MINUTES

of

THE ADVISORY COMMITTEE

on

FEDERAL RULES OF CRIMINAL PROCEDURE

October 7-8, 1996

Gleneden, Oregon

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Gleneden, Oregon on October 7th and 8th, 1996. 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 Monday, October 7, 1996. 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. Edward E. Carnes

Hon. Sam A. Crow

Hon. George M. Marovich

Hon. David D. Dowd, Jr.

Hon. D. Brooks Smith

Hon. B. Waugh Crigler

Prof. Kate Stith

Mr. Darryl W. Jackson, Esq.

Mr. Robert C. Josefsberg, Esq.

Mr. Henry A. Martin, Esq.

Mr. Roger Pauley, Jr., designate of the Asst. Attorney General for the Criminal Division

Professor David A. Schlueter, Reporter

Also present at the meeting were: Hon William R. Wilson, Jr., a member of the Standing Committee on Rules of Practice and Procedure and a liaison to the Committee; Professor Daniel R. Coquillette, Reporter to the Standing Committee; Mr. Peter McCabe and

Mr. John Rabiej from the Administrative Office of the United States Courts; Mr. Jim Eaglin from the Federal Judicial Center, and Ms. Mary Harkenrider from the Department of Justice.

The attendees were welcomed by the chair, Judge Jensen, who recognized a new member to the Committee, Judge Edward E. Carnes. Judge Jensen recognized the contributions of Judge Crow, whose term on the Committee had expired.

II. APPROVAL OF MINUTES OF APRIL 1996 MEETING

Following minor changes to the minutes of the October 1995 meeting, Judge Marovich moved that they be approved. Following a second by Judge Davis, the motion carried by a unanimous vote.

III. RULES PUBLISHED FOR PUBLIC COMMENT AND PENDING FURTHER ACTION BY THE COMMITTEE

The Reporter informed the Committee that the Standing Committee, at its June 1996 meeting in Washington, D.C., had approved a number of proposed amendments for publication and public comment: Rule 5.1 (Preliminary Examination; Production of Witness Statements); Rule 26.2 (Production of Witness Statements; Applicability to Rule 5.1 Proceedings); Rule 31 (Verdict; Individual Polling of Jurors); Rule 33 (New Trial; Time for Filing Motion); Rule 35(b) (Correction or Reduction of Sentence; Changed Circumstances); and Rule 43 (Presence of Defendant; Presence at Reduction or Correction of Sentence). Written comments on the proposed amendments are due not later than February 15, 1997. A hearing has been scheduled in Oakland, California for witnesses who wish to present oral testimony on the proposed amendments.

IV. RULES APPROVED BY STANDING COMMITTEE AND FORWARDED TO JUDICIAL CONFERENCE

Judge Jensen reported that the Standing Committee had approved and forwarded the Committee's

proposed amendment to Rule 16 to the Judicial Conference. The amendment to Rule 16(a)(1)(E) and 16(b)(1)(C), which addresses reciprocal disclosure of information on expert witnesses, had originally been included in a package of proposed amendments to Rule 16 submitted to the Judicial Conference in March 1995. The Conference had generally rejected the amendments although the opposition had focused specifically on those amendments in Rule 16(a)(1)(F), addressing the pretrial disclosure of witness names. At its meeting in April 1996, the Advisory Committee considered the amendment anew and resubmitted the matter to the Standing Committee. That Committee made several minor changes to the language of the amendment and forwarded it, without further publication, to the Judicial Conference.

V. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Rule 11. Pleas.

The Reporter indicated that several interrelated matters affecting guilty pleas and the sentencing guidelines were on the agenda for the meeting. Several judicial decisions and correspondence had generated interest in amending Rule 11.

1. Rule 11(e); Report of Subcommittee; Impact of Sentencing Guidelines on Plea Bargaining; Ability of Defendant to Withdraw Plea

In a continuation of discussions begun at the April 1996 meeting, a Subcommittee consisting of Judge Marovich (chair), Professor Stith, Mr. Martin, and Mr. Pauley, presented an oral report on possible amendments to Rule 11. Judge Marovich reported that the subcommittee had considered the possible impact of *United States v. Harris*, 70 F.3d 1001 (8th Cir. 1995), which read Rule 11(e)(4) to also apply to (e)(1)(B) plea agreements regarding sentencing facts or calculations. The subcommittee had concluded that *Harris* was not consistent with the language or history of Rule 11 and recommended that some amendments be made to Rule 11(e) which would clearly include references to guideline sentencing factors vis a vis plea bargains.

Judge Marovich indicated that the subcommittee had focused initially on the question of the amount of notice and information each side should have regarding applicable sentencing guidelines; the subcommittee believed that the process would work more smoothly and efficiently, if the government and the defendant had a clearer idea--going into the plea bargaining process--of the possible reaction of the court to a proposed plea agreement. Lawyers, he noted, should be able to accurately assess the probability that a plea agreement will be accepted by the court.

Judge Jensen added that Judge Conaboy, the Chair of the Sentencing Commission, had expressed interest in the Committee's action on any proposals to amend Rule 11. He had informed Judge Jensen that the Commission would welcome any input on the impact or role of sentencing guidelines in the plea bargaining process.

Mr. Pauley expressed concern about the slow process of amending Rule 11, should the Committee decide

to consider global changes to the rule. He believed that the amendment addressing the *Harris* case should be moved forward now. Ms. Harkenrider added that the subcommittee's proposed amendment would make it clear that the parties might be able to agree on sentencing factors or guidelines, and not just on an agreed-to sentence. Mr. Pauley added that the proposed language would not directly affect the right of a defendant to appeal.

Professor Stith distributed a chart she had prepared from data provided by the Sentencing Commission which demonstrated the reduction of cases going to trial. Judge Jensen noted in particular that the national average of cases being disposed of in a plea process was 92 %. He reiterated that the genesis of the discussion on the binding nature of (e)(1)(B) agreements was the *Harris* decision and that the decision in *United States v. Hyde*, 82 F.3d 319 (9th Cir. 1996) had raised the question of the impact of deferring acceptance of a guilty plea until after preparation of the Presentencing Report.

Judge Marovich observed that the Circuits may have different practices relating to when a plea is accepted and he repeated the concern that the parties may not fully know what they are facing when the plea is entered. Ms. Harkenrider noted that although the Solicitor General's office had not yet decided whether to appeal the *Hyde* decision it appeared that an appeal would be filed. Ms. Harkenrider also expressed the view that in light of such an appeal, the Committee should defer any action which would amend Rule 11 in response to the *Hyde* decision..

Professor Stith raised the question of whether it might be appropriate to amend Rule 11 to clarify when the plea could, or must, be accepted. Judge Crigler responded that any amendment to Rule 11 be as clear and straightforward as possible. Following discussion on how the sentencing guidelines had affected the plea bargaining process, Judge Dowd observed that the process is now more complicated and that Rule 11, as written, does not adequately accommodate the realities of plea bargaining and guilty pleas.

In discussing the possible process of amending Rule 11 at this point to address the *Harris* problem, Judge Jensen commented that the proposed changes should be forwarded to the Sentencing Commission. A consensus emerged that some amendment was appropriate and the discussion turned to specific language used in the proposed language submitted by the Standing Committee, which in turn had been suggested by the Department of Justice. Judge Marovich stated that the amendments were a step in the right direction.

Ultimately, Judge Davis moved to adopt the subcommittee's proposed amendments to Rule 11(e)(1)(B), (C), and (e)(4). Judge Marovich seconded the motion. Judge Carnes expressed concern about amending a criminal procedure rule specifically to address a court decision from one circuit. Several members added that it should be clear that the proposed amendment does not address the *Hyde* problem of when a plea could be accepted. The Committee approved the amendment unanimously. The reporter indicated that he would draft the appropriate language and committee note for the April 1997 meeting.

2. Rule 11(c); Advice to Defendant Regarding Waiver of Right to Appeal

The Reported stated that the Committee on Criminal Law had proposed an amendment to Rule 11(c)(6) which would require the court to discuss with the defendant any terms or provisions in a plea agreement which would waive the right to appeal or collateral attack the sentence. Ms. Harkenrider moved that the

proposed amendment be approved. Judge Davis seconded the motion.

The Committee discussion focused on whether the amendment would affect the defendant's constitutional rights and what is actually waived. Professor Stith expressed concern about the breadth of such waivers and Judge Carnes commented that he had always understood that the rules of procedure and any waivers are subject to the Constitution. Mr. Martin added that there might be other waiver provisions in a plea agreement, for example, provisions dealing with immigration or asset forfeiture. Ultimately, Professor Stith moved that the proposed language be amended to reflect that (c)(6) applied to terms or provisions in a plea agreement and delete the language requiring the court to discuss with the defendant the "consequences" of any waiver provision. The motion to amend was seconded by Judge Carnes and carried by a vote of 10 to 1. The Committee, by a vote of 8 to 3, approved the proposed amendment to Rule 11(c).

3. Rule 11(e)(4). Rejection of Plea Agreement.

Judge Davis suggested that the Committee consider an amendment to Rule 11(e)(4), in addition to the approved amendments to (e)(1)(B) and (C), supra, which would clearly address the issue in *United States v. Harris*. Following brief discussion, the Reporter was asked to draft proposed language for the April meeting which would address that decision and also draft an alternate version which would address both *Harris* and *United States v. Hyde*.

4. Rule 11. Summary of Pending Amendments and Action

Judge Jensen provided a summary of the Committee's actions regarding Rule 11: It had approved amendments to Rule 11(e)(1)(B) and (C), Rule 11(c)(6)(new provision). The Reporter was asked to finalize a draft of the amendments so that the Sentencing Commission would have an opportunity to review it. Second, the Committee had requested the Reporter to draft alternative versions of possible amendments to Rule 11(e)(4) which would deal with the issues raised by the *Harris* and *Hyde* decisions. Finally, Judge Jensen asked the Rule 11 Subcommittee to continue its work with a view toward additional amendments to that Rule.

B. Rule 24(c). Alternate Jurors

The Reporter indicated that the Committee had received a letter from Judge Selya of the Court of Appeals for the First Circuit in which the judge suggested that it would be appropriate to consider an amendment to Rule 24(c). Although that rule currently provides that alternate jurors (who are designated as replacements) are to be discharged after the jury retires to deliberate. In *United States v. Houlihan*, not yet reported, the First Circuit concluded that the trial judge committed harmless error in not discharging the alternate jurors.

Mr. Josefsberg believed that an amendment to Rule 24(c) was in order and Mr. Pauley observed that there was a certain tension between the provisions in Rule 24(c) and 23(b), citing statistics which indicate that it is less desirable to make substitutions in jurors. Following additional brief discussion, Judge Marovich moved that Rule 24(c) be amended to eliminate the mandatory language in that rule. Judge Dowd seconded the motion which carried by a vote of 8 to 2, with one abstention. The Reporter indicated that he would draft language for the Committee's consideration at its next meeting.

C. Rule 25(b). Judge Disability

Judge Jensen informed the Committee that Judge Kazen had proposed that the Committee consider a clarifying amendment to Rule 25(b) concerning the ability of using different judges to hear guilty pleas and handle pretrial motions. Mr. Jackson expressed the concern that judges not be viewed as fungible in the eyes of the community. Mr. Josefsberg gave several examples of state practice where judge may be rotated before completing a case. Several members of the Committee expressed the view that Rule 25(b) is not violated by substituting a judge to complete a case when another judge has found the defendant guilty following a guilty plea. Judge Jensen noted that a consensus had seemed to emerge that no change was needed at the present time; but he asked the Reporter to review the history of Rule 24(b) and make sure that it is clear the rule does not cover guilty pleas procedures.

D. Rule 26. Taking of Testimony

The Reporter informed the Committee that Judge Stotler, Chair of the Standing Committee, had requested the Criminal Rules Committee to consider an amendment to Criminal Rule 26 which conform that rule to amendments to Civil Rule 43, which take effect on December 1, 1996. Those amendments delete the requirement that the testimony be taken orally in open court. The change is apparently designed to permit testimony to be given in court by other means if the witness is not able to communicate orally, e.g., using sign language. Additionally, Rule 43 is being amended to permit presentation of testimony by transmission from another location in compelling circumstances.

Mr. Rabiej provided some additional background information on the civil rule amendment and Mr. McCabe indicated that the Ninth Circuit's pilot program of electronic transmission of proceedings was on hold--criminal defendants are apparently not consenting to those procedures. Following additional brief discussion, Mr. Josefsberg moved that Rule 26 be amended by deleting the word "orally" and that the rule be restyled to conform to the civil rule. That motion was seconded by Ms. Harkenrider. It carried unanimously.

E. Rule 32.2. Forfeiture Procedures

Mr. Pauley introduced the Justice Department's proposed new rule 32.2 which would accomplish two key points: It would consolidate several existing rules into one rule, i.e., Rule 32 and 31. Second, the new rule would eliminate the role of the jury in criminal forfeiture proceedings. He indicated that in framing the rule, the Department had polled United States Attorneys and members of the Asset Forfeiture Division. Mr. Pauley provided a detailed background of current forfeiture provisions and indicated that within the Department there is some disagreement on whether the proposed rule will help or hinder the Government's interests.

In the ensuing discussion, Professor Coquillette questioned whether the provisions for forfeiting property belonging to a third party, without a jury trial, might violate the Constitution. Other members questioned whether the rule would be consistent with existing statutory provisions governing forfeiture. Several other members suggested possible changes to the draft of the rule which first, make it clear that the court must find a nexus between the property and the defendant, second, address the issue of the right to appeal a ruling adverse to the Government. Mr. Pauley indicated that the Department would continue to work on the draft of the rule and welcomed suggested changes to address the issues raised by the Committee.

F. Rule 40(a). Appearance Before Federal Magistrate Judge

The Reporter provided a brief overview of proposed changes and discussion regarding Rule 40(a). He noted that in October 1994, the Committee had considered a proposed amendment from Magistrate Judge Robert Collings (Boston) to amend Rule 40(a) to provide that a defendant arrested in a district other than where the offense occurred could be taken to that latter district if the magistrate was located within 100 miles of the place of arrest. The Committee deferred any further action pending input from the Department of Justice. In recent correspondence between Magistrate Judge Crigler and the Department, the issue had been revived. Following discussion of the matter, the Committee reached a consensus that no action was required; as written, the rule does not explicitly require that an arrested defendant be taken to a magistrate in the district of arrest. It only requires that the defendant be taken before the nearest available magistrate.

VI. RULES PENDING BEFORE OTHER COMMITTEES HAVING IMPACT ON RULES OF CRIMINAL PROCEDURE

1. Bankruptcy Committee Proposal to Provide for Electronic Service of Motions.

The Reporter informed Committee that the Bankruptcy Rules Committee was considering an amendment to Rules 9013 and 9014 which would permit electronic filing of motions on the other party, under technical standards established by the Judicial Conference. He added that the parallel criminal rule, Rule 49, specifically cross-references the Civil Rules, and that in the past that committee had taken the lead in considering any changes in the method of service. Judge Jensen indicated that he was not interested in changing that approach. Judge Dowd observed that the bankruptcy bar might be more attuned to using

electronic filing methods than members of the criminal justice bar. No action was taken on the matter.

2. Rules of Evidence Committee Proposal to Amend Fed. R. Evid. 103

Re Preservation of Error

The Reporter and Mr. Rabiej indicated that the Evidence Rules Committee had considered an amendment to Federal Rule of Evidence 103 which would clearly indicate whether counsel must renew an evidentiary objection at trial to preserve the issue for appeal. The Evidence Committee had been unable to reach a clear consensus on the issue and had requested the Civil and Criminal Rules Committees to review the issue and provide any additional input. Following a discussion of the issue, to the effect that the members did not perceive any need to amend the current rule, a consensus emerged to inform the Evidence Committee that the issue should be left to caselaw development.

VII. ORAL REPORTS; MISCELLANEOUS

A. Status Report on Legislation Affecting the Federal Rules of Criminal

Procedure

Mr. Rabiej informed the Committee that there was some momentum building in Congress for a Victims Rights Amendment to the Constitution and presented copies of Joint Resolution 52 to the Committee along with a letter from the Criminal Law Committee which generally opposed the resolution. Judge Jensen raised the question of whether, and to what, extent, the Committee might make its views known, Judge Wilson recommended that the chair send a letter stating the Committee's reservations about the resolution. Judge Carnes responded that in his view, this matter was outside the purview of the federal courts. Professor Stith believed that there was good arguments for being a part of the debate on the resolution in pointing out potential problems with any amendment.

Professor Coquillette stated that the Committee had a role under the Rules Enabling Act and that the Criminal Law Committee was perhaps the best body for expressing any views on the appropriateness of the amendment. Judges Wilson and Smith expressed the view that the Committee could provide invaluable expertise on the practical implications of any amendment affecting criminal procedure. Judge Davis indicated that any input from the Committee should focus on the criminal rules and the rule-making process and Judge Dowd observed that the judiciary should speak with one voice on this matter. Mr. Rabiej added that the Committee could legitimately comment on any legislation potentially affecting the rules of criminal procedure--given its mandate to perform a continuous study and evaluation of criminal procedure matters.

Following additional discussion concerning the process of preparing the Committee's views, Judge Jensen indicated that he would draft a letter to the Standing Committee.

B. Oral Report on Restyling of Appellate Rules of Procedure.

Mr. Rabiej reported that the publication and comment period on the re-styled Appellate Rules was proceeding and that the Committee had received some favorable comments on the new format for the rules.

C. Oral Report on Legislatively Proposed Language to Rules

The Committee was informed by Mr. Rabiej that a part of the Child Pornography Bill would have amended Rule 32 to require judges to apprise defendants of the possible consequences of sentencing for certain offenses. He indicated that the Administrative Office had been successful in deterring that amendment.

D. Oral Report on Change in Effective Date of Amendments to Federal

Rules of Evidence 413-415.

Finally, Mr. Rabiej informed the Committee that the Justice Department had succeeded in asking Congress to amend the effective date of Rules 413-415. Those rules, in effect, now apply to conduct committed before the effective date of those rules.

VIII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee decided to hold its next meeting in Washington, D.C., at the Thurgood Marshall Federal Judiciary Building, on April 7th and 8th, 1997.

Respectfully submitted

David A. Schlueter

Professor of Law

Reporter