MEMORANDUM

TO: Chairman and Members of the Advisory Committee on Criminal Rules

FROM: Edward L. Barrett, Jr.

RE: Summary of Important Problems to be discussed at our June Meeting.

The purpose of this memorandum is to highlight and summarize the more important problems which should be discussed at our meeting in June. I have also included references to comments received from committee members and others since the tentative drafts were prepared.

I hope you will all come prepared with detailed and vigorous criticisms.

RULES 1 and 2

No special problems. Perhaps the conclusions under Rule 1 as to the scope of our authority should be discussed.

RULE 3

1. Shall the Rule state specifically that complaints may be made on information and belief, or is it better to leave it without change?

2. Shall the Rule go further and require that no complaint requested by a private complainant be issued except on authorization of the attorney for the government? See Judge Hoffman's recommendation to this effect.

3. Shall the Rule go further and require that except in emergencies no complaint requested by a law enforcement officer be issued except on authorization by the attorney for the government? In this connection see Judge Hoffman's comments and the survey of actual practices as contained in the memorandum from the Department of Justice dated March 29 (hereinafter called the "U.S.Attorney Survey"). The survey indicates in the reporting districts all investigative agencies (except the Alcohol and Tobacco Tax Division) seek approval before arresting without a warrant is far less uniform. Professor Remington has added the cautionary note that attempts to tighten controls over federal agencies may result

in increasing dependence on local agencies to make the arrests in situations regarded as emergencies.

RULE 4

1. The amendment proposed (to permit probable cause for issuance of the warrant to be determined from a sworn affidavit as well as from the face of the complaint) appears to pose no difficult problems.

2. The basic question is whether the Rule should be amended to change the present law which appears to require that probable cause be determined solely from the face of the complaint or the affidavit. See my discussion of the conflicting policy considerations in the Tentative Draft. Alternative courses of action would be:

(a) Retain the Rule (with the amendment suggested in the draft) requiring probable cause to be shown on the face of the documents. Professor Remington suggests that this may make obtaining warrants sufficiently difficult that it will discourage their use. The statistical evidence derived from the U.S. Attorney Survey suggests that some factor other than the formal rules (perhaps such a factor as local ground rules requiring a very strict standard of probable cause?) must control the extent to which warrants are used. Notice that some districts report that arrests are made on warrant in "nearly none", "very few", "20.7%", "25%", of the cases while many more report warrant usage in from 90 to 100% of the cases.

(b) Permit reliance on oral testimony under oath before the commissioner to sustain the warrant in those situations where the oral testimony is reported - a suggestion made by Judge Hoffman. Perhaps it would be a great advance if we could encourage the adoption of mechanical recording of all proceedings before commissioners - at least before those with a substantial enough workload to justify the expense.

(c) Permit oral evidence under oath before the commissioner but require the prosecution on a motion to exclude evidence seized as an incident to the arrest to establish that in fact probable cause existed to justify the commissioner in issuing the warrant. (This course of action appears to be that suggested by Professor Remington in a letter to me on March 1 - if I have not understood him correctly, he can speak for himself.)

3. However, we resolve the questions stated above there is also the question whether the rules should state that the commissioner may take oral evidence. In the draft I recommended against such a rule. The kind of statement which might be added is suggested by California Penal Code §1526 (dealing, however with search warrants rather than arrest warrants): "The magistrate may, before issuing the warrant, examine on oath the person seeking the warrant and any witnesses he may produce, and

must take his affidavit or their affidevits in writing, and cause same to be subscribed by the party or parties making same."

RULE 5

1. The draft presented to you makes no changes to respond to the problems created by the McNabb-Mallory cases. On this issue your reporter (prodded by Judges Pickett and Hoffman) is having some second thoughts. The following paragraphs are designed to suggest the avenues which might most usefully be explored in our discussion.

2. It still appears that viewing the Rule in its administrative aspect (i.e., in telling what is to be done with the person who has been arrested) no more satisfactory standard can be devised than the existing one of "without unnecessary delay." This conclusion is fortified by the U.S. Attorney Survey which shows that in most districts most arrests are made on warrant or in any event with prior screening by the U.S. Attorney and also that detention for periods longer than 24 hours between arrest and appearance before the commissioner is rare and then limited largely to weekend arrests.

3. The problem of recognizing the legitimacy of some limited amount of questioning of suspects is still with us and should probably be faced rather than avoided as suggested in the draft. The need for facing the issue is highlighted by the recent Supreme Court case of Coppola v. United States, 29 LW 4338. In that case it appears (from the dissent) that Coppola

(on a tip from the FBI) was arrested by state police for a violation of state law at 9:30 A.M. and interrogated during the day. At 9 P.M. the state police permitted the FBI to interrogate Cuppola in the state jail which they did until 1 A.M. During this period he confessed to bank robbery. He was brought before a local court at 2 P.M. the next day after which he was turned over to the FBI and brought before a federal commissioner at 4 P.M. In a Per Curiam opinion eight members of the Court voted to affirm a conviction obtained after a trial in which the defendant's confession was introduced, - apparently regarding the issue as turning on the question whether the FBI agents should be regarded as responsible for the state detention. Justice Douglas dissented, arguing that this decision permitted federal officers to avoid the restrictions of Rule 5 by using state officials. The decision would appear to be a holding that a confession obtained as the result of several hours (in this case 4) of noncoercive interrogation of a suspect while in legal custody (or at least while not in illegal federal custody) may be introduced in a federal prosecution. It would also appear to create a substantial danger that federal agents may seek to avoid the restrictions of Rule 5 by utilizing state arrests and custody, - hardly a desirable development.

4. Judge Hoffman suggests that a remedy might take the form of defining "the time of arrest." My question is whether we have jurisdiction to make rules governing the law of arrest. See my comments in the tentative draft on Rule 1. Furthermore, it may be that under Henry v. United States, 361 U.S. 98, the issue has been resolved in constitutional terms. What do other members of the Committee think on this problem?

5. Another possible solution would be to propose the addition of a sentence along the lines of the following immediately after the first sentence of the Rule 5(a): "Delay in taking the arrested person before a commissioner or other officer which is occasioned by non-coercive questioning of the arrested person for a period not exceeding ___(five?) hours shall not be regarded as unnecessary." Judge Pickett suggests that any attempt to fix an exact number of hours is unrealistic and may result in intensifying the pressure on the accused.

6. Another solution would be to propose to the Court the adoption of a rule (akin to the Judges' Rules in England) which states that confessions shall not be received in evidence where it is shown that _____. If this type of a rule is to be drafted, much thought will need to be given to the conditions. The simplest would be to say the confession must be excluded where it is shown that the defendant was questioned

prior to giving the confession for a period longer than ____ hours. Or there could be added where he was held without a Rule 5 appearance before the commissioner for longer than (48?) hours prior to confessing? Or it could be more detailed and make requirements as to the time of day of the questioning, the number of questioners, etc. What does the Committee think of this approach?

6. Professor Remington has suggested that the Committee should move in the direction of making an adequate statement of the procedural rights of the accused - including such items as the duty of the arresting officer to permit telephone calls to counsel, etc., promptly after arrest. He also suggests that if we are worried about the possibilities of the application of the Mallory exclusionary rule to such detailed rules, we should provide specifically for the consequences of rule violations.

RULE 44

1. The draft attempted to set up a procedure for introducing counsel at the commissioner stage by a process of court appointment. Hudge Hoffman has demonstrated that such a scheme is not really feasible.

2. If the Committee agrees that we can properly and practically provide for appointment of counsel by the commissioner, then a simpler and more inclusive procedure could be set up. It might include the following steps:

a. As soon as an arrested person is brought before the commissioner he shall be informed of his right to retain counsel or to request the assignment of counsel - the provision made in the draft in Rule 5.

b. If the defendant is unable to employ counsel and requests (in writing?) the commissioner to assign counsel, the commissioner shall assign counsel (who need not be admitted to practice in the district court?) to represent him in all proceedings (felony or misdemeanor) before the commissioner.

c. The obligation of the counsel appointed by the commissioner to represent the defendant shall cease upon the return of an indictment or the filing of an information, subject to reappointment by the court in appropriate cases.

d. We should also consider, as Judge Hoffman suggests, a provision here or elsewhere preventing collateral attacks on judgments based on incompetency of counsel at the commissioner stage.

RULE 6

1. The major question presented in the Tentative Draft relates to disclosure of grand jury minutes to the defense. Judge Hoffman has raised some pertinent and practical objections to the proposal that the Jenck's rule approach be extended to such minutes.

a. To the extent that indictments are based only on the testimony of investigative agents (the U.S. Attorney Survey indicates this to be the fact in most of the cases in about half the districts), I agree that there is little practical reason for change. The defense will doubtless be able to get earlier statements made by the agents under the Jenck's statute. The prosecutor will seldom even have the grand jury testimony reported because he will already have it available in the form of the report of the agent.

Where other witnesses are used (and especially where they are used for the purpose of tying them down to a story), however, it seems to me that the present system is too unfair to be defended. The prosecution has access to the statement made by the witness before the grand jury and can use that statement to challenge deviations at the trial which are favorable to the defense. The defense, however, does not have access to the statement and hence has no comparable protection against deviations favorable to the prosecution.

c. If it would be unduly prejudicial to the prosecution to permit even such limited access as proposed here to grand jury minutes, should we not, then, restrict the use which can be made of them by the prosecution?

d. As a very minimum should we not provide for giving to the defendant in advance of trial a list of the names of all persons who testified with reference to him before the grand jury which returned the indictment?

2. Several relatively minor changes are also proposed for this Rule:

(a) The change in subsection (d) requiring a showing of prejudice before an indictment can be dismissed because of the presence of an unauthorized person during the hearing, but not during the deliberation or voting. Judge Pickett suggests that this amendment might encourage loose practices before grand juries. He recommends that the exceptional cases where it is reasonable to have other persons in the grand jury room be taken care of by revising the existing language to read somewhat as follows: "Attorneys for the government, the witness under examination, interpreters when needed, other persons whose presence is specifically authorized by the court and, for the purpose of taking evidence, a stenographer may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting."

RULE 7

1. No change is suggested to this rule.

2. The draft presents reasons why, in the view of the reporter, it is not desirable to attempt to encourage waivers of indictments through amendment to this Rule. Committee comments on this problem would be helpful.

RULE 8

1. In the tentative draft, your reporter raised the question whether subsection (b) should be amended to incorporate the substance of H.R. 12923 introduced by Congressman Celler. Judge Hoffman votes no. What is the general opinion?

2. Judge Hoffman now raises the question whether the case of Milanovich v. United States, 81 S.Ct. 728, necessitates an amendment to subsection (a). Not knowing what sort of a change Judge Hoffman has in mind, your reporter leaves the issue for discussion at our meeting.

3. Professor Remington raises the question whether it would "be desirable to face the issue of compulsory joinder of offenses." In this connection he refers to Section 1.08(2) of Tentative Draft No. 5 of the American Law Institute, Model Penal Code. That draft provides that except for an exercise of the discretion of the judge to order a severance,

"if a person is charged with two or more offenses and the charges are known to the proper officer of the police or prosecution and within the jurisdiction of a single court, they must be prosecuted in a single prosecution when: (a) the offenses are based on the same conduct; or (b) the offenses are based on a series of acts or omissions motivated by a purpose to accomplish a single criminal objective, and necessary or incidental to the accomplishment of that objective; or (c) the offenses are based on a series of acts or omissions motivated by a common purpose or plan and which result in the repeated commission of the same person or the same persons or the property thereof."

What does the Committee think?

RULE 9

Only a minor change is proposed here to make it clear that an affidavit of probable cause is necessary before a warrant of arrest will be issued upon the filing of an information.

RULES 10 - 17

A draft relating to these rules will be ready perhaps by the time of our meeting. I suggest that while we may have some preliminary discussion in June, the main discussion of these rules - and particularly the problems of criminal discovery - be postponed until our next meeting.

RULE 18

No change suggested in the draft. Professor Remington has raised the question whether we should attempt to give greater substantive content to the phrase "in which the offense was committed," dealing with such questions as to the proper venue where the offense constitutes a failure to perform a legal duty.

RULE 19

No change suggested. Professor Glueck raises the question whether it is clear enough that a motion for new trial may be heard in another division than that of trial.

1. I gather that there are substantial variations in procedure in the various districts with reference to the utilization of Rule 20 in cases where arrests have been made on warrant but prior to the filing of an indictment or information. The United States attorney for Wyoming, e.g., has indicated in a letter to Judge Pickett that they are able to handle the matter expeditiously under present procedures. Judge Hoffman, on the other hand, has indicated that a procedure such as that proposed in the draft "should save an appreciable amount of time and money. Under the present system, we frequently wait a period of 30 days or longer pending action in another jurisdiction." The United States Attorney's Manual also suggests a need for simplification of the procedures.

2. One difficulty with the procedure proposed in subsection (b) of the tentative draft is that it puts the defendant in the position of waiving indictment without knowing the contents of the information proposed to be filed. This could result in serious detriment where he was arrested on a warrant charging one offense and the information actually filed should charge a different offense or additional offenses. Professor Glueck has indicated his concern that the defendant not be put in this position. On further consideration, I should like to suggest an

alternative subsection (b) for your consideration. This alternative, set out below, would contemplate the use of the following steps when an arrest has been made on a warrant prior to the filing of the indictment or information:

(a) The defendant, if he desired, could sign the written consent to transfer. He could be asked informally if he would be willing to waive indictment to expedite matters. This could be done shortly after arrest and without the need of waiting for a court appearance or the appointment of counsel.

(b) The U.S. Attorney in the district of the arrest could add his consent and send the papers to the U.S. Attorney in the district in which the warrant issued.

(c) The latter U.S. Attorney could add his consent and either secure an indictment or file an information as seemed appropriate under the circumstances.

(d) After receipt of the papers with the consent and the filing of the information or the return of the indictment the clerk would send all the papers to the clerk in the district in which the defendant was arrested.

(e) If an information was filed and waiver of indictment needed, the defendant could execute such a waiver in open court upon his formal arraignment. Under general rules he would be entitled to counsel by this time. If he objected to the information actually filed, he could refuse to waive indictment. If he had changed is mind about his consent to transfer, he could void the whole proceedings by pleading guilty. Hence, he would be fully protected by the fact that at this stage when he should have counsel, or have waived counsel, he could in effect repudiate his previous expressions of willingness both to waive indictment and to consent to transfer.

3. The proposed redraft in a rought and tentative form would substitute the following for the subsection (b) contained in the tentative draft:

(b) Indictment or Information Not Pending. A defendant arrested on a warrant issued upon a complaint in a district other than the district of arrest may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the warrant was issued and to consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States Attorney for each district. If the United States Attorney in the district of the arrest concurs in the waiver he shall add his consent and forward the papers to the United States Attorney in the district in which the warrant was issued, who may add his consent. Upon receipt of the defendant's statement with the written consents of the United States Attorneys and upon the filing of an information or the return of an indictment, the clerk of the court in the district in which the warrant was issued shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court in the district in which the defendant was arrested and the prosecution shall continue in that district. When the defendant is brought before the court to plead to an information filed in the district where the warrant was issued, he may file at that time a waiver of indictment pursuant to Rule 7, and the prosecution may continue based upon the information originally filed.

4. The suggestion has been made by Judge Hoffman and others that the procedures of Rule 20 be made available to proceedings under the Juvenile Delinquency Act. I would appreciate suggestions as to how this might be done.

RULE 21

The change proposed here is designed to clarify the procedures under subsection (b) in cases when there are multiple counts against single defendant or whether there are multiple defendants. It goes somewhat beyond the existing law as discussed in United States v. Choate, 276 F.2d 724, and gives discretion to the court to transfer all counts in a multiple count indictment if any one of the counts transferred charges an offense committed in the district or division which transfer is ordered.

RULE 22

No change suggested.

RULE 23

1. While no change was proposed in subsection (a), the Committee should consider whether the present requirement that the government consent to waiver of a jury trial should be eliminated.

2. An amendment to subsection (c) is proposed to conform the rule to Civil Rule 52(a) and permit special findings of fact to be made in an opinion or memorandum of decision.

RULE 24

1. No changes were proposed for subsections (a) and (c) pending action by the Civil Rules Committee on Civil Rule 47(a) and (b). In the meantime, a number of comments have been received regarding subsection (c) and the problem of protracted trials. Since the problems would appear to be substantially the same in civil and criminal cases, it is recommended that action be postponed pending consultation with the Civil Rules group.

2. No change was proposed in subsection (b). Judge Hoffman has suggested that consideration be given to reducing the number of peremptory challenges authorized. What does the Committee think?

RULE 25

Consideration of this Rule is deferred pending information as to action planned on Civil Rule 63.

RULE 26

Consideration deferred pending decision as to the creation of a Federal Evidence Code.

RULE 27

No change proposed.

RULE 28

Consideration deferred pending decision as to the creation of a Federal Evidence Code.

RULE 29

1. The draft proposes three changes in subsection (b):

(a) Elimination of the need for a motion for judgment of acquittal prior to submitting the case to the jury and a later renewal of that motion in order to raise the issue after acquittal.

(b) Making the time provision for the post-verdict motion roughly parallel to that governing motions for new trial.

(c) Providing that the motion for new trial shall be deemed to include a motion for judgment of acquittal as an alternative.

2. Judge Hoffman has suggested that there may be some advantage to permitting the judge to reserve decision on a motion for judgment of acquittal even though a pre-verdict motion is not made a prerequisite to raising the issue after verdict. Perhaps this problem should be taken care of by adding the following sentence (presently the first sentence in subsection (b)) to subsection (a): "If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict."

3. Professor Remington has raised the question as to what standard is to guide the judge in ruling on a post-verdict motion for judgment of acquittal under the tentative draft. The intention in the draft was merely to give to the judge in the post-verdict situation the discretion to deny the motion even though the evidence was insufficient if granting it was not "in the interest of justice." To better express the intention of the last portion of the first sentence in the proposed new subsection (b) should read as follows: "and may be granted if the evidence is insufficient to sustain the conviction and if required in the interest of justice." Professor Remington asks whether we should go further and give discretion to the judge to enter a judgment of acquittal "in the interest of justice" for reasons other than the insufficiency of the evidence. He states: "The problem of conviction under circumstances where conviction seems to the trial judge inappropriate is dealt with in the Model Penal Code by giving to the judge the power to enter a judgment for an offense less serious than the one of which the defendant is actually convicted. I understand also that the reporter of the Model Penal Code intends to draft a section providing the judge discretion to acquit for "de minimus" violations, basing the test on the purpose of the legislation. What I wonder is whether you intend to reflect any of this kind of consideration in Rule 29(b). It is, I think, a problem of considerable importance.

RULE 30

Consideration of this Rule has been deferred pending information as to action planned on Civil Rule 51.

RULE 31

1. No changes were proposed in the draft.

2. A question was raised whether it was necessary to make express provision for the use of special interrogatories in addition to a general verdict to take care of a limited number of situations which appear to call for their use.

3. Professor Remington has raised the question where it would be desirable to try to define a "lesser included offense."

RULE 32

1. An amendment is proposed to subsection (a) to incorporate specifically into the rule the conclusion of the Supreme Court in Green v. United States, 81 S.Ct. 653, that the judge must address the defendant personally and specifically.

2. A doubtless controversial proposal is made to add to subsection (c)(2) a provision giving the defendant a limited opportunity to rebut the contents of the presentence report. If the Committee agrees with the idea of permitting the defendant to have such an opportunity, we should consider whether it would be better to use the language in the draft or to go back to the proposal made by the original Advisory Committee that "the report shall be available, upon such conditions as the court may impose, to the attorneys of the parties . . . ."

3. Another controversial proposal is made to add a new subsection (f) giving substantial procedural protections to the defendant in a proceeding for revocation of probation.

RULE 33

1. It is proposed to amend the rule in accordance with the recommendation of the original Advisory Committee to permit a motion for new trial based on the ground of newly discovered evidence to be made at any time.

2. In accordance with the general drift of comments made by Professor Remington, I suppose consideration should be given to the possibility of spelling out in the rule the grounds upon which new trial may be based instead of the existing general standard "in the interest of justice."

3. The most fundamental and difficult problem posed in connection with this rule is whether an attempt should be made to draft a comprehensive rule governing post-conviction remedies. The problems are discussed in the draft and the issue should be a major point of discussion by the Committee.

RULE 34

No recommendation made for change.

RULE 35

This rule should be considered along with the general problem of post-conviction relief. Pending decision on that issue, no recommendations for change are made.

RULE 36

No recommendation made for change.

RULES 37 - 39

Consideration of these rules is deferred pending the result of work by Judge Prettyman's Committee.