MINUTES OF THE MEETING OF THE ADVISORY COMMITTEE ON THE FEDERAL CRIMINAL RULES HELD AT THE LAFAYETTE BUILDING, ROOM 638, WASHINGTON, D.C., ON THURSDAY, MARCH 14 AND FRIDAY, MARCH 15, 1974

PRESENT:

Hon. J. Edward Lumbard, Chairman
Chester Bedell, Esquire
Hon. R. Ammi Cutter
Robert S. Erdahl, Esquire
Hon. Gerhard A. Gesell
Hon. Walter E. Hoffman
Terence F. MacCarthy, Esquire
Hon. Leland C. Nielsen
Hon. Henry E. Petersen
Hon. Roger Robb
Hon. Russell E. Smith
Hon. Roszel C. Thomsen
Professor James Vorenberg
Hon. William H. Webster
Hon. Joseph Weintraub
William B. West, III, Esquire
Professor Frank J. Remington
Professor Wayne LaFave
William E. Foley, Esquire
Richard Green, Esquire
Ronald Gainer, Esquire
Carl Imlay, Esquire

ABSENT:

Hon. Wade H. McCree, Jr.

Judge Lumbard, Chairman of the Committee, opened the meeting at 9:10 a.m.

I

DISCUSSION OF PROPOSED RULES GOVERNING HABEAS CORPUS PROCEEDINGS

Professor Remington reviewed the reactions of the bench and bar to the proposed §2254 and §2255 rules submitted January, 1973, noting that the major areas of criticism centered upon Rules 9 and 11.

Rule 1. Scope of Rules. It was noted that Professor Bator had inquired whether it was intended to include non-judicial custody situations in these rules. Judge Hoffman expressed the view that the purpose of the rules was to deal with those in judicial custody as distinguished from seamen on vessels, etc. It was agreed that a statement should be included in the Advisory Committee Note which should make this clear and that references to nonjudicial custody cases in the Notes should be eliminated. Judge Friendley's suggestion to update the Notes to include Preiser was noted and approved. Mr. Imlay inquired whether bail should be discussed in the rules; it was agreed that it should not be included.

Rule 2. Petition. The report of the State Attorneys General expressing concern about routinely designating the Attorney General as a respondent in future custody cases was considered. It was the consensus that the Attorney General would be in the best position to identify the proper

party and could move for appropriate substitution. It was voted to strengthen our position on this point in the Notes.

A review of the model form of petition followed. It was generally agreed that the insertion of a laundry list of available grounds was not counter-productive and would be useful in helping the prisoner to identify the particular rights which he wished to assert with factual allegations. At Judge Thomsen's suggestion, it was agreed that the list of grounds on page 48 should be modified by putting the present (a) and (b) after the present (j), in order not to emphasize the possible denial of effective assistance of counsel. The suggestion has the merit of putting the grounds in alphabetical order. It was noted that the form can be revised from time to time or modified by local rules. Judge Hoffman suggested the insertion in the Note, at page 42, of a statement that if the Supreme Court of the state has ruled on an issue, it was not necessary to raise it again. It was also suggested that the form, at page 45, be revised at instruction (2) to make clear that memoranda of law are to be filed separately, if at all, in substitution for the statement that "no briefs or arguments are to be submitted unless requested by order of court."

A number of responses were directed to the extent of the right to counsel in connection with a habeas corpus petition. Judge Hoffman noted that the proposed amendment to §2254 submitted by his committee and adopted by the Judicial Conference would not provide for counsel at the state level except for assistance and advice in deciding whether to apply for habeas corpus.

Discussion of the requirement limiting assertions of claim to the judgment or judgments of a single state court followed. Justice Weintraub expressed a preference for cleaning up as much as possible in one proceeding. It was observed that the purpose of 2(d) was to anticipate the record-gathering problem and to simplify and move along this procedure as much as possible. There was no general desire to change the rule as drafted.

Rule 3. Filing Petition. Professor Remington reported that a number of clerks had inquired about the procedure for dealing with in forma pauperis applications. He asked whether in forma pauperis orders should be accompanied by reasons, to demonstrate that the grant or denial was not based on the merits. No action was deemed necessary on this point.

It was agreed that the five-year presumption of prejudice gives the clerk no basis for "ruling" on the filing of petitions. Judge Robb suggested a Note that no answer was required.

Rule 4. Preliminary Consideration by Judge. An objection by the State Attorneys General, reinformed by representatives of the Department of Justice at the meeting, was directed to the procedure which requires the state (or government) to file its answer ten days after the filing of a motion to dismiss or for more definite statement, notwithstanding the court may not have ruled on such motions. Judge Doiman

explained that the purpose of the rule as drawn was to avoid delay waiting for courts to rule on pending motions and to discourage the use of motions for such purpose. He noted that the phrase in line 27 "unless the court otherwise orders" should protect the government when it has a serious motion pending. The reporter was directed to redraft subsection (b), and if necessary subsection (a), for consideration by the Committee the next day. [See Committee action, infra.] Judge Gesell agreed with a suggestion that a Note should be inserted indicating that inmates should receive copies of all pleadings filed.

Rule 5. Answer; Contents. It was noted that the State Attorneys General suggested that a copy of respondent's brief be filed with the record. This seemed an unnecessary requirement, and no action was taken. Judge Thomsen suggested that there be included in the Note a statement that respondent could file a copy of his brief if he wished to do so.

Objection was reported to putting the burden of proving exhaustion upon the respondent. Further objection was made to the requirement of filing a transcript in each case. This problem was discussed at length in an effort to balance the mechanical burden imposed on the state against the need of the district judge and the reviewing court for sufficient record to substantiate need or lack of need for an evidentiary hearing. Judge Smith requested a draft revision to reflect that the answer should contain information with respect to the transcript and that the state should furnish what it deems relevant and such additional material as per order of

court. [See discussion of revised draft, infra.]

Rule 6. Discovery. It was noted that discovery is discretionary with the court. Judge Hoffman urged that discovery be limited to the period following the order of a plenary hearing. The State Attorneys General object to absorbing the expenses of petitioner in connection with a deposition. It was agreed that witness fees and expenses of transcription were not proper matters to be dealt with in these rules and would more properly be the subject of legislation. Professor Remington noted that the Association of the Bar of the City of New York wanted to see counsel in the discovery proceeding. The consensus was that this matter would be in the discretion of the judge. It was agreed that the Note on page 66 should be expanded to explain that the purpose of subdivision (b) was to inform the court of the intended scope of discovery so that he could properly control it.

Rule 7. Expansion of Record. Professor Remington inquired whether materials submitted both for and against an expanded record should be under oath. Judge Smith suggested that the rule be modified to permit the court in its discretion to require authentication of any expanded material.

Rule 8. Evidentiary Hearing. This rule was approved in its present form with the insertion of a modifying clause in the final Note on page 73 to read "In the light of experience [i]t may prove more desirable, however, to codify one

standard procedure by placing it in the body of rule 8 itself."

Rule 9. Delayed or Successive Petitions. Professor Remington noted objections that this rule is substantive and therefore outside the purview of rules. Judge Hoffman noted that the same provisions are incorporated in the proposed amended statute. Justice Cutter inquired whether the five-year period would run from the imposition of sentence in the case of a probation revocation since, under Rule 1, the rules are made applicable only to persons in custody. Justice Weintraub was of the opinion that there should be one rule applicable to all situations. Judge Hoffman stated that it was intended that the five years would apply to any situation following a judgment of conviction. Judge Hoffman will draft a proposed additional subsection (c) to make this clear, and that the only rights which would not be subject to the five-year provision would be those which resulted from proceedings following conviction.

Judge Webster inquired whether the requirements of Sanders v. United States, 373 U.S. 1 (1963) should not be incorporated in the provisions of subdivision (b) relating to successive petitions. After discussion, it was voted that the additional finding mandated by Sanders that the prior determination be on the merits should be incorporated in subdivision (b), for the reason that the Notes are not

always published with the rules and such factual finding is required by Sanders.

It was the consensus of the members that, contrary to suggestions, the term "prejudice" and the term "grounds" need not be specially defined.

Rule 10. Transfer of Petition to Another District. After discussion it was voted to insert the word "timely" before the word "motion". It was suggested that Braden v. Thirtieth Judicial District, 418 U.S. 484 (1973) be incorporated in the Notes under this rule.

Rule 11. Powers of Magistrates. Mr. Joseph Spaniol was present during these discussions. It was noted that the present use of magistrates as hearing officers, under authority of Rule 53, Federal Rules of Civil Procedure, is somewhat circumscribed by the requirements of 53(b) that a reference shall be the exception and not the rule. It was the consensus that if Rule 53 should be modified to permit routine use of magistrates, no change other than a footnote would be required as to Rule 11. It was voted to recommend such amendment to the Advisory Committee on Federal Rules of Civil Procedure.

Rule 12. Federal Rules of Civil Procedure; Extent of Applicability. Approved as drafted.

Rule 13. Definition. Approved as drafted.

A discussion thereafter followed on the draft of proposed rules for §2255. It was recalled that Judge Maris had taken a strong position that a §2255 motion was in fact a continuation of the prior criminal case, and the rules had been drafted accordingly. Mr. Grainer expressed concern about extending the provisions of these rules to matters which would have been foreclosed in a separate habeas corpus proceeding. It was voted to make clear that the rules may not be thus abused, in a Note. The Note to Rule 1 was strengthened by deleting the words "is intended to indicate" and "is intended to be" and substituting therefor "indicates" and "is", respectively.

Rule 2. Motion. Mr. Grainer suggested that the United States be named in all §2255 proceedings routinely. It was pointed out, however, that the United States is already a party since this is but a continuation of a prior proceeding. The amendment to the Notes, supra, strengthen this interpretation.

A new Rule 11 was adopted as follows:

"Nothing in these rules shall be construed as extending the time for appeal from the judgment of the district court."

Rule 4. Preliminary Consideration by Judge. It was agreed that this rule shall be modified in the same manner that

Rule 4 to §2254 shall be modified.

It was further agreed that all other amendments to proposed rules for §2254 (including forms) which are applicable to and consistent with §2255 shall be adopted and incorporated in the §2255 rules.

Rule 9. Delayed or Successive Motions. Mr. Gainer stated that the government wanted to be able to show what happened on direct appeal, as it relates to Rule 9(b) successive motions. Judge Nielsen observed that the judge has the entire record since he tried the case, and Mr. Petersen expressed satisfaction with this explanation.

II

GRAND JURY

The Committee proceeded to consider the report of Professor LaFave prepared in response to instructions at the August, 1973 meeting. Judge Smith referred the Committee to the letter from the Federal Judicial Center dealing with possible resource materials in connection with a study of the grand jury system. Mr. Petersen suggested that a study made by the Department of Justice through its United States Attorneys sometime ago might be useful. Judge Lumbard stated that in view of the circumstances and timing, it would be most profitable to examine areas of potential improvement through rule change rather than full consideration of a constitutional change in the grand jury system, especially in view of the lack of available data to support conclusions

of constitutional dimension.

A. Size. It was noted that any change in size would require revision of 18 U.S.C. §3321 and Rule 6. Professor LaFave noted that the proposed revision to §3321 would require a minimum of nine jurors to be present when a vote was taken. Judge Gesell asked whether the term of the grand jury should be fixed. Judge Smith replied that the various districts operated under different conditions and that the term should not be made rigid. A draft revision to 18 U.S.C. §3321, submitted in accordance with instructions voted at the August meeting, was presented for consideration. Professor Vorenberg observed that size and function are interrelated and that he supported the change; the present size is a waste to the people's time, and a two-thirds vote is desirable in view of the reduced number. Justice Cutter stated that nine would be as good as twenty-three in performing the screening or buffer function of the grand jury; Judge Smith agreed. Judge Hoffman moved, and it was voted, that the draft amendment be recommended for adoption, and that Rule 6 be appropriately amended if and when the statute is amended.

At this point, Judge Smith asked for advice as to the form the report should take. Judge Thomsen doubted that a report on the grand jury should go to the Standing Committee. Judge Lumbard stated that the Committee should first determine

what actions it wished to recommend, and that thereafter, Judge Thomsen and Judge Lumbard would talk to the Chief Justice and obtain instructions on how to proceed.

B. Recording Grand Jury Proceedings. A draft revision to Rule 6(e) incorporating the August, 1973 recommendations was presented for consideration. It was generally agreed that all proceedings before the grand jury should be recorded, at least electronically. There was some disagreement with respect to the proposed language at lines 9-13 re: disclosure. Judge Lumbard noted that the rule was not intended to affect Jencks Act material; it was simply a requirement to record. Judge Hoffman was concerned that the last sentence under 6(e)(1) intimated too strongly that there should be a disclosure. It was agreed that lines 9-13 should be revised to reflect clearly that the method, form and conditions of disclosure were under the control of the court.

The draft revisions to 6(e)(2) were approved with the addition of the words "after notice to the government" after the word "court" in line 31.

C. Competency of Evidence. A proposed new Rule 7(g) was considered and, after substituting the word "sufficient" for "adequate" in line 3, approved. Mr. Bedell voted in opposition thereto.

At this point, discussion reverted to further consideration of Rule 6(e), and in particular the reference to "oral statement" appearing in lines 2-3. Government members expressed

some interest in excluding off the record statements. Justice Weintraub said that admonitions by the prosecutor were part of the testimony and should not be excised. There was general agreement that permitting any form of editing of the recording would be inadvisable. Mr. Gainer suggested the substitution for "All testimony and oral statements" the words "All proceedings during which a witness is present".

D. Subpoena of Distant Witnesses. A discussion of proposed addition to Rule 6 to permit testimony under certain circumstances by distant witnesses by deposition followed. In view of the general uncertainty about the aspect of fairness, and the potential for abuse and increasing use of motion practice, Judge Webster moved to table the proposal, and the motion was adopted.

E. Grand Jury Secrecy. A proposal to recommend a draft statute making it a criminal offense to disclose matters within the grand jury room was next considered. There was general agreement that such a statute should have teeth in it and that, while it may be possible to strengthen the rule with respect to disclosure, the most effective attack would be by means of statute. It was also the consensus that the present practice of permitting disclosure by a witness should be continued except in unusual circumstances, which could be governed by special court order. A draft statute, appearing on page 32 of Professor LaFave's report, was considered and approved, subject to the following

amendments:

1. In line 1 deletion of the word "intentionally" and substitution therefor "knowingly".

2. In line 11 insertion after "witness" the words "who has appeared".

3. In line 25 insertion at the end of the sentence the words "for violation of any Rule or order of the court".

A companion amendment to Rule 6(e) appearing on pages 34-35 of the report, was next considered. While there was some sentiment in favor of the alternative draft appearing at pages 47-48, the draft amendment at pages 34-35 was approved, subject to the following amendments:

1. In line 11 strike "preliminarily" and substitute "prior".

2. After word "jury" in line 17, insert "except for good cause stated on the record".

F. Investigatory Depositions. In view of the policy decision to approach the grand jury system from a non-constitutional base, it was voted to table discussion of a suggested rule 40.1 authorizing the use of investigatory depositions.

G. Other Matters. It was agreed that the report as finally prepared should reflect our prior consideration and view not to recommend action with respect to the following proposals, previously considered: (1) requiring prospective defendant to appear before the grand jury as a witness; (2) allowing prospective defendant to appear before the grand jury as a witness; (3) warning witness of his Fifth Amendment

rights; (4) right to counsel of grand jury witnesses; (5) requiring showing of grounds to call a witness; (6) challenge of questions on ground of irrelevancy; (7) suppression of testimony as fruit of violation of the constitutional rights of witnesses; (8) transcript of testimony for grand jury witness; (9) access by defendant to grand jury testimony in advance of trial and (10) selection of grand jurors.

H. Possible Constitutional Change. Judge Smith stated that in view of the likelihood that the Committee would not receive much statistical help from the Judicial Center, possibly members could do local survey work on the effectiveness of grand juries within their own area. Mr. Petersen suggested that United States Attorneys and former United States Attorneys could be consulted for their views; Judge Thomsen suggested the use of public defenders; Judge Lumbard suggested the American College of Trial Lawyers. Mr. Imlay noted that waivers of indictments were going down; Judge Smith felt this varied depending on whether a grand jury was in permanent session. Judge Lumbard recommended that we suggest no change at this time; if the Chief Justice wishes us to develop more information, we can proceed as instructed. Judge Lumbard stated that nothing further would be developed until he and Judge Thomsen had conferred with the Chief Justice.

III

JUDGE HOFFMAN'S PROPOSAL RE: TRIAL PUBLICITY

Judge Hoffman presented a proposed addition to Rule 23(d) dealing with waiver of right to a public trial where circumstances warrant. Judge Webster suggested that Rule 26 would be a more appropriate vehicle. It was agreed that any such revision would apply only to jury trial situations. The draft was referred to the reporter for consideration at the next session of the Committee.

IV

RULE 6 - THE GRAND JURY

Reactions to proposed revisions to 6(e) were discussed. Professor LaFave stated that the comments did not require action. Professor Remington questioned whether this minor amendment should be sent forward in view of the major changes under consideration. Mr. Petersen thought the amendment expanding "attorneys for the government" was important but not crucial. It was agreed that this amendment should not be sent forward until the Committee had advanced in its overall work on the grand jury.

V

RULE 23 - TRIAL BY JURY OR BY THE COURT

It was agreed that the Note should make clear that oral findings should be on the record. It was voted to send the amended rule forward.

VI

RULE 24 - TRIAL JURORS

Judge Robb and Mr. Bedell expressed concern about the extent of the reduction in peremptory challenges, although favoring an even number for each side. Mr. MacCarthy stated that federal defenders would be opposed to reduction. Professor Remington pointed out that one of the purposes of reducing the number of challenges was to prevent mass exclusion of minority groups. Justice Cutter noted that the public has an interest in the conservation of jury time. By a vote of 9-4, it was voted to forward proposed Rule 24(b)(1) appearing at lines 16-27.

Subdivision (2) - relief from limitations - was considered and approved subject to the following amendments:

1. In subparagraph (C) delete "3" and substitute "1" in line 37.

2. In line 40 substitute for the words "rules of the district court" the words "rules or order of the court". (Lines 28-40 approved as amended.)

Discussion followed on the proposed amendments to 24(c), alternate jurors. Principal disagreements centered around the use of alternate jurors after deliberations had commenced and a juror became incapacitated. Constitutional questions were recognized. It was observed that the Association of the Bar of the City of New York considered the need for this provision to be so infrequent that it was not worth the constitutional risk. Data seems to be lacking. A motion to forward the proposal as drafted was defeated 4-6. Lines 69-82 were, however, approved for forwarding.

VII

REDRAFT OF HABEAS CORPUS RULES

Rule 4. A proposed revision to Rule 4 and a proposed alternative 1 revision to Rule 4 was considered. [See prior comments under Section I.] Further modifications were made, and amended Rule 4 was approved as follows:

"Rule 4. Preliminary Consideration by a Judge.

(a) Reference to Judge; Dismissal or Order to Answer. The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned who shall thereupon make an order for its summary dismissal if it plainly appears on the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court. Otherwise the judge shall order the respondent to file an answer or otherwise plead to the petition within the period of time fixed by the court, or take such other action as the court deems appropriate."

The Chairman was authorized to appoint an Editorial Committee to make final style changes in the drafts before forwarding to the Standing Committee.

Rule 5. A redraft to Rule 5 was presented and discussed. Judge Smith suggested that the draft be revised so that the respondent shall indicate what information is available and shall attach what he deems relevant and shall thereafter file such further information as may be required.

Rule 9. A revision to Rule 9 - delayed or successive petitions - was next considered. The members preferred "validity of an action" to "procedure" appearing in the draft. The revised draft was approved subject to style changes.

Rule 10. A proposed Rule 10 providing for transfer of petition to another district was considered and approved subject to style changes. This changes present Rule 11 to Rule 12.

Following this discussion, it was voted to send the edited proposed rules governing §2254 and §2255 forward with revised Notes.

VIII

RULE 11 - PLEAS

Comments from the field focused on the policy question of forcing the government to accept a plea to a lesser offense. Judge Webster expressed concern that this approach implied too much involvement of the judge in plea bargaining. On motion of Mr. Petersen, consideration of Rule 11 was tabled.

IX

RULE 40.1 - REMOVAL FROM STATE COURT

The proposed rule was approved for forwarding.

RULE 41 - SEARCH AND SEIZURE

Professor Remington presented a proposed revision dated February 27, 1974 reflecting recommended changes in the draft by the field. These changes mandate the transcribing of oral testimony given in support of a warrant. The amended draft was approved for forwarding. [Warrant upon oral testimony.]

X

PROBATION REVOCATION PROBLEMS

Professor Remington asked the Committee to give further thought to whether Rules 32(f) and 40 should be amended to deal with the due process questions raised by Scarpelli. Judge Gesell expressed concerned about the dehumanizing effect of formal rules for dealing with revocation, which should be dealt with on a less formal structured basis. Consideration was laid over until the next meeting.

XI

RULE 35

Judge Robb expressed the view that while review of sentencing was considered undesirable by most judges, it appeared that either panel review or appellate review were the only current alternatives, especially in view of the pending legislation calling for appellate review of sentencing. Professor Remington remarked that most of the opposition to Rule 35 is conceptual, with the possible exception of alternative suggestions on the time within

which the motion could be filed. Judge Lumbard presented for possible consideration an alternative which is being discussed in Connecticut whereby the four district judges would adopt a rule to provide that in each case likely to result in a jail sentence the sentence would be imposed by a panel of three judges. Judge Gesell stated that the difficulty with a sentencing council where one judge imposes sentence is determining whether the sentencing judge is getting advice or is governed by a vote. (In Michigan, the panel consideration is only a recommendation.) The problems of geographical differences as applied to this suggestion were considered.

Judge Thomsen read a summary of the report of the Committee on Criminal Laws. This Committee, while not favoring a review, commented on the proposed panel review and appellate review suggesting, inter alia, a three-year minimum before eligible for sentence review; power to increase as well as decrease; that the record include the presentence report, the stated reasons of the judge and the transcript of the sentence proceedings; that review be final; that defendant must seek leave to apply for review; that the stated standard be "abuse of discretion" rather than "excessive"; and that the petitioner be permitted only one application. (Copies of this report will be distributed.)

Judge Thomsen suggested that perhaps a panel consisting of two district judges and one circuit judge might be considered. Judge Lumbard questioned whether this alternative could be

handled under the rule making power. Judge Gesell opined that it would be better to get the sentence review out of the way because of delays in prosecuting appeals. Justice Cutter expressed the hope that we get at this before Congress decides without the benefit of our thinking. Professor Remington reported that the Criminal Rules Committee of the Ninth Circuit was generally favorable to the proposal.

Professor Remington recalled our previous vote to incorporate an addition that the right of sentence review did not apply to a plea of guilty made pursuant to a plea bargain.

The meeting was adjourned at 3:00 p.m. March 15, 1974.