February 28, 2002
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 and of Evidence: Request for Comments Issued August 2001

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 and Federal Rules of Evidence, 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.

COMMENTS ON FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 35. Correcting or Reducing Sentence.

Summary of Comment

The National Association of Criminal Defense Lawyers agrees that Rule 35 should be amended to render unnecessary "the significant number of appeals" that could be avoided if the time for correcting an error in the sentence continued until the time for taking an appeal, rather than ending seven days after the oral announcement of the sentence. This objective can be best achieved, we believe, in a different manner from that proposed for comment; that is, by amending the Rule instead to provide that an error in the sentence may be corrected any time prior to expiration of the time for taking an appeal, together with a corresponding amendment of Fed.R.App.P. 4(b)(3)(A) designating a motion to correct an error in the sentence under Rule 35 as a motion which extends the time for filing a

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notice of appeal until ten days after the entry of the order disposing of the motion.

We do not believe there is a need or reason to amend the provisions of present Rule 35(b) (to be recodified as Rule 35(c)) governing calculation of the time periods applicable to substantial assistance sentence reduction motions, as would result from the Advisory Committee's proposal.

Discussion

The Committee has published for comment an amendment to the restyled and amended version of Rule 35, scheduled to become effective December 1, 2002 (absent contrary action by the Supreme Court). The amendment would add a new subparagraph (a), which would define "sentencing" to mean "entry of judgment," for purposes of Rule 35. The problem the Committee would address by this proposal is real, but there is a better solution.

Establishing a unique definition of the term "sentencing" in Rule 35, applicable only to that rule, would not only be confusing to courts and practitioners, but it would also affect other date calculations not intended to be addressed by the Committee. The event of "sentencing" is used in the restyled and amended version of Rule 35 to demarcate three time periods, all of which would be changed by the proposed amendment. The term "sentencing" is used in Rule 35 as the date:

- after which the district court has seven days to correct an error in the sentence, present Rule 35(c)/new 35(b);
- after which the government has one year to file a motion for reduction of the defendant's sentence for substantial assistance, present Rule 35(b)/new 35(c); and
- to be used in determining whether the conditions required for a court to grant a substantial assistance sentence reduction motion filed more than one year after the sentencing are satisfied, present Rule 35(b)/new 35(c).

The effect of the amendment would be that the date to be used for all of the above purposes would be the date of the entry of judgment, rather than the date of the oral announcement of the sentence. The proposed amendment would not only introduce a new confusion into the vocabulary of federal criminal procedure, but would also have unjustified and perhaps unintended consequences in relation to a different subsection of the Rule.

The Committee Note accompanying the amendment explains that the justification for choosing the "entry of judgment" date over the date of the "oral announcement of the sentence" is that it is the later of the two dates, and for that reason it will help prevent the "significant number of appeals" that are now made necessary because the seven-day period within which a district court may correct an error in the sentence has expired before

the error can be corrected, even though time remains to correct the error before an appeal must be taken. We agree that Rule 35 should be amended in a manner that achieves this objective of preventing as many such unnecessary appeals as possible.

Amending the Rule to provide that the seven-day period does not begin to run until the entry of judgment, however, will not fully achieve that objective. (In this regard, it should be noted that the "seven days" under present Rule 35(c), being fewer than eleven, are seven working days, by virtue of Rule 45(a). The time allowed for the court to act is actually nine calendar days in most cases.) Where a court is not able to rule on a motion to correct an error in the sentence within seven days of the entry of judgment, an appeal will still be made necessary that might have been avoided if the court had time to rule on the motion, even though the Appellate Rules, as expected to be amended effective December 2001 will allow ten working days from entry of judgment to file the notice of appeal, a change from the present ten calendar days.

We believe the intended objective can be best achieved by amending the Rule to provide that an error in the sentence may be corrected at any time prior to expiration of the time for taking an appeal, together with a corresponding amendment of Fed.R.App.P. 4(b)(3)(A) designating a motion to correct an error in the sentence under Rule 35(c) as a motion which extends the time for filing a notice of appeal until ten days after the entry of the order disposing of the motion. Technical correction motions would thus be treated the same way the Rules treat other motions to amend a judgment -- as terminating the appeal time, with a new appeal period commencing upon entry of the order on the motion. This action would insure that an otherwise avoidable appeal will never be made necessary by the district court's inability or failure to rule on a motion before the time for taking an appeal has expired, by eliminating the need to retain the unwieldy provision of Rule 35(c) requiring the district judge to act within seven days.

Even if it were decided to amend the Rule to make the seven day period for correcting an error to run from the entry of judgment, we do not believe such a change should be accomplished by redefining "sentencing," for purposes of Rule 35 only, to mean "entry of judgment." Rather, the change should be effected by replacing the term "sentencing" in the first clause of Rule 35(a) with the words "entry of judgment." This would accomplish what the amendment is intended to achieve, without affecting other provisions of the Rule or introducing a new confusion into an area which is already replete with burgeoning technicalities. In contrast, a rule-wide redefinition of "sentencing" would have the effect of also altering the calculation of the time periods governing substantial assistance reduction motions under present Rule 35(b) (proposed to be redesignated as Rule 35(c)). We do

not know of any reason why the Rule 35 substantial assistance time periods should be calculated from the entry of judgment, rather than the date of the oral announcement of the sentence. Nor does the Committee Note offer any reason for such a change. Moreover, the oral announcement of the sentence is the more appropriate event to use for purposes of calculating the one-year time period under (current) Rule 35(b), because easy ascertainment of the controlling date is more important than extending the one-year period by what will be, at most, a matter of days.

Alternatively, and at the least, Appellate Rule 4 should provide that if a timely motion to correct a sentence is filed under redesignated Rule 35(b), 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 would expire), whichever comes first, or (ii) the entry of judgment. A defendant contemplating a sentencing appeal on a technical or arithmetic sentencing issue may choose not to appeal if the question 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's 2000 note).

Surely the Committee was right last year to delete the present Rule 35(a), which served no real purpose; it goes without saying that a district court may (indeed, it must) correct a sentence as directed on remand following a sentencing appeal. However, rather than introduce a unique and unnecessary definition of "sentencing" as a new Criminal Rule 35(a), the Committee should take this opportunity to restore part of a provision dropped from Rule 35(a) in 1987 by the Sentencing Reform Act, but made necessary again by the introduction of a statute of limitations for motions under 28 U.S.C. § 2255 in 1996. The Rule formerly provided that "the court may correct an illegal sentence at any time." The Committee should create a new Rule 35(a) at this time to provide 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 or availability of § 2255 or other traditional means of collateral attack.

COMMENTS ON FEDERAL RULES OF EVIDENCE

Rule 608(b). Specific Instances of Conduct.

Summary of Comment

NACDL fully supports the proposed amendment to Evidence Rule 608(b). The proposed amendment only makes more clear what the Rule already intends -- that the prohibition against proving a specific instance of conduct by a witness with extrinsic evidence only applies where the specific instance of conduct is offered to attack or support the witness's character for truthfulness. In other words, the prohibition does not make extrinsic evidence inadmissible to prove a specific instance of conduct by a witness, if the specific instance is relevant to attack or support the witness's credibility, on a basis other than his or her character for truthfulness.

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

Summary of Comment

NACDL agrees that the existing asymmetry in Evidence Rule 804(b)(3) should be remedied; presently, a statement against penal interest that would otherwise be admissible, is not admissible when offered to exculpate the accused "unless corroborating circumstances clearly indicate the trustworthiness of the statement." However, we do not agree that the way to remedy the asymmetry is to subject all statements against penal interest to the additional showing of reliability now required only if they are offered to exculpate the accused.

Admission of a statement against penal interest offered to exculpate an accused should not be subject to requirements beyond those necessary to satisfy the traditional hearsay exception itself. Those requirements are sufficiently rigorous to provide an adequate guarantee of reliability for such statements to be received by the jury, which may then evaluate the weight to which they are due. No legal reason or factual basis supports subjecting this exculpatory evidence to a more stringent standard. Admission of statements against penal interest offered by the prosecution to inculpate an accused, on the other hand, should be conditioned upon a showing of reliability beyond what is required to meet the general hearsay exception. Conditioning the admission of such statements on a specific showing of reliability is required as a matter of constitutional law by the Confrontation Clause of the Sixth Amendment, and is warranted as a matter of fact by the inherently suspect nature of incriminating statements implicating others in wrongdoing, given the powerful incentives that exist for making such statements in today's federal criminal justice system.

For these reasons, NACDL believes that the asymmetry of the present Rule should be maintained, but the objects of the asymmetry should be reversed. Any statements against penal interest offered by the prosecution to inculpate the accused should be subject to the additional showing of reliability that the Rule now applies to statements against penal interest offered to exculpate the accused.

Discussion

Rule 804(b)(3) codifies the hearsay exception for statements against interest. For a hearsay statement to be admissible under Rule 804(b)(3), the following requirements must be 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 without believing it to be true.

The Rule subjects one type of statement against interest to an additional showing of reliability -- a statement against penal interest that would otherwise be admissible, is nevertheless not admissible when offered to exculpate the accused "unless corroborating circumstances clearly indicate the trustworthiness of the statement." The proposed amendment to Rule 804(b)(3) is intended to remedy this asymmetry in the Rule.

If the purpose of the proposed amendment is symmetry, the amendment should make the additional showing of trustworthiness required for admission of statements against penal interest offered to exculpate the accused, also applicable to statements against penal interest offered by the prosecution to inculpate the accused. The amendment instead proposes to remedy the asymmetry by making this additional showing of trustworthiness a condition of admission for all statements against penal interest -- even statements against penal interest offered in a civil proceeding or offered in a criminal proceeding for a purpose other than exculpating or inculpating the accused. The Committee Note does not attempt to justify this proposed remedy by contending that statements against penal interest, as a category, are less trustworthy than the other statements against interest that are made admissible by Rule 804(b)(3). Absent

such justification, there is no basis for subjecting statements against penal interest to an additional showing of trustworthiness not required for the admission of other statements against interest.

This same reasoning applies to statements against penal interest offered to exculpate the accused. The only "justification" for subjecting such 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 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.

Subjecting the admission of such exculpatory evidence to a more restrictive standard than is applied to other hearsay statements against interest is inconsistent with, any may violate, the right of an accused to present evidence in his or her defense. See Chambers v. Mississippi, 410 U.S. 284 (1973); but see La Grand v. Stewart, 133 F.3d 1253 (9th Cir.), cert. denied, 525 U.S. 971 (1998) (additional showing of trustworthiness required for admission of statements against penal interest offered to exculpate an accused does not violate due process). In any event, it flatly contradicts the ancient preference of our criminal justice system that it is better that 99 guilty persons go free than that one innocent suffer wrongful conviction. See, e.g., Schlup v. Delo, 513 U.S. 298, 325 (1995). To the extent that self-incriminating statements of a declarant offered to exculpate another may in fact sometimes be deemed somewhat suspect, a cautionary instruction may be added to the trial court's charge on credibility, like that often given to caution juries about the testimony of accomplices or drug addicts.

In contrast, substantial justification does exist for subjecting statements against penal interest offered by the prosecution to inculpate the accused to an additional showing of trustworthi-

ness. The statement-against-interest hearsay exception has not been declared to provide a guarantee of reliability sufficient to satisfy the demands of the Confrontation Clause. See Williamson v. United States, 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994). Thus, the Confrontation Clause requires an additional showing of trustworthiness before such statements can be admitted, without causing constitutional error. See Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (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, NACDL believes that asymmetry in the Rule is quite justifiable, but the direction of the asymmetry should be reversed. Hearsay statements against penal interest offered by the prosecution to inculpate the accused should be subject to the additional showing of reliability that the Rule now applies to statements against penal interest offered to exculpate, that is, to judicial screening for "corroborating circumstances clearly indicat[ing] the trustworthiness of the statement." Statements against penal interest offered to exculpate -- such as the confession of someone other than the defendant -- should be admissible without a further showing, subject only to a cautionary instruction in appropriate cases.

As always, NACDL appreciates the opportunity to offer the Standing Committee 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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