MINUTES OF MEETING OF THE ADVISORY COMMITTEE ON THE FEDERAL CRIMINAL RULES HELD AT THE LAFAYETTE BUILDING, ROOM 442, WASHINGTON, D.C., ON FRIDAY, SEPTEMBER 24 AND SATURDAY, SEPTEMBER 25, 1971.

PRESENT:

Hon. J. Edward Lumbard, Chairman
Joseph A. Ball, Esq.
Robert S. Erdahl, Esq.
Hon. Gerhard A. Gesell
Hon. Walter E. Hoffman
Harold Koffsky, Esq.
Hon. Wade H. McCree, Jr.
Hon. Leland C. Nielsen
Hon. Russell E. Smith
Professor James Vorenberg
Hon. William H. Webster
Hon. Joseph Weintraub
Will Wilson, Esq.
Professor Frank J. Remington, Reporter
Judge ALBERT B. MARIS

Absent:

Hon. Frank M. Johnson, Jr.
Hon. Roger Robb
Hon. Walter V. Schaefer
Barnabas F. Sears, Esq.

Chief Justice Warren Burger made some introductory remarks and the committee then began consideration of the proposed Rules amendments.

Rule 45

Rule 45 has to do with the prompt disposition of criminal cases. Professor Remington said that the great majority of comments favored some rule, though the responses were equally divided between a flexible or

a specific rule. It was noted that there was pending in the Senate a speedy trial proposal. Professor Remington explained that alternative 1 left it to the district court to make their own plans but that a circuit plan could be promulgated as a minimum standard. Judge Gesell raised the problem of how the cases to be dismissed would be selected and indicated that he favored giving the judge complete control over his calendar. There was general assent to the proposition that calendar management was ultimately the judge's responsibility.

Judge Lumbard noted that after the adoption of the rule by the Supreme Court, the district courts had only 30 days in which to adopt a plan. He wondered whether this gave them enough time. Judge Hoffman suggested, and received general assent, that when the rule was submitted to Congress, the Administrative Office ought to send notice of the submission to all the district courts so that plans could be prepared.

It was emphasized that the public interest in speedy trials was what the rule sought to vindicate and that the bare consent of the defendant, even if the government were to agree, was not sufficient for continuing the case past the time specified by the district court rules.

The Reporter will transmit the rule with notes to Judge Maris' committee so that it may be considered at the October meeting of the Judicial Conference.

The committee then considered the January 1970 proposed amendments to the rules.

Rule 1

Rule 1 is merely definitional. Professor Remington noted the suggestion by the ABA that since a United States magistrate is part of the district court, the term "judge of the district court" should be substituted for "court" whenever applicable in the rules and that "magistrate" be added when desired. It was agreed that to avoid any ambiguity in the rules Professor Remington would make these changes when applicable.

Rule 1 was unanimously approved.

Rule 3

Rule 3 was approved with no discussion.

Rule 4

Professor Remington noted that the attempt to define probable cause in the proposed rule had met with unanimous disapproval in the received comments. His suggestion that the attempt be abandoned was unanimously approved.

Discussion then turned to the proposed requirement that the magistrate make a record electronically or by court reporter of any witness that he examines. Judge McCree suggested that a signed statement made by the magistrate summarizing the testimony should be sufficient record. Judge Smith suggested that the recording requirement be dropped completely. Judge Lumard suggested that there should be some requirement that the magistrate summarize and record the testimony before him. There was general assent to this proposal. Judge Smith indicated that he was afraid the committee was building into the rule a bundle of rights which would allow convictions to be reversed on technical grounds. Professor Remington indicated that there had to be some rule to cover the question of how the magistrate might supplement the record. There was general agreement that since a magistrate would have to take supplemental testimony if the original affidavits were not sufficient, some record of the supplemental testimony would have to be kept. This led to agreement that the magistrate should make or cause to be made a record or summary of any supplemental proceeding.

Discussion then turned to whether a magistrate should have the authority to issue a summons instead of a warrant. Judge Gesell indicated that the magistrate needed this power for "housekeeping" purposes. Mr. Koffsky indicated that the Justice Department felt that it had the necessary information to determine when a summons should issue instead of a warrant and, therefore, the magistrate should await the government's decision on this matter. The judges on the committee were unanimous in agreement that the magistrates should have the discretion to issue a summons and felt that giving them this power would lead to little friction between the courts and the United States Attorneys. Lines 23 and 24 were amended to read: The magistrate may issue a summons instead of a warrant.

Rule 9 was amended to conform to Rule 4 and to allow discretion in the court to issue a summons or a warrant.

As amended Rules 4 and 9 were unanimously approved.

The amended portions read as follows:

Rule 4,l. 10-27. "The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the magistrate may require the complainant to appear personally and may examine under oath the complainant and any witness he may

produce. The magistrate shall promptly make or cause to be made a record or summary of such proceeding. The magistrate may issue a summons instead of a warrant."

Rule 9, l. 2 "... the court may issue a warrant ..."

Rule 5

Professor Remington noted that section (a) had been amended to conform to the Magistrate's Act. With respect to section (b), he noted that there had been criticism of the dropping of the proviso regarding the admission of the defendant to bail. It was unanimously agreed that the proviso, lines 31-32, should be reinstated as follows: "and shall admit the defendant to bail as provided by statute or in these rules."

It was explained that old section (c) had been moved to Rule 5.1.

To conform new section (c) to the Magistrate's Rule, lines 58-66 were stricken so that the section would read l. 58 "... United States magistrate shall proceed in accordance with the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates. Proceedings shall be taken ...."

It was also suggested by Mr. Erdahl that it might be more appropriate to have new section (c) as section (a). This suggestion was adopted and its implementation was left to the Reporter.

Section (d) was modified by dropping completely (d)(1). In section (d)(2), lines 103-04 were modified by striking out "in appropriate cases" and on l. 113 after "extended," "by a judge" was added.

Rule 5.1

The attempt to define probable cause was dropped to conform to the changes made in Rule 4. On l. 13, it was agreed to substitute "Objections to" in place of "Rule excluding."

It was agreed that the Rule left t[illegible]oper standard of probable cause to be determined by court decision.

The Reporter will change lines 30-31 to conform to the change in Rule 4.

In line 36, "recording" was substituted for "recorded tape" and in line 37 "available" was substituted to "replayed."

Rule 6

Rule 6, l. 8, was amended to reinsert "law" in place of "the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861 to 1874.: On line 20, "28 U.S.C. § 1867(e)" was substituted for "the Jury Selection and Service Act of 1968." On line 22 "statute" was substituted for "Act."

Judge Gesell then suggested that all grand jury proceedings ought to be transcribed. He felt it to be an archaic practice to hold secret hearings under coercion and not allow the defendant to hear what had been said. Mr. Wilson opposed this because he did not feel that grand jury errors should be a basis for an attack on an indictment particularly after a conviction had been secured. Judge Lumbard suggested that recording would offer substantial protection to defendants. Judge Smith noted that the proceedings of an exploratory grand jury were almost always reported and Mr. Wilson agreed to this. Judge Hoffman noted that the major problem was the availability of court reporters, particularly in areas that were not heavily populated. Mr. Ball said that in California the proceedings were electronically recorded and Justice Weintraub noted that machines were used in all New Jersey courts. Mr. Ball indicated that recording would avoid Star Chamber proceedings and would provide for the possibility of discovery. Judge Lumbard suggested that a survey be made by the Administrative Office as to the availability of recorders and sound equipment. Professor Vorenberg suggested that the California and New Jersey experiences indicated that no survey was necessary. It was moved, and passed 8-3, to have the

Administrative Office make a study of the cost and availability of grand jury reporters and/or sound recordings for use in all grand jury proceedings.

Judge Gesell suggested that all motions with respect to the grand jury would have to be made before trial and he was appointed to draft a rule to this effect.

Rule 9

Rule 9 was adopted with the change noted above regarding probable cause (see Rule 4) and, on line 73, reference to the magistrates' rules replaced "rule 5."

Rule 12

Rule 12(b) was amended to add on line 18 after "motion," "Motions may be written or oral depending on the discretion of the judge."

On line 39 "on the ground that it was illegally obtained" was deleted.

On line 65, "move to suppress" was substituted for "raise objections to" and on line 69 "may be" was substituted for "is."

It was generally agreed that any abuses possible under the bare terms of Rule 12 would be protected against by the provisions of Rule 16. Professor Remington said that he would indicate in the notes that Rule 12 puts duties on the defendant, not the prosecution.

Rule 16

All members of the committee felt that the government as well as the defendant should have independent discovery rights. The question whether independent government discovery violated a defendant's rights was raised but it was unanimously agreed that Rule 16 would not violate a defendant's Fourth and Fifth Amendments rights. Thus the alternative draft of Rule 16 was rejected.

The committee felt that defendant discovery under Rule 16(a) should proceed on request rather than under court order. Accordingly the language of the rule was changed in Rule 16(a)(i),(iii),(iv) and (v) to read, "Upon request of a defendant, the government shall permit the defendant to ..." This is in contrast to 16(a)(vi) where discretion was left with the court. It was decided that while the content of lines 77-82 ought to be maintained in the notes, this sentence could be dropped from the text as the protective order provision, Rule 16(d)(1), was adequate.

A further change in 16(a)(1) at line 20, after "person" insert "then."

The committee unanimously approved Rule 16(a)(1) and (2).

Action on 16(a)(3) was postponed until the January meeting.

16(a)(4) was approved, with the following changes. In line 114 "subdivision (a)(i)(vi) of" was deleted and in line 116 "commented upon" was replaced by "grounds for comment upon failure to call a witness."

[The Friday meeting adjourned at 6:00 P.M. and resumed Saturday morning at 9:00 A.M.]

Professor Blakey, counsel to the Senate Committee on the Judiciary, was present by invitation to discuss the rules regarding criminal forfeiture.

Criminal Forfeiture

Criminal Forfeiture affects Rules 7(c)(3), 31, 32 and 54.

Professor Blakey explained criminal forfeiture as allowing the government to recover all property in which a defendant had acquired a possessory interest as a fruit of his criminal activities. In contrast, civil forfeiture involves all property used illegally as a means of implementation of the crime. In a criminal forfeiture case, the issues before the jury would be ownership and the relationship to illegal activity. Usually the illegal activity will be proved in the case in chief and the government will then only have to prove ownership. A

A verdict binds only the defendant and the government. It was agreed to amend Rule 32, Note, to indicate that the authority of seizure is limited to the government's interest.

Rules 7(c)(3), 31, 32 and 54 were unanimously approved.

The committee then resumed its consideration of the Rule proposals of January, 1970.

Rule 16

Rule 16(b) was rediscussed and all were in agreement that an independent right of discovery was preferable. The Reporter was designated to make the necessary editorial changes to provide for discovery upon request of the government.

Rule 16(b)(iii), line 152 "shall" was changed to "may" to give the court discretion.

Rule 16(b)(2) was to be revised by the Reporter to agree with the revision of Rule 16(a)(4).

Rule 16(d)(1), line 196, "may" was changed to "shall."

Rule 17

Rule 17 was unanimously approved.

Rule 20

Rule 20 was unanimously approved.

Rule 29.1

Rule 29.1 is intended, as put by Mr. Ball, "to bring New York into line with the rest of the nation." Judges McCree and Smith were afraid that the third sentence created a right of reversal and the committee agreed. The third sentence was struck.

The title of the rule was changed so that it would apply to nonjury cases by striking "in Jury Cases."

Rule 29.1 was adopted with these changes and with directions to the Reporter to write a new Advisory Committee Note.

Rule 32

Rule 32.2

The committee decided that the recommendations of parole officers and the like need not be disclosed to the defendant. It was thought that disclosure might impair the working relationship between the officer and the defendant. Professor Remington said that this had not proved to be the case in Wisconsin. However, Rules 32.2(c)(1) and (5) were amended to reflect the general feeling that recommendations need not be disclosed. On line 65 the words "and recommendations"were struck.

There was substantial discussion of when the report need be disclosed. The Justice Department suggested that

too quick disclosure of the report would lead to the drying up of necessary sources. This was substantially disputed by Mr. Ball on the basis of the California experience. It was decided to substitute the Justice Department's language for that of the present rule. Rule 32.(c)(1) line 34 would read "permit the defendant, or his counsel, if he is represented, to read the report of the presentence investigation exclusive of any recommendations as to sentence unless in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information that have been obtained upon promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or any other persons."

Mr. Ball and Professor Vorenberg felt that one clause suggested by the Department of Justice allowed them to foreclose any disclosure. This was "sources of information that had been obtained upon promise of confidentiality." The Reporter said that he thought inclusion of this clause required some thought. The committee voted again and it was decided 8-2 to retain the Justice Department's language.

Rule 32(c)(2) was approved.

Rule 40

Rule 40 was approved.

Rule 41

The committee noted that lines 20-21 raised the Warden v Hayden problem, but it was determined that the Reporter could avoid any difficulty by making appropriate references in the Notes. On line 20 after "(1)," the words "property that constitutes" were inserted so that the statutory words would be tracked.

Lines 22-25 were stricken and the original language of the rule retained.

There was a motion that paragraph (b) be stricken entirely, but the discussion indicated that paragraph (b) gave helpful guidelines to district judges, and the motion was withdrawn.

The committee reconsidered Rule 41(a) and decided that a definition of "federal law enforcement officer" ought to appear in the Rule. The drafting was left to the Reporter.

Rule 41(c) was considered. It was amended to reflect the changes in Rule 4 with respect to the decision not to attempt to define probable cause.

With these changes, Rule 41 was approved. It was decided that the Note, p. 78 should be amended by striking "based upon legally obtained evidence." This change is designed to reflect the fact that challenges are to be made at a suppression hearing and not before.

Judge Gesell suggested and it was unanimously agreed upon that the Note should reflect the special statutes in force in the District of Columbia. This also applies to Rule 46.

Rule 44

Rule 44 was approved.

Rule 46

Rule 46(a) will include a reference to 18 U.S.C. § 3149.

It was suggested that in light of the speedy trial bill and the adoption of Rule 45, the last three sentences of Rule 46(g) might be dropped. It was decided that Judge Zirpoli's committee ought to be consulted as to the desirability of amending the Rule.

Rule 46 was then approved.

Rule 48

Judge Gesell felt very strongly that the suggested changes should be adopted to give a judge the power to control his calendar. Mr. Wilson said that the Justice

Department opposed Rule 48(2) because certain judges had biases against certain cases and the rule would give them too much power to dismiss. Judge Lumbard noted that while the government could appeal dismissals for improper reasons, it was both costly and time-consuming to go to the courts of appeals on such issues. Rule 48, as proposed, was rejected 7-5. Thus the rule will stand as it is presently written.

Rule 54

Rule 54 was approved.

Habeas Corpus Rules

The Habeas Corpus Rules as redrafted had been circulated to the members on Friday afternoon. They were explained to the committee by Judge Hoffman, who had redrafted them with the aid of Judge Maris and others at a meeting on Thursday, September 23. Professor Vorenberg raised the question of the meaning "should have known" in Rule 9 and whether this placed too great a burden on the petitioners. It was the general concensus of the committee that the "writ-writers" knew all the potential grounds and that between them and the help of prison authorities, a habeas petitioner will be acquainted with all possible grounds prior to the running of the five-year period.

Moreover, it was determined that with the forms for the petitions (to be prepared by Judge Hoffman), a checklist would be circulated that listed all the grounds upon which the writ might issue.

The Rules were unanimously approved by the committee. The Reporter was directed to make Notes, draw up similar rules for section 2255 proceedings and the form and checklist for the petitioners and circulate these to the committee for further action at the next meeting.

Review of Sentence

The committee then turned to the problem of review of sentences in criminal cases. It was agreed that the questions before the committee were, first, whether there ought to be review at all and, second, if any review was advisable, whether it could be accomplished by rule, rather than by statute.

Judge Hoffman pointed out that most district judges were against any sort of review. He suggested that if there were to be review, the committee might decide that the reviewing authority might have the power to raise as well as lower sentences. Judge Lumbard suggested that courts of appeals might review sentences in cases before them on appeal, but that a district court panel might

review the sentences imposed after a guilty plea. Judge Gesell suggested that if the courts of appeals wanted the job of reviewing, they could have it. Mr. Wilson said that he had found that disparity within districts was not too great, but that it was substantial between districts. Professor Blakey suggested that the McClellan subcommittee felt that the decision to allow appellate review involved jurisdictional questions. Justice Weintraub suggested that district court panels were not too helpful and Judge Nielsen noted that in the Ninth Circuit the vote had been 57-1 against a sentencing panel. Mr. Ball was against it, but felt there was a great need for uniformity.

After some further discussion, Judge McCree suggested that the court of appeals might direct a district court panel to review sentences in appropriate cases. It was agreed that this idea should be further considered. A subcommittee, Judge McCree, Chairman, Judge Hoffman and Judge Webster, was appointed to suggest a rule (or legislation) to the effect that the courts of appeals should have power to remand to a panel/district court judges sentences of certain severity.

Judge Lumbard suggested that approval of the April 1971 proposals could be expedited if the groups that usually make comments were notified and asked to have their comments available for consideration at the January meeting. The committee agreed that if this were done these proposed changes could be acted on in January. The Reporter will contact the concerned organizations to implement this proposal.

The next meeting of the committee will be held January 14 and 15, 1972, in Washington, D.C.

Adjourned at 5:00 P.M.