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

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MEMORANDUM

DATE: December 11, 2009

TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Richard C. Tallman, Chair
Advisory Committee on Federal Rules of Criminal Procedure

RE: Report of the Advisory Committee on Criminal Rules

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met on October 13, 2009 in Seattle, Washington, and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are attached.

This report describes discussion items concerning Rule 16 (Discovery and Inspection), Rule 12 (Pleadings and Pretrial Motions), Rule 32 (Sentencing and Judgment), Rule 5 (Initial Appearance), and Indicative Rulings.

II. Discussion Items

A. Rule 16 (Discovery and Inspection)

Proposals to codify and/or expand the government's obligation to disclose exculpatory and impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963), have been considered by the

Criminal Rules Committee on multiple occasions. Most recently, in 2007 the Standing Committee voted not to publish for notice and comment an amendment endorsed by the Rules Committee that would have mandated "open file" discovery of all exculpatory and impeaching information in the custody or control of federal prosecutors and their investigative agencies. The Justice Department, which opposed the proposed amendment, argued that the proposed amendment would upset the balance of interests in the criminal justice process. The Department also took the position that it was important to allow time for a recent amendment to the United States Attorneys' Manual to have an impact on the practice of federal prosecutors. The Standing Committee remanded the matter to the Advisory Committee for further consideration at some future date after sufficient time had passed to assess the impact of those changes.

The Advisory Committee has now turned its attention once again to Rule 16. In April 2009, Judge Emmet Sullivan, who had presided over the trial of Senator Ted Stevens in the United States District Court for the District of Columbia, wrote a letter to Judge Tallman urging the Committee to reconsider amending Rule 16. In response, Judge Tallman appointed a Rule 16 subcommittee, which met by teleconference prior to the October meeting, and he put the matter on the agenda for the October meeting.[1]

At the October meeting, Attorney General Lanny Breuer addressed the Committee. He stated that both he and the Attorney General are committed to holding federal prosecutors to the highest ethical and professional standards, and he described a variety of steps the Department had taken in the aftermath of the Stevens' trial. The Department established a working group on discovery in criminal proceedings to recommend changes, and is taking a multi-faceted approach that includes training, guidance, strong leadership, and more uniformity. Every federal prosecutor will be required to undergo training, and each district will designate an expert on discovery to advise its prosecutors. There will be a new position in Washington to oversee these efforts, and a new online repository of relevant materials.

General Breuer stated that the Department of Justice would not object to amending Rule 16 simply to codify the disclosure requirements of *Brady*, but it would oppose any proposed amendment going beyond *Brady*. He said that extending the government's disclosure obligations beyond *Brady* would be inconsistent with Supreme Court precedent, would upset the careful congressionally-mandated balance inherent in criminal discovery under the Jencks Act, and would disregard critical interests such as the rights and safety of victims and other witnesses, and special concerns relating to cases implicating national security. If the Committee decided to amend Rule 16 to require more disclosure than *Brady* currently requires, General Breuer said that the proper course of action would be for the Committee to write a report to Congress seeking statutory authorization for such a change, including an amendment of the Jencks Act.

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[1]The members of the Subcommittee chaired by Judge Tallman are Judge Morris England, Professor Andrew Leipold, Ms. Rachel Brill, and Assistant Attorney General Lanny Breuer.

The Committee discussed various mechanisms for gaining additional information that might illuminate the issues. Although it would be desirable to have detailed information about the impact of the changes in internal procedures as a result of the amendment to the United States Attorneys Manual, it was determined that this subject would not lend itself to research conducted by the Federal Judicial Center. Members noted that extensive disclosure is already available in some districts, in which an open file procedure is the norm. Judge Tallman requested the assistance of the Center in surveying judges and lawyers in the so-called "open file districts" to determine whether those districts have fewer *Brady*-type problems.

There was general agreement that it would be useful for the Rule 16 subcommittee to host a consultative session, as the Civil Rules Committee did when considering changes to summary judgment and expert witness issues in civil litigation, bringing together criminal justice experts from the bench, bar, and academia to share their views. The Advisory Committee on Civil Rules found this procedure to be very useful. Accordingly, a consultative session has been scheduled for February 1, 2010, in Houston, Texas. The reporters and members of the Rule 16 subcommittee will be joined by an small group of practitioners, academics, and judges with substantial experience bearing on different issues of concern.

After discussion, Judge Tallman recommitted full consideration of the issue to the Rule 16 Subcommittee. Given the time required for additional research and extensive consultation on the various issues raised by the proposal to amend Rule 16, it is not anticipated that the Subcommittee will present a draft proposal at its April 2010 meeting. But there will be a full report on what it has learned in the interim.

B. Rule 12 (Pleadings and Pretrial Motions)

In April 2009, the Committee voted to send to the Standing Committee an amendment to Rule 12 that attempted to conform the rule to the Supreme Court's ruling in *United States v. Cotton*, 535 U.S. 625 (2002). The amendment required defendants to raise a claim that an indictment fails to state an offense before trial, but provided relief in certain narrow circumstances when defendants failed to do so. In particular, the amendment provided for relief if the failure to raise the claim was for good cause or prejudiced a substantial right of the defendant.

The Standing Committee declined to publish the proposed amendment and remanded it to the Committee for further study. Specifically, as Judge Raggi pointed out, members of the Standing Committee generally approved of the concept of the proposed amendment to Rule 12 but wanted the Advisory Committee to consider the implications of using the term "forfeiture" instead of "waiver" in the relief provision. In *Cotton*, the Supreme Court had used the term "forfeiture" and the two terms trigger different standards of review on appeal. In drafting its proposed amendment, the Committee had used "waiver" because it was part of the existing language of Rule 12.

Judge Tallman observed that the Committee had not previously considered the option of

using "forfeiture" and the impact of such a choice was unclear, and he recommitted the issue of whether to use "waiver" or "forfeiture" to the Rule 12 subcommittee, with the goal of presenting a revised draft to the full Committee at the spring meeting in 2010.

C. Indicative Rulings

In light of the adoption of Appellate Rule 12.1 and Civil Rule 62.1, which went into effect on December 1, 2009, the Committee took up the question whether to propose a parallel provision in the Criminal Rules permitting "indicative rulings." The new Appellate and Civil Rules are designed to facilitate remands to the district court to enable it to consider motions after appeals have been docketed and the district court no longer has jurisdiction.

Because the new rules permitting indicative rulings have been adopted in the appellate and civil context, the Committee focused on whether the criminal context is different and somehow incompatible with adoption of such a rule. The Committee considered but was not persuaded by the Department of Justice's concern that the proposed rule might be viewed by jailhouse lawyers as an invitation to file frivolous motions. One member expressed the view that this fear is overstated because in his experience as a trial judge, jailhouse lawyers do not need an invitation to file such motions. In addition, Judge Rosenthal pointed out that the Standing Committee had considered and rejected a proposal to limit the appellate rule's applicability in the criminal arena.

After discussion of whether the new Rule would apply to motions under 28 U.S.C. § 2255, members concluded that the rule did not so apply, because § 2255 motions, while disfavored, are not precluded during the pendency of a direct appeal. Because the new Rule would apply solely to motions that a district court is unable to consider during an appeal, the proposed rule would not cover § 2255 motions.

The Committee voted unanimously to approve a proposed rule paralleling Civil Rule 62.1, and also approved an amendment to the Committee Note. Following the meeting, the Chair and Reporter determined that the new language in the Committee Note raised issues on which additional research and discussion would be beneficial. Accordingly, these matters will be placed on the agenda for the Committee's meeting in April, and it is anticipated that the proposed rule will be submitted to the Standing Committee in June 2010.

D. Rule 5 (Initial Appearance)

In June 2009, the Standing Committee considered the Committee's decision not to amend Rule 5 and recommitted the matter to the Committee for further study as part of its ongoing monitoring of the implementation of the Crime Victims' Rights Act ("CVRA").

In April 2009, the Committee had decided against forwarding to the Standing Committee an amendment to Rule 5 that would have required a judge, when deciding whether to detain or release

the defendant, to consider the right of any victim to be reasonably protected from the defendant. The Committee based its decision on its belief that the current version of Rule 5 already provides adequate protection for victims: the rule requires a judge making a decision to release or detain to apply all relevant statutes, including both the CVRA and the Bail Reform Act, which require a judge to consider danger to the community.

The Committee was informed that recent hearings on CVRA oversight had not indicated any need for amendments to the Rules. The Committee requested that the Department of Justice continue to provide a liaison with advocates for victims' rights, and that it report any dissatisfaction with the application of Rule 5 as it relates to victims. The Committee noted the need to continue to monitor victims' rights.

E. Rule 32 (Sentencing and Judgment)

In April 2009, the Committee deferred consideration of two amendments to Rule 32: (1) an amendment to Rule 32(h) that would require a judge to give notice to parties when the judge was considering imposing a sentence that was a "variance" from the sentencing guidelines; and (2) an amendment to Rule 32(c) that would ensure that parties receive the same information as the probation officer who prepares the presentence report ("PSR"). At the October meeting, it was agreed that consideration of both amendments should again be deferred to await further development in sentencing law.

F. Rule 11 (Advice on Immigration Consequences of Conviction)

The Committee had been asked by Judge Rosenthal to consider the desirability and feasibility of amending Rule 11 to require the district court to warn an alien defendant who is pleading guilty of the possible collateral consequences that might flow from a conviction, *i.e.*, deportation or ineligibility for various forms of relief under immigration laws. The Committee had twice previously declined to add immigration consequences to the list of warnings required to be issued by a judge conducting a plea colloquy under Rule 11.

The Committee decided to defer consideration of amending Rule 11. The Supreme Court has before it this term *Padilla v. Kentucky*, No. 08-651, a case presenting the related question of whether the Sixth Amendment requires that counsel advise an alien defendant who pleads guilty of the immigration consequences of the conviction. The Court's decision in *Padilla* will clarify the obligations of defense counsel. Additionally, the Department of Justice has awarded a grant to a project conducted by the American Bar Association to create a computer database compiling the collateral consequences of various offenses. The availability of a mechanism to determine the collateral consequences of the conviction for various offenses might also bear on the desirability of amending Rule 11.

G. Other Issues

The Committee heard reports on the work of the Sealing and Privacy Subcommittees. It also

considered and declined to pursue the suggestion that it consider amending Rule 12.2 to require a district court to advise a defendant of his right to appeal from an order to submit to a competency examination or from an order of commitment.