October 27, 1970

Dear Professor Remington:

As requested in your letter to Mr. Foley I am enclosing the minutes with regard to habeus corpus which were taken from discussion at the June 1-3, 1970 meeting of the Criminal Rules Committee.

Sincerely yours,

Barbara A. Gray

Professor Frank J. Remington
The University of Wisconsin
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Habeus Corpus

Judge Hoffman submitted a report from his subcommittee to make recommendations with respect to the preparation of special rules for habeus corpus cases. For the benefit of those who did not have a copy of the report Judge Hoffman summarized it. He felt the answer to the question of whether the scope of rules should be broadened by the inclusion of all complaints appears in Long v. Parker, 390 F. (2d) 816 (3 Cir., 1968), where the court said that habeus corpus is not a proper proceeding to investigate complaints by prisoners since they do not attack the legality of confinement. He further stated that a writ of habeus corpus should be limited to the situations listed on page 3 of his report.

The Committee discussed the problem of state-federal relationships in Section 1983 cases whereby unlike the habeus corpus cases there is no requirement for exhaustion of state remedies. Judge Hoffman stated that Judges Mansfield and Zirpoli, Professor Remington and Dean Barrett discussed the possibility of putting the prisoner complaint cases into habeus corpus however, the prisoners usually ask for damages. Judge Hoffman indicated the subcommittee had concluded that they should not deal with the prisoner complaint cases. Mr. Wilson suggested setting up a procedure to handle these substative state prisoner rights. Professor Remington agreed that this would be better than the

present system. Mr. Wilson stated a requirement for exhaustion of state remedies could be added to this procedure. Professor Remington felt the Committee should develop the procedure for the right to get legal advice while in an institution. Judge Hoffman stated in his district it is up to the judge to decide whether the case comes under Section 1983 or habeus corpus. He felt habeus corpus should be limited to the legality of confinement complaints, both state and federal. Professor Remington stated that in order to do this a procedure has to be developed to be used in those cases which are not true habeus corpus cases but which raise questions which federal courts deal with and which also should require exhaustion of state remedies. Judge Hoffman said he would request the Administrative Office to write to the clerks of the district courts asking that they mail to him copies of any standardized forms which are being used. After the forms are reviewed and the prisoner sees them he should be told in lay terms that the forms and rules should be used not as complaints about treatment but for the purpose of testing the validity of their complaints. Judge Zirpoli asked if the Committee felt it would be possible to incorporate rules which would affect habeus corpus and petitions affecting terms and conditions of custody. Mr. Wilson said one could not effect the definition of the content of a writ for example

habeus corpus. Judge Maris stated that under the Civil Rights Act, it is a civil action with regard to the filing of a complaint. Judge Hoffman said that the Judicial Center has a state-federal relations setup composed of judges who are quite concerned with this problem and he would be willing to contact them. Professor Remington replied that the Center committee had been contacted and responded by saying that they were concerned, however, did not have any ideas but would like to come to a meeting of the Criminal Rules Committee. Professor Remington felt this Committee has the authority to develop, possibly with assistance, a procedure for the non-true habeus corpus cases assuming Mr. Wilson is right that the use of habeus corpus is a procedural matter as long as the rights are not restricted. Judge Hoffman suggested they end the discussion for the moment until the subcommittee could study the problem further. He felt Professor Remington after reviewing the discussion might recommend another member of the Rules Committee to help in this legislation.

Laches, Staleness or Forfeited Constitutional Claim

In summarizing his report Judge Hoffman stated that there is some intimation that the Supreme Court feels something should be done about collateral attacks upon sentences long since imposed. He felt if the Committee could in some way relieve the increasing habeus corpus burden, it would be in the field of limiting the right to withhold the presentation of grounds for

relief, and the right to file multiple petitions, and to establish with a degree of finality the decisions previously rendered. He believed a modified statute of limitations or laches doctrine is legally permissible, subject to the proviso that any presumption arising by reason of failure to collaterally attack a conviction may be disregarded where (1) there has been a change of law, or (2) where the court feels the collateral attack should be entertained and the prisoner makes a proper showing as to why he has not previously asserted a particular ground for relief. The grounds for relief in a post-conviction proceeding which should be subject to a limitation are ineffective counsel, denial of right of appeal, plea of guilty unlawfully induced, use of a coerced confession and illegal jury. These grounds are interlocked with the allegation of ineffective counsel and because of the seriousness of this charge a time limitation should be imposed to require this type of relief to be sought within at least five years from the date of the initial sentence. By placing the most frequently assigned grounds for relief on the reverse side of standardized petitions, it may impress upon the prisoner the time element involved. Judge Hoffman then asked whether some limitation or laches should be put into the rules to foreclose repetitive or fragmentary petitions and, if so, how should this be accomplished. As far as the presumption is concerned the Committee felt this is an evidentiary matter.

Discovery

Judge Hoffman indicated his belief that discovery in habeus corpus proceedings should be subject to judicial control, i.e., only with the approval of the district judge or magistrate.

Expanded Record

Judge Hoffman felt the Committee should consider authorizing an expanded record in federal habeus corpus cases touching state prisoners, as well as federal prisoners under section 2255. A rule establishing appropriate safeguards for the use of an expanded record may be tied into the discovery process if authorized.

Oath or Affirmation

If discovery is permitted or an expanded record through the medium of affidavits is adopted, Judge Hoffman felt the Committee should retain the requirement of the oath or affirmation and extend the use beyond the petition. He stated that these are not the views of the ABA standards or in the Harvard Law Review.

Pleadings in General

Because of the difficulty created by the vagueness of petitions filed by prisoners, Judge Hoffman felt the committee should seek to minimize the length of these petitions and authorize the court to call upon petitioners for more extensive factual allegations under oath.

In general Judge Hoffman felt the use of habeus corpus should be restricted rather than expanded.

Judge Mansfield expressed his favor of the recommendations made in Judge Hoffman's report. He stated that one of the greatest contributions that could be made is in the area of laches. He felt it is consistent with the spirit of the habeus corpus statutes and specifically the finality statute, section 2244 (2255?). It defines in terms of laches, abuse of process, the conditions under which there would be a presumption of regularity and a burden placed on the petitioner which if not met right in the petition would render the petition dismissible summarily without the necessity of extensive terms. He agreed with Professor Barrett that they could not have a 5-year statute of limitations in the rules. However, they could have a rule to that effect if there has been a petition filed more than a certain number of years after the petitioner has been taken into custody and it fails to state in detail facts showing why a ground now available was not asserted. They could also state that if the fact were available prior to the five-year period and were not asserted presumptively it would be dismissible. The only thing Judge Mansfield would add to the recommendations is that the rules define the form and contents of a petition because he disagrees with the ABA standards and the Harvard Law Review Article. His view is that a petition should be required in order for a summary

dismissal for insufficiency on the face to state all prior applications for habeus corpus relief that he has made and the grounds on which he sought these, the court where it was filed and the disposition thereof. He should be able to state facts that he has exhausted his state remedies or why he has not. This could be stated in the rules and a form could be included in the appendix as a sample petition. Judge Zirpoli suggested Judge Hoffman pursue the rule making power and the procedure in accordance with the outline he has given in his report and the committee agreed. Judge Maris suggested the sample petition be in the form of a questionnaire.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON 25, D. C.

July 10, 1970

Dear Professor Remington:

As requested in your telephone conversation with Mr. Imlay I am enclosing the discussion on Rule 45 which was held at the June 1-3, 1970 meeting of the Criminal Rules Committee.

I hope these minutes will be helpful.

Sincerely,

Barbara A. Gray

(Mrs.) Barbara A. Gray

Professor Frank J. Remington
The University of Wisconsin
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RULE 45. Time

Professor Remington stated the subject of time limits has been before the Committee at its last four meetings and he indicated there were now five alternative drafts. Alternative Draft No. 1 retains the time limits previously discussed in addition to Judge Hoffman's suggestions. He stated all the drafts attempt a delegation of responsibility for insuring prompt disposition of criminal cases to the local level, either circuit judicial council or district court. Alternative No. 1 prescribes time limits on criminal trials unless there are local rules of the district court on time limits, which prior to their becoming effective have been submitted to the Judicial Council of the Circuit for approval. Alternative No. 2 delegates responsibility to the judicial council of the circuit through periodic studies. Alternative No. 3 is the same with an additional requirement of an annual report to the Judicial Conference of the United States. Alternative No. 4 delegates responsibility to the district court. Alternative No. 5 adds a mandate to provide for the prompt disposition of those cases in which there is reason to believe that pretrial release and delay will create a danger to the community. Discussion of these alternatives led to the study of Alternative No. 1. Judge Maris suggested deletion of "Prior to their being effective," from subdivision (a). Judge Hoffman moved approval of Rule 45(a) as amended. The motion carried. He also moved to approve subdivision (b) and the motion carried.

Under subdivision (c) Arraignment, a motion was made to change 10 days if in custody to 15, and 20 days if not in custody to 30 days. The motion carried. Judge Zirpoli suggested adding, "on the charge in the information" after "if in custody." He also suggested deletion of the words after "calculated" and substituting "from the date of the filing of the information." Judge Gesell moved adoption of these changes and the motions carried. Judge Hoffman moved adoption of (2) On Indictment, (i), and (ii). However Judge Maris suggested combining (i) and (ii) into (2) and this was approved. A motion was made to set the time limits under (2) at 15 days if in custody and 30 days if not in custody. The motion carried.

Judge Hoffman moved to strike the first two sentences of subdivision (d) Trial, and change the time limits to within 90 days after arraignment if held in custody rather than 60, and 180 days if not in custody rather than 120 days. The motion carried.

Judge Hoffman moved to redraft subdivision (e) Extension of Time Limits, and it carried.

Professor Remington suggested striking the first sentence of (f) Effect of Noncompliance with Time Limits. It was decided that the remaining language would be redrafted. Subdivision (g) was redrafted. Judge Zirpoli suggested adding Columbus Day to subdivision (h). Subdivisions (i) and (j) were approved as drafted.

In view of the suggested changes in Alternative Draft No. 1 it was retyped and again submitted to the committee for review. Judge Mansfield urged against putting in subdivision (d) which would provide that the defendant shall be scheduled for trial within 90 days after arraignment if he is held in custody or within 180 days if he is not in custody. He pointed out that it started out with 60 days and 120 days and these figures would be unrealistic in his district because of conditions which presently are beyond control and could not be remedied unless more personnel are hired and more courtrooms allotted. If these time limits could be changed from 60 to 90 and 120 to 180, they could urge it be changed from 120 and 360. Because of conditions in his district these time limits might work, however, in other districts where cases are up to date it might create an invitation to delay. Judge Mansfield urged adoption of an alternate rule such as No. 5 which will permit time limits to be tailored according to the particular district and circuit. If the addition of subdivision (d) is approved he suggested that Alternative No. 5 be added along the lines of Professor Pirsig's views of having two alternates for the reaction of those to whom the proposed rule would be distributed.

Judge Hoffman pointed out the bill introduced by Congressman Mikva of Illinois on speedy trial indicated the time limits were set at 120 days and within 60 days if charged with a crime of violence. He stated the committee should do something before Congress takes action.

Mr. Meserve suggested deletion of, "Prior to their being effective," from subdivision (a) of Alternative Draft No. 1, for the reason that it is redundant. He also stated that subdivision (g) should include the phrase, "on the charge in the information," and taken out of (c)(1) On Information. He pointed out "move" on line 2 of page 3 should be "have." Judge Maris stated Columbus Day should be underlined on page 4 because it is a new matter.

Professor Remington suggested the additional language in (g) be, "means custody on the charge contained in the complaint information or indictment." Mr. Meserve agreed. Professor Remington indicated this will exclude a person who may be in custody on a different offense.

Dean Barrett suggested the first line under subdivision (d) read, "The Trial shall be commenced" rather than, "The defendant shall be scheduled for trial." In view of the broad provisions of subdivision (e) which permit the extension of time limits, Mr. Meserve moved approval of Dean Barrett's suggestion. Judge Hoffman agreed but point out that some courts may read "time limits" in subdivision (e) to mean commencement of trial. Professor Remington suggested phrasing it "any period of time" and striking, "time limits." Mr. Meserve moved adoption of this suggestion.

Mr. Erdahl stated that time limits should be set for all defendants whether in custody or not in view of the liberality of the bail reform act, the liberal provisions for extension, etc. He indicated the time limits as follows: 10 for preliminary examination, 15 for arraignment, and 90 for trial, thus eliminating a definition of custody. Judge Hoffman objected. He felt it is less important as to when those not in custody are brought to trial. While these time limits can be extended, the effectiveness of the rule may be destroyed by pushing everything into the "in custody rule."

Judge Johnson stated he agreed with Judges Gesell and Mansfield that it is impossible to implement on the trial court level. If this rule is promulgated he sees no reason for differentiating between those in custody and those not in custody. Mr. Erdahl stated that in the District of Columbia the man out is more of a problem to society than the man in custody.

Mr. Wilson expressed his disapproval of the entire rule especially inclusion of the sanction on dismissal.

Judge Maris stated that "magistrate courts" in line 5 of Alternative No. 5 should be United States magistrates, because they do not hold separate courts.

Approval of Alternative No. 1 was carried. Judge Johnson moved that Alternative No. 5 be submitted along with No. 1 and the motion carried. Professor Remington stated he would harmonize the language so that one alternative would be submitted to the Judicial Council as well as the Judicial Conference for approval

and the other would be submitted only to the judicial council for approval.