MINUTES OF MEETING
ADVISORY COMMITTEE ON CRIMINAL RULES
WASHINGTON, D.C., AUGUST 26-27, 1976

The meeting was called to order at 9:00 a.m., August 26, by the chairman, Judge Lumbard. All members of the Advisory Committee on Criminal Rules were present, except Justice Cutter and Assistant Attorney General Thornburgh. The Department of Justice was represented by Roger Pauley and John Clark, U. S. Attorney from San Antonio. Judge Webster did not attend the session on August 27 due to a marriage in his family.

Also meeting with the Advisory Committee was the Standing Committee on Rules of Practice and Procedure, all of whom were present, except Judge McGowan. The Honorable Griffin Bell was absent on August 27.

Judge William Bryant, of the Committee on the Administration of the Criminal Law, was present for both days. Paul C. Summitt, Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedure, joined the Committee for August 26, and Thomas W. Hutchison, Counsel for the House Subcommittee on Criminal Justice, joined the meeting for August 27.

A brief history of the Committee's proposed Rule 35 on review of sentences was given by Professor LaFave, who pointed out that Congress in S.1 was proposing appellate review of sentences and that the Committee draft of the rule was circulated in 1973 and sent on to the Standing Committee in 1975. However, the Judicial Conference referred it back to the Advisory Committee for circulation to the bench and bar and further consideration. The chairman then asked the various committee members to express their personal views on the matter.

Judge Webster stated that his first reaction to the suggestion of sentence review was "shock, revulsion and anger" but that he has now changed his opinion substantially. His two main concerns now with the panels are: (1) the burden of work, and (2) divisiveness, the reluctance to have more work piled on; however, he believes this has been no real problem in states with sentence review laws. He believes there are many sound arguments in favor of

enhancement, but feels there would be a real chilling effect if it applied only when the defendant asked for a reduction in his sentence. This matter was treated in our Advisory Committee notes to our proposal last year, but the Standing Committee omitted it when sending it forward to the Judicial Conference. He believes that appellate review would avoid friction between the district judges and would allow a simplified procedure, although he does not believe that there can be any common law of sentencing, which is the Judge Frankel approach, and he questions the timing of the application for review when the district judge must rule first.

Judge Webster said that it appeared to him that although the district judges around the country have been against the proposal that everyone else is in favor, and he believes the Lumbard proposal meets many objections to the district judge review panels. He pointed out that at the Fifth Circuit Conference many said they would favor not only defendant's rights, but also the government's right to enhancement. He would feel that a panel designated by the chief of the circuit, comprised of one circuit judge and two district judges would be the best answer, that the motion papers should go to the panel but that it would not be required to meet and it would take very little time.

Judge Robb stated that he is still opposed to any review by the circuit as the judges there are not equipped and have no experience. He believes Judge Lumbard's proposal should be acceptable, but he would let the chief of the district court name the two district judges rather than the chief of the circuit, and he favors the right of the government to enhancement.

Judge McCree, who was the chairman of the subcommittee which drafted the original proposal, stated that he is now convinced that the burden of the proposed Rule 35 is intolerable and that a similar burden would be created by Judge Lumbard's proposal. He is close to Judge Frankel's common law of sentencing ideas and thinks that the appeal in this situation can be analogized to an appeal from excessive or inadequate verdicts, but is not sure that it should apply to all judgments and would not be averse to some minimum limits. He feels enhancement would only be proper if the defendant asked for a reduction as, otherwise, there would be a double jeopardy problem.

Mr. Pauley, of the Department of Justice, stated that the Department has long been interested in sentence

review and basically favors the scheme in S.1, that it favors use of appellate review as they believe precedents would be valuable. The Department also thinks it would not be an intolerable burden on the Courts of Appeal. It favors limits on the right to petition to a certain fraction of the maximum possible, or by the government if less than a certain fraction. It has a strong feeling that the government should have the right to enhancement and that there would be no chilling effect of constitutional dimensions if this was an independent right. No one in the Department thinks that it should be done by rules as Congress is very jealous of its power at the present time.

Judge Webster stated that he still believes that the Committee draft of Rule 35 is better than any other proposal, except that the burden would be great. He thinks the interlocutory approach suggested by Judge Lumbard may be okay, but still would be a burden. He doubted enhancement power was needed as it was rarely used in Massachusetts, and he doubted any meaningful common law of sentencing could be established. He then suggested that the various circuits might have an option: those who feel it to be an excessive burden could opt for either Rule 35 or straight appellate review.

Judge Nielsen stated that he felt the burden would be intolerable under the Committee proposal and that he liked Judge Lumbard's proposal except that it should be three circuit judges on the panel and no district judges. In regard to the burden, he stated that he had checked the records in the Southern District of California last week and there were 27 sentences pronounced that would have been subject to review under the Committee proposal. He said he favored the government right of enhancement.

Mr. Green stated that he favors review by the circuit court but that it would be suitable for them to screen the requests. He tends to believe that the Court of Appeals can develop a body of law of sentencing.

He inquired as to the relation between the new Parole Act and the move to have appellate review, as the guidelines which the judge has at the time of sentencing, with the salient factor score that Congress has approved to take care of most disparity. He is against the government's right to enhancement.

Mr. Bedell stated that he was strongly against the government's right to enhancement. He thinks there should be review of clearly excessive, unreasonable or shocking sentences, and thinks that all prison sentences should be subject to such review. He believes the Lumbard proposal superior to the Committee's proposal, but this review should be by circuit judges and not district judges.

Mr. West stated that he is now back to favoring appellate review as he believes it simpler, and he is against the right to enhancement. He would not allow review below certain minimums, but he believes that review is necessary as now he feels there are tradeouts and some cases are reversed on really harmless error just because of the severity of the sentence.

Judge Smith stated that he felt we were really looking at a very narrow problem -- really only the few judges who let everybody go and the few who always throw the book at them. He favors the government having the right of enhancement. He also favors appellate review with the circuit courts free to screen any way they want to.

Judge Lacey stated that he thinks the few aberrant sentences are the cause of the push for appellate review. He stated that all of the New Jersey judges had a discussion a few days ago and that the only ones any of them remembered were two suspended sentences and that he would be mad if any of his sentences were reversed. He is strongly opposed to sentence review as there has been no district-by-district analysis as to the number of aberrant sentences, so no one can tell what the burden will be in hours or cases. However, he believes the burden to be intolerable, and also that public opinion is what we make it. If sentence review is to come, he is convinced that the Court of Appeals should do it rather than anything on the district court level, and he believes there should be a pilot program in a circuit to see what the burden might be. He favors enhancement and is against the Lumbard proposal just for the burden.

Judge Gordon agrees with Judge Lacey: he does not want sentence review and does not think there is an overwhelming public sentiment for it. He believes disparity is very hard to define and that it would be very difficult to get any meaningful body of sentencing law. If any review is necessary, he feels the Lumbard proposal to screen is the best approach. He believes enhancement to be all right and that any actual review should be by the Court of Appeals.

Mr. MacCarthy stated that he was not in favor of any sentencing review as he feels that disparity is needed as defendants are different. He feels the burden would be very bad as Defenders would end up representing all of the defendants. He is fearful that it would result in bad law if sentences were reviewed in the Court of Appeals. He proposes the consensus view of the Seventh Circuit that there should be a mandatory sentencing council, the input should be before and not after the sentencing, and that if the sentencing council did not come to a consensus and the sentencing judge went over the recommendations of the other members that then the defendant could go to appellate review.

Judge McCree said he started on a sentencing council in 1961, but his great objection to it is that there is no chance for the attorney then to convince the judge because his mind has already been made up in the sentencing council.

Mr. MacCarthy stated that perhaps we could experiment with pilot programs of different systems. He stated he was mildly against enhancement as you would always have to have counsel appointed for the defendant. He also said that if there was to be review of sentences that he would prefer it by district judges as they are much more knowledgeable on sentencing.

Judge Lumbard stated he felt it was equally valid to have just Court of Appeals judges on the panel, or leave it up to each circuit whether district judges or circuit judges should sit on the panels. Judge Thomsen stated that we must remember that districts and circuits vary greatly. In Maryland they have normal ranges for most cases and if you are going to be in the range, you are to talk to other judges, one tough and one lenient, and it is really easy to come to a consensus, and that some sort of conference should be used. He favors the right to enhancement, and if there is to be sentence review then he favors the Lumbard proposal, except that the screening should be by the circuit courts as there are too many small districts; however, there should be a district judge on the panel or perhaps two.

Professor Levin favors appellate review of grossly excessive sentences, stating that if there are even two percent bad ones that it should be done, and that we need to know the added volume of work. He is against enhancement, and he does not believe Congress would go for a rule with enhancement, but would if it was not in the rule.

Mr. Marshall stated that he felt he was the most detached person present as he had no criminal practice whatsoever. He believes enhancement to be a philosophical question, that if there is a wrong it should be righted, so he is in favor of enhancement. As a practical matter he was impressed by Mr. MacCarthy's suggestion of a mandatory sentencing council. If there is to be appellate review, he thinks it should be along the lines of the Lumbard proposal with either the chief judge or the circuit council appointing a panel. He says politically there are very divergent views in the Committee indicating that the Congress would never go along with any Committee proposal, so the Judicial Conference should suggest skeleton laws.

Professor Remington believes that most of these matters will require action by Congress but that proposed rules could be of great help. He thinks we could change Rule 35 to make no review possible if the sentence was by plea agreement or from a sentencing council. He believes appellate review in some form is coming. He is mildly in favor of enhancement but that would have to be by Congress.

Judge Joiner stated that Congress has put big ranges of possible sentences in without definition and there is a great effort throughout the country to get much smaller ranges, and Congress may very well do that. He is not really convinced that there is much disparity in sentences despite the Second Circuit survey. He thinks the problem on burden is being overstated. He believes there is a lot to be said to the effect that this is not in the rulemaking authority and perhaps not even if Congress did it as far as enhancement is concerned. He thinks we should give Congress a judicial impact statement.

Judge Wilson stated that he was not really acquainted with all of the problems. He has a question of Rule 35 constitutionality as it is really creating a new court with new jurisdiction, and he believes we should absolutely have a statute because of the Article III problems. He doubts judges should evaluate public opinion and act in response to the public, the bar and Congress. He believes we might avoid constitutional problems if providing an appeal to the district court and would consider limiting it such as by cert or limit it to non-4205b2 sentences.

Judge Bell states he believes we are reacting to the S.1 proposals and that there wouldn't be any problem for appellate review now if the Courts of Appeal would just change a few decisions. He stated Georgia now has a trial

judge panel reviewing, and it is working well with just one panel and handling as many cases as the whole federal system. The S.1 proposal has the review searching the entire record, which he is against, but he feels there should be review if the sentence is clearly unreasonable. He believes that if review is proper, it should be by rules and leave it to the circuit council to appoint one or two district judges to the screening panel.

Judge Bryant stated that his committee has missed many of the problems that have been discussed today, and he wonders why there should be a screening panel as it would appear to be just a duplication of effort. He thinks any sentence of incarceration should be appealable. Mr. Summitt stated that he had not realized the ramifications of the questions and he has no opinion as to whether it would be proper or not as Congress will look in depth at any proposal. There is a great tendency in the House, at the present time, to say any change is substantive rather than procedural. He feels the Judiciary should get its views to Congress more definitely and earlier.

Judge Bell believes there is no power by rule to provide for enhancement.

Mr. Pauley said he has a draft of the Department of Justice statutory proposal and gave the members copies.

Mr. Clark stated there was no sentence bargaining at all in the Western District of Texas, and he felt the sentences were inadequate as often as they were excessive and that it was not fair to deal with just one side of the question.

Mr. Summitt questioned why the judges could not agree on the guidelines on sentencing.

At this time the noon recess was taken.

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Afternoon session

Judge Webster stated that he believes there should not be any review of sentences unless the sentence was three years or more, as we are shooting for identifying only the aberrations in sentences. He also stated that because of the great airing there has been a change of heart and the district judges now say "let the Courts of Appeal do it."

Judge Nielsen stated that at least 50% of the district judges in the Ninth Circuit have changed their minds and now want the circuit judges to do it.

The chairman then proposed a series of questions to the two committees and asked for votes on them.

Question 1. Should there be some form of sentence review? Advisory Committee: 10 yes, 2 no, 1 abstain; Standing Committee: 6 yes, 1 no.

Question 2. Should the merits of the sentence be decided by the Court of Appeals? Advisory Committee: 12 yes, 1 no; Standing Committee: 7 yes, 0 no.

Question 3. Should leave to appeal the sentence be required when there is an appeal on the merits? Advisory Committee: 10 yes, 3 no; Standing Committee: 6 yes, 1 no.

Question 4. Should there be some limitation as to the length of sentence imposed before granting the right to petition for sentence review? Advisory Committee: 9 yes, 3 no, 1 abstain; Standing Committee: 5 yes, 2 no.

Question 5. Should there be review of fines? Advisory Committee: 7 yes, 6 no; Standing Committee: 1 yes, 6 no.

Question 6. Should there be review if the fine is at least one-fifth of the maximum? Advisory: 3 yes, 6 no.

Question 7. Should there be review of probation or suspended sentences? Advisory Committee: 2 yes, 11 no.

Question 8. Should there be review of any sentence imposing imprisonment? Advisory Committee: 9 yes, 2 no, 2 abstain; Standing Committee: 5 yes, 2 no.

Question 9. Again putting the question: Should there be review of any fine? Advisory Committee: 9 yes, 4 no.

Professor Levin questions whether the standard for the petition is too lax. Judge Bell stated that the Department of Justice seems to agree.

Mr. Pauley stated that you should first decide what the ultimate standard is to be, then decide whether there is substantial basis for believing that the ultimate standard may apply.

Judge Lumbard pointed out that plea bargains should not be reviewable nor should probation or suspended sentences. Judge McCree moved that all sentences be subject to review except negotiated plea sentences. This motion was seconded but lost six to seven.

Judge McCree moved to exclude any sentence of fine only. This motion was seconded but lost four to eight, with one abstaining.

A discussion then ensued as to the proper standard as to whether it should be "a substantial basis for questioning the propriety of the sentence" or "clearly unreasonable" or "abuse of discretion."

It was then suggested that in the commentary to the proposed rule it should be made plain that it would be proper to have district judges on the screening panel.

Question 10. Should there be the power of enhancement? Advisory Committee: 8 yes, 4 no; Standing Committee: 4 yes, 2 no.

At this point the Committee adjourned to resume its meeting at 9 a.m. on August 27, 1976.

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August 27, 1976.

Professor LaFave reported briefly upon the status of the rules that we had sent forward to the Standing Committee at our last meeting.

Judge Smith reported on the grand jury proposals before Congress, stating there were many bad proposals before the Eilberg Subcommittee in the House, and he suggested that he go over the bills and circulate them to the Committee so we can vote on them at our next meeting.

Mr. Pauley stated that the Department of Justice agrees with Judge Smith on the bills having many bad provisions and that they will give the Committee the Department of Justice position on all of the bills.

Mr. Hutchison advised the Committee that there would probably be no legislation involving the grand jury through Congress this year.

Professor LaFave then reported on the proposed Rule 43 changes and explained the alternatives A and B, which have been submitted to the Committee.

Judge Nielsen moved, and Judge Robb seconded, the adoption of alternative B with "good cause." Judge Gordon preferred "unavoidable" over "good cause"; Judge Joiner wanted the strongest possible language; Mr. Bedell wants less strong language; Mr. MacCarthy thought it was no great problem; Mr. Marshall suggested the language "with justification"; Mr. Bedell wished to change subparagraphs b and c and wilfully; Mr. Pauley wanted the discretion of court; Judge McCree suggested "justifiable excuse"; and Mr. Green wanted to take a different tack.

The motion then passed without a dissenting vote.

Mr. Marshall and Judge Smith then both said they had a problem with the word "knowingly," and on motion the word "knowingly" was unanimously stricken.

Mr. Bedell then moved, and Judge McCree seconded, to insert in line 3, "by defendant's absence." After discussion, this motion carried ten to one.

Some of the additional problems of the grand jury were discussed by Professor LaFave. Judge Smith then moved, and Mr. MacCarthy seconded, that the proposed Amendments to Rule 6(e) and 7(g)(2) be sent on to the Standing Committee. This motion carried unanimously.

Professor LaFave then discussed H.R.14666. Mr. Pauley advised that the Department of Justice appeared on the bill and favored it with certain amendments, especially to sub(b)(1)B. Mr. Pauley was the Department of Justice witness before the Committee, and he believes the bill goes too far, and that perhaps sub(b) should be dropped entirely. Judge McCree believes that this is not in our scope as it is too substantive. Mr. MacCarthy was against the whole idea and expressed his views at length, stating that it was only material in an alleged consent case. Mr. Hutchison then advised that it would be okay for the Committee to say it was not interested. Professor Levin believes that there are serious constitutional problems with the provisions of the bill. Judge Robb believes that there are practical problems with the bill and that it is not necessary and is a bad bill. Judge Robb moved, and Mr. MacCarthy seconded, that we disapprove the bill. Mr. Pauley spoke against the motion as the Department of Justice thinks it is very needed. Judge Smith suggested that the vice and the whole situation

is unjustified cross examination which could be controlled by a strong judge. Mr. Hutchison says that we should not vote to oppose without hearing from the proponents of the bill. Judge Joiner thinks it is a political bill. Judge McCree objects as it is implicit criticism of judges for failing to protect witnesses and singling out a particular crime, which he believes is inappropriate. Professor Remington pointed out that a majority of the states have changed their laws. Judge Nielsen moved, and Mr. Bedell seconded, a substitute to put over this matter until the next morning. This motion was carried unanimously, and a subcommittee of Professor Remington, Mr. Pauley and Mr. MacCarthy was appointed to consider the matter.

A redraft of the appeal from sentences was then circulated and brought up for discussion.

Judges Lumbard and Thomsen reported that they had talked to the Chief Justice and he had approved a further report fo the Committee's recommendations to the Judicial Conference to be followed by recirculation to the bench and bar, further consideration by the Advisory Committee and the Standing Committee, after hearings, so that the matter could be further considered at the March 1977 meeting of the Judicial Conference.

Judge McCree thought line 4 on page 1 should read "with copy thereof to clerk of the district court," or that two copies should be filed with the clerk of the district court, who sends one to the Court of Appeals. He also wants to strike line 74 on page 4 and line 82 as the Court of Appeals should not impose sentence. Judge Wilson thought that (i) should be stricken and that (i) should read "remand for resentencing in accordance with its decision." Judge Smith then moved, with Judge Nielsen seconding, that it was the sense of the Committee that the Court of Appeals should not impose sentence but would have full power to order whatever necessary. This motion carried unanimously.

Judge Smith thought that line 15 on page 1 was really a problem.

Mr. Pauley thought the word "death" in line 12 on page 1 should go out, and also "no fine" in line 28 "or no fine," and that the government should be able to appeal anytime that the sentence was grossly inadequate.

Mr. Green and Mr. Marshall again expressed their opinions on the fine situation. Mr. Marshall again would recommend a

brief statute and detailed rules, and he submitted a proposed statute. Professor Levin expressed his opposition to the Marshall statute. Mr. Marshall hopes there will be a petition for review.

After discussion it was decided that on page 3, line 45, the words "require or" should be added.

The Standing Committee then left the room to rewrite the proposal another time.

The Committee then took up the proposed Amendment to Rule 7(c)(2). Mr. Pauley then moved, with Judge McCree seconding, to adopt the amendment and send it forward to the Standing Committee. This motion carried unanimously.

The proposed Amendment to Rule 11 was then discussed. Judge Webster wants to add the language "and that disapproval will not require the court to allow withdrawal of the plea." Judge Nielsen moved, with Mr. MacCarthy seconding, to adopt the amendment with the Webster addition and to send it forward. Mr. Clark expressed his concern over the possible dilution of prosecutorial discretion under Rule 48 by this amendment, but after discussion it was carried with one dissenting vote. The noon recess was then taken.

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Afternoon session

The Committee then took up the proposed Amendment to Rule 18.

Judge Nielsen moved, and Judge McCree seconded, the adoption and sending forward of the proposed amendment. Judge Gordon objected because of a Speedy Trial Act problem and moved to strike line 4 of the proposal. He moved, with Judge Nielsen seconding, to strike. Discussion ensued by Mr. Pauley, Mr. West and Mr. Bedell, and the motion to strike lost -- two yes, eight no. The original motion then carried eight yes, zero no.

The Committee then took up the proposed Amendment to Rule 9. Judge Nielsen moved, and Mr. MacCarthy seconded, the adoption and sending forward of the amendment. Mr. Bedell originally objected, but the motion carried unanimously.

The Committee then took up the proposed Amendments to Rule 32. Professor LaFave, Mr. Pauley and Judge Nielsen expressed their views. Judge Nielsen moved, with Judge Gordon seconding, the adoption and sending forward of the amendments.

Judge McCree stated that there must be a note to indicate that the magistrate has only some jurisdiction, and Mr. Green thought that the language in the Committee notes should be "appropriate judicial officer." Judge Robb commented on the provisions in the note on page 4, that it certainly be a review on the record made and not de novo. Judge Smith thought no note on the matter was needed. The motion to adopt and send forward was then carried unanimously. Judge Smith stated that the judges want the authority. Mr. Pauley believes that the issues are of constitutional dimension. Judge Lumbard wondered why we shouldn't give the judges the help they seek. Mr. Pauley believes that the function of rulemaking is to step in only after the perameters of an area have been established by the Supreme Court. Judge Lumbard stated that this is not an area where we would be acting precipitously. Mr. West believes we should not hesitate to express our views just because there is uncertainty in the area.

The proposed Amendment to Rule 40 was then considered. After a short discussion, Judge Nielsen moved, with Judge Gordon seconding, to lay this matter over until the next meeting. This motion was carried unanimously.

The Committee then took up the proposed Rule 43.1 - Exclusion of Public. Judge McCree thinks this is a Kent State order. Mr. Pauley thinks the matter should be tabled and so moved, with Judge McCree seconding. This motion was lost.

Mr. West would not hesitate to act in this matter, and Judge Smith says we are talking the defendant's rights, not first amendment. Judge Nielsen believes that there is a first amendment violation in 43(c). Mr. West moved, with Mr. Bedell seconding, to strike subsection (c). This motion carried unanimously.

Judge McCree moved, with Mr. MacCarthy seconding, to strike subsection (d). That motion carried unanimously.

Mr. Hutchison believes that the side-bar problem is for Congress. Judge McCree feels that the words "for good cause" should be inserted in lines 3 and 13. No one appeared to agree with Judge McCree in this respect. Judge Nielsen then moved, with Judge McCree seconding,to strike the entire 43.1. This motion carried eleven to one.

A discussion was then had as to whether the district judges should be required to give reasons for their sentences. This discussion was interrupted when the Standing Committee returned with the rewritten sentence review proposal.

Judge McCree noted that an entity would not be subject to imprisonment. After a short discussion, Judge McCree moved, and Judge Nielsen seconded, approval of the Standing Committee rewriting the new proposal for sentence review for recirculation and hearings with comments due by January 1, 1977, whereupon the Committee adjourned.