MINUTES

of

THE ADVISORY COMMITTEE

on

FEDERAL RULES OF CRIMINAL PROCEDURE

April 29, 1996

Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. on April 29, 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 8:40 a.m. on Monday, April 29, 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. Sam A. Crow

Hon. George M. Marovich

Hon. David D. Dowd, Jr.

Hon. D. Brooks Smith

Hon. B. Waugh Crigler

Hon. Daniel E. Wathen

Prof. Kate Stith

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. Alicemarie H. Stotler; Chair of the Standing Committee on Rules of Practice and Procedure; 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, Mr. John Rabiej, and Mr. Paul Zing from the Administrative Office of the United States Courts; Mr. Webb Hitt from the Federal Judicial Center, Ms. Mary Harkenrider from the Department of Justice, and Mr. Joseph Spaniol, consultant to the Standing Committee.

The attendees were welcomed by the chair, Judge Jensen, who recognized a new member to the Committee, Professor Kate Stith from Yale Law School. Later in the meeting, Judge Jensen recognized the contributions of Professor Saltzburg, who made a brief appearance, and whose term on the Committee had expired.

II. APPROVAL OF MINUTES OF OCTOBER 1995 MEETING

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

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

The Reporter informed the Committee that by operation of the Rules Enabling Act, amendments to four rules had become effective on December 1, 1995: 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).

IV. RULE 24(a): APPROVED BY STANDING COMMITTEE FOR PUBLICATION AND COMMENT

The Reporter informed the Committee that the period for comment on proposed amendments to Rule 24(a) had been completed and presented a brief overview of the comments supporting and opposing the

proposal. He also noted that a number of witnesses had provided testimony at two scheduled hearings.

Judge Jensen informed the Committee that the Civil Rules Advisory Committee had decided not to forward a similar amendment in Civil Rule 47 to the Standing Committee. Instead, it hoped to encourage continued discussion and education about the issue of attorney conducted voir dire.

Judge Marovich expressed regret and doubt about the prospects for the proposed amendment and the process used to obtained comments on the amendment. He believed that those judges who believe that attorney conducted voir dire takes too much time should examine their procedures. And, he added, speed is not everything in conducting a criminal trial.

Judge Jensen responded by noting that the Committee's agenda is public and that anyone interested in commenting on a proposal may do so. He also noted that a short article was being prepared for the publication, Third Branch, which would address the issue of attorney conducted voir dire. Judge Davis questioned whether the proposed amendment had any real chance of succeeding and Mr. Josefsberg stated that he had no strong desire to push forward with an issue that seemed doomed. But, he added, he was also hesitant to completely abandon the proposal. Judge Jensen noted that he too believed that some attempt should be made to monitor attorney participation in voir dire in death penalty cases.

Judge Wilson stated that he believed the proposed amendment should be carried forward to the Standing Committee for its consideration. Judge Marovich added that he was willing to accept the rejection of the proposal on the merits. In response, Judge Jensen observed that the rules enabling act process had worked. In this instance the bench and bar had been sensitized to the debate regarding attorney conducted voir dire. Professor Stith opposed the proposal on the merits and asked whether the Department of Justice had stated a position on the proposal. In response, Ms. Harkenrider indicated that initially, the Department had voted against the proposal because it believed that the judge should maintain control of the courtroom. The Department, however, had voted in favor of seeking public comment and that it was not opposed to a pilot program. Its current position was to oppose the proposed amendment. In particular, she noted that the Department had concerns about pro se defendants questioning the jurors.

Judge Smith expressed reluctance to forward the amendment to the Standing Committee. While he had been initially opposed to the idea of more attorney participation in voir dire, he now believed that the amendment would marginally improve the process and give the appearance of fairness. He did not believe that judges would lose control of the courtroom by permitting attorney conducted voir dire. He agreed with other members who had expressed the view that the process of obtaining comments had been constructive.

Justice Wathen indicated that Maine follows the present federal practice and that intellectually he could not support a proposed amendment which would increase attorney participation. In his view the proposal would result in a significant interference with the jurors. Judge Crow indicated that he too would oppose forwarding the amendment. He had polled the judges in the Tenth Circuit and only one judge favored the proposed change. He added, that in his view, the current voir dire procedures were not "broken."

Judge Dowd noted that he had supported the version of the amendment forwarded to the Standing

Committee because that version had included a timely request provision. Now that that provision had been deleted--as a result of conforming both the civil and criminal rule versions--he could no longer support the amendment.

Mr. Martin moved that the proposed amendment to Rule 24(a) be approved by the Committee and forwarded to the Standing Committee. Judge Marovich seconded the motion, which failed by a vote of 3 to 8.

Judge Stotler informed the Committee that an upcoming issue of the Third Branch would contain a short article on the proposed amendments to both the civil and criminal rules. She noted that the publication of the proposals had raised the level of consciousness of the bench and bar and that the issue of attorney-conducted voir dire should be subject to continued study and education.

V. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Proposed Amendments to Rules; Report of Subcommittee on Local Rules Project.

Judge Davis provided an oral and written report of his subcommittee on the local rules project. That subcommittee, consisting of Judge Davis (chair), Judge Crow, Judge Crigler, and Mr. Pauley, had addressed the question of whether certain local rules, identified by the Local Rules Project, might be worthy of including in the national rules. The subcommittee examined local rules which addressed the following four rules:

Rule 4: In some districts, a local rule requires the arresting officer to notify other members of the court family of the arrest. The subcommittee recommended against adoption of that practice in the national rule.

Rule 16: The subcommittee noted that in some districts, the parties are required to confer on discovery matters before filing a motion. The subcommittee also recommended against adoption of that practice in the national rule.

Rule 30: In fifteen districts, the parties are required to submit proposed jury instructions sometime before trial. The subcommittee also recommended that that practice not be included in the national rule.

Rule 47. The subcommittee noted that it had been recommended that Rule 47 be amended to require the parties to confer or attempt to confer before any motion is filed. That recommendation was also rejected by the subcommittee.

The subcommittee noted in its report that the proposed amendments to the foregoing four rules address "details of practice and procedure about which courts have differing customs and traditions and that are properly the subject of local rules." The report also noted that the members of the subcommittee did not believe that any significant problems existed in any of the foregoing areas.

The proposed amendment to Rule 12, generated some discussion: Two districts require the defense to give notice of an intent to raise the entrapment defense. Although a majority of the subcommittee had opposed adoption of that practice in the national rule, they believed that the matter should be raised for evaluation by the Committee.

Mr. Pauley indicated that the Department of Justice did not necessarily believe that the proposed notice requirement had merit but thought that the issue should be raised. He recounted a case where there were multiple defendants and after the jury was selected one defendant wanted to raise the defense, which resulted in a severance.

Judge Crow noted that adoption of such an amendment might lead to additional notifications of defenses that may not actually be raised at trial. Judge Crigler added that he did not perceive that any problem existed in this area.

Judge Dowd commented that it would difficult to distinguish between required notice of an entrapment defense and other defenses. He moved that the subcommittee's report be accepted. Judge Smith seconded the motion, which carried by a unanimous vote.

Professor Coquillette thanked the Committee and the subcommittee for assisting in carrying out the congressional mandate that the local rules be studied. In his view, the local rules governing criminal cases had not presented any serious conflicts with the national rules.

B. Rules 5.1 and 26.2, Production of Witness Statements at Preliminary Examinations

The Reporter indicated that in response to the Committee's action at its Fall 1995 meeting, he had drafted proposed amendments to Rules 5.1 and 26.2, which would require the production of a witness' statement at a preliminary examination. Following brief discussion and several changes to the language of the amendments, Judge Crigler moved that the proposed amendments to those two rules be forwarded to the Standing Committee for publication and comment. Judge Davis seconded the motion, which carried by a unanimous vote.

C. Rule 6(e)(3)(C)(iv). Disclosure of Grand Jury Information to State Officials

Judge Jensen provided a brief background on the implementation of Rule 6(e)(3)(C)(4), which permits disclosure of grand jury information to state officials. Although the rule does not explicitly require such, any requests to disclose the information must first be approved by the Assistant Attorney General, Criminal Division. That practice resulted from an assurance in 1984 by the Department of Justice to the Committee when amendments to Rule 6 were being considered. He noted that the Department had informed the Committee that it favored placing the decision to disclose in the hands of the local United States attorneys.

Mr. Pauley stated that the Department has dutifully followed the stated practice and that it believed it appropriate to inform the Committee of an intent to consider changing the practice. Professor Stith asked for information on how many requests are actually processed through this method. Mr. Pauley responded that approximately 20 or thirty requests were forwarded to the Department and could not think of a single case where it really made a difference that the request was handled at the Department level.

Judge Crigler raised the issue of judicial review of such requests, as currently required by the rule; several members noted that the requirement of review at the national level may be restrictive and that they generally count on the presentations of the attorney for the government.

Ms. Harkenrider indicated that the issue had arisen in the process of reviewing the United States Attorney's Manual and that currently, the Department was interested in de-centralizing various decisions, which can be made just as effectively at the local level.

Mr. Josefsberg observed that in most cases there should be no problem with the local United States attorney seeking permission to disclose the information. But, he added, there may be politically sensitive cases where it would better to place the authority at the national level. After brief discussion about the options available to the Committee in addressing the issue, the consensus developed that the Department should be informed of the Committee's view that the current practice should be reaffirmed. No further action was taken on the matter, with the understanding that the Department would convey its response to the Committee at a future meeting.

D. Rule 11(e). Provision Barring Court from Participation in Plea Agreement Discussions

Judge Marovich presented a written and oral report on his subcommittee's consideration of the issue of whether a judge might be permitted to participate in any fashion in plea bargaining. The issue had been discussed at the Committee's Fall 1995 meeting in response to the practice used in the Southern District of California to expedite plea agreements. Under that procedure, a judge, other than a sentencing judge, works with the parties to reach a plea agreement and recommends a particular sentence, a procedure

which might be in violation of Rule 11(e) which indicates that the "court" may not participate in plea discussions. The subcommittee, consisting of Judge Marovich (chair), Mr. Martin, and Mr. Pauley recommended that no action be taken to amend the rules. It had learned that it solicited the views of both government and defense attorneys and that the prevailing view was that no change should be made to Rule 11. The subcommittee also learned that the Southern District of California had discontinued the practice which originally gave rise to the Committee's consideration of the issue.

In the ensuing discussion, the Committee focused on the question of whether some change should be made to the rules to provide for some mechanism for determining the appropriate Sentencing Guidelines before trial. Several members expressed support for such a study; Judge Dowd noted that in Alabama, for example, a guilty plea and plea bargain are presented in conjunction with a presentencing report. Judge Stotler raised the question of whether the rules could be amended to provide for what might informally be called a "criminal motion for summary judgment" which would permit the court to resolve controlling issues of law at the pretrial stage.

Judge Jensen asked the subcommittee to continue its study of the issue and added Professor Stith as a member.

Judge Dowd moved that the subcommittee's report be accepted and Judge Davis seconded the motion, which carried by a unanimous vote.

The Committee also addressed the operation of Rule 11 on the two types of plea agreements reflected in Rule 11(e)(A)(B) and (C). Following brief discussion on the problem of predicting what effect the Sentencing Guidelines might have on a particular agreement, the Reporter was instructed to study Rule 11 and how it actually operates in conjunction with those Guidelines.

E. Rule 16(a)(1)(E), (b)(1)(C). Disclosure of Expert Witnesses

Judge Jensen indicated that when the Judicial Conference had considered the Committee's proposed amendments to Rule 16 at its Fall meeting, it had apparently rejected all of the proposed amendments, including the rather noncontroversial amendment requiring disclosure of expert witness' expected testimony. At its January 1996, meeting the Standing Committee had asked the Advisory Committee to consider whether it wished to resubmit those particular amendments to Rule 16. Judge Jensen asked whether the Department of Justice, which originally proposed the amendment, cared to seek further action.

Mr. Pauley noted that the proposed amendments were minor and had passed through the proposal and comment period without opposition; but he expressed reluctance to trigger further discussion of the rejected amendments which would have required the government to disclose the names and statements of its witnesses before trial.

Judge Jensen noted that the proposed amendment might raise a conflict with the Jencks Act which seemed to concern some members of the Standing Committee. Professor Stith noted that the Jencks problem already exists in other provisions of Rule 16.

Following consultation between the representatives of the Department of Justice, Mr. Pauley moved that the Committee approve and resubmit the amendments to Rule 16(a)(1)(E) and (b)(1)(C) to the Standing Committee for transmittal to the Judicial Conference, without additional public comment. Judge Dowd seconded the motion, which carried by a vote of 10 to 1.

F. Rule 31(d). Polling of Jurors

The Reporter indicated that as a result of the Committee's action at its Fall 1995 meeting, he had drafted a proposed amendment to Rule 31(d) which would require individual polling of jurors when a polling was requested by a party, or directed by the court on its own motion.

Judge Dowd indicated that although he had no problem with the rule as drafted, he questioned whether the specifics of carrying out the individual polling might be addressed. Mr. Josefsberg observed that the proposed change would be good for both the defense and the prosecution. Following some minor drafting changes, Judge Marovich moved that the amendment be approved and forwarded to the Standing Committee for publication and comment. Judge Smith seconded the motion, which carried by a unanimous vote.

G. Rule 31(e). Forfeiture Proceedings

Mr. Pauley explained a proposal submitted by the Department of Justice which would address the procedures for criminal forfeiture. In the Department's view, there are a number of inadequacies in Rule 31 for determining whether, and to what extent, the defendant had an interest in the property; the Circuits seem split on what the role of the jury should be in making those decisions. The proposed amendment would attempt to resolve the question of the jury's role and defer determination of the extent of the defendant's interest to an ancillary proceeding. Finally, he noted that in *Libretti v. United States*, ---- U.S. ---- (Nov. 7, 1995), the Court held that criminal forfeiture constitutes a part of sentencing in a criminal trial.

Following some additional discussion on whether the jury should have any role in making forfeiture decisions, Judge Jensen, with the concurrence of Mr. Pauley, indicated that the proposal to amend Rule 31(e) would be deferred to the Committee's Fall 1996 meeting to consider whether the amendment should be made to Rule 31 or Rule 32 or some other rule.

H. Rule 33. Motion for New Trial

The Reporter submitted a draft amendment to Rule 33 in accordance with the Committee's action at its Fall 1995 meeting. The proposed amendment would change the triggering event for a motion for new trial on grounds of newly discovered evidence from "final judgment" to an event at the trial level, i.e., the verdict or finding of guilty.

Mr. Pauley indicated that although the amendment would have the practical effect of shortening the period of time for filing a motion for new trial, it would promote consistency. He added that the Department might be willing to consider extending the period of time from two years, as it now reads, to three years, to come closer the approximate time now spent on a typical appeal.

Justice Wathen noted that it seemed odd to require the defendant to file a motion for new trial before the "final judgment," before he or she would know what the final disposition was. Professor Stith questioned why the time could not run from sentencing, to which Mr. Pauley responded that depending on the circumstances, the time expended for sentencing could run considerably longer in some cases. Following brief discussion on whether the time should be extended to three years, Judge Dowd moved that the proposal be changed to reflect three years. That motion was seconded by Mr. Martin. The motion failed by a vote of 5 to 6. Judge Davis moved that the proposed amendment, as drafted, be forwarded to the Standing Committee for publication and comment. Following a second by Judge Crigler, the motion carried by a vote of 9 to 2.

I. Rule 35(b). Reduction of Sentence for Substantial Assistance

The Reporter submitted two drafts of an amendment to Rule 35(b) to reflect the Committee's discussion of the issue at its Fall 1995 meeting. Both versions addressed the issue of whether the term "substantial assistance" should include a situation where the aggregate of both pre-trial and post-trial assistance was substantial. The first version included language adopted at that meeting plus bracketed language which would address the issue of possible double dipping by a defendant: "In evaluating whether substantial assistance has been rendered, the court may consider the defendant's presentence assistance, [unless the sentencing court considered such presentence assistance in imposing the original sentence.]." The second version of the amendment, provided by Mr. Pauley, provided a more detailed version of essentially the same approach.

Several members of the Committee expressed concern about whether the amendment needed to address specifically the potential problem of double dipping, noting that if the government believes that the defendant has already benefitted from non-substantial assistance during sentencing, it need not file a Rule 35(b) motion.

Judge Dowd moved that the proposed amendment in version one (without the bracketed information) be approved and forwarded to the Standing Committee for publication and comment. Following a second by Mr. Martin, the motion carried by a vote of 9 to 1.

J. Rule 43(c)(4). Presence of the Defendant.

The Reporter informed the Committee that the Justice Department had requested the Committee to consider amendments to Rule 43(c)(4) to clarify whether a defendant must be present at a proceeding to reduce a sentence under Rule 35 or to change a sentence under 18 U.S.C. § 3582(c). He indicated that in the process of amending Rule 43(b), some changes had been made as well to Rule 43(c) cross-referencing Rule 35 which apparently inadvertently changed the existing practice. Mr. Pauley provided additional background information, as reflected in the Department's memo to the Committee, to explain that the various positions taken by the courts on the issue of whether the defendant must be present at a proceeding to correct, reduce, or otherwise change the sentence.

Following brief discussion by several members of the Committee about the practical problems of having the defendant appear for a proceeding, and then returned to prison for release, Judge Crigler moved that Rule 43 be amended and forwarded to the Standing Committee for publication and comment. Following a second by Judge Davis, the motion carried by a unanimous vote.

VI.RULES OF APPELLATE PROCEDURE HAVING IMPACT ON CRIMINAL PRACTICE

A. Federal Rule of Appellate Procedure 4. Time for Filing Appeal in Criminal Case

The Reporter informed the Committee that Judge Stotler had inquired whether the Committee desired to support any changes to Federal Rule of Appellate Procedure 4 as a result of *United States v. Marbley*, ---- F.3d ---- (7th Cir. 1996). In a letter to the Committee, Judge Posner noted that in *Marbley* the defense failed to show excusable neglect for failure to file a timely appeal and that as a result, the defendant would probably argue ineffective assistance of counsel in seeking relief under 28 U.S.C. § 2255. That, he suggests, will only result in more delay when the appellate court might have otherwise waived the untimely filing.

Following brief discussion, the Committee decided to defer to the Appellate Rules Committee on the issue.

B. Federal Rule of Appellate Procedure 9. Release of Defendant in Criminal Case

The Reporter also informed the Committee that Judge Stotler had raised the question of whether the

Rules of Criminal Procedure should be amended to reflect the requirements in Appellate Rule 9(a), which requires the court to state reasons for releasing or detaining a criminal defendant. After a brief discussion of the issue, no action was taken. The Committee was generally of the view that Rule 46 currently cross-references 18 U.S.C. §§ 3142, 3143, and 3144, which govern detention and already include very specific requirements for the judicial officer to state reasons and/or findings for detention and conditions for release.

VII. ORAL REPORTS; MISCELLANEOUS

A. Report on Legislation Affecting Rules of Criminal Procedure

Mr. Rabiej informed the Committee that Senator Thurmond had introduced a bill to amend Criminal Rule 31 which would provide for a 5/6 vote on a verdict. Following brief discussion, Judge Jensen indicated that it appeared that the Committee was of the view that Congress should be informed that the proposal should be processed through the Rules Enabling Act procedures which would provide for public comment and input from the appropriate committees in the Judicial Conference.

B. Report on Restyling the Rules of Criminal Procedure

Judge Jensen reported that the effort to restyle the Rules of Criminal Procedure was on hold pending consideration of the restyled Appellate Rules which had been published for comment. The deadline for comments on those rules is December 31, 1996.

C. Report on Activities of Evidence Advisory Committee

Judge Dowd, who serves as the Committee's liaison to the Evidence Rules Committee, reported on proposed amendments to the Rules of Evidence which might have an impact on criminal trials. No action was taken on the proposed changes.

D. Impact of Anti-Terrorism Legislation on Criminal Rules

Judge Jensen indicated that the Committee should be prepared at the Fall 1996 meeting to discuss

possible rules amendments resulting from recent legislation, especially in the area of habeas corpus review.

VIII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee was reminded that its next meeting would be held at Portland Oregon on October 7-8, 1996.

Respectfully submitted,

David A. Schlueter

Professor of Law

Reporter