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VIA FedEx Overnight

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., suite 4-170
Washington, DC 20002

Re: Proposed Changes in Federal Rules of Criminal Procedure, Habeas Corpus, and Evidence: Request for Comments Issued August 2002

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit our comments with respect to the proposed changes in the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and the Rules Governing § 2254 and § 2255 Cases. This letter contains our comments on the Criminal and Evidence proposals. Our habeas comments were transmitted earlier by informal memorandum, and a formal letter will follow very shortly. Our organization consists of more than 10,000 members; in addition, NACDL's 79 state and local affiliates, in all 50 states, comprise a combined membership of some 28,000.

COMMENTS ON FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 41. Warrant for Tracking Device; Delay in Notice.

Summary of Comment

The National Association of Criminal Defense Lawyers believes that procedural rules for implementing new statutory authority for searches should serve the purpose of reinforcing constitutional values and restraining excessive law enforcement zeal. The proposed amendments to Fed.R. Crim.P. 41 do not fully achieve these purposes.

Discussion

The Committee has published for comment a group of amendments to Fed.R.Crim.P. 41. Their stated purpose is to afford necessary procedural implementation for expanded search authority conferred by 18 U.S.C. §§ 3103a(b) and 3117. Whether or not NACDL agrees that the adoption of those provisions constituted wise legislation, we agree that such statutory innovations should be implemented, if at all, not only within constitutional bounds, but also with procedural caution and fairness even if that means more than is minimally required by the Constitution. Whether or not every installation and use of a tracking device or other form of new surveillance technology constitutes a "search" within the meaning of the Fourth Amendment -- a subject which is not likely soon to cease being of intense interest to the American people and their courts -- NACDL believes that there are at least two useful benchmarks we can look to in this area: the tradition and jurisprudence of warrant issuance, and Title III of the Omnibus Crime Control Act of 1968, the wiretap law. It is there that we look for guidance in support of our comments.

Taking the amendments to Rule 41(b) first, although these are perhaps not the most important of our comments, the committee should address what we presume to be an unintended lack of parallelism in proposed Rule 41(b)(4) (and, we now note, in subsection (b)(3), as added last time), as compared with subsections (b)(1-2). Proposed new subsection (b)(4) would state that the Magistrate Judge "may issue" a warrant to install or use a tracking device. "May" is ambiguous, as it could mean either "has the authority to" or "has discretion but not an obligation to." Subsections (b)(1) and (b)(2) state that the judge "has authority to" issue a warrant in the situations covered by each of those subsections, which we believe is what is meant by "may" in subsections (b)(3) and (b)(4) also. The wording of (b)(3) and (b)(4) should be conformed to that of (b)(1) and (b)(2).

We also note that although Rule 41(b) refers only to a Magistrate Judge as authorized to issue a warrant, such authority thereby automatically exists also in District Judges, by virtue of Rule 1(c). It might be helpful for some users of the Rule if the Advisory Committee Note called attention to this cross-reference.

We turn now to what our most substantive comments, which concern the proposed revision of Rule 41(d) -- probable cause for issuance of a tracking device warrant. The proposed text reads:

> After receiving an affidavit or other information, a magistrate judge ... must issue the warrant if there is probable cause to search for and seize a person or property or to install or use a tracking device.

We recognize that the only supposedly new language is that adding the reference to tracking devices. But that addition makes evident the need for a general clarification of this

provision. We suggest that it read (with our changes highlighted):

> Upon receiving an affidavit or other information supported by oath or affirmation, a magistrate judge ... must issue the warrant if that information establishes probable cause to search for and seize a person or property or to install and use a tracking device. A warrant to install and use a tracking device may issue only if --
>
> (i) the information provided to the issuing authority establishes probable cause to believe that use of the device will disclose within the permitted time period the existence or location of property or a person for which a warrant may issue under Rule 41(b); and
>
> (ii) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

The reasons for these suggestions should be self-evident. Addressing a point that comes up both in proposed Rule 41(b)(4) and in Rule 41(d)(1), we strongly suggest that no warrant to install a tracking device should be allowed unless there is at present also probable cause to utilize that device; the Advisory Committee's proposed language would allow mere installation, while ours would not. There is an obvious and grave potential for later abuse of latent surveillance devices. It is even more troubling that so far as the committee's proposal states, a device may remain in place indefinitely after it has been "installed"; the time limits in proposed Rule 41(e)(2)(B) only restrict the period during which the warrant may be "used." Therefore, Rule 41(b)(4) should read "to install within the district a tracking device and to use that device;," striking the phrase "or both." Concomitantly, at the end of Rule 41(d)(1), "or" should be replaced in the new phrase with "and." Indeed, we are unable to fathom, and the Advisory Committee Note does not explain, how there could be probable cause to install but not to "use" such a device. The Rule should not allow it.

Others of our suggestions are intended to ensure that the proposed Rule operate under traditional norms for the issuance of warrants. Information in support of a search warrant may become stale, rendering issuance of the warrant unreasonable. The requirement that a warrant issue merely "after" receiving the information fails to recognize this point, while the term "upon" does emphasize the importance of timeliness. In addition, the Fourth Amendment requires that any warrant that issues be supported by "oath or affirmation." The term "other information," used in contrast with "affidavit," seems to eliminate this critical and historic protection. The constitutional language should therefore be added. Moreover, it is not

enough that there "is" probable cause; it must be the information submitted upon oath, and not any other source, that establishes the probable cause.

Further, the meaning of "probable cause" to issue a warrant to search and/or seize is well established. What is meant by probable cause to install (and use) a tracking device is not, as the Reporter's note acknowledges. We cannot agree that it makes sense to use a phrase in a Rule while openly stating that the Committee does not know what the language means. Rather, we think terms used in the Rule should say what the drafters intend to become the law. The Rule need not authorize issuance of tracking device warrants only on the constitutional minimum standard, of course; a standard that protects the pertinent interests is appropriate. We have attempted unambiguously to spell out that standard. Moreover, there is nothing in the proposed language of the Rule, and there should not be, to support the Reporter's comment, in the Note (p. 32), that a "warrant is only needed if the device is installed ... or monitored ... in an area in which the person being monitored has a reasonable expectation of privacy." This phrase -- contrary to the rest of the Note -- does seem to prejudge the constitutional issue (by adopting language from the Katz line of cases). Then, it inappropriately and inadequately focuses on "areas," a limitation on the reach of the Fourth Amendment that has been obsolete for decades, rather than the full range of constitutionally protected interests. That sentence should simply be stricken from the Note.

Our proposal also includes language, copied from Title III, to require that ordinary investigative means be exhausted first. See 18 U.S.C. § 2518(3)(c). This reflects Supreme Court and Congressional concerns, which NACDL certainly shares, about the greater intrusiveness of continuing and undetectable surveillance, as contrasted with a traditional search and seizure, which occurs at a particular moment and is known to the subject, either while occurring or immediately thereafter.

With respect to proposed, revised Rule 41(e), our objections focus on the description of a termination date and on extensions of the time for a tracking device warrant. As under Title III, the 45-day limit should be qualified to provide that the warrant must not authorize use of a tracking device "for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than 45 days." Cf. 18 U.S.C. § 2518(5). Similarly, as under Title III, a tracking device warrant should not only state the period of time during which the use of the device is authorized but also "whether the authorization automatically terminates when and if the existence or location of the property or person sought is earlier disclosed by use of the device or otherwise." Cf. 18 U.S.C. § 2518(4)(e). And, again as under Title III, any extension of the time allowed for the use of a tracking device warrant must

not be for any period of time "longer than the authorizing judge deems necessary to achieve the purposes for which the warrant was initially granted and in no event for longer than 30 days." Cf. id. When surveillance, including tracking, proves fruitless for 45 days, significant doubt is cast on the original determination of probable cause. After another 30 days without achieving its objective, the probability of success falls so low that the tracking should terminate.

With regard to execution and return of a tracking device warrant under proposed Rule 41(f)(2), the magistrate judge should be authorized to extend the time for service of the warrant, after the surveillance has ended, "on one or more occasions, for good cause ... for a specified, reasonable period, not to exceed a total of 90 days after use of the device has ended." The open-ended language of the proposal is too vague, and fails to require the magistrate judge to specify the duration of any extension. The proposed provision in Rule 41(f)(3), while perhaps "co-extensive with" the USA-PATRIOT Act's new 18 U.S.C. § 3103a(b), fails to seize the opportunity to render that statute constitutional as applied, by requiring that any extension of time to give notice be reasonable in scope. Rule 41(f)(3) should require that any such extensions be of limited, specified duration, and must in no event not be granted for any total period exceeding 90 days, as under 18 U.S.C. § 2705(a)(1)(A). Moreover, the "good cause" for any such extensions should nor be left undefined, as in the committee's proposal, but must include a showing of reasonable grounds to believe that failure to grant the extension will "have an adverse result," as defined in id. § 3103a(b)(1), incorporating id. § 2705(a)(1)(A) and (a)(2).

Adoption of our suggestions would employ the Committee's power to specify procedures in a manner designed to check the misuse of new forms of surveillance technology, in keeping with both the requirements and the spirit of the Fourth Amendment.

COMMENTS ON FEDERAL RULES OF EVIDENCE

Rule 804(b)(3). Statement Against Penal Interest.

Summary of Comment

We have previously advised the Committee (2002 comments) of NACDL's view that no additional reliability requirement are appropriate before allowing exculpatory statements against interest, but that additional protections against false inculpatory statements are needed. At most, the reliability issues regarding statements against penal interest are equal as between inculpatory and exculpatory statements; the defendant's burden should not be greater than the prosecutor's. We therefore support, in general, the amendment of Rule 804(b)(3) to require that statements against penal interest offered to inculpate the accused be subject to an additional showing of trustworthiness.

The amendment should not, however, be adopted "to assure that the exception meets constitutional requirements," nor should the Committee Note justify or explain the special showing of trustworthiness the amendment would require of such statements by reference to the Sixth Amendment's Confrontation Clause. The Clause applies to all statements against interest offered by the prosecution against an accused in a criminal case, not just to statements against penal interest or statements against penal interest offered to inculpate the accused. Instead, justification for the additional showing of trustworthiness that the proposed amendment would apply to such statements rests on the inherently suspect nature of self-incriminating statements implicating others in wrongdoing, and the powerful incentives that exist for making such statements in today's federal criminal justice system. The Rule should be amended to subject statements against penal interest offered to *inculpate* an accused to a special showing of trustworthiness, for experience-based reasons similar to those which are traditionally invoked to justify subjecting statements against penal interest to an additional showing of trustworthiness when offered to *exculpate* an accused.

The separate, and additional showing of trustworthiness that the prosecution must establish with respect to all statements against interest in order for them not to be excluded by the Confrontation Clause should addressed, if at all, by a separate provision of the rules, noting that a statement admissible under a hearsay exception must still clear any applicable Confrontation Clause barrier when offered against the accused in a criminal case.

Discussion

Rule 804(b)(3) codifies the "statement against interest" exception to the hearsay rule. Rule 803(b)(3) provides that a statement is "not excluded by the hearsay rule" where the following requirements are satisfied:

> (1) the declarant is unavailable, as defined by Rule 804(a);
>
> (2) the declarant had personal knowledge of the facts
>
> (3) at the time the statement was made, it was
>
> -- so far contrary to the declarant's pecuniary or proprietary interest,
> -- or so far tended to subjected the declarant to civil or criminal liability,
> -- or so far to tended to render invalid a claim by the declarant against another,
>
> that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

The Rule as presently in effect requires a heightened showing of reliability for statements against penal interest which are offered in a criminal case "to exculpate the accused," Fed.R.Evid. 804(b)(3). In that circumstance, the rule requires that "corroborating circumstances clearly indicate the trustworthiness of the statement."

The revised proposed amendments to Rule 804(b)(3) would expand the circumstances in which statements against penal interest are subject to an additional showing of trustworthiness to include the following:

- when offered in a criminal case by the prosecution "to inculpate an accused": the additional showing of trustworthiness required in that circumstance would be that the statement "is supported by particularized guarantees of trustworthiness." Amended Rule 804(b)(3)(B);
- when "offered in a civil case": the additional showing of trustworthiness required in that circumstance would be that "it is supported by corroborating circumstances that clearly indicate its trustworthiness." Amended Rule 804(b)(3)(A).

In other words, under the proposal, statements against penal interest offered in a civil case would be subject to the same heightened standard as statements offered by the defense in a criminal case. Statements of the same nature offered to support the prosecution position, however, would be subject to a less heightened requirement. NACDL opposes that approach.

As we attempt to explain in these comments: (1) The amendment does not achieve its stated objectives; (2) By explaining the proposed amendment as being necessary and sufficient to satisfy the constitution, the Committee Note creates constitutional problems where none currently exist; and (3) It wrongly implies that the Rules of Evidence are intended to, and do, codify the restraints the Constitution places on the admission and exclusion of evidence.

A. Statements Against Penal Interest Offered to Inculpate an Accused Should Be Subject to an Additional Showing of Trustworthiness

We agree with the Committee that Rule 804(b)(3) should be amended to require statements against penal interest offered by the prosecution in a criminal case to inculpate an accused be subject to an additional showing of trustworthiness, beyond that now required under the Rule and stricter than is required of other statements against interest, in order not to be excluded by the hearsay rule. Conditioning statements against penal interest offered to inculpate the accused on an additional showing of trustworthiness is justified by the inherently suspect nature of such statements, especially in today's federal criminal justice system. From the pre-indictment investigative stage to sentencing stage and thereafter, the federal criminal justice system offers powerful incentives and provides substantial rewards to those who incriminate themselves and inculpate others. Those incentives and rewards inevitably result in some witnesses' falsely inculpating others to save themselves, rendering such statements as a category inherently suspect.

The proposed Committee Note explains this amendment of Rule 804(b)(3) on a different basis that we have just identified. Instead, the Note states that the amendment is "intended to assure that the exception meets constitutional requirements, and to guard against the inadvertent waiver of constitutional protections." The Committee Note fails for several reasons to justify or explain the special showing of trustworthiness the amendment would require of such statements by reference to the constitutional requirements of the Confrontation Clause.

The Confrontation Clause applies to all statements against interest offered by the prosecution against an accused in a criminal case, not just to statements against penal interest or statements against penal interest offered to inculpate the accused. See Lilly v. Virginia, 527 U.S. 116 (1999). Neither the Constitution generally nor the Confrontation Clause in particular imposes special reliability requirements on hearsay statements against the declarant's interest according to the nature of the interest or the fact the statement is offered to prove, and thus they do not and cannot justify or explain the special showing of trustworthiness that the amendment would require of statements against penal interest offered to inculpate the accused.

To begin with, the suggestion in the Report of the Advisory Committee On Evidence Rules that "after Lilly, Rule 804(b)(3) as written is not consistent with constitutional standards" is unfounded because the Rule does not make a statement against interest admissible, it only provides that a statement which meets the exception is "not excluded by the hearsay rule." Rule 804(b) (emphasis added). Moreover, the proposed amendment fails

"to assure the exception meets constitutional requirements," because it only subjects statements against penal interest to the constitutional requirements of the Confrontation Clause. By explaining the proposed amendment as being necessary and sufficient to satisfy the Constitution, the Note would create constitutional problems where none currently exist. The amended rule would create constitutional problems because it would make it appear, incorrectly, that the Judicial Conference believes that the showing of trustworthiness required by the Confrontation Clause only applies to statements against penal interest, and does not apply to other statements against interest, or to other hearsay statements.

Further, the proposed amendment should not be justified or explained by reference to the requirements of the Confrontation Clause because it wrongly suggests that the Rules of Evidence attempt to codify the constraints that the Constitution may place on the admission, or exclusion, of evidence in criminal cases. The Rules are not intended for that purpose, and for good reason. In particular, the admirably slow and deliberative Rules Enabling Act process make the Rules ill-suited to stay current with constitutional law as developed by case law. As a result, even to suggest to practitioners that all that they need to know about constitutional evidence is found in the Rules would increase "the inadvertent waiver of constitutional protections," rather than guard against such inadvertent waivers, one of the Committee's commendable objectives.

B. The Additional Showing of Trustworthiness Should Be at Least the Same Showing Required of Statements Against Penal Interest Offered to Exculpate an Accused

The proposed amendment of Rule 804(b)(3) would require that the prosecution provide a showing of "particularized guarantees of trustworthiness" when a declaration against penal interest is offered to inculpate an accused in a criminal case. This is a lower additional burden than presently exists for the admission of statements against penal interest offered by the defense (and lower than the Rule would require in civil cases). What the Committee should do instead is require an additional showing of trustworthiness at least equal to that required of statements against penal interest offered to exculpate an accused.

The only "justification" for subjecting exculpatory statements to a more restrictive standard of admissibility appears to be a statement in the Advisory Committee Notes to the 1972 proposed rules, relating that the Committee "believed ... that statements of this type tending to exculpate the accused are more suspect and so should have their admissibility conditioned upon some further provision insuring trustworthiness." Such an expression of mere belief, unaccompanied by explanation or evidence, does not justify excluding statements against penal interest offered to exculpate an accused which otherwise satisfy

the conditions for admission of statements against interest. Many categories of evidence are admissible and routinely received in criminal trials which experience teaches are often unreliable, such as eyewitness identifications (whether in the courtroom or from photographs), stationhouse confessions, co-conspirator hearsay, the testimony of paid ex-accomplices, and the defendant's own testimony. We rely on cross-examination, cautionary instructions where warranted, and the jury's collective good judgment to maximize accurate verdicts. Surely statements against penal interest offered to exculpate an accused are not so much less reliable than these others, as a class, that a sui generis barrier to admissibility is appropriate.

Whether or not a special trustworthiness requirement for exculpatory statements against penal interest can be justified, substantial reason does exist for subjecting statements against penal interest offered by the prosecution to inculpate the accused to an additional showing of trustworthiness. The statement-against-interest hearsay exception does not itself provide a guarantee of reliability sufficient to satisfy the demands of the Confrontation Clause. See Williamson v. United States, 512 U.S. 594 (1994). Thus, not being "firmly rooted" in our legal history, to avoid constitutional error the Confrontation Clause such statements require an additional showing of trustworthiness before they can be admitted. See Lilly v. Virginia, 527 U.S. 116 (1999).

Conditioning the admission of statements against penal interest offered by the prosecution on an additional showing of trustworthiness is also justified by the inherently suspect nature of such statements, especially in today's federal criminal justice system. To an unprecedented degree, from the pre-indictment investigative stage to the sentencing stage and thereafter, the federal criminal justice system today offers powerful incentives and provides substantial rewards to those who incriminate themselves and inculpate others. Those incentives and rewards inevitably result in some witnesses' falsely inculpating others to save themselves, and in shifting of responsibility and exaggerating of others' roles, rendering such statements as a category inherently suspect. Cf. Williamson, 512 U.S. at 603 (acknowledging less-reliable nature of self-incriminating statements offered "to shift blame or curry favor"). While most accomplice testimony is not presented in the form of hearsay, when it is, as in the cases governed by Rule 804(b)(3), the reliability problems are only exacerbated.

For these reasons, "corroborating circumstances that clearly indicate trustworthiness" should be required, and not merely "particularized guarantees of trustworthiness", before the prosecution is be allowed to obtain admission of hearsay statements on the basis of their having been made against the declarant's penal interest.

C. The Constitutional Restraints and Requirements Should Be Addressed Separately, if at All

We agree that the Evidence Rules might usefully include an explicit acknowledgement that the Confrontation Clause constrains the admissibility of hearsay statements offered by the prosecution in criminal cases. This cautionary provision should not be unduly restrictive or limited, however. An example of such a provision can be found in the California Evidence Code:

> **Hearsay offered against a criminal defendant.** A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California.

Cal.Evid.Code § 1204. The separate and additional showing of trustworthiness that the prosecution must establish with respect to statements against interest in order for them not to be excluded by the Confrontation Clause should addressed, if at all, by a similar, separate provision of the federal rules.

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

Very truly yours,

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