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Submitted online

Acting Secretary and General Counsel
Committee on Practice & Procedure
Judicial Conference of the United States

AMENDMENT TO CRIMINAL RULES PROPOSED FOR COMMENT, Aug. 2021

To the Committee and Staff:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed addition of a new Rule 62 of the Federal Rules of Criminal Procedure.

Founded in 1958, NACDL is the preeminent organization in the United States representing the views, rights and interests of the criminal defense bar and its clients. Our association has almost 10,000 direct members. Including NACDL's 95 state and local affiliates, in nearly every state, we speak for a combined membership of some 40,000 private and public defenders, along with many academics.

CRIMINAL RULE 62 – RULES EMERGENCY

The new Criminal Rule 62, proposed to be adopted in coordination with similar Civil, Appellate and Bankruptcy Rules, would describe in detail when and how the federal courts may carry on with handling criminal cases in the event of an emergency situation – such as the current pandemic – that renders full compliance with the ordinary rules not feasible. By commenting on certain specifics of this Rule, NACDL does not mean to denigrate the larger concerns expressed by our colleagues, the Federal Public Defenders, in their letter to the Advisory Committee of August 11, 2020, warning how history teaches that "emergency" measures can become permanent and exceptional powers may come to seem ordinary. We see, however, that seemingly strong limitations have been written into Rule 62 to make it difficult to trigger, and requiring its application to end when the justification for its invocation has ceased. On the understanding that these protections will be scrupulously honored, we offer these particularized observations.

We appreciate the committee's obvious close attention to the need for the Criminal Rule on this subject to protect fairness to the accused in a way and to a degree that does not apply in other kinds of cases. The Bill of Rights requires no less. That said, we are concerned that the Rule may not go far enough in that direction, or if it was intended to go far enough, then the Advisory Committee Note should be further strengthened to underscore the point. Our particular concern is with the protections for the right of the defendant to "consult" with counsel before (as well as during) a proceeding conducted under the emergency rule. Our members' experience over the past two years is that the

pandemic, to an even greater degree than it has affected the courts, has affected the already tenuous ability of jails and other detention facilities to function adequately. As a result, our members have often been unable to consult with their clients – a critical aspect of rendering effective assistance of counsel – as frequently, for as long, or with sufficient privacy, as is required for us to establish a proper attorney-client relationship and to fulfill our professional duties and constitutional mission.

For this reason, we are grateful for the reiteration in each of the subsections of proposed Rule 62(e) of a requirement that a videoconference in lieu of a conventional in-person court appearance must not proceed unless the court finds that there has been an "adequate opportunity for confidential consultation" between counsel and defendant before, as well as during, the proceeding. We urge the committee to direct the Reporters to add to the Note that an "adequate opportunity" will ordinarily require an unhurried and confidential meeting between the accused and counsel that occurs well before – and whenever feasible, not on the same day as – the proceeding itself. A few minutes' consultation immediately prior to the videoconference will rarely suffice to meet this critically important requirement. As we read it, the current draft Note is silent on what is meant by "before," and does not suggest, as it should, that the requirement of consultation "before" the proceeding would ordinarily not be satisfied by a few minutes of contact just before appearing before the judge, while the other participants are kept waiting.

Response to Certain DOJ Comments:

1. In its letter to the Committee dated January 26, 2022, the Department of Justice recommends an addition to the Committee Note for Rule 62(d)(1) that would subordinate the emergency power to the admonitions of 18 U.S.C. § 3771(a), the Crime Victims' Rights Act. We strongly disagree. The current draft Note is entirely correct to group alleged victims with other members of the public for this purpose. The CVRA does not dictate the details of "victim" notice or access, and in some respects is superseded by Fed.R.Crim.P. 60. As to procedural implementation, then, under the principles of the Rules Enabling Act the CVRA's notice and attendance requirements are properly subordinated to the provisions of the new Rule (in the event of a qualifying emergency), just as it is to Rule 60(a) in ordinary times. The Department's suggested addition to the Committee Note would not "avoid confusion" but rather would engender it, by encouraging challenges by alleged "victims," either before or after the fact, to proceedings held in accordance with the Rule.

2. The Department also belatedly suggests adding a new provision (d)(5) to proposed Rule 62, to permit the extension of the term of an ordinary grand jury (as contrasted with a "special grand jury") beyond the 18 months (and six-month extension) allowed by Criminal Rule 6(g). This is a substantial change to the proposal which would require republication. It should be rejected for that reason alone. It is also unwise. Grand juries expire after 18 months for good reason: to prevent the development of too close a relationship between jurors and prosecutors, and thus to protect the grand jury's independence. See *United States v. Skulsky*, 786 F.2d 558, 562 (3d Cir. 1986); *United States v. Fein*, 504 F.2d 1170, 1178–79 (2d Cir. 1974). The limited term also ensures a greater level of public participation due to turnover in composition of the jury, again protecting

the grand jury's historic independence that explains and thus necessarily informs its enshrinement in the Fifth Amendment. If an emergency does not prevent previously-sworn grand jurors from continuing to meet (as would occur under the government's belated proposal), then we do not see how it would prevent the empaneling of a new jury, if needed. The Committee should not adopt the Department's suggestion in this regard.

We thank the Committee for its excellent and valuable work and for this opportunity to contribute our thoughts. NACDL looks forward to continuing our longstanding relationship with the advisory committees as a regular submitter of written comments.

Respectfully submitted,
THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

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