MINUTES OF THE MEETING OF THE ADVISORY COMMITTEE ON THE FEDERAL CRIMINAL RULES HELD AT THE LAFAYETTE BUILDING, ROOM 638, WASHINGTON, D.C., ON FRIDAY, JANUARY 14 AND SATURDAY, JANUARY 15, 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
Harold D. Koffsky, Esq.
Hon. Albert B. Maris
Hon. Leland C. Nielsen
Professor Frank R. Remington, Reporter
Hon. Roger Robb
Barnabas F. Sears, Esq.
Hon. Russell E. Smith
Professor James Vorenberg (absent Saturday)
Hon. William H. Webster
Hon. Joseph Weintraub
Franklin D. Kramer, Secretary

ABSENT:

Hon. Frank M. Johnson, Jr.
Hon. Wade H. McCree, Jr.
Henry E. Peterson, Esq.

Judge Maris reported that Rule 45, approved by the Committee, had been renumbered Rule 50 by the Standing Committee, then approved by the Standing Committee and the Judicial Conference in October 1971 and sent to the Supreme Court.

January 1970 Amendments

The January 1970 amendments to the Rules were reconsidered. Professor Remington indicated that the only additional comments received since the September meeting had been directed to Rule 32.2 and disclosure of the presentence report.

The proposed amendments were considered seriatim.

Rule 1 was reapproved with no discussion.

Rule 3 was reapproved with no discussion.

Rule 4. Mr. Erdahl said that the sentence "The magistrate may issue a summons instead of a warrant" was unnecessary. There was general agreement that the magistrate had this power; discussion was directed to the most appropriate way to express this. It was suggested that the sentence be deleted and that lines 7-8 be amended to read "by law to execute it or, in the

discretion of the magistrate, a summons for the appearance of the defendant may issue in lieu thereof."

The committee agreed to leave the final wording to the Reporter. Rule 4 was then approved.

Rule 5. Mr. Erdahl said that ¶(a) and ¶(b) should be transposed and ¶¶(c) and (d) should be consolidated. It was agreed that Mr. Erdahl would produce a draft to this effect.

Rule 5.1 was approved.

Rule 6. Judge Gesell raised the problem that resolving motions made on the eve of trial in regard to the grand jury would delay the trial and detrimentally affect the administration of justice. He felt that the trial judge ought to have discretion to resolve such motions after trial. After discussion, the Committee agreed that Rule 12(e), as amended, gave the trial judge the power to defer decision on all motions, including grand jury motions, "until after verdict" and that the Note would reflect this.

Rule 6(e) expands the definition of "attorney for the government" to include all government agents necessary to aid government attorneys. After discussion, the Committee approved the rule although it had not been distributed to the bench and bar.

Rule 6 was then approved.

Rule 9 was approved.

Rule 12 was approved with the caveat that the Note make clear that decision by the trial judge on grand jury motions may be deferred until after the trial.

Rule 16. In Rule 16(a)(1)(v), the need to define "unavailable" arose. It was agreed that the definition should be consistent with the definitions used in Rule 15 and in the proposed Rules of Evidence. Determination of the precise place to put the definition was deferred until it was decided whether Rule 15 would be accepted.

The question was raised whether Rule 16 provided for the maximum amount of discovery allowable or merely prescribed a minimum. For instance, could a trial judge order the government attorney to turn over the grand jury minutes to the defendant? It was unanimously agreed that Rule 16 provided only a minimum, i.e., what the defendant can demand of right, and that the rule was not intended to restrict the trial judge's power to order broader discovery in appropriate cases. It was agreed that the Note should reflect this sentiment and in particular that 16(a)(3) was not intended to restrict the trial judge's discretion to make disclosure of grand jury minutes in appropriate cases.

Rule 16(b)(1)(ii) and (iii) were amended to read "shall" in place of "may."

Rule 16(a)(4) was amended to read "shall" instead of "may." In response to Judge Robb's question, it was pointed out that the protective order provision, 16(d) was available, in appropriate cases, to restrict discovery. It was agreed that the Note should point out the type of cases in which protective orders might be appropriate.

Mr. Erdahl raised the question whether 16(d)(2) and 16(d)(3) ought to be transposed. The necessity of including 16(d)(2) at all was considered since 16(d)(3) authorizes the court to make "other order[s] as it deems just." It was agreed that 16(d)(2) should be deleted as a separate paragraph and, with "shall" changed to "may," added as a clause to 16(d)(3).

The title of Rule 16(a)(2) was changed to "Information Not Subject to Disclosure."

Rule 16 was then approved.

Rule 17 was approved.

Rule 20 was approved.

Rule 29.1 was approved after the words "be permitted to" had been stricken.

Rule 32. It was agreed to revise Rule 32's format and move Rule 32.1-32.4 into Rule 32 itself. The Reporter will make the appropriate changes.

A question was raised whether the substance of Rule 31.1 ought to be included within Rule 11. Since 32.1 deals with setting aside judgment, it was determined to keep it within Rule 32.

The problem of a judge not wanting a presentence report because of the disclosure provision was briefly raised. It was agreed that the presentence report was invaluable not only to the sentencing judge but to the prison authorities to aid them in classification and in supplying information with respect to the prisoner's family, medical history and the like.

It was agreed that an exception ought to be included in Rule 32.2(a) if "a prior report is available," but that this might be indicated in the Note rather than in the Rule.

Rule 32, including Rules 32.1-32.4, was then approved.

Rule 40 was approved.

Rule 41 was approved.

Rule 44 was approved. The Committee agreed that even though a defendant had signed a waiver of a lawyer

before a magistrate, a judge might appoint a lawyer prior to indictment or at any time appointment of counsel would be appropriate.

Rule 46 was approved.

Rule 54 was approved.

In response to Judge Webster's question, the Committee agreed that no defendant had the right to discover the presentence report of another defendant.

The Committee then referred all the proposed January 1970 Rules to the Reporter for final style corrections. The Rules will then be forwarded to the Standing Committee with the expectation that they will be presented to the Judicial Conference in April.

The Committee gave Judge Lumbard authority to appoint an editorial committee to work with the Reporter on any needed stylistic revisions of the proposed Rules prior to their submission to the Standing Committee. [On Saturday, Judge Gesell and Judge Hoffman were appointed to the Editorial Committee.]

Habeas Corpus Rules

The proposed Habeas Corpus Rules, as originally drafted by Judges Haris and Hoffman, and with the Notes prepared by Professor Remington, were presented to the Committee.

It was agreed that Rule 2(d) will be modified to make clear that all sentences arising from a single trial can be attacked in the same petition.

The certificate of the warden will be unnecessary in a very great part of the cases, as over 90% will not require assignment of a lawyer. Rule 3 was modified at line 9 to read "In all such cases ...." to limit the number of cases where the certificate need be filed.

Since prisoners may have assets other than cash to pay filing fees and counsel costs, Rule 3 at line 12 was amended to read "money or securities" to cover the case of the prisoner who has bonds.

Judge Cutter expressed disappointment that Rule 4 had failed to erect enough obstacles against the filing of habeas corpus petitions and, particularly, wished to see greater specificity as to the cases in which summary dismissal was possible. Judge Cutter and Chief Justice Weintraub were appointed a temporary committee to "beef up" the rules in this regard, if that was possible in light of existing Supreme Court precedents.

The Committee then agreed to circulate these proposed Rules, along with Judge Hoffman's form, to the bench and bar.

Grand Jury: Recording

Judges Gesell and Smith and Mr. Ball were appointed a temporary committee to consider the feasibility of recording grand jury proceedings in light of the Administrative Office's report.

Appellate Review of Sentencing

Judge Gesell raised the question whether there was anything wrong with appellate review of sentencing, particularly if the appellate court itself would impose the new sentence, rather than remand for resentencing to the district court. He raised the possibility of making all sentences 4208(a)(2) sentences so that any disparities could be corrected by the parole board.

The Committee felt that this last was peculiarly a legislative decision.

Judge Lumbard said that the sentence is the most important concern of most defendants, yet the one thing that they could not appeal.

Judges Hoffman and Webster opposed appellate review of sentences, but favored the proposed rule with the modification that review be allowed after a guilty plea.

Judge Robb opposed appellate review as he felt that the trial judge knew the defendant best. Though he felt there need be no intervention as long as the sentence

was within legal bounds, he also associated himself with Judges Hoffman and Webster.

Judge Gesell felt that statutory change allowing the parole board to review all sentences was in order. He noted that review of the sentencing judge would cut down the finality of judgments.

Mr. Koffsky opposed appellate review, noting that such review decreased the finality of sentences.

Mr. Erdahl noted that the proposal before the Committee was not for straight-out appellate review which he opposed. District court judges have far more expertise than circuit court judges with respect to sentencing. He favored the Detroit system (presentence consultation) as it allowed more than one mind to be brought to bear on the sentence. If that were not feasible, he favored the proposed rule.

Mr. Sears thought that sentencing review was a function of the courts, not the parole board. He felt that often there was great disparity in sentences with no justification. The proposed rule represents a step forward.

Mr. Ball was not favor of an appellate court passing on all sentences, but was willing to have appellate court review of severe sentences with remand to the district court when necessary. He did not think a presentence panel was feasible.

Judge Smith opposed general review of sentences by either appellate courts or panels of district judges. He felt such review would increase the number of 2255 petitions and would overly and unnecessarily consume federal judges' time. He favored review only of non-4208(a)(2) sentences of more than three years.

Judge Cutter felt that appellate courts had no particular expertise to offer with respect to sentencing. He felt that sentence review should be available even in the absence of an appeal from the judgment. The sentence review panel ought to stand for a reasonable time and its operation should not require the intervention of the Court of Appeals.

Judge Nielsen agreed with Judges Smith and Cutter. Sentence review ought not be couched in terms of "after appeal." A Rule 35 motion would be more appropriate. The application could be made to the chief judge of the district. The panel should have the right to increase as well as decrease sentences.

Chief Justice Weintraub felt that sentences should be subject to judicial review, as would any decision made in the trial court's discretion, and he favored appellate review. He questioned the meaningfulness of the word "excessive." For a reviewing court to determine

that a sentence was excessive would require that it have a full record before it including the presentence report.

Judge Robb then said he favored a review panel to which application must be made within ten days after sentence was imposed and which had the power to increase or decrease sentences.

By unanimous vote, the Committee determined that any sentence review panel should consist solely of district judges.

By unanimous vote, the Committee determined that the Courts of Appeals should not be involved in the substance of sentencing at all. At most, the Courts of Appeals, likely the chief judge, should be involved in the mechanics of review, e.g., naming the panel of reviewing judges.

Judges Hoffman, Nielsen and Webster and Mr. Sears were constituted a temporary committee which would confer and report back to the full committee a revision of Rule 35 that would conform to the sentiment of the above discussion.

Form 15

Form 15 was approved.

Rule 41

Mr. Ball was in favor of the rule, but felt that when a warrant issued on oral testimony, particularly by

telephone, a record of the testimony should be made prior to the issuance of a warrant. Otherwise the magistrate would have a tendency to conform the "record" to the results of the search. Mr. Sears agreed with Mr. Ball.

The question was raised whether requiring prior recording "where feasible" would be sufficient. Mr. Ball indicated that he would be satisfied if the Rule were amended to require recording "unless circumstances made it impossible."

Mr. Sears indicated that he would be dissatisfied with such a clause. He felt that memory was only the "logical reconstruction of past events" and that it was human nature to reconstruct the past to justify one's present position.

The point was raised that requiring contemporaneous recording might make policemen more reluctant to call for warrants and that it was certainly preferable to have them call than to have them arrest without any reference to a magistrate.

With the modification that Rule 41(c)(2) would be amended to read "and shall be recorded if practicable to do so," Rule 41 was approved.

Rule 11(c)

Rule 11(a) was approved.

Rule 23

Rule 23 had been referred to the Advisory Committee on the Jury.

Rule 24(b); Peremptory Challenges

The aims of the Rule are to equalize the number of challenges between the government and the defendant and to reduce the number of challenges.

It was pointed out that the proposed Rule left the government at a disadvantage if there were multiple defendants. To remedy this 24(b)(2)(ii) was amended to read "... the court may allow the parties additional challenges ..."

It was agreed that 24(b)(2)(ii) was actually redundant, given 24(b)(2)(i), but that it was worthwhile to pinpoint the problem with regard to multiple defendants.

Rule 24(b)(2)(iii) was amended to read "... shall be filed at least 3 weeks or within such other time as provided by the rule of the district court in advance of the first scheduled trial date."

Mr. Sears protested the reduction in the number of the defendant's peremptory challenges. Additionally, he felt that 24(b)(2)(i) was a meaningless provision in that "good cause" as here used lacked substantive meaning.

It was pointed out that with the large number of peremptory challenges available, defendants had often been able to defeat the purposes of the Jury Selection Act. The reduction in the number of peremptory challenges will make this more difficult.

The question was raised whether five challenges were too few in felony cases.

Mr. Sears suggested that Rule 24 be left unamended, except for evening up the challenges.

It was agreed that allowing additional challenges for "good cause shown" did not require the same showing as would disqualify a juror for cause.

As amended, Rule 24(b) was approved for consideration by the bench and bar.

Rule 24(c): Alternate Jurors

Chief Justice Weintraub suggested that no juror be designated as an alternate juror until after the evidence had been presented and charge given. The Committee unanimously approved this suggestion.

The question was raised whether the designation of alternates should be reflected in an increased number of peremptory challenges. No conclusion was reached by the Committee.

Whether alternate jurors should participate in the deliberations was next considered. In California, the alternates stay outside with the bailiff. Allowing them to listen to deliberation without actually participating in discussions will increase their usefulness if they were needed. On the other hand allowing alternates in might violate a defendant's constitutional (jury trial and confrontation) rights. The defendant might stipulate to allow alternate jurors to remain in the room during deliberations.

Judge Robb and Professor Vorenberg were appointed a temporary subcommittee to produce alternative drafts, both which would incorporate Justice Weintraub's suggestion providing for the inclusion or exclusion of alternate jurors during deliberations.

Rule 40.1: Removal from State Courts

Alternative 2, which provides that the filing of removal petition shall not stay a state prosecution, was considered the most appropriate by the Committee.

The Committee felt that a more definite time period would be in order. Judge Cutter suggested that 10 to 20 days after arraignment was a sufficient limitation period, with the proviso that relief from this bar might be warranted for good cause.

The Committee concurred. The Rule was to be amended to read "Such petition shall be made within 10 days after arraignment in state courts except, for good cause shown, the federal district court may grant relief from this limitation."

Alternate 2, as amended, was approved for forwarding to the bench and bar.

Rule 5

Rule 5, as redrafted, was reconsidered and 5(c) amended so that a new paragraph begins as "A defendant is entitled to ..." As amended, the redrafted rule was approved.

Rule 35: Sentence Review

In reconsidering Rule 35, the relationship between the district court and the appellate court had to be clarified, e.g., who would keep the record or record the decision.

It was suggested that the length of the term for members of the panel ought to be three years, perhaps with staggered terms.

The Committee agreed that the sentence review panel need consider a review motion only once.

The Committee agreed that the "file" need not include the transcript.

The point was raised that defendants who were convicted after trial had a much longer time in which to make a Rule 35 motion than defendants convicted by guilty plea and that this was rather inequitable. It was suggested that this inequality be eliminated.

In determining the composition of the reviewing panel for each district court, it was agreed that the members should come from the circuit, but need not come from the particular district court.

Defendants sentenced under the Youth Corrections Act may have their sentences reviewed by the proposed sentence review panel.

In order to equalize the time for Rule 35 motions between guilty plea defendants and trial defendants, present Rule 35 was amended by ending the second sentence after "imposed."

Rule 38 was amended to provide for stays of sentence of an "appeal as to guilt" is taken. The Reporter will make the necessary changes.

The Committee reconsidered the length of the sentence that could be reviewed. Six persons voted that all sentences of one year or more should be reviewable; six voted that only sentences of three years or more should be reviewable. The issue was deferred.

The Friday meeting then adjourned until Saturday, 9:00 A.M.

Saturday, January 15

Habeas Corpus

Judge Maris suggested a revision of Rule 2 to provide that all matters before a particular court be included in the same petition.

Judges Weintraub and Cutter reported that they had no further suggestions regarding the habeas corpus rules.

Rule 6: Grand Jury

Judge Gesell and Mr. Ball reported that the recording of grand jury proceedings was feasible in light of a report of the Administrative Office. They felt it was a matter of adequate funds. Judge Smith opposed any requirement of recording.

Judge Gesell will draft a rule requiring recording of all grand jury testimony. He indicated that he was in favor of complete discovery of grand jury minutes.

April 1971 Proposals

Rule 11: Pleas

Professor Remington reported that most of the reactions concerned the plea bargaining provisions and that they fell into three groups: (a) that any recognition was undesirable; (b) that the judge should be allowed to participate in greater amount than the proposed rule allowed; and (c) that the rule, as drafted, was satisfactory.

The nolo contendere plea was then considered. In light of the Alford case, an increased number of defendants may want to plead guilty, yet insist that they had not committed the offense. The Committee agreed that nolo was an appropriate plea in these circumstances and that the Notes should reflect this sentiment.

Mr. Koffsky moved that nolo pleas be accepted only if the government approved. There was no second,

Rule 11(e)(b) was considered. Mr. Koffsky suggested that the words "or judgment" be stricken so that the rule conformed to the Gun Control Act. The Gun Control Act allows such considerations if the offense is committed while the plea verdict is on appeal. The Committee agreed to accept the Justice Department's proposal with the addition of the words "or vacated." Rule 11(e)(b) as approved reads

> "If a plea discussion does not result in a plea of guilty or nolo contendere or if a plea of guilty or nolo contendere is not accepted or is withdrawn, or if a judgment on a plea of guilty or nolo contendere is reversed or vacated on direct or collateral review, neither the plea discussion nor any resulting agreement or plea shall be admissible against the defendant in any criminal or civil action or administrative proceeding."

Rule 11(c), Advice To Defendant, was considered. The Committee agreed that either a very limited approach had to be taken or else the judge would have to inform a defendant of all sorts of consequences, e.g., on conviction, he might lose his barber's license. There

was general agreement that the limited approach was better designed to achieve the efficient administration of justice.

Rule 11(e) was then considered. Judge Nielsen felt that the last sentence of 11(e)(1), "The court shall not participate in any such discussions," should be stricken.

The Committee discussed what "participate" meant. It was agreed that the judge should not confront or negotiate with a defendant across a table.

Judge Gesell felt that the court might participate if the discussion were on the record.

In complicated factual situations, a judge's participation might be needed to arrange a plea. The Committee was generally against direct participation, but felt it might be needed to resolve some cases.

Judge Gesell wanted it clear that a judge was not bound by any agreement which the lawyers might reach. Additionally, he wanted to make certain that the judge would not get involved in the bargaining. It is undesirable "to sell the judge every day."

Judge Hoffman said that he didn't favor plea bargaining even for cleaning up the docket nor did he think that the judge should be "splitting the difference."

Some consideration was given to substituting "negotiations" for "discussion" in the last sentence of (e)(1). However, it was felt that in light of the prior sentence, the substitution was unnecessary. It was agreed that (e)(1) referred to the preliminary stages before a proposed agreement had been worked out.

The Committee agreed that a judge need not recuse himself even if he rejects a plea. The Committee felt that there was little difference between this situation and the situation involved in a motion to suppress. In either the judge will know the strength of the government's case against the defendant.

The question was raised as to whether a judge could immediately accept a plea if a defendant changed his plea just prior to trial. Similarly, the problem was raised whether Rule 11, as amended, would necessitate more than one hearing. Professor Remington indicated that, given the availability of the presentence report, see Rule 33, probably only one hearing would be necessary in either case.

The Committee had earlier agreed that the nolo contendere plea might often be offered and should be accepted in many situations in lieu of a guilty plea.

For this reason the Reporter will insert the words "or nolo contendere" where appropriate throughout the Rule.

Rule 11 was then approved.

Rule 32

Rule 32, which relates to Rule 11, was approved.

Rule 12.1: Notice of Alibi

Professor Remington reported that the received comments mostly concerned (1) whether the defendant should have to initiate the process and (2) the constitutionality of the proposed sanction.

Mr. Koffsky said the Justice Department wanted the defendant to trigger the process as he has exclusive knowledge of an alibi.

It was pointed out that before a defendant could establish an alibi he needed to know the specific time and place of the offense.

Whether the defendant or the government initiated the process, there was certain to be some paper work involved.

Mr. Koffsky suggested that paragraphs (a) and (b) of the proposed Rule be dropped and the version suggested by the Justice Department substituted. This proposal

puts some burden on the defendant to indicate that he will utilize an alibi defense.

It was noted that the defendant has the initial burden under Rule 12.2, Insanity Defense. However a defendant need not know the specifics of the government's case in order to determine to use an insanity defense, but he must know specifically the time and place of the offense in order to utilize successfully an alibi defense.

The Committee approved Rules 12(1)(a) and 12(b)(1)-(2) as proposed by the Justice Department.

Rules 12(d) and (e) as proposed were approved.

The Reporter will make the necessary language changes.

Rule 12.2: Notice of Insanity

Professor Remington said that the comments had addressed three questions (a) should the government have the right to have its psychiatric expert examine the defendant; (b) did the rule need a sanction; (c) did the government have to give notice of its intent to use experts.

Judge Gesell said he favored exchanging the written statements of all experts.

Mr. Ball said the government should have the right to examine the defendant with its expert or an expert appointed by the court.

The problem with providing a sanction is that the government must prove its case, including sanity, beyond a reasonable doubt. Implicitly, the defendant must be able to contest every part of the government's case.

The Committee agreed that the Notes should be changed to indicate that the Rule was not in reference to competence to stand trial, but referred to whether the crime had been a "product of a diseased mind."

The purpose of the Rule is to stand in place of a plea of "not guilty by reason of insanity."

Rules 12.2(a) and (b) were approved by the Committee, but the question of sanctions was left open.

It was suggested that a sanction be included in the Rule along the lines of the D.C. statute: "Insanity shall not be a defense in any criminal proceeding unless the defendant gives such notice."

The Committee determined that sanctions should be included separately in paragraphs (a) and (b). In ¶(a), the Committee approved: "If there is a failure to comply with this provision, the court shall not accept the defense of insanity." In ¶(b), the Committee approved: "If there is a failure to comply with the provision, the court shall exclude the testimony of the expert."

The question was raised whether the court might sua sponte initiate the defense.

The Committee unanimously agreed that a provision should be added to the Rule which would allow the court to require the defendant to submit to a psychiatric examination.

The Committee agreed that any Fifth Amendment problems caused by a court-compelled psychiatric examination could be solved by bifurcating the trial. The Note will be amended to indicate that a court may bifurcate a trial when it wishes (except, as Mr. Ball noted, if specific intent is at issue).

Rule 15:Depositions

The Committee approved the Rule as written with the proviso that the definition of unavailability be updated to conform to the Proposed Rules of Evidence.

Mr. Sears indicated strenuous opposition to the Rule. He noted the already great disparity of resources between the government and the defendant and that this Rule gave added advantage to the government. Compelling the defendant's attorney to attend deposition procedures is too burdensome on his time and energy. He does not have only one case in his office to which he can devote all his attention.

It was noted that depositions were to be taken only when a witness was likely to be unavailable at trial and that the deponent is to be brought into the jurisdiction of the defendant and his attorney. Only if the deponent is bedridden will the defendant have to go to him.

Mr. Sears noted that a different sort of cross-examination takes place at depositions than at trial.

Rule 17: Subpoena

Rule 17 was approved, but the Reporter will consider rewriting the Note.

Rule 20: Transfer

Rule 20 was approved.

Rule 38 and Rule 9, F.R.App.P.

Strenuous opposition had developed in opposition to Rule 9(b). The opposition felt that the defendant might arbitrarily be kept imprisoned pending appeal. It was noted that Rule 46(c) provided for release while awaiting notice of appeal. However, it was determined not to adopt 9(b) except that "orally in open court" was retained.

Rule 38 was approved.

Rules 9(c) and 9(d) were approved with page 62, lines 59-60 amended to read "... that defendant has made application for leave to prosecute the appeal in forma pauperis." The change was made to ensure that a trial judge could not arbitrarily keep a defendant in jail by refusing to act on his forma pauperis application.

If a defendant is denied forma pauperis, the government can move that he be recommitted pending satisfactory arrangements regarding the preparation of the transcript.

Rule 10, F.R.App.P.: Record on Appeal

Rule 10 was approved.

Judge Maris queried whether 10 days might not be too short a time, but no change was made.

Rule 41.1: Nontestimonial Identification

The comments split about equally, half favoring, half opposing. Federal judges generally favored the Rule.

The Committee agreed that this was a helpful procedure and that, in the District of Columbia, Adams orders had been used with good success.

Judge Gesell noted that the District of Columbia had very sophisticated line-up procedures and that defense lawyers feel that line-ups have been fair.

The question was raised whether Davis v Mississippi actually supports Rule 41. It was agreed that it provided some support and that the Committee was authorized to break new ground through rules.

The Committee then approved Rule 41.1 in principle.

Mr. Sears registered strong opposition to the Rule. He felt that "reasonable grounds, not amounting to probable cause" gave the government too much power and allowed too great an impingement on citizens. Both he and Judge Gesell disapprove the acceptance of this Rule by the Committee.

Rule 41.1(b) was amended by putting a period after "suspect" p. 49, line 8 and by substituting "which may or may not amount" for "not amounting" on p. 49, lines 17-18.

Rule 41, lines 120-23, was amended to read "After a person is presented in court, an attorney for the government or the person arrested may request the federal magistrate to order a nontestimonial identification procedure."

Rule 43: Presence of the Defendant

The Committee agreed that the judge need not tell the defendant that the trial could go on in his absence. Rule 43(c) will be amended to so provide.

Rule 43(b), line 14 was amended to read: "... shall not be prevented and the defendant shall be considered to have waived his rights to be present whenever a defendant ...." This change was made to reflect the Supreme Court's opinion in Illinois v Allen. The Reporter will make necessary stylistic corrections.

Judge Lumbard suggested that there is no logical basis for a distinction between capital and non-capital cases. Accordingly Rule 43(b)(1) was amended by striking "in noncapital cases." Similarly, the first paragraph of the Advisory Note on page 60 was struck.

In light of the revision of Rule 35 providing for sentencing review, Rule 43(c)(3) line 31 was amended to read: "at a reduction or review of sentence under Rule 35."

The Committee unanimously agreed that when the judge retired to chambers to discuss matters of law or did so during bench conferences, the presence of the defendant is not required. It was suggested that

Rule 35

Rule 35 has been substantially revised and the Reporter will be sending revised copies to all members of the Committee.

The Committee agreed that the composition of the Review Panel should change from time to time but that the makeup of the panel should be left to the chief judge of the circuit.

The Committee agreed that the sentencing judge should be disqualified from participation on the panel.

The sentencing Review Panel need not write opinions justifying its decisions and the Advisory Note will so indicate.

Following Friday's vote which divided evenly between reviewing sentences of one year and three years, Judge Lumbard suggested that the Committee agree that sentences of two years or more should be reviewable. This suggestion was adopted and it was agreed that the Advisory Note should reflect the fact that it was a compromise position taken after consideration of the feelings for review of any sentence as opposed to reviewing only sentences which are for a long term of years.

The Committee agreed that the sentence review panel should seek to correct only abuses of discretion and not

to eliminate disparity or tinker with the sentencing judge's decision.

Judge Hoffman, Judge Gesell, and Professor Remington were appointed to the Editorial Committee.

The meeting was then adjourned.