MINUTES OF THE MEETING OF THE ADVISORY COMMITTEE ON THE FEDERAL CRIMINAL RULES HELD AT THE LAFAYETTE BUILDING, ROOM 638, WASHINGTON, D.C., ON THURSDAY, AUGUST 2 AND FRIDAY, AUGUST 3, 1973

PRESENT:

Hon. J. Edward Lumbard, Chairman
Chester Bedell, Esquire
Hon. R. Ammi Cutter
Robert S. Erdahl, Esquire
Hon. Gerhard A. Gesell
Hon. Walter E. Hoffman
Carl Imlay, Esquire
Harold D. Koffsky, Esquire
Terence F. MacCarthy, Esquire
Hon. Wade H. McCree, Jr.
Hon. Albert B. Maris
Hon. Leland C. Nielsen
Hon. Russell E. Smith
Hon. William H. Webster
Professor Frank J. Remington
Professor Wayne LaFave
William E. Foley, Esquire

ABSENT:

Hon. Henry E. Petersen
Hon. Roger Robb
Professor James Vorenberg
Hon. Joseph Weintraub
William B. West, III, Esquire

Judge Lumbard, Chairman of the Committee, opened the meeting at 10:00 a.m.

I

DISCUSSION OF CURRENT ISSUES RELATING TO THE GRAND JURY.

Scope. Separate memoranda prepared by Judge Smith, Professor LeFave and Professor Remington previously circulated to the members provided the basis for a general discussion of the grand jury function. Judge Lumbard observed that the Chief Justice had requested a general study of the grand jury system and that this study was not limited to a study of the rules. It was noted that a grand jury is required in the federal system by the Constitution, unless the defendant waives indictment. Therefore, any study of alternative methods must rely upon the experience of those states which permit persons to be charged with a felony by other means.

Judge Lumbard stated that a prosecutor needed a method of compelling secret testimony, and that the inquisitorial function of the grand jury should not be discarded. Judge Hoffman stated that he opposed placing the prosecutive discretion entirely in a prosecutor, but that he would favor authorizing the United States Attorney to issue an information upon a magistrate's finding of probable cause. Judge Nielsen

noted that this is the procedure followed in California. Professor Remington suggested that an alternative might be to combine a waiver of indictment with a guaranteed preliminary hearing, but Judge Smith observed that most defendants would decline to waive in order to stay on the street pending indictment. Mr. Imlay observed that there was a 20% drop in waivers of indictment from 1971 to 1972.

A discussion followed on various alternative methods to test probable cause, including the possible use of a magistrate to conduct proceedings in the grand jury room. Mr. Bedell favored keeping the grand jury but giving the United States Attorney power to issue informations in felony cases. Judge Lumbard asked whether such power should be subject to a right to have a grand jury after the filing of the information. Judge Hoffman felt this would result in too much delay.

Judge Gesell observed that the grand jury system has frequently served to spur on the prosecutor to pursue investigations which he might otherwise allow to fade away. Judge Webster suggested that the primary function of the grand jury as expressed in the Constitution is to test probable cause, and that, therefore, the focus of any study should be upon the various alternative means used in the various states to test probable cause.

It was observed that the pressures for change come from those who charge that the present system results in delay, expense, inconvenience of witnesses and the creation of legal issues raised in pre-trial proceedings. Those who oppose the grand jury system usually say that it is the tool of the prosecutor and that it performs a rubber-stamp function which does not test probable cause in a meaningful way. Mr. MacCarthy appraised the value and need of the grand jury as follows: that the buffer function had little value; that the availability of the grand jury as a "prosecutive out" to dispose of sensitive cases was an insufficient reason for retaining the grand juries; and that although the prosecutor needs an investigative tool, there probably could be devised some alternative method to compel secret testimony.

Judge Gesell observed that there was an intangible but definite value in citizen participation in the jury system. Justice Cutter agreed and would preserve the availability of the grand jury. Judge Hoffman cautioned that any alternative proposals not eliminate minority representation, which helps control misuse. Judge Lumbard observed that citizen participation on trial juries has been increased as a result of the Jury Selection Act, but Justice Cutter made the distinction that such functions do not deal as clearly with policy as does the function of the grand jury.

It was the sense of the meeting that the discussion showed the need for research to support any judgment on how radical a revision should be recommended. It was AGREED that Judge Smith's subcommittee consisting of himself, Mr. Erdahl, Mr. Bedell, Professor Vorenberg and Judge Robb should prepare a set of guidelines for use by the Federal Judicial Center, which would then be requested to undertake a study of the uses and functions of the grand jury.

Judge Hoffman suggested that the reporter look into the possibility of making a reasonable reduction in the number of grand jurors, and also the propriety of using a magistrate in grand jury proceedings, some of the members having expressed concern that this might constitute an intrusion on the historic separation between the executive and judiciary in which the grand jury served as the buffer.

Justice Cutter and Judge Webster were of the view that it was unlikely that the inquisitorial function of the grand jury would be abolished or that it would cease to be used for testing probable cause in extraordinary crimes; but that the most constructive approach would be a review of the rule making function relating to run-of-the-mill crimes to promote the filing of informations in such cases.

Adequacy of the Grand Jury Selection System. Professor

LeFave stated that there was not much indication that there was any public reaction to the present method of jury selection. Judge Nielsen observed that his district had experienced hippies who refused to vote true bills. It was generally agreed that the present selection method was not much of a problem.

Size. It was noted that in interviews in the District of Columbia, foremen frequently observed that grand juries were too big. Judge Hoffman suggested that perhaps the number could be reduced and an indictment based upon a stated majority. Judge McCree felt that since it was a grand jury it should be greater than twelve. A majority of the members felt that a reduction would result in economy and savings in jury time and would tend to fix individual responsibility to a greater degree than does the larger number. Accordingly, on motion of Judge Nielsen, it was VOTED to recommend amending Rule 6 to provide that the grand jury shall consist of not less than nine nor more than thirteen, at least nine of whom must be present, and that at least two-thirds of those present must vote in favor of an indictment. Mr. Bedell and Mr. Erdahl were opposed.

A discussion on possible uses of the magistrate followed. Judge Hoffman MOVED that the reporters prepare drafts of

procedure utilizing a magistrate for examination and study. The motion was ADOPTED.

Probable Cause. Judge Gesell favored supplying a transcript in each case in order to avoid raising a due process issue each time there is an indictment. Judge Hoffman urged that pre-trial inquiry into probable cause for indictment by the grand jury be circumscribed and MOVED that the reporter prepare a draft rule revision which would make this clear. The motion was ADOPTED, Mr. Bedell voting in opposition.

Mandatory Reporting. After discussion, Judge Hoffman MOVED and it was VOTED that the reporter draft a rule to provide for mandatory recordation of testimony other than grand jury deliberations and voting, the term "recordation" to include tape recordings. Judge Webster asked who would supervise the recording. It was assumed that an employee of the reporter, rather than the prosecutor, would perform this function. It was noted that a study by Mr. Imlay had reported an additional annual cost of $300,000.00 to report all grand jury proceedings. Judge Webster expressed concern that mandatory transcripts might be counter-productive to the Rule 50(b) policy of more speedy disposition of criminal cases.

Additional Protection. The members felt in general that the subpoena power is not abused in current practice,

although occasionally United States Attorneys are known to issue subpoenas returnable on a date when the grand jury is not in session, and have sought production of documents not reasonably related to the subject of the investigation.

Judge McCree recommended that the present practice of excluding the attorney from the grand jury room be retained, with the customary advice that the witness has a right to consult with his attorney outside the grand jury room at any time.

A discussion on the need to inform witnesses of Fifth Amendment rights followed. Most agreed that this was mandatory for putative defendants. Judge Hoffman and Judge Webster were of the view that it was not unfair to require the putative defendant to assert his constitutional rights. Judge Gesell favored limiting abuses by the prosecutor, possibly by limiting repeated questions resulting in Fifth Amendment answers.

Right to Testify. Judge Nielsen and Judge McCree expressed the view that a putative defendant should be permitted to testify if he wished to do so. Discussion of various methods of warning of Fifth Amendment rights followed. Mr. Koffsky stated that the Department of Justice was following the opinion in United States v. Scully, 225 F.2d 113 (2d Cir.

1955), which casts the burden on the witness to assert his constitutional privilege. Judge Hoffman MOVED and it was AGREED that there should be no change in the present rule which does not grant a right of appearance. It was also AGREED that the subpoena need not advise the witness of the subject matter in any more detail than the present practice. Mr. Bedell favored more specific advice.

A discussion of unauthorized release of grand jury testimony followed. Judge Gesell urged that this should be a statutory offense, noting that at present the only apparent means of enforcement is through the contempt power. Justice Cutter urged that solutions be kept within the framework of the Criminal Rules rather than statutes, if possible. It was VOTED to recommend no changes in the subpoena practice. Judge Hoffman referred the question of placing witnesses under an oath of secrecy to the reporter for examination of state practice and experience.

Professor Remington requested a general statement of the Department of Justice's policy on issuing subpoenas on dates grand juries are not in session. It was AGREED that the present practice of not requiring a showing of grounds to call a witness should be retained, the members relying upon the inherent power of the court to intervene where abuses occur.

It was also VOTED not to change the present procedures where the defendant contends the grand jury evidence was illegally obtained, the members preferring a case by case approach, although there was some difference of opinion on this subject.

It was VOTED to make no change in present practice with respect to testing irrelevancy. Judge Hoffman noted that recording testimony would help in this regard.

Various alternative procedures to requiring attendance of witnesses from distant places were discussed, including use of depositions and change of venue. The possible use of a magistrate to take and preserve testimony was suggested. The reporter was INSTRUCTED to prepare alternative proposals.

It was VOTED to make no recommendations with respect to furnishing copies of transcripts to witnesses, other than the defendant.

A number of the members favored requiring the government to give the defendant prior access to grand jury testimony for use in trial. Judge Webster observed that congressional policy is set forth in 18 U.S.C. §3500, and that this policy cannot be modified by rule. It was VOTED to recommend no rule making change in this procedure.

H.R. 8461. A discussion of House Resolution 8461 was

introduced by Congressman Eilberg. This bill dealt with a number of the subjects discussed above, generally liberalizing procedures in a manner opposed by the members of the Committee. The Committee RECORDED its disapproval of H.R. 8461. The meeting adjourned at 6:10 p.m.

The meeting reconvened August 3, 1973 at 9:00 a.m., under the Chairmanship of Judge Hoffman.

II

REACTION TO PROPOSED RULE 35 AMENDMENTS.

It was noted that written reactions expressed general disapproval by district judges of any form of sentence review. Judge Hoffman observed that in view of the activity and attitudes in Congress, it did not seem a question of whether to have review, but what kind. Judge Webster stated that the one objection which required consideration was the assertion that every defendant would seek review of his sentence. Judge Hoffman replied that perhaps review should be limited to sentences of three years or more rather than two years or more. Judge McCree felt the Committee should emphasize that there was no requirement that the panel convene as a body in order to reach a decision.

A proposal to amend Rule 35(c) to make clear that there

would be no sentence review in sentences resulting from plea bargaining agreements was approved. The draft was modified to substitute the word "Judge" for "Magistrate". It was AGREED that Congress, having heard testimony from members of this Committee, should be informed of such draft changes for use in connection with its own work product.

III

A discussion on reaction to proposed Rule 24(c) - use of alternate jurors - followed. Particular attention was given to mechanical and constitutional objections raised by the report of the Jury Committee. Further discussion on this matter was passed to the February meeting.

[Note: At this point, Professor Remington was REQUESTED to prepare a flow chart on the status of various rules considered by this Committee so as to reflect the present status of such rules, i.e. whether in circulation, before the Judicial Conference, before the Supreme Court or before the Congress.]

[Note: It was also DETERMINED that the commentaries are to be updated regardless of whether they have already been submitted to the Supreme Court, whenever Supreme Court decisions fill out, explain or modify previous Advisory Committee notes.]

IV

REPORT ON MAGISTRATE RULES.

Mr. Spaniol reported that relatively few comments had been received from the bench and bar, and that at Judicial Seminars there had been no indications that any of the rules required revision. It was VOTED that the reporter and Mr. Erdahl confer with the Magistrate Committee concerning any possible need for revision of the rules.

Judge Gesell ASKED that the Committee consider whether a magistrate could by rule be permitted to try a civil case by consent (as distinguished from acting as a master).

V

REPORT ON S-1 AND S-1400.

Judge Zirpoli, Chairman of the Committee on Administration of the Criminal Law, reported that his Committee had reviewed the substantive provisions of S-1 and S-1400 and had indicated in each case their specific preferences. It was noted that S-1400 does not incorporate the rules. It was observed that S-1 was not likely to be taken up in this session, but that the House of Representatives was conducting hearings on S-1400.

VI

CONSIDERATION OF PROPOSED AMENDMENTS TO RULES.

A. Rule 32 (probation revocation). Judge Hoffman stated

that he did not believe a magistrate should have power to revoke probation granted by a judge. Judge McCree noted that on page 3 the provision for revocation should read "may" rather than "shall" and that the reasons for revoking probation should be in a written "statement" rather than "explanation".

Professor Remington observed that the Committee should be interested in the procedure for revocation as set forth in the rules. He asked whether the rule procedure could be structured so that no preliminary hearing was necessary. It was AGREED that a federal magistrate should only revoke probation imposed by him. Mr. Imlay stated that a problem in determining which court to hear the matter occurred where the probation supervision was transferred without transfer of jurisdiction. See §3653. Professor Remington ASKED for examples of various procedures followed in various districts.

B. Rule 40 (commitment to another district). This rule had been referred back by the Judicial Conference for further consideration following Judge Spears' objection to magistrates having the power to reduce bail set by a district judge in another district. The rule as revised by the reporter requires that the federal magistrate shall take the bond previously fixed by a judge of another district into account but not be completely bound by that amount. A discussion of what proper

disposition to make of an absconder apprehended after conviction and sentence followed. No action was taken and the entire matter was REFERRED BACK to the reporter for further study.

C. Rule 35 (no review of sentence where plea agreement). This rule revision was previously approved in discussion, with the first clause modified to read "There shall be no such right of review where such sentence was a part of a plea agreement approved by the federal judge pursuant to Rule 11,".

VII

It was agreed that the various forms contained in the "Appendix of Forms" should be updated.

VIII

REPORT ON HABEAS CORPUS.

Judge Hoffman reported that the Judicial Conference had directed that the Special Committee on Habeas Corpus study pending bills and report on their significance. The Committee had previously deferred from such statements on policy grounds. Judge Hoffman reported that the Committee had met in San Francisco and had submitted, in addition to its study, two alternative approaches to limiting habeas corpus by statute: (1) a statute based on the approach of Justice Powell in

Schneckloth v. Bustamente, 93 S.Ct. 2041 (1973); and (2) a procedure which would incorporate the proposed habeas corpus Rule 9 laches concept and a 90-day limit on bringing actions. He noted that the real vice in habeas corpus proceedings has been in the use of successive and repetitive petitions and petitions filed after long delays. Judge Hoffman noted that an emerging problem was the flood of civil rights actions under §1983. It was still not clear whether these petitions should be reviewed by the Criminal Rules Committee, the Habeas Corpus Committee or by the Civil Rules Committee.

IX

Judge Hoffman announced that Judge Albert B. Maris was retiring as Chairman of the Standing Committee on Rules of Practice and Procedure after 14 years - the only Chairman the Committee has ever had. Many complimentary remarks were made, and Judge Maris was given a standing round of applause in appreciation for his great service to the judiciary.

The meeting adjourned at 11:25 a.m.