MINUTES OF THE MEETING OF THE ADVISORY COMMITTEE ON THE FEDERAL CRIMINAL RULES HELD AT THE LAFAYETTE BUILDING, ROOM 638, WASHINGTON, D.C., ON WEDNESDAY, SEPTEMBER 6 AND THURSDAY, SEPTEMBER 7, 1972

PRESENT:

Hon. J. Edward Lumbard, Chairman
Joseph A. Ball, Esq.
Hon. R. Ammi Cutter
Robert S. Erdahl, Esq.
William E. Foley, Esq.
Hon. Gerhard A. Gesell
Hon. Walter E. Hoffman
Carl B. Imlay, Esq.
Hon. Frank M. Johnson, Jr.
Harold D. Koffsky, Esq.
Hon. Albert B. Maris
Hon. Wade H. McCree, Jr.
Hon. Leland C. Nielsen
Hon. Henry E. Peterson
Professor Frank J. Remington, Reporter
Hon. Roger Robb
Hon. Russell E. Smith
Professor James Vorenberg
Hon. William H. Webster, Secretary
Hon. Joseph Weintraub

ABSENT:

Barnabas F. Sears, Esq.

(These minutes were reorganized to conform with the agenda items and organization of work materials for more convenient reference.)

I

REPORT ON RULES ADOPTED BY THE SUPREME COURT ON 4/24/72.

Judge Albert Maris, Chairman of the Standing Committee on Rules of Practice and Procedure, reported that all rule amendments submitted by this Committee had been approved by the Standing Committee with the exception of amended Rule 41. The Standing Committee, however, had only forwarded to the Supreme Court rule changes in the nature of housekeeping or perfecting amendments. These were adopted April 24, 1972, effective October 1, 1972. This group includes new Rule 50(b) providing for district court plans for disposition of criminal cases. The Standing Committee will next meet in October.

II

IMPLEMENTATION OF RULE 50(b) PLAN FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES.

Mr. William E. Foley, Deputy Director, Administrative Office of the United States Courts, reported that a model plan had been approved by the Committee on the Administration of the Criminal Laws and had been circulated by the Administrative Office to all federal judges and clerks. Judge Gesell expressed concern that the plan as circulated by the Administrative Office would have a negative effect upon districts which were in the process of preparing plans tailored to their particular circum-

stances and might discourage useful innovations. Judge Webster commented that the plan was substantially the pilot plan which he had used for discussion purposes in presenting the 50(b) Rule to the Fifth Circuit Judicial Conference. The theory of the pilot plan was to deal with the requirements of Rule 50(b) both in terms of maximum time limits and in terms of special procedures tailored by each district to facilitate disposition of cases in less time than provided in the maximum periods. He noted that time limits in the pilot draft dealing with arraignment, sentencing, etc. had been extended in the so-called "model plan" and that it would perhaps have been more appropriate to leave those times blank to emphasize the flexibility of individual plans intended by this Committee. Mr. Carl Imlay, who had attended the San Francisco meeting at which the "model plan" was approved, reported that there had been a diversity of views and that the draft reflected the time pressures present in metropolitan areas.

Judge Nielsen moved and it was duly adopted that the sample draft was a starting point to assist the districts in preparing their individual plans; that the circulation of the plan should not be considered a plea for uniformity; and that Judge Lumbard should communicate this view to Judge Zirpoli, Chairman of the Committee on Administration of the Criminal Laws.

Judge Alfred Murrah, Director of the Federal Judicial Center, and Mr. Richard Green of the Center reported on the activities of the Center in furtherance of reducing delay in criminal cases. Judge Murrah noted that there had been three meetings with the metropolitan judges. Mr. Green reported on a study of causes of delay in the twenty largest districts. The study included a survey of expenditures of time in various courts, with the greatest time being spent at the pretrial stage. Studies of methods to shorten the time from plea to sentence had been made without any real conclusions. The Center is also working with the metropolitan districts to find ways to reduce the volume of motions. Research indicated that discovery accounted for thirty per cent of all motions filed. Some districts reported good results from inducing the United States Attorney to make prior disclosure of §3500 material. Proposals are under consideration for preparation and inspection of presentence reports at an earlier stage. Mr. Green distributed a set of statistics summarizing the findings of the Center. In reply to a question, Mr. Green indicated that the Center was not aware of the current proposed redraft of Rule 16 dealing with discovery without motion, as well as the new procedures proposed for advance view of presentence reports under amended Rule 32. It was agreed

that the Center should be kept advised of rule changes and additions being proposed by the Advisory Committee.

Judge Johnson requested the Judicial Center to consider means to avoid the delay caused by late filing of competency motions.

III

REPORT ON RULES APPROVED BY THE STANDING COMMITTEE BUT NOT FORWARDED TO THE JUDICIAL CONFERENCE OF THE UNITED STATES.

(A) Professor Remington reported briefly on the following classification for discussion of rules previously approved by the Standing Committee: those in category (B) include requests for reconsideration, although previously approved by the Committee; in category (C), the Judicial Conference requested the Committee to reconsider proposed Rule 40 in view of possible ambiguities; in category (D) Rule 41.1 - nontestimonial identification - was not approved by the Standing Committee and was returned to this Committee for reconsideration; and finally the rules in category (E) were approved by the Standing Committee without comment and are in order to be forwarded to the Judicial Conference, subject to final approval of language and Advisory Committee notes.

-- (B) Reconsideration (at the request of the Committee).

Rule 11 - Pleas. Professor Remington stated that the rule did not require that the court ascertain that a factual basis existed for a plea of nolo contendere, reflecting the opposition of the anti-trust bar in view of the implications of such disclosures and findings in future civil litigation. After discussion of the plea agreement sections, it was determined that subparagraph (e)(1) meant only an agreement to recommend, and that it extended to recommending probation as well as sentencing. Therefore, no changes were necessary. On Judge Hoffman's recommendation, the Committee voted to amend subparagraph (e)(2) by striking the word "receipt" in the next to last line of such subparagraph and inserting the word "consideration". [See Appendix 1]

A suggestion to incorporate a clause dealing with a plea agreement predicated upon future testimony before a grand jury was abandoned in view of the possible conflict with the proposed Federal Code of Evidence now under consideration by the Supreme Court. The advisability of taking pleas under oath was discussed, with no action requested. A recent Ninth Circuit panel opinion, not identified by citation, which makes a distinction between sworn and unsworn testimony, was suggested for inclusion in the Advisory Committee notes.

Rule 12.1 - Notice of alibi. Approved without change.

Rule 12.2 - Notice of insanity. The rule was approved without change. However, a change in the title to encompass more than insanity was felt desirable, such as "notice of defense based on mental condition." Professor Remington was requested to develop such change through the Editorial Committee prior to October 2nd.

Rule 15 - Depositions. Approved without change.

Rule 17 - Subpoena. Approved without change.

Rule 32 - Sentence and judgment. Professor Remington reported that probation officers wanted an additional provision that such officers could not be compelled, except by the court, to disclose presentence reports except in accordance with the rule. After discussion, it was concluded that the change was not warranted, and the rule was approved without change.

The Committee adopted Judge Hoffman's motion to amend 32(c)(1) by inserting in the second paragraph thereof after the word "report" the words "at any time" and deleting the balance of the sentence. [See Appendix 2]

Appellate Rule 9 - Release in criminal cases. The Committee discussed the need for clarification of subparagraph (d) dealing with preparation of transcripts, in connection with defendants appealing in forma pauperis, both to align more

closely with the Criminal Justice Act and to recognize that some defendants are already proceeding in forma pauperis and others are seeking that classification for the first time upon appeal. The Committee voted to delete the proposed amendment to subparagraph (d) and substitute therefor the following:

> ". . . has been granted leave to proceed under the Criminal Justice Act"

The Committee also voted to incorporate an Advisory Committee note with respect to carry-over rights on appeal and a reference to new Rule 46(c). [See Appendix 3]

Appellate Rule 10 - The record on appeal. For reasons applicable to Appellate Rule 9, the Committee voted to amend the final clause in subparagraph (b) referring to "in forma pauperis" to read:

> ". . . unless the appellant has been granted leave to proceed on appeal under the Criminal Justice Act." [See Appendix 4]

(C) Reconsideration of Rule 40 (at the request of the Judicial Conference).

Professor Remington reported that the original draft of Rule 40 had been referred back to the Committee by the Judicial Conference for further clarification, calling particular attention to the matter of setting bond by the local magistrate after bond had been originally fixed by the district court in which

the offense was alleged to have been committed; and also the applicability of the rule to bench warrants issued by the district court. A proposed redraft of Rule 40 was submitted for consideration. Judge Gesell expressed his opposition to attempting to delineate the historic power of the trial judge to issue bench warrants. Following discussion, it was voted to pass the matter to the next meeting of the Committee.

(D) Reconsideration of Rule 41.1 - Nontestimonial identifica

This rule was reconsidered in its entirety and certain language modifications were adopted, following a report by Judge Gesell on operation in the District of Columbia under the so-called "Adams order". Judge Gesell stated that the District Court of the District of Columbia receives from fifteen to thirty requests per month for eight different types of identification. In most situations, the defendant has been arrested and has counsel, and the order is issued on "probable cause" with no problems presented. In situations where a defendant is seeking exculpation, generally while under arrest and under suspicion of having committed another offense, the magistrate had been issuing on less than ("almost") probable cause. These are being handled on an ad hoc basis with the court favoring an application by the United States Attorney supported by a search warrant.

It was suggested, but no action taken thereon, that subparagraph (b) was not broad enough to include a suspect seeking aid of process. Professor Vorenberg asked for a provision that persons subjected to Rule 41.1 not be interrogated, in order to avoid using the rule as a pretext to get the suspect to the station house for interrogation. No action was taken on this request. Judge Hoffman stated that he felt the interrogation question was adequately covered, and there was general agreement that this subject could be covered in the Advisory notes. Item amendments were adopted as follows:

(a)(1) amended by adding as a final clause after "government" the words "or any defendant".

(a)(3)(ii) amended by inserting after the word "affidavit" the words "may have".

(a)(6) amended by substituting for "order" in line 2 the words "and comply with", and to amend the caption to read "failure to appear and obey".

(b) amended to insert "attorney for" before the words "the person arrested".

At the suggestion of Judge Robb, the reference to Spriggs v. Wilson on page 2 of the Advisory Committee notes was stricken.

[for these changes see Appendix 5]

On discussion of the amended rule, Judge Webster questioned

the lack of opportunity for a person subjected to the rule to raise constitutional objections to the court order. The majority felt that the new rule was analogous to search warrant procedures, where use could be limited in the event the taking proved invalid. The rule, amended as above, was adopted. Judge McCree voted in opposition thereto on constitutional grounds.

(E) Review of rules and Advisory Committee notes previously approved by the Standing Committee without request for further consideration.

Professor Remington inquired whether Rule 12 - Pleadings and Motions Before Trial; Defenses and Objections - required further treatment in view of the use of pre-arraignment motions in omnibus proceedings. It was the view of the Committee that these matters could more appropriately be handled by local rule.

IV

REPORT OF RULE PROPOSALS APPROVED FOR CIRCULATION BY THE ADVISORY COMMITTEE AT ITS JANUARY, 1972 MEETING.

Rule 6 - The grand jury. Approved in present form.

Rule 11 - Pleas. Mr. Harold Koffsky of the Department of Justice objected to court accepting a plea to a lesser included offense over the objection of the government, as an encroachment on the government's prosecutive discretion. Judge Gesell raised

the question whether "accessory after the fact" could be a lesser included offense within the meaning of the rule, but the Committee agreed with Judge Johnson that the Committee should not attempt to decide substantive questions. The rule was approved in its present form.

Rule 24 - Trial jurors. The Committee voted to approve the August 28, 1972 redraft incorporating the words "is found to be" in connection with disability of jurors. Judge Johnson stated that the sequestered alternate jurors should be told never to deliberate, and the Committee approved incorporating this in an Advisory note. In order to deal with a possible reduction of alternate jurors at the conclusion of the trial, pending deliberations, an amendment was approved inserting after the word "but" on the top line of page 2 the words "such number as the court shall determine in its discretion". [See Appendix 6] An amendment to the Advisory note to incorporate available experience in state courts was approved. The reference to doubt as to constitutionality of the provision was referred to the reporter for more positive revision.

Professor Remington stated that the Committee on Criminal Procedure had suggested a note to Rule 24(b) to the effect that

"continued provision for peremptory challenges where the offense charged is punishable by death is to provide for the eventuality of legislation which imposes the death penalty and can pass constitutional scrutiny," which was approved for inclusion.

Rule 35 - Correction or reduction of sentence. The rule and Advisory note were approved following deletion from the Advisory note of the sentence on page 5 reading, "The choice of two years represents a compromise." [See Appendix 7] It was noted, in response to a question, that page 13 of the Advisory Committee note expressly states that the rule does not impose a duty on the sentencing judge to notify the defendant of his right to move for reduction or review of sentence.

Rule 40.1 - Removal from state court. The rule was approved in its present form. It was noted that Judge Haynesworth had suggested that the rule make it explicit that removal was not effective until the entry of the order. The Committee concluded that the rule was sufficient in this respect as drafted. The note might well contrast the criminal removal procedure with civil removal procedure.

Rule 41 - Search and seizure. The thrust on the issue of practicality under (c)(2) was revised by amending the words "shall be recorded if it is practical to do so" to read "shall

be recorded unless it is impractical to do so". [See Appendix 8] As amended, the rule was again approved.

V

HABEAS CORPUS RULES.

Professor Remington expressed concern about the provisions of habeas corpus rule 12 which appeared to require the application of Federal Rules of Civil Procedure. Rule 12 was amended to read as follows:

> "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied where appropriate to petitions filed under these rules." [See Appendix 9]

The reporter was directed to add a companion note.

Rule 2 - Petition. A new last sentence was added to paragraph (e) as follows:

> "The clerk shall retain one copy." [See Appendix 10]

Rule 9 - Laches; successive petitions. A lively discussion centered upon shifting the burden to show no prejudice to the defendant, as suggested by Justice Cutter. The proposed language revisions were tendered for recopying and thereafter reconsidered. A proposal to create a presumption of prejudice to the state after five years was thereafter suggested, the exact language being left to the Editorial Committee. Judge Johnson expressed the view that this rule encroached upon substantive questions

decided by the circuits. Judge Maris stated that he thought the proposal would assist in making the circuits uniform. Finally, a change in title, to avoid the traditional connotation of "laches" as a defense vehicle was approved. The amended motion, subject to final revision by the Editorial Committee, was approved. [For draft of Rule 9 as believed to be finally approved and referred to the Editorial Committee, see Appendix 11.]

Professor Remington was requested to prepare a companion set of rules to cover §2255 applications which would be substantially the same except as to exhaustion and other technical variances, both rules to go in the same pamphlet for circulation.

VI

REPORT ON FEDERAL PENAL LAW.

Mr. Robert Blakey, chief counsel, Senate Judiciary Committee, presented a report on the proposed reform of the Federal Penal Law and presented a proposal for a cooperative effort between the Senate Judiciary Committee and the Advisory Committee. Mr. Blakey stated that the Judiciary Committee staff had under consideration a tri-part integrated code. Title 1 would be the revised criminal code incorporating the substantive provisions found substantially in 18 U.S.C. Title 2 would be a re-enactment

of the current Federal Rules of Criminal Procedure together with certain procedural statutes which could more properly be dealt with as rules, such as the Jencks Act statute. A third title would incorporate the proposed Federal Code of Evidence. The rules title would provide for subsequent amendment in the same manner as provided for the current rules. Mr. Blakey observed that there was great difficulty in dealing with small changes in the Congress, but that procedural rule changes could be handled through the Supreme Court, as in the past. A salutary purpose of the tri-part code would be the logical integration of the substantive provisions, the rules, and the evidentiary rules.

Mr. Blakey proposed that for one unique point in time the Advisory Committee be authorized to cooperate with the Judiciary Committees of the Senate and the House to develop the first code. A discussion of the propriety of such cooperation followed. Judge Maris observed that Congress has not previously suggested a positive approach with the courts on rule making procedures and that this might be a unique opportunity. On motion of Judge Hoffman, duly seconded, it was resolved by a vote of 9-3 that Judge Maris be requested to obtain approval from the Standing Committee and the Judicial Conference for the Advisory Committee to cooperate with the Judiciary Committees of the Senate and House of Representatives on procedural aspects of the Federal Penal Code.

VII

REPORT ON THE MAGISTRATES' RULES.

Mr. Joe Spaniol reported that statistics on the first full year had been completed June 30th and reflected 236,000 items of business completed by the magistrates. 81 full-time magistrates handled two-thirds of all matters and 234 part-time magistrates handled the balance. Mr. Spaniol noted some of the ways in which magistrates were providing useful assistance and relief to the district judges, including conducting omnibus hearings, Rule 20 transfers, some handling of criminal calendars and some Rule 48(b) dismissals.

Judge Hoffman criticized giving all persons free copies of transcripts, which is apparently the effect being given to the rules.

Mr. Spaniol commented upon magistrate Rule 4. In its present form, a bench warrant may issue for failure to appear for hearing. If the application rests upon a citation, the officer must come in and swear to it before the magistrate can issue the bench warrant.

On motion of Judge Hoffman, it was voted that the magistrates and district judges be circulated for suggested changes and that these suggestions be referred to Mr. Erdahl and thereafter considered at the next meeting of the Advisory Committee.

Mr. Spaniol will keep the reporter and Mr. Erdahl informed of practices in the magistrate courts.

VIII

NEW RULE PROPOSALS.

(A) Rule 6(e) - Recording of grand jury proceedings.

Consideration was given to Judge Smith's minority report opposing the majority report of the subcommittee consisting of Judges Gesell and Smith and Mr. Ball. It was generally agreed that such recordings, if required, should not be used to attack probable cause. At the same time, several members of the Committee expressed a desire not to impose a new burden on the trial judge to read all grand jury testimony. Professor Remington stated that the alternatives appeared to be either to raise the requirements for indictment by grand jury or lower the requirements in connection with preliminary hearings (Rule 5), in order to encourage greater use of the latter. Mr. Carl Imlay noted that the Department of Justice had provided reporters for grand jury proceedings up to this time, but there would be a budgetary problem if all proceedings were to be recorded.

Principal concerns centered upon delay, cost and burden. Judge Webster suggested that mandatory transcription might be a step in the opposite direction from the Rule 50(b) goal of speedy

trials. Judge Nielsen indicated recordings had proved less than satisfactory as a substitute for court reporters. Justice Cutter suggested that the matter was the subject of possible legislation and that the matter might well be referred to a Congressional Committee. The number of grand jurors came into discussion with substantial sentiment for reducing the maximum, minimum and number required to indict. These are incorporated by statute in Title 18, §3321 and would require a statutory amendment.

Following discussion, it was voted to amend Rule 6(e) so as to provide that disclosure of grand jury testimony should not be used for the purpose of testing probable cause, and that defendant's "right" to prepare a transcript should be changed to defendant's "privilege". [See Appendix 12]

(B) Rule 20 - Transfer from the district for plea and sentence.

The Committee considered the written suggestion of Judge Real that the rule be amended to permit oral transmission of information necessary to authorize a local plea. Judge Nielsen reported on the proposal. He stated that Rule 20 pleas can be consummated in three to four days by ordinary mail if the United States Attorney will act promptly. Mr. Harold Koffsky noted that this was essentially a manual problem. Judge Nielsen was

of the view that "written approval" could be achieved on Telex devices without change in the rule. It was noted that the current draft of Rule 20 had previously been approved by the Standing Committee without request for change. It was voted to make no further change in the rule, but to incorporate a note to show the possibility of broader application; and at the same time, warn that forum shopping is protected by requiring the consent of the United States Attorney. A change in the consent form may be necessary. Judge Nielsen will cummunicate these views to Judge Beal.

(C) Rule 23(c) - Trial without jury.

The proposed rule changed the existing rule by mandating findings of fact, but providing that such findings may be oral. Judge Smith proposed that the former words "on request" be reinserted together with the words "made before a general finding" with reference to the duty to find facts specially. This was adopted. It was the view of the members of the Committee that the trial judge would have power to amend or correct his findings at any time prior to final judgment or denial of motion for new trial. Rule 23, as amended, was unanimously approved. [See Appendix 13]

(D) Rule 43 - Presence of the defendant.

Professor Remington stated that the proposed addition would be a subsection 3 and that a subsection 2 dealing with courtroom

disruption is now in process. Judge Gesell noted a practical problem generated by local court rules requiring evidence of diligent efforts to locate the defendant. Judge Johnson observed that failure to look for the defendant was not a real problem because the ultimate question is whether the defendant did or did not voluntarily absent himself. On motion of Judge Hoffman, duly seconded, the proposed addition to Rule 43 obviating the continued presence of the defendant upon grounds set forth therein was approved.

IX

MISCELLANEOUS.

As the Committee was concluding its business, it was joined by the Chief Justice of the United States. Chief Justice Burger discussed a number of areas of interest to the Committee, including the impact of the proposed penal code on case law dealing with construction of present criminal statutes, as well as on court instructions. He also discussed efforts being made to reduce the volume of cases on appeal.

Judge Lumbard appointed an Editorial Committee, consisting of Judges Hoffman and Webster and Professor Remington, with instructions to meet to put the changes and modifications in final shape for submission to the Standing Committee prior to

October 2, 1972.

The meeting was adjourned at 3:00 P.M., September 8, 1972.