

DRAFT

MINUTES OF THE JULY 7-8, 1969 MEETING OF THE  
ADVISORY COMMITTEE ON CRIMINAL RULES

The twelfth meeting of the Advisory Committee on Criminal Rules convened in the Conference Room of the Administrative Office of the United States Courts, 725 Madison Place, N.W., Washington, D.C. on Monday, July 7, 1969, at 10:00 a.m. and adjourned at 3:30 p.m. on Tuesday, July 8. The following members of the committee were present during all or part of the sessions:

Alfonso J. Zirpoli, Chairman  
Joseph A. Ball  
Edward L. Barrett, Jr.  
George R. Blue  
George C. Edwards, Jr. (absent on Monday)  
Gerhard A. Gesell  
Walter E. Hoffman  
Frank M. Johnson, Jr.  
Robert W. Meserve  
Maynard Pirsig  
Will Wilson  
Frank J. Remington, Reporter

Mr. Barnabas F. Sears was working on a trial and was unable to attend. Others attending all or part of the sessions were Honorable Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure; Harold K. Koffsky, Chief of Legislation and Special Projects Section, Criminal Division, Department of Justice; Theodore G. Gilinsky, Deputy Chief, Appellate Section, Criminal Division, Department of Justice; Carl H. Imlay, General Counsel,

Administrative Office of the U. S. Courts; and William E. Foley, Deputy Director, Administrative Office of the U. S. Courts, and secretary to the committees.

Chairman Zirpoli opened the meeting welcoming the new members: Judge Gerhard A. Gesell, United States District Judge, Washington, D.C.; and Honorable Will Wilson, Assistant Attorney General, Criminal Division, Department of Justice, Washington, D.C.

RULE 3. The Complaint.

The chairman stated this rule contained the definition of United States Magistrate as suggested in Rule 54. There was a motion to adopt the rule for circulation. The motion carried.

RULE 4. Warrant or Summons Upon Complaint.

There were two alternative drafts of Rule 4. Professor Remington stated the major difference was the definition of probable cause as related to Rule 54. Judge Zirpoli suggested placing the definition in Rule 54. Mr. Blue suggested further simplifying the rule by stating in alternative number 1, paragraph (a), that in order for a magistrate to issue a summons he has to be convinced that some substantial evidence is available to indicate the commission of a crime. He suggested the rule state "The finding of probable cause may be based upon substantial

evidence which may include hearsay" and leave the definition of hearsay to the courts. Mr. Meserve proposed the insertion of "in whole or in part" before "upon hearsay" in alternative number 1. There was a suggestion to change "informant" to "source of the information". Chairman Zirpoli suggested "The finding of probable cause shall be based upon substantial evidence which may include hearsay provided there is a substantial basis for believing the source of the information to be credible and for believing that there is a factual basis for the information furnished." Mr. Meserve moved the adoption of alternative number 1 with the second sentence reading "The finding of probable cause shall be based upon substantial evidence which may be hearsay in whole or in part provided that there is a substantial basis for believing the source of the hearsay to be credible and for believing that he has a factual basis for the information which he furnishes." Mr. Blue stated he felt the sentence "To carry out the policy against unnecessary detention of defendants prior to trial," should be stricken. Before taking action on Mr. Blue's suggestion, a vote was taken on Mr. Meserve's motion. The motion carried to adopt alternative number 1 with the change as proposed by Mr. Meserve.

Mr. Blue also suggested that the words "recorded by suitable" be deleted. This deletion was acceptable with the members. The chairman then directed the attention of the members to Mr. Blue's original suggestion. Judge Zirpoli stated the sentence was in the rule to probable alert and encourage the use of a summons and was requested by those who had passed the bail reform act.

Professor Remington stated that in 1966 this language was put into the present rule 46(h) "the court shall exercise supervision over the detention of defendants and witnesses within the district pending trial for the purpose of eliminating all unnecessary detention."

It was suggested to place a period after "instead of a warrant" in the third line and striking the remainder of the sentence. There was an even vote on Mr. Blue's suggestion of striking the "policy statement". Chairman Zirpoli then stated it should be put into the Note accompanying the rule. Mr. Wilson moved the portion of the sentence dealing with the request by the attorney of the government be left in the rule. His motion carried. There was a motion to adopt alternative number 1 as amended. The motion carried. The reporter stated the definition of "Reliable hearsay" in Rule 54 was deleted in accordance with the action taken. Judge Hoffman moved the definition of United States Magistrate in Rule 54 be approved. It carried.

RULE 5. Proceedings Before the United States Magistrate.

There was a motion to add the word "general" before "circumstances", place a period after "pretrial release", and strike "under 18 U.S.C. 3146" in subsection (c). There were no objections to this motion. It was suggested "carefully" and "recorded" and "suitable sound" be stricken from subsection (d). It was adopted. There was discussion of "United States magistrate" becoming "magistrate" in the definition of Rule 54. Mr. Blue moved the change. It was approved. The reporter stated in all rules wherein "United States magistrate" appeared would be changed to "magistrate". Judge Hoffman made a formal motion to allow Professor Remington to make changes regarding "magistrate" in the rules as he deems necessary. It carried. Regarding subdivision (e) of Rule 5, paragraph (3) Pretrial Release was changed to subdivision (f) by the reporter. In paragraph (2) Right to Preliminary Examination, the words "including either a minor offense or" were suggested to be changed to "other than". Also "which is" was stricken from the sentence. It was then decided to add "or in appropriate cases and information is filed in district court" after "that the preliminary examination need not be held if the defendant is indicted". The paragraph was approved as amended. Paragraph (3) which was changed to subdivision (f) was moved to be deleted. The motion carried. The entire rule was approved as amended.

RULE 5.1. Preliminary Examination. The chairman stated this rule was as previously approved by the committee. For consistency "recorded by suitable" was deleted. Professor Remington stated it would be changed as was Rule 4 by including "The finding of probable cause shall be based upon substantial evidence which may be hearsay in whole or in part provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that he has factual basis for the information which he furnishes." as a second sentence. The first sentence will be changed by the deletion of ", which may be based in whole or in part on hearsay,". Subdivision (a) was adopted as amended by the reporter. Mr. Koffsky asked the reporter to delete the reference in the Note to "Department of Justice Memo # 511". It being an inter-departmental memo, the reporter agreed.

RULE 12. Pleadings and Motions Before Trial; Defenses and Objections. Regarding the Note, Professor Pirsig suggested the first full sentence on page 5 be deleted. The reporter stated there was a substantive point which should be retained and he would redo the sentence. He felt there was no need for sanction for failure to comply. Dean Barrett suggested that Rule 1 should be changed to make perfectly clear what the rules intend. There were no further comments on Rule 12.

RULE 16. Disclosure of Evidence by the Government.

It was decided subdivision (b)(1) National Security would be stricken. Thereby making subdivision (2) Government Reports subsection (b). The title of subsection (b) was enlarged to include "Not Subject to Disclosure". "(b) Information Not Subject to Disclosure" was stricken. No further decisions were made to this rule.

RULE 16.1. Disclosure of Evidence by the Defendant.

(a) Information Subject to Disclosure. (1) Physical Evidence. The word "photographs" was added in this subparagraph following "books, papers,". (2) Reports of Examinations and Tests. "and relates to his testimony" was added to the end of the subparagraph.

RULE 16.2. Continuing Duty to Disclose.

This rule was adopted as written.

RULE 16.3. Regulation of Discovery.

(a) Protective Orders. In the second sentence "court in camera" was changed to "judge alone"; and a comma was placed after "showing" and "in camera," was stricken from the third sentence. The typographical error "test" was changed to "text".

(b) Time, Place, and Manner of Discovery and Inspection. "16.2" was added to the related rules. The rule was approved as amended.

RULE 32. Sentence and Judgment.

Judge Hoffman stated at the January meeting he had asked to take this matter up with the Probation Committee. The question was whether the district judges should be canvassed on disclosure. The view of the committee was not to canvas the judges. He stated Mr. Smith, Chief of Probation, felt the 5-year maximum penalty should be lower. Mr. Ball stated this was not possible because of the Statutes. Mr. Meserve moved to circularize Rule 32.2 as presented by Judge Hoffman on subparagraph (a), [(b) is to be left as presented in the deskbook], and (c) as presented by the Division of Probation, and subparagraph (d) as suggested by Judge Hoffman. Dean Barrett felt (c)(1) as presented by the Division of Probation was awkward and did not really change anything. Regarding (a), it was suggested by the reporter that subparagraph (1) read: "if the maximum penalty is one year or less" and "three" be changed to "two" in subparagraph (2), and that the last full sentence of (a) be deleted. Subparagraph (1) of subsection (c) is to be left as drafted. No change in subparagraph (2). Judge Hoffman's draft of subparagraph (3) was changed to read: "If the court is of the opinion that there is information in the presentence report, disclosure of which would be detrimental to the person furnishing information or to the defendant or to others, the court may,



in lieu of making available the report or portions thereof, state orally or in writing a summary of the factual information which the court considers material, and give counsel for the defendant, or the defendant, an opportunity to comment thereon." Subparagraph (d) of Rule 32.2 was deleted. The rule was approved for circulation.

RULE 40. Commitment to Another District; Removal.

The reporter stated conforming language would be needed in this rule concerning the magistrate. Judge Hoffman stated the magistrate should not inform a defendant of his right to avail himself of the provisions of Rule 20 if it is a federal charge of unlawful flight to avoid prosecution. He suggested "if applicable" be inserted. There were no further changes to this rule.

RULE 41. Search and Seizure.

Professor Remington drew the attention of the members to alternative number 1. It was decided "or a judge of a state court record" would replace "within the district wherein the property sought is located" in subsection (a) Authority to Issue Warrant.

Professor Remington stated subsection (b) Property Which May Be Seized With a Warrant was an effort to reflect Warden v. Hayden. The subsection was drafted as approved at

the last meeting. A discussion was held on the time within which to serve. It was decided "night time" was the hours of 10:00 p.m. and 6:00 a.m. local time. It was approved as drafted.

Subsection (c) Issuance and Contents. Judge Edwards stated "It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof." should be deleted. There were no objections to the deletion of the sentence. Professor Remington suggested striking the underlined portion at the end of subsection (c). Mr. Ball was in favor of the language through "at times other than daytime". He preferred retaining language where an authority has discretion. Judge Hoffman moved subsection (c) retain "The issuing authority may, by appropriate provision in the warrant, authorize its execution at times other than daytime." The remainder of the underlined portion was deleted, retaining the last sentence "It shall designate the magistrate to whom it shall be returned." The motion carried. It was then decided "the" referring to magistrate in the last sentence would be changed to "a". There was an amendment proposed to the underlined portion of subsection (c). Mr. Blue suggested the addition of "and on reasonable cause shown" after "by appropriate provision in the warrant,". The

motion carried. The sentence following the deleted language by Judge Edwards was amended by striking "forthwith" and adding "at any time within seven days after its issuance" after "It shall command the officer to search". There were objections to the "seven days". Mr. Meserve moved the sentence read "It shall command the officer to search within a period of time not to exceed seven days the person or place named for the property specified". The motion carried.

Subsection (d) Execution and Return with Inventory.

In view of the fact that previously the committee approved "it shall be executed forthwith" the first sentence of the subsection was stricken. The subsection was approved as amended.

Subsection (e) Motion for Return of Property.

There was a motion to add "If a motion for return of property is made or comes on for hearing in the district of trial after indictment or information is filed, it shall be treated also as a motion to suppress as provided in Rule 12." at the end of the subsection. The subsection was approved.

Subsection (f) Motion to Suppress. The reporter suggested the subsection read: "A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12." It was approved.

Subsection (g) Return of Papers to Clerks. The subsection was approved as drafted.

Subsection (h). Scope and Definition. The reporter stated there would be a sentence stating "The term 'daytime' as used in this rule will mean the hours from 6:00 a.m. to 10:00 p.m. according to local time." The subsection was approved as amended.

RULE 41.1. Judicial Authority to Conduct Nonelectronic and Nonwiretapping Surveillance.

The chairman stated this rule would raise a lot of questions particularly from the Department of Justice. He felt a memorandum from the Department should be submitted before consideration was given to the rule by the committee. Mr. Wilson suggested circulating the proposed rule through all the police agencies of the federal government. It was then decided this rule would be presented at the next meeting along with a report from the Department of Justice.

At this point, a discussion was held on the dates of the next meeting of the committee. It was decided to meet at 9:00 a.m. on Thursday and Friday, September 4 and 5, 1969.

RULE 45. Time.

It was decided this rule, too, would be presented at the meeting in September. The problem with this rule was whether the committee should actually fix any time limits.

RULE 46. Release from Custody Pending Further Judicial Proceedings.

(a) Release Prior to Trial. This subsection was approved as drafted.

(b) Release During Trial. This subsection was approved as drafted.

(c) Pending Sentence or Appeal. Judge Gesell was opposed to this subsection. There was a suggestion to delete the last sentence altogether. The reporter suggested the title be "Pending Sentence." The subsection would be redrafted as "Eligibility for release pending sentence shall be in accordance with 18 U.S.C. 3148. The burden of establishing that the defendant will not plea or be a danger to any other person or to the community rests with the defendant." Judge Edwards moved the adoption of the language suggested by the reporter (that the burden of establishing that the defendant will not plea or post danger to any person or a community and that the appeal is not frivolous or taken for delay is on the defendant). He also suggested the reporter draft the rule concerning detention after the verdict and notice of appeal in accordance with the principles contained in that sentence.

Subsections (d), (e), (f), and (g) were unchanged.

Subsection (h). Supervision of Detention After Plea or Verdict. It was decided this subsection would be incorporated into subsection (c) and Rule 9.

RULE 6.(b) Objections To Selection of Grand Jury and to Grand Jurors. This rule was presented for the committee to give suggestions to the reporter for his submission of a draft at the next meeting. The chairman suggested he felt the consensus of the committee regarding this rule was that subsection (1) not give a provision for providing a transcript, but should give consideration to the requirement that the grand jury proceedings be recorded and the transcripts be available if disclosure becomes necessary under § 3500 or any other reason. Judge Hoffman stated nothing could be done about recording grand jury proceedings. He so moved. His motion carried.

RULE 8. Joinder of Offenses and of Defendants.

RULE 14. Relief from Prejudicial Joinder.

The reporter stated these rules were the proposals of the ABA committee. He also stated he would update these rules for presentation at the next meeting.

RULE 53. Regulation of Conduct in the Courtroom and Its Environs. There was a short discussion on this rule. It was decided to further consider this rule at the next meeting. Keeping this rule would prevent a judge from allowing photographs to be taken in the courtroom.

The meeting adjourned at 3:30 p.m.