February 14, 2012
via e-mail

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

COMMENTS OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Concerning Proposed Amendments to
the Federal Rules of Evidence
Published for Comment in August 2011

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 Appellate Procedure. NACDL's comments on the proposed amendments to the Appellate and Criminal Rules are being submitted separately. Our organization has more than 12,000 members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of about 35,000 private and public defenders. NACDL, which celebrated its 50th Anniversary in 2008, is the preeminent organization in the United States representing the views, rights and interests of the defense bar and its clients.

FRE 803(10). The Committee proposes to amend Rule 803(10) ("absence of a public record" exception to the hearsay rule) to ensure that its implementation does not violate the Confrontation Clause as explicated by the Supreme Court in *Crawford v. Washington*, 541 U.S. 46 (2004), and elaborated in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). The amendment would take advantage of the "notice and demand" procedure approved by the Court in *Melendez-Diaz*, by allowing "a prosecutor" who "intends" to use a certification to prove the absence of a public record to provide "written notice of that intent at least 14 days before trial ...." The certification will then be admissible, notwithstanding the hearsay rule and presumably without violating the Confrontation Clause if "the defendant does not

object in writing within 7 days of receiving the notice – unless the court sets a different time for the notice or the objection." In principle, NACDL does not disapprove of this amendment, but we see problems with the wording and the timing aspects.

First, the obligation should be placed on "the government," not on any particular "prosecutor." Second, the obligation should not depend on any subjective state of mind (what the prosecutor "intends" to do at trial). Rather, the Rule as amended should be framed objectively: that is, in terms such as these: "and (B) *provided*, that in a criminal case, a certification does not satisfy this paragraph unless the government has provided written notice that it will rely on such a certification …."

As to the timing aspect, the government's ability to rely on a certification to prove an essential fact (or to rebut a likely affirmative defense, such as the defendant's claimed possession of a pertinent license) should depend primarily on its compli-ance with Fed.R.Crim.P. 16(a)(1)(E), since the certification will qualify as a "document[] … within the government's possession, custody, or control" that "the government intends to use … in its case-in-chief at trial …." (Indeed, as written, this amendment could easily be misinterpreted to create an exception to Criminal Rule 16(a)(1)(E) for such certifications.) The typical case is one where the defendant is charged with failure to file an income tax return, to make some required payment, or to register with some agency, or the like. To establish probable cause before the grand jury as to this element, the government will have to have conducted the records search before indictment, not shortly before trial. Thus, 14 days before trial is the very latest such notice should be tolerated, and there should not be any hint of a suggestion that 14 days' notice is ordinarily considered sufficient.

The authority of the trial court to set "a different time for the notice" should be revised to provide that no lesser time before trial for disclosure is permissible, only an earlier deadline. Otherwise, the defense will not have a reasonable opportunity to investigate or evaluate the credibility of the critical claim that "a diligent search failed to disclose a public record …." For the same reason, even seven days will often be too little time (*Melendez-Diaz* requires sufficient time to object, after all, as a constitutional matter), and the language establishing the trial court's authority to set "a different time for … the objection" must be revised to ensure that under no circumstances may the objection period be less than ten days. Moreover, the Advisory Committee Note should make clear that where the notice is given early (such as in the Rule 16(a) discovery), the court's authority to allow "a later objection" includes both the power to set a later deadline and the power to permit – and should ordinarily permit, on request – an objection to be lodged after the time has otherwise expired, thus allowing the defense to rescind its consent or waiver closer to the time of trial, so long as the government is not unfairly prejudiced. For all these reasons, NACDL suggests that the amendment be revised to read:

> … and
>
> (B) *provided*, that in a criminal case, a certification does not satisfy this paragraph unless the government has provided written notice that it will rely on such a certification in connection with its disclosure under Fed.R.Crim.P. 16(a)(1)(E), and in any event at least 14 days before trial, and the defendant does not object in writing within ten days of receiving

the notice – unless the court sets an earlier time for the notice or allows a later objection.

The National Association of Criminal Defense Lawyers is grateful for the opportunity to submit its views on this proposal. We look forward to continuing to work with the Committee in the years to come.

Very truly yours,
s/Peter Goldberger

Alexander Bunin
Houston, Texas
Cheryl Stein
Washington, D.C.
William J. Genego
Santa Monica, CA
Peter Goldberger
Ardmore, PA

National Association of Criminal Defense Lawyers
Committee on Rules of Procedure

Please reply to:
Peter Goldberger
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
peter.goldberger@verizon.net