

REPORT OF THE COMMITTEE
ON THE RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES, CHAIRMAN; AND
MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

Your Standing Committee on the Rules of Practice and Procedure met at Washington, D. C. on August 26 and 27, 1976. All members of the committee were present except Judge Carl McGowan and Richard D. Kyle who were unavoidably absent. During a portion of the meeting your committee met with the Advisory Committee on Rules of Criminal Procedure as noted below.

BANKRUPTCY RULES

On April 26, 1976, the Supreme Court, on recommendation of the Judicial Conference, approved the rules and forms governing proceedings under Chapters VIII and IX of the Bankruptcy Act and rules and forms amending certain rules and forms previously prescribed pursuant to Chapters I through VII, XI and XIII of the Bankruptcy Act. These rules became effective August 1, 1976 and thus completed the work of the Advisory Committee on Bankruptcy Rules. The committee

which had been in session periodically for more than 10 years, was discharged with an expression of appreciation of the Conference for its achievement.

CRIMINAL RULES

On April 26, 1976 the Supreme Court also approved and transmitted to the Congress amendments to certain of the Rules of Criminal Procedure, as well as rules and forms governing section 2254 cases in the United States district courts and the rules and forms covering section 2255 proceedings in the United States district courts. The Congress subsequently enacted legislation which was approved by the President on July 8, 1976 and signed into law as Public Law 94-349 changing the effective date of certain of these rules and amendments to rules as follows:

1. The amendments to Rules 6(e), 23, 24, 40.1 and 41(c)(2) of the Rules of Criminal Procedure shall not take effect until August 1, 1977, or until and to the extent approved by Act of Congress, whichever is earlier;
2. The remaining amendments to Rules of Criminal Procedure, namely amendments to Rules 6(f), 41(a), 41(c)(1), and 50(b) are not changed by PL 94-349 and hence shall become effective August 1, 1976,

as set forth in the Order of the Supreme Court of April 26, 1976; and

3. The rules and forms governing section 2254 cases in the United States district courts and the rules and forms governing section 2255 proceedings in the United States district courts, embraced in the Order of the Supreme Court of April 26, 1976, shall not take effect until 30 days after the adjournment sine die of the 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier.

Review of Sentences

A proposed amendment to Rule 35 of the Federal Rules of Criminal Procedure, to provide for review of sentences by review panels in the district courts, was circulated to bench and bar in January 1973. It did not receive general approval by the judges; some opposed any review of sentences, and some of those who favored review of sentences preferred review by the courts of appeals.

Further study indicated, however, that if the three-judge review panels consisted of one or two circuit judges and one or two district judges, it would be more generally

acceptable. Consequently, after further study by the Advisory Committee on Criminal Rules and by the Standing Committee, we submitted to the Judicial Conference in the fall of 1975 a modified form of the proposed Rule 35, with a modified advisory committee note, which provided for such review panels in the district courts, with the right in the several circuits to assign circuit judges to such panels as they might see fit. The Conference did not approve that proposed rule, but suggested that it be circulated again to all federal judges and to all others who had commented on the original draft. That was done in the fall of 1975, and many comments were received.

The Federal Judicial Center aided us in preparing and submitting a questionnaire to all circuit and district judges. The replies received, together with those previously received, indicate that a large percentage of judges now favor some review of sentences, but are sharply divided as to whether such review should be by district courts or by the courts of appeals. Further study convinced the Advisory Committee on Criminal Rules and the Standing Committee that the type of review proposed in 1975 would not be practical in many circuits for a variety of reasons, and that a different type of review

should be provided. Therefore, the Advisory Committee on Criminal Rules and the Standing Committee met together on August 26 and 27, 1976, to consider again the most desirable provisions for review of sentences.

As a result of the study of all of the comments received, both the Advisory Committee and the Standing Committee are of the view that appellate review of sentences in certain cases is necessary, and further, that there should be a limited type of review available to the government in certain cases.

We are agreed that any such review should be in the courts of appeals, and should involve: (a) the filing of a petition for leave to appeal; (b) the screening of such petitions by a three-judge panel of the court of appeals, which panel may include one or two district judges, as each circuit may decide; and (c) if the screening panel decides that a showing has been made of a substantial basis for believing that the sentence is clearly unreasonable, the panel shall grant the petition and the court of appeals shall thereafter determine whether the sentence is clearly unreasonable.

The reasons for these conclusions are set out in the advisory committee note attached to the proposed rule included in this report. We believe that the proposed procedure will

require less expenditure of judicial time and money than any other proposed procedure.

The committees believe that it is advisable to accomplish the desired result by a new rule, so far as that can be done.

It is recognized that while review can be afforded to the defendant through the rule-making process, review at the request of the government can be provided only through legislation.

The draft attached hereto represents the rule which your committees favor, with the bracketed portions representing the portions which we believe would require appropriate legislation.

Because of the obvious interest of the Advisory Committee on Appellate Rules, the matter will be discussed at their meeting on September 16 and 17, a week before the meeting of the Judicial Conference. An oral report of that discussion will be made to the Conference.

Because of the changes that have been made since the proposed rule was last circulated for comment, your committee is planning to circulate the attached rule, together with the advisory committee notes, to the bench and bar for further

comment. Replies will be requested by January 1, 1977, and during January the Advisory Committee will hold hearings and draw its own final recommendations with a view to submitting these to the Standing Committee and to the Judicial Conference at its next session. At the same time our committee will recommend that the Judicial Conference endorse a legislative proposal providing for a limited right of appeal by the government.

Respectfully submitted,



Roszel C. Thomsen, Chairman
Carl McGowan
Charles W. Joiner
Frank W. Wilson
A. Leo Levin
Frank J. Remington
Griffin B. Bell
Richard E. Kyle
Francis N. Marshall