer on the Internet that routes communications when a user types a domain name, such as www.cnn.com, into his or her web browser. Essentially, the domain name must be translated into an Internet Protocol (IP) address so the computer hosting the web site may be located, and the DNS server provides this function.

d. "Hyperlink" refers to an item on a web page which, when selected, transfers the user directly to another location in a hypertext document or to some other web page.

e. The Internet is a global network of computers and other electronic devices that communicate with each other. Due to the structure of the Internet, connections between devices on the Internet often cross state and international borders, even when the devices communicating with each other are in the same state.

f. "Internet Service Providers" (ISPs), as used herein, are commercial organizations that are in business to provide individuals and businesses access to the Internet. ISPs provide a range of functions for their customers including access to the Internet, web hosting, e-mail, remote storage, and co-location of computers and other communications equipment. ISPs can offer a range of options in providing access to the Internet including telephone based dial-up, broadband based access via digital subscriber line (DSL) or cable television, dedicated circuits, or satellite based

subscription. ISPs typically charge a fee based upon the type of connection and volume of data, called bandwidth, which the connection supports. Many ISPs assign each subscriber an account name – a user name or screen name, an "e-mail address," an e-mail mailbox, and a personal password selected by the subscriber. By using a computer equipped with a modem, the subscriber can establish communication with an ISP over a telephone line, through a cable system or via satellite, and can access the Internet by using his or her account name and personal password.

g. "Internet Protocol address" or "IP address" refers to a unique number used by a computer to access the Internet. IP addresses can be dynamic, meaning that the Internet Service Provider (ISP) assigns a different unique number to a computer every time it accesses the Internet. IP addresses might also be static, if an ISP assigns a user's computer a particular IP address which is used each time the computer accesses the Internet. IP addresses are also used by computer servers, including web servers, to communicate with other computers.

h. "Minor" means any person under the age of eighteen years. See 18 U.S.C. § 2256(1).

i. "Sexually explicit conduct" means actual or simulated (a) sexual intercourse, including genital-genital, oral-genital, or oral-anal, whether between persons of the same or opposite sex; (b) bestiality; (c) masturbation; (d) sadistic or masochistic abuse; or (e) lascivious exhibition of the genitals or pubic area of any person. See 18 U.S.C. § 2256(2).

j. "Visual depictions" include undeveloped film and videotape, and data stored on computer disk or by electronic means, which is capable of conversion into a visual

image. See 18 U.S.C. § 2256(5).

k. "Website" consists of textual pages of information and associated graphic images. The textual information is stored in a specific format known as Hyper-Text Mark-up Language (HTML) and is transmitted from web servers to various web clients via Hyper-Text Transport Protocol (HTTP).

PROBABLE CAUSE

The Tor Network

7. The targets of the investigative technique described herein are the administrators and users of a child pornography website who regularly send and receive illegal child pornography via a website that operates as a "hidden service" located on the Tor network, described below and referred to herein as Website A. Website A is dedicated to the advertisement and distribution of child pornography, the discussion of matters pertinent to child sexual abuse, including methods and tactics offenders use to abuse children, as well as methods and tactics offenders use to avoid law enforcement detection while perpetrating online child sexual exploitation crimes such as those described in paragraph 5 of this affidavit.

8. Website A operates on an anonymity network available to Internet users known as "The Onion Router" or "Tor" network. Tor was originally designed, implemented, and deployed as a project of the U.S. Naval Research Laboratory for the primary purpose of protecting government communications. It is now available to the public at large. Information documenting what Tor is and how it works is provided on the publicly accessible website www.torproject.org. In order to access the Tor network, a user must install Tor software either by downloading an add-on to the user's web browser or by downloading the free "Tor browser bundle" available at

www.torproject.org.[1]

9. The Tor software protects users' privacy online by routing their communications through a distributed network of relay computers run by volunteers all around the world, thereby masking the user's actual IP address which could otherwise be used to identify a user. It prevents someone attempting to monitor an Internet connection from learning what sites a user visits, prevents the sites the user visits from learning the user's physical location, and lets the user access sites which could otherwise be blocked. Because of the way Tor routes communications through other computers, traditional IP identification techniques are not viable. When a user on the Tor network accesses a website, for example, the IP address of a Tor "exit node," rather than the user's actual IP address, shows up in the website's IP log. An exit node is the last computer through which a user's communications were routed. There is no practical way to trace the user's actual IP back through that Tor exit node IP. In that way, using the Tor network operates similarly to a proxy server.

10. Tor also makes it possible for users to hide their locations while offering various kinds of services, such as web publishing, forum/website hosting, or an instant messaging server. Within the Tor network itself, entire websites can be set up as "hidden services." "Hidden services" operate the same as regular public websites with one critical exception. The IP address for the web server is hidden and instead is replaced with a Tor-based web address, which is a series of algorithm-generated characters, such as "asdlk8fs9dflku7f" followed by the suffix ".onion." A user can only reach these "hidden services" if the user is using the Tor client and operating in the Tor network. And unlike an open Internet website, is not possible to determine through public lookups the IP

1 Users may also access the Tor network through so-called "gateways" on the open Internet such as "onion.to" and "tor2web.org," however, use of those gateways does not provide users with the anonymizing benefits of the Tor network.

address of a computer hosting a Tor "hidden service." Neither law enforcement nor users can therefore determine the location of the computer that hosts the website through those public lookups.

Finding and Accessing Website A

11. Because Website A is a Tor hidden service, it does not reside on the traditional or "open" Internet. A user may only access Website A through the Tor network. Even after connecting to the Tor network, however, a user must know the web address of the website in order to access the site. Rather than a plain language address containing the name of the website such as www.cnn.com, a Tor web address is a series of algorithm-generated characters, such as "asdlk8fs9dflku7f" followed by the suffix ".onion." Moreover, Tor hidden services are not indexed like websites on the traditional Internet. Accordingly, unlike on the traditional Internet, a user may not simply perform a Google search for the name of one of the websites on Tor to obtain and click on a link to the site. A user might obtain the web address directly from communicating with other users of the board, or from Internet postings describing the sort of content is available on one of the Website A as well as the website's location. For example, there is a Tor "hidden service" page that is dedicated to pedophilia and child pornography. That "hidden service" contains a section with links to Tor hidden services that contain child pornography. Website A is listed in that section. Accessing Website A therefore requires numerous affirmative steps by the user, making it extremely unlikely that any user could simply stumble upon Website A without understanding its purpose and content. Accordingly, there is probable cause to believe that, for the reasons described below, any user who successfully accesses Website A has knowingly accessed it with the intent to view child pornography.

Identification of the Computer Server Hosting Website A

12. Through investigation, the FBI identified the physical computer server that hosts

Website A. That computer is located in this district. However, the identities of the administrators and users of Website A remain unknown. Users of Tor-based websites cannot be identified from the IP address logs of the website. Such logs will contain only the IP addresses of Tor "exit nodes" utilized by the users. Instead, the identities of the administrators and users of Website A can potentially be determined using the Network Investigative Technique described below. The network investigative technique may assist investigators to locate and apprehend offenders including users of Website A who are engaging in the continuing sexual abuse and exploitation of children, and to locate and rescue children from the imminent harm of ongoing abuse and exploitation.

Description of Website A and Its Content

Website A

13. On January 1, 2014, an FBI Special Agent operating in this district connected to the Internet via the Tor Browser and accessed the Tor hidden service at the URL example.onion (hereinafter referred to as "Website A"). Website A is a Tor network hidden service whose primary purpose is the production and dissemination of new child pornography between and among producers of child pornography—i.e., individuals who sexually abuse children, document that sexual abuse via photos or video, and share that documented sexual abuse with others. Website A requires users to both register and upload child pornography to the satisfaction of the site's administrators before they are allowed to access the child pornography on the site.

14. A review of the initial web page revealed it was a message board that contained the name of the site and the words "Private Sharing Community." Located below the title was the current date and time, along with the text "Welcome, Guest." A data-entry field with a corresponding button entitled "Login" and the text, "Please login or register. Login with username

and password," was located below the "Welcome Guest" text.

15. Located below the login field were three tabs entitled "Home," "Login" and "Register." A review of the "Home" tab, which was the default tab, revealed the following forums and corresponding topics and posts, which were visible to any user who accessed the site:

Forum	Topics	Posts
General Boards		
Welcome to [Website A] Read this before you register.	1	1
Open Boards - Giving you our old stuff so you can have something new		
Open Girls Posts	0	0
Open Boys Posts	0	0

16. A review of the "Welcome to [Website A]" forum revealed one topic entitled "Welcome Q&A," which contained one post with the same title. This post was made on January 1, 2013 by a user who was listed as an administrator of the board. This post contained the following text:

> Welcome to [Website A]!
> Q: What is [Website A]?
> A: We are a forum for producers of pre-teen material
> Q: How do I become a member?
> A: firstly decide on your NEW nickname. We do NOT want people using nicks that they use elsewhere in the community, it will only stop you from participating properly here. Decide on something original. Random lettered nicks will not be accepted at all. After you have registered as a member on the board you must submit an application post for the Admins to approve. Until the Admins have approved your application you will not be able to see any content of the board.
> Q: What material can I use for application?
> A: Application posts must contain self-produced material of a PRETEEN (Before Puberty) Girl or Boy or it will not be accepted.
> Enjoy your time here, contribute and make it last..lurk and watch it slip away.
> The [Website A abbreviation] Admins.

17. Based on my training and experience, I believe that "self-produced material" refers to

child pornography images or videos that the user has personally produced by videotaping or photographing a minor that is engaged in sexually explicit conduct. Also based on my training and experience, I believe that the reference to the term "community" in the above quoted post is to the community of individuals who sexually exploit children online through websites such as Website A.

18. Registration on Website A is open to any user and requires only the creation of a username and password. After registering an account via the "Registration" tab and logging into the site as a registered user, a review of the "Home" tab revealed two additional forums in the General Boards section, as follows:

> Forum Topics Posts
> General Boards
> Rules 3 3
> Read this before doing anything else and stay updated!
> Application Posts 2 11
> Apply here for access to Member groups. Topics is only visible to topic starter and Admins.

19. A review of the "Rules" forum revealed it contained the following three topics:

> Getting a Membership
> Filehosts for your uploads & Banned Hosts READ!
> Rules

20. The first two topics were created by a user who was listed as an administrator of the site and the last topic was created by a second user who was also listed as an administrator of the site. The "Getting a Membership" topic contained one post, made by one of the administrators, which contained the following text:

> OK, so you just signed up and now you wonder where all the nice stuff is?
> Memberships
> We have two types of membership. You apply for a membership in the "Application Board." Your application is only visible to you and the admins - not to other members. Applications will then be processed by the Admins who will

approve or disapprove.

Private Membership - For those with new, rare or private material
Application posts must contain new or rare material of a PRETEEN (Before Puberty) Girl or Boy or it will not be accepted and you will have to resubmit. We do NOT accept normal family photo's of nude children or children playing on the beach or elsewhere. The children must at least pose in a sexual way like spreading legs or showing pussy.

Producer Membership - For those who are active with children.
You must prove that you are the producer of the material - check the Application Board for the requirements for the proof material. Producers have access to all members boards.
We look forward to your Application! The Admins.

21. Accordingly, access to child pornography on Website A is limited to those members who apply for and are accepted as private members or producer members. Those sections of the website are accordingly accessible only to members who successfully apply for and are granted those levels of membership.

22. A review of the "Application Posts" forum revealed the following two topics:

Rules for Application - READ THIS BEFORE YOU APPLY! (2734 views)
Example of an Application Post (5254 views)

A review of the above two topics revealed instructions for how to submit an application and provided a description of an example. Among other things, these topics instructed users to submit at least a 25MB (megabyte) file with at least 25 images or two-minute video in good quality. Producers were further instructed to submit the following:

1. The Proof Material must be at least 5 High Quality Pictures or 15 seconds of High Quality Video.
2. A large clear Sign (letter or A4 sized paper) with the text "(Your Nick) for [Website A]" must be visible in the ALL Proof Material. The Sign can be hold by the Child or placed on his / her Body.
3. A Candle must be visible in ALL Proof Material. The Candle must be hold by the Child or inserted into his / her Mouth, Ass or Pussy (it does not have to be lit).

4. The Proof Material must show different positions / poses of the Child ? all with the candle and sign visible.
5. The Proof Material must show must of the Childs Body. We do not accept close-ups images only.
6. The Proof Material can not be a part of the Entry Post. The proof is for the Admins only and the Entry Post for the other Producers.
We hope you understand that the strict requirements is for your own and the other Producers safety. No one likes the wrong people (scammers) to get into the Producers Boards.
We look forward to your application. The Admin Team.

23. No further Website A content was accessible to the undercover law enforcement officer, who did not apply for private or producer membership because of the website's requirement, described above, that users post specific child pornography in order to gain those levels of membership.

24. After registering an account via the "Registration" tab and logging into the site as a registered user, an additional tab entitled "My Messages" was observed in the same area as the "Home" tab. Further, a hyperlink was observed near the bottom of the home page entitled "Personal Messages" and the text "You've got 0 messages….Click here to view them." This "Personal Messages" function appeared to be a feature that allowed users to send each other private or "personal" messages.

THE NETWORK INVESTIGATIVE TECHNIQUE

25. Based on my training, experience, and the investigation described above, I have concluded that using a network investigative technique may help FBI agents locate the users of the child pornography Website A. Accordingly, I request authority to use the NIT, which will be deployed on Website A to investigate any user or administrator who logs into any of Website A by entering a username and password.

26. In the normal course of operation, websites send content to visitors. A user's computer downloads that content and uses it to display web pages on the user's computer. Under the NIT authorized by this warrant, the website would augment that content with some additional computer instructions. When a computer successfully downloads those instructions from Website A, the instructions are designed to cause the "activating" computer to deliver certain information to a computer controlled by or known to the government. That information is described with particularity on the warrant (in Attachment B of this affidavit), and the warrant authorizes obtaining no other information. The NIT will not deny the user of the "activating" computer access to any data or functionality of that computer.

27. The NIT will reveal to the government environmental variables and certain registry-type information that may assist in identifying the computer, its location, and the user of the computer, which constitute evidence of violations of the statutes cited in paragraph 5. In particular, the NIT will reveal to the government no information other than the following items, which are also described in Attachment B:

- The "activating" computer's actual IP address, and the date and time that the NIT determines what that IP address is;
- A unique identifier (e.g., a series of numbers, letters, and/or special characters) to distinguish the data from that of other "activating" computers. That unique identifier will be sent with and collected by the NIT;
- The type of operating system running on the computer, including type (e.g., Windows), version (e.g., Windows 7), and architecture (e.g., x 86);

- Information about whether the NIT has already been delivered to the "activating" computer;
- The "activating" computer's Host Name. A Host Name is a name that is assigned to a device connected to a computer network that is used to identify the device in various forms of electronic communication, such as communications over the Internet;
- The "activating" computer's Media Access Control ("MAC") address. The equipment that connects a computer to a network is commonly referred to as a network adapter. Most network adapters have a MAC address assigned by the manufacturer of the adapter that is designed to be a unique identifying number. A unique MAC address allows for proper routing of communications on a network. Because the MAC address does not change and is intended to be unique, a MAC address can allow law enforcement to identify whether communications sent or received at different times are associated with the same adapter.

28. Each of these categories of information described in Attachment B may constitute evidence of the crimes under investigation, including information that may help to identify the "activating" computer and its user. The actual IP address of a computer that accesses Website A can be associated with an Internet service provider ("ISP") and a particular ISP customer. The unique identifier and information about whether the NIT has already been delivered to an "activating" computer will distinguish the data from that of other "activating" computers. The type of operating

system running on the computer, the computer's Host Name, and the computer's MAC address can help to distinguish the user's computer from other computers located at a user's premises.

29. During the up to thirty day period that the NIT is deployed on Website A, each time that any user or administrator logs into Website A by entering a username and password, the NIT authorized by this warrant will attempt to cause the user's computer to send the above-described information to a computer controlled by or known to the government in [District].

REQUEST FOR DELAYED NOTICE

30. Rule 41(f)(3) allows for the delay of any notice required by the rule if authorized by statute. 18 U.S.C. § 3103a(b)(1) and (3) allows for any notice to be delayed if "the Court finds reasonable grounds to believe that providing immediate notification of the execution of the warrant may have an adverse result (as defined in 18 U.S.C. § 2705) . . . ," or where the warrant "provides for the giving of such notice within a reasonable period not to exceed 30 days after the date of its execution, or on a later date certain if the facts of the case justify a longer period of delay." Because there are legitimate law enforcement interests that justify the unannounced use of a NIT, I ask this Court to authorize the proposed use of the NIT without the prior announcement of its use. Announcing the use of the NIT could cause the users or administrators of Website A to undertake other measures to conceal their identity, or abandon the use of Website A completely, thereby defeating the purpose of the search.

31. The government submits that notice of the use of the NIT, as otherwise required by Federal Rule of Criminal Procedure 41(f), would risk destruction of, or tampering with, evidence, such as files stored on the computers of individuals accessing Website A. It would, therefore, seriously jeopardize the success of the investigation into this conspiracy and impede efforts to learn

the identity of the individuals that participate in this conspiracy, and collect evidence of, and property used in committing, the crimes (an adverse result under 18 U.S.C. §3103a(b)(1) and 18 U.S.C. § 2705).

32. Furthermore, the investigation has not yet identified an appropriate person to whom such notice can be given. Thus, the government requests authorization, under 18 U.S.C. §3103a, to delay any notice otherwise required by Federal Rule of Criminal Procedure 41(f), until 30 days after any individual accessing Website A has been identified to a sufficient degree as to provide notice, unless the Court finds good cause for further delayed disclosure.

33. The government further submits that, to the extent that use of the NIT can be characterized as a seizure of an electronic communication or electronic information under 18 U.S.C. § 3103a(b)(2), such a seizure is reasonably necessary, because without this seizure, there would be no other way, to my knowledge, to view the information and to use it to further the investigation. Furthermore, the NIT does not deny the users or administrators access to Website A or the possession or use of the information delivered to the computer controlled by or known to the government, nor does the NIT permanently alter any software or programs on the user's computer.

TIMING OF SEIZURE/REVIEW OF INFORMATION

34. Rule 41(e)(2) requires that the warrant command FBI "to execute the warrant within a specified period of time no longer than fourteen days" and to "execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time." The government requests authority to deploy the NIT onto Website A at any time of day, within fourteen days of the Court's authorization. The NIT will be used on Website A for not more than 30 days from the date of the issuance of the warrant.

35. For the reasons above and further, because users of Website A communicate on the board at various hours of the day, including outside the time period between 6:00 a.m. and 10:00 p.m., and because the timing of the user's communication on the board is solely determined by when the user chooses to access the board, rather than by law enforcement, I request authority for the NIT to be employed at any time a user's computer accesses Website A, even if that occurs outside the hours of 6:00 a.m. and 10:00 p.m. Further, I seek permission to review information transmitted to a computer controlled by or known to the government, as a result of the NIT, at whatever time of day or night the information is received.

36. The government does not currently know the exact configuration of the computers that may be used to access Website A. Variations in configuration, e.g., different operating systems, may require the government to send more than one communication in order to get the NIT to activate properly. Accordingly, I request that this Court authorize the government to continue to send communications to the activating computers for up to 30 days after this warrant is authorized.

37. The Government may, if necessary, seek further authorization from the Court to employ the NIT on Website A beyond the 30-day period authorized by this warrant.

SEARCH AUTHORIZATION REQUESTS

38. Accordingly, it is respectfully requested that this Court issue a search warrant authorizing the following:

a. the NIT may cause an activating computer – wherever located – to send to a computer controlled by or known to the government, network level messages containing information that may assist in identifying the computer, its location,

other information about the computer and the user of the computer, as described above and in Attachment B;

b. the use of multiple communications, without prior announcement, within 30 days from the date this Court issues the requested warrant;

c. that the government may receive and read, at any time of day or night, within 30 days from the date the Court authorizes of use of the NIT, the information that the NIT causes to be sent to the computer controlled by or known to the government;

d. that, pursuant to 18 U.S.C. § 3103a(b)(3), to satisfy the notification requirement of Rule 41(f)(3) of the Federal Rules of Criminal Procedure, the government may delay providing a copy of the search warrant and the receipt for any property taken for thirty (30) days after a user of an "activating" computer that accessed Website A has been identified to a sufficient degree as to provide notice, unless notification is further delayed by court order.

CONCLUSION

39. Based on the information identified above, information provided to me, and my experience and training, I have probable cause to believe there exists evidence, fruits, and instrumentalities of criminal activity related to the sexual exploitation of children on computers that access Website A, in violation of 18 U.S.C. § 2252A(g), Engaging in a Child Exploitation Enterprise; 18 U.S.C. §§ 2251(d)(1) and or (e), Advertising and Conspiracy to Advertise Child Pornography; 18 U.S.C. §§ 2252A(a)(2)(A) and (b)(1), Receipt and Distribution of, and Conspiracy

to Receive and Distribute Child Pornography; and/or 18 U.S.C. § 2252A(a)(5)(B) and (b)(2), Knowing Access or Attempted Access With Intent to View Child Pornography.

40. Based on the information described above, there is probable cause to believe that the information described in Attachment B constitutes evidence and instrumentalities of these crimes.

41. Based on the information described above, there is probable cause to believe that employing a NIT on Website A, to collect information described in Attachment B, will result in the FBI obtaining the evidence and instrumentalities of the child exploitation crimes described above.

Sworn to under the pains and penalties of perjury.

_____
John Smith
Special Agent

Sworn to and subscribed before me
this _____ day of [ ], 20_____

_____
HONORABLE Jane Doe
UNITED STATES MAGISTRATE JUDGE

ATTACHMENT A

Locations to be Searched

This warrant authorizes the use of a network investigative technique ("NIT") to be deployed on the computer server described below, obtaining information described in Attachment B from the activating computers described below.

The computer server is the server operating the Tor network child pornography website referred to herein as Website A, as identified by the Tor URL example.onion, which is located in this district.

The activating computers are those of any user or administrator who logs into Website A by entering a username and password.

The government will not employ this network investigative technique after 30 days after this warrant is authorized, without further authorization.

ATTACHMENT B

Information to be Seized

From any "activating" computer described in Attachment A:

1. the "activating" computer's actual IP address, and the date and time that the NIT determines what that IP address is;
2. a unique identifier (e.g., a series of numbers, letters, and/or special characters) to distinguish data from that of other "activating" computers, that will be sent with and collected by the NIT;
3. the type of operating system running on the computer, including type (e.g., Windows), version (e.g., Windows 7), and architecture (e.g., x 86);
4. information about whether the NIT has already been delivered to the "activating" computer;
5. the "activating" computer's Host Name;
6. the "activating" computer's media access control ("MAC") address;

that is evidence of violations of 18 U.S.C. § 2252A(g), Engaging in a Child Exploitation Enterprise; 18 U.S.C. §§ 2251(d)(1) and or (e), Advertising and Conspiracy to Advertise Child Pornography; 18 U.S.C. §§ 2252A(a)(2)(A) and (b)(1), Receipt and Distribution of, and Conspiracy to Receive and Distribute Child Pornography; and/or 18 U.S.C. § 2252A(a)(5)(B) and (b)(2), Knowing Access or Attempted Access With Intent to View Child Pornography.

IN THE UNITED STATES DISTRICT COURT
FOR THE [_____] DISTRICT OF [_____]

IN RE APPLICATION FOR A WARRANT UNDER RULE 41 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE	Case No. _____

AFFIDAVIT IN SUPPORT OF AN APPLICATION UNDER RULE 41 FOR A WARRANT

I, **[[AGENT NAME]]**, being first duly sworn, hereby depose and state as follows:

INTRODUCTION AND AGENT BACKGROUND

1. I make this affidavit in support of an application for a warrant under Federal Rule of Criminal Procedure 41 to authorize a remote network technique, further described in Attachment B, affecting computers described in Attachment A.

TECHNICAL BACKGROUND

2. A "botnet" is a collection of computers (called bots) that have been compromised with malicious software, causing the bots to receive and obey commands from a common command and control infrastructure. A single individual (called a "bot herder"), using that command and control infrastructure, can control the group remotely. This control is usually used for unlawful purposes, such as stealing information from bots, using the bots' Internet connections to commit crimes, or using the bots to send spam e-mail.

3. In several cases, law enforcement or private industry have taken measures that have either removed botnets from the Internet, substantially reduced their size, or otherwise impaired their operation. Examples of botnet disruptions include the "Bredolab" botnet, disrupted by Dutch law enforcement in 2010, the "Waledac" botnet, disrupted by Microsoft in 2010, and the "Coreflood" botnet, disrupted by the FBI in 2011.

PROBABLE CAUSE

4. There is probable cause to believe that the computers identified in Attachment A are infected by malicious software that causes them to receive and obey commands from a common command and control infrastructure—collectively, forming a botnet that has been named "XXXX." That infection was unlawful under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5), and the ongoing operation of the botnet continues to violate that statute and also violates [other statutes.] Facts supporting that probable cause include:

a. [Establish probable cause here-- Discuss the scope of the botnet, the structure of the botnet and how it is controlled, the criminal uses of the botnet, and how we know that the target computer specified in Attachment A are members of the botnet. Discuss the malware the botnet installs on the victim computer, and explain how the information identified in Attachment B relates to the botnet malware, and, if possible, how such evidence collected would be used to further the investigation by, *e.g.*, assisting victim notification, identifying additional

victims, furthering the identification of perpetrators, and/or taking steps to disrupt the command and control functions of the botnet.]

5. The FBI has developed a remote network technique in which law enforcement agents have the capability to transmit to the computers identified in Attachment A code and/or commands that will gather the information described in Attachment B.

AUTHORIZATION REQUEST; DELAYED NOTICE

6. I state the following in support of the government's request, under 18 U.S.C. § 3103a(b), that the Court authorize the officer executing the warrant to delay notifying the owners of the TARGET COMPUTERS for 30 days after the remote network technique authorized by the warrant has been used:

a. [Establish potential "adverse result" from notification, as defined in 18 U.S.C. § 2705, here; for example: Immediate notification of the owners of the TARGET COMPUTERS may have the adverse result of leading to the destruction of or tampering with evidence. Immediate notification of the owners of the TARGET COMPUTERS, at this point, would as a practical matter also amount to notification of the botnet controllers; and, knowing what the government has done, there is reason to believe based that those botnet controllers could take steps to improve the botnet's defenses, or to destroy evidence of the crime that may be in other locations.]

7. I further request that the Court authorize execution of the warrant at any time of day or night, as the warrant does not authorize the physical seizure of tangible property.

FACTS RELEVANT TO THIS COURT'S AUTHORITY AND JURISDICTION

8. The infected computers described on Attachment A are "property . . . intended for use [and] used in committing a crime" under Rule 41(c)(3) because, as explained above, the infected computers have been used to steal login credentials.

Respectfully submitted,

_____

[[AGENT NAME]]
Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me
on January 17, 2014:

_____

UNITED STATES MAGISTRATE JUDGE

ATTACHMENT A

This warrant authorizes the use of a remote network technique described in Attachment B on computers that receive communications from [describe the common command and control infrastructure from which the technique will be sent, including as many unique characteristics of the botnet as possible] (the TARGET COMPUTERS).

ATTACHMENT B

This warrant authorizes a remote network technique in which law enforcement agents will transmit to each of the TARGET COMPUTERS described in Attachment A code and/or commands intended make the following information available to officers authorized to execute this warrant:

(1) the TARGET COMPUTER's actual IP address, and the date and time that the IP address is determined;

(2) The TARGET COMPUTER'S Computer Name and Media Access Control Address; and

(3) a unique identifier (e.g., a series of numbers, letters, and/or special characters) for the TARGET COMPUTER.

AFFIDAVIT

Matthew Fine, being duly sworn according to law deposes and says:

1. I am a Special Agent of the Federal Bureau of Investigation (FBI) and have been since May 1999. I am currently assigned to the Philadelphia Division of the FBI where I am responsible for the investigation of, among other things, computer intrusion offenses. In addition to graduating from the FBI Academy, Quantico, Virginia (VA), my prior occupation was that of a computer network engineer for two years at the National Cancer Institute. I have also attended the following basic and advanced computer investigation courses provided by the FBI:

2.) Basic Internet Fraud Investigations
3.) Basic Network Investigation Techniques
4.) Unix for Investigators Part I
5.) Network Investigation Techniques for Agents
6.) Unix for Investigators Part II
7.) Unix Intrusion Techniques for Agents
8.) Introduction to Sun Solaris
9.) Introduction to Cisco Systems
10.) Advanced Network Investigation Techniques
11.) Advanced Intrusion Techniques

2. I am an investigative or law enforcement officer of the United States within the meaning of Section 2510(7) of Title 18, United States Code, in that I am empowered by law to conduct investigations and to make arrests for federal felony offenses.

3. This affidavit is submitted in support of an application for a search warrant to permit me in conjunction with other agents of the FBI and the Information Technology staff of [redacted] ("the College"), to use a tool known a Computer and Internet Protocol Address Verifier (CIPAV) for the purpose of identifying and locating the person who has been making unlawful access to the computers of the College and has been

downloading information from the College, in violation of Title 18 U.S.C. § 1030(a)(2) and has been changing data within the College's databases, in violation of Title 18 U.S.C. § 1030(a)(5).

4. More specifically, the United States is applying for a search warrant authorizing:

a. the use of multiple CIPAVs in conjunction with the e-mail address "d[redacted]@yahoo.com" (the "target e-mail account") without prior announcement within 10 days from the date this Court authorizes the use of the first CIPAV;

b. that the CIPAVs may cause any computer - wherever located - that activates any CIPAV authorized by this Court to send a network level message containing the activating computer's IP address, http environment variables, MAC address information and registry information to a computer controlled by the FBI and located within the Eastern District of Virginia;

c. that the FBI may receive and read within 10 days from the date this Court authorizes the use of the first CIPAV, at any time of day or night, the information that any CIPAV causes to be sent to the computer controlled by the FBI and located within the Eastern District of Virginia; and

d. that to satisfy the notification and delayed notice requirements of Federal Rule of Criminal Procedure 41(d) and 18 U.S.C. § 3103a, the FBI shall follow the provisions set forth in paragraphs 60 to 65.

5. I am familiar with all of the facts contained in this application for a search warrant based upon my own personal investigation, that of other law enforcement officers, review of documents and discussion with computer experts. Because this is an application for a search warrant I have not set forth every fact that I know about the investigation, but only those that are pertinent to the application for a search warrant.

HISTORY

6. The [redacted] is a membership organization that provides professional materials to [redacted]. It is located at [redacted]

7. Beginning on or about Monday, January 24, 2005, a person whose identity and location are unknown started to make unauthorized access to the computers of the College through the Internet.[1]

8. At approximately 9:00 PM on January 24, 2005, the staff at the College noted a spike in traffic at its member connection site. The College permits its registered members access to a database that contains information about each member of the College. The amount of traffic normally received is 1,000 views per day. The staff members noticed a view rate of more than 1,000 views per hour.

9. The account being used to make these viewing was the account jr[redacted], a registered account with the College.

[1]The "Internet" is a global computer network that electronically connects computers and allows communications and transfers of data and information across state and national boundaries. To gain access to the Internet, an individual utilizes an Internet service provider (ISP). These ISP's are available

worldwide.

10. The computer logs of the College showed that the access to this account was from Internet Protocol (IP) addresses 38.119.107.76, 38.119.107.88, and 38.119.107.89, Those IP addresses are assigned to Performance Systems International Inc. (PSINET). An IP address is a unique address that is assigned by an Internet Service Provider to each customer as that customer logs onto the Internet. No computer can be connected to the Internet with out an IP address. No two computers connected to the Internet can have the same IP address at the same time. An IP address always has four parts, each part separated by a period. In each part there will be numbers ranging from 0 to 255. An IP address is analogous to a telephone number. The Internet uses IP addresses to route traffic. Each time a computer sends information (such as a request for a web page or an e-mail) the message is broken into small packets, each one containing a header. The header includes the source and destination IP addresses. With a request for a web page, for example, the destination IP address tells the routers along the Internet where this packet should be sent. When the destination web server receives the information, it looks to the source IP address to learn where it should send the requested information.[2]

[2] An Internet service provider (ISP) normally controls a range of several hundred (or even thousands of) IP addresses, which it uses to identify its customers' computers. IP addresses are usually assigned "dynamically." Each time the user dials into the ISP to connect to the Internet, the customer's computer is randomly assigned one of the available IP addresses controlled by the ISP. The customer's computer retains that IP address until the user disconnects, and the IP address cannot be assigned to another user during that period. Once the user disconnects, however, that IP address becomes available to other customers who dial in thereafter. Thus, the IP address assigned to a user normally differs each time he dials into the ISP. By contrast, an ISP's business customer will commonly have a permanent, 24-hour Internet connection to which a "static" (i.e., fixed) IP address is assigned. Practices for assigning IP addresses to cable Internet users vary, with many providers assigning semi-persistent numbers that may be allocated to a single user for a period of days or weeks, and then reassigned.

11. As part of the investigation the Systems Administrator of the College traced this IP address further and determined that it had been leased to Sterling Security Research, Inc, an anonymizer site. An anonymizer site helps users conceal their originating IP addresses. An anonymizer site acts as an intermediary between the user and the computers to which the user ultimately sends communications. The result is that any records retained by these ultimate computers do not reveal the user's originating IP address, but rather show only the IP address assigned to the anonymizer. In addition, the software controlling most anonymizer sites have been intentionally designed not to retain records regarding the users of the anonymizer site, including a user's originating IP address, for more than a few hours. Hence, when a person uses an anonymizer to send an e-mail, the anonymizer computer typically can be expected to retain that person's originating IP address only for a few hours.

12. The Sterling website advertises, "Surf anonymously, without revealing your true identity." The site also says, "Your true IP address will be shielded as if it is coming from our server."

13. The jr[redacted] account was downloading information from the membership database that is only available to members of the College. The College website states that members are not allowed to collect and aggregate the membership information.

14. On January 26, 2005 at approximately 10:30 AM, the College shut down the account to stop the downloading.

15. As soon as the account was disabled, there was a series of attempts to log on to this account. The number of attempts was in the thousands. Based upon my training and

experience, I believe that these attempts were automated, *i.e.*, done by a computer which was programmed to attempt to log in automatically, and were not done manually.

16. On January 26, 2005 at approximately 6:08 PM, the account of s[redacted] logged into the database from the same IP address that the j[redacted] account had been using.

17. On Thursday, January 27, 2005, the staff of the College noticed that the web server seemed to be running slowly. They determined that the s[redacted] account was downloading data from the membership file and they disabled that account.

18. On the same date, at approximately noon, the staff of the College changed the access to the database to limit access to a maximum of 150 records per hour.

19. At approximately 6:27 PM on that date, the database was accessed from the account of r[redacted]. The access was from the same IP address as the prior accesses.

20. At 6:33 PM, the r[redacted] account reached the 150 record per hour limit and was blocked temporarily from further access.

21. At approximately 9:00 PM, the staff of the College blocked the range of IP addresses, 38.119.107.xxx.

22. At 6:49 PM on the same date, the r[redacted] account again accessed the database, this time from IP address 24.199.134.250, an address that is assigned to the ISP, Road Runner.

23. The r[redacted] account triggered the 150 record limit at 8:55 PM. The r[redacted] account made additional accesses that evening and triggered the limit at 10:10 PM and at 11:15 PM.

24. On Friday, January 28, 2005, the College staff blocked range of IP addresses, 24.199.132.xxx.

25. On the same date, at approximately 4:36:27 PM, the r account accessed the database from IP address 160.79.249.240, an address that is assigned to Intellispace.net.

26. At 4:44 PM, the r account triggered the 150 record limit.

27. At 4:44:31 the p account was accessed from the same IP address and began to download records from the database.

28. The p access showed that the intruder was attempting to adapt to the record limit. In the previous accesses the record requests were coming every two to three seconds. On this occasion, they were coming every three to nine seconds.

29. At 6:16 PM, the p account triggered the 150 record limit.

30. At 6:16:26 PM, the g account began to download records. This account was accessed from IP address 82.194.62.16, that is assigned to ISP, Batelco, in Manama, Bahrain.

31. At 6:34 PM, the g account reached the 150 record limit.

32. At 6:39:27 PM, the k account began to download records from the database. Access to this account was from the same IP address in Bahrain.

33. At 6:48 PM, the account of k reached the 150 record limit.

34. At 6:48:42 PM, the account of j began downloading records. Access to this account was made from the same Bahrain IP address.

35. At 7:01 PM, the staff of the College disabled the j account.

36. At 7:01:35 PM the account of e[redacted] began to download records from the database. Access to this account was made from the same IP address in Bahrain.

37. At 7:09 PM, the staff of the college deactivated the e[redacted] account.

38. At 7:09:20 PM, the account of d[redacted] began to download records from the database. Access to this account was made from the same IP address in Bahrain.

39. At 7:17 PM, the staff of the College deactivated the d[redacted] account.

40. At 7:17:26 PM, the account of m[redacted] began to download records from the database. Access to that account was made from the same IP address in Bahrain.

41. At 7:23 PM, the staff of the College blocked the range of IP addresses, 82.194.62.xxx.

42. At approximately 9:37 PM, the k[redacted] account made began downloading records from the database. Access to that account was made from IP address 80.58.5.235, that is assigned to Telefonica de Espana in Madrid, Spain.

43. At approximately 10:00 PM, the staff of the College took the database offline and left it offline for the entire weekend.

44. On Saturday, January 29, 2005, the College received two e-mails from a [redacted], asking why the database was down and inquiring when it would be back in service. There is a [redacted] who is a member of the College. He has not yet returned calls from the College regarding this inquiry. However, his office did call the general membership service number at the College in response to the phone call. His staff said the [redacted]'s e-mail address is [redacted]@meritcare.com. The e-mail that was sent to the College came from a

Yahoo! account, [redacted]@yahoo.com. Yahoo! provides free e-mail accounts and the registration information for accounts is usually false. The headers on the e-mail showed that the Yahoo! account was accessed from IP address, 38.119.107.88. This is the same IP address that was used to access the database on January 24, 2005 from the account of j[redacted] the first intrusion.

45. On Monday, January 31, 2005, the staff of the College contacted the FBI.

46. On Wednesday, February 2, 2005, at approximately noon, the staff e-mailed [redacted] at the Yahoo! address and said that the database was back on line. The staff also unblocked the IP addresses that are assigned to United States ISPs.

47. At 4:11 PM and at 7:57 PM there were brief contacts with the College's website from IP address 38.119.107.89. This was the same IP address used in the first intrusion and that was used to access the Yahoo! mail account of [redacted]. There was no log in, however.

48. On Thursday, February 3, 2005, the account of t[redacted] downloaded files from the database several times during the day. The t[redacted] account was accessed from IP address 24.98.254.252, an IP address that is assigned to Comcast.

49. On February 3, 2005, the staff of the College also limited the number of downloads to 150 per day.

50. On February 4, 2004, the staff of the College again took the database offline at approximately 5:00 PM and left it offline for the entire weekend.

51. That evening at about 9:20 PM, access to the website was made from the initial anonymizer IP address. This person logged into the accounts of p[redacted], g[redacted] k[redacted], and a[redacted]. and changed the passwords on these accounts.

52. Then, at about 10:22 PM, an automated attack on the registration system began. The individual began accessing accounts and changing the passwords on these accounts. The staff at the College believes that the first entry at 9:20 PM was manual (*i.e.*, done by an individual sitting at a computer) because the entry browsed several pages and the incoming signals requested all the information on a page, including the graphics. The staff believes that the attack that began at 10:22 PM was automated because of a number of factors. First, the incoming signals did not call for any extraneous information, such as graphics. Second, between 10:22 and approximately 1 AM on February 5, 2005, the attempts to change passwords came at a rate of approximately one every five seconds. Third, every member is assigned an identification number (ID). The attack was made sequentially by ID numbers. During this time, the attacker attempted to change the passwords on approximately 3,000 accounts and succeeded to do so in approximately 200 accounts.

THE SEARCH TECHNIQUE

53. We propose to send an e-mail to [redacted]@yahoo.com, saying that the database will go back on line. We intend to insert a CIPAV into this e-mail.

54. In general, a CIPAV utilizes standard Internet computer commands that computers broadcast on local networks and on the Internet. Each type of information will be

discussed in turn. We plan to use the gather three types of information: IP addresses and environmental variables; MAC addresses; and registry information.

55. The first type of information that the CIPAV will gather are what are referred to as IP addresses and "environment variables." IP addresses are discussed above in Paragraph 10. It is the equivalent of a telephone number on the Internet.[3] Environment variables are information that the requesting computer sends to a server so that the server knows, for example, how to format a response that the requesting computer can read and render for the viewer to use. For example, if a person attempts to view a website, his/her computer will send information about the type of Internet browser the user is employing so that the requested server will know what type of information to send back.

56. The second type of information that we will gather will be the MAC address of the computer that reads the e-mail. Computers that access, and communicate on Local Area Networks (LANs) do so via a network interface card (NIC) installed in the computer. The NIC is a hardware device and every NIC contains its own unique media access control (MAC) address. A MAC address is an unique numeric address of the network interface card

[3]To the extent that the CIPAV gathers the IP address, it is analogous to Caller ID in the telephone world. Caller ID works because the dialing telephone sends, as part of its communication information, its telephone number. This permits the receiving telephone to inform its owner the number of the person calling.

The court should also view the gathering of IP address information as the equivalent of a pen register/trap and trace device. A person has no reasonable expectation of privacy in this type of information. *Smith v. Maryland*, 442 U.S. 736 (1979). The use of such devices is governed by 18 U.S.C. § 3121 et. seq. The definitions of these pen registers and trap and traces devices include devices or processes that gather "routing, addressing and signaling information." 18 U.S.C. § 3127. To obtain a court order for such a device the government merely has to certify that the information likely to be gathered by such devices is relevant to an ongoing criminal investigation. In this case, to be cautious, we are requesting a search warrant based upon probable cause.

in a computer. Environment variables that may be transmitted include: operating system type and version, browser type and version, the language the browser is using, etc. Every time a computer connected to a LAN communicates on the LAN, the computer broadcasts its MAC address to computers on the LAN. Thus, this type of information is shared with other computers on a network, but it is not broadcast over the Internet. Because this information is shared with others, an individual computer user probably has no reasonable expectation of privacy in it. However, to be cautious, the government seeks a search warrant to obtain this information. This information will be helpful in the event that the computer being used is part of a network. This will allow us to focus any future search on a particular computer on the network.

57. The final piece of information is the registry information. The hard-drive of some computers contain registry-type information. A registry contains, among other things, information about what operating system software and version is installed, the product serial number of that software, and the name of the registered user of the computer. Sometimes when a computer accesses the Internet and connects to a software vendor's web site for the purpose of obtaining a software upgrade, the web site retrieves the computer's registry information stored on its internal hard drive. The registry information assists the software vendor in determining if that computer is running, among other information, a legitimate copy of their software because the registry information contains the software's product registration number. Registry information, such as the serial number of the operating system software and the computer's registered owner, may assist us in locating the computer and

identifying its user(s). However, we have no way of knowing if the user of this computer has ever upgraded the software on it. Thus, there is no way of knowing if the information has been shared with anyone else or not. Thus, there may be a reasonable expectation of privacy in this information.

JUSTIFICATION FOR THE USE OF THE TECHNIQUE

58. There is probable cause to believe that a single person is making unauthorized access into the computers of the College and attempting to hide his/her identity while doing so. The use of multiple user accounts and the rapid, automated changing of accounts when access is blocked leads to this conclusion. The fact that the person logging in is using anonymizer sites and sites in Spain and in Bahrain is a further indication. I have caused subpoenas to be issued to PSINET, Road Runner, and Comcast seeking the identities of the persons that held the IP addresses at the relevant times. Because of the nature of the intrusions and the rapid change of IP addresses, I believe that these addresses belong to compromised computers (i.e., ones to which the intruder has gained access without the knowledge or consent of their owners). Thus, interviewing those persons will not likely prove fruitful. I have also caused a subpoena to be issued to Yahoo! for identifying information for the account of [redacted], but because Yahoo! is a free account, much of the registering information for Yahoo! accounts is easily falsified. Yahoo! makes no effort to verify any of the information provided by its subscribers. I do not expect that the information that Yahoo! will provide will be useful. Other than Comcast, none of the ISPs has yet responded to the subpoenas. Comcast responded that it is unable to provide the information because “the log

files we use to make subscriber account identifications were either incomplete or contained an error associated with the registration of the cable modem or other device in question."

59. Thus, there is probable cause to believe that the intruder has masked his/her own IP address and this technique is necessary to discover that information.

DELAY OF NOTICE

60. I further request that the Court permit the use of the CIPAV without prior notice of its use. Announcing the use of the CIPAV would assist the person controlling the target e-mail account to evade revealing his or her originating IP address and other information, thereby defeating the purpose of the CIPAV.

61. Title 18, United States Code, Section 3103a(b) permits a court to allow delayed notification if:

a. there is reasonable cause to believe that providing immediate notification may have an adverse result (as defined in Section 2705);

b. the warrant prohibits the seizure of any tangible property, any wire or electronic communication (as defined in Section 2510) or, except as expressly provided in Chapter 121, any stored wire or electronic information, except where the court finds reasonable necessity for the seizure; and

c. the warrant provides for the giving of such notice within a reasonable period of time after its execution.

62. An "adverse result" is defined in Title 18, United States Code, Section 2705(a)(2) as including "(A) endangering the life or physical safety of an individual; (B)

flight from prosecution; (C) destruction or tampering with evidence; (D) intimidation of potential witnesses; or (E) otherwise seriously jeopardizing an investigation or unduly delaying a trial."

63. To the extent that use of a CIPAV to obtain an IP address, "variables," the MAC address and the registry information can be characterized as a seizure of an electronic communication or electronic information under 18 U.S.C. § 3103a(b)(2), such a seizure is reasonably necessary for the reasons that I have set forth above in paragraphs 53 to 59.

64. Furthermore, as noted above in paragraph 60, notice of the CIPAV will jeopardize the investigation. In addition, notice of the use of the CIPAV could result in the destruction or tampering with evidence as the intruder could erase the data on his/her computer if he/she realizes that his/her identity has been discovered.

65. For these reasons, I request that the Court permit a delay in the notification requirement for a period of thirty (30) days after the name and location of the owner or user of the activating computer is positively identified.

TIME OF SEARCH

66. Rule 41(c)(1) requires that (A) the warrant command the FBI "to search, within a specified period of time not to exceed ten days" the person or property at issue and (B) that the warrant "be served in the daytime, unless the issuing authority . . . authorizes its execution at times other than daytime." In order to comply with Rule 41, the Government will only send CIPAV e-mails to the target account between the hours of 6:00 a.m. and 10:00 p.m. (Eastern Standard Time) during an initial 10-day period. However, the Government seeks permission to read any messages generated by the activating computer as a result of a CIPAV regardless of when they were generated (*i.e.*, at any time of day or night) during the initial 10-day period. This is because the user of the target e-mail account may activate the CIPAV after 10:00 p.m. or before 6:00 a.m., and law enforcement would seek to read the information it receives as soon as it is aware of the CIPAV response given the emergent nature of this investigation. In addition, because we do not know where the suspect is located, an e-mail sent between 6 AM and 10 PM, EST may be read by the recipient outside of the 6 AM to 10 PM range in his/her local time. If a particular CIPAV e-mail is not activated by any user of the target e-mail account within the initial 10-day period, the Government will seek further authorization from the Court to read any information sent to the computer controlled by the FBI as a result of that CIPAV e-mail after the 10th day from the date the Court authorizes the use of the first CIPAV.

67. Because the FBI cannot predict whether any particular formulation of a CIPAV to be used will cause a person controlling the target e-mail account to activate a

CIPAV, I request that this Court authorize the FBI to use multiple CIPAVs in conjunction with the target account within 10 days of this Court authorizing the use of the first CIPAV.

VENUE

68. I do not know where the intruder is physically located. Thus, obtaining a search warrant in that district is impossible. The victim is located in this district and the e-mail containing the CIPAV will be sent from the victim's computer in this district. The FBI computer that will receive the information from the use of the CIPAV will be located in the Eastern District of Virginia. Subsequently, the information will be electronically transmitted to me in the Eastern District of Pennsylvania.

CONCLUSION

69. Accordingly, it is respectfully requested that this Court issue a search warrant authorizing the following:

a. the use of multiple CIPAVs in conjunction with the target e-mail account without prior announcement within 10 days from the date this Court authorizes the use of the first CIPAV e-mail;

b. the CIPAV may cause an activating computer – wherever located – to send a network level message containing the activating computer's IP address to a computer controlled by the FBI;

c. that the FBI may receive and read, at any time of day or night, within 10 days from the date of the Court authorizes of use of the first CIPAV e-mail, the

information that any CIPAV causes to be sent to the computer controlled by the FBI; and

d. the delay of notification for a period of thirty (30) days after the name and location of the owner or user of the activating computer is positively identified.

70. It is further requested that this Application and the related documents be filed under seal. The information to be obtained is relevant to an on-going investigation. Premature disclosure of this Application and related documents may jeopardize the success of the above-described investigation.

WHEREFORE, I respectfully request that a warrant be issued authorizing the FBI to utilize CIPAVs and receive the attendant information according to the terms set forth in this Affidavit.

MATTHEW FINE
Special Agent
Federal Bureau of Investigation

Sworn to before me this
_____ day of February, 2005.

HONORABLE M. FAITH ANGELL
Chief United States Magistrate Judge

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MEMORANDUM

To: Members of the Rule 41 Subcommittee
From: Orin Kerr
Re: Proposal to Narrow the Amendment to Rule 41
Date: February 3, 2014

I am writing this memo to offer and justify language narrowing the scope of the proposed amendment to Rule 41. I will begin by explaining my concerns with the current proposal, and I will then turn to my proposed language that would amend the proposal.

According to DOJ's 9/18/13 memo, DOJ's proposal is designed to solve two different problems. First, it corrects the result of Magistrate Judge Smith's opinion in *In re Warrant*, 2103 WL 172975 (S.D. Tex 2013), barring remote searches when the location of the computer is unknown. Second, it is also designed to authorize searches of numerous computers in numerous districts under a single warrant, which is a situation that has not yet arisen in reported cases.

I propose that our fix to Rule 41 should address the first problem but not the second problem. The first problem should be addressed because it is simple and straightforward. We all agree that if the government has probable cause to search a computer remotely, the fact that the government doesn't know the computer's location should not be an impediment to obtaining a warrant. So it makes sense to amend Rule 41 to ensure that warrants are available in such cases.

On the other hand, I think it is premature to amend Rule 41 in response to the second problem, that of searches of multiple computers in multiple districts. I'm reluctant to address the second problem at this time for three reasons:

(1) Whether Rule 41 should allow multiple searches of multiple districts under a single warrant is a significant policy question, and we haven't yet had the discussion of its merits as a matter of policy. Importantly, this is a different kind of issue than that raised by Magistrate Judge Smith's opinion. In the Smith case, the issue was whether the Rules allow a warrant to be issued when the location is unknown. Here, by contrast, there is no question that a warrant can be obtained: The issue is only whether the government needs multiple warrants or only one warrant.

This is an important question because we live in an increasingly networked world, in which more and more information is available online. Access to one computer provides potential remote access to hundreds of millions of other computers. Whether the law should allow a single warrant to remotely search many locations connected over a network strikes me as a somewhat complex question that is going to come up in diverse settings. It might come up in the specific kinds of settings that are contemplated in the warrant applications we saw last month. But it might come up in entirely routine cases in

which warrants are executed and the government finds an Internet-connected computer during the search.

For example, imagine the government is executing a search of a home for evidence of child pornography. Agents come across a computer connected to the Internet. The warrant allows the government to search the computer, but does it also allow the government to search "the cloud" when it can be accessed from the person's home computer? Imagine that the suspect has a Dropbox account connected to his home computer. Can the agent access the Dropbox account, accessing files on Dropbox's server? And we can imagine the same dynamic in the case of a warrant executed at a corporate headquarters, such as if agents come across a computer that can connect to the corporate network but the servers are off-site. Perhaps the law should require the government to get a warrant in each district where the servers are located, which would alleviate concerns of forum-shopping. On the other hand, perhaps the law should allow the government to conduct a remote search of all of the person's files from the one access point, which alleviate the burden on the government to get separate warrants to obtain the files from the remote provider.

I'm open to debate on which is the better rule. But it seems like an important and non-trivial question that is unrelated to the issues raised by Magistrate Judge Smith's opinion. Given that, I'm not sure it is wise to amend Rule 41 at this time to allow such searches without first having a thorough discussion of the potentially far-reaching consequences of such a rule change.

(2) A second reason I am reluctant to address the multiple-computers-in-multiple-district problems at this point is that answering that question implicitly answers an antecedent question: Should Rule 41 authorize extraterritorial hacking? That is, should Rule 41 eliminate the traditional rule of only allowing territorial warrants simply because the evidence is available to be collected remotely? Again, I think this is a debatable question. Imagine investigators in one district know that a suspect has evidence on his Internet-connected computer in another district. If the investigators want to obtain a warrant to hack into the computer remotely, should the investigators have to get authority from a magistrate where the computer is located?

I can see arguments on both sides. On one hand, it is more convenient for the government to be able to do all its hacking from one district. But there are considerations on the other side, too, beyond the concern with forum-shopping. For example, if the suspect receives notice of the evidence-collection and wants to file a Rule 41 motion for return of the information, where is the motion filed? Does the suspect have to file the motion in the district where the warrant was issued, which could be thousands of miles away? And what is the meaning of the limitation in the proposal, copied from Rule 41(b)(5), that the magistrate can issue the warrant "in any district where activities related to the crime may have occurred"? As far as I know, no cases have interpreted that language. Does that phrase mean where there would be venue over the offense, assuming the alleged facts are true? Or does it mean something else? That phrase can be vague in 41(b)(5) because 41(b)(5) has only a very narrow application, but I think the proposed

41(b)(6) will arise much more often. The scope of venue for Internet crimes is quite uncertain right now, and if that phrase is designed to match venue standards, then we can't know what the meaning is of the statutory limitation given the present uncertainty in the caselaw.

(3) The final reason I am cautious about addressing the multiple-computer problem is the one mentioned our earlier call: The proposal raises significant Fourth Amendment issues. Courts have generally allowed searches of multiple places owned by the same person under a single warrant, as long as there is probable cause as to each place. But there is considerable authority to the effect that allowing a search of multiple locations not owned by the same person under a single warrant violates the particularity clause. *See* Wayne R. LaFave, 2 Search & Seizure § 4.5(c) at n.99 (5th ed.). I recognize that Committee Notes can expressly disavow any interest in the Fourth Amendment question. Nonetheless, I think the issues are significant enough that I would prefer to have at least a closer look at the legal issues before we amend the Rule to authorize those searches.

That brings me to my proposal. I propose to limit our amendment to instances in which the location of the computer is not reasonably known. That is, I propose to solve problem 1 (the unknown location problem) but not problem 2 (the multiple computers in multiple districts problem). I would amend DOJ's proposal with the following added language:

> (6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant authorizing remote access of electronic storage media to obtain electronically stored information **if the district (if any) in which the electronic storage media is located cannot reasonably be ascertained.**

Under this proposal, the authority to issue an extraterritorial hacking warrant is limited to those cases in which the location of the computer cannot reasonably be ascertained. When the location cannot reasonably be ascertained -- as explained in the affidavit, I would think -- then the warrant can be issued. On the other hand, where the location of the computer is known or can be reasonably ascertained, then the government should get the warrant in that district.

I think this approach will solve the problem identified in Magistrate Judge Smith's opinion without also taking on the broader and more difficult issues of multiple-district remote searches.

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U.S. Department of Justice

Criminal Division

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

February 7, 2014

MEMORANDUM

TO: Judge John F. Keenan
Chair, Subcommittee on Rule 41

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

SUBJECT: Proposed Amendment to Rule 41 of the Federal Rules of Criminal Procedure

We very much appreciate Professor Kerr laying out in his memorandum his concerns surrounding the Department's proposal to amend Rule 41. Professor Kerr endorses part of the proposal but then suggests deferring consideration of another important part. Specifically, he suggests the Subcommittee leave unaddressed whether a federal judge should be authorized to issue a warrant for a remote search of electronic media located in a known location outside her district, including in those cases when a search would require coordination of simultaneous action in many districts at once such as when law enforcement confronts a botnet.

On process – We think the Committee should address Professor Kerr's concerns on our upcoming call and not defer consideration indefinitely. As you know, the rules amendment process, at its fastest, spans three years from proposal to full enactment. Further, the Standing Committee has indicated in the past that repeatedly revisiting a single procedural rule for amendment is to be avoided because it creates unnecessary confusion for the users of the rules. The Standing Committee has suggested that if a Committee is considering a procedural issue, it should address all aspects of that issue at once rather than in a piecemeal basis. As the ability to effectively and efficiently investigate data stored in multiple jurisdictions is a present and growing issue, we think the Subcommittee should take the time necessary to consider a better rule now to deal with these issues.[1]

[1] *On language* – Professor Kerr repeatedly uses the word "hacking" in his memorandum to describe what the government is seeking to do here. The Merriam-Webster Dictionary definition of a hacker is "a person who illegally gains access to and sometimes tampers with information in a computer system." *See*, m-w.com. As in the physical world, the government will, from time to time, need to search computers involved in criminal activity in order to fulfill its public safety mission. We have made our proposal to the Committee to facilitate the process of seeking court authorization for such searches where required under the law.

On the substance of Professor Kerr's concerns – Professor Kerr's chief concern surrounds the constitutional requirements for warrants for searches of electronic information. For example, Professor Kerr is concerned with searches of multiple computers through a single warrant. We recognize that this is an important issue and may be litigated in an appropriate case. But as we discussed before in exploring some members' concerns over the particularity requirement for warrants for electronic information, the proposed amendment cannot and does not address substantive constitutional questions. The language of our proposed rule does not address the question of multiple searches using a single warrant. And as requested, we have drafted Committee Note language with the Committee reporters to ease the concerns that the amendment might be read as an attempt to influence resolution of this or other constitutional issues.

On the other hand, we are indeed seeking a rule that would authorize a federal judge to issue a warrant for a remote search of electronic media located in a known – or unknown – location outside her district where the crime occurred in the district, including for those cases when a search would require coordination of simultaneous action in many districts at once. Despite Professor Kerr's concerns, we think this is the right policy and the right rule for several reasons.

First, Congress and the federal courts have already recognized that because of the very nature of electronic information, multijurisdictional judicial authorization for obtaining such information is good public policy. In the context of pen registers, wiretaps and the Electronic Communications Privacy Act, multijurisdictional authorization for obtaining electronic information is already the law.

For example, Professor Kerr notes in his memorandum that the proposed amendment could be used to obtain warrants in multi-district cases that do not involve botnets, such as where a suspect uses a Dropbox account to store information. He is correct. In such cases, however, Congress has already authorized a judge in the district where the crime occurred – rather than in the district where the data is stored – to issue an order for law enforcement to obtain the information. *See* 18 U.S.C. §§ 2703(a), (b)(1)(A), (c)(1)(A) and 2711(3)(A) (authorizing a court with "jurisdiction over the offense being investigated" to issue an order requiring an online service provider to disclose information it stores regarding a customer). These existing multijurisdictional authorizations have raised no serious concerns and our proposal is consistent with them.

Second, as we have previously indicated, investigations that require obtaining warrants in multiple districts for searches of computers involved in a single crime create serious practical obstacles for law enforcement while also wasting judicial resources. Rule 41 already recognizes these realities in terrorism cases and provides for multijurisdictional reach in those cases.

Third, providing multijurisdictional reach for searches of electronic media will facilitate a more robust review of the warrant applications. It will permit a single judge with knowledge of the investigation – in the district where the investigation is taking place – to review all warrant

requests related to the case. That judge will be in a better position to question – face-to-face if need be – the investigators leading the case.[2]

Moreover, we have serious concerns with Professor Kerr's proposal which would require agents seeking a warrant to establish that "the district (if any) in which the electronic storage media is located cannot reasonably be ascertained." It is unclear how law enforcement would satisfy this requirement in practice. The proposal might require a showing that other investigatory means have been tried and failed or are unlikely to succeed. Warrants issued under such a provision would likely routinely result in *Franks* hearings on whether agents disclosed every fact that might have suggested a possible location of the computer, and would also draw courts into a determination of which investigative steps are "reasonable" in a given type of case. Moreover, the requirement would preclude use of the new amendment in cases, such as botnet cases, where the location of the computer is actually known.

- - -

We appreciate the opportunity to address Professor Kerr's concerns before our call. We encourage the Subcommittee to fully consider them. We also believe, though, that the Subcommittee should adopt the proposal we circulated earlier this week for the reasons discussed in this memorandum and on our previous calls. We look forward to our discussion on Monday.

[2] Professor Kerr raises questions about the meaning of the phrase "any district where activities related to the crime may have occurred." As Professor Kerr recognizes, though, the Department's proposed language is drawn from existing Rule 41(b)(3) and (b)(5). This language has not caused confusion or concerns with courts or commentators to date, and we see no reason to believe it will in the future in the vast majority of cases. Moreover, Professor Kerr himself retains this very language in his own proposal.

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MEMORANDUM

To: Members of the Rule 41 Subcommittee
From: Orin Kerr
Re: Response to Mr. Wroblewski's February 7th Memorandum
Date: February 8, 2014

I very much appreciate Mr. Wroblewski's memorandum in response to my February 4th memorandum. Because it might assist the subcommittee's deliberations to have my response now rather than on Monday's call, here are my thoughts in response. Let me begin by first expanding on my concerns, and by next responding to Mr. Wroblewski's substantive arguments. I conclude with a brief thought on process.

I. A More Thorough Explanation of My Policy Concerns

Mr. Wroblewski's memorandum states that "Professor Kerr's chief concern surrounds the constitutional requirements for warrants for searches of electronic information." That is not the case, so let me try to explain more carefully the substantive basis of my objection.

My primary concern with attempting to address the broader issue of extraterritorial remote searches is that DOJ's proposal would considerably alter prevailing law enforcement practices in ways that raise important and quite difficult questions of how to balance law enforcement and civil liberties interests. I am not sure how I come out on these questions. But I think they are important and complex questions for which there are considerable arguments against DOJ's view. At the very least, DOJ's position gives me significant pause.

To see the significance of the issue, consider current search and seizure practices in cases that involve digital evidence. Today, there are two basic kinds of warrant searches in such cases. The standard kind of warrant search is a physical search. Officers show up at the place to be searched, knock and announce, and look for digital storage devices. Computers are seized, taken off site, and imaged, and the images are then searched for evidence. The second kind of warrant is a warrant under 18 U.S.C. 2703 of the Electronic Communications Privacy Act (ECPA). When information about a person is stored in "the cloud" with a third-party network provider, the norm is to work with the provider to obtain an ECPA warrant. In such cases, the government obtains a warrant for each provider and serves the warrant on the provider much like a subpoena, such as by faxing or e-mailing the warrant to the provider. The provider then sends back the information to the government.

Amending Rule 41 to authorize extraterritorial remote computer searches would likely change these prevailing practices in a significant way. More and more digital storage devices are connected to the Internet, which means that they can be accessed remotely. If agents know that they can conduct remote searches from anywhere, they will be significantly more inclined to conduct remote searches instead of pursuing the current two options of physical searches and obtaining ECPA warrants.

My concern is that switching over from the current regime of physical warrants and ECPA warrants to an alternative regime of remote search warrants will have two major policy implications. First, conducting remote searches instead of physical searches will foster a shift to delayed-notice searches. Second, conducting remote searches instead of obtaining ECPA warrants will allow the government to avoid the statutory individual-warrant standard of ECPA warrants. Let's consider each in turn.

From physical-search warrants to remote-search warrants. In a physical search, the norm is to provide notice to the homeowner; when the search occurs, the homeowner ordinarily knows about the investigation. To be sure, federal law allows for authority to delay notice. *See* 18 U.S.C. 3103a. But that is the exception rather than the norm in the case of physical searches, in part because the delayed notice provision only applies when no tangible evidence is seized. *See id*. at 3103a(b)(2). The opposite is true with remote searches. In the case of remote searches, the standard course is to delay notice. Because no tangible evidence is seized, the standard of 3103a(b) is easy to meet in most remote search cases. And because the remote search is inherently secret, there is nothing about the search itself that will provide notice. This signals a very significant change, I think. It means that the shift from physical searches to remote searches is also a shift from a standard of notice searches to a standard of delayed notice (aka "sneak and peek") searches.

From ECPA warrants to remote warrants. Second, the allowance of extraterritorial remote network searches also may have important implications for the standard of probable cause when the government seeks to obtain contents of communications held by remote network providers. In light of 18 U.S.C. 2703(a) and Fourth Amendment precedents such as *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010), the government ordinarily must obtain a warrant to obtain the contents of the account from providers. And because the providers act as a third-party intermediary, the providers generally demand a warrant specific to their own services. For example, if the government wants the remotely stored files of a suspect who has a Dropbox account, a Google Cloud account, and an Amazon Cloud Drive account, the government must obtain three separate warrants, not one. Critically, this means that the government must show probable cause as to each service. It must show that there is probable cause to believe that there is evidence in the Dropbox account; probable cause to believe that there is evidence in the Google Cloud account; and probable cause to believe that there is evidence in the Amazon Cloud Drive account.

I gather that this would no longer be true under Mr. Wroblewski's proposed rule. Because all of the accounts would be accessible through remote access, the government

could obtain a single warrant to search the target's home and all of their cloud services together. Investigators could search directly instead of obtaining ECPA warrants. There would only need to be one showing of probable cause, not many. The only issue would be existence of probable cause somewhere in computers owned and operated by that person, rather than probable cause as to evidence being located in each place (whether physical or in the cloud) where the warrant would be executed.

I can appreciate the view that these two changes are beneficial changes. They are understandably attractive to law enforcement: They enable the government to search more and with less notice to targets. Replacing physical searches with remote searches also has the salutary effect of less intrusive searches, at least if the remote searches are not later followed by subsequent physical searches. At the same time, there are also significant arguments on the other side. Some may prefer a stronger notice requirement and may object to a new norm of delayed-notice remote searches. Others may prefer requiring the government show probable cause as to each cloud service. Either way, choosing between the two rules requires difficult decisions about how to balance law enforcement and civil liberties concerns.

II. A Response to Mr. Wroblewski's Substantive Arguments

Mr. Wroblewski's memorandum makes several substantive arguments that I think are deserving of additional scrutiny. I consider them in the order they appear:

1) First, Mr. Wroblewski points out that ECPA court orders are nationwide in scope. "These existing multijurisdictional authorizations have raised no serious concerns," he writes, "and our proposal is consistent with them." I recognize this argument, but I think there are significant differences between ECPA court orders served on a third-party providers and remote access warrants that authorize hacking into a target's machine.[1]

Some background may be helpful. Federal law was amended in 2001 to allow nationwide ECPA court orders because investigators could not know in what district the information was actually located when obtaining ECPA orders to serve on third-party network providers. ECPA orders are served like subpoenas; they are faxed or e-mailed to third-party providers. As DOJ explained at the time in the context of pen/trap orders, a

[1] Mr. Wroblewski suggests that use of the word "hacking" may be inappropriate because the Merriam-Webster Dictionary definition of a hacker is "a person who illegal gains access to and sometimes tampers with information in a computer system." *See* Wroblewski Memo at n.1 (citing m-w.com). To be clear, I do not use the word "hacking" to imply any illegality. I use it only as shorthand for secret remote access to a computer system that is not authorized by its owner or operator. No other word in the English language approximates this meaning, and I think the shorthand can be useful here. Also, to the extent the Merriam-Webster Dictionary is our guide, it is perhaps worth noting that the definition Mr. Wroblewski quotes is only the fifth and last alternative definition of the word hacker. The first and primary definition provided by the Merriam-Webster Dictionary is "a person who secretly gets access to a computer system in order to get information, cause damage, etc." *See* http://www.merriam-webster.com/dictionary/hacker. Based on that definition, I believe the word is used accurately in this context. But I am happy to switch to a less controversial term, such as "remote-access network searches," if others prefer.

territorial restriction in such circumstances resulted in unnecessary delays that served no countervailing interest:

> Because of deregulation in the telecommunications industry, . . . a single communication may be carried by many providers. For example, a telephone call may be carried by a competitive local exchange carrier, which passes it to a local Bell Operating Company, which passes it to a long distance carrier, which hands it to a local exchange carrier elsewhere in the U.S., which in turn may finally hand it to a cellular carrier. If these carriers do not pass source information with each call, identifying that source may require compelling information from a string of providers located throughout the country – each requiring a separate order.
>
> Moreover, since, under previous law, a court could only authorize the installation of a pen/trap device within its own jurisdiction, when one provider indicated that the source of a communication was a different carrier in another district, a second order in the new district became necessary. This order had to be acquired by a supporting prosecutor in the new district from a local federal judge – neither of whom had any other interest in the case. Indeed, in one case investigators needed three separate orders to trace a hacker's communications. This duplicative process of obtaining a separate order for each link in the communications chain has delayed or — given the difficulty of real-time tracing — completely thwarted important investigations.

United States Department of Justice Computer Crime and Intellectual Property Section, Field Guidance on New Authorities (Redacted) Enacted in the 2001 Anti-Terrorism Legislation (2001) at 7-8.[2]

As far as I can tell, there are no analogous reasons to enact a general rule allowing extraterritorial remote access warrants. When the location of the computer is not reasonably ascertainable, the territoriality rule should be excused. But the ground for adopting a nationwide-scope rule for ECPA warrants in 2001 does not appear to apply generally in the case of remote access warrants. And while that is one comparison to make, there are others that could be drawn instead. When looking for comparative rules, why not make the comparison to physical searches? The usual rule under Rule 41 is that search warrants are territorial. If the government wants a warrant to search a home in a particular district, it must obtain the warrant in that district. If the arguments in favor of nationwide remote searches are persuasive, why are they not also persuasive for physical searches? Why not eliminate entirely the territorial provisions of Rule 41(b)?

2) Mr. Wroblewski next argues that "providing multijurisdictional reach for searches of electronic media will facilitate a more robust review of the warrant. It will permit a single judge with knowledge of the investigation - in the district where the investigation is taking place - to review all warrant requests related to the case." But as noted above, I believe the opposite is true. Under the government's proposal, a single judge will review a single warrant that authorizes many searches at once -- even tens of

[2] This document is available at http://epic.org/privacy/terrorism/DOJ_guidance.pdf.

thousands of searches at once -- instead of many judges reviewing many warrants to conduct many searches. The result will be a shift to less review of the warrant, in part because the standard of probable cause will be lower and in part because the affidavit will provide less information about each individual search.

3) Mr. Wroblewski offers the following arguments against the "reasonably ascertainable" standard I propose (with my lettering added):

> [a] The proposal might require a showing that other investigatory means have been tried and failed or are unlikely to succeed. [b] Warrants issued under such a provision would likely routinely result in *Franks* hearings on whether agents disclosed every fact that might have suggested a possible location of the computer, and [c] would also draw courts into a determination of which investigative steps are "reasonable" in a given type of case. [d] Moreover, the requirement would preclude use of the new amendment in cases, such as botnet cases, where the location of the computer is actually known.

As to [a]-[c], I don't presently see the basis of these concerns. Warrant affidavits routinely provide factual bases for special treatment under Rule 41 with no apparent difficulties. For example, Rule 41(e)(2)(B)(ii) states that officers must "execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time." When the government seeks nighttime execution, the affidavit states the basis for the good cause. As far as I am aware, this required factual showing has raised no major difficulties. I gather that is true in part because federal courts have recognized that the daytime search rule is not a Fourth Amendment requirement; as such, violations of this requirement are ordinarily not subject to suppression. *See, e.g., United States v. Rizzi*, 434 F.3d 669 (4th Cir. 2006).

The same presumably would be true of a requirement that the government must show that the location of a computer is not reasonably ascertainable to justify an extraterritorial remote search. Although the issue is not entirely clear, I tend to believe that the in-district territoriality requirement of searches is a question of policy, not Fourth Amendment law. As a result, I would expect little litigation over this requirement in the context of motions to suppress. The absence of an exclusionary remedy would both deter challenges and make them very easy for the prosecutors to defeat. Nor would my proposed rule "routinely result in *Franks* hearings," as *Franks* hearings are only available when the alleged misstatement or omission relates to the basis of probable cause. *See, e.g., United States v. Poulsen*, 655 F.3d 492, 504 (6th Cir. 2011).

As to [d], I agree, but I am not sure if that is a bug or a feature.

4) In a footnote, Mr. Wroblewski states that the meaning of the phrase "any district where activities related to the crime may have occurred" in his proposal "has not caused confusion or concerns with courts or commentators to date." That may be true, but I believe that is the case because it has not been litigated (at least as far as I know) and it is only very rarely used in Rule 41(b). The meaning of the term would be comparatively much more important if this proposal were to be adopted. Given that, I

think the uncertainty as to what this phrase means is a continuing concern.

III. On Process

I have no objection to the subcommittee beginning consideration of the broader issues raised by DOJ's proposal. They are fascinating and very important issues. And as I am new to the Committee, I will gladly defer to others with more experience as to the wisdom of proceeding in parts or tackling both problems together.

At the same time, I would think that one benefit of addressing only the narrow question of unknown location is that it would lead to a quicker and more certain amendment. The narrow issue is uncontroversial and relatively simple. For the reasons explained in this memorandum, however, I don't think the broader issue of extraterritorial network searches is a straightforward issue that can be resolved on Monday's call. Further, I would guess that any reform proposal that takes on the broader issue would spark significant controversy when eventually made public. Taking on more issues may significantly delay the process and may lead to less certain results.

With that said, I am happy to defer to those with more experience on how best to proceed. I look forward to continuing the conversation on Monday's call.

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U.S. Department of Justice

Criminal Division

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

March 5, 2014

MEMORANDUM

TO: Judge John F. Keenan
Chair, Subcommittee on Rule 41

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

SUBJECT: Proposed Amendment to Rule 41 of the Federal Rules of Criminal Procedure

This memorandum responds to several issues raised on our recent conference call and in several subsequent email messages from subcommittee members. We continue to believe the amendment language we proposed – together with the Committee Note addressing the concerns raised on our prior calls – should be published for public comment.[1] We hope this memorandum will help forge a consensus in our subcommittee that will in turn help move this proposal forward.

Notice

In his February 10, 2014 email message, Judge Kethledge asked whether the Department's Rule 41 amendment proposal would affect existing law or practice with respect to the notice given when the government searches multiple computers whose locations are known. We do not think so. The Department's proposal concerning which courts have authority to issue warrants does not impact the standards for when notice may appropriately be delayed with the approval of the issuing court. *See* 18 U.S.C. § 3103a. Further, the Department believes that its proposal is unlikely to substantially impact existing practice with respect to notice of such warrants.

First, the Department's proposal regarding which courts can authorize search warrants permitting remote searches does not work any change in the delayed-notice statute, 18 U.S.C. § 3103a. The issuing court still must find "reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result (as defined in section

[1] As described below, we have made one small amendment to our proposal to make clear that it was not intended to work any change to the constitutional particularity standard.

2705, except if the adverse results consist only of unduly delaying a trial)." 18 U.S.C. § 3103a(b)(1). Nothing in this standard distinguishes physical searches from remote electronic searches. In addition, a court cannot authorize the seizure of either physical evidence or electronic information pursuant to a delayed-notice warrant without a judicial finding of reasonable necessity. *See* 18 U.S.C. § 3103a(b)(2) (requiring that a delayed-notice warrant must prohibit "the seizure of any tangible property, any wire or electronic communication (as defined in section 2510), or, except as expressly provided in chapter 121, any stored wire or electronic information, except where the court finds reasonable necessity for the seizure"). Significantly, this provision treats "stored wire or electronic information" in precisely the same manner as "any tangible property."[2] In practice, the Department has interpreted "seizure . . . of any stored wire or electronic information" in § 3103a(b)(2) broadly to include the copying of information stored on a computer.

In accordance with this view, the Department advises against copying even the most basic electronic information pursuant to a delayed-notice warrant without a finding of "reasonable necessity." For example, on February 5th, the Department circulated to the subcommittee an affidavit for a remote-access search warrant obtained in the Eastern District of Pennsylvania. Paragraph 63 of that affidavit includes the following:

> To the extent that use of a CIPAV to obtain an IP address, "variables," the MAC address and the registry information can be characterized as a seizure of an electronic communication or electronic information under 18 U.S.C. § 3103a(b)(2), such a seizure is reasonably necessary for the reasons that I have set forth above in paragraphs 53 to 59.

We anticipate the Department will continue to use this approach: we will seek a judicial finding of "reasonable necessity" to obtain stored electronic information in those cases where a delay of notice is warranted.

Second, under the existing Rule 41, a remote search of a computer whose location is known can already be done, at least where the warrant is issued from the district where the computer is located. Thus if conducting a remote search of a computer offers the government practical advantages over conducting a physical search of the same computer, nothing in Rule 41 prevents the government from opting for the remote search. By the same token, nothing in the government's proposed amendment would make it easier for the government to opt for the remote search, with the exception that the amendment would make clear that the government could seek the warrant from the district where the investigation is taking place.

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[2] In his February 8, 2014 memorandum, Professor Kerr suggested that the delayed notice standard of 18 U.S.C. § 3103a is easier to meet for electronic searches than for physical searches. He stated that "the delayed notice provision only applies when no tangible evidence is seized," and that "[b]ecause no tangible evidence is seized [in the case of remote searches], the standard of § 3103a(b) is easy to meet." As explained above, the Department interprets § 3103a differently and we disagree with Professor Kerr on this point. In any event, as explained below, even if Professor Kerr is correct that notice can be more easily delayed in remote searches, nothing in the Department's proposal affects the availability of remote searches in cases where the location of the computer is already known; rather, the proposal only affects which district can authorize the remote search.

In his February 10, 2014 email message, Professor Kerr also inquired about the Department's practices for delaying notice when it obtains remote access warrants. Currently, the Department obtains remote access warrants primarily to combat Internet anonymizing techniques. In such investigations, delayed notice is normally sought because of the nature of the investigation. Where we are trying to identify an online criminal who is taking steps to avoid identification, there will typically be reasonable necessity for delaying notice of the search. On the other hand, if the Department were to use remote access warrants in circumstances that did not involve the same risk of an adverse result such as flight or destruction of evidence, the Department would be less likely to invoke the delayed notice procedures of § 3103a. Alternatively, the Department might request a delay of shorter duration, limited to the amount of time necessary to complete the initial, critical stage of a remote operation before a subject could destroy evidence, modify malicious code, change servers or hosting services, or take other countermeasures.

Problems the Department Intends to Address

In his February 11, 2014 email message, Judge Filip asked about the specific problems the Department intends to address by this proposal. In its initial letter to Judge Raggi on September 18, 2013, the Department described two problems it intended the proposal to address. First, the proposal is intended to enable investigators to obtain warrants where the location of the computer to be searched is unknown. Second, the proposal is intended to enable investigators to obtain warrants to search computers in many districts simultaneously. For example, a large botnet investigation may require action in all 94 districts simultaneously, but obtaining simultaneous search warrants from 94 different magistrates is nearly impossible as a practical matter.

Addressing these two circumstances remains the Department's top priorities in this proposal. However, there is a third circumstance that our proposal would address and that we believe Rule 41 should speak to. When law enforcement obtains a warrant authorizing a physical search of a particular location, it should be able to obtain a warrant that authorizes it to simultaneously search documents that are accessible from a computer at that location even if they are actually stored remotely in another district. For example, suppose that officers execute a warrant to search a business located in San Francisco and that, upon entry, they discover that the business stores its documents with a cloud-based server. Under the current version of Rule 41 (assuming the requisite probable cause and particularity requirements are met), a magistrate in the Northern District of California could issue a warrant authorizing agents to search the business and, while they are present at the business, access any cloud-based storage located within the district (such as a DropBox account). Our proposed amendment would clarify that the magistrate could equally authorize the agents to access such storage in any district, including an unknown district. We think such a provision would be sound policy; if, upon identifying a remote storage account, agents were required to obtain a subsequent warrant in another district, their ability to obtain the records in that account may be lost. By the time a subsequent warrant could be obtained, the documents may be deleted or encrypted. We believe courts in the district

where criminal activities have taken place should have authority to issue warrants for all such records accessible from the premises.[3]

Particularity

In our subcommittee calls, concerns have been raised on several occasions concerning whether a single warrant for electronic information could be used to search multiple computers. As we've stated, our proposal is not intended to address, and does not address, the constitutional standard of particularity required in any search warrant, and we have deleted the words "or both" from section (b)(6) of our proposed amendment to clarify that no such change was intended. Existing case law around physical searches permits multiple locations to be included in a single warrant in certain circumstances so long as adequate probable cause exists for searching each of the locations. We are unaware of any case law directly addressing this issue in virtual searches. Even to the extent that current law does place limits on the number or combination of premises or pieces of property that may be searched pursuant to one warrant, of course, our proposed amendment still offers the substantial advantage that the requisite number of warrant applications can all be simultaneously presented to the same magistrate.[4]

The particularity requirement of the Fourth Amendment for search warrants is a well-established doctrine. It demands that "warrants must particularly describe the things to be seized, as well as the place to be searched." *Dalia v. United States*, 441 U.S. 238, 255 (1979); *see also Go-Bart Importing Co. v United States*, 282 U.S. 344, 357 (1931); *Coolidge v. New Hampshire*, 403 U.S. 443, 471 (1971); *Andersen v. Maryland*, 427 U.S. 463, 480 (1976). The rationale underlying the particularity requirement is to prevent the issuance of warrants based on vague information, and to protect against the use of general warrants. *Go-Bart Importing Co.*, 282 U.S. 357. A warrant has described the place to be searched with sufficient particularity when "the description is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place intended." *Steele v. United States*, 267 U.S. 498, 503 (1925) (approving as sufficient the most common practice of identifying the location by street address). If the warrant does not particularly describe the place where a search is to be conducted, police

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[3] As discussed below, the benefits of permitting an out-of-district search are present whether the government is allowed to proceed by a single warrant authorizing both physical and remote search or required to submit separate warrant applications for each.

[4] We note that in a 2010 law review article, Professor Kerr argued that the Fourth Amendment's particularity requirement should allow searches of multiple accounts pursuant to a single showing of probable cause:

> How should the particularity requirement apply to Internet evidence collection? The best answer is that the particularity requirement should apply to a particular person rather than a specific account. When the government establishes probable cause to believe that a person has or will use the Internet to store, transmit, or receive specific evidence of criminal activity, any account that the person has or will use – and that therefore might plausibly contain the evidence sought – should be included within the scope of the warrant. In other words, the particularity requirement should apply to Internet users, not Internet accounts.

Orin S. Kerr, *Applying the Fourth Amendment to the Internet: a General Approach*, 62 Stan. L. Rev. 1005, 1045-46 (2010).

do not have the authority under that warrant to search that location, even if belongings listed on the warrant are found at that location. *United States v. Alberts*, 721 F.2d 636, 639 (8th Cir. 1983) (finding a warrant deficient where it authorized the search of effects thought to be contained in bags and located at one residence when the bags were in fact found at another).

Although a warrant must normally specify the place to be searched, the Supreme Court explained in a tracking device case, *United States v. Karo*, 468 U.S. 705 (1984), that this requirement would be excused where the purpose of the search is to discover the very place to be searched:

> The Government contends that it would be impossible to describe the "place" to be searched, because the location of the place is precisely what is sought to be discovered through the search. However true that may be, it will still be possible to describe the object into which the beeper is to be placed, the circumstances that led agents to wish to install the beeper, and the length of time for which beeper surveillance is requested. In our view, this information will suffice to permit issuance of a warrant authorizing beeper installation and surveillance.

Id. at 718.

Current Fourth Amendment particularity jurisprudence allows for a single warrant to describe and authorize the search of more than one physical location or piece of property. *See, e.g., United States v. Burkhart*, 602 F.3d 1202, 1208 (10th Cir. 2010) (*obiter dictum*, citing *United States v. Rios*, 611 F.2d 1335, 1347 (10th Cir. 1979) (four separate structures)); *United States v. Pennington*, 287 F.3d 739, 744-45 (8th Cir. 2002) (three specific buildings one property); *United States v. Johnson*, 26 F.3d 669, 694 (7th Cir. 1994) (two units within one house); *United States v. Hillyard*, 677 F.2d 1336, 1339 (9th Cir. 1982) (two warrants, each listing two vehicles). As one court said in approving a search warrant that covered multiple, non-adjacent buildings occupied by the same person, "A separate warrant for each suspected place to be searched is not called for either by the letter or the spirit of the constitution . . . To require it would occasion useless delay and expense, and tend to defeat the salutary objects of the law." *Williams v. State*, 95 Okla. Crim. 131, 136 (Okla. Ct. Crim. App. 1952) (quoting *Gray v. Davis*, 27 Conn. 447, 455 (Conn. 1858)).

One important constraint on the rule allowing a single warrant to list multiple locations is that adequate probable cause must exist for searching each of the locations or pieces of property. *See, e.g., Johnson*, 26 F.3d 692; *Greenstreet v. County of San Bernardino*, 41 F.3d 1306, 1309 (9th Cir. 1994); *United States v. Gonzales*, 697 F.2d 155, 156 (6th Cir. 1983); *Rios*, 611 F.2d 1347.

We anticipate that the law surrounding the particularity requirement and virtual searches will continue to evolve both in the context of searches of individual computers or servers and in the context of searches of multiple computers. As we've stated, our proposal is not intended to address, and does not address, the constitutional standard of particularity required in any search

warrant, and we support adding Committee Note language to make clear that none of this is addressed in the rule amendment.

Conclusion

We hope that this memorandum will make the subcommittee members more comfortable with publishing our original amendment proposal for public comment. We look forward to discussing all of this with the subcommittee next week. Please let us know if there is any further information we can provide to you.

Proposed Amendment to Rule 41

* * *

(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 seize electronically stored information that are located within or outside that district.

* * *

(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. In a case involving a warrant authorized by Rule 41(b)(6) to use remote access to search electronic storage media and seize electronically stored information, the officer executing the warrant must make reasonable efforts to serve a copy of the warrant on the person whose information was seized or whose property was searched. Service may be accomplished by any means, including electronic means, reasonably calculated to reach the person whose information was seized or whose property was searched. Upon request of the government, the magistrate judge may delay notice as provided in Rule 41(f)(3).

COMMITTEE NOTE

Subdivision (b)(6). The amendment adding Rule 41(b)(6) is intended to clarify that a magistrate judge with authority in a district where the activities related to a crime may have occurred may issue a warrant to use remote access to search electronic storage media and seize electronically stored information even when that media or information is located outside of the district. 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 electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

Subdivision (f)(1)(C). The amendment to Rule 41(f)(1)(C) is intended to ensure that reasonable efforts are made to provide notice of the search or seizure to the person whose information was seized or whose property was searched.

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TAB 5A

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To: **Members, Criminal Rules Advisory Committee**

From: **Sara Beale and Nancy King, Reporters**

Re: **Rule 53 and Twitter from the Courtroom (13-CR-A)**

Date: **March 10, 2014**

Writing on behalf of the Criminal Law Committee, Judge Irene Keeley asked the Advisory Committee to consider a request to clarify Rule 53 to allow a district judge to permit a reporter to Tweet from the courtroom during criminal proceedings. In United States v. Shelnutt, 2009 WL 3681827 (M.D.Ga.), Magistrate Judge Clay Land ruled that Rule 53 precludes a reporter from sending Twitter messages from the courtroom. Judge Keeley reported Judge Land's view that it would be desirable to amend Rule 53 to permit Tweeting. Other than noting that Judge Land's views may be shared by others, the Criminal Law Committee took no position on the desirability of an amendment.

Judge Raggi referred the issue to a subcommittee chaired by Judge Morrison England. The other members of the Rule 53 Subcommittee are Judge Donald Molloy, Ms. Carol Brook, and Mr. Jonathan Wroblewski (representing the Department of Justice). The question before the Subcommittee was whether to recommend that the Advisory Committee undertake a full review of Rule 53 or defer action, allowing individual district judges to develop more experience with Twitter (and perhaps other new forms of technology), before undertaking a revision of Rule 53.

The Subcommittee met by conference call and unanimously concluded that it would be premature at this time to undertake an amendment. Subcommittee members emphasized that district judges currently have discretion to deal with the multiple issues that arise because of the various forms of technology–including smart phones, cell phones, iPads, laptops– that are used by members of the bar and journalists, as well as members of the public. Judges are employing this discretion to respond to requests to employ Twitter (as well as other forms of technology) in the courtroom. The reporters identified only one written decision, Magistrate Judge Land's ruling in Shelnutt, interpreting the current rules to prohibit Twitter. In the Subcommittee's view, this single decision did demonstrate the need for an amendment at this time.

In this memorandum, we first provide background information on Twitter and its use by reporters, and then review (1) the history of Rule 53, (2) Twitter use in the federal courts, (3) developments in the state courts, and (4) issues raised by the limited law review and practice

commentary. Usage of Twitter by reporters is substantial now and likely will increase. Rule 53's language does not directly address the use of Twitter. Although Judge Land ruled to the contrary in Shelnutt, other federal courts have permitted Tweets from the courtroom (with limitations in some cases to prevent any disruption of the proceedings and to prevent juror exposure). At present, there is limited law review and practice commentary on the issues presented by the new technologies used by reporters, and we have been able to identify only a few states that have amended their rules to address Twitter and other technology.

I. Background Information – Twitter and its Use By the News Media

Twitter is a micro-blogging and social networking service that allows registered users to send short (140 character) messages ("Tweets"); Tweets can be integrated with other forms of communications, including websites and blogs that can be viewed by the general public.[1]

Twitter is now used extensively by mainstream news media, including national outlets such as the New York Times, the Wall Street Journal, and television networks,[2] as well as many local news outlets. The Reporters' Committee on Freedom of the Press has characterized Tweeting from the courtroom as "de rigueur," especially in competitive media markets.[3]

A 2013 study by the Pew Research Center found that 8% of U.S. adults consume news on Twitter (most frequently on mobile devices).[4] Twitter news consumers are younger and better educated than the U.S. population overall; nearly half are 18-29 years old. The core function of Twitter in this context is passing along information as a story develops.

Twitter accounts posted by reporters attending trials have included both a reporter's commentary or conclusions (such as a statement that the atmosphere was "testy" and voices were

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[1]See generally Jacob E. Dean, *To Tweet or Not to Tweet: Twitter, "Broadcasting," and Federal Rule of Criminal Procedure 53*, 79 U. CIN. L. REV. 769, 769 (2010).

[2]Mark L. Tamburri et al., *A Little Bird Told Me About the Trial: Revising Court Rules to Allow Reporting from the Courtroom Via Twitter*, 15 ELECTRONIC COMMERCE & LAW REPORT 1415 (2010).

[3]Cathy Packer, *Should Courtroom Observers Be Allowed to Use Their Smartphones and Computers in Court? An Examination of the Arguments*, 36 AM. J. TRIAL ADVOC. 573, 573 (2013).

[4]PEW RESEARCH JOURNALISM PROJECT, TWITTER NEWS CONSUMERS: YOUNG, MOBILE AND EDUCATED, *available at* http://www.journalism.org/2013/11/04/twitter-news-consumers-young-mobile-and-educated/ (last visited March 1, 2014).

being raised) and brief quotations from a witness's testimony.[5] The number of Tweets may be quite large. For example, a series of more than 1,000 Tweets sent during a high profile six-week state political corruption trial allowed the public to follow the trial's progress closely, and is said to have generated public debate about the trial.[6]

II. Discussion

A. The Text and History of Rule 53

As originally adopted in 1944, Rule 53 prohibited "radio broadcasting of judicial proceedings from the court room." The 1944 Committee Notes state that the prohibition was a response to problems that had arisen in state proceedings, referencing materials referring to the proper standards for the conduct of judicial proceedings and publicity that may interfere with the right to a fair trial. Scholarly commentary and cases interpreting Rule 53 refer to the desire for orderly behavior in the courtroom and the need to prevent members of the press and broadcast media from interfering with the business of the court and the right to a fair trial.[7]

Rule 53 was amended in the 2002 restyling, and the reference to "radio" broadcasting was deleted. It now provides:

> **Rule 53. Courtroom Photographing and Broadcasting Prohibited**
>
> Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

The 2002 Committee Note stated the Committee's understanding that the deletion of the reference to radio broadcasting was not a substantive change, because it "accords with judicial interpretation applying the current rule to other forms of broadcasting and functionally equivalent means." Further, "Given modern technology capabilities, the Committee believed that a more generalized reference to 'broadcasting' is appropriate." Finally, the Note recognized that Rule 53 would have to be read with other rules, which might permit exceptions, such as video teleconferencing for limited purposes.

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[5]Tamburri, *supra* note 2, at 2.

[6]*Id.*

[7]Dean, *supra* note 1, at 774-75 (citing various sources). *See also* 3B Fed. Prac. & Proc. Crim. § 861 (4th ed. 2013).

B. Twitter Use in Federal Criminal Cases

Although the Shelnutt case that gave rise to Judge Keeley's letter appears to be the only written decision concerning Rule 53 and Twitter, articles in the ABA Journal and other secondary sources report that other federal district judges have permitted reporters to Tweet from the courtroom during criminal trials.

1. Shelnutt

In United States v. Shelnutt, 2009 WL 3681827 (M.D.Ga.), Magistrate Judge Land denied a newspaper reporter's request to use his handheld electronic device during a criminal trial to send electronic messages describing the court proceedings directly from the courtroom to his newspaper's Twitter website. The court stated:

> Rule 53 states in relevant part: "[T]he court must not permit the taking of photographs in the courtroom during judicial proceedings or the *broadcasting of* judicial proceedings from the courtroom." Fed.R.Crim.P. 53 (emphasis added). The Court finds that the term "broadcasting" in Rule 53 includes sending electronic messages from a courtroom that contemporaneously describe the trial proceedings and are instantaneously available for public viewing. Although "broadcasting" is typically associated with the dissemination of information via television or radio, its plain meaning is broader than that. The definition of "broadcast" includes "casting or scattering in all directions" and "the act of making widely known." Webster's Third New International Dictionary (Unabridged) 280 (1993). It cannot be reasonably disputed that "twittering," as previously described, would result in casting to the general public and thus making widely known the trial proceedings. Moreover, it appears clear that the drafters of Rule 53 intended to extend the Rule's reach beyond the transmission of trial proceedings via television and radio.

The court also noted that the 2002 restyling of Rule 53 replaced the phrase "radio broadcasting" with a prohibition against "broadcasting" generally. The Advisory Committee Notes stated that "[g]iven modern technology capabilities, the Committee believed that a more generalized reference to 'broadcasting' is appropriate." Since the contemporaneous transmission of electronic messages from the courtroom describing the trial proceedings by Tweeting would make them widely and instantaneously accessible to the general public, the court concluded it would constitute "broadcasting" as used in Rule 53.

2. The Use of Twitter in Other Federal Cases

At least two other district judges have permitted reporters to use Twitter to report on federal criminal trials from the courtroom, and one court has issued an administrative rule that allows Twitter in other parts of the courthouse but not in the courtroom.

In a tax fraud case involving a local landlord, Judge Mark Bennett (N.D. IA) permitted a reporter for a local paper to send Tweets and blog from the courtroom, though he required her to sit

in the rear of the courtroom to be sure that her typing would not create a distraction. Judge Bennett told the ABA Journal that he had concluded the public's right to know what goes on in federal court and the benefits of transparency from live blogging outweighed any possible prejudice to the defendant.[8] Additionally, he saw little difference between what this reporter was doing and another journalist sitting there and taking notes.[9] Bennett noted that in the future he would consult the parties before ruling on a similar request, and he might suggest that the District develop a policy on courtroom blogging.[10]

Similarly, Judge Thomas J. Marten (D. KS) allowed a reporter for a local paper to file live Twitter posts from the courtroom during a racketeering trial.[11] Judge Marten reasoned that allowing Twitter posts would open judicial proceedings to the public, leading to greater public understanding and increasing the perception of the courts' legitimacy.[12] In response to the attorneys' concern that jurors might read Twitter posts, Judge Marten stated that the jurors would be instructed to avoid newspaper, broadcast, and online reports. He reportedly relied upon Fed. R. Crim. P. 57(b), which grants the judge broad discretion to regulate courtroom affairs.[13] The father of one of the defendants was reported to have been able to follow the trial closely from his home in another state.[14]

Finally, Judge Frederico Moreno (S.D. FL) reportedly took a different approach, issuing an administrative order allowing reporters to send Twitter posts, text messages, and emails from the courthouse but not within the courtroom. It appears that Judge Moreno relied upon the need to preserve "the sanctity of the courtroom," rather than Rule 53.[15]

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[8]Debra Cassens Weiss, *Judge Explains Why He Allowed Reporter to Blog Federal Criminal Trial* (Jan. 16, 2009), *available at* http://www.abajournal.com/news/article/bloggers_cover_us_trials_of_accused_terrorists_cheney_aide_and_iowa_landlor/ (last visited Mar. 2, 2014).

[9]Adriana C. Cervantes, *Will Twitter Be Following You in the Courtroom? Why Reporters Should Be Allowed To Broadcast During Courtroom Proceedings*, 33 HASTINGS COMM. & ENMT. L.J. 133 (2010)

[10]Weiss, *supra* note 8.

[11]Richard M. Goehler et al., *The Legal Case for Twitter in the Courtroom, Communications Lawyer* 14, 14 (April 2010).

[12]Dean, *supra* note 1, at 770-71.

[13]*Id.*

[14]Goehler, *supra* note 11, at 14.

[15]*Id.* at 16.

C. Developments in the States

Our initial survey of relevant developments in the states reveals two points of interest: (1) state courts, like federal courts, have both permitted and prohibited Tweeting and blogging from the courtroom,[16] and (2) some states have amended, or are considering amendments, to their procedural rules to permit Tweeting and/or live blogging from the courtroom during criminal cases. In 2012 Utah and Kansas amended their rules, taking different approaches. Utah's new rule creates a presumptive right for news reporters to use cell phones and laptop computers to report from the courtroom, and defines news reporters broadly.[17] Kansas, in contrast, requires the judge's permission for the use of smartphones and laptops, and it defines reporters more restrictively.[18] Both prohibit recording of certain aspects of trials, such as the faces of jurors.[19] In 2012 Connecticut repealed a rule that prohibited broadcasting (or televising, recording, or photographing) a sexual assault trial,[20] and Pennsylvania was reported to be considering an amendment.[21]

If the Committee decides to undertake a revision of Rule 53, state developments may be instructive. Although the state judicial decisions may rest on specific language not present in Rule 53, they may nonetheless provide helpful analysis that would shed light on the issues that may arise when Tweets or blogging is permitted. State rulemaking may be even more instructive.

D. Issues Raised in the Law Review and Practice Commentary

The commentary highlights a variety of issues that would need to be considered if the Committee were to undertake a revision of Rule 53. These include:

1. Identifying the interests protected by the present rule

The brief Advisory Committee Notes do not provide a comprehensive analysis of the various interests that may be protected by the current rule. The law review commentary links the rule to the

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[16]*See, e.g.*, Connecticut v. Komisarjevsky, 2011 WL 1032111 (Conn. Super. Ct., Feb. 22, 2011) (holding that Tweeting was not broadcasting and permitting reporter to Tweet in capital felony and sexual assault case); Goeholer, *supra* note 11 at 15-16 (citing decisions from Maryland, Kentucky, and Florida), and Tamburri, *supra* note 2 (reporting on extensive Tweeting in Pennsylvania "Bonusgate" trial).

[17]Packer, *supra* note 3, at 591-92.

[18]*Id.*

[19]*Id.*

[20]Packer, *supra* note 3, at 589 (referring to P.B. § 1-11(b), repealed effective Jan. 1, 2012).

[21]Tamburri, *supra* note 2, text accompanying n. 6.

media circus that occurred at the trial of the Lindberg baby's kidnappers and other high profile cases, and to interests in preventing courtroom distractions that might disrupt the court's decorum and even prevent the defendant from receiving a fair trial.

2. Considering mechanisms to protect these interests

Once the interests protected by the rule have been specified, it will be possible to consider other mechanisms that may protect them. For example, if Rule 53 is intended to prevent courtroom distraction and shield witnesses and jurors from information that might prevent a fair trial, courts have identified other mechanism, such as requiring that reporters use technology that permits them to type silently and ordering jurors not to read online media.

3. Weighing the Benefits of Allowing the Use of New Technologies

Both courts and rule makers in Utah and Kansas have concluded that allowing reporters to use technology in the courtroom may have significant value, and commentators have urged that it be considered in connection with the right to a public trial as well as freedom of the press.

4. Understanding the distinctions between various technologies and their implications

Courts and commentators have recognized that allowing cameras in the courtroom may raise concerns about the safety of witnesses and jurors.[22] There are some obvious differences between

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[22]For example, in United States v. Moussaoui, 205 F.R.D. 183, 186-87 (E.D.Va., 2002) (footnote omitted), the court rejected requests to allow television networks to record and telecast pretrial and trial proceedings, commenting:

> Advances in broadcast technology, however, have also created new threats to the integrity of the fact finding process. The traditional public spectator or media representative who attends a federal criminal trial leaves the courtroom with his or her memory of the proceedings and any notes he or she may have taken. These spectators do not leave with a permanent photograph. However, once a witness' testimony has been televised, the witness' face has not just been publicly observed, it has also become eligible for preservation by VCR or DVD recording, digitizing by the new generation of cameras or permanent placement on Internet web sites and chat rooms. Today, it is not so much the small, discrete cameras or microphones in the courtroom that are likely to intimidate witnesses, rather, it is the witness' knowledge that his or her face or voice may be forever publicly known and available to anyone in the world.
>
> As the United States argues, this intimidation could lead foreign prosecution witnesses, outside the jurisdiction of the Court, to refuse to testify or withhold their full testimony out of reasonable fears for their personal safety. It could similarly lead witnesses favorable to the defense to refrain from coming forward for fear of being ostracized. The

televising a trial and allowing a reporter to Tweet from the courtroom, which one judge likened to a reporter taking notes during a trial. Does Twitter nonetheless pose security issues? Most smartphones now include cameras that allow the user to take both still photos and movies, which may be attached to emails. Does it matter whether a reporter who wishes to Tweet is using a smartphone? What about a laptop computer? Is there any distinction between a series of Tweets and live blogging?

5. Recognizing that technology will change.

The present limit of 140 characters in a Tweet naturally limits their content, and may push them more toward commentary with occasional quotations, rather than full scripts. But the next generation of Twitter may not contain that limitation. Moreover, other technology may become commonplace.

6. Line drawing: rules for members of the general public and for other communications

Although the cases to date have generally concerned members of the press who wish to report from the courtroom, members of the public also Tweet about news events. This presents the question whether there should be different rules for reporters, and, if so, how to define reporters. Other line drawing issues may also arise. For example, if smartphones are permitted in the courtroom, what rules should govern emails sent from the courtroom? Would it matter if the sender should have realized the recipient would make the contents publicly available?

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permanent preservation of images of law enforcement witnesses could also jeopardize their future careers or personal safety. How could an agent whose face was known throughout the world ever be able to work undercover or interview witnesses on the street effectively?

Knowledge that the proceedings were being broadcast may also intimidate jurors. Excluding cameras and other recording devices from the courtroom will help preserve the anonymity of the jurors who are selected to serve and minimize the potential for a "popular verdict."

TAB 5B

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COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
United States District Court
500 West Pike Street, 2nd Floor
Clarksburg, WV 26301

Honorable Tena Campbell
Honorable Curtis Lynn Collier
Honorable Raymond W. Gruender
Honorable Jeffrey R. Howard
Honorable Ellen Segal Huvelle
Honorable Sterling Johnson, Jr.
Honorable C. Darnell Jones II
Honorable William T. Lawrence
Honorable Ricardo S. Martinez
Honorable Franklin L. Noel
Honorable Margaret Casey Rodgers
Honorable Keith Starrett

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Honorable Irene M. Keeley, Chair

October 7, 2013

Honorable Reena Raggi
United States Court of Appeals
Emanuel Celler Federal Building
225 Cadman Plaza East, Room 704S
Brooklyn, NY 11201-1818

Dear Judge Raggi:

I am writing on behalf of the Criminal Law Committee to ask that the Criminal Rules Advisory Committee consider a request from Judge Clay D. Land (GA-M) to clarify Rule 53 of the Federal Rules of Criminal Procedure. Specifically, Judge Land has suggested that the rule be revised to allow a judge to decide whether contemporaneous reporting, such as "tweeting," should be permitted during a judicial proceeding. As Judge Land explained in *United States v. Shelnutt*, 2009 WL 3681827 (M.D. Ga 2009), the prohibition on "broadcasting" contained in Rule 53 includes a prohibition on "tweeting." Despite his decision, Judge Land does not agree with the result, and it is possible that his views are shared by others. Accordingly, we would ask the Criminal Rules Advisory Committee to consider this matter. If you require any assistance, please do not hesitate to contact me.

Sincerely

Irene M. Keeley

cc: Honorable Clay D. Land
Mr. Jonathan Rose
Mr. Matthew Rowland

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 45

DATE: March 10, 2014

This amendment comes to the Advisory Committee as part of the work of the Standing Committee's CM/ECF Subcommittee, chaired by Judge Michael Chagares. Judge Donald Molloy is the Advisory Committee's liaison representative on the Subcommittee. Parallel amendments to the civil, criminal, bankruptcy and appellate rules have been drafted, and to the extent possible, the rule changes and notes are the same across each set of rules.

The proposed amendment of Rule 45 would abrogate the rule providing for an additional three days whenever service is made by electronic means. The proposal reflects the CM/ECF Subcommittee's conclusion that advances in the reliability of technology have undermined the principal justifications for the current rule. 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, concerns about the reliability of electronic service were cited as justifications for allowing three added days to act after electronic service. At that time, there were concerns that (1) the electronic transmission might be delayed, (2) incompatible systems might make it difficult or impossible to open attachments, or (3) parties might withhold their consent to receiving electronic service unless they had three additional days to act. The CM/ECF Subcommittee concluded that those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

The CM/ECF Subcommittee also noted that elimination of the three day rule for electronic service would also simplify time computation. To ease the task of computing time, many rules were amended in 2009 to adopt 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding three 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.

Finally, the proposed amendment (and the parallel amendment to the other rules) includes new parenthetical descriptions of the forms of service for which three days will still be added.

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 in

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.

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TAB 7A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy J. King, Reporters

RE: Pre-plea PSRs (13-CR-C)

DATE: February 28, 2014

Professor Gabriel Chin has asked the Committee to consider "making Pre-Sentence Reports available in advance of a guilty plea." He details his argument in a twelve-page section of his article, *Taking Plea Bargaining Seriously: Reforming PreSentence Reports After* Padilla v. Kentucky, 31 St. Louis Public L. Rev. 61, 62-74 (2011) (hereinafter *Reforming*). Professor Chin does not propose particular language for the Committee to consider, but instead in his article recommends that "Rule 32 could provide for a criminal history calculation or a full PSR in advance of a plea upon the request of one or both parties." *Reforming*, at 70, 73.

The Committee has not considered this particular question in the past. Our tentative recommendation is that this proposal be tabled absent a more compelling showing that it is needed. After summarizing existing law on this issue, this memo outlines arguments that might be raised for and against this proposal to assist the Committee to determine how to proceed. If the Committee decides to study this proposal further, we recommend seeking input from the Sentencing Commission (or the Commission's Advisory Groups - Practitioners, Probation Officers, and Victims) early in the process.

I. Current Law.

Current law does not require the preparation or the disclosure to the parties of the PSR or the defendant's criminal history prior to a guilty or nolo plea. As described more fully, below, 18 U.S.C. § 3552(a) and (d), Rules 11 and 32, and U.S.S.G. § 6B1.1(c) all regulate the preparation or disclosure of the PSR, but despite modification over the years, continue to require only that the report be prepared before sentencing, not plea.

A. **Sentencing Reform Act: 18 U.S.C. § 3552**

- § 3552 (a) "Presentence investigation and report by probation officer," provides: "A United States probation officer shall make a presentence investigation of a defendant that is required pursuant to the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure, and shall, *before the imposition of sentence, report the results of the investigation to the court*." (emphasis added).

- § 3552 (d) "Disclosure of presentence reports" provides: "The court shall assure that a report filed pursuant to this section is *disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing*, unless this minimum period is waived by the defendant. The court shall provide a copy of the presentence report to the attorney for the Government to use in collecting an assessment, criminal fine, forfeiture or restitution imposed." (emphasis added)

B. **Federal Rule of Criminal Procedure 32**

- Rule 32(c)(1)(A) requires the PSR to be submitted "to the court before it imposes sentence" but notes two types of cases in which a PSR need not be prepared: death cases and cases in which the court finds the record enables it to meaningfully exercise its sentencing authority under 18 USC 3553, and explains this finding on the record.
- Rule 32(e)(1) *forbids* disclosure of the PSR to the court or anyone else before the defendant has pleaded guilty, nolo contendere, or has been found guilty, *unless the defendant has consented to that disclosure in writing*. Prior to 1975, pre-conviction disclosure of the PSR to the court was forbidden entirely, to preserve the impartiality of the court in the event of trial. An amendment, effective in 1975, added the option for the defendant to consent to disclosure to the court prior to a plea. The option of consenting to disclosure to *the parties* before plea was added in 1989. The Committee Note accompanying that amendment states "The Committee conformed the rule to the current practice in some courts: i.e., to permit the defendant and the prosecutor to see a presentence report prior to a plea of guilty if the court, with the written consent of the defendant, receives the report at that time. The amendment permits, but does not require, disclosure of the report with the written consent of the defendant."
- Rule 32(e)(2) requires disclosure of the PSR to the parties "at least 35 days before sentencing unless the defendant waives this minimum period." Disclosure of the PSR to the defense has been mandatory (no request needed) since 1983. Disclosure at least 10 days prior to sentencing was added in 1989, and the time period was extended to 35 days in 1994 in order to provide adequate time for resolution of disputes about the PSR prior to sentencing.

C. **Federal Rule of Criminal Procedure 11**

- Rule 11(c)(3)(A) *allows* but does not require a court to defer its decision to accept either a charge agreement or a "c" plea involving a binding sentencing term until after the court has reviewed the PSR. The option for a court to defer accepting a plea until after examining the PSR has been in the Rule since 1974.[1]
- Rule 11 was amended in 1989 to require the judge to inform a defendant of the obligation to apply the Guidelines and the discretion to depart from the Guidelines. Commentary to this

[1] In 1979, the Rule was amended to divide plea agreements into three types, and the deferral option was provided for charge bargains, and binding sentence agreements, but not sentence recommendation agreements.

amendment recognizes that this advice will be delivered prior to the preparation of the presentence report. [2] This advice is now found in Rule 11(b)(1)(M).

D. **Guidelines**

- Since 2004, U.S.S.G. § 6B1.1(c) has provided that a court "may" defer a decision whether to accept a plea agreement under 11(c)(1)(A) or (C) until after reviewing the presentence report. Prior to 2004, this guideline *required* judges to review the PSR before accepting these plea agreements. The former guideline read:

  "The court *shall* defer its decision to accept or reject any nonbinding recommendation pursuant to Rule 11(e)(1)(B), and the court's decision to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C), until there has been an opportunity to consider the presentence report, unless a report is not required under §6A1.1." (emphasis added).
- The Commentary to this guideline was changed with the 2004 amendment. The former commentary read: "Since a presentence report normally will be prepared, *the court must defer* acceptance of the plea agreement until the court has had an opportunity to consider the presentence report." After the 2004 amendment, it read: "Given that a presentence report normally will be prepared, the Commission *recommends that the court defer* acceptance of the plea agreement until the court has reviewed the presentence report." (emphasis added).
- The explanatory history provided to this amendment does not speak to this particular change from mandatory to optional consideration of the PSR before a plea. The Commentary states that the changes "update[d]" Chapter 6 in response to the primarily stylistic 2002 amendments to the Criminal Rules, and that "certain outdated commentary also has been deleted." As noted above, however, Rule 11 and 32 never *required* a court to defer accepting a plea agreement until after reviewing the PSR; instead, the option to defer a decision on a plea agreement until after reviewing the PSR had been part of the Rules since 1975.

II. Brief summary of arguments in favor and against the proposed change.

[2] Commentary to the amendment reads: "The amendment mandates that the district court inform a defendant that the court is required to consider any applicable guidelines but may depart from them under some circumstances. This requirement assures that the existence of guidelines will be known to a defendant before a plea of guilty or nolo contendere is accepted. *Since it will be impracticable, if not impossible, to know which guidelines will be relevant prior to the formulation of a presentence report and resolution of disputed facts, the amendment does not require the court to specify which guidelines will be important or which grounds for departure might prove to be significant.* The advice that the court is required to give cannot guarantee that a defendant who pleads guilty will not later claim a lack of understanding as to the importance of guidelines at the time of the plea. No advice is likely to serve as a complete protection against post-plea claims of ignorance or confusion. By giving the advice, *the court places the defendant and defense counsel on notice of the importance that guidelines may play in sentencing and of the possibility of a departure from those guidelines. A defendant represented by competent counsel will be in a position to enter an intelligent plea. . . .*" (emphasis added).

A. The reason for the proposal.

The primary reason stated for the proposed change is to avoid plea agreements based on erroneous information about the probable sentence. Much of the concern expressed in Professor Chen's article involves the possibility that the parties, and particularly defendants, will be blindsided, after a plea is accepted, by newly discovered criminal history that requires a sentence higher than the sentence the parties expected at the time of plea. Although the parties can attempt to generate the defendant's criminal history on their own before plea, Professor Chin argues that "it would be much cheaper to have a criminal history generated definitely once (subject to correction by the parties) than to have it generated in full three times, once each by the prosecution, defense and probation office." *Reforming*, at 70. He notes that probation offices also have better access than the parties to information about criminal history. *Id*.

It is not clear to us that the Professor Chin's concern about the inability to access accurate criminal history information prior to the plea is widely shared by litigants or judges. No statute, rule, or guideline has required pre-plea preparation or disclosure of the presentence report for at least ten years, yet this is the first suggestion to the Committee that the absence of such a requirement creates a systemic problem. It is our understanding that in some districts probation officers willingly provide such presentence information to the parties when asked. If this practice is widespread, it may explain why no one else has brought this issue to the attention of the Committee.

B. Potential problems with the proposed amendment.

The proposed amendment could create additional burdens for probation officers, and, if not limited to providing criminal history, could potentially undercut other restrictions on the disclosure of witness information.

1. Duplication of effort, additional burdens on probation officers.

As to the extra work for probation officers, it is not clear how frequently PSRs are already prepared before guilty plea proceedings. The Sentencing Commission appears to believe that pre-plea preparation is typical, stating in its commentary to § 6B1.1(c), that "a presentence report normally will be prepared" before the time a district judge must decide whether to accept a plea. This is an empirical claim. Its accuracy may vary among districts or among crime types. Professor Chin acknowledges that "preparation of a full PSR before a plea would be a substantial change from the practice in many districts," and states that "[r]outinely," the PSR is prepared "*after* acceptance of a guilty plea or conviction at trial" *Reforming*, at 63, 70, 73 (emphasis added). It is possible that additional research could shed more light on how common this practice is.[3] But even if PSRs are normally *prepared* before the *judge* is asked to accept a plea, there is no

[3] Professor Chin cites as support a statement from *United States v. Horne*, 987 F.2d 833, 839 (D.C. Cir. 1993), in which Judge Buckley writing for a panel that also included Judges Williams and Douglas Ginsburg recommended that "wherever feasible, the district court make their presentence reports available to defendants before taking their pleas. By doing so, sentencing judges (and reviewing courts) will have greater confidence that pleas are both willing and fully informed." However, the full quote indicates that the judges in *Horne* may have

evidence that the reports are normally *disclosed to the parties* before a plea proceeding, much less disclosed well in advance of that time, before the defendant decides whether or not to enter a guilty plea.

Professor Chin notes (unconvincingly, in our view) that unnecessary reports would be minimized by conditioning preparation on a request of one or both parties. He argues that the need to update pre-plea PSRs with new information before sentencing will be minimal because the time between plea and sentence will be shortened. Professor Chin recognizes that extra work would be required by the probation office in redoing the PSR if the defendant either opts for trial or agrees to plead guilty to different charges. He argues, however, that "to the extent that the result is a more just plea agreement" this extra work " is probably worth the effort" and "it can hardly be counted as undesirable that defendants reject plea bargains that are unacceptable to them." *Id.* at 70, 71-72.

2. *Early disclosure of information that would otherwise be available only for trial.*

Professor Chin recognizes that in some cases it might cause problems to disclose statements of victims or other information in the report that might allow the defendant to identify government witnesses before the defendant decides whether to plead guilty or go to trial. He suggests that if this is a concern, these aspects of the presentence investigation could be deferred until after the plea, or the disclosure could be limited to criminal history. *Id.* at 72-73. We anticipate this may be a serious concern for the Committee, given the concerns raised during its multi-year consideration of proposed amendments to Rule 16.

3. Other concerns

The proposal does not address if and how disputes about the contents of the pre-plea PSR would be handled before conviction. It is also unclear how any extra time required to prepare the

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premised their recommendation upon two facts that are no longer true today: First, that the guidelines are mandatory, second, that those guidelines required *courts* to review PSRs, prior to deciding to accept a plea. The full quote reads:

> "*Because the Guidelines have largely replaced the statutes as the determinants of the maximum penalty facing criminal defendants*, we recommend that, wherever feasible, the district court make their presentence reports available to defendants before taking their pleas. By doing so, sentencing judges (and reviewing courts) will have greater confidence that pleas are both willing and fully informed. *And because a Guidelines policy statement requires district courts to review presentence reports before accepting plea agreements, see United States Sentencing Commission, Guidelines Manual § 6B1.1(c), p.s. (Nov. 1992), providing the defendant with a copy of the report should not, in most cases, materially delay the plea proceedings.*" 987 F.2d at 839 (emphasis added).

As noted above, although § 6B1.1(c) prior to 2004 required district judges to review presentence reports before accepting plea agreements, that command was in tension with Rule 11 as it read then and now. Rule 11 does not require but permits a court to defer accepting certain plea agreements until reviewing the PSR, and otherwise forbids review without the defendant's consent. Moreover, the requirement in § 6B1.1(c) was replaced by language making deferral optional, consistent with the Rule, in 2004.

PSR prior to plea would be handled under the Speedy Trial Act, should the defendant decide not to plead guilty and go to trial.

Finally, if the problem to be cured by the proposed amendment is difficulty accessing accurate criminal history information, there may be potential remedies that would assist the parties in this regard short of mandating pre-plea preparation and disclosure of the PSR under Rule 32.

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SCHOOL OF LAW

400 MRAK HALL DRIVE
DAVIS, CALIFORNIA 95616-5201

October 25, 2013

The Honorable Reena Raggi
United States Court of Appeals
Emanuel Celler Federal Building
225 Cadman Plaza East, Room 704S
Brooklyn, NY 11201-1818

Dear Judge Raggi:

I write to suggest that the Advisory Committee on the Federal Rules of Criminal Procedure consider making Pre-Sentence Reports available in advance of a guilty plea so that all parties can be aware of the potential sentence. In *United States v. Horne*, 987 F.2d 833, 839 (D.C. Cir. 1993), Judge Buckley writing for a panel that also included Judges Williams and Douglas Ginsburg recommended that "wherever feasible, the district court make their presentence reports available to defendants before taking their pleas. By doing so, sentencing judges (and reviewing courts) will have greater confidence that pleas are both willing and fully informed." Having a PSR in advance of a plea will prevent unfair surprise, and because a PSR must be prepared before sentencing anyway, preparation should not delay the proceedings.

From what I can discern, this proposal was not considered by your committee. I elaborate on the idea in the attached paper *Taking Plea Bargaining Seriously: Reforming Pre-Sentence Reports After* Padilla v. Kentucky, 31 ST. LOUIS PUBLIC LAW REVIEW 61, 62-74 (2011).

Thank you for considering this suggestion.

Very truly yours,

Gabriel J. Chin
Professor of Law

TAKING PLEA BARGAINING SERIOUSLY: REFORMING PRE-SENTENCE REPORTS AFTER *PADILLA V. KENTUCKY*

GABRIEL J. CHIN*

INTRODUCTION

As the work of Stephanos Bibas has shown, criminal procedure as a whole has failed to adjust to meet the imperatives of a system in which almost all convictions are obtained by plea rather than through a trial.[1] The Supreme Court's recent decision in *Padilla v. Kentucky*[2] may mark the beginning of a change in constitutional law to account for the current realities. In *Padilla*, the Court held that defense counsel must advise clients of the possibility that a plea may lead to deportation.[3] Though technically not a criminal consequence, deportation is critically important to many individuals choosing whether to plead guilty.

Lack of information about deportation is hardly the only discontent associated with the plea process. Inspired by *Padilla*'s recognition that the current system offered inadequate information, this Article explores how one important feature of the plea process, the pre-sentence report (hereinafter "PSR"), should evolve to be more useful in a plea-based criminal justice system.[4]

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1. *E.g.*, Stephanos Bibas, *The Myth of the Fully Informed Rational Actor*, 31 ST. LOUIS U. PUB. L. REV. 79 (2011); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) [hereinafter Bibas, *Shadow of Trial*]; Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117 (2011) [hereinafter Bibas, *Regulating the Plea-Bargaining Market*].

2. 130 S. Ct. 1473 (2010).

3. *Id.* at 1486.

4. For general background on the PSR, see Nancy Glass, *The Social Workers of Sentencing? Probation Officers, Discretion, and the Accuracy of Presentence Reports Under the Federal Sentencing Guidelines*, 46 CRIM. L. BULL. 21 (2010); Gregory W. Carman & Tamar Harutunian, *Fairness at the Time of Sentencing: The Accuracy of the Presentence Report*, 78 ST. JOHN'S L. REV. 1 (2004); Gary M. Maveal, *Federal Presentence Reports: Multi-Tasking at Sentencing*, 26 SETON HALL L. REV. 544 (1996).

This Article proposes two changes. First, the PSR, or at least major parts of it, should be prepared before, rather than after, the guilty plea. Prior to the plea, the PSR will enable both the prosecution and the defendant to understand the actual sentencing range. Knowledge of the information upon which the sentence will be based, particularly the defendant's actual criminal record, benefits both parties and will produce plea bargains which are more knowing and informed.

The second proposed reform is in the area of collateral consequences, which are consequences of the plea other than the sentence itself. In addition to whatever arguments might be advanced in support of advising defendants of collateral consequences as a matter of fairness, there is a strong argument from the perspective of sentencing policy.[5] Many felony convictions are associated with months or years of some form of non-custodial supervision, such as probation in lieu of incarceration or supervised release following incarceration.[6] These forms of supervision generally require a person to work and pay restitution, as well as obey all federal, state, and local laws.[7] Accordingly, PSRs must include information relevant to a defendant's financial status and earning capacity, as well as the particular legal constraints to which a defendant is subject. Yet, PSRs and the terms of probation and supervised release given as part of the sentencing process routinely do not include collateral consequences relevant to employment or a general canvass of lesser-known legal restrictions on an individual resulting from the conviction at issue. In order to achieve the existing statutory goals of sentencing, relevant collateral consequences should be included in a PSR.

I. A PSR IN ADVANCE OF THE PLEA

A. The Unavailability of PSRs at the Time of the Plea Leads to Surprises at Sentencing

In the federal system, pre-sentence investigations and reports were part of the original Federal Rules of Criminal Procedure, adopted in 1944.[8] The

5. *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-2.3(a) (3d. 2004) ("The rules of procedure should require a court to ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law."); UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 5 cmt. (2010).

6. *See* 18 U.S.C. § 3561 (2006).

7. *Id.* § 3563.

8. FED. R. CRIM. P. 32(c)(2) (1946) ("The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in

significance of plea bargaining in the criminal justice system was almost entirely different before and during the World War II era.[9] There were fewer criminal cases, of course, but more fundamentally, many more convictions resulted from trials rather than plea bargains.[10] This meant that the focus in criminal cases was appropriately on the underlying facts rather than on facts primarily relevant to the sentence. Also, consideration of the sentence could be postponed until after trial because an acquittal would render a PSR unnecessary. In addition, sentences were largely subject to the discretion of the court.[11] Now, most convictions are obtained by plea, and statutory mandatory minimum sentences and "advisory," but still influential, guidelines affect the discretion of judges.[12]

By federal statute and the Federal Rules of Criminal Procedure, a PSR must normally be prepared before sentencing.[13] Routinely, this is done after acceptance of a guilty plea or conviction at trial.[14] In a plea agreement, the defendant typically agrees to be bound by the findings of the sentencing court.[15] The sentencing court, in turn, typically relies on the facts of the case and defendant's criminal history as set out in the PSR.[16] Because the PSR follows the defendant to the Bureau of Prisons, it is "the critical document at both the sentencing and the correctional stages of the criminal process."[17] The PSR's unavailability at the time of the plea means that the most portentous decision in the criminal case—to accept a guilty plea to a particular set of charges or to go to trial—is made without the benefit of some of the most important facts.

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imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.").

9. *See* Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, CRIM. L. QUARTERLY, Apr. 2005, at 67, 73–74.

10. *Id.*

11. *Id.* at 82.

12. Bibas, *Shadow of Trial*, *supra* note 1, at 2487.

13. 18 U.S.C. § 3552(a) (2006); FED. R. CRIM. P. 32(c)(1)(A). This Article is based primarily on federal law, not because federal law is unique, but, rather, because it is a reasonably representative system. As I understand it, many state systems work largely the same way, in their regular reliance on PSRs, and therefore, the arguments in this Article are applicable to those state systems as well.

14. In the original rules, disclosure of the report before a plea or guilty verdict was prohibited. FED. R. CRIM. P. 32(c)(1) (1946).

15. *See, e.g.*, plea agreements cited *infra* notes 22–23.

16. Stephen A. Fennell & William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1613, 1616 (1980).

17. *Id.*

Federal Rule of Criminal Procedure 11(c)(1)(C), allowing parties to stipulate to the application or non-application of sentencing factors,[18] could solve the problem. The parties could stipulate to criminal history and other factors, and if the court accepts the plea, the stipulation would be binding. However, the prosecution must first be willing to stipulate, which they may hesitate to do in the absence of a PSR.[19] In addition, the court may accept or reject the stipulation or "defer a decision until the court has reviewed the presentence report."[20] The Sentencing Commission's commentary disfavors early acceptance: "Given that a presentence report normally will be prepared, the Commission recommends that the court defer acceptance of the plea agreement until the court has reviewed the presentence report."[21] Accordingly, courts following the Sentencing Commission's recommendation may wait until they have reliable data and reject a plea if the stipulated facts are inconsistent with the PSR. Thus, where possible, a stipulation pursuant to Rule 11 offers the defendant certainty, but in many cases, it will not be available.

Currently, this informational uncertainty is frequently resolved by placing the risk on a defendant. Plea agreements often contain explicit contingencies about sentencing that are tied to a defendant's criminal record. For example, a plea agreement in the United States District Court for the Northern District of Alabama provides:

> [T]he Parties understand that if the defendant has three previous convictions for a violent felony or a serious drug offense, or both, . . . then the maximum statutory punishment that may be imposed for the crime of Felon in Possession of a Firearm . . . is:
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> a. Imprisonment for not less than 15 years and not more than life;
> b. A fine of not more than $250,000, or;
> c. Both (a) and (b).[22]

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18. FED. R. CRIM. P. 11(c)(1)(C).

19. The U.S. Attorney's Manual hints that such agreements are disfavored: "In order to guard against inappropriate restriction of the court's sentencing options, the plea agreement should provide adequate scope for sentencing under all circumstances of the case." U.S. DEP'T. OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-27.430(B)(3) (1997), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/ [hereinafter U.S. ATTORNEYS' MANUAL]. Note, however, that while a PSR is not a mandatory part of sentencing, a defendant may not simply waive its preparation. U.S. SENTENCING GUIDELINES § 6A1.1(b) (2011). Instead, the court must make a finding that it can meaningfully exercise its authority without one. *Id.* § 6A1.1(a)(2); *see also* United States v. Williams, 641 F.3d 758, 765 (6th Cir. 2011).

20. FED. R. CRIM. P. 11(c)(3)(A); U.S. SENTENCING GUIDELINES MANUAL § 6B1.1(c).

21. U.S. SENTENCING GUIDELINES MANUAL § 6B1.1 cmt.

22. Plea Agreement at 2, United States v. Kimble, No. 2:10-102-JHH-RRA (N.D. Ala. July 22, 2010), 2010 WL 3581142. A state plea agreement is similarly full of contingencies:

> (a) [I]f I have at least two prior convictions on separate occasions whether in this state, in federal court, or elsewhere, of most serious crimes, I may be found to be a Persistent

That is, depending on what the PSR reveals about currently existing facts, a defendant could be sentenced to life. In the United States District Court for the District of Montana, a plea agreement stated: "The defendant understands that Title 21 penalties may be enhanced for prior drug-related felony convictions. The defendant states that he has fully consulted with his attorney, and understands the potential impact of these enhancements to his sentence."[23] Here too, the defendant is warned that the sentence may be increased by facts which are knowable at the time of the plea, but which have not yet been uncovered.

Such warnings in plea agreements are not merely examples of over caution. Frequently, details of a criminal record not known at the time of a plea but included in a PSR create sentencing effects which neither party intended or appreciated. *United States v. White* is a good example of a misunderstanding about a criminal record.[24] White pleaded guilty to a crack offense, with the understanding that he would be entitled to the safety valve reduction below a ten year mandatory minimum "if my criminal history qualifies me for safety valve treatment."[25] As the Seventh Circuit explained, with the safety valve and "additional reductions for acceptance of responsibility and being a minor participant, White could have received a sentence as low as forty-six months."[26]

Offender. If I am found to be a Persistent Offender, the Court must impose the mandatory sentence of life imprisonment without the possibility of early release of any kind. [If *not* applicable, this paragraph should be stricken and initialed by the defendant and the judge _____.]

(b) The standard sentence range is based on the crime charged and my criminal history. . . .

(c) The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions.

(d) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendations may increase or a mandatory sentence of life imprisonment without possibility of parole maybe required by law. Even so, I cannot change my mind and my plea of guilty to this charges binding on me.

Statement of Def. on Plea of Guilty to Felony Non-Sex Offense, Washington v. Franklin, No. 06-1-10112-6 SEA (Wash. Super. Ct. Nov. 5, 2007), 2007 WL 4977223 (citation omitted).

23. Plea Agreement at 6, United States v. Jaeger, Nos. CR 05-23-BU-DWM, CR 06-03-BU-DWM, (D. Mont. July 19, 2010), 2010 WL 3182781.

24. 597 F.3d 863 (7th Cir. 2010).

25. *Id.* at 865.

26. *Id.* at 866 (quotations omitted).

The trial court warned of the mandatory minimum, and "that White's actual sentence would be determined by the court after an investigation by the U.S. Probation Office and consideration of the U.S. Sentencing Guidelines."[27] The trial judge further emphasized that he was "not going to be able to determine the advisory guideline sentence for [White] until after a presentence report has been completed."[28] However, the prosecution and defense assumed that safety valve relief would be available: "[A]t the plea hearing, the district judge asked the government's counsel if she had reviewed White's criminal history, and she responded in the affirmative."[29]

Unfortunately, the PSR revealed two marijuana misdemeanors, and the defendant's criminal record rendered him ineligible for the safety valve.[30] Even though a "mutual mistake here led both parties to believe that White would be eligible for safety valve treatment," the Seventh Circuit affirmed the trial court's denial of the defendant's motion to withdraw his plea.[31] The court noted that "[l]ike the district court, we too sympathize with White. But had he been allowed to withdraw his plea, a subsequent guilty verdict by a jury looks here like it would have been a foregone conclusion."[32]

United States v. Horne, a case from the District of Columbia, was similar to *White*.[33] Defendant Horne was charged with a crack offense.[34] "Both the defense counsel and the prosecutor had surmised prior to receiving the presentence report that Horne's prior conviction for possession with intent to distribute marijuana was only a misdemeanor in the State of Maryland as it would be in the District of Columbia; in fact, however," it was a felony.[35] As a result, Horne's sentencing guideline range was dramatically increased.[36] The D.C. Circuit affirmed the denial of Horne's motion to withdraw his plea, noting that the trial "court specifically informed Horne that no one—not even the judge—could know what sentencing range would apply until the presentence report was available."[37]

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27. *Id.*

28. *Id.*

29. *Id.* at 866 n.2.

30. *White*, 597 F.3d at 866. The court stated, "[w]e are unclear how the mistake was made, but we trust that the government does not go around promising to recommend reductions that it knows will not be available." *Id.* at 866 n.2.

31. *Id.* at 867–68.

32. *Id.* at 868; *see also, e.g.*, United States v. Welch, 290 F. App'x 543, 545 (4th Cir. 2008) (upholding the district court's decision to deny defendant's motion to withdraw his guilty plea). *But see* United States v. Hernandez-Wilson, 186 F.3d 1, 6 (1st Cir. 1999) (allowing withdraw of plea based on erroneous suggestion that defendant would be eligible for safety valve relief).

33. 987 F.2d 833 (D.C. Cir. 1993).

34. *Id.* at 834.

35. *Id.* at 835.

36. *Id.*

37. *Id.* at 837.

B. *The Case for a Pre-Plea PSR*

The *Horne* court correctly observed that it was impossible to predict a sentence without a PSR, at least in the absence of a stipulation.[38] However, the unavailability of a PSR is not intrinsic or inevitable—it is the result of custom and choice. The PSR could be available at the time of the plea if it were prepared in advance.

Horne, remarkably, has two opinions for a unanimous panel, each written by a different judge, plus a third opinion by Judge Buckley, apparently concurring in his other opinion for the panel.[39] Judge Buckley, in an opinion marked "writing separately for the court," expressed a "wish to make a recommendation concerning the taking of guilty pleas. Our reason for writing separately is to emphasize that our recommendation is just that—a suggestion without the force of law."[40] The court further recommended that PSRs be prepared and disclosed before the taking of a plea.[41] The court's reasoning was straightforward:

> [C]ertain goals of the Rule 11 plea-taking procedures have become more difficult to achieve [because of sentencing guidelines]. That rule was designed to make sure that a guilty plea is both voluntary and informed. Yet, while Rule 11 requires a court to advise the defendant of the "maximum possible penalty provided by law" . . . in many federal criminal cases today, this statutory maximum is irrelevant. . . .
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> . . . .
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> Because the Guidelines have largely replaced the statutes as the determinants of the maximum penalty facing criminal defendants, we recommend that, wherever feasible, the district court make their presentence reports available to defendants before taking their pleas. By doing so, sentencing judges (and reviewing courts) will have greater confidence that pleas are both willing and fully informed.[42]

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38. *Id.*

39. 987 F.2d at 834.

40. *Id.* at 838 (Buckley, J., writing separately for the court).

41. *Id.* at 839.

42. *Id.* at 838–39. The court continued:

> In making this recommendation, we are mindful of the strict resource constraints faced by the district court's probation office and the severe time pressures confronting the district judges themselves. Hence, we do not suggest that defendants have a right to peruse their presentence report before pleading. Nor do we question that, in a given case, it may not be feasible to await the completion of a report or that there may be valid reasons for withholding the report until after the plea is accepted. We do no more than suggest the desirability of such a practice in the run of cases. *Cf. United States v. Salva*, 902 F.2d 483, 488 (7th Cir.1990) ("We do . . . believe that defendants will be able to make more intelligent choices about whether to accept a plea bargain if they have as good an idea as possible of the likely Guidelines result.").

Similarly, the Second Circuit has suggested, though not required, that sentencing courts[43] and prosecutors[44] advise defendants about likely sentences.

The idea that the critical information should be available in advance of the plea has much to recommend it. If the question were a matter of fault rather than fairness and accuracy, the legal system could end the matter by applying the presumption that all persons know the law. If the defendant or her lawyer has not marshaled the available facts, the risk and consequences of this failure would appropriately fall on the defendant. But in the plea context, the Supreme Court has not adopted this emptor approach: "[A] guilty plea 'not only must be voluntary but must be [a] knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances and likely consequences.'"[45] Thus, due process requires a warning of the maximum sentence, notwithstanding the fact that it is available in the U.S. Code to all who care to look. In a system where criminal history may be as significant to the sentence as is the particular crime to which the defendant is pleading guilty, there is good reason to settle it before the plea.

While denying that advice is required by the Constitution itself, courts recognize that pleading without sentence information implicates the concerns of the Due Process Clause. In *United States v. Pimentel*, the Second Circuit stated that while pleas made without understanding the likely Guideline range might be knowing and voluntary, "we are, given our own struggles with the Guidelines, not unsympathetic to their claims that they did not fully appreciate the consequences of their pleas."[46] The court urged prosecutors to inform defendants of sentencing ranges to help "ensure that guilty pleas indeed represent intelligent choices by defendants."[47] Similarly, in *United States v. Horne*, the D.C. Circuit stated that presenting a PSR in advance of a plea would lead to "greater confidence that pleas are both willing and fully informed."[48] Judge Buckley, in a second concurring opinion, added that, "Horne's decision to forego the exercise of a constitutional right was not as informed as it could have been, hence not as voluntary as it might have

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Id. at 839.

43. United States v. Fernandez, 877 F.2d 1138, 1143 (2d Cir. 1989) (suggesting that the district court should, but is not legally required, to make "each defendant, at the time of tendering a guilty plea . . . fully cognizant of his likely sentence under the Sentencing Guidelines").

44. United States v. Pimentel, 932 F.2d 1029, 1034 (2d Cir. 1991) (suggesting that the prosecution "inform defendants, prior to accepting plea agreements, as to the likely range of sentences their pleas will authorize under the Guidelines").

45. Haring v. Prosise, 462 U.S. 306, 319 (1983) (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

46. 932 F.2d at 1032.

47. *Id.* at 1034.

48. 987 F.2d 833, 839 (D.C. Cir. 1993) (Buckley, J., writing separately for the court).

been."[49] Under the decision, a defendant "may well be trapped by the formal implications of a guilty plea and the failure of the Rule 11 Proceeding to provide him with a reliable understanding of its consequences."[50]

One gets the feeling that in their hearts, these judges believed that a plea made without any understanding of the likely sentence is not fully knowing, voluntary, and intelligent. However, for some, presumably pragmatic, reason, they were unwilling to conclude that due process required a warning even of the features of the sentence which were knowable and determinable at the time of the plea.

C. *A Pre-Plea PSR Would Not Be Impractical*

Whether required by the Constitution or not, PSRs could be made available before a plea. Under Rule 32, a pre-sentence investigation must include an interview of the defendant.[51] The PSR must calculate the offense level and identify the applicable guidelines, the relevant sentencing factors, and the grounds for departure.[52] The report must also indicate the defendant's "criminal history category" and "the resulting sentencing range and kinds of sentences available."[53] In addition, language carried forward from the original 1944 Federal Rules of Criminal Procedure requires information about the defendant's history and characteristics including criminal record, financial condition, and any circumstances relevant to sentencing and "correctional treatment."[54] Likewise, the PSR must also contain victim impact and restitution information, and "any other information that the court requires."[55] There is nothing in a PSR that is legally or factually incapable of investigation and determination in advance of a guilty plea. A PSR prepared in advance of a plea could be subject to the same sort of objection and correction as exist under current practice.[56]

There are several practical considerations, none of which are insurmountable.

The Parties Should Do It. As previously mentioned, in principle, a defendant's criminal history is available to both the prosecution and defense without a PSR. The defendant was presumably present for all of her prior convictions and sentences, and the prosecution has access to criminal history

49. *Id.* at 840 (Buckley, J., concurring).

50. *Id.* at 841.

51. FED. R. CRIM. P. 32(c)(2).

52. FED. R. CRIM. P. 32(d)(1).

53. *Id. See generally* FED. R. CRIM. P. 32(d)(2)(A)(i) (requiring that a PSR include "any prior criminal record").

54. FED. R. CRIM. P. 32(c)(2) (1946); FED. R. CRIM. P. 32(d)(2).

55. FED. R. CRIM. P. 32(d)(2)(F).

56. FED. R. CRIM. P. 32(f).

databases. Under what Professor Bibas calls the "caveat emptor" approach to plea bargaining, the system could leave it to the parties to generate their own information.[57] Yet, in the actual criminal justice system, the critical analyst of criminal record information is neither the prosecution nor the defense—it is the probation officer who prepares the PSR. In the absence of a stipulation pursuant to Rule 11(c)(1)(C), which is part of a plea agreement accepted by the court, the PSR's accounting of a criminal record will ordinarily control, particularly over a mistaken view of one or both attorneys.[58] For this reason, the approach of the Second Circuit in *Pimentel* is unsatisfactory. The prosecution is encouraged to present its understanding of the guidelines calculation before a plea, but it is free to embrace or adopt new or harsher recommendations by the Probation Office presented in the PSR.[59] Thus, the *Pimentel* approach replaces a complete absence of information about the contours of the sentence with unreliable information. The actual PSR, not an imperfect rough draft, should be the basis of a plea.

In addition, it would be much cheaper to have a criminal history generated definitively once (subject to correction by the parties) than to have it generated in full three times, once each by the prosecution, defense and probation office.

Further, both defense attorneys and prosecutors have informational disadvantages compared to probation officers. The prosecution might not easily discover out-of-state convictions, old convictions, convictions under an alias, or convictions in lower courts. For its part, the defense might not fully understand whether a particular proceeding resulted in a conviction or not, or whether particular judgments are misdemeanors or felonies. Neither prosecutors nor defense attorneys are specialists in finding out this information, while it is a critical part of probation officers' jobs.

Additional Work. Another issue is the potential additional work involved. In the normal run of cases, the argument for preparing some or all of a PSR in advance of a plea of guilty is compelling because precisely this work will have to be performed at some point anyway. However, it would, in retrospect, be undesirable to have PSRs prepared in the small number of cases that are ultimately dismissed or tried to an acquittal.

To avoid unnecessary reproductions of PSRs, Rule 32 could provide for a criminal history calculation or a full PSR in advance of a plea upon the request of one or both parties. The prosecutor and defense attorney will generally have solid information on whether there is a reasonable likelihood that a case is heading toward dismissal or trial, in which case preparation of a PSR could be

57. Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 1, at 1143.

58. *See* FED. R. CRIM. P. 32(i)(3)(A) (stating a court "may accept any undisputed portion of the presentence report as a finding of fact").

59. *See* United States v. MacPherson, 590 F.3d 215, 217 (2d Cir. 2009); United States v. Habbas, 527 F.3d 266, 270 (2d Cir. 2008).

deferred. Counsel's belief that a case is heading toward a plea is also likely to be reliable. Of course, the Speedy Trial Act should be amended, if necessary, to make clear that time spent waiting for a PSR requested by defense counsel in anticipation of a plea is excluded.[60]

Nevertheless, if PSRs are prepared before entry of a plea, there will inevitably be some number of unnecessary reports generated. In some cases apparently headed toward a plea, a defendant will die before pleading. In other cases, a bargain will fall apart, and the case will be tried or dismissed, although neither of those cases renders a PSR necessarily useless.[61] But given the overwhelming number of cases that plead, the numbers of unnecessary reports are likely to be minimal, if not insignificant.

The earlier preparation of a PSR raises the possibility of another form of additional work: updating the PSR in the period between preparation of the PSR and imposition of sentence. Of course, some of this is required now if, for example, a defendant is rearrested or there are other material developments. However, pre-plea PSRs will shorten the time between plea and sentence. Most of the delay is occasioned by waiting for the PSR, so there may not be an appreciable lengthening of the period of time not covered by the PSR, and therefore, no appreciable information gap to make up at sentencing.

Frustration of Pleas. In some cases, the results of a PSR will lead the parties to change their bargain, perhaps involving a plea to different charges, if the sentence under the original charges is other than what they anticipated, or if the actual criminal record makes the original charges unwarranted for some reason. The revised charges could be more or less severe. A pre-plea PSR could improve prosecution decision-making just as it could improve defense calculations.

If an anticipated plea falls apart, more work might be required of the probation office to revise the guidelines calculations based on the new charges. To the extent that the result is a more just plea agreement, it is probably worth the effort. Some plea bargains will fail when a PSR leads defendants to recognize their actual exposure—a case that would have pleaded then turns in

60. 18 U.S.C. § 3161 (2006). The Speedy Trial Act provides time limits in an effort to "assure a speedy trial." *Id.* § 1361(a). In addition, the Act currently provides for exclusions from the time limit computation, including an exclusion for consideration of a plea agreement. *Id.* §§ 1361(h)(1)(A)–(J).

61. A PSR in a case later tried to an acquittal will be useless, but if there is a conviction, the PSR could still be updated and used. In a case where a prosecution is dismissed, the PSR would not necessarily have been wasted. In fact, the criminal history calculation or other information in a report could be the basis for an exercise of prosecutorial discretion. *See* U.S. ATTORNEYS' MANUAL, *supra* note 19, § 9-27.220(A)(3) (providing that "adequate non-criminal alternative" may be a ground for declining prosecution). Although from the perspective of the probation office this report may seem to be a waste, from the perspective of the criminal justice system as a whole, it is more likely seen as a cost-effective piece of information.

to a trial case. This means not only that the PSR could turn out to be a wasted effort if the trial results in an acquittal, but also that the early PSR has generated the costs of a trial.[62] But the PSR could still be used, as revised, if necessary, in the event of a conviction, and it can hardly be counted as undesirable that defendants reject plea bargains that are unacceptable to them.

Admissibility of Statements. There are evidentiary concerns in addition to the resource concerns outlined above. If a case that the prosecutor and defense attorney believe is heading toward a plea actually does plead, then no evidentiary difficulty would be raised by generating the PSR before rather than after the plea agreement. But if the plea does not go forward for some reason, then the PSR contains two sets of statements about which counsel might be concerned.

One category of statements is the victim's statements relating to the case. The defense counsel might be happy to have these statements for use during cross-examination at trial, and the prosecutor might wish to prevent the availability of such statements. On the one hand, there is no strong policy reason to prevent the generation of these kinds of statements. A witness with a good memory who makes consistent statements will not be impeached, and the cause of justice is not harmed by allowing juries to evaluate the credibility of other categories of witnesses. However, the point of pre-plea PSRs is not to change the balance between prosecution and defense as it now exists. To avoid a side controversy, it may make sense to extend the evidentiary prohibition against admitting pleas and plea bargain discussions to make statements of witnesses contained in PSRs inadmissible, even for impeachment purposes.[63]

This might not completely resolve the situation. A second category of statements which might raise concerns for counsel is statements made by the defendant to a probation office. The defendant enjoys the privilege against self-incrimination,[64] and statements to a probation officer are admissible only if not compelled and voluntarily made.[65] A defendant may wish to get credit for accepting responsibility and avoid an enhancement for obstruction of justice, but may hesitate to speak candidly without the security of an actual plea deal in hand. Extending the protection of Federal Rule of Evidence 410 to statements made to probation officers as a part of sentencing, provided that the statements cannot be used in other cases or in any sentencing which might

62. On the other hand, the PSR may well have avoided the cost of an appeal or motion to withdraw a plea.

63. FED. R. EVID. 410.

64. U.S. CONST. amend. V.

65. *See* United States v. Perez-Franco, 873 F.2d 455, 460–62 (1st Cir. 1989).

occur if the contemplated plea bargain fails, would be helpful.[66] However, prosecutors will justly object to bearing the burden of proving that they made no direct or derivative use of the statements. On the other hand, defense counsel will be reluctant to allow statements to be made if they can be used by the prosecution for investigative leads. It may be that this part of the pre-sentence investigation must be deferred until after the plea. That would still mean that many of the most important parts of the PSR could be completed in advance.

Full PSR or Just Criminal History? Admittedly, preparation of a full PSR before a plea would be a substantial change from the practice in many districts.[67] A compromise approach might be to prepare only the criminal history. It would correct some of ignorance associated with pleading, while avoiding other problems, such as concerns about statements of witnesses or the defendant. Ultimately, preparing only the criminal history would be sub-optimal, because it would fail to address many questions about the application of the Guidelines which could be definitively determined. Yet, it would clearly be better than nothing.

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There is a final pragmatic reason that under current sentencing systems, more information should be provided to the defendant in advance of the plea. Under the old system, a person convicted of a serious crime might be subject to a sentence of probation, any term of years, or life.[68] Thus, when a defendant pled guilty and took the risk that their sentence could be on the high end of that range, that risk was counterbalanced by the possibility of getting a one day sentence or straight probation. It is one thing to warn a defendant only that they face life imprisonment when, should things go their way, they might walk out of court that day. It is another to give a limited warning when there is no hope of a low sentence because of a mandatory minimum sentence which is applicable under the circumstances, or little hope of a low sentence because guidelines recommend many years in prison.[69]

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66. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 1B1.8(a) (2011) ("Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.").

67. Fennell & Hall, *supra* note 16, at 1626 (noting that PSRs "generally cannot be submitted until the defendant pleads or is found guilty").

68. *Id.* at 1615 ("[J]udges have virtually unlimited discretion to impose any type and length of sentence for a specified offense, within statutory limits.").

69. *Cf.* United States v. Goins, 51 F.3d 400, 402–05 (4th Cir. 1995) (noting that mandatory minimum sentence must be disclosed as part of Rule 11 colloquy).

In *Boykin v. Alabama*, the Supreme Court explained further: "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence."[70] By preparing PSRs in advance of a plea, courts could greatly improve the understanding of defendants and prosecutors at little to no additional cost and also improve the fairness and legitimacy of the criminal justice system.

II. COLLATERAL CONSEQUENCES AND THE DEFENDANT'S STATUS AFTER CONVICTION

Criminal convictions, particularly felonies, subject a defendant to a wide range of collateral consequences relating to employment, public benefits, family status, and civil rights beyond the sentence.[71] PSRs do not ordinarily list collateral consequences of the criminal conviction that will be applicable to the defendant.[72] To be sure, there is some overlap between collateral consequences and information provided as part of the sentencing process. For example, the collateral consequence of firearms ineligibility[73] is also a condition of probation and supervised release.[74] However, there is no systematic effort to canvass the restrictions to which a convicted person is subject as part of the sentencing process. This is both a defect and a missed opportunity, because the immediate and long-term sentencing goals cannot be achieved without an understanding and articulation of the defendant's changed legal status.

A. The Defendant's Financial Condition

The defendant's future financial and employment prospects are important to know before sentencing. Rule 32 requires a PSR to contain information about "the defendant's financial condition."[75] Financial condition is important because there is a sentencing goal "to provide restitution to any victims of the

70. 395 U.S. 238, 243–44 (1969).

71. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d. ed. 2004); UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT prefatory note (2010).

72. *See generally* FED. R. CRIM. P. 32(d) (describing the information included in PSRs).

73. 18 U.S.C. § 922(g) (2006).

74. *Id.* § 3563(b)(8).

75. FED. R. CRIM. P. 32(d)(2)(A)(ii).

offense,"[76] and because the amount of a fine depends on "the defendant's income, earning capacity and financial resources."[77]

A defendant's financial condition, ordinarily, is not a static fact, it is affected by context. Other than the wealthy, most people's "financial condition" is determined by their earning capacity more than their assets.[78] Further, even someone with limited assets may be able to pay a fine or restitution if their earning capacity is strong.[79]

A critical aspect of the context of a defendant's earning capacity is that the conviction dramatically changes the kinds of employment that are open to an individual.[80] It makes little sense to calculate a defendant's earning potential based on employment settings which are legally prohibited to the defendant or on the retention or acquisition of licenses or permits for which a defendant is no longer eligible.[81] To set a restitution schedule and a fine, then, often requires attention to collateral consequences and their effect on a defendant's earning potential.

The importance of a defendant's financial status does not end at the time of sentencing. In addition to or in lieu of incarceration, most people convicted of felonies will be under the supervision of the criminal justice system in some form. Most people convicted in federal court serve either probation instead of prison or supervised release after prison.[82] Standard conditions of probation

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76. 18 U.S.C. § 3553(a)(7).

77. *Id.* § 3572(a)(1); *see also id.* § 3572(b) (providing that "a fine or other monetary penalty" should be imposed "only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution").

78. *Id.* § 3572(a)(1); *see also* United States v. Blackman, 950 F.2d 420, 425 (7th Cir. 1991); United States v. Ruth, 946 F.2d 110, 114 (10th Cir. 1991).

79. *See, e.g.*, United States v. Castner, 50 F.3d 1267, 1278 (4th Cir. 1995); United States v. Gresham, 964 F.2d 1426, 1430–31 (4th Cir. 1992); United States v. Morrison, 938 F.2d 168, 172 (10th Cir. 1991).

80. *See* Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617 (2005).

81. *Id.* at 620–21.

82. Probation and supervised release are similar in many ways. Both are administered by the U.S. Probation Service. The conditions mandated by statute and the sentencing guidelines are, for the most part, the same. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 5B1.3 (2011) ("Conditions of Probation"), *with* U.S. SENTENCING GUIDELINES MANUAL § 5D1.3 ("Conditions of Supervised Release"). They are also similar in that the conditions of probation and conditions of supervised release are communicated by a probation officer at the time of sentencing. *See* 18 U.S.C. § 3563(d) ("The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the sentence is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required."); *id.* § 3583(f) ("The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.").

and supervised release require that a person pay restitution,[83] "work regularly at a lawful occupation,"[84] and "support the defendant's dependents and meet other family responsibilities."[85] Defendants are commonly returned to prison for failure to comply with these conditions. Thus, even if the defendant is able to pay any restitution and fine in full upon sentencing, a defendant will ordinarily be subject to ongoing financial and employment responsibilities. A defendant's ongoing financial obligations, imposed as part of the criminal judgment, mean a sentencing judge and counsel must understand the defendant's future occupational restrictions at the time of sentencing.

B. General Compliance with Law

In addition to financial obligations, probation and supervised release require the defendant to be generally law-abiding. It is a condition of both that "[t]he defendant shall not commit another federal, state or local offense."[86] When the violations are of *malum in se* criminal prohibitions, a defendant should not be heard to complain that she did not know, for example, that it was illegal to sell drugs.[87] But the legal restrictions on those convicted of crime are often little-known, even to lawyers and judges.

A system aiming for compliance with a complex set of restrictions must actually articulate the nature of the behavior for which it is looking.[88] Once again, the law seems to require this already.[89] Conditions of supervised release and probation must be "sufficiently clear and specific to serve as a guide for the defendant's conduct."[90] The implication is that if there is a particular set of unusual restrictions applicable because of a criminal conviction, it should be

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83. U.S. SENTENCING GUIDELINES MANUAL § 5B1.3(a)(6); *id.* § 5D1.3(a)(6).

84. *Id.* § 5B1.3(c)(5); *id.* § 5D1.3(c)(5).

85. *Id.* § 5B1.3(c)(4); *id.* § 5D1.3(c)(4).

86. *Id.* § 5B1.3(a)(1); *id.* § 5D1.3(a)(1).

87. United States v. Ortuno-Higareda, 450 F.3d 406, 411 (9th Cir. 2006) (quoting United States v. Dane, 570 F.2d 840, 843–44 (9th Cir. 1977)), *vacated en banc*, 479 F.3d 1153 (9th Cir. 2007).

88. *See, e.g.*, United States v. Gallo, 20 F.3d 7 (1st Cir. 1994).

89. United States v. Felix, 994 F.2d 550, 552–53 (8th Cir. 1993) (holding that a probation violation must be supported by fair notice, but failure to serve written statement of conditions as required by statute can be cured by providing oral notice); *see also* United States v. Ortega-Brito, 311 F.3d 1136, 1139 (9th Cir. 2002) (noting the importance of compliance with 18 U.S.C. § 3583(f) by emphasizing that "the obligations of the district courts and probation officers under those statutes are specific, and we encourage the establishment of procedures that would ensure compliance with the letter, as well as the purpose, of the statutes").

90. 18 U.S.C. § 3563(d) (2006); *id.* § 3583(f); *see also* United States v. Stanfield, 360 F.3d 1346, 1354 (D.C. Cir. 2004) (quoting United States v. Simmons, 343 F.3d 72, 81 (2d Cir. 2003)) ("Due process requires that the conditions of supervised release be sufficiently clear to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.").

set out in the PSR. For example, in many states, those on probation or parole may not vote, and voting when not authorized to do so can be a criminal offense.[91] But some states do allow probationers and parolees to vote, and this turns out to be something more than a simple question.[92]

Like other people, defendants travel and move their residences, so it will not always be a simple matter to determine which collateral consequences are germane to a particular defendant. In state systems, it would be reasonable to list the collateral consequences applicable in the state. In the federal system, federal consequences plus those applicable in the defendant's current state of residence should be listed.

CONCLUSION

The PSR was invented in a time when most cases were decided by trial and judges generally imposed discretionary sentences. It is inadequate for an era when most cases are decided by guilty plea, and most sentences are imposed by judges with limited discretion. To the extent that critical ingredients of mandatory or discretionary sentences, such as a defendant's criminal history, are legally and factually determinable in advance of a plea, they should be determined at that time.

In addition, current law requires a PSR to describe the defendant's current and prospective financial condition and earning capacity in order to set fines and restitution.[93] Probation and supervised release documents also require sufficient detail about restrictions and obligations so as to "serve as a guide for the defendant's conduct."[94] These goals require clear articulation of the collateral consequences to which a defendant will be subject while on probation or supervised release.

91. *See* Ryan S. King, SENTENCING PROJECT, A DECADE OF REFORM: FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2006), *available at* http://www.sentencingproject.org/doc/publications/fd_decade_reform.pdf.

92. *See id.*

93. *See supra* notes 76–86 and accompanying text.

94. 18 U.S.C. 3583(f).

THE MYTH OF THE FULLY INFORMED RATIONAL ACTOR

STEPHANOS BIBAS*

I. THE OUTDATED LAISSEZ-FAIRE MODEL OF THE PLEA BARGAINING MARKET

Traditionally, American criminal procedure has treated the jury trial as the norm, the basic event protected by the Bill of Rights and rules of criminal procedure. The Supreme Court has developed a range of doctrines to ensure fair jury selection and instructions, confrontation and cross-examination, and the like. But when it comes to waiving a jury trial and pleading guilty, the Court has largely assumed that defendants can readily forecast the costs and benefits of pleading guilty and do so only if plea bargaining serves their interests. Put another way, the Court has taken a laissez-faire, hands-off approach, assuming that plea bargaining is a rational and well-functioning market in which price signals obviate regulation. Free markets require only the most modest regulation to prevent force, threats, fraud, and deceit; governments need not go much further to help buyers assess the substantive desirability of deals. In this respect, the case law presupposes economists' stylized model of plea bargaining, in which each party chooses to enter into a plea agreement only if there is "mutuality of advantage."[1] The defendant gets a lower sentence; in exchange, the prosecution frees up time and money to pursue more defendants, and may also purchase one defendant's testimony or cooperation to use against others.

The free market works pretty well for commercial transactions, in which enough market participants are sophisticated and shop around that sellers must lower prices for everyone to match the going rate. That model roughly describes much bargaining over civil settlements, where each side usually maximizes its own dollar recovery and attorneys' fees are often pegged to a percentage of their clients' recoveries.

Unfortunately, plea bargaining is far from a well-functioning market with transparent, competitive prices. For starters, the prosecutor is a monopsonist, the only buyer with whom a defendant can shop unless he will risk going to

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1. Brady v. United States, 397 U.S. 742, 752 (1970).

trial.[2] The prosecutor probably is not looking to maximize the overall punishment or sentence, but rather is seeking to guarantee a conviction and willing to trade off severity for certainty. Likewise, the defense lawyer, often underpaid and overworked, has strong interests in moving his docket by getting his clients to plead quickly. Appointed defense lawyers are often paid a salary, a flat fee, or a low fee per case, so there is little incentive to invest extra work and resources to turn over every stone.[3] Also, defense lawyers vary greatly in their skills, experience, and relationships with prosecutors, which can further influence plea bargaining outcomes.[4] Nevertheless, the Court put great faith in defense lawyers' advice as the key to making defendants' pleas knowing and voluntary and set a very high bar for overturning pleas based on deficient legal advice.[5]

Perhaps the biggest problem is the assumption that defendants have enough information to rationally forecast their guilt and expected sentences and whether it makes sense to plead guilty. Most defendants do indeed know whether they are guilty of something and whether they have an obvious defense, and most guilty defendants have a reasonable idea of the witnesses and other evidence against them.[6] But criminal cases are much more complex than binary judgments of guilt or innocence. Often, there is a range of criminal charges that can fit a criminal transaction, and prosecutors start out stacking multiple charges only to bargain some away. There also is usually a range of criminal sentences that can fit a particular charge. That is most obvious in unstructured-sentencing systems, in which a judge can give zero to twenty years for a robbery, for example. Structured sentencing systems, though narrower, still preserve a range over which the parties can bargain. In the federal system, for example, the top of the range is at least 25% higher than the bottom.[7] Even when mandatory-minimum penalties can apply, prosecutors may agree to drop charges, let them run concurrently, or recommend reductions below the minimum in exchange for cooperation against other defendants.[8]

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2. *See* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1477–88 (1993); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 64–66 (1988).

3. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2477 (2004).

4. *Id.* at 2480–82.

5. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

6. Even so, stingy discovery rules can hurt defendants, especially those who are innocent or were too intoxicated or mentally ill to remember the details. Bibas, *supra* note 3, at 2494.

7. *See* 28 U.S.C. § 994(b)(2) (2006) (limiting top of guidelines range to 25% or six months above the bottom of the range, whichever is greater); U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A tbl. (2011) (setting forth federal sentencing ranges).

8. Bibas, *supra* note 3, at 2485.

Today, criminal convictions not only carry prison terms and fines, but also trigger a range of so-called collateral consequences. A violent-crime conviction may cost a convict his right to carry a gun and thus to work as a police officer or security guard. A sex-offense conviction, even for flashing or public urination, may require a convict to register as a sex offender and not live in large parts of cities near schools, parks, or playgrounds. A drug conviction may count as an aggravated felony, making a noncitizen automatically removable from the country. These consequences can matter greatly to defendants;[9] someone who has lived in America for decades and has family here may care far more about deportation than about a sentence of probation or a few months in jail. But because these consequences are nominally civil, they are not mentioned in plea agreements or plea colloquies. Traditionally, neither judges nor defense lawyers have mentioned them to their clients, as they are imposed by civil agencies and statutes rather than criminal courts.[10] Criminal proceedings remained formally divorced from civil ones, even though collateral consequences have in effect become predictable parts of the total punishment package. And often, especially in cases of moderate severity, that package is negotiable. Traditionally, a criminal defense lawyer might ask to have a one-year sentence bumped up from 365 to 366 days, to qualify his client for good-time credits. But where a one-year sentence is the threshold for deportation, prosecutors and judges often will agree to lower a sentence by a day, to 364 days, if a defense lawyer is knowledgeable enough to request such a favor.[11] Savvy, experienced defense lawyers knew enough to advise their clients and try to bargain over these consequences where possible, but many others did not.

All too often, however, these plea-bargaining issues remained below the Court's radar. Guilty pleas, and especially plea bargains, waive most possible appellate issues. Thus, disproportionately few plea-bargained cases make it all the way up to the Supreme Court's docket. Confronting an unrepresentative sample of cases, the Court continued to hyper-regulate trials while leaving plea bargaining largely untouched.[12]

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9. *See* Gabriel J. Chin and Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700 (2002).

10. *Id.*

11. *See, e.g.*, State v. Quintero Morelos, 137 P.3d 114, 119 (Wash. Ct. App. 2006); 1 NORTON TOOBY & JOSEPH ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS § 10.1 (4th ed. 2007).

12. *See* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1118–19 (2011).

II. *PADILLA*'S RECOGNITION OF PLEA BARGAINING REALITIES

The traditional model has long since become an anachronism for the 95% of defendants who plead guilty.[13] What they need is not a litany of boilerplate warnings about the procedural trial rights they are waiving, as criminal procedure rules require,[14] because for most, a jury trial was never a serious option and the various trial procedures were immaterial. Rather, they need clear information about the substantive outcomes they will face and how good a deal they are receiving. They need to know not only the prison and parole terms but also whether they will lose custody of their children or be deported, forbidden to live at home, or barred from working in their profession.

The bar had begun to acknowledge these realities. Bar publications explained how to spot and understand immigration consequences of criminal convictions, and continuing legal education programs taught criminal defense attorneys how to navigate the thicket of immigration consequences.[15] Good, experienced criminal defense attorneys increasingly saw explaining these consequences as part of representing the whole client's interests within the criminal case. But less experienced attorneys and those who do not specialize in criminal or immigration law remained ignorant or unconcerned with consequences beyond the criminal sentence itself. Thus, many defendants were unpleasantly surprised, taking seemingly lenient pleas only to discover that they had unwittingly agreed to be deported.

In *Padilla v. Kentucky*, the Court for the first time confronted this cluster of issues in interpreting the Sixth Amendment's guarantee of effective assistance of counsel.[16] The Court acknowledged that plea bargaining is no longer a negligible exception to the norm of trials; it is the norm.[17] A defendant who pleads guilty is not getting some exceptional break, but ought to be getting the going rate. In contrast, the defendant who goes to trial will probably receive a heavier sentence than usual, just as only a few suckers pay full sticker price for a car. A range of options is on the table, and defendants need to explore where within that range they can fall. A competent defense lawyer "may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence" that serves both the prosecution's and the defense's interests.[18] The parties trade risks for certainty and may likewise

13. *Id.*

14. *See, e.g.*, FED. R. CRIM. P. 11.

15. *See generally* J. McGregor Smyth, *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, CRIM. JUST., Fall 2009, at 42 (describing ways to mitigate collateral consequences).

16. 130 S. Ct. 1473 (2010).

17. *Id.* at 1485 & n.13.

18. *Id.* at 1486.

agree to heavier criminal sentences or restitution in exchange for avoiding collateral consequences.[19]

Plea bargaining is thus not an esoteric corner of the market reserved for indisputably guilty defendants who should be happy to receive any lower sentences as a matter of grace. It *is* the market, and defendants need competent advice about the facets and consequences of the transaction before they agree to a deal. A corollary is that a fair deal requires more than a rubber stamp by a lawyer with a pulse. Defense lawyers must explain not only the criminal sentences, but also the other consequences that will clearly flow from the convictions.[20] Not only affirmative misadvice, but even failure to offer advice where the correct advice is clear, violates the Sixth Amendment.[21] That means that defendants are not left to fend for themselves, but have an affirmative right to at least minimally competent advice.

Padilla thus goes well beyond the night watchman state's minimal regulation of force, threats, fraud, misrepresentations, and broken promises in an otherwise laissez-faire market. It imposes an affirmative obligation: the state must ensure that defendants have counsel who will help them to understand and evaluate the substantive merits of plea deals. The goal is not simply to forbid inaccurate or coerced pleas, but to promote a more robust and intelligent choice among alternative outcomes. That goes much further than *Santobello*'s ban on broken promises[22] or *Brady*'s ban on threats, misrepresentations, and bribes.[23] *Brady* had also required judges and counsel to explain the direct consequences authorized by the plea,[24] but *Padilla* significantly extended that disclosure requirement as well.

Looking backwards, one might see something vaguely similar in earlier cases that trusted competent defense counsel to ensure fair deals.[25] But *Padilla* imposes a much more robust and affirmative requirement on counsel. It follows the accumulated wisdom of the bar and the academy in gradually explicating defense lawyers' professional obligations. Rather than creating a new duty out of whole cloth, *Padilla* takes an incremental, common-law approach to discerning the minimum that a client can expect. That minimum need not mirror best practices, but at least it evolves to adapt to new plea-bargaining realities in a fluid market.

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19. *Id.*

20. *See, e.g., id.* at 1481–82.

21. *Id.* at 1483; *see also id.* at 1494 (Alito, J., concurring) (proposing a rule that would go beyond forbidding misadvice to require a generic warning to consult an immigration attorney about possible immigration consequences).

22. Santobello v. New York, 404 U.S. 257, 261–62 (1971).

23. Brady v. United States, 397 U.S. 742, 755 (1970) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958)).

24. *Id.* at 754–55.

25. *E.g., id.* at 756–57; McMann v. Richardson, 397 U.S. 759, 769–71 (1970).

III. THEORETICAL MODELS VERSUS REALITY

At root, the *Padilla* decision has gone a great way toward rejecting the simplistic assumption that defendants are fully informed rational actors. Anyone who has practiced criminal law for any length of time knows that few defendants resemble a cool, calculating, cerebral Vulcan. Many are hampered by poor education, low intelligence, and limited proficiency in English. Many mistrust their appointed defense lawyers, assuming that lawyers whom they are not paying are not looking out for their interests. More importantly, though some defendants are experienced recidivists and think they know the system, few understand the process, the legalese, and the realistic range of outcomes very well. Up until now, our system has trusted judges' boilerplate plea colloquies, which are mostly about foregone procedural rights rather than the substantive merits of deals and which largely rubber stamp deals already struck. Defendants need substantive information about likely outcomes before they strike deals from defense lawyers familiar with their particular cases.

Padilla cannot solve all of these problems. Given the chronic underfunding of criminal defense counsel and the wide variations in their quality and workloads, no constitutional doctrine could. But it begins to attack the problem of poor information and chronic misunderstandings in plea bargaining. One of the worst aspects of collateral consequences is that, even though they are often predictable, they are hidden because they take place outside the criminal courtroom. *Padilla* brings them out into the light. That will not help all defendants: those facing very serious charges, or those whose criminal transactions are extremely simple, may face deportation regardless and have little room to bargain. But it warns them of what is coming down the pike and empowers them to explore whether there is anything they can do.

There are many other ways to provide more information to complement *Padilla*'s new right to information about deportation. *Padilla*'s right may or may not ultimately reach other consequences such as loss of custody, employment, public housing, or residency restrictions. Even if the Constitution does not require it, good defense lawyers should mention at least these serious consequences where they are likely to apply. Likewise, statutes and rules of criminal procedure can learn lessons from another area of law that has experimented with imparting useful information to inexperienced market participants: consumer-protection law. Laws could require putting plea agreements in writing and in plain English, with graphics to help defendants grasp numbers and comparisons. They could forbid or disfavor high-pressure tactics, such as threats to prosecute a family member, and require cooling-off periods before accepting serious felony pleas. Mildly pro-defendant default rules of construction could force prosecutors to set out their understandings and terms clearly, so that defendants will focus on them. And most of all, defense lawyers need not only better funding and lower caseloads, but also

better training and checklists to keep them from overlooking common issues and concerns.

The root problem, however, is deeper and harder to fix. There are two distinct barriers to informed decision-making: first, defendants must have enough information; and second, they must be able to understand, digest, and use that information. Almost all of our efforts, from *Boykin* on,[26] have gone into the first requirement. If some information is good, we reason, then more must be better. *Padilla* makes sure that defendants get some good information about immigration consequences. But that important information risks drowning, unnoticed, amidst the many other warnings that defendants receive in preparation for and during their plea colloquy. Litany after boilerplate litany can cause defendants to tune out, as the unimportant procedural wallpaper of a plea colloquy masks the crucial substantive information on which defendants ought to be focusing. Mandatory disclosures often fail for this very reason.[27] Less is more. But trial judges and legislatures are unlikely to pare back warnings, lest some appellate court reverse a conviction for omitting some minor point. As happens with jury instructions, warnings can encrust the plea process like barnacles, becoming verbose and incomprehensible. If it could be done, boiling down information to a simple grade or report card, and training defense counsel to offer better advice, would help more.[28]

Improving the advice of counsel would also address a second problem with our current over-reliance on judges' advisements at plea colloquies: the information comes too late to be of help. By the time of the plea colloquy, the defendant is not legally but psychologically committed to the deal. Given psychological sunk costs, time pressures, and all actors' desires to get things over with, defendants have almost no time to reflect and weigh collateral-consequence information if it comes at the end of the process. They need substantive information about criminal and collateral civil penalties when they are weighing the deal in earnest.

There are concrete things defense lawyers can do to improve the timely advice that defendants receive. As Professor Jack Chin suggests, defender organizations can collaborate to create and update lists of collateral consequences for each jurisdiction, as the ABA is in the process of doing, and then to turn these into usable checklists.[29] Lawyers must also question their clients and then summarize the most serious and common consequences

26. Boykin v. Alabama, 395 U.S. 238, 242 (1969).

27. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 737–38 (2011).

28. *Id.* at 743–44.

29. Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 685–87 (2011).

applicable to each client's situation.[30] They must, for example, learn their clients' citizenship and professions in order to figure out whether they may face immigration or employment consequences. They must focus on the type of convictions: violent, drug, and sex offenses each carry consequences specific to that category. Margaret Love recommends that defenders take time to explore with their clients ways to avoid or mitigate collateral consequences, both by negotiating with the government at the front end of cases and through relief mechanisms at the back end.[31] And, as Professor Ron Wright suggests, defense lawyers can band together into larger public-defender organizations with in-house immigration and collateral-consequence experts, to better handle complex areas in which not all line attorneys can become experts.[32]

Padilla cannot revolutionize criminal justice; our system suffers from too many pathologies for a single decision to fix. But it is a welcome recognition that defendants are not fully informed rational actors who need only the negative rights to be free of threats, broken promises, lies, and bribes. They need affirmative help from their defense counsel to evaluate the fairness and desirability of their pleas, and *Padilla* is an important step in that direction.

30. *Id.* at 689–90.

31. Margaret Colgate Love, *Collateral Consequences After* Padilla v. Kentucky*: From Internal Punishment to Regulation*, 30 ST. LOUIS U. PUB. L. REV. 87, 113–16 (2011).

32. Ronald F. Wright, Padilla *and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515, 1536–39 (2011).

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TAB 8A

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

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Rule 52 (14-CR-A)**

DATE: **March 2, 2013**

As described more fully in the letter that follows, Judge Jon Newman has written to urge consideration of an amendment to Rule 52 that would increase the availability of appellate review of sentencing errors.

In contrast to the correction of trial errors by retrials, which impose very significant burdens on the judicial system, Judge Newman notes that the correction of sentencing errors is much less burdensome. Moreover, the cost of sentencing errors can be very high. An uncorrected guideline miscalculation may lead to months or years of unwarranted imprisonment. Accordingly, Judge Newman proposes an amendment that would permit appellate courts to consider sentencing errors not first raised in the district court–even if they would not meet the standard of plain error–when the error was prejudicial to the defendant and its correction would not require a new trial.

This proposal is included on the April Agenda for discussion of the question whether the Advisory Committee wishes to study the proposal in depth.

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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).

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

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Rule 29 (14-CR-B)**

DATE: **March 10, 2014**

As described more fully in the attached letter and accompanying law review article, Jared Kneitel recommends that the Advisory Committee consider amending Rule 29 to provide a procedure for making a motion for a judgment of acquittal in a bench trial. Mr. Kneitel argues that Rule 29 provides rules adapted to jury trials, and he recommends the addition of a new subdivision to address the distinctive concerns applicable to bench trials.

Judge Raggi decided that the matter did not warrant a reporters' memorandum at this time. Nevertheless, it is put before the Advisory Committee determine whether there is any interest in further pursuit (in which case a subcommittee will be appointed).

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14-CR-B

Jared Kneitel, Esq.
23 Waverly Place, Apt. 6S
New York, New York 10003
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(917) 678-4844

February 21, 2014

The Honorable Reena Raggi, Chair
Advisory Committee on the Criminal Rules
704S United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201-1818

Dear Judge Raggi:

Recommended is an amendment to Rule 29 of the Federal Rules of Criminal Procedure to clarify and include the procedure by which a motion for a judgment of acquittal is made in a non-jury trial. At present, there is no such rule governing the motion.

This recommendation is made in my individual capacity as a member of the bar of the Eastern District of New York, as a Trial Attorney with Brooklyn Defender Services, as an adjunct professor of law at Fordham University School of Law, and as defense counsel to a detainee at the United States Naval Station, Guantánamo Bay, Cuba.

There Is No Rule Governing A Motion For A Judgment of Acquittal In A Bench Trial

Although district court judges in almost all of the reported decisions assume Rule 29 ("Motion for a Judgment of Acquittal [in a Jury Trial]") governs, there are several cases in which district court judges have turned to Rule 23 ("Jury or Nonjury Trial") as the governing statute.

Further, even among the authors of treatises on the Federal Rules of Criminal Procedure, there is disagreement as to what Rule governs. Wright's *Federal Practice and Procedure* discusses a motion for a judgment of acquittal in a bench trial under Rule 29. Yet *Moore's Federal Practice* states, "Rule 29 has no real application when a case is tried by the court since the plea of not guilty asks the court for a judgment of acquittal."

Description Of The Proposed Rule

The proposed amendment to Rule 29, Rule 29(e) ("Nonjury Trial") of the Federal Rules of Criminal Procedure includes two subdivisions. The first subdivision, similar to a motion for a judgment of acquittal in a jury trial (Rule 29(a) ("Before Submission to the Jury")), allows for the defendant to move the court for a judgment of acquittal of any offense for which the evidence is legally insufficient to sustain a conviction. The court may also, on its own, consider whether the evidence is legally insufficient to sustain a conviction.

The second subdivision allows for the defendant to move the court for a judgment of acquittal of any offense on the ground that the government did not prove that the defendant is guilty of such offense beyond a reasonable doubt. The court may also, on its own, consider

whether the government did not prove that the defendant is guilty of such offense beyond a reasonable doubt.

Background & Basis For The Proposed Rule

In practice, courts – in both jury and non-jury trials – entertain a motion for a judgment of acquittal on the mere legal sufficiency standard. This is Rule 29(a) for jury trials. No such rule exists in a non-jury trial. This is the proposed Rule 29(e)(1).

In a criminal jury trial, the Rule 29(a) motion for a judgment of acquittal is made to the court and granted by the court only when "the evidence is insufficient to sustain a conviction."[1] Of course, no provision is made for a motion for a judgment of acquittal on the beyond a reasonable doubt standard in a jury trial because the bench – as the arbiter of law – cannot usurp a defendant's Sixth Amendment protection to be tried on the facts by a jury of his peers.

For better or worse, it is through the lens of the Sixth Amendment that the motion for a judgment of acquittal – in both jury and non-jury trials – is viewed.

However, a historical analysis of our modern motion for a judgment of acquittal bears out that the modern motion is improperly based on mid-nineteenth century motions in civil suits for a judgment as a matter of law. The mere importation of the standards employed in a civil jury trial into a criminal non-jury trial fail to take into appropriate consideration the defendant's exposure to a deprivation of his liberty, his right to remain silent, the government's burden of proving the defendant guilty beyond a reasonable doubt rather than by a preponderance, and the presumption of the defendant's innocence.

In contrast to jury trials, the court in a non-jury trial is both the arbiter of law and fact-finder[2] and there is no Sixth Amendment protection at issue. In the absence of the Sixth Amendment preclusion, there is nothing to prevent – other than an improper interpretation of the law – a court from determining a motion for a judgment of acquittal on the facts and the beyond a reasonable doubt standard.

Presently, when a motion for a judgment of acquittal is made to the court in a non-jury trial, and the motion is denied, the defendant is still left to speculate and guess whether the government satisfied its burden – on the government's evidence – of proving the defendant guilty beyond a reasonable doubt. Of course, if the government does not introduce evidence to prove the defendant guilty beyond a reasonable doubt, then the defendant is not guilty. The government (not the defendant) must introduce evidence sufficient to persuade the fact-finder, beyond a reasonable doubt, of the defendant's guilt. Thus, not knowing whether the government has discharged its burden leaves the presumption of innocence and the defendant's right to remain silent in competition with the government's obligation to discharge its burden when, in fact, these three aims should be cooperating with one another.

Effectively, "inviting" the defendant to call a defense case – despite the uncertainty of whether the government has proved its case beyond a reasonable doubt at the close of its case and whether the judge would have acquitted the defendant of an offense charged – reduces the

[1] Rule 29(a). "BEFORE SUBMISSION TO THE JURY."
[2] Rule 23(c). "NONJURY TRIAL."

government's burden at that stage. This "invitation" to the defendant to call defense witnesses or for the defendant to testify on his own behalf militates against the government's obligation to prove its case. Such an invitation should be correctly considered as not only a reduction of the government's burden (and therefore impermissible burden shifting) but also a violation of due process.[3] The defendant should not be called upon to supply the gaps missing in the government's proof that will ultimately lead to his conviction.

The Proposed Rule – based on research included in the appended article[4] – better coordinates the government's obligation to discharge its burden with the presumption of innocence and the defendant's right to remain silent. This research includes a comparative study of motions for judgment of acquittal in the courts of the United States, the courts of several foreign common-law nations, and international war crimes tribunals.

Generally speaking, reported decisions from the courts of the United States, treatises on the Federal Rules of Criminal Procedure, and reported decisions from the international war crimes tribunals, improperly cite – for the standard in a non-jury trial – the standard of *appellate* review of the sufficiency of evidence after trial, or the standard for determining a motion for a judgment of acquittal in a *jury* trial.[5] Of note, in Australia[6] and in England and Wales,[7] the court in a non-jury trial may acquit the defendant after the prosecution's case-in-chief.

Language Of The Proposed Rule

Rule 29. Motion for a Judgment of Acquittal

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(e) NONJURY TRIAL.

(1) *Legal Sufficiency.* After the government closes its evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction.

(2) *Beyond a Reasonable Doubt.* After the government closes its evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the

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[3] "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

> Both doctrinally and practically, criminal procedure, as presently constituted, does not give the accused [as stated by Judge Learned Hand] "every advantage" but, instead, gives overwhelming advantage to the prosecution. The real effect of the "modern" approach has been to aggravate this condition by loosening [the] standards of pleading and proof without introducing compensatory safeguards earlier in the process. Underlying this development has been an inarticulate, albeit clearly operative, rejection of the presumption of innocence in favor of a presumption of guilt.

Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1152 (1960).

[4] Jared Kneitel, *The Forgotten Dinner Guest: The "Beyond a Reasonable Doubt" Standard in a Motion for a Judgment of Acquittal in a Federal Bench Trial*, 36 Am. Jur. Trial Advocacy 35 (2012).

[5] *Id.*, at 43-58.

[6] *Id.*, at note 101.

[7] *Id.*, at note 26.

government did not prove the defendant guilty beyond a reasonable doubt. The court may on its own consider whether the government did not prove the defendant guilty beyond a reasonable doubt.

How The Rule Would Work In Practice

If the proposed Rule 29(e) were implemented, no drastic change to the manner in which bench trials are conducted is envisaged.

In the course of any ordinary prosecution, a defendant would naturally move for a judgment of acquittal on the grounds that the evidence is insufficient to sustain a conviction. Proposed Rule 29(e)(1). In some instances, some defendants – without any present statutory authority (albeit with the strength of the presumption of innocence, the defendant's right to remain silent, and the government's obligation to discharge its burden in favor of the defendant) – move for a judgment of acquittal on the grounds that the defendant has not been proven beyond a reasonable doubt. Proposed Rule 29(e)(2).

The Proposed Rule 29(e)(1) motion is being made in any event with the corresponding opposition, reply, and decision from the court. No judicial economy is lost by introduction of Proposed Rule 29(e)(1).

Of note, the defendant is not required to make a motion pursuant to the Proposed Rule 29(e)(2) (nor (1)). If the defendant makes a motion pursuant to Proposed Rule 29(e)(2), the motion will likely include many, if not all, of the features and elements of the defendant's prospective closing argument and the government's closing argument. The introduction of these arguments – in whole or in part – at the close of the prosecution's case, will have little effect on the proceedings.

If a motion on Proposed Rule 29(e)(2) is granted as to all counts, the defendant would be acquitted, double-jeopardy would attach, and the trial would conclude, thus saving judicial resources by stopping a trial that is heading towards an acquittal. The defendant's right to remain silent and his presumption of innocence are held intact in coordinated fashion with the government having made every effort to discharge its burden. There would be no further need for additional closing arguments.

On the other hand, if a defendant's motion on the Proposed Rule 29(e)(2) is denied in part or in its entirety, double-jeopardy would attach on any count or counts for which the defendant was acquitted, and the government would have been found to have discharged its burden in part (or as to all counts). At this juncture, the defendant – no longer presumed innocent as to the counts on which the motion was denied – may call a defense case including making a fully knowing and intelligent waiver of his right to remain silent and choose to testify. Any closing arguments would presumably rely upon the arguments made at the Proposed Rule 29(e)(2) stage and would not create a diseconomy of judicial resources.

The Proposed Rule 29(e) should logically exist in our jurisprudence. The standard for determining the motion in a bench trial should include a determination as to both legal sufficiency and beyond a reasonable doubt. The motion is being made to the arbiter of law and the fact-finder. Only because of the perception that the Sixth Amendment precludes a judge from

making findings of fact – thus usurping the fact-finding function of a non-extant jury – has the standard remained (in practice at least) as solely legal sufficiency.

The lack of a standard in the Federal Rules appears to be a legislative oversight based on the mere importation of the standard in a civil jury trial into a criminal non-jury trial leading to our present tradition. Further, treatises on the standard to be employed suggest that the proper standard is only legal sufficiency. However, this is based on a misunderstanding of the law. For example, Wright's *Federal Practice and Procedure* improperly cites the standard for a *pre-trial* dismissal of an indictment, the test to be applied in *appellate review* of the sufficiency of evidence after trial, or the standard for a judgment of acquittal *after* a conviction.[8] Perhaps because of the tradition borne out of civil jury trials, the treatises, and the lack of acknowledgment of the history of the motion, neither the Supreme Court nor any Circuit Court has had an opportunity to properly determine what the standard should be.

The Proposed Rule ensures that the defendant's right to remain silent and his presumption of innocence work in coordination – instead of the present antagonism – with the government's discharge of its burden of proving the defendant guilty, if it can, beyond a reasonable doubt. The Proposed Rule, which has demonstrated support in other common-law jurisdictions, can add to judicial economy or otherwise have little effect on the proceedings other than strengthening the presumption of innocence, the right to remain silent, and the discharge of the government's obligations.

I very much appreciate the Committee's consideration of this proposal and would be glad to provide the Committee with any further information it might request.

Sincerely,

Jared Kneitel

cc: Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter

[8] *Id.*, at 43-45.

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The Forgotten Dinner Guest: The "Beyond a Reasonable Doubt" Standard in a Motion for a Judgment of Acquittal in a Federal Bench Trial

Jared Kneitel[†]

Abstract

In comparison to civil trials, criminal trials are decided on more stringent standards of proof. However, motions for judgment of acquittal in criminal non-jury trials are currently decided on a mere legal sufficiency standard as opposed to the "beyond a reasonable doubt" standard. This Article examines the lack of reasoning and uniformity in deciding these motions as well as the potential dangers and injustices posed to a defendant by applying a lower standard. Through an examination of both domestic and foreign law, the author argues for the application of the "beyond a reasonable doubt" standard when determining motions for judgment of acquittal in criminal non-jury trials.

Welcome to the Dinner Party: Introduction

The standard for judging a civil trial is lower than the standard for judging guilt in a criminal trial, and there is no jury in a non-jury trial. Somehow—despite these two very obvious conclusions—the nineteenth century standard for determining a motion for a directed verdict in a civil jury trial is still applied to our modern motion for a judgment of acquittal in a criminal non-jury trial.

In a criminal trial, at the close of the government's case-in-chief, the defense may make a motion for a judgment of acquittal on one or more offenses charged.[1] If the motion is unsuccessful and the defense calls

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[†] B.S.E. (2000), University of Pennsylvania; J.D. (2005), Fordham University School of Law. The author is an adjunct professor of law at Fordham University School of Law, a trial attorney with Brooklyn Defender Services, and defense counsel to a detainee at the United States Naval Station, Guantánamo Bay, Cuba. Mr. Kneitel was defense counsel to Issa Sesay, the Interim Leader of the Revolutionary United Front at the Special Court for Sierra Leone, an international war crimes tribunal. The author would like to express his gratitude to the editorial staff of the American Journal of Trial Advocacy.

All opinions expressed herein belong solely to the author.

[1] Federal Rule of Criminal Procedure 29(a) describes a motion for a judgment of acquittal:

a case, the defense may make another motion for a judgment of acquittal at the close of its case.[2] This Article concerns only the motion at the end of the government's case. At present, the motion will succeed only if the government has not presented legally sufficient[3] evidence of all the elements of the particular offense or offenses.

This Article discusses why, in a non-jury trial, the "beyond a reasonable doubt" standard should be applied—instead of merely the legal sufficiency standard—when the bench considers a motion for a judgment of acquittal. Not knowing whether the government has proven—in the judge's mind—the defendant's guilt before inviting the defendant to call a case actually militates against the presumption of innocence, the assurance that the government discharges its burden, and the defendant's right to remain silent.

This Article shows that the jurisprudence in the United States improperly cites, for the standard for determining whether to grant or deny a motion for a judgment of acquittal in a non-jury trial, either the standard in a jury trial or the standard for appellate review. This Article examines the historical (lack of) development of the motion for a judgment of acquittal and the perceived constitutional preclusion against the "beyond a reasonable doubt" standard. Namely, the bench—as the arbiter of law—cannot usurp a defendant's Sixth Amendment protection to be tried on the facts by a jury of his peers.[4] Of course, in a non-jury

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> After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

FED. R. CRIM P. 29(a).

[2] FED. R. CRIM. P. 29(a).

[3] In *Tibbs v. Florida*, the United States Supreme Court explained that evidence "'legally insufficient'" to support a conviction "'means that the government's case was so lacking that it should not have even been *submitted* to the jury.'" 457 U.S. 31, 40-41 (1982) (quoting Burks v. United States, 437 U.S. 1, 16 (1978)). Note, as discussed in more detail below, *Tibbs* and *Burks v. United States* concern the standard of appellate review on a motion for a judgment of acquittal; however, they correctly enunciate the standard for legal sufficiency. *Tibbs*, 457 U.S. at 40-41; *Burks*, 437 U.S. at 16-17.

[4] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

trial, the bench is both the arbiter of law and fact-finder;[5] hence, there is no Sixth Amendment preclusion.

At present, there is no rule in the Federal Rules of Criminal Procedure explicitly governing a motion for a judgment of acquittal in a bench trial. Is it Rule 23[6] ("Jury or Nonjury Trial") or Rule 29[7] ("Motion for a Judgment of Acquittal [in a Jury Trial]") that governs the motion? Although district court judges in almost all of the reported decisions assume Rule 29 governs, there are several cases in which district court judges have turned to Rule 23 as the governing statute.[8] Further, even among the authors of treatises on the Federal Rules of Criminal Procedure, there is disagreement as to what Rule governs.[9] Wright's *Federal Practice and Procedure* discusses a motion for a judgment of acquittal in a bench trial under Rule 29.[10] Yet *Moore's Federal Practice* states, "Rule 29 has no real application when a case is tried by the court since the plea of not guilty asks the court for a judgment of acquittal."[11]

This Article concludes by proposing a new Rule 29(e) to resolve this ambiguity and to make clear that the "beyond a reasonable doubt" standard is the standard that should be employed in determining a motion for a judgment of acquittal in a bench trial.

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[5] FED. R. CRIM. P. 23(c) ("In a case tried without a jury, the court must find the defendant guilty or not guilty.").

[6] FED. R. CRIM. P. 23(c).

[7] FED. R. CRIM. P. 29(a).

[8] *See, e.g.*, United States v. Wasson, No. 06-CR-20055, 2009 WL 4758604, at *1 (C.D. Ill. Dec. 4, 2009); United States v. Kalb, 86 F. Supp. 2d 509, 510 (W.D. Pa. 2000).

[9] *See, e.g.*, 26 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 629.02[3] (3d ed. 2012) (stating Rule 29 does not apply to a nonjury trial); 2A CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE § 467, at 375-76 (4th ed. 2009) (stating Rule 29's sufficiency standard should be applied by a judge determining whether or not to grant a motion for a judgment of acquittal).

[10] WRIGHT & HENNING, *supra* note 9.

[11] MOORE ET AL., *supra* note 9. Notably, however, Moore's *Federal Practice* on Rule 23 does not address the motion for a judgment of acquittal in a bench trial. 25 MOORE ET AL., *supra* note 9, §§ 623.00–623.05. Nor does Wright's *Federal Practice and Procedure* discuss the motion under Rule 23. 2 WRIGHT & HENNING, *supra* note 9, §§ 371-376, at 476-547.

I. By Invitation Only: Respondez S'il Vous Plaît

A criminal defendant is not guilty unless proven guilty;[12] the government bears the burden of proving the criminal defendant guilty beyond a reasonable doubt;[13] and the government (not the defendant) must introduce evidence sufficient to persuade the fact-finder, beyond a reasonable doubt, of the defendant's guilt.[14] Thus, if the government does not introduce evidence to prove the defendant guilty beyond a reasonable doubt, then the defendant is not guilty.

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[12] *In re* Winship, 397 U.S. 358, 364 (1970) ("Lest there remain[ed] any doubt about the constitutional stature of the reasonable-doubt standard, [the Supreme Court] explicitly h[eld] that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

[13] *Id.* at 363-64 ("The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest[s] of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As [the Supreme Court] said in *Speiser v. Randall*: 'There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.'" (alteration in original) (citation omitted) (quoting Speiser v. Randall, 357 U.S. 513, 525-26 (1958))).

[14] "All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." Miranda v. Arizona, 384 U.S. 436, 460 (1966) (citation omitted) (quoting 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE: EVIDENCE IN TRIALS AT COMMON LAW § 2251(12), at 317 (McNaughton rev. 1961)). "In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" *Miranda*, 384 U.S. at 460 (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)).

At the conclusion of the government's case, the government's case will presumably—and in almost all circumstances—be at its highest. If the government has not proven its case beyond a reasonable doubt after the presentation of its evidence, when will it ever be able to prove its case beyond a reasonable doubt? This begs the very simple question: If the defendant is not guilty at the conclusion of the government's case-in-chief, why should the defendant be "invited" to call a defense?

Although the government may have presented legally sufficient evidence of the offenses charged, the judge still may not find at the close of the government's case that the government proved its case beyond a reasonable doubt. For example, the judge may find the accounts of the government witnesses to be unworthy of belief (either alone or in combination) or circumstantial evidence presented to be too circumspect to sustain a conviction. As always, the government must prove its case beyond a reasonable doubt. This burden is without the assistance of any defense evidence (including the defendant's testimony).[15]

Effectively, "inviting" the defendant to call a defense case—despite the uncertainty of whether the government has proved its case beyond a reasonable doubt at the close of its case and whether the judge would have acquitted the defendant of an offense charged—reduces the government's burden at that stage. This "invitation" to the defendant to call defense witnesses or for the defendant to testify on his own behalf militates against the government's obligation to prove its case. Such an invitation should be correctly considered as not only a reduction of the government's burden (and therefore impermissible burden shifting) but also a violation of due process.[16]

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[15] If the government has not proven its case, the defendant—by poor representation, ineffective counsel, or otherwise—should not be called upon to supply the missing gaps in the government's proof, resolving doubt in favor of the government.

[16] "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. at 364; *see also infra* text accompanying note 27.

> Both doctrinally and practically, criminal procedure, as presently constituted, does not give the accused [as stated by Judge Learned Hand] "every advantage" but, instead, gives overwhelming advantage to the prosecution. The real effect of the "modern" approach has been to aggravate this condition by loosening [the] standards of pleading and proof without introducing compensatory safeguards earlier in the process. Underlying this development has been an inarticulate, albeit clearly

Elevating the government's burden at the motion for a judgment of acquittal stage to beyond a reasonable doubt actually strengthens the presumption that the defendant is not guilty and properly holds the government to its burden. This strengthens the requirement that the government prove its case based solely on its own evidence and without the assistance of the introduction of a defense case.

II. The Forgotten Dinner Guest: Historical Development of the Motion for a Judgment of Acquittal

The motion for a judgment of acquittal in criminal suits evolved from its counterpart in civil procedure. Federally, in the late 1700s, civil judges could withdraw a civil case from a jury and decide the case; then, the common law motion for non-suit came; and finally, in the mid-nineteenth century, the civil motion for a directed verdict emerged.[17] "The motion for judgment of acquittal in criminal cases came still later and was probably influenced by these earlier developments in the civil trial."[18] "The early cases directing acquittal did so without citing any authority but apparently assumed such power was inherent in the judge's role as presiding officer."[19]

Indeed, *Moore's Federal Practice* states that Rule 29 ("Motion for a Judgment of Acquittal" in a jury trial) of the Federal Rules of Criminal Procedure was modeled on Rule 50 of the Federal Rules of Civil Procedure.[20] "Thus, a motion for acquittal [in a jury trial] is equivalent to a motion for a directed verdict (now called 'judgment as a matter of

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operative, rejection of the presumption of innocence in favor of a presumption of guilt.

Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1152 (1960).

[17] Theodore W. Phillips, Comment, *The Motion for Acquittal: A Neglected Safeguard*, 70 YALE L.J. 1151, 1151-52 (1961).

[18] *Id.* at 1152.

[19] *Id.* at 1152 n.8; *see also* Richard Sauber & Michael Waldman, *Unlimited Power: Rule 29(a) and the Unreviewability of Directed Judgments of Acquittal*, 44 AM. U. L. REV. 433, 439-41 (1994).

[20] MOORE ET AL., *supra* note 9, § 629.02[2].

law' under Civil Rule 50), or judgment notwithstanding the verdict (judgment n.o.v.) under pre-Rules practice."[21]

However, there still remains no legislation specifically directed towards a motion for a judgment of acquittal in a criminal bench trial. This is due to legislative oversight based, seemingly, on the mere importation of the standards employed in a civil jury trial into a criminal non-jury trial without appropriate consideration for the defendant's exposure to a deprivation of his liberty, his right to remain silent, the government's burden of proving the defendant guilty beyond a reasonable doubt rather than by a preponderance, and the presumption of the defendant's innocence.

III. The Head of the Table: The Prevailing Legal Sufficiency Standard

The standard for judging a motion for a judgment of acquittal—in a jury trial at least—is based on *Burks v. United States*.[22] "The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt."[23] "Even the trial court, which has heard the testimony of witnesses first hand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal."[24] This view is accepted on the Sixth Amendment right that a defendant be tried by a jury of his peers. In jury trials, the court cannot substitute its

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[21] *Id.*

[22] 437 U.S. 1, 16 (1978); *see also* Tibbs v. Florida, 457 U.S. 31, 37 (1982) ("[A] conviction rests upon insufficient evidence when, even after viewing the evidence in the light most favorable to the prosecution, no rational factfinder could have found the defendant guilty beyond a reasonable doubt.").

[23] *Burks*, 437 U.S. at 16; *see also* Jackson v. Virginia, 443 U.S. 307, 318 n.11 (1979) ("If 'reasonable' jurors 'must necessarily have . . . a reasonable doubt' as to guilt, the judge 'must require acquittal, because no other result is permissible within the fixed bounds of jury consideration.' . . . This is now the prevailing criterion for judging motions for acquittal in federal criminal trials." (quoting Curley v. United States, 160 F.2d 229, 232 (D.C. Cir. 1947))). The reference in both *Burks* and *Jackson* to the "jury" demonstrates that the "prevailing rule" or "prevailing criterion" is the rule or criterion in jury trials. The Supreme Court has made no ruling on what the rule or criterion is in bench trials.

[24] *Burks*, 437 U.S. at 16.

judgment for that of the jury.[25] To do so would usurp the power of the jury and violate the Sixth Amendment guarantee to be tried by one's peers[26] as well as the Fifth and Fourteenth Amendments' due process protections.[27]

To date, however, the Supreme Court has not considered the standard on a motion for a judgment of acquittal in a non-jury trial.[28] This might

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[25] *Jackson*, 443 U.S. at 318-19.

[26] *See* U.S. CONST. amend. VI. "It is quite clear that a court may not direct a verdict of guilty, either in whole or in part. To permit this would invade [the] defendant's constitutionally protected right to trial by jury." WRIGHT & HENNING, *supra* note 9, § 461, at 324-25 (footnote omitted). Also, consider if a judge were to not acquit a defendant of one or more charges at the close of the government's case. The failure to acquit would effectively be an endorsement of the government's case and a signal (however slight) to the jury that it should consider convicting the defendant. The danger for an improper conviction (resting upon the judge instead of the jury as an *ipso facto* fact-finder) would be ever more present because lay jurors might inherently follow an experienced and professional judge's view of the evidence.

By contrast, consider that in England and Wales—where there is no Sixth Amendment preclusion—"[t]he right of the jury to acquit an accused at any time after the close of the case for the Crown, either upon the whole indictment or upon one or more counts, is well established at common law." ARCHBOLD: CRIMINAL PLEADING, EVIDENCE, AND PRACTICE 2011 Ch. 4, § XII, § G, 4-303 (James Richardson ed., 59th ed. 2010). Similarly, in a bench trial, "magistrates are judges both of facts and law. It is therefore submitted that . . . they . . . have the same right as a jury to acquit if they do not accept the evidence, whether because it is conflicting, or has been contradicted or for any other reason." *Id.* § D, 4-296.

[27] "In [*In re*] *Winship*, the Court held for the first time that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Jackson*, 443 U.S. at 315 (quoting *In re* Winship, 397 U.S. 358, 364 (1970)). The Supreme Court in *In re Winship* saw it vital to the due process protection of the Fourteenth Amendment "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Id.* at 316; *see also* Thompson v. Louisville, 362 U.S. 199, 206 (1960) ("Just as '[c]onviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt." (footnote omitted) (quoting De Jonge v. Oregon, 299 U.S. 353, 362 (1937))).

[28] Although *Jackson* is often cited for the appellate and trial standard on determining a motion for a judgment of acquittal, *Jackson* actually concerns what "sufficiency" of evidence means and whether a conviction on less than sufficient evidence would be a violation of due process:

> Our inquiry in this case is narrow. The petitioner has not seriously questioned any aspect of Virginia law governing the allocation of the burden of production or persuasion in a murder trial. . . . His sole constitutional claim, based squarely upon

be because esteemed and erudite practitioners have effectively written off considering the "beyond a reasonable doubt" standard in bench trials and, as such, the issue has not reached the Supreme Court. For example, Section 467 of Wright's *Federal Practice and Procedure* states, "A motion for judgment of acquittal at the close of the prosecution's evidence in a case tried to the court is considered by the same standard as in a jury case."[29] However, none of the cases Wright relies on for this proposition in Section 467 are on point.

IV. The Unwelcome Guest: When Wright Is Wrong

For support, Wright cites *United States v. Salman*,[30] *United States v. Pierce*,[31] *United States v. Magallon-Jimenez*,[32] *United States v. Carter*,[33] and *United States v. Stubler*[34]—none of which were decided by the United States Supreme Court. *Salman* involved a *pre-trial* dismissal of an indictment.[35] *Pierce* involved the test to be applied in *appellate review*[36]

> [*In re*] *Winship*, is that the District Court [for the Eastern District of Virginia in which the petitioner brought his habeas corpus proceeding] and the [Fourth Circuit] Court of Appeals were in error in not recognizing that the question to be decided in this case is whether any rational factfinder could have concluded beyond a reasonable doubt that the killing for which the petitioner was convicted was premeditated. The question thus raised goes to the basic nature of the constitutional right recognized in the [*In re*] *Winship* opinion.

Jackson, 443 U.S. at 313 (citations omitted).

[29] WRIGHT & HENNING, *supra* note 9.

[30] 378 F.3d 1266, 1267 n.3 (11th Cir. 2004) (per curiam); WRIGHT & HENNING, *supra* note 9, at 376 n.33.

[31] 224 F.3d 158, 164 (2d Cir. 2000); WRIGHT & HENNING, *supra* note 9, at 376 n.33.

[32] 219 F.3d 1109, 1112 (9th Cir. 2000); WRIGHT & HENNING, *supra* note 9, at 376 n.33.

[33] 311 F.2d 934, 940 (6th Cir. 1963); WRIGHT & HENNING, *supra* note 9, at 376 n.33.

[34] No. 4:06-CR-00225, 2006 WL 3043073, at *2 (M.D. Pa. Oct. 24, 2006) (order denying motion for judgment of acquittal); WRIGHT & HENNING, *supra* note 9, at 362 n.1.

[35] *Salman*, 378 F.3d at 1267.

[36] The standard for appellate review is clear error, and the clear error standard is significantly deferential, requiring a "'definite and firm conviction that a mistake has

of the sufficiency of evidence *after* a trial, jury or bench, and quoted *Jackson v. Virginia* for the appellate standard.[37] Thus, *Pierce* did not concern a determination by the trial court on a motion for acquittal.[38]

Both *Magallon-Jimenez* and *Carter* held that, in both jury and bench trials, "there is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the [government], any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[39] As with *Pierce*, *Magallon-Jimenez* and *Carter* concerned the *appellate review* of the sufficiency of the evidence and did not relate to a determination of a motion for acquittal at trial level.[40]

Out of those five cases, *Stubler* was the only one that happened to be a bench trial.[41] In *Stubler*, the defendant moved for a judgment of acquittal *after* he was convicted.[42] The district court held that "Rule 29 of the Federal Rules of Criminal Procedure allows for a motion for judgment of acquittal[, and] [t]he standard the court must apply is whether 'the evidence is insufficient to sustain a conviction.'"[43] Further, the district court held "this standard remains the same [even in] a non-jury trial."[44] In a surprise demonstration of a lack of understanding of the

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been committed.'" Easley v. Cromartie, 532 U.S. 234, 242 (2001) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)). Special deference is paid to a trial court's credibility findings. Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574-75 (1985). Consequently, on appeal, the reviewing court determines whether the evidence was sufficient to sustain a conviction. Jackson v. Virginia, 443 U.S. 307, 318-19 (1979). If the evidence was insufficient, then a violation of due process has occurred. *Id.* at 315 (quoting *In re* Winship, 397 U.S. 358, 364 (1970)).

[37] United States v. Pierce, 224 F.3d 158, 164 (2d Cir. 2000) (quoting *Jackson*, 443 U.S. at 319).

[38] *See id.*

[39] United States v. Magallon-Jimenez, 219 F.3d 1109, 1112 (9th Cir. 2000) (citing *Jackson*, 445 U.S. at 319); *Carter*, 311 F.2d 934, 940 (6th Cir. 1963).

[40] *See Pierce*, 224 F.3d at 164; *Magallon-Jimenez*, 219 F.3d at 1112; *Carter*, 311 F.2d at 940.

[41] United States v. Stubler, No. 4:06-CR-00225, 2006 WL 3043073, at *1 (M.D. Pa. Oct. 24, 2006) (order denying motion for judgment of acquittal).

[42] *Id.*

[43] *Id.* at *2 (quoting WRIGHT & HENNING, *supra* note 9, § 467, at 362).

[44] *Id.* (citing McCarthy v. N.Y.C. Technical Coll. of City Univ. of N.Y., 202 F.3d 161, 166 (2d Cir. 2000)).

standard—*Stubler* cited *civil case law* regarding the Age Discrimination in Employment Act to support that holding.[45]

Wright's *Federal Practice and Procedure* demonstrates—by its citation to these inapposite cases—that it has not appropriately analyzed the jurisprudence in making its assertion that the standard in a bench trial is the same as in a jury trial. None of these cases concern a trial-level determination of a motion for a judgment of acquittal in a bench trial at the conclusion of the government's evidence. Thus, Wright has propounded a baseless proposition on a mere cursory examination, preventing a proper analysis of the standard. A more thorough examination is warranted.

V. A Nostalgic Affair: Let Us Go Back to *Camp*

In the United States, there are only three cases found to date in which the "beyond a reasonable doubt" standard was discussed in a bench trial: *United States v. Camp*,[46] *United States v. Laikin*,[47] and *United States v. Cascade Linen Supply Corp. of New Jersey*.[48]

In *Camp*, a two-defendant case tried before a district judge, a motion for a judgment of acquittal was made after the close of the government's evidence and before either defendant put on a case.[49] The court expressly considered whether the standard on the motion should be "whether the evidence was insufficient to sustain a conviction" and held, "*logically*," that standard meant whether the government's evidence proved the defendant guilty beyond a reasonable doubt.[50] According to the court,

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[45] *Id.* (citing *McCarthy*, 202 F.3d at 163 (where the plaintiff brought a civil claim under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2006))).

[46] 140 F. Supp. 98, 99 (D. Haw. 1956).

[47] 439 F. Supp. 257, 257-58 (E.D. Wis. 1977) (order denying defendant's motion for a judgment of acquittal).

[48] 160 F. Supp. 565, 566-67 (S.D.N.Y. 1958).

[49] *Camp*, 140 F. Supp. at 99, 101 ("The question to be determined . . . is whether the government has proved beyond a reasonable doubt that [the] defendants are guilty as charged, absent some defense which they may or may not be prepared to make.").

[50] *Id.* at 99 (emphasis added) ("This case, however, is a criminal case tried to the court without a jury, jury trial having been waived by both parties. The motion for

if the government did not prove the defendant guilty and the case were to proceed, continuing with the case

> would put upon the defendant the risk that by his own evidence, as by testimony produced on cross-examination, he might supply the evidence which convinces the trier of fact of his guilt, where absent such evidence the trier of fact would not be so convinced. To subject the defendant in a criminal case to such a risk would be contrary to the principles by which the criminal law has developed in [the United States]. It would in effect require the defendant to assist in providing a vital element of the evidence which convicts him.[51]

Thus, *Camp* allowed for a coordinated effort of (1) the presumption of innocence, (2) the government's evidentiary burden of proving the defendant guilty (if it can), and (3) the defendant's right to remain silent to protect the defendant from conviction.[52]

While *Camp*'s reasoning appears sensible, some courts have expressly rejected the *Camp* logic. In *Laikin*, the defendant in a bench trial requested the court to consider whether, on his motion for a judgment of acquittal, the government's evidence proved him guilty beyond a reasonable doubt.[53] The *Laikin* court, citing the Seventh Circuit case of *United States v. Feinberg*,[54] held that the correct standard is taking the government's evidence in the light or aspect most favorable to the government.[55] The *Feinberg*[56] court, in making its holding, cited *Glasser*

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judgment of acquittal, therefore, logically goes beyond the test of whether the evidence is sufficient to *sustain* a conviction by the trier of fact. Where the court is the trier of fact, the test to be applied to the evidence produced by the government is not whether it *could* sustain a conviction, but whether the government has so far substantiated its case, that absent a defense the court *would* find the defendant guilty as to any of the counts of the indictment." (emphasis added)).

[51] *Id.*

[52] *See id.*

[53] United States v. Laikin, 439 F. Supp. 257, 257-58 (E.D. Wis. 1977) (order denying defendant's motion for a judgment of acquittal).

[54] 535 F.2d 1004, 1008 (7th Cir. 1976).

[55] *Laikin*, 439 F. Supp. at 258 (citing Glasser v. United States, 315 U.S. 60, 80 (1942), *superseded by rule on other grounds*, FED. R. EVID. 104(a), *as recognized in* Bourjaily v. United States, 483 U.S. 171, 181 (1987)).

[56] 535 F.2d at 1008.

v. United States,[57] *United States v. Velasco*,[58] and *United States v. DeNiro*.[59] However, *Glasser*, *Velasco*, and *DeNiro* each refer to the standard of *appellate review*.[60]

United States v. Cascade Linen Supply Corp. of New Jersey[61] similarly declined to follow *Camp*.[62] The defendants in a bench trial moved for judgments of acquittal after the close of the government's evidence.[63] *Camp* was not followed in *Cascade Linen* because the district judge held—without citing any authority—that determining whether the government proved its case beyond a reasonable doubt at the close of the government's case would "severely impair the orderly disposition of the issues."[64] The judge also held, again without citing any authority, that determining the motion using the "beyond a reasonable doubt" standard "would be tantamount to submitting the evidence to the trier of the facts twice. To this defendants are not entitled."[65]

The judge further indicated, without discussion, that "[he was] unable to understand [the] defendants' contentions that the presumption of their innocence and their right to remain silent and offer no proof [were] in some way diminished or impaired by [his] ruling."[66] From the language

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[57] 315 U.S. 60, 80 (1942).

[58] 471 F.2d 112, 115 (7th Cir. 1972).

[59] 392 F.2d 753, 756 (6th Cir. 1968).

[60] *Glasser*, 315 U.S. at 80 ("It is not for [the Supreme Court] to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." (citing United States v. Manton, 107 F.2d 834, 839 (2d Cir. 1939))); *Velasco*, 471 F.2d at 115 ("In deciding whether the trial court erred in denying the appellant's motions for acquittal [the reviewing court] must take the evidence in the aspect most favorable to the government." (citing *Glasser*, 315 U.S. at 80)); *DeNiro*, 392 F.2d at 756 ("'In determining whether the evidence was sufficient to withstand a motion for acquittal, the evidence must be viewed in the light most favorable to the prosecution. This rule applies to a case tried to a District Judge as well as to a case tried to a jury.'" (quoting United States v. Carter, 311 F.2d 934, 940 (6th Cir. 1963))).

[61] 160 F. Supp. 565, 566-68 (S.D.N.Y. 1958).

[62] *Cascade Linen*, 160 F. Supp. at 568.

[63] *Id.* at 566-67.

[64] *Id.* at 567.

[65] *Id.* at 568.

[66] *Id.* ("The obligation to measure the evidence against the rule of reasonable doubt arises only when both sides have rested, and this is as true in a case tried to a jury as it is in one in which a jury is waived. This obligation cannot arise from a resting of the Government's case alone and a motion for acquittal. In this posture, the moving

and tone in *Cascade Linen*, it appears the judge was eager to convict the defendants. Indeed, after the defendants' respective motions for judgment of acquittal were denied, the defendants rested.[67] They were then convicted.[68]

Herein lies the problem. The court can readily deny a motion for a judgment of acquittal. Upon this denial, the defendant is still left to speculate and guess whether the government satisfied its burden—on the government's evidence—of proving the defendant guilty beyond a reasonable doubt. Thus, not knowing whether the government has discharged its burden leaves the presumption of innocence and the defendant's right to remain silent in competition with the government's obligation to discharge its burden when, in fact, these three aims should be cooperating with one another.

VI. Pass the Salt: The International Tribunals—An Exercise in Impermissible Burden Shifting

As a comparative study, consider that the proceedings before international war crimes tribunals are bench trials.[69] Although in a number of

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defendants are entitled to invoke the Court's power to enter a judgment of acquittal as a matter of law, but not to impose the duty of rendering findings on the facts. The latter occurs only upon the final termination of the proof and is the final conclusion of the trier of the facts on the totality of the evidence. Short of the resting of both sides there can be no totality of evidence, no obligation to render findings, and necessarily, no occasion for applying the rule of reasonable doubt.").

[67] United States v. Consol. Laundries Corp., 291 F.2d 563, 567 (2d Cir. 1961).

[68] *Id.* ("After pleading not guilty, the sixteen defendants waived trial by jury. Trial began before Judge Palmieri on January 20, 1958 and the government rested on March 12. . . . Their motions [for acquittal] being denied, they rested without introducing any evidence. On June 16, 1958 the trial judge filed findings of fact and conclusions of law which denied the motions for acquittal and found all the defendants guilty.").

[69] *See, e.g.*, Rule 87 of the RULES OF PROCEDURE AND EVIDENCE, The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("When both parties have completed their presentation of the case, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt."); Rule 87 of the RULES OF PROCEDURE AND EVIDENCE, The Special Court for Sierra Leone ("After presentation of closing arguments, the Presiding Judge shall declare the hearing

instances the "beyond a reasonable doubt" standard was argued by defense counsel on a motion for a judgment of acquittal at the close of the government's case,[70] the use of the legal sufficiency standard became settled law. Unfortunately, this was without the benefit of any real analysis.

The Appeals Chamber Judgement in *Prosecutor v. Jelisić*[71] is the

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closed, and the Trial Chamber shall deliberate in private. A finding of guilty may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.").

[70] *See, e.g.*, Andrew T. Cayley & Alexis Orenstein, *Motion for Judgement of Acquittal in the Ad Hoc and Hybrid Tribunals: What Purpose If Any Does It Serve?*, 8 J. INT'L CRIM. JUST. 575, 584 & n.60, 587 & n.82 (2010) (citing Prosecutor v. Kordić, Case No. IT-95-14/2, Decision on Defence Motions for Judgement of Acquittal, ¶¶ 2, 4 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 6, 2000) (defendants contending that the standard was beyond a reasonable doubt); Prosecutor v. Norman, Case No. SCSL-04-14-T, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, ¶ 23 (Special Ct. for Sierra Leone Oct. 21, 2005) (defense counsel arguing the standard was beyond a reasonable doubt)). Note Cayley and Orenstein incorrectly stated that "[t]he *Jelisić* Trial Chamber concluded that the standard of review [on a motion for a judgment of acquittal] was the familiar common law requirement of guilt 'beyond a reasonable doubt.'" *See* Cayley & Orenstein, *supra*, at 584. This statement is incorrect. First, at common law, the "beyond a reasonable doubt" standard is nowhere near familiar on a motion for a judgment of acquittal. Second, Cayley and Orenstein refer to the standard of *review*. *Id.* As an appellate court reviews a trial decision or verdict, this has misleading insinuations. Third, and perhaps most importantly, Cayley and Orenstein refer to the *Jelisić* Trial Chamber *Judgement* and not the Trial Chamber's decision on the motion for judgment of acquittal. *See id.* at 584 n.59.

[71] Case No. IT-95-10-A, Appeals Chamber Judgement, ¶ 37 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001) ("The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt." (footnote omitted)). In *Jelisić*, the Appeals Chamber followed its holding in *Prosecutor v. Delalić* "where it said: '[t]he test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.'" *Jelisić*, Case No. IT-95-10-A ¶ 37 & n.66 (quoting Prosecutor v. Delalić, Case No. IT-96-21-A, Appeals Chamber Judgement, ¶ 434 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001)). The Appeals Chamber in *Jelisić* also cited the Canadian case of *R. v. Syms* and expressly referred to the fact that *Syms* was a jury trial. *Id.* ¶ 37 n.67 ("[A] trial judge should withdraw a case from the jury only where 'the evidence was so slight or tenuous that it would be incapable of supporting a verdict of guilty.'" (quoting R. v. Syms (1979), 47 C.C.C. (2d) 114, para.

leading case among the international tribunals[72] for use of the legal sufficiency standard in determining a motion for a judgment of acquittal—known as Rule 98 *bis*[73]—at the close of the prosecution's evidence.

The Appeals Chamber in *Jelisić* followed[74] its prior Appeals Chamber Judgement in *Prosecutor v. Delalić*,[75] which in turn cited the Appeals Chamber Judgement in *Prosecutor v. Tadić*,[76] the Appeals Chamber Judgement in *Prosecutor v. Aleksovski*,[77] and the Trial Chamber's "Decision on Motion for Acquittal" in *Prosecutor v. Kunarać*[78] for support.

However, those portions of *Aleksovski* and *Tadić* referred to by the *Delalić* Appeals Chamber Judgement concern the standard of *appellate review* in determining whether a trial chamber's factual finding can

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6 (Can. Ont. C.A.))). Of course—as expressed in *R. v. Monteleone*, the other Canadian case cited in *Jelisić*—if the court were to decide issues of fact, the court would be usurping the function of the jury. *Id.* ¶ 37 n.65 (citing R. v. Monteleone, [1987] 2 S.C.R. 154, paras. 5, 9 (Can.) ("'The function of the trial Judge on the motion is only to decide if there is any evidence to go to the jury. To hold otherwise would be to permit the Judge to usurp the function of the jury.'" (quoting R. v. Kavanagh, [1972] 3 O.R. 546, para. 15 (Can. Ont. C.A.))). All things considered, this pair of Canadian cases does not support *Jelisić*'s holding as applied to a bench trial.

[72] ARCHBOLD: INTERNATIONAL CRIMINAL COURTS PRACTICE, PROCEDURE & EVIDENCE § 8-88, at 380 (Karim A.A. Khan et al. eds., 2d ed. 2005); *see also* Cayley & Orenstein, *supra* note 70, at 586 & n.74 (noting the standard of review under Rule 98 *bis* was settled by *Jelisić* and "other international tribunals cite [it] as authoritative").

[73] Rule 98 *bis* of the RULES OF PROCEDURE AND EVIDENCE, The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991; *see also* Rule 98 of the RULES OF PROCEDURE AND EVIDENCE, The Special Court for Sierra Leone (requiring the trial court to "enter a judgment of acquittal" if the prosecution provides "no evidence capable of supporting a conviction").

[74] *Jelisić*, Case No. IT-95-10-A ¶ 37 (stating the court was "follow[ing] its recent holding in . . . *Delalić*").

[75] Case No. IT-96-21-A, Appeals Chamber Judgement, ¶ 434 & nn.665, 667 (Int'l Crim. Trib. for the Former Yugoslovia Feb. 20, 2001).

[76] Case No. IT-94-1-A, Appeals Chamber Judgement, ¶ 64 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

[77] Case No. IT-95-14/1-A, Appeals Chamber Judgement, ¶ 63 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000).

[78] Case No. IT-96-23-T, Decision on Motion for Acquittal, ¶¶ 2-10 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2000).

withstand appellate scrutiny—that is, legal sufficiency.[79] As such, *Tadić* and *Aleksovski* are incorrectly cited by *Delalić* for the proposition that the standard a *trial court* sitting without a jury should use to determine a motion for a judgment of acquittal is also legal sufficiency.[80]

The Trial Chamber's "Decision on Motion for Acquittal" in *Prosecutor v. Kunarać* held—citing the Trial Chamber's "Decision on Defence Motions for Judgement of Acquittal" in *Prosecutor v. Kordić*[81]—that the appropriate test to be applied on a motion for a judgment of acquittal "was not whether there was evidence which satisfied the Trial Chamber beyond reasonable doubt of the guilt of the accused (as the defence in that case had argued), but rather it was whether there was evidence on which a reasonable Trial Chamber *could* convict."[82]

All things considered, the Trial Chamber in *Kunarać* did its best not to impugn the prior jurisprudence on the issue. Thus, *Kunarać*, shifting the burden of proof off the shoulders of the prosecution, noted—*without citing any authority*—that

> [i]f the Trial Chamber *were* entitled to weigh questions of credit generally when determining whether a judgment of acquittal should be entered, and if it found that such a judgment was not warranted, the perception would

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[79] *See Tadić*, Case No. IT-94-1-A ¶ 64 (The defense's third ground of appeal was regarding an error of fact. As such, the Appeals Chamber had no contention with the parties agreement that "the standard to be used when determining whether the Trial Chamber's factual finding should stand is that of unreasonableness, that is, a conclusion which no reasonable person could have reached."); *Aleksovski*, Case No. IT-95-14/1-A ¶ 63 ("[I]t is for a Trial Chamber to consider whether a witness is reliable and whether evidence presented is credible. The Appeals Chamber, therefore, has to give a margin of deference to the Trial Chamber's evaluation of the evidence presented at trial. The Appeals Chamber may overturn the Trial Chamber's finding of fact only where the evidence relied on could not have been accepted by any reasonable tribunal or where the evaluation of the evidence is wholly erroneous." (footnote omitted)).

[80] Prosecutor v. Delalić, Case No. IT-96-21-A, Appeals Chamber Judgement, ¶ 434 & n.667 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (citing *Tadić*, Case No. IT-94-1-A ¶ 64; *Aleksovski*, Case No. IT-95-14/1-A ¶ 63).

[81] Case No. IT-95-14/2, Decision on Defence Motions for Judgement of Acquittal, ¶ 26 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 6, 2000).

[82] *Kunarać*, Case No. IT-96-23-T ¶ 9 (citing *Kordić*, Case No. IT-95-14/2 ¶ 26). *Kunarać* also cites to both an English and an Australian opinion—both of which concern a trial court's power to withdraw a case from a jury (that is, the cases are not bench trials). *Id.* ¶ 7 n.19 (citing *Alexander v The Queen* [1981] 145 CLR 395, 402-03, 417, 430, 433, 435 (Austl.); R. v. Galbraith, [1981] 1 W.L.R. 1039 (H.L.) 1042 (Eng.)).

> necessarily be created (whether or not it is accurate) that the Trial Chamber had accepted the evidence of the prosecution's witnesses as credible. Such a consequence would then lead to two further perceptions: (1) that the accused will bear at least an evidentiary onus to persuade the Trial Chamber to alter its acceptance of the credibility of the prosecution's witnesses, and (2) that the accused will be convicted if he does not give evidence himself. He would virtually be required to waive the right given to him by the Tribunal's Statute to remain silent.[83]

An analysis of *Kordić*—the case spawning the seminal misunderstanding of the proper application of a motion for a judgment of acquittal at the international tribunals—is thus warranted.

First, the Trial Chamber in *Kordić* seemed satisfied that because other trial chambers at the International Criminal Tribunal for the former Yugoslavia were using a standard lower than beyond a reasonable doubt, using a lower standard was the appropriate thing to do.[84] Without any analysis, the Trial Chamber indicated that "[i]mplicit in Rule 98 *bis* proceedings is the distinction between the determination made at the halfway stage of the trial, and the ultimate decision on the guilt of the accused to be made at the end of the case, on the basis of proof beyond a reasonable doubt."[85] The Trial Chamber failed to provide any basis or reasoning for that distinction.

Next, the *Kordić* Trial Chamber looked to the Trial Chamber's "Decision on Defence Motion to Dismiss Charges" in *Prosecutor v. Tadić*,[86] the Trial Chamber's "Order on the Motions to Dismiss the Indictment at the Close of the Prosecutor's Case" in *Prosecutor v. Delalić*,[87] the Trial Chamber's "Decision of Trial Chamber I on the

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[83] *Kunarać*, Case No. IT-96-23-T ¶ 5.

[84] *Kordić*, Case No. IT-95-14/2 ¶ 11. ("An analysis of the International Tribunal's jurisprudence shows a consistent pattern in determining motions for acquittal at the close of the Prosecution's case, not on the basis of a Trial Chamber being satisfied beyond a reasonable doubt of the guilt of the accused on the basis of the Prosecution's case, but on a different and lower standard.")

[85] *Id.*

[86] *Id.* ¶ 12 (citing *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on Defence Motion to Dismiss Charges, at 2 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 13, 1996)).

[87] *Id.* ¶ 13 (citing in *Prosecutor v. Delalić*, Case No. IT-96-21-T, Order on the Motions to Dismiss the Indictment at the Close of the Prosecutor's Case, at 4 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 18, 1998)).

Defence Motion to Dismiss" in *Prosecutor v. Blaškić*,[88] and the Trial Chamber's "Decision on Motion for Withdrawal of the Indictment against the accused Vlatko Kupreškić" in *Prosecutor v. Kupreškić*.[89]

The Trial Chamber in *Tadić* merely held—without citing any authority—that, because it would ultimately determine whether each count was proven beyond a reasonable doubt at the conclusion of the entire case, it would only determine whether the evidence presented was legally sufficient.[90]

In *Delalić*, the Trial Chamber held that a motion for judgment of acquittal will be denied if, "as a matter of law, there is evidence before it relating to each of the offences in question for the accused persons to be invited to make their defence."[91] There was no analysis as to the foundations for this principle nor did this decision cite any jurisprudence.

After citing *Tadić* and *Delalić*, the Trial Chamber in *Blaškić* held:

> CONSIDERING that, on these legal foundations, based on a strict application of the spirit and letter of the Rules, the Trial Chamber limits the review of the Motion:
>
> [1] in fact: to the mere hypothesis that the Prosecutor omitted to provide the proof for one of its counts;
>
> [2] in law: to the mere hypothesis that the Prosecution failed to show a serious *prima facie* case in support of its claims.[92]

That decision was made without any legal analysis as to the foundations for this principle nor did the decision cite any jurisprudence for that holding.

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[88] *Id.* ¶ 14 (citing *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Decision of Trial Chamber I on the Defence Motion to Dismiss, at 5 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 3, 1998)).

[89] *Id.* ¶ 15 (citing *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Decision on Motion for Withdrawal of the Indictment Against the Accused Vlatko Kupreškić, at 3, 5 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 18, 1998)).

[90] *See Tadić*, Case No. IT-94-1-T, at 2 ("[T]he test to be applied in determining this motion is whether as a matter of law there is evidence, were it to be accepted by the Trial Chamber, as to each count charged in the indictment which could lawfully support a conviction of the accused; . . . this is in contradistinction to what will remain for ultimate determination at the conclusion of this trial, namely, the question of fact whether, as to each count and on the whole of the evidence relating to that count, the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt . . . .").

[91] *Delalić*, Case No. IT-96-21-T, at 4.

[92] *Blaškić*, Case No. IT-95-14-T, at 5.

Lastly, the Trial Chamber in *Kupreškić* merely referred to the test enunciated in *Tadić* and dismissed the motion to withdraw the indictment because the Trial Chamber was of the opinion that there was "evidence as to each count charged in the indictment, which were it to be accepted by [the] Trial Chamber, could [have] lawfully support[ed] [the] conviction."[93] Other than referring to *Tadić*, the *Kupreškić* Trial Chamber did not provide any legal support for that standard.

Kordić then examined the practice in five domestic jurisdictions—England and Wales,[94] Canada,[95] Australia,[96] the United States,[97] and Spain[98]—and found "the test that is applied on motions for acquittal at the end of the Prosecution's case is not the high standard of proof beyond [a] reasonable doubt."[99] However, the practice referred to in England and Wales, the United States, and Spain is in relation to *jury trials*, not bench trials.[100] As explained above, the low legal sufficiency standard is used

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[93] Kupreškić, Case No. IT-95-16-T, at 3.

[94] Prosecutor v. Kordić, Case No. IT-95-14/2-T, Decision on Defence Motions for Judgement of Acquittal, ¶ 19 & n.11 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 6, 2000) (citing R. v. Galbraith, [1981] 1 W.L.R 1039 (H.L.) 1040-42 (Eng.) (involving a jury trial rather than a bench trial where the test was not beyond a reasonable doubt)). *Compare Galbraith*, [1981] 1 W.L.R. at 1040-42, *with* ARCHBOLD, *supra* note 26 (where the jury has the common law power to stop a trial after the Crown's evidence has been presented). Also consider that, in a bench trial, magistrate judges can acquit the defendant after the Crown's evidence. ARCHBOLD, *supra* note 26, § D, 4-296.

[95] *Kordić*, Case No. IT-95-14/2-T ¶ 20 (quoting 2 ROGER E. SALHANY, CRIMINAL TRIAL HANDBOOK § 11.2(b) (2d Release 2004)).

[96] *Id.* ¶ 21 (quoting RAY WATSON ET AL., CRIMINAL LAW (NSW) § 2.35740 (1996)).

[97] *Id.* ¶ 22 (citing FED. R. CRIM. P. 29). As explained above, the United States' Rule 29 explicitly concerns jury trials, and "Rule 29 has no real application when a case is tried by the court since the plea of not guilty asks the court for a judgment of acquittal." MOORE ET AL., *supra* note 9. *Kordić* also cites *United States v. Mariani*, a jury trial, but the cited portion of *Mariani* concerns the standard of *appellate review* of a motion for a judgment of acquittal. *Kordić*, Case No. IT-95-14/2-T ¶ 23 (citing United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984)). This is further evidence of the international tribunals' misunderstanding of the proper standard for determining a motion for a judgment of acquittal at the trial level.

[98] *Id.* ¶ 24 ("Civil law jurisdictions do not generally have a procedure equivalent to Rule 98 *bis*, except for Spanish legislation, *which allows the judge to dismiss the jury* after the Prosecution's case, where there is no evidence that could support a conviction of the accused." (emphasis added) (citing S. ANDRÉS DE LA OLIVA SANTOS ET AL., DERECHO PROCESAL PENAL 905-06 (3d ed. 1997))).

[99] *Id.* ¶ 18.

[100] *See* R. v. Galbraith, [1981] 1 W.L.R. 1039 (H.L.) 1040-42 (Eng.); *see also Alexander v The Queen* [1981] 145 CLR 395, 403 (Austl.). Similarly, with the excepf-

in jury trials because the judge is precluded from usurping the fact-finder's role. As such, the jury trial practice in these jurisdictions provides *Kordić* no support. Next, Australian practice allows for a judge to acquit a defendant after the close of the prosecution's case[101] and is

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tion of *Jackson v. Virginia* and Salhany's *Criminal Trial Handbook*, each of the authorities to which Cayley and Orenstein refer for the "Origins of the Rule" for a motion for a judgment of acquittal at the international tribunals concern jury trials. Cayley & Orenstein, *supra* note 70, at 577-80 nn.5, 12, 14-22, 24 & 27-34 (citing FED. R. CRIM. P. 29; Jackson v. Virginia, 443 U.S. 307, 309 (1979) (involving a bench trial conviction); Holland v. United States, 348 U.S. 121, 130, 139-40 (1954); United States v. Sax, 39 F.3d 1380, 1384-85 (7th Cir. 1994); United States v. Taylor, 464 F.2d 240, 242 (2d Cir. 1972); United States v. Masiello, 235 F.2d 279, 284-85 (2d Cir. 1956); Curley v. United States, 160 F.2d 229, 230, 232-33 (D.C. Cir. 1947); *Doney v The Queen* [1990] 171 CLR 207, 214-15 (Austl.); United States v. Shephard, [1977] 2 S.C.R. 1067, paras. 1, 8 (Can.) (concerning a determination made by a magistrate judge, prior to extradition, on whether the evidence was legally sufficient for a jury to convict); R. v. Galbraith, [1981] 1 W.L.R. 1039 (H.L.) 1040 (Eng.); *Kordić*, Case No. IT-95-14/2-T ¶ 24 (citing S. ANDRÉS DE LA OLIVA SANTOS ET AL., *supra* note 98) (noting the Spanish procedure for a "judge to dismiss the jury after the [p]rosecution's case"); SALHANY, *supra* note 95; WRIGHT & HENNING, *supra* note 9 (stating the sufficiency of the evidence standard for judgment of acquittal is the same for a bench trial as in a jury trial)).

[101] *See* RAY WATSON ET AL., CRIMINAL LAW (NSW) § 18.1830, *available at* Thomson Reuters (Professional) Australia, http://legalonline.thomson.com.au (last visited Oct. 19, 2011) (purchase required) (on file with the American Journal of Trial Advocacy). Section 18.1830 of Watson's *Criminal Law* titled, "Where there is a case to answer—Prasad direction," states that "[a]t the close of the prosecution['s] case the accused may make an application that the court give itself a 'Prasad direction' and enter a verdict of not guilty if the prosecution evidence is conflicting or unsatisfactory." *Id.* (citing *R v Prasad* (1979) 23 SASR 161, 163 (Austl.); *May v O'Sullivan* (1955) 92 CLR 654, 656-67 (Austl.)).

Section 18.1830 distinguishes, citing *Prasad*, between a non-jury trial and a jury trial. Concerning jury trials, the *Prasad* court holds that

> [i]t is, of course, *open to the jury at any time after the close of the case for the prosecution to inform the judge that the evidence which they have heard is insufficient to justify a conviction and to bring in a verdict of not guilty without hearing more.* It is within the discretion of the judge to inform the jury of this right, and if he decides to do so he usually tells them at the close of the case for the prosecution that they may do so then or at any later stage of the proceedings. *He may undoubtedly, if he sees fit, advise them to stop the case and bring in a verdict of not guilty.* But a verdict by direction is quite another matter. Where there is evidence which, if accepted, is capable in law of proving the charge, a direction to bring in a verdict of not guilty would be . . . a usurpation of the rights and the function of the jury.

Prasad, 23 SASR at 163 (emphasis added) (citation omitted). Chief Justice King writing for the court in *Prasad* continued the holding with respect to a non-jury trial:

> [T]here is a clear distinction for this purpose between a trial before a magistrate or other court which is the judge of both law and facts and a trial by judge and jury.

in direct contradistinction to *Kordić*.

Finally, Canadian practice is the lone exception that does provide some support for *Kordić*'s proposition. However, in Canada—per statutory requirement—the fact-finder can only render a verdict after the defendant declares, after the prosecution's evidence, whether the defendant intends to call a defense case (and upon such an affirmative declaration, after hearing the defense evidence).[102] Notably, there is no such requirement

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> I have no doubt that a tribunal which is the judge of both law and fact may dismiss a charge at any time after the close of the case for the prosecution, notwithstanding that there is evidence upon which the defendant could lawfully be convicted, if that tribunal considers that the evidence is so lacking in weight and reliability that no reasonable tribunal could safely convict on it. This power is *analogous to the power of the jury, as judges of the facts, to bring in a verdict of not guilty at any time after the close of the prosecution's case.* It is part of the tribunal's function as judge of the facts. It cannot, consistently with principle, exist in a judge whose function does not include adjudication upon the facts.

Id. (emphasis added). Consequently, *Kordić*'s reference to Australian law for support of the proposition that the test to be applied "on motions for acquittal at the end of the Prosecution's case is not the high standard of proof beyond reasonable doubt" refers, at best, to the standard in a jury trial. *Kordić*, Case No. IT-95-14/2-T ¶ 18. Watson's *Criminal Law*, citing *Prasad*, actually supports a holding opposite to *Kordić*. *See* WATSON, *supra* (quoting *Prasad*, 23 SASR at 163). In particular, *Prasad* holds that the judge or tribunal in a non-jury trial may find the defendant not guilty at the end of the prosecution's case despite evidence having been presented on "'which the defendant could lawfully be convicted.'" WATSON, *supra* (quoting *Prasad*, 23 SASR at 163).

As a caveat, "if a Prasad application is not successful, the accused may not be permitted to call evidence in reply." WATSON, *supra*.

[102] SALHANY, *supra* note 95. The only non-jury decision discussed in Section 11.2(b) of Salhany's *Criminal Trial Handbook* is the 1949 case of *R v. Morabito*. *See id.* (citing [1949] S.C.R. 172, para. 6 (Can.)). *Morabito* turned on the interpretation of what is now Section 651(1) of the Canadian Criminal Code, which states:

> Where an accused, or any one of several accused being tried together, is defended by counsel, the counsel shall, at the end of the case for the prosecution, declare whether or not he intends to adduce evidence on behalf of the accused for whom he appears and if he does not announce his intention to adduce evidence, the prosecutor may address the jury by way of summing up.

CANADA CRIMINAL CODE, R.S.C. 1985, c. C-46, s. 651(1); *see Morabito*, [1949] S.C.R. 172 at para. 13. The Supreme Court of Canada held that this statute requires—by the word "shall"—that defense counsel, at the close of the prosecution's case, must declare whether he intends to adduce evidence; thus, it was inappropriate for the trial judge to consider the defendant's motion to dismiss for lack of "sufficient evidence which *could* legally and properly support a conviction . . . . [N]o other application could have been made at that stage in the absence of an election on the part of the defence to call or not

in the Rules of Procedure and Evidence at the international tribunals nor in the Federal Rules of Criminal Procedure in the United States. Consequently, *Kordić*'s citation to Canadian procedure does not support *Kordić*'s proposition.

Ultimately, what happened at the international level was that a meager legal analysis emanating from the domestic practice in *jury trials* was applied to the motion for a judgment of acquittal in non-jury trials. Of course, the jurisprudence demonstrates worry that the court would usurp the jury's function and, as such, would allow only for a court's determination as to legal sufficiency on a motion for a judgment of acquittal. This led to a fundamental misunderstanding of how such a motion should be decided in *non-jury trials* and a failure to recognize that it is impossible for trial judges to usurp the fact-finder's function because the trial judges themselves are the fact-finders.

Further propounding this misunderstanding was (1) the misapplication of the standard of appellate *review* (as in *Tadić* and *Aleksovski*) as the standard for a trial court's determination, (2) reliance on a "consistent pattern" in the jurisprudence of solely a legal sufficiency standard (although this pattern developed without any forethought),[103] and (3) a demurrer to the trial chambers' ultimate responsibility of determining guilt beyond a reasonable doubt at the close of the trial. What remains is a very low hurdle for the prosecution to meet for a motion for a judgment of acquittal to be denied. Thus, "since the denial of such a motion is, in no sense, an indication of the view of the Chamber as to the

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to call evidence." *Morabito*, [1949] S.C.R. 172 at para. 6-7 (internal quotation marks omitted).

[103] Prosecutor v. Kordić, Case No. IT-95-14/2, Decision on Defence Motions for Judgement of Acquittal, ¶ 11 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 6, 2000).

> An analysis of the International Tribunal's jurisprudence shows a consistent pattern in determining motions for acquittal at the close of the Prosecution's case, not on the basis of a Trial Chamber being satisfied beyond a reasonable doubt of the guilt of the accused on the basis of the Prosecution's case, but on a different and lower standard.

Id. That "consistent pattern" was based on *Tadić*, *Delalić*, *Blaškić*, and *Kupreškić*. *Id.* ¶¶ 12-15. As discussed above, those cases—other than *Kupreškić*'s reference to *Tadić*—did not cite any jurisprudence.

guilt of the accused on any charge, little meaningful guidance is provided to the accused in connection with his defence case."[104]

As highlighted in *Kunarać*, the jurisprudence implicitly prefers—in attempts to avoid the twin perceptions that the accused has to persuade the trial chamber "to alter its acceptance of the credibility of the prosecution's witnesses" and that "the accused will be convicted if he does not give evidence himself"—the defense to call a case instead of holding the prosecution to its evidentiary burden of proving the defendant guilty.[105]

It should be the opposite. The government should be held to its burden. If, and only if, the government has satisfied its burden of proving the defendant guilty beyond a reasonable doubt, the defendant may then *choose* to waive his right to silence. Indeed, if the trial chamber finds that the defendant is guilty beyond a reasonable doubt, the government has discharged its burden.

VII. The Invitee: The Proposed Rule 29(e)—"Motion for a Judgment of Acquittal, Nonjury Trial"

To remedy the problems previously discussed, the author proposes the following addition to Rule 29:

> (e) Nonjury Trial. After the government closes its evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense on the ground that the government did not prove that the defendant is guilty of such offense beyond a reasonable doubt.

Note, with this proposed rule, the defendant may—but is not required to—make a motion for a judgment of acquittal. Further note that the

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[104] Cayley & Orenstein, *supra* note 70, at 583. Thus, Cayley and Orenstein propose that defendants at the international and ad hoc tribunals should be stripped of their opportunity to make a motion for a judgment of acquittal. *See id.* at 576. This is despite acknowledging that "some defendants [have] certainly succeed[ed] in obtaining a reduction of some of the charges against them." *Id.* at 588.

[105] Prosecutor v. Kunarać, Case No. IT-96-23-T, Decision on Motion for Acquittal, ¶ 5 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2000).

language in the proposed Rule 29(e) would require the court, upon such a motion, to make a decision—without reservation—on the motion.

Of course, if acquitted on one or more counts, double jeopardy attaches. If the bench indicates, upon decision of the motion, there will be a conviction on one or more counts, the defendant may elect to call a case and may elect to testify. The proposed rule does not include the prospect for a defendant to make a motion at the conclusion of the evidence.[106]

Just Desserts: Conclusion

"[I]t may fairly be said, that, so soon as a man is arrested on a charge of crime, the law takes the prisoner under its protection, and goes about to see how his conviction may be prevented."[107] Elevating the standard in determining a motion for a judgment of acquittal from prima facie to beyond a reasonable doubt is the "forgotten" protection that a criminal defendant deserves. Odd would be the prosecutor who would fuss about elevating the standard. After all, the government bears the burden of proving the defendant guilty beyond a reasonable doubt, and if the government cannot do so on its own evidence, the defendant must be not guilty.

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[106] *See* United States v. Houston, 159 F.R.D. 33, 34 (N.D. Ohio 1994) (order denying motion for judgment of acquittal) ("The logic is simple: the rules do not provide any express discussion of post-verdict motions for judgment of acquittal in nonjury criminal cases. Absent such provision, such motions, it can be argued, are not allowed. This argument makes some sense in view of the requirement of Rule 23(c) that the judge in a bench trial is, on request, to make special findings of fact—i.e., to provide an explanation for his or her verdict. No such demand can, of course, be made of a jury. By granting the opportunity to defendants to call on the judge to develop special factual findings in the course of returning a bench-trial verdict, the drafters of the rules may have acknowledged the protection that such request gives against haphazard or conclusory findings. By asking for special findings, the defendant has a way of protecting himself from oversight on the judge's part. Alternatively, the drafters of Rule 29 may have concluded that it would make little sense to require a trial judge to revisit the evidence under the guise of deciding a post-verdict motion for acquittal, in view of the review that the judge would necessarily have undertaken in the course of concluding that the defendant had been proven guilty beyond a reasonable doubt." (citation omitted)).

[107] John W. May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642, 661 (1876).

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TAB 10

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To: **The CM/ECF Subcommittee**

From: **Professors Sara Sun Beale and Nancy King**

Re: **Possible Amendments to Federal Rules of Criminal Procedure to accommodate CM/ECF**

Date: **July 5, 2013**

This memo discusses the Criminal Rules that might be affected by CM/ECF (and technology more generally), and it provides comments and suggestions on whether any amendment is necessary or advisable. However, our analysis at this stage is necessarily preliminary and general because of the uncertainty about how CM/ECF may change. Because of the large number of rules that might conceivably be affected, we provide the full text only for selected rules, giving a brief description of others.

In the sections that follow, we discuss:

I. Rules referring to "recording," "the record," actions and events that must occur "on the record," handing of or access to recordings, etc.
II. Rules requiring that a document or record be signed
III. Rules requiring writing
IV. Rules governing filing
V. Rules requiring sending and return of files or grand jury material to another district
VI. Rules requiring mailing
VII. Rules requiring the entry of information on documents, and the entry of orders
VIII. Rules requiring the preservation records or testimony
IX. Rules governing service

This memo does not discuss the Rules Governing Actions Under Sections 2254 and 2255, which pose distinctive issues.

I. Rules referring to "recording," "the record," actions and events that must occur "on the record," handing of or access to recordings, etc.

The Criminal Rules contain a myriad of references to "the record," to "recording," to events or actions that must occur or be made "on the record," to the making and handling of recordings. Because of the large number of rules involved, we have grouped the rules, describe each briefly (rather than providing the relevant text), and provide comments about the various categories of record-related rules.

A. Rules referring to "recording" or a "recording device" or "recorded statement"

Rule 4.1. authorizes a number of different options for recording the testimony taken during an application for warrant by electronic means, including recording the conversation by an "electronic recording device," but all recordings must be transcribed, certified, and filed.

Rule 5.1(g) requires that the preliminary hearing be recorded "by a court reporter or by a suitable recording device"; a copy of both the recording of the preliminary hearing and the transcript "may" be provided to any party upon request for the fee specified by the Judicial Conference.

Rule 6(e) states that grand jury proceedings (except deliberations and voting) "must be recorded by a court reporter or by a suitable recording device," and that the government will ordinarily retain control of "the recording, the reporter's notes, and any transcript prepared from those notes."

Rules 11(g) and 12(f) requires plea and motion hearing proceedings to be recorded by a court reporter or a "suitable recording device" and say nothing about a transcript.

Rule 26(f) defines statement, includes "recorded recital" of statement contained in any "recording" or transcription of "recording."

Rule 32.1 requires preliminary hearings in revocations to be recorded by reporter or suitable device as well and says nothing about transcripts.

Rule 41(d)(2) requires testimony in support of a warrant application to be recorded by reporter or suitable device, and requires the judge to file the transcript or recording with the clerk**.**

Rule 58(e) states proceedings under Rule 58 must be recorded by "a court reporter or a suitable recording device."

Rule 58(g)(2)(C) defines the record for an appeal from a magistrate judge's order as "the original papers and exhibits in the case; any transcript, tape, or other recording of the proceedings; and a certified copy of the docket entries." It also requires that "a copy of the record or proceedings" must be made available to a defendant who establishes his inability to pay.

Reporters' Comments

If audio or video recordings are ever accepted in place of written transcripts (see discussion in Professor Struve's CM/ECF report on the Appellate Rules), the Criminal Rules that reference transcripts of recordings may warrant a second look. Also, to the extent recordings are conditioned upon payment of a fee, if technology changes allow linking the recordings to the file, the cost of providing a "copy" of the recording could be eliminated for those with access. Those without access to CM/ECF or equipment to play an electronic recording (pro se defendants and petitioners) would presumably require a written transcript. Rule 58(g)(2)(C) so provides in the particular situation of an appeal from magistrate's order.

B. Rules referencing actions or events or statements that must be made or appear in "the record"

Rule 6(b) and (c) state that the foreperson or another designated juror must record how many qualified grand jurors concurred in an indictment in the record.

Rule 11(c)(5) states that if the court rejects certain plea agreements it must provide certain advice to the defendant "on the record and in open court (or, for good cause, in camera)." Rule 11(g) requires the proceedings in which the defendant enters a plea to be "recorded by a court reporter or by a suitable recording device," and states that "the record" must include the plea colloquy.

Rule 12(d) requires the court to state factual findings "on the record" when deciding pretrial motions.

Rule 26(c) requires the court to "preserve the entire statement" if redacted, "under seal, as part of the record."

Rule 26(e) requires the court to strike testimony "from the record."

Rule 32(c) requires the submission of a presentence report unless the court finds "information in the record" sufficient to meaningfully exercise sentencing authority and "explains its finding on the record."

Rule 32.2(d) bars transfer of property interest without defendant's consent "on the record" or in writing.

Rule 58(b)(3)(A) allows magistrates to take a plea only if defendant consents "either in writing or on the record."

Rule 59(b)(1) requires magistrate judge to "enter on the record" an oral or written order in nondispositive matters, make "[a] record" of any evidentiary proceedings, and "enter on the record" any recommendation and proposed findings.

Rule 60(a)(2) requires a court to state reason for excluding a crime victim "on the record."

Reporters' Comments

If CM/ECF changes how items are made part of the record – by filing or ensuring that it is part of a recording or transcript of a proceeding – all of these rules, or at least the practice under these rules, may be affected. If a change in CM/ECF affects how items are placed under seal or how items are removed from the record, these rules may have to be addressed as well. More information is needed about any changes in CM/ECF to determine whether any rules changes would be desirable.

C. Rules addressing access to or handling of "the record" or "recording"

Rule 6(d) and (e) refer to the "operator of a recording device" as an authorized person in a grand jury session, and require "all proceedings" to be "recorded by a court reporter or by a suitable recording device."

Rule 6(c) states that "the record" of number of jurors concurring in every indictment may not be made public without court order.

Rule 6(e) notes that unless the court orders otherwise, the government must retain the recording, notes, and any transcript of grand jury proceedings, and that the person who operates a recording device or transcribes recorded testimony is bound to secrecy. It also requires all "records" "relating to grand jury proceedings" to be kept under seal.

Rule 16(a)(3) exempts grand jury's recorded proceedings from discovery, except as noted.

Rule 26.2(c) states that if a witness's prior testimony is redacted before being produced, the court must "preserve the entire statement with the excised portion indicated, under seal, as part of the record."

Rule 25(a) requires a judge to certify "familiarity with the trial record" before substituting in a jury trial.

Rule 36 allows court to "correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission."

Rule 49.1(d) allows filing under seal without redaction and provides for later unsealing or fling of a redacted version "for the public record" and Rule 49.1(f) requires court to retain unredacted copies "as part of the record."

Rule 55 requires the clerk to "keep records of criminal proceedings" and enter in "the records" every order or judgment and date of entry.

Reporters' Comments

There are many records in criminal cases that are filed under seal or to which access is limited. Grand jury records and presentence reports are always secret. Plea agreements are also unavailable electronically on PACER in many districts, in part because of concerns about retaliation against cooperators. There will be an ongoing need to limit access to some documents that are part of the public record, even as the court's own record itself becomes digitized.

Rule 49.1 seems to be the only Criminal Rule that refers to the "public record" separately from "the record."

D. Rules referencing records or recordings or transcripts to be produced by parties

Rule 15 states that a court may order a deponent to produce a "record, or recording" at a deposition. It says nothing about what is done with the material so produced.

Rule 16(a) requires the government to disclose records, recorded statements, and recorded testimony to the defendant.

Rule 49(a) says a party must serve every other party the "designation of the record on appeal."

Rule 59 says "the objecting party" must arrange for "transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient."

Reporters' Comment

We are uncertain whether proposed changes in CM/ECF will change the way discovery is conducted. Is it envisioned that the material that is produced will be electronically stored?

II. Rules requiring that a document or record be signed

Thirteen Criminal Rules require that one or more documents or records be signed or make some reference to signatures or signing. The most important of these rules is Rule 49(e), which provides for local rules permitting the use of electronic signatures, and thus provides a basis for the application of local rules to the specific Criminal Rules requiring signing and signatures. It provides:

Rule 49. Serving and Filing Papers

* * * * *

(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.**

The remaining rules requiring signatures are summarized below, grouped according to whose signature is required: the judge, the clerk, the attorney for the government, the defendant (and his counsel), a detained material witness, or the grand jury foreperson. We provide a brief description of the rules falling within these categories. Because the categories do generally raise distinctive issues, our comments refer to all.

A. Rules requiring the judge's signature on a warrant, summons, the judgment, or a contempt order

Rule 4(b)(1)(D) requires a warrant to be signed by a judge, and (b)(2)(B)(iii) requires that a judge who considers both materials by reliable electronic means and other testimony or exhibits to sign any other record and verify its accuracy.

Rule 4.1(b)(2)(6) requires the judge issuing a warrant or summons to sign the original documents or direct the applicant to sign the judge's name on the duplicate original.

Rule 32(k) requires the judge to sign the judgment.

Rule 42(b) requires the judge to sign a contempt order.

B. Rules requiring the clerk's signature

Rule 9(b)(1) requires the clerk to sign an arrest warrant or summons.

Rule 17(c) requires the clerk to sign and seal blank subpoenas provided to the parties.[1]

C. Rules requiring the signature of the defendant and defendant's counsel where the defendant is waiving a right

Rule 10(b)(2) requires both the defendant and defense counsel to sign a waiver of the defendant's presence at arraignment.

Rule 17.1 provides that the government may use a statement made at a pretrial conference only if the statement was in writing and signed by the defendant and defendant's attorney.

Rule 26.2(f) defines a statement for purposes of that rule, inter alia, as a written statement the defendant makes or signs.

D. Other rules requiring a signature

Three other rules require the signature on particular documents of the grand jury foreperson, an attorney for the government, or a detained material witness:

Rule 6(c) requires the foreperson or deputy foreperson to sign all indictments.

Rule 7(c) requires an attorney for the government to sign the indictment or information.

Rule 15 requires a detained material witness who has been deposed at the witness's request to sign a transcript of the deposition under oath before the witness is discharged.

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[1]Rule 17(c) requires the clerk to "issue a blank subpoena–signed and sealed–to the party requesting it." We interpret this to mean that the clerk must sign the subpoena.

Reporters' Comments

Digital records, electronic filings, and digital signatures are now ubiquitous, and the rules need to take account of that fact. Concerns of that nature prompted the current proposal to amend the Bankruptcy Rule 5005(3)(B) to provide for electronic signatures by persons other than registered users of the court's electronic filing system.

The Criminal Rules now have in place a general mechanism to accommodate electronic signatures. Rule 49 allows local rules to provide for electronic signatures, and when local rules provide for electronic signatures Rule 49(e) allows the substitution of an electronic signature that complies with the local rules. To the extent it is desirable to allow for electronic signatures on routine court documents, Rule 49.1 provides at least a stop gap basis for authorization pursuant to local rules.

We have not collected or evaluated the local rules providing for electronic signatures, and we believe that such a study would be a necessary first step for any attempt to modify the Criminal Rules that currently govern signing. The discussion concerning proposed Bankruptcy Rule 5005(3)(B) would also provide useful information if the Advisory Committee were to consider amending the Criminal Rules to deal more specifically with electronic signatures. If the Advisory Committee were to do so, we expect it would draw distinctions between the electronic signatures by judges and other registered users of the court's electronic filing system and third parties such as the defendant, a detained material witness, and the grand jury's foreperson.

We discuss in the next section of this memo the more general question whether it would be useful to amend the language of Rule 49.1 (modeled on Civil Rule 5(d)(3)), which presently refers to the filing of "paper[s]" as the norm and allows for electronic filing of papers only pursuant to the authority of local rules.

III. Rules requiring writing

Twenty-eight Criminal Rules require a writing or refer to written materials. The writing requirement in these rules serves a variety of purposes. Rules 3 and 7(c) – which define a complaint and indictment as "a written statement of the essential facts constituting the offense charged" – by implication require that any charge be in writing to be treated as an official complaint, indictment, or information. The other rules discussed in this section generally require that a filing, motion, request, consent, notice, approval, evaluation, summary, statement of reasons, disclosure, or waiver be "written" or made or provided "in writing."

All are subject to Rule 49, which allows electronic filings made in accordance with local rules to be treated as if they were made in writing. It provides (emphasis added):

Rule 49. Serving and Filing Papers

* * * * *

(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.**

Because of the large number of rules that require a writing or refer to written materials, we have attempted to group the rules for purposes of discussion (though admittedly there is some overlap and some rules are difficult to characterize). We discuss below rules governing (a) motions, (b) requests or notifications to be made by the parties, (c) disclosures by the parties, (d) judgments and judicial orders, findings, and statements of reasons, (e) consents, approvals, and stipulations, (f) other miscellaneous rules.

A. Rules governing motions

Rule 47 requires motions to be made in writing unless otherwise permitted by the court (and includes general rules for the time of filing). It provides (emphasis added):

Rule 47. Motions and Supporting Affidavits

> **(b) Form and Content of a Motion. A motion—except when made during a trial or hearing—must be in writing, unless the court permits the party to make the motion by other means**. A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit.
>
> **(c) Timing of a Motion.** A party must serve a **written motion**—other than one that the court may hear ex parte—and any hearing notice at least 7 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application **.**

In addition, Rule 15(a)(2) provides that a detained material witness may file a written motion requesting to be deposed. The reference to a "written" motion appears to be superfluous in light of Rule 47(b).

B. Rules governing other requests or notification by the parties

Many Criminal Rules do not refer to "motions," but they require one or both parties to make a formal request or provide required forms of notification in writing.

> Rule 12.1(a) allows the attorney for the government to request in writing notification of any intended alibi defense and then requires the defendant to respond in writing.
>
> Rule 12.2(a) and (b) require a defendant intending to assert an insanity defense or introduce expert evidence of a mental disease or defect to notify the attorney for the government in writing.

Rule 12.3(a) and (b) require a defendant asserting a public-authority defense to notify the attorney for the government and requires the attorney for the government to respond in writing.

Rule 15(b)(1) requires a party seeking to take a deposition to provide the other party with "reasonable written notice."

Rule 16(d) provides that the court may permit a party to show good cause for a protective order restricting discovery by a "written statement" to be inspected ex parte.

Rule 26.1 provides that a party intending to raise an issue of foreign law must provide all parties with "reasonable written notice."

Rule 30 provides that a party may request "in writing" that the court give an instruction to the jury.

Rule 32(f) provides that the parties may "state in writing" any objections to the presentence report.

Rule 59(b)(2) provides that a party may file "specific written objections" to a magistrate judge's proposed findings and recommendations.

C. Rules governing disclosures by the parties

Several Criminal Rules governing discovery require the parties to make disclosures of various kinds in writing.

As noted above, Rule 12.1(a) allows the government to make a written request for notification of an intended alibi defense. Rule 12.1(b)(1) mandates reciprocal disclosure "in writing" by the attorney for the government to a defendant who has served notice of an alibi defense, and Rule 12.1(c) mandates a continuing duty to disclose "in writing."

Rule 12.3(a)(4) provides that the attorney for the government may "request in writing" disclosure of witnesses intended to establish a public-authority defense, and requires reciprocal written witness disclosures by the government and the defense; (b)(1) imposes a continuing duty to disclose "in writing."

Rule 16(a)(1)(B) requires the government to disclose the defendant's "written or recorded statement" and the portion of any "written record" containing the substance of an oral statement.

Rule 16(a)(1)(G) and (b)(1)(c) require the government and the defense to provide a "written summary" of certain testimony the government or defense intends to introduce.

D. Rules governing judgments, orders, findings, and statements of reasons

The following Criminal Rules require that the court's orders, judgments, and other judicial statements or findings be "written" or "made in writing."

Rule 4.1(b)(2)(A) requires a judge acting under the rule to "acknowledge the attestation in writing" if the applicant for a warrant or summons does no more than attest to the contents of a written affidavit submitted by telephone or other reliable electronic means. If the judge considers additional testimony or exhibits, (b)(1)(B) requires the judge to "sign any other written record, certify its accuracy, and file it."

Rule 6(e)(3) requires the transferring court to provide a "written evaluation of the need for continued grand jury secrecy" when transferring a petition for the release of grand jury materials.

Rule 23(c) requires the court to state its specific findings of fact in open court or a written decision or opinion.

Rule 32(i)(1)(B) provides that the court must provide the parties with a "written summary of" (or summarize in camera) any information excluded from the presentence report upon which the court intends to rely.

Rule 40(c) states the court may modify a previous release or detention order issued in another district but must state the reasons for do so "in writing."

Rule 59(a) allows a magistrate judge to enter a written or oral order in a nondispositive matter referred by the district court.

E. Rules governing consent, approval, reservation of rights, or stipulations

Many Criminal Rules require that a party (usually the defendant) who waives a right or consents a certain procedure do so in writing, and other rules require that approvals, stipulations and the like be in writing. These rules provide a record of the waiver, consent, or other action, and may also draw the party's attention to the importance of the decision being made.

Rule 10(b) provides that a defendant who has signed a written waiver of appearance, affirmed receipt of the indictment or information, and is pleading not guilty need not be present if the court accepts the waiver.

Rule 11(a) allows entry of a conditional guilty or nolo plea (with the consent of the court and government) "reserving in writing" appellate review of a specified pretrial motion.

Rule 15(c)(1) provides that a defendant may "waive[] in writing" the right to be present at a deposition.

Rule 17.1 provides that the government may not use any statement by the defendant or counsel made at a pretrial conference unless the statement is "in writing and signed by the defendant and the defendant's attorney." In this context, the provision of a written statement operates to waive the general rule preventing admission.

Rule 20(a) provides that a prosecution may be transferred to another district if the defendant states "in writing" a wish to plead guilty, consents "in writing" to disposition in the transferee district, and the U.S. Attorneys in both districts "approve the transfer in writing."

Ruler 20(d) provides for transfer of a case involving a juvenile when, inter alia, the juvenile consents to the transfer "in writing" and the U.S. Attorneys in both districts "approve the transfer in writing."

Rule 23(b) allows the parties to "stipulate in writing" their agreement to proceed with fewer than 12 jurors.

Rule 32(e) provides that unless "the defendant has consented in writing" a presentence report may not be submitted to the court or otherwise disclosed before the defendant has been found guilty or pleaded guilty or nolo contendere.

Rule 32.2 provides for a stay of forfeiture pending appeal and prevents transfer to a third party until the appeal becomes final "unless the defendant consents in writing or on the record."

Rule 43(b)(2) provides that in certain low level misdemeanor cases the defendant need not be present if he or she gives "written consent" and the court agrees to permit arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.

Rule 58(b)(5) allows a plea to be taken before a magistrate judge if the defendant consents "either in writing or on the record" to be tried before a magistrate judge and specifically waives trial before a district judge.

Rule 58(b)(2)(a) allows waiver of venue if the defendant "state[s] in writing a desire to plead guilty or nolo contendere," to waive venue, and to consent to the court's disposing of the case in the district.

F. Other rules requiring writing or governing the use of written documents[2]

Rule 6(f) requires that when 12 grand jurors do not concur in a pending complaint or information the foreperson must "promptly and in writing report the lack of concurrence to the magistrate judge."

Rule 32.1(b)(2) requires that the court to hold a hearing on the revocation of supervised release and provide the person "written notice of the alleged violation" as well as disclosure of the evidence against the person.

Rule 32.2(b)(1)(B) provides that the court may base a forfeiture determination on the record "including any written plea agreement."

Reporters' Comments

In general, the Criminal Rules seem to require that information be in "writing" or be "written" in order to provide initial clarity and to create a record. Additionally, the requirement of a writing signals to

[2]Additionally, Rule 41(d)(2)(B) provides that under some circumstances the judge "may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony."

the parties the importance of a decision or action. Although the pervasive inclusion of writing requirements reflect the assumption that paper filings are the norm, these requirements are subject to Rule 49, which allows electronic filings to be treated as "written or in writing" under the Criminal Rules if they are authorized by local rules.[3] Thus in districts with local rules authorizing electronic filings, most or all of the "written" submissions could be made electronically.

The current rules raise two main questions.

First, are the local rules governing electronic filing operating in a satisfactory fashion? For example, are there problems in certain districts, or with certain kinds of filings? Has a consensus best practice emerged, making it time for a uniform rule? We are agnostic on these issues. We have made no study of the relevant local rules and their operation. We think such a study would require the assistance of the Federal Judicial Center and/or the Administrative Office, and it would be important to involve clerks of court, magistrate judges, the Department of Justice, Federal Defenders, and others who deal with the rules on a day to day basis. Moreover, it would be beneficial to consider whether such a study should consider local rules governing civil as well as criminal cases. Discussions in the CM/ECF Subcommittee may be helpful in determining whether such a study is warranted at the present time.

The second question raised by the current structure – reflected in Rule 49 as well as the other rules noted above -- is whether it is time to reconsider the assumption that paper filings are the norm, and that electronic filings should be permitted only when authorized by local rules. Since Rule 49 was based on and tracks Civil Rule 5(d)(3), such a determination should certainly consider civil as well as criminal practice, though there are significant differences that might ultimately dictate different results. It seems likely that eventually paper filings will be the exception rather than the rule, but we are not certain that whatever changes may be made in the CM/ECF system signal that the time is ripe for a change of this magnitude. Again, we look forward to a discussion of these issues in the CM/ECF Subcommittee.

IV. Rules governing filing

Twenty-four Criminal Rules make reference to filing. Most reference the duty, need, or option to file. These rules govern filings by the clerk,[4] by the judge,[5] by the government,[6] by the defendant,[7] by

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[3]Rule 49 authorizes only "papers" to be filed electronically pursuant a valid local rule, and the Criminal, Rules do not generally refer to "papers." In this context, however, the term "papers" is understood to be a generic term encompassing a wide variety of writings such as those encompassed by the Criminal Rules discussed above: notices, discovery disclosures, consents, requests, etc.

[4]Rule 32(j)(2) (requires clerk to prepare and file a notice of appeal on defendant's behalf if so requested).

[5]The following rules refer to filing by the judge: Rule 4.1(b)(2) (judge must file transcription of notes of testimony, exhibits, modified original warrant, etc. considered during application for warrant); Rule 41(d)(2)(C) (same); Rule 42(b) (summary contempt orders must "be filed with the clerk").

[6]The following rules refer to filing by the government: Rule 5(a) (complaint must be promptly filed in district where offense committed after warrantless arrest); Rule 5.1(a) (magistrate judge must hold a preliminary hearing unless government files an indictment or information); Rule 6(e) (attorney for

either party,[8] by the grand jury foreperson,[9] by a third party claimants in forfeiture proceedings,[10] by persons seeking the return of seized property,[11] and by anyone (including the defendant) seeking disclosure of grand jury materials.[12] Additionally, although the rules on filing do not refer to victims, victims are also affected by rules concerning the filing of motions. Rule 60 recognizes that victims have various rights, Rule 60(b)(1) references motions to assert a victim's rights, and Rule 60(b)(2) provides that a victim or a victim's lawful representative may assert those rights.

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government must file under seal a notice of certain disclosures); Rule 7(f) (court may direct government to file a bill of particulars); Rule 12(g) (if court grants motion to dismiss, it may order defendant to be detained until new indictment or information has been filed); Rule 12.4(a)(2) (government must file statement identifying organizational victim upon the defendant's initial appearance).

[7]The following rules refer to filing by the defendant: Rule 12.2(a) (requires defendant to notify government if he intends to assert insanity defense or introduce expert evidence on a mental condition and to file copy of notice "with the clerk"); Rule 12.3(a) (requires defendant to notify government of intent to rely on public authority defense and to file copy of the notice "with the clerk"; also requires notice to be filed under seal if defendant identifies intelligence agency as alleged source of authority); Rule 12.4(a)(1) (requires nongovernmental corporate party to file statement that identifies any parent corporation and any publicly held corporation that owns 10% of its stock): Rule 20(a) & (d) (requires adult and juvenile defendants seeking transfer to file in "the transferee district" a statement waiving proceedings in original district); Rule 33 (requires motion for new trial to be filed at certain times).

[8]The following rules implicitly or explicitly refer to filings by either party: Rule 15(e) (requires filing of deposition in same matter as in civil action); Rule 32.2(b)(2)(C) (governing appeals from forfeiture order by either party); Rule 49(d) (requires parties to file "with the court a copy of any paper the party is required to serve"); Rule 49(e) (court may allow papers to be filed by electronic means); Rule 49.1(b) (governs required privacy protections for "filings," requiring redactions, providing for exemptions from redaction requirements, filing under seal without redaction, filing of redacted version, protective orders including orders limiting remote access, filing of reference list, and waiver by filing of person's own information without redaction); Rule 58(g)(2) (party appealing from magistrate's order must file notice "with the clerk"); Rule 59(a) & (b) (party objecting to magistrate judge's order on nondispositive matter or findings and recommendations on dispositive matter must "file" objections).

[9]Rule 6(c) states the foreperson "will" record the number of jurors concurring in each indictment and "will" file the record with the clerk.

[10]Rule 32.2 contains multiple references to claims filed by third party in forfeiture proceedings, including requirement in Rule 32.2(c) that the court conduct an ancillary proceeding if a third party files a petition asserting interest in property sought to be forfeited.

[11]Rule 41(g) requires a person aggrieved by unlawful search and seizure to file motion for return of property to be filed in district where the property was seized.

[12]Rule 6(e)(3)(F) provides that anyone seeking disclosure of grand jury matter must file a petition in district where grand jury convened.

A few Criminal Rules describe or refer to a relationship between documents or items that have been filed:

Rule 4(a) references "affidavits filed with the complaint."

Rule 5(d)(1)(A) references "affidavits filed with the complaint"

Rule 49.1(b)(9) exempts from redaction an affidavit filed "in support of any charging document."

Rule 49.1(g) states that a filing containing redacted information may be filed "together with" a reference list.

Reporters' Comments

In general, the Criminal Rules direct that certain filings be made or reference documents that have been filed, but they do not specify how filing is to be accomplished and make no reference to the mechanics of the CM/ECF system. However, all of these people who file under the Criminal Rules – including not only the clerk and the judge, but also the government, persons seeking grand jury disclosure, third parties claiming a right to property the government is seeking to forfeit, and the grand jury foreperson – must have access to system to "file" these things. Is it contemplated that CM/ECF will make any changes that would affect the various groups? Are there any problems with access now? For example, the Advisory Committee was informed that victims in some courts had problems filing motions asserting their rights because the system did not accommodate such filings; the Committee was later advised changes had been made to address the problem. Also, some criminal filings are to be non-public. The grand jury foreperson's filing under Rule 6(c) "may not be made be public" without judicial authorization, under Rule 12.3 certain filings regarding the defense of public authority must be filed under seal, and Rule 49.1 makes provision for sealed filings. We do not know whether the changes being contemplated would affect how such filings would work.

In our view, the rules that refer to the relationship between documents and items that are filed raise questions. These rules assume that there is a way to determine when a document is filed "with" or "in support of" another document. We don't know how that works now, and we wonder whether it might change. For example, if related paper documents are now stapled together, what is the analogous mechanism for electronic filing?

We also note that the language used to describe filings varies. For example, some rules refer to filing "with the clerk"[13] or "with the court." Indeed, the caption of Rule 49.1 (the rule governing privacy protections) refers to "Filings Made With the Court," and the rule uses the terms "filing," "court filing," and "a document filed with the court." Civil Rule 5.2, which parallels Rule 49.1, also refers to "filing with the court" and "filing made with the court." We don't know what is adding by a reference to the court or to the clerk. In this context, are there filings not made with the clerk and the court? Is there anything about the move toward electronic filing that makes it less desirable to refer to filing with the clerk or with the court?

[13]E.g., Rule 12.2(a) (copy of notice regarding insanity defense must be "filed with the clerk"), and Rule 42(b) (judge's summary contempt order must be "filed with the clerk").

Finally, we note that Rules 20 and 21 – which govern transfers for plea and sentence, or for trial – use the term "file" in a difference context, referring to sending "the file, or a certified copy" to the transferee district clerk. We are not certain why these rule refer to the file rather than the "record" as other rules do. (We note that Rule 58(g)(2) defines the "record" for purposes of an appeal from the decision of a magistrate judge, and do not use the term "file.") As noted in the next section of this memo, another feature of Rules 20 and 21 also suggests that it may be appropriate to consider revisions to both rules.

V. Rules requiring sending and return of files or grand jury material to another district

Rules 20 and 21 require "send[ing]" the file of a case to another district. Rule 20 requires the clerk of court to send the case file (or a certified copy) to the clerk of another district and requires the return of the "papers" under certain circumstances. Rule 21 similarly requires the clerk to send "the file" in a case involving a juvenile. Rule 6 requires the clerk "to send" grand jury material to another district under certain circumstances.

Rule 20, which governs transfer for plea and sentence, provides (emphasis added):

> **(b) Clerk's Duties.** After receiving the defendant's statement and the required approvals, **the clerk where the indictment, information, or complaint is pending must send the file, or a certified copy, to the clerk in the transferee district**.
>
> **(c) Effect of a Not Guilty Plea.** If the defendant pleads not guilty after the case has been transferred under Rule 20(a), **the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket**. The defendant's statement that the defendant wished to plead guilty or nolo contendere is not, in any civil or criminal proceeding, admissible against the defendant.
>
> **(d) Juveniles.**
>
> * * * * *
>
> **(2) Clerk's Duties. After receiving the juvenile's written consent and the required approvals, the clerk where the indictment, information, or complaint is pending or where the alleged offense occurred must send the file, or a certified copy, to the clerk in the transferee district**.

Rule 21(c), which governs transfer for trial, also requires "the file" (or a certified copy) be "sent" to the district in which trial will be held. It provides (emphasis added):

> **(c) Proceedings on Transfer. When the court orders a transfer, the clerk must send to the transferee district the file, or a certified copy, and any bail taken.** The prosecution will then continue in the transferee district.

And finally, Rule 6, which governs the grand jury, provides in pertinent part (emphasis added):

> **(e) Recording and Disclosing the Proceedings.**
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> * * * * *
>
> **(3)** ***Exceptions.***
>
> (G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. **If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy**. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

Reporters' Comments

Although we are not certain exactly how the technology will work, it seems likely that there are – or soon will be – more efficient options than sending a case file or certified copy to another district. Accordingly, study of those options would be appropriate. Rule 6 poses somewhat different issues because it does not require an entire case file to be sent, and it deals with grand jury materials, which are afforded a high degree of secrecy.

One option would be to amend Rules 20 and 21 to adopt a variant of the language in the proposed amendment to Appellate Rule 6, which refers to "making the record available." That language would accommodate both providing electronic access and physical delivery of the file (or a certified copy) to the receiving district. However, adoption of the "make available" language in Rule 20(b) would raise a question about Rule 20(c), which currently provides for restoring the proceeding to the sending court's docket if the case is returned. If electronic access is provided, would the case be removed from the court's docket? The time may be ripe for an evaluation of Rules 20 and 21 considering both the requirement of "sending" the case and the question whether to retain the references to the "file" and the "papers" discussed in the previous section of this memo.

It may also be appropriate to consider amending Rule 6 to provide that the district court would "make available" grand jury materials to the court to which a petition to disclose is being transferred. However, before making such a change it would be desirable to determine whether that would be consistent with the general principle of grand jury secrecy.

VI. Rules requiring mailing

Four rules – Rules 4, 41, 46, and 58 – require the mailing of a summons, warrant for a tracking device, motion to enforce bail forfeiture, and notice to appear in a misdemeanor or petty offense case. In each case, the rule provides that the mailing is to be made to the recipient's "last known address."

Reporters' Comments

Although technology is increasingly replacing the use of the mails, three (or perhaps all four) of these rules govern situations in which there may be no means of electronic communication and mailing remains the best alternative.

Rule 4(c)(3) governs the service of a summons on an individual or organization. The purpose of the summons is to initiate the case, and at this stage there will often be no mechanism to accomplish electronic service (even in the case of a defendant who will be represented by counsel who may be later be served electronically). Where personal service cannot be made, Rule 4(c)(3) requires service by mail is required in addition to another form of service. In the case of an individual, Rule 4(c)(3)(B)(ii) governs cases in which service is not made in person, but by leaving a copy with a third party at the defendant's residence. In such cases, Rule 4(c)(3)(B)(ii) requires that service also be made by mailing to the defendant's last known address. Similarly, in the case of a corporation, Rule 4(c)(3)(C) requires service both by delivery to an agent of the corporation and by a mailing to the organization's last known address withing the district or its principal place of business. In the absence of effective means of accomplishing electronic service, the mailing provisions continue to provide the only means of service for many defendants. We note that the Advisory Committee is presently considering a proposal by the Department of Justice to amend Rule 4 to revise the provisions on service on corporations to enable effective service on foreign corporations that have no known address within the district or principal place of business in the U.S. This proposal would affect the mailing requirement.

Rule 41(f)(2)(C) requires that after the use of a tracking device has ended, the officer who executed the warrant must serve the warrant on the person whose property was tracked. As under Rule 4(c)(3)(B)(ii), where service is not made in person, but by leaving a copy with a third party at the defendant's residence, the officer must also mail the warrant to the defendant's last know address. As with Rule 4, the mailing provisions continue to provide the only means of service for many defendants.

Rule 58(d) provides that in certain petty offense and misdemeanor cases the court may allow the defendant to pay a lump sum in lieu of appearance and end the case. Subdivision (d)(2) states that if a defendant in such a case has neither paid the fixed sum, requested a hearing, nor appeared in response to the citation or violation notice, the clerk or the magistrate judge "may" issue a notice giving the defendant an additional opportunity to pay the fixed sum. In such a case, the clerk is required to mail the notice of this additional opportunity to the defendant's last known address. Because this rule applies in cases in which the defendant has not appeared or responded by other means to the citation or violation notice, there are no obvious alternatives to mailing.

Rule 46(f)(3)(B) & (C), which govern bail forfeiture, stand on a somewhat different footing and it is possible that electronic service may be (or soon be) plausible. The Rule provides that a bail surety consents to the court's jurisdiction and irrevocably appoints the clerk as its agent for receipt of service for any filings. The rule also provides for the service of a motion to enforce the surety's liability to be made upon the clerk, with the proviso that the clerk must promptly mail a copy to the surety at its last known

address. Since the surety has consented to the court's jurisdiction, as electronic communication becomes increasingly ubiquitous it may become possible to require the surety to provide the court with an electronic address. Electronic service of the motion provided for in Rule 46(f)(3)(C) would be more efficient for the clerk, and at some point it may also be more likely to reach the surety than a mailing to the surety's last known address. It may be useful for the Committee to study this issue.

VII. Rules requiring the entry of information on documents, and the entry of orders

A large number of Criminal Rules refer to the entry of the judgment or various orders,[14] but other rules refer to the entry of information on documents related to the issuance of complaints, warrants, and summonses. Although the rules regarding the entry of orders or the judgment seem to pose no distinctive questions for purposes of the CM/ECF Subcommittee, the rules regarding the entry of information on a documents related to the issuance of complaints, warrants, or summonses may be affected by technological changes. The most elaborate provisions appear in Rule 4.1, which provides (emphasis added):

> **Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means.**
>
> **(B) Procedures. ....**
>
> > **(4)** ***Preparing an Original Complaint, Warrant, or Summons.*** **If the applicant reads the contents of the proposed duplicate original, the judge must enter those contents into an original complaint, warrant, or summons**. If the applicant transmits the contents by reliable electronic means, the transmission received by the judge may serve as the original.
> >
> > * * * * *
> >
> > **(6)** ***Issuance.*** To issue the warrant or summons, **the judge must**:
> >
> > (A) sign the original documents;
> > (B) **enter the date and time of issuance on the warrant or summons**; and
> > (C) transmit the warrant or summons by reliable electronic means to the applicant **or direct the applicant to sign the judge's name and enter the date and time on the**

[14]E.g., Rule 16(d)(2) (court may enter any other order for failure to comply with discovery obligations); Rule 17(c) (requiring court to give notice to victims before entering an order for subpoena for victim's confidential information); Rule 29(a) & (c)(2) (court must enter a judgement of acquittal at close of government's case if evidence is insufficient to sustain a conviction and may enter a judgment of acquittal if jury fails to return a verdict); Rule 32(k) (judge must sign and clerk must enter the judgment).

duplicate original.

Rule 41 also contains some parallel provisions (emphasis added):

Rule 41. Search and Seizure.

* * * * *

(f) Executing and Returning the Warrant.
(1) ***Warrant to Search for and Seize a Person or Property.***
(A) *Noting the Time.* The officer executing the warrant must **enter on it the exact date and time it was executed.**

* * * * *

(2) ***Warrant for a Tracking Device.***
(A) *Noting the Time.* The officer executing a tracking-device warrant must **enter on it the exact date and time** the device was installed and the period during which it was used.

Reporters' Comments

The rules do not specify how information is to be "entered." In the past, this was likely done in handwriting on the documents. As the technology changes, we expect that the form in which a judge or an officer executing a warrant "enters" information will change as well. Although we have had no indication that issues have arisen under these rules that should be addressed by an amendment, this seems to be an issue worth watching.

VIII. Rules requiring the preservation records or testimony

Rules 16 and 26.2 explicitly impose an obligation to "preserve" certain materials that are not disclosed during pretrial discovery or after a witness has testified.

In the context of pretrial discovery, Rule 16(d) requires the preservation of an statement seeking a protective order limiting discovery. It provides (emphasis added):

Rule 16. Discovery and Inspection

(d) Regulating Discovery.

(1) ***Protective and Modifying Orders.*** At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. **The court may permit a party to show good cause by a written statement that**

the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

Rule 16 does not permit pretrial discovery of prior statements by witnesses, but Rule 26.2 provides for the production of the relevant portion of a witness's prior statements after the witness testifies at the trial or other proceedings governed by the rule. Like Rule 16, Rule 26.2(c) imposes an obligation to preserve material that was not produced. It provides (emphasis added):

Rule 26.2. Producing a Witness's Statement.

(c) Producing a Redacted Statement. If the party who called the witness claims that the statement contains information that is privileged or does not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera. **After excising any privileged or unrelated portions, the court must order delivery of the redacted statement to the moving party. If the defendant objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record.**

Reporters' Comments

The rules requiring the preservation of particular testimony not disclosed to the opposing party or a written statement examined ex parte make no reference to the technology needed to meet this requirement. Thus they are consistent with any modifications in the CM/ECF system. We include them here, however, because the requirements for preservation so starkly highlight the need for electronic systems of information storage and retrieval to provide not merely short term, but also long term access to the courts' records.

IX. Rules governing service

Many Criminal Rules require a variety of documents to be served on the parties and others (e.g., victims, sureties for bail, and claimants to property being forfeited). All are subject to Rule 49, which provides (emphasis added):

Rule 49. Serving and Filing Papers

(a) When Required. A party must **serve** on every other party any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.

(b) How Made. Service must be made in the manner provided for a civil action. When these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party, unless the court orders

otherwise.

(c) Notice of a Court Order. When the court issues an order on any post-arraignment motion, the clerk must provide notice in a manner provided for in a civil action. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve—or authorize the court to relieve—a party's failure to appeal within the allowed time.

(d) Filing. A party must file with the court a copy of any paper the party is required to serve. A paper must be filed in a manner provided for in a civil action.

(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.

In addition, Rule 4(c) contains more specific provisions regarding service:

Rule 4. Arrest Warrant or Summons on a Complaint

(c) Execution or Service, and Return.

* * * * *

(3) ***Manner.***

* * * * *

(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 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 must also be mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States.

Reporters' Comments

Since Rule 49 provides that service in criminal cases generally follows the Civil Rules, changes in CM/ECF that would affect service in civil cases would affect criminal cases as well. However, Rule 4 does provide distinctive procedures for serving a summons on individual and corporate defendants. As noted above, the requirement of mailing to the last known address may be affected by changes in technology, and the mailing requirement in cases involving corporate defendants outside the U.S. is presently under study by the Criminal Rules Committee.

The more general issues raised by permitting electronic service only when and to the extent permitted by local rules are discussed above.