MINUTES

of

THE ADVISORY COMMITTEE

on

FEDERAL RULES OF CRIMINAL PROCEDURE

October 6 & 7, 1994

Santa Fe, New Mexico

The Advisory Committee on the Federal Rules of Criminal Procedure met at the New Mexico State Supreme Court in Santa Fe, New Mexico on October 6 and 7, 1994. These minutes reflect the actions taken at that meeting.

I.CALL TO ORDER & ANNOUNCEMENTS

Judge Jensen, Chair of the Committee, called the meeting to order at 8:30 a.m. on Thursday, October 6, 1994. The following persons were present for all or a part of the Committee's meeting:

Hon. D. Lowell Jensen, Chair

Hon. W. Eugene Davis

Hon. Sam A. Crow

Hon. George M. Marovich

Hon. David D. Dowd, Jr.

Hon. D. Brooks Smith

Hon. B. Waugh Crigler

Mr. Darryl W. Jackson, Esq.

Mr. Henry A. Martin, Esq.

Mr. Roger Pauley, Jr., designate of Ms. Jo Ann Harris, Asst. Attorney General

Professor David A. Schlueter, Reporter

Also present at the meeting were: Judge William R. Wilson, Jr., a member respectively of the Standing Committee on Rules of Practice and Procedure; Professor Daniel Coquillette, Reporter to the Standing Committee; Ms. Mary Harkenrider, from the Department of Justice: Mr. John Rabiej and Mr. Paul Zingg from the Administrative Office of the United States Courts; and Mr. James Eaglin from the Federal Judicial Center.

Professor Stephen A. Saltzburg and Mr. Robert C. Josefsberg, Esq. were not able to attend the meeting although Professor Saltzburg did participate in a portion of the meeting by conference call.

The attendees were welcomed by the chair, Judge Jensen who introduced a new member of the Committee, Mr. Jackson. Judge Jensen noted that two outgoing members of the Committee, Mr. Tom Karas and Ms. Rikki Klieman were not able to attend; Mr. Karas' term had expired and Ms. Klieman had resigned from the Committee in conjunction with acceptance of full-time employment by Court TV, as a commentator. On behalf of the Committee Judge Jensen expressed the Committee's profound thanks for their excellent and tireless efforts over the last years.

II. APPROVAL OF MINUTES OF APRIL 1994 MEETING

Judge Marovich moved that the minutes of the Committee's April 1994 meeting in Washington, D.C. be approved. Mr.Martin seconded the motion which carried by a unanimous vote.

III.CRIMINAL RULES APPROVED BY THE SUPREME COURT AND FORWARDED TO CONGRESS

The Reporter informed the Committee that the Supreme Court had approved and forwarded to Congress proposed amendments to four rules: Rule 16(a)(1)(A)(statements of organization defendants); Rule 29(b) (Delayed ruling on judgment of acquittal); Rule 32 (Sentence and Judgment); and Rule 40(d) (Conditional release of probationer). He noted that although the Committee had rejected any proposed amendments to Rule 32 regarding victim allocution, Congress had included the provision. Mr. Pauley indicated that he believed that United States Attorneys would coordinate implementation of the amendment through existing victim assistance programs. All of these amendments, including the Congressional addition to Rule 32, will become effective on December 1, 1994.

IV.RULES APPROVED BY JUDICIAL CONFERENCE AND FORWARDED TO THE SUPREME COURT

The Reporter also informed the Committee that the Judicial Conference had approved several proposed amendments and forwarded them to the Supreme Court for its review: Rule 5(a)(Initial Appearance Before the Magistrate); Rule 43 (Presence of Defendant); Rule 49(e) (Repeal of Provision re Filing of Dangerous Offender Notice); and Rule 57 (Rules by District Courts). The Conference declined to approve a proposed amendment to Rule 53 which would have authorized cameras in federal criminal trials under guidelines promulgated by the Judicial Conference. And because of a Congressional correction of a typographical error in Rule 46, no further action was taken by the Judicial Conference to correct the error through the Rules Enabling Act process.

V.RULES APPROVED BY STANDING COMMITTEE

FOR PUBLICATION AND COMMENT

The Committee was informed by the Reporter that the Standing Committee had approved three amendments for publication and comment: Rule 16(a)(1)(E), (b)(1)(C) (Discovery of Experts); Rule 16(a)(1)(F), (b)(1)(D) (Disclosure of Witness' Names and Statements); and Rule 32(d) (Sentence and Judgment; Forfeiture Proceedings Before Sentencing). The deadline for submitting written comments on the proposed amendments is February 28, 1995. Public hearings on the proposed amendments have been scheduled for December 12, 1994 in New York and January 27, 1995 in Los Angeles.

VI.CRIMINAL RULES CURRENTLY UNDER CONSIDERATION

BY ADVISORY COMMITTEE

A. Rule 5(c). Offenses Not Triable by the United States Magistrate: Proposal to Amend Rule to Address Issue of Defendant Not in Custody.

The Reporter informed the Committee that Magistrate Judge Robert B. Collings from Boston had recommended that Rule 5(c) be amended. He had pointed out what he believed was a conflict between Rules 5 and 58. Read together, he asserted that it is not clear whether a defendant who is charged with a misdemeanor, but is not in custody, is entitled to a preliminary examination. Rule 5(c), he maintained, seems to indicate that the defendant is entitled to a hearing while Rule 58(b)(2)(G) indicates to the contrary.

The sense of the Committee discussion was that there are very few cases where the conflict, if it exists, would arise. Magistrate Judge Crigler noted that this issue might be viewed as largely academic and noted that in his experience he rarely encounters a defendant held in custody on a misdemeanor charge. Agreeing with that point, Professor Coquillette observed that the public should not be deluged with minor amendments; Mr. Pauley suggested that the amendment be deferred and considered in conjunction with possible restylizing efforts of the Rules.

B. Rule 6. Grand Jury Disclosure.

The Committee was informed that a provision in the Administration's Health Care Act (S. 1757 and H.R. 3600) would amend Title 18 to permit the Department of Justice to share grand jury information with other attorneys in the Department who are charged with civil enforcement purposes. Following a very brief discussion on the issue, no action was taken by the Committee.

C. Rule 16. Discovery and Inspection; Proposal to Include Provision Requiring Parties to Confer on Discovery.

In a letter to the Committee, Magistrate Judge Robert Collings of Boston recommended that Rule 16 be amended to require that the parties confer on discovery before asking the court to compel discovery. He noted that such a provision now exists in the civil rules and that it would make sense to require counsel in both civil and criminal trials to confer on the issue of discovery before submitting it to the court. Judge Crow noted that normally counsel may be required to confer on a wide range of issues and that the record may be protected by including a statement on the record as to that conference. Mr. Pauley indicated that substantively the Department of Justice had not objections to the proposal but indicated that it would be helpful to have more information about the current practices. He believed that in a majority of the districts local rules already covered the issue. Professor Coquillette indicated that Professor May Squires was currently compiling the local rules governing criminal cases and several members of the Committee volunteered to submit sample local rules or forms for the Committee's consideration. Mr. Pauley noted that the proposed amendment would presumably include sanctions for failure to confer and Judge Dowd raised the question of whether the amendment would affect reciprocal discovery provisions.

Judge Crow observed that a procedure of requiring a conference before filing pretrial motions need not include a penalty; it still has a positive effect. The defense counsel is protected from allegations of ineffectiveness by showing on the record that a particular motion was not necessary because the parties had conferred on the matter. Judge Wilson concurred that conferences seem to work but Judge Davis noted that there may be a problem with practitioners who practice in different districts.

Judge Jensen indicated that the proposed amendment would be deferred until a future meeting when the Committee would have before it the compiled local rules governing criminal cases.

D. Rule 24(a). Trial Jurors; Proposal Re Voir Dire by Counsel.

The Reporter pointed out Judge Bill Wilson, of the Standing Committee, had encouraged the Committee to consider amendments to Rule 24 which would increase counsel's role in voir dire and that the issue was being considered by the Civil Rules Committee at its Fall meeting. The Reporter also informed the Committee that the possibility of permitting greater participation by counsel in voir dire had not been

directly considered by the Committee in many years; the topic had only been tangentially considered in connection with proposed amendments to equalize peremptory challenges. Since 1943 the Judicial Conference has opposed legislative attempts to increase the role of greater participation by counsel.

Judge Jensen observed that conditions and practices may have changed to the point where it might be appropriate to consider a change to Rule 24(a). Mr. Pauley noted that the Department of Justice considered the present rule and practices to be adequate and that any discussion should distinguish between permitting and requiring counsel participation in voir dire. Mr. Jackson indicated that there seems to be connection between the time permitted to counsel to conduct voir dire and the likelihood of being upheld on appeal. He agreed with Judge Wilson that counsel's role should be expanded but that counsel have abused the opportunity to do so; the trial judge should have the discretion to limit voir dire.

Judge Wilson stated that the courts have uniformly upheld limits placed on counsel's role at trial and Ms. Harkenrider indicated that the Department of Justice takes the position that the trial judge may permit counsel voir dire on a case by case basis. Noting that he favored an amendment to Rule 24, Judge Davis observed that the "school" advice is to keep the lawyers out of the voir dire process. Judge Dowd expressed deep concern over the need for speed records; the real issue is whether counsel will be permitted to talk to individual jurors. He added that an unlimited opening up of voir dire may not be the best solution. Ms. Harkenrider indicated that experienced counsel are able to build rapport with the jurors and that it is important that judges be able to do the same thing.

Professor Coquillette indicated that any possible amendments to the Criminal Rules should be coordinated with the other committees and Judge Jensen indicated that there appears to be diversity in actual practice and that there has been a change in legal culture. He noted for example that in past practice in California state courts, voir dire was conducted primarily by counsel. Judge Crigler noted that he had come to the meeting opposed to counsel voir dire but that he was willing to consider a middle ground. Judge Marovich questioned whether attitudes have been changed by the trial of O.J. Simpson. He noted that the attorneys who are used to conducting voir dire are now on the stand, running the process.

Mr. Jackson observed that there seems to be fear of the adversarial process and Judge Jensen questioned whether there is a chance that Congress will act to amend the rules. He also indicated that the Supreme Court seems to assume that counsel are conducting voir dire. Judge Smith observed that the process is intended to determine the qualifications of a juror and it is possible that counsel will be able to get answers that the judge cannot get. Several other members expressed the view that judges are encouraged to keep the docket moving and conduct case management. Mr. Wilson noted that the Department of Justice is normally opposed to counsel voir dire and Judge Dowd questioned whether a rule could be drafted which would give the right to counsel to conduct voir dire unless the trial judge puts reasons on the record for denying the opportunity. Mr. Pauley indicated that the fact that Congress might consider the issue should not be sufficient reason for amending the rule.

Following a straw poll of the members (5 to 4) in favor of continued consideration of an amendment to Rule 24, the Reporter indicated that the matter could be considered at the Spring 1995 meeting and that several proposals could be considered, including an amendment which would provide counsel with the right to conduct voir dire unless specifically limited by the trial judge.

E. Rule 35(c); Correction of Sentence.

Judge Jensen informed the Committee that a recent case from the Ninth Circuit, *United States v. Navarro-Espinosa*, 30 F.3d 1169 (9th Cir. 1994) had addressed the applicability of Rule 35(c). In dicta the court addressed the question of whether the time for correcting a sentence runs from the oral announcement of the sentence or from the date the formal entry of judgment is entered. Noting that the language in the rule itself refers to imposition of the sentence, i.e. oral announcement, but the Advisory Committee Note seems to indicate that the time runs from formal entry of the judgment. The court expressed the hope that the Advisory Committee would clarify the point.

Following brief discussion by the Committee it was determined that the Reporter would look into the matter and place the item on the agenda for the Committee's Spring 1995 meeting.

F. Rule 40(a). Commitment to Another District; Exception for Transporting UFAP Defendants Across State Lines.

Magistrate Judge Robert Collings recommended in a letter to the Committee that Rule 40(a) be amended. As written, the rule requires that a defendant who is arrested in a district other than the district where the offense was committed is to be taken to the nearest available magistrate in the district of the arrest. Judge Collings suggested that an exception to that rule should be permitted where the nearest available magistrate happens to be in the district where the offense took place. Magistrate Judge Crigler indicated that the legislative history of Rule 40 indicates that in the 1960's the rule was amended specifically to require an appearance in the district of arrest.. Mr. Pauley added that there is little caselaw on the issue and that if the rule is properly applied there should not be any real problems. Noting that the Department of Justice has no current position on the proposed amendment he added that even if the defendant is taken to the wrong district, there appears to be no sanction.

Judge Jensen deferred any further discussion on the proposal until the next meeting, pending input from the Department of Justice.

G. Rule 46. Release From Custody; Proposal to Add Provision for Release of Persons After Arrest for Violation of Probation or Supervised Release.

The Committee considered the written proposal from Magistrate Robert Collings of Boston who suggested that Rule 46 be amended to make the rule explicitly applicable to those cases where a person has been arrested for a violation of probation or supervised release. Following a very brief discussion, the Committee decided to defer consideration of the amendment until such time as the rule might be otherwise amended or restylized.

H. Rule 53. Regulation of Conduct in Courtroom; Report of Subcommittee on Guidelines.

Judge Jensen provided a brief overview of the proposed amendments to Rule 53 which would have permitted broadcasting from federal criminal trials to the same extent provided for in civil trials. He noted that the Judicial Conference had completed a pilot program of cameras in civil court rooms and that the Criminal Rules Committee had forwarded an amendment to Rule 53 to parallel whatever guidelines might have been adopted by the Judicial Conference. To that end, a subcommittee, chaired by Ms. Rikki Klieman, had drafted suggested guidelines which were to have been considered by the full Committee. In the meantime, however, the Judicial Conference at its Fall 1994 meeting had decided not to permit any further testing of cameras in federal courtrooms, thus negating any need for an amendment to Rule 53. He raised the question of whether the Committee should take any formal action on the subcommittee's report and recommendations.

Ms. Harkenrider indicated that the Department of Justice had not taken a formal position on cameras in the courtroom but that it would be important to proceed with great caution. Judge Jensen questioned whether some action should be taken in light of the fact that some groups had expressed an intent to seek legislative changes in Congress. Judge Crigler noted that he was still opposed to cameras in the courtroom but that he had consented to the proposed amendment because it would not be inconsistent to adopt guidelines to insure that the Judicial Conference would have some say in permitting cameras. Professor Coquillette questioned how the guidelines should be drafted and whether they might be considered as "rules." Judge Marovich indicated that the issue of cameras in the courtroom was a dead issue at this point and that no further consideration of the issue would be fruitful. Following additional brief discussion, the Committee accepted the subcommittee's report as presented.

I. Rule 10. Arraignment; Proposal to Consider Amendment.

Judge Crigler suggested that the Committee consider an amendment to Rule 10 which would provide that a guilty plea may be entered at an arraignment. The Reporter indicated that he would contact Judge Crigler about possibly placing the issue on the agenda for the Spring 1995 meeting.

VII.RULES AND PROJECTS PENDING BEFORE THE STANDING COMMITTEE AND JUDICIAL CONFERENCE.

A. Local Rules Project for Criminal Cases.

Professor Coquillette gave a full report on the background of the local rules project, which had originally focused on civil cases. He noted that with the cooperation of the Committee, he and Mary Squires had continued the project in order to study local rules governing the trial of criminal cases. He noted that the main complaint with regard to local rules was from practitioners that out-of-state lawyers may be able to quickly locate the pertinent rule. To that end, the project would focus on the possibility of uniform number among the districts. The second point, he added, is that the project would assist the district courts

in reviewing their own rules and how they related to the national rules. Following a brief discussion about what if any steps could be taken if it appeared that a local rule was in conflict with the national rule, Professor Coquillette indicated that the project would be coordinated with the Committee.

B. The 1994 Crime Bill

Mr. Rabiej briefly noted several statutory changes which had resulted from the Crime Bill.. First, a typographical error in Rule 46 had been remedied as a part of the bill. Second, Title 18 had been amended to with regard to presentence reports in death penalty cases. And finally, Title 18 was amended to reflect that in capital cases, the government is required to disclose the names of its witnesses to the defense three days before trial unless it can show by a preponderance of the evidence that doing so would endanger the witness.

VIII.EVIDENCE RULES UNDER CONSIDERATION:

RULES 413, 414 & 415

Judge Jensen and the Reporter provided a brief overview of recent Congressional promulgation of Federal Rules of Evidence 413, 414, and 415 which address the admissibility of propensity character evidence. They noted that those evidence rules are being considered by the Evidence Advisory Committee at an upcoming meeting and that the Committee's position or comments on the proposals might be helpful. Professor Saltzburg was connected through telephone conference call to the Committee and offered additional background discussion on the issue. During the ensuing discussion the Committee considered the rules promulgated by Congress as part of the Crime Bill, and memos from Professors Margaret Berger and Steve Saltzburg concerning possible changes to Congress' version of the rules. The Reporter suggested that rather than endorse any particular language or draft, the Committee might instead address specific policy issues and transmit its views to the Evidence Committee and indicate a willingness to assist that Committee in any way it felt appropriate.

A. Rules Enabling Act Process.

Before addressing the specifics of the evidence rules, the Committee, at the suggestion of Professor Coquillette, noted its deep concern over the last minute addition of key evidence rules which will in effect drastically change the rules governing the admissibility of other offense, or extrinsic act, evidence -- a controversial and complicated topic in its own right. There was a general consensus that the Congress should be apprised of that concern and the need for initial input from the Judicial Conference before such rules are promulgated. The Committee was convinced that the Rules Enabling Act process is sound and that it insures that a broad cross-section of view points and suggestions will be heard on proposed amendments.

B. The Need for Rules Governing Propensity Evidence.

Several members of the Committee also expressed the view that Rule of Evidence 404(b) provides an adequate vehicle for introducing other offense evidence against a criminal defendant. Given the sensitive nature of this evidence, and the special dangers attending such information in a criminal trial, several members seriously questioned whether Rules 413-415 are worth the danger of convicting a defendant for his past, as opposed to charged, behavior. The Reporter noted that similar rules were before Congress in 1991 and at that time the Criminal Rules Committee voted by a margin of 8 to 1 to oppose such amendments. Judge Dowd moved that the Committee oppose the adoption of the rules. Judge Davis seconded the motion which carried by a vote of 8 to 1.

C. The Need for Three Separate Rules; Cross-Over Evidence.

Judge Marovich moved that the three other offense evidence rules adopted by Congress be combined into one rule which would be applicable in both civil and criminal cases. The motion was seconded by Judge Smith passed by a vote of 8 to 0 with one abstention. The Committee believed that so combining the rules would make it easier for practitioners and courts to locate and apply the applicable provision or rule. The Reporter suggested that because the rules deal with the admissibility of other offenses or extrinsic acts, it might be advisable to include the new provisions in Rule 404, which already deals with that topic, as exceptions to the general rule that extrinsic act evidence is not admissible to prove circumstantially that a person acted in conformity with those previous acts and thus committed the charged offense.

In addressing the question of whether the three rules should be combined, the Committee also noted some ambiguity on whether there could be any cross-over of other offense evidence from sexual assault cases to child molestation cases. That is, could the prosecution in a rape case offer evidence that on prior occasions the defendant had committed acts of child molestation or vice versa? The Committee expressed doubt whether there is justification for any cross-over offense propensity evidence and recommended that that particular issue should be addressed in any proposed alternatives to the Congressional versions of the rules.

E. Balancing Test.

Upon motion by Judge Marovich (seconded by Judge Crigler), the Committee voted 7 to 2 to recommend that no new balancing test be adopted for other offense evidence regarding sexual propensities. During the discussion, it was suggested that perhaps the evidence should be admissible only if the probative value of the evidence outweighed the prejudicial dangers. Although the Committee was concerned about the special dangers presented by the evidence, in the end it concluded that the balancing test in Rule 403 would suffice. In this regard, the Committee noted that any redraft should make it clear that the admissibility of any proffered evidence under the new rule must be subject to Rule 403 analysis by the court.

F. Burden of Proof.

The Committee next considered the question of whether any particular or different balancing test should be placed on the admissibility of a defendant's prior acts of sexual misconduct where there has been no

conviction. Following a discussion of the current rules applicable to admitting a defendant's prior acts under Rule 404(b), Judge Davis moved that the prosecution be required to prove by clear and convincing evidence in a Rule 104 proceeding that the alleged act occurred before the evidence could be submitted to the jury. The motion was seconded by Judge Dowd and passed by a vote of 6 to 3.

G. Notice Provision.

The Congressional version of Rules 413-415 include notice provisions which require the prosecution to inform the defense of its intent to introduce extrinsic act evidence. During the discussion, the Committee considered the issue of whether such notice should be dovetailed with Rule of Criminal Procedure 16 or adopt the more generalized notice provision in Rule 404(b). Judge Crow moved that the 404(b) notice provision be adopted as a recommended notice provision. The motion was seconded by Marovich and failed by a vote of 3 to 5, with one abstention. Judge Dowd then moved that the notice provisions remain as they appear in the Congressional version of the rules. That motion, which was seconded by Judge Davis, passed by a vote of 8 to 0, with one abstention.

H. Requirement that Sexual Act Resulted in a Conviction.

The suggestion was made during the Committee's discussion that to be admissible under the proposed rules, the defendant's prior sexual conduct must have resulted in a conviction. Several members noted that Rule 404(b) permits non-conviction evidence. Ms. Harkenrider moved that the proposed rules should not be limited to prior convictions. Judge Crow seconded the motion, which carried by a vote of 7 to 2.

I. Timing Requirement.

Finally, the Committee discussed the question of whether any particular provision should be made for remote sexual conduct, in a manner currently noted in Rule of Evidence 609 for remote convictions. The Committee believed that the balancing test in Rule 403 would adequately cover the court's consideration of prior sexual misconduct. Judge Marovich moved that no specific time limits be established and Judge Crow seconded the motion. It passed by a margin of 7 to 1, with one abstention.

IX.CONCLUDING REMARKS; DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Judge Jensen expressed the Committee's gratitude to the New Mexico Supreme Court for permitting the Committee to use its facilities. He also thanked John Rabiej and his staff for their excellent support for the meeting.

It was determined that the Committee's next meeting will be held in Washington, D.C. on April 10th and 11th.

Respectfully submitted,

David A. Schlueter

Professor of Law

Reporter