February 28, 2001

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Bldg.
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Changes in Federal Rules of Appellate Procedure, Rules Governing Habeas Corpus, and Style Revision of Criminal Rules: Request for Comments Issued August 2000

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit the following comments with respect to the proposed changes in the Federal Rules of Criminal Procedure on behalf of the over 10,000 members of our association, and its 80 affiliates in all 50 states, with an additional membership of some 28,000. The comments of NACDL on the proposed substantive changes in the rules of criminal procedure are being submitted separately.

COMMENTS ON FEDERAL RULES OF APPELLATE PROCEDURE

Rule 1(b). Scope of Rules.

The committee's proposal to repeal Fed.R.App.P. 1(b) in response to the enactment of 28 U.S.C. §§ 2072(c) and 1292(e) is undesirable, because of the probability of unintended consequences in other areas. Instead, Rule 1(b) should be retained and amended to insert the phrase "Except as expressly authorized by statute," at the beginning. For example, the court of appeals' jurisdiction over government appeals in criminal cases is conferred by 18 U.S.C. § 3731. The fifth paragraph of that statute provides that the appeal must be taken within 30 days after the challenged order "has been rendered," which means announced, orally or in writing (as the case may be). The statute does not say, and does not mean, "has been entered." See Black's Law Dictionary 1296 (6th ed.

1025 Connecticut Avenue NW, Suite 901 Washington, DC 20036
Tel: (202) 872-8600 *E-mail: assist@nacdl.org*
Fax: (202) 872-8690 *Website: www.criminaljustice.org*

1990) (definition of "render judgment": emphasizing it is "not synonymous with 'entering,' 'docketing,' or 'recording' the judgment"). Rule 4(b)(1)(B)(i), to the extent it says otherwise, is presently invalid because it conflicts on a jurisdictional matter with § 3731. (See also our comment on proposed amended Rule 4(b).)

Repeal of Rule 1(b) could thus be interpreted to mean that the Conference thinks Rule 4(b)'s timing language now extends the jurisdiction of the court of appeals, excusing the government from taking any appeal promptly as consistently required by Congress in statutes dating to 1907. New ambiguities about the time to appeal should be avoided. Inserting our proposed language would accomplish the Committee's purpose while avoiding new problems under the Rules Enabling Act.

Rule 4. Appeal of Right -- When Taken

We support the proposed addition of new Rule 4(a)(1)(C), providing that an appeal from the final order on a petition for a writ of error coram nobis shall be treated as a civil appeal, with a 60 day filing rule, like other proceedings against the federal government in the nature of habeas corpus, including motions under 28 U.S.C. § 2255. Many coram nobis applicants are prisoners, who need this extra time to learn of the court's decision and to communicate with counsel.

NACDL also appreciates the desirability of clarifying the relationship between Rule 4(b)'s restriction on the time to appeal in a criminal case and the district court's power under Fed.R.Crim.P. 35(c) to correct a sentence. It would be better, however, to resolve the circuit split differently. Rule 35(b) motions should be treated the same way the rules treat other motions to amend a judgment -- as terminating the appeal time, with a new ten days commencing upon entry of the order on the motion. Tolling is the wrong term (implying that the time stops running and then picks up again where it left off) and should not be used in the notes, and "suspending" is worse, as it has no settled legal meaning in this context. At the least, the rule should provide that if a timely motion to correct a sentence is filed under Rule 35(c), the time to appeal does not commence until the later of (i) the date the motion is ruled upon, or seven days after imposition of sentence (when the court's power to act expires under that rule), whichever comes first, or (ii) the entry of judgment. A defendant contemplating a sentencing appeal may choose not to appeal if the issue can be resolved by motion, and should not have to make that decision until the final contours of the sentence are settled. This would also avoid the necessity, in some cases, of filing two notices of appeal in the same case from what is really the same judgment, as required by the Committee's approach (as recognized in the final paragraph of the advisory committee note).

Finally, as discussed in our comment to Rule 1(b) the drafting error in Rule 4(b)(1)(B)(i) should be immediately corrected. See United States v. Sasser, 971 F.2d 470, 472-75 (10th Cir. 1992); United States v. Eliopoulos, 158 F.2d 206 (2d Cir. 1946) (dismissing government appeals brought in compliance with Rule 4(b) but after the time allowed under 18 U.S.C. § 3731). The Committee might, at most, want to revise the rule to reflect the decisions in such cases as United States v. St. Laurent, 521 F.2d 506, 511 (1st Cir. 1975), and United States v. Lee, 501 F.2d 890, 891 n.1 (D.C.Cir. 1974), holding that the time for a government appeal runs from entry where the orally rendered order was followed during the 30 day appeal period by the entry of a written order. Arguably, these cases merely fill a gap or resolve an ambiguity, like the Rule's provision of a deadline for defendants to appeal, which has had no statutory support at all as a jurisdictional matter since the 1988 repeal of former 18 U.S.C. § 3772. But even this modification might breach the Rules Enabling Act limitation against substantive rules, 28 U.S.C. § 2072(b), such as those purporting to extend appellate jurisdiction.

Rule 21. Writs of Mandamus, etc.

The proposed page limit for mandamus papers is too short. A limit of 20 pages implies that a mandamus petition is no more complex than the most complicated motion. See Fed.R.App.P. 27(d)(2). A mandamus petition has more in common with a brief on the merits than it does with most appellate motions. On the other hand, it is the rare mandamus petition that involves more than one issue. We think a reasonable compromise is therefore to put a limit of 9500 words (about 35 pages of traditional 12 point Courier type) on a mandamus petition or response, absent court permission. For all the reasons that led the committee to go to a word-count rather than a page-limit approach for briefs, we suggest that a "20 pages" rule is far too ambiguous and will cause enormous headaches for clerks' offices. (The same is true of present Rule 27(d)(2), which has the same limit for motions.) If the committee does not decide to increase the presumptively allowable length, we note that 20 pages is the approximate equivalent of 5500 words, and could be so expressed, using the ratio that underlies the current Rule 32(c)(7).

Rule 24. Proceedings IFP

This revision still needs some work. First, in proposed 24(a)(1)(A), there is either a comma missing after "shows," or the comma should be deleted after "Forms." Rule 24(a)(2) should substitute an introductory "Except as otherwise expressly provided by statute," for the proposed "unless the law requires otherwise," which is unnecessarily imprecise. ("The law" might be understood to include circuit precedent, for example.)

More important, the proposed language of Rule 24(a)(3) on judicial approval of continued IFP status contradicts the Criminal Justice Act for the many defendants who have been "determined to be financially unable to obtain an adequate defense in a criminal case." (We realize that to a large extent this contradiction exists in the present rule as well, but this is a good time to correct the problem.) Under 18 U.S.C. § 3006A(d)(7), such defendants may appeal or petition for certiorari "without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28." A district court simply should not be able to deny an IFP appeal in a criminal case, after appointing counsel under the CJA, by certifying the appeal is "frivolous." The court's authority to terminate the appointment if the defendant is no longer indigent (or obtained appointed counsel inappropriately) is covered by 18 U.S.C. § 3006A(c). The PLRA does not apply at all to criminal cases, and certainly not to criminal appeals. The reference to criminal defendant-appellants should be entirely removed from Rule 24(a)(3). Either a new Rule 24(a)(4) reflecting the applicable provisions of the CJA should be inserted, or the matter of criminal cases should be entirely removed from the rule and left to statutory regulation.

Rule 25. Filing and Service

We agree that service by electronic means should be allowed only if the recipient consents in writing. All of us have received far too many attachments to e-mail messages that were composed in a word processor that our system could not read, or which took forever to download, or which had the effect of turning the recipient into the (unpaid) clerical employee of the sender. Moreover, formatting is often distorted in electronic transmission, so the ability to answer a brief intelligibly may be impeded because of uncertainty about page numbering. Advance consent is essential.

Rule 26. Computing and Extending Time

NACDL strongly supports making the appellate rules consistent with the criminal and civil rules on computation of time. We note that the extension to 11 days from 7 of the minimum time that is unaffected by weekends and holidays will also have the welcome effect of extending by at least two days the time for defendants to appeal in a criminal case (because that is a ten-day period under Rule 4(b)), and will thereby remove a source of confusion and inadvertent error that presently exists in that computation for some inexperienced practitioners.

Rule 27. Motions.

We agree that the amendment to Rule 26 would make desirable a parallel change in the presumptive response time for motions from ten days to seven. Rule 27(a)(3)(A) should be clarified, however, to say that the response time can be shortened by order in a particular case, or by local rule with respect to a class or type of motion (such as 3d Cir. LAR 9.1(b), which provides a three-day response time for bail motions), but not by local rule applicable to all motions.

We also reiterate here our suggestion with respect to the 20-page limit for motions presently found in Rule 27(d)(2). See comment to Rule 21 above. A 5500-word rule would be more understandable and clear, given the wide variety of formats readily available in word processing software. The Committee might also want to incorporate into Rule 27(d)(1)(D) a cross-reference reminding practitioners that under Rule 32(c)(2), the type-size and style requirements of Rule 32(c)(5) and (6) do apply to motions.

Rule 28(j). Briefs - Supplemental Authority

NACDL supports the amendment allowing counsel some latitude, in a short letter, to explain the significance of new authority.

Rule 32(d). Form of Briefs

We do not disagree with the proposal to add a signature requirement like that of Fed.R.Civ.P. 11. The proposed new rule requiring "every" brief and motion to be signed is unclear and should be rewritten, however. Briefs often require signatures in three of more places, on various certificates. The Rule should not require counsel to sign up to 25 briefs several times each. Does the committee mean that the original of each must be personally signed manually, in ink, although some or all of the rest may be conformed? Or would it comply to sign the brief before copying, so that all copies would bear a copy of counsel's signature, but none would have an original ink signature? May counsel delegate the right to sign his or her name to a secretary, paralegal or other employee, or must the signature be affixed personally? These questions are not clarified by the advisory committee note either. (In its list of statutes authorizing sanctions, the note should also mention 28 U.S.C. § 1927.) A cross-reference should perhaps be added to Rules 28(a)(10) and 28(b), which list the required contents of briefs.

Rule 44(b). Constitutionality of State Statutes

The applicability of 28 U.S.C. § 2403(b) in criminal cases is very rare, although not unheard of. See Maine v. Taylor, 477 U.S. 131 (1986) (state allowed to intervene in federal prosecu-

tion under § 2403(b) and then to pursue appeal when Solicitor General declined). State criminal statutes are often incorporated into federal criminal statutes, however, such as the Assimilative Crimes Act (18 U.S.C. § 13), the Gun Control Act (id. §§ 922, 924), the Travel Act (18 U.S.C. § 1952), RICO (id. § 1961), and the Controlled Substances Act (21 U.S.C. §§ 801(44), 841(b), 851). The constitutionality of the state statute may sometimes be challenged in such cases; the same may occur, for example, where the legality of an arrest or a search and seizure by state law enforcement officers is at issue. It therefore might be helpful to add, "in any civil or criminal case," or at least to mention this in the advisory committee note.

COMMENTS ON CIVIL RULE 81 AND THE HABEAS CORPUS RULES

The National Association of Criminal Defense Lawyers believes that the rules of habeas corpus and 2255 procedure need more of an overhaul than this year's proposals would give. The related amendment to Fed.R.Civ.P. 81(a)(2) is premature until the habeas rules are more fully reconsidered. The proposal to delete time limits for the return is apparently based on an error which appears in the Advisory Committee Note on proposed Civil Rule 81. The 2254 habeas and 2255 rules do not "govern as well habeas corpus proceedings under § 2241." See 2254 Rule 1(b) (application of any of these rules in other habeas cases is "at the discretion of the United States district court"). Deletion of these provisions therefore eliminates important rules governing § 2241 petitions (such as those challenging Bureau of Prisons and Parole Commission actions, as well as military custody and some immigration challenges) which are not provided for elsewhere.

Many of the procedural provisions of the AEDPA are so impractical, counterproductive, or poorly drafted that the Committee should use its authority under the Rules Enabling Act to supplant them. Cf. Lindh v. Murphy, 521 U.S. 320, 336 (1997) (discussing "silk purses and pigs' ears" in legislative drafting; acknowledging AEDPA is "not a silk purse"). A perfect example and opportunity is Rule 9(b), which should be amended to replace (rather than to implement) the absurd and wasteful statutory requirement of obtaining a certification from a three-judge panel of the court of appeals before presenting a second or successive petition to the district court. The substantive limitations on successive petitions created by 28 U.S.C. § 2244 (to the extent they may be constitutional under the Suspension Clause) can be enforced quite adequately by district judges on preliminary review of such petitions or motions. Until that time, however, we offer the following comments on the proposals issued this fall:

Rule 2 - Petition.

Because of the AEDPA's addition of a statute of limitations, Rule 2(e) should be made more explicit about the Clerk's duty to protect the prisoner's filing date. The Rule should clearly state the Clerk's duty to mark "filed" any paper received from or on behalf of a prisoner which may be intended as a petition for a writ of habeas corpus, as of the date received at the Clerk's office or, in the case of an incarcerated person proceeding without counsel, as of the date that the petitioner indicates s/he placed it in the prison mail system for delivery to the court. Because of the change requiring nonconforming papers to be filed, it might be better to move this provision to Rule 3. This comment applies to 2255 Rule 2(d) as well.

The form which Rule 2(c) requires prisoners to use should be revised in at least two ways. First, questions 11(e) and 13 should be deleted. These seek to force the petitioner to go forward with a showing on the potential issue of procedural default, when the Supreme Court has recognized that default is an affirmative defense which the respondent must plead to put it in the case and which the respondent waives by failing to do so. See Trest v. Cain, 522 U.S. 87, 89-90 (1997), quoting Gray v. Netherland, 518 U.S. 152, 165-66 (1996). The state and federal governments have so many unfair advantages already in habeas corpus procedure that it is hardly necessary for the court to demand that the petitioner anticipate and try to refute an affirmative defense that the state or the government may or may not raise. Also, Rule 2(c) simultaneously requires the petitioner to use the form and also to "state the relief requested," while the form itself seems to tell the petitioner not to state the relief requested. This inconsistency should be fixed. This comment applies fully to 2255 Rule 2(b) as well.

Rule 9(b) - Successive petitions

See introduction to these comments.

Section 2255 Rule 2 - Motion.

See comments under habeas Rule 2 above. In addition, Rule 2(a) should be amended to make explicitly clear that the proper caption of a 2255 motion is the caption of the criminal case out of which it arises. The practice of some district court and court of appeals clerks and judges of reversing the caption to make it read like a civil case brought by the prisoner against the United States, like a Federal Tort Claims action, is inconsistent with the view taken in the Rules that § 2255 authorizes a post-conviction motion in the criminal case, not a new civil action. An amendment would promote national uniformity on this fundamental matter of form.

COMMENTS ON STYLE REVISION FOR CRIMINAL RULES

As an original matter, the Committee on Rules of Procedure of the National Association of Criminal Defense Lawyers does not think the complete rewrite project can achieve enough improvement to the intelligibility of the federal rules to justify the risks of making numerous inadvertent changes of substance. The criminal rules are simply more "quasi-substantive" in nature than the appellate rules and possibly even more than the civil rules. We assume, however, that "Just don't do it," is not advice the Standing Committee is really open to hearing. That said, we noted a few changes that should not be allowed and also some existing errors in the rules that should not be unnecessarily perpetuated. What follows should not by any means be taken as a comprehensive list of every question raised by the style revision; it should serve more as a warning that for every slip-up we located, there may be four more we missed.

1. **Rule 6(e).** (a) The style revision seems to omit without comment one important provision of current Rule 6(e) on grand jury secrecy -- the penultimate sentence of current Rule 6(e)(2). This provision states, "No obligation of secrecy may be imposed on any person except in accordance with this rule." This protects witnesses and their counsel, inter alia, from being commanded to keep secret their own appearance before the grand jury. It should not be deleted in a "style" revision.

(b) The current rule is awkwardly phrased, but appears to be intended, and properly so, to limit disclosure of "matters occurring before the grand jury" to an attorney for the government "for use in the performance of such attorney's duty ... to enforce federal criminal law." Rule 6(e)(3)(A). The revision seems to remove the "federal criminal law" restriction and apply that restriction only to disclosures to non-attorney government personnel. Even if the attorney for the government has duties in civil law enforcement, that attorney should not be able to obtain grand jury information to assist in fulfilling those other duties. We believe it was always the intendment of the Rule that grand jury information only be available to "enforce federal criminal law," and that restriction should be clearly stated in revised Rule 6(e)(3)(A)(i).

2. **Rule 7(c).** The last sentence of Rule 7(c)(1) requiring a citation in each count would be better placed as the first sentence under what is designated Rule 7(c)(3), which should then be restyled simply "Citation." What the committee has designated as 7(c)(2) should be (c)(3) and vice versa. Rule 7(c)(2) (criminal forfeiture), as recently amended, by virtue of omitting any requirement that the indictment aver the facts

which establish the identity, and extent or value, of the items alleged to be forfeitable, is unconstitutional under the June 2000 decision in Apprendi v. New Jersey, 530 U.S. 466, because each such forfeiture increases the applicable statutory maximum punishment for the offense in the sense that the Supreme Court in that case used the concept "applicable statutory maximum."

3. **Rule 11.** It would clarify Rule 11(a) to add that the defendant may plead guilty or not guilty "to each count." The same clarification should be added to Rule 11(b)(1)(B). In new Rule 11(e), replacing current Rule 32(d) regarding withdrawal of guilty pleas, it would be more cautious to replaced "motion under 28 U.S.C. § 2255" with "appropriate collateral attack." Under some circumstances, a § 2255 motion may be inadequate or ineffective to test the constitutionality of a defendant's conviction on a plea of guilty, requiring use of a § 2241 habeas corpus petition or a petition for coram nobis, for example.

4. **Rule 12.** In revised Rule 12(e), the reference to "Rule 12(b)(1)" should read "Rule 12(b)(3)." In revised Rule 12(h), the phrase "suppression hearing" should be changed to "hearing on a suppression motion"; it is the motion, not the "hearing," which is "under Rule 12(b)(3)(C)."

5. **Rule 16.** By changing the word "introduce" to the word "use" in Rule 16(b)(1)(A)(ii), the Committee has inappropriately made a substantive change, which increases the defendant's duty of disclosure. Such items as evidentiary summary charts, materials that a witness will need to refresh recollection, and learned treatises that an expert will endorse may be "used" during the defendant's case in chief without being "introduced" in evidence. NACDL longs for the opportunity to engage with the committee in a discussion about how discovery under Rule 16 should be broadened, but a style revision is not that occasion. This is certainly not the occasion to smuggle in one little change to further aid the prosecutor at the defendant's expense. This proposed alteration must be reversed.

6. **Rule 30.** The deletion of the "no party may assign as error" language from Rule 30 is appropriate and welcome.

7. **Rule 31(b).** The way the restyled rule deals with attempts is erroneous, apparently based on a misreading or misunderstanding of the current rule. There is no general attempt provision in federal criminal law. Current rule 31(c) therefore permits a verdict for an attempt to commit an offense, when the offense itself is charged, or a verdict for an attempt to commit a lesser included offense, only "if the attempt is an offense." Under the revision, the qualification that a conviction for attempt is permissible only "if the attempt is an

offense" is mistakenly assigned only to Rule 31(c)(3), which refers to verdicts for an attempt to commit an included offense. Rule 31(c) should have only two subsections, stating "(1) an offense necessarily included in the offense charged, or an attempt to commit a necessarily included offense, if the attempt is an offense in its own right, or (2) an attempt to commit the offense charged, if the attempt is an offense in its own right."

8. **Rule 32.** See our comments to proposed revised Rule 32, many of which would apply even if no substantive change is made.

9. **Rule 32.2.** NACDL adheres to its position that Rules 32.2(b)(1) and (b)(4) violate the Rules Enabling Act by calling upon the court and/or jury to make a different determination from that allowed by the statutes defining the property which is forfeitable. The statutes allow criminal forfeiture only of the defendant's interest in a specific item of property; the court or jury must therefore determine what that interest is and forfeit only that much. This rule instead calls upon the court or jury to declare a forfeiture of the entire item of property, subject to third party claims, thus giving the government a windfall transfer of property not belonging to it in the large number of cases where the innocent third parties lack the resources or knowledge to intervene as claimants. The rule also improperly refers to forfeiture of a "money judgment," when the statutes authorize no such thing.

10. **Rule 35.** The Committee should add a sentence to Rule 35(a) providing that a court may, at any time, correct a sentence it determines to be in excess of the applicable statutory maximum. Such gross illegalities and miscarriages of justice must be subject to correction, regardless of any limitation on the scope of § 2255 or other traditional means of collateral attack. As to Rule 35(b), see our comments on the substantive revision, some of which apply regardless of what version is adopted.

11. **Rule 38(b)(2).** The reference to "the Attorney General" should be changed to "the Bureau of Prisons" to reflect the current wording of 18 U.S.C. § 3621(b).

12. **Rule 43(c)(2).** NACDL adheres to its continuing objection to the 1995 provision, contradicting 600 years of legal wisdom, see Ball v. United States, 140 U.S. 118, 129-31 (1891), allowing a fugitive defendant to be sentenced in absentia.

NACDL appreciates the opportunity to offer our comments on the Standing Committees' proposals. We look forward to working with you further on these important matters.

Very truly yours,

William J. Genego
Santa Monica, CA
Peter Goldberger
Ardmore, PA
Co-Chairs, National Association
of Criminal Defense Lawyers
Committee on Rules of Procedure

Please reply to:
Peter Goldberger, Esq.
50 Rittenhouse Pl.
Ardmore, PA 19003