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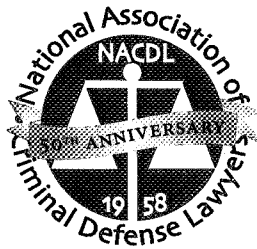
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December 5, 2008

Honorable Lee H. Rosenthal, Chair
Committee on Rules of Practice and Procedures
Judicial Conference of the United States
Washington, D.C. 20544

Dear Judge Rosenthal and Members of the Committee:

Thank you for requesting comments from the National Association of Criminal Defense Lawyers on the proposed legislation extending statutory deadlines. We especially appreciate the second effort made to seek NACDL's comments after not receiving a response when the material was sent to us earlier. We do not know how it is that we did not respond when the material was sent to us previously, but it was surely unintended and we regret any resulting inconvenience.

Conflicts and ambiguities between provisions of the Rules, on the one hand, and related statutes, on the other, are a persistent source of confusion and thus of inadvertent errors by judges and counsel alike in federal criminal practice; statutory provisions setting deadlines are often the culprit. The Committee's approach of asking Congress to amend statutory time deadlines so they effectively will be the same period of time under the new "days-are-days" method of calculating time periods as they were under the former calculation method is straightforward and we agree is non-controversial. There are, however, two statutory

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Honorable Lee H. Rosenthal, Chair
December 5, 2008
page 2

provisions that we believe should be amended differently than as is proposed in your memorandum, and two additional amendments we would urge the Committed to consider and propose.

1. 18 U.S.C. § 3060(b)

It is proposed that section 3060(b) be amended to change "ten days" to "fourteen days" to clarify, without intent to change, the time period within which a preliminary examination must be held. We believe section 3060(b) should instead be amended to state that preliminary examinations shall be scheduled (or held) "within the time provided in the Federal Rules of Criminal Procedure."

The time deadline within which preliminary examinations must be held is also specified in Fed. R. Crim. P. 5.1 (although the Rule now uses the term "preliminary hearing"). We believe, given the Rules Enabling Act, that procedural matters (such as time limits) covered by both 18 U.S.C. § 3060 and Fed. R. Crim. P. 5.1 are properly governed by Rule 5.1. Thus, instead of amending section 3060(b) by changing the ten days to fourteen days, the statute should be amended to state that preliminary examinations shall be scheduled (or held) "within the time provided in the Federal Rules of Criminal Procedure," and that subsection (c) of section 3060 (governing continuances of preliminary examinations) should for the same reason be repealed.

2. 18 U.S.C. § 3771(d)(5)

It is proposed that section 3771(d)(5) be amended to change "ten days" to "fourteen days" to maintain the same time period within which a crime victim has to seek mandamus review in the court of appeals. We believe section 3771(d)(5) should be amended to reduce the time period for filing such a mandamus petition from ten days to seven days (not excluding weekends and holidays), or at most ten calendar days.

The proposed amendment would continue to have the time period within which a victim may file a mandamus petition, in cases where the victim's complaint concerns the conduct of sentencing and the district court has promptly

entered judgment, the same as the time period within which a defendant must file a notice of appeal. *See* Fed. R. App. P. 4(b). Having those two time periods be the same makes it impossible for the defendant to know whether the judgment is or is not final until it is too late to file an appeal. To minimize the confusion of jurisdiction, as well as the uncertainty and instability that such mandamus petitions introduce into the system, the time period should be reduced from ten days to seven days (not excluding weekends and holidays) – the same as the time allowed under Fed. R. Crim. P. 35(a) for the court to correct a technical or arithmetic error in the sentence.

3. 18 U.S.C. § 3771(d)(3)

Section 3771(d)(3) provides that when a victim files a mandamus petition under the CVRA, “[t]he court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed.” Seventy-two hours is not sufficient time for even minimally adequate research and careful briefing, without even considering argument and decision. The Committee should recommend that Congress remove the provision requiring the court to rule within 72 hours, and that subsection (d)(3) be amended to state, for example, “The court of appeals shall take up such application forthwith and render its decision as expeditiously as fairness permits.” At the very least, the “72 hours” provision should be amended in some manner that would explicitly exclude weekends and holidays (if not also to exclude eight hours each day for sleeping).

The related restriction in section 3771(d)(3) on issuing stays of proceedings in the district court for no more than five days to allow enforcement of the Crime Victims Rights Act is also too restrictive. (“In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter.”) The Committee should recommend that this restriction be removed and that subsection (d)(3) be amended in a manner similar to that suggested above with respect to the 72 hour limitation. Procedural fairness in the administration of the CVRA should be governed by the Rules of Procedure, subject to judicial discretion.

4. 28 U.S.C. § 2072

Certain other statutes set time deadlines for acts to be taken by counsel or by the Court in criminal cases that are also subject to time deadlines set by Rules of Procedure, and those periods may sometimes conflict. For example, 18 U.S.C. § 3237(b) specifies that a motion for change of venue must be filed "within 20 days of arraignment," but judges often set time deadlines for the filing of pretrial motions longer than twenty days, as they are authorized to do by Fed. R. Crim. P. 12(c).

To avoid such conflicts and the uncertainty they create, we would urge the Committee to propose an amendment to the Rules Enabling Act, 28 U.S.C. § 2072 to specify that in such instances the period set by or pursuant to the Rule and not that set by statute controls, regardless of which was enacted first, unless Congress expressly provides otherwise in a particular matter. This could be accomplished by a new subsection (d), stating that whenever a time for taking an action as provided in a statute conflicts with the time allowed for an action of the same sort under a duly adopted Rule of Procedure, the time limit in the statute shall be of no force or effect.

We appreciate the opportunity to work with your Committee on this and other matters, and look forward to future opportunities to do so.

Respectfully,

s/Peter Goldberger

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