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National Association of Criminal Defense Lawyers

August 31, 1990

James E. Macklin, Jr., Secretary
Standing Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Washington, DC 20544

Re: Proposed Changes in Federal Rules
of Criminal Procedure and Federal Rules of Evidence
Request for Comments, Issued March 1, 1990

Dear Mr. Macklin:

As Co-Chairs of the National Association of Criminal Defense Lawyers' Committee on Rules of Procedure, we are pleased to submit the following comments on behalf of the 6300 members of our association, and its 42 state affiliates with a total membership of about 20,000.

1. Proposed Change to Fed.R.Crim.P. 16(a)(1)(A)

The proposed changes to Rule 16 concern the government's obligation to disclose, upon request of the defendant, oral statements made by the defendant in response to interrogation by any person then known by the defendant to be a government agent.

Currently, the Rule requires the government to disclose the substance of oral statements of the defendant which the government intends to offer in evidence at trial. The proposed changes are two. First, the government would be required to disclose the substance of oral statements of the defendant whenever "the government intends to use that statement at trial." This would slightly expand the government's obligation by requiring disclosure in situations where the government intends to "use [the] statement at trial" as opposed to requiring disclosure only where the government intends to offer the statement in evidence. Second, the government would be required to disclose "any written record containing the substance of any relevant oral statement" by the defendant, even if the government does not intend to offer the statement in evidence at trial or to use the statement at trial.

The NACDL supports the proposed changes. The changes are commendable in that they expand, albeit slightly, the disclosure of information prior to trial, thereby reducing delays and confusion caused by surprise at trial and increasing the likelihood of a non-trial disposition of the case.

2. Proposed Change to Fed.R.Crim.P. 24(b)

The proposed changes in peremptory challenges of trial jurors are two. First, the proposal would alter the number of peremptory challenges available to the parties in felony prosecutions. Under the current rule, a defendant is entitled to ten peremptory challenges while the government receives six. The proposal would equalize the number of peremptory challenges to six for both the defense and prosecution. Second, the proposal would clarify the current procedure whereby the court may increase the number of peremptory challenges if there is more than one defendant, by requiring that the total number of challenges provided to the government in such circumstances may not exceed the total number of peremptories allocated to all defendants. The proposal also clarifies the procedure for the execution of peremptories in multiple defendant trials by stating that the court may permit multiple defendants to exercise peremptory challenges either separately or jointly.

The NACDL does not object to the equalization of peremptory challenges between the government and the defense in felony prosecutions. While there are arguably reasons why a defendant should be provided with more challenges than the government, we accept that the proposal provides for equality between the parties and brings the rule for felony prosecutions in line with the equal number of peremptories provided for in the current rule for misdemeanor prosecutions and prosecutions where the penalty is death.

The proposal to assign six as the number of peremptory challenges available to each side in felony prosecutions would appear to be arbitrary, as the Note does attempt to justify this choice. While the Committee Note makes reference to three reasons supporting a reduction in the number of peremptory challenges, the reasons given appear to be based on assumptions and speculation which are not supported by any empirical data. While a reduction in the number of peremptories will, at least in some cases, provide for a quicker selection process and reduced jury costs, the potential savings will likely be insignificant. Jury voir dire in federal criminal cases is well known for its speed and efficiency (even when providing the defendant with ten peremptories in felony cases) and there would

not appear to any pressing need to further streamline or quicken the process. Moreover, it has not been established, at least to our knowledge, that the potential gain in reducing the number of defense peremptories to six would outweigh the interest in achieving a representative and satisfactory jury by allowing the parties a greater number of peremptories. This interest is of particular importance to defendants given the notable increase in mandatory-minimum penalty provisions; the defendant's appreciation of the fairness of the entire criminal justice system, as well as that of the defendant's family or other supporters, is vitally affected by their subjective perception of the fairness of the jury. As long as an arbitrary number must be selected, it would appear to be equally defensible and sound to choose eight as the number of peremptories, averaging between the current number assigned the government (six) and the defendant (ten). We therefore support a change to eight peremptories for each side in single defendant cases.

We would also encourage the Committee to modify the proposal for peremptories in multiple defendant cases by adding a requirement that, in any event, each defendant be allowed a minimum of two peremptories. With increasing frequency, the government has seen fit to indict and try large numbers of defendants in so-called "megatrials." Where the government does proceed against a large number of defendants in a single trial, there is a potential that the number of peremptories will be less than the number of defendants. Each defendant should be allowed at least some peremptory challenges, since each defendant may have different objectives in exercising his or her challenges. A defendant should not be deprived of this ability because the government has seen fit to join him or her with a large number of other persons for trial. While there might be some increase in jury selection time and costs from such a requirement, the attendant increase in likely to be relatively minor and further, any increase is properly viewed as a function of the government's prosecutorial decisions and trial strategy.

3. Proposed Change to Fed.R.Crim.P. 35(b)

Criminal Rule 35(b), "Correction of Sentence for Changed Circumstances," currently permits a sentence to be reduced only within one year after imposition, only upon motion of the government, and only "to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person." This is the only provision for modification of a term of imprisonment in current Rule 35 which fulfills the open-ended authority granted in the Sentencing Reform Act, 18 U.S.C. § 3582(c)(1)(B), that the Rule may specify the "extent"

of allowable modification of sentences of imprisonment, beyond those grounds otherwise set forth in the statute.

The Committee proposal would make the caption of this part of the rule more accurate by changing the term "Correction" to "Reduction," would expand the time during which the Court may act on a government motion made within the first year, and would allow such motions also to be made at any later time, if the defendant's assistance involves information not known to the defendant until after the year expires. We believe these changes would be salutary, but that they do not go far enough in accepting Congress's mandate, expressed in § 3582(c), that the Committee develop and articulate substantive grounds for sentence modification that are appropriate under the current sentencing scheme.

a. Title of the Rule. The Committee is right, of course, that Rule 35(b) is currently mislabeled; the sentencing guideline system is not so mechanical that a sentence is now either "correct" or "incorrect" and that any change, to be appropriate, has to be in the nature of a correction. The title should be changed not to "Reduction of Sentence for Changed Circumstances," as proposed, however, but simply to "Modification of Sentence," to reflect the statutory language of § 3582(c)(1)(B). The phrase "for Changed Circumstances" suggests a broad range of grounds for modification, more in line with what NACDL would favor (see point 3.c., below), but is not descriptive of the content of the Rule as it stands or as your Committee would leave it.

b. Substantial Cooperation as a Basis for Sentence Modification. Both the current Rule and the Committee's proposed expansion are too narrowly drawn to fulfill the policy strongly favoring rewards for cooperation by convicted persons expressed by Congress in § 215 of the Sentencing Reform Act and in 18 U.S.C. § 3553(e). The time frames are not realistic, and the restriction to motions filed by the government is unfair to defendants and derogatory of the ability of the courts to administer impartially an adversary system of criminal justice.

The defendant should not be limited to only one year to offer cooperation after sentencing. The appellate process after trial often takes longer than that, and if the defendant is seeking a new trial, s/he may be well advised not to have self-incriminating conversations with government agents. If an appeal is pending, the jurisdiction of the district court to modify the sentence is highly questionable at best. See Berman v. United States, 302 U.S. 211 (1937); United States v. Kerley,

838 F.2d 932, 941 (7th Cir. 1988). Either the defendant or the government might have to abandon a potentially meritorious appeal in order to allow a timely motion under Rule 35(b), either as currently drafted or under the Committee's proposal. (For this reason, regardless of what other changes may be adopted, Rule 35 should be amended to allow temporary relinquishment of jurisdiction from the circuit or Supreme Court to the district court under a procedure akin to that provided in Fed.R.Crim.P. 33, for motions arising during the pendency of an appeal or petition for certiorari. See United States v. Cronic, 466 U.S. 648, 667 n.42 (1984); United States v. Feliciano-Grafals, 309 F.Supp. 1292, 1293, 1295 (D.P.R. 1970).) Early cooperation is ordinarily more valuable, but the defense can and certainly will take this fact into account in making the decision of whether and when to offer assistance to the authorities, as will the court in deciding the extent, if any, of a sentence reduction to grant. Moreover, late cooperation in may cases may still be highly useful to the authorities (often in the most serious kinds of cases, such as ongoing racketeering enterprises and murders), and the Rule should not eliminate all incentives for a defendant to offer it.

In addition, the determination whether a defendant has rendered substantial assistance is appropriately a question for the court to make, after impartial consideration of the facts and the views of the parties, rather than for the prosecutor alone. The policy of encouraging cooperation, as well as the policy of eliminating unwarranted disparity, can only be enhanced by removing the opportunity for a defendant to be denied a reasonable modification of sentence by the unilateral and subjective veto of the prosecutor. We have no doubt that federal district judges will give appropriate weight to the government's position when a defendant files such a motion.

c. Other Appropriate Grounds for Sentence Modification. The Committee should recommend more changes to Rule 35 than those it has proposed. First, it would be appropriate and helpful for Rule 35(b) to refer to the fact that 18 U.S.C. § 3582(c) specifies various occasions on which a sentence may be modified, much as Rule 35(a) currently references 18 U.S.C. § 3742. Second, and more important, the Committee should broaden the grounds on which a sentence can be modified.

It is highly inappropriate and unjust that a criminal sentence should be the only kind of judgment subject to such severe restriction on the time and circumstance when it can be reconsidered. Compare Fed.R.Civ.P. 59, 60. Criminal sentences are no less subject than other judgments to the possibility of error

of many kinds, and more subject than most to the influence of temporary excesses of judicial zeal and passion. See 3 ABA Standards for Criminal Justice, "Sentencing Alternatives and Procedures," § 18-7.1, at 501-02 (2d ed. 1980). Nor does the guideline sentencing system by any means eliminate the opportunity for a significant exercise of judicial discretion -- in selecting a type of sentence, in setting a sentence within a guideline range, or in choosing whether to depart -- such that reconsideration would not be meaningful other than to correct an error under Rule 35(a).

We are aware that in its June 15, 1990, transmittal to the Standing Committee the Criminal Rules Advisory Committee reported that it had considered and rejected "at this point" the suggestion of the Federal Courts Study Committee that the grounds available for modification of sentences be expanded to permit presentation of new factual information within 120 days of sentencing. (We will comment on the proposed new Rule 35(c) and the subject of correction of illegal or erroneous sentences at a later time prior to the October 31 deadline.) The Advisory Committee feels that "there is not a sufficient showing ... of a need" for such a change. July 25, 1990, Proposed Draft, at xi. Based on a practitioner's perspective, we must disagree.

For example, consider a case in which a healthy, middle-aged defendant with no prior record, free on bail pending appeal from a conviction for a nonviolent crime which called for imprisonment based on the dollars involved, suffered complications from life-saving neurosurgery which left him wheelchair-bound, blind and deaf on one side, and unable to feed, wash or toilet himself. It is at least fair to say that these were mitigating circumstances "of a kind or to a degree," 18 U.S.C. § 3553(b), which might have led a reasonable judge to depart downward from an applicable guideline if they had existed at the time of initial sentencing. To prevent a modification of the sentence in this situation is to exalt finality over elimination of disparity to a completely outrageous degree.

To give just one other example, a defendant failed to appear for sentencing on a case in which he had been convicted notwithstanding a claim of innocence. He later surrendered and was sentenced on the earlier charge, and then pleaded guilty to the failure to appear, receiving a consecutive term of imprisonment. A few months into the service of sentence, the appellate court reversed the underlying conviction for insufficient evidence, resulting in the defendant's acquittal. Although this did not exonerate his violation of bail, it would certainly tend to justify a low-end sentence or perhaps even a departure with

respect to the failure to appear. Yet Rule 35 did not permit the judge to reduce the sentence for failure to appear to account for this after-occurring recognition that the defendant was indeed innocent of the crime for which he was to be sentenced.

In other cases, later medical examination reveals psychiatric or psychological evidence, or a history of abuse or other victimization, which tends to excuse, although not to justify, the defendant's criminal conduct to a degree not previously recognized. Even more common are cases in which, after sentencing, various tragedies befall defendants and their families, or new information demonstrates that the defendant's role in the offense was less than had been thought, or there is a late-blooming but genuine remorse and acceptance of responsibility (or where on advice of counsel, in view of a hoped-for new trial, expression of such sentiments has previously been withheld).

Our committee and the NACDL's appellate advocacy and postconviction committees are also aware of a distressingly large number of cases in which defense counsel, at the time of sentencing, failed to recognize and bring to the attention of the court mitigating factors which bore directly on guideline calculation or placement lower within a range, or would have provided grounds for departure. A simple opportunity by motion to seek reconsideration of a sentence on such grounds may reduce the number of petitions under 28 U.S.C. § 2255 asserting ineffective assistance of counsel at sentencing which are otherwise likely to be spawned by the complexity of guideline sentencing.

All of these considerations lead to the conclusion that a sentence should be subject to modification on the basis of new (even if not newly-discovered) information during the same time-frame allowed under the version of Rule 35(b) which remains applicable to pre-SRA cases: 120 days after sentencing or after the completion of the direct appeal process, with the added flexibility that a judge should be able to consider such a motion while an appeal is pending and to grant it upon remand of the record or relinquishment of jurisdiction. Cf. Fed.R.Crim.P. 33 (equivalent provision for new trial motions). While any deadline works against some of the points made in this submission, we recognize that there must be finality at some point, subject to the extraordinary relief available on motion of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A); cf. 28 U.S.C. § 994(t).

Such a modification-of-sentence process is perfectly consistent with the purposes of the SRA. An overriding goal of sentencing

reform, as articulated time and again by Congress, is to avoid unwarranted sentencing disparity. See 18 U.S.C. § 3553(a)(6); 28 U.S.C. §§ 991(b)(1)(B), 994(b). The system's interest in finality, while legitimate, is subsidiary to this goal -- and frequently at odds with other express goals of sentencing reform such as fairness and flexibility (see id. § 991(b)(1)(B)). A single-minded focus on finality which raises artificial bars to reconsideration of an erroneous or disproportionate sentence promotes rather than prevents disparity, unfairness and inflexibility. To eliminate any doubt that the kind of provision we urge would be consistent with the SRA, a simple proviso could be added that motions for modification of sentence must be decided "subject to the requirements of the Sentencing Reform Act of 1984, as amended, and applicable guidelines and policy statements issued by the Sentencing Commission as applied to the facts before the court at the time of deciding the motion."

4. Proposed Change to Fed.R.Evid. 404(b)

The proposed change in Evidence Rule 404(b), which governs the admission of "other crimes" evidence, would require the government, on request of the defendant, to disclose prior to trial "the general nature of such evidence it intends to introduce at trial." The NACDL supports the disclosure requirement. Given the potential impact of such evidence, it is only fair that a defendant be given a meaningful opportunity to challenge the admission of such evidence or, if it is admitted, the reliability of the evidence.

The proposal does, however, in our view, contain a substantial shortcoming which could easily undermine the salutary purpose of the proposed change. As the Committee Note indicates, the proposed change would not require any set time for pretrial disclosure nor does it require any specific form of disclosure. While we accept the difficulty in establishing a set time for pretrial disclosure given the vagaries of individual cases, the same is not true for the form of disclosure.

If pretrial disclosure of the information is to be meaningful, so as to fulfill the intended goals of the proposed change, there should be minimum criteria set for the form of disclosure. For example, as written and interpreted by the Committee Note, in a controlled substance case the prosecution could simply give notice that it intends to introduce "prior instances of drug use by the defendant"; or in a fraud case, the government could simply state that it intends to introduce "prior instances of fraudulent conduct by the defendant." Such limited disclosure is undesirable for at least two reasons. First, such summary

disclosure would seriously undermine the trial court's ability to rule on the admissibility of such evidence prior to trial on a motion in limine. Second, it would make it virtually impossible for a defendant to prepare to meet such evidence, since there would be no effective means to investigate the alleged "other crimes" evidence.

For these reasons, we would strongly urge that the proposal be modified in text, or at least in the Committee Notes, to reflect that the prosecution is obligated to provide the same type of information concerning the "other crimes" evidence that would be required in an indictment or other charging instrument. Under Fed.R.Crim.P. 7(c)(1), as consistently interpreted in the cases, this would only require a concise statement of the essential facts. Given the limited nature of this requirement, the change we propose should not be burdensome on the government. If the prosecution intends to offer such evidence at trial, it will have the additional information concerning date and location easily available. Moreover, as noted above, there are substantial benefits to be gained by such a requirement, as it would enhance the trial court's ability to rule accurately on the admissibility of Rule 404(b) material and would further the fairness objective of the proposal by allowing a defendant a meaningful opportunity to investigate and dispute the evidence.

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

Very truly yours,

William J. Genego
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Co-Chairs, National Association
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cc: Hon. Leland C. Nielson, Chair
Prof. David A. Schlueter, Reporter
Advisory Committee on Criminal Rules