**MINUTES**
**of**
**THE ADVISORY COMMITTEE**
**on**
**FEDERAL RULES OF CRIMINAL PROCEDURE**

**January 10-11, 2000**
**Orlando, Florida**

The Advisory Committee on the Federal Rules of Criminal Procedure met at Orlando, Florida on January 10 and 11, 2000. These minutes reflect the discussion and actions taken at that meeting.

## I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, January 10, 2000. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. David D. Dowd, Jr.
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Tommy E. Miller
Hon. Daniel E. Wathen
Prof. Kate Stith
Robert C. Josefsberg, Esq.
Darryl W. Jackson, Esq.
Lucien B. Campbell, Esq.
Mr. Laird Kirkpatrick, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Professor David A. Schlueter, Reporter

Also present at the meeting were: Mr. Roger Pauley of the Department of Justice; Mr. Peter McCabe of the Administrative Office of the United States Courts, Mr. John Rabiej and Mr. Mark Shapiro from the Rules Committee Support Office of the Administrative Office of the United States Courts; and Mr. Joseph Spaniol, consultant to the Standing Committee.

Judge Davis, the Chair, welcomed the attendees and reported on the Standing Committee's actions on the proposed amendments to Rules 1 to 31. He noted that the Committee's reaction had generally been positive and that it had approved the rules for publication and comment, subject to some minor editing issues. He added that some members had recommended careful consideration of whether to include any controversial issues, such as the proposal to change the number of peremptory challenges, in the package to be published.

## II. PROPOSED AMENDMENTS TO RULES 1 TO 31

Judge Davis indicated that the primary purpose of the meeting would be to review the proposed style changes to Rules 32 to 60. Any additional changes to Rules 1 to 31 would be referred initially to the respective subcommittees for their consideration. The proposed schedule, he said, would be to hold subcommittee meetings before the scheduled April meeting of the full committee, and then use that meeting to finalize the proposed changes to all of the Rules.

The Committee discussed briefly the question of whether to pursue any substantive amendments to Rule 24(b) concerning the number of peremptory challenges. Judge Miller moved that the current number of peremptory challenges in felony cases (6 for the defense and 10 for the prosecution) be retained and that any discussion regarding equalization of the number be deferred until the October meeting. Mr. Campbell seconded the motion, which carried by a unanimous vote.

## III. PROPOSED AMENDMENTS TO RULES 32-40

Judge Dowd, the chair of Subcommittee B, informed the Committee that the Subcommittee had reviewed the proposed style changes to Rules 32 through 40.

### A. Rule 32. Sentencing and Judgment.

Judge Dowd explained that Mr. Campbell had proposed a re-organization to the Rule to make it easier to follow and apply. Mr. Campbell added that although there were no major substantive changes in his draft proposal, the sequencing of the provisions had changed and noted, for example, that the definitions in the rule had been moved to the first sections.

The Committee turned first to Rule 32(e)(1), which addresses the issue of disclosure of the Presentence Report and Recommendation. Following discussion, the Committee voted unanimously to approve the proposed language. The Committee discussed the time requirements set out in Rule 32 for completing the various stages of presentencing and sentencing and ultimately decided to retain the language in Rule 32(b) that requires the court to impose a sentence "without unnecessary delay."

Mr. Pauley raised the question of whether any reference should be made in Rule 32 to sentences imposed by the court under Rule 42 for a contempt. He noted that currently both of those rules are silent, for example, on the issue of whether a presentence report would have to be prepared, or whether the person found in contempt would be entitled to any of the other provisions in Rule 32. Following discussion, there was no consensus that the issue should be explicitly addressed in the Rule.

Mr. Pauley and other members of the Committee raised the question whether Rule 32(h)(3)(A) should be retained. Some members believed that the provision, which requires the court to rule on all unresolved objections to the presentence report, placed an unnecessary burden on the court. Although the Committee ultimately voted 8-1 to delete the provision, it also concluded that additional research would be appropriate. Mr. Campbell and Professor Stith will examine this issue further, in particular the question of whether the Rule should attempt to distinguish between ruling on an objection and making a finding.

In discussing Rule 32(h)(4)(ii) (addressing the defendant), the Committee again discussed the issue of whether the Rule should explicitly exempt contempt proceedings from its coverage. The Committee decided not to address Rule 42 contempt proceedings in this particular provision. The Committee also discussed the topic of in camera hearings addressed in Rule 32(h)(4)(C) and determined that it would be appropriate to research further the issue of whether such hearings should be on a joint motion by the parties or perhaps even by a victim.

### B. Rule 32.1. Revoking or Modifying Probation or Supervised Release.

Judge Dowd introduced the proposed revisions to Rule 32.1, noting that the Subcommittee had discussed the issue of whether a proceeding under this Rule should be conducted by a magistrate judge or a district judge. He also noted that the revised rule contained new language in (a)(1)(D) to the effect that the defendant bears the burden of showing that he or she will not flee or pose a danger; that language, however, is not a substantive change and will make no change in practice. The Committee also focused on Rule 32.1(b)(1) (dealing with modification of conditions) and concluded that that provision did not make any change in practice or substance. Following additional discussion, the chair asked Judge Miller, Professor Stith and Mr. Campbell to review Rule 32.1 and determine, inter alia, whether any cross-reference should be made to Rule 40.

### C. Rule 32.2. Criminal Forfeiture.

In light of the fact that Rule 32.2 had not yet been approved by the Supreme Court, it would be advisable to wait with any additional changes to the Rule. Mr. Spaniol indicated that he would pass along some additional minor style suggestions to Mr. Rabiej for possible inclusion in the next draft of the rule.

### D. Rule 33. New Trial.

Judge Dowd noted that only minor style changes had been made to Rule 33. The Committee agreed with the changes.

### E. Rule 34. Arrest of Judgment.

The Committee first addressed the issue of whether to change the title of this rule, noting that the term "arrest in judgment" should be replaced with the style subcommittee's suggested language, "Vacating a Verdict or Finding of Guilty on Jurisdictional Grounds." That point, the Committee concluded, should be addressed in the Committee Note. There was some question on whether the rule should address findings following a nolo contendere plea and whether the rule was intended to focus on vacating a conviction or arresting a judgment and whether they are one in the same. Following additional discussion, the Committee concluded that additional work was required on this rule.

### F. Rule 35. Correcting or Reducing a Sentence.

The Committee's discussion focused on two primary areas. First, the Committee engaged in a lengthy discussion regarding the need or utility of Rule 35(a), which currently addresses the issue of the district court's responsibilities following a remand on the issue of sentencing. Initially the discussion focused on Rule 35(a)(1); ultimately the Committee voted 8 to 2 to delete that specific provision. The prevailing view was that that provision was unnecessary. Additional discussion focused on the remainder of Rule 35(a). The discussion focused on the issue of whether it was necessary to even address an issue that should be very clear to a district court following a decision by a Court of Appeals on the issue of whether the sentence was correct. The Committee voted 6-4 to delete Rule 32(a) in its entirety and to re-number the remaining subdivisions.

The second issue for discussion focused on new language in Rule 32(b) to the effect that the government may file a late motion to reduce a sentence if it demonstrates that the defendant had presented information, the usefulness of which could not reasonably be known until more than one year following sentencing. This point, which is a substantive change, reflects the decision of *United States v. Orozco*, ___ F.3d ____ will be reflected in the Committee Note.

### G. Rule 36 Stay of Execution.

The Committee agreed with the Style Subcommittee's recommended style changes to Rule 36. No substantive changes are intended.

### H. Rule 38. Stay of Execution.

Following discussion of the proposed draft of Rule 38, the Committee decided to remove the reference to Appellate Rule 9(b). The Committee believed that the reference was unnecessary and its deletion was not intended to be substantive in nature. A question was raised about Rule 38(e)(2)(D) and whether the term "surety bond" could be substituted for

the term "performance bond." Following additional discussion, the Committee decided to research the issue further.

### I. Rule 40. Transfer to Another District.

Mr. Pauley recommended that the Committee consider the issue of explicitly addressing in Rule 40, and in other rules, the issue of whether authorities should be permitted to cross district lines in taking a defendant before a magistrate. He noted that the language in Rules 5 and 5.1 did not address the point. He believed that it would be advisable to consider the point with a view toward including something in the rules. He also raised the question of whether Rule 40 should be incorporated into Rules 5 and 5.1

The Committee discussed the issue and a consensus emerged that Rule 40 should be so incorporated into Rules 5, 5.1, and possibly Rule 32.1. Judge Davis asked Judge Miller and Mr. Pauley to confer on proposing changes to those rules.

## IV. PROPOSED AMENDMENTS TO RULES 41 TO 60

### A. Rule 41. Search and Seizure.

Mr. Pauley and the Reporter explained the changes to Rule 41, noting that the rule had been completely reorganized to more clearly reflect its key provisions. Mr. Pauley pointed out that the redrafted rule was the result of a subcommittee's work and that it includes a reference to "covert" searches, e.g., where officers seek a warrant to examine or monitor activities in a covert manner.

The Committee engaged in an extensive discussion regarding a proposed change in Rule 41(b) that states a clear preference for seeking a warrant from a magistrate judge. This would be a change in practice from the current rule that states no preference. Judge Roll noted that in his district, where there is an extremely heavy caseload, law enforcement officials often request warrants from state judicial officers and urged the Committee to carefully consider the change and the possibility that it might lead to unintended consequences of creating an unnecessary appellate issue. Following additional discussion, the Committee decided to retain the preference and asked the Reporter to include language in the Committee Note that would make it clear the change was not intended to create any new ground for contesting the validity of a search warrant.

### B. Rule 42. Criminal Contempt.

The Committee discussed the issue of whether to include a specific provision in Rule 42 for the appointment of a prosecutor where a person has been charged with contempt. Mr. Pauley pointed out that the proposed language in Rule 42(a)(2) mirrored language in *Klayminic v. United States ex rel Vuitton*, 481 U.S. 787 (1987). In that case, he pointed out,

the Court had indicated that ordinarily the court should request that an attorney for the government prosecute the contempt; only if that request is denied, should the court appoint a private prosecutor. Following additional discussion the Committee agreed with the general concept but suggested that the language be reworked.

Some members suggested that there might be an ambiguity in Rule 42(b) in using the word "court" and "judge" in the same sentence. However, a consensus emerged that in the context of the provision, no ambiguity existed.

Mr. Pauley raised the issue of whether there should be a specific reference in Rule 42 to the fact that the formal sentencing proceedings in Rule 32 do not apply to contempt procedures. The Committee agreed tentatively to include a reference in Rule 42(b) to the effect that notwithstanding Rule 32, the court may summarily punish a person found in contempt in the presence of the judge.

Several members questioned the meaning of the provision at the end of Rule 42(b) that the contempt order must be "entered on the record." The Committee agreed that the better phrase might be "filed with the clerk."

### C. Rule 43. Presence of the Defendant.

In discussing the proposed style changes to Rule 43, several committee members raised the question of whether some mention should be made in the Rule of the defendant's presence at an arraignment following a superceding indictment. The Committee ultimately decided to change the language in Rule 43(a) to make it clear that the rule applies to "initial" arraignments and to include some discussion of the issue in the Committee Note. The Committee also indicated that the Note should make it clear that the language in Rule 43(b) referring to the fact that the defendant "need not be present..." is designed to reflect the view that the defendant does not have a right to be present under the specified instances.

### D. Rule 44. Right to and Assignment of Counsel.

The Committee briefly discussed the proposed style changes to Rule 44 and made several minor modifications, including changing several reference to the assignment of counsel; the Committee believed that the word "appointment" was more appropriate. The Committee also agreed with deletion of the word "promptly" from current Rule 44(c) regarding the timing of the judge's inquiry into the issue of joint representation. Now, the Rule simply requires that the inquiry be made; the Committee anticipates no change in practice.

### E. Rule 45. Computing and Extending Time.

The Committee generally agreed with the proposed style changes but some members questioned whether the reference in Rule 45(a)(4)(C) to "Presidents' Day" was

still appropriate. Other members noted that that term had been used in the recent restyling of the appellate rules, although the statute uses the term "Washington's Birthday." It was also pointed out to the Committee that current Rule 45(d), which governs the timing of written motions and affidavits, has been moved to Rule 47.

### F. Rule 46. Release from Custody.

During the discussion of the changes to Rule 46, several members raised the question of whether the district court may grant release of a defendant once notice of an appeal has been filed and whether any more specific guidance should be provided in the Rule itself. Currently, Rule 46(c) simply cross-references 18 U.S.C. § 3143(a). Following additional discussion regarding the exoneration of obligors and sureties in Rule 46(g), the Committee decided that more research was required into the question of whether a court must exonerate a surety who deposits cash in the amount of the bond or produces the defendant. The Committee also suggested that more research was required into the question of whether there is any further need for the government to provide bi-weekly reports on defendants who are in pretrial detention. The Committee discussed whether Rule 46(h) should be changed to reflect that the attorney for the government is not required to list each defendant, and the reason for that defendant's continued confinement. Mr. Pauley and Judge Miller had indicated that in their view that provision was not needed; however, the Committee was of the view that more research was required. Finally, the Committee agreed that the Subcommittee should attempt to clarify the language in Rule 46(i).

### G. Rule 47. Motions and Supporting Affidavits.

The Committee agreed that the word "orally" should be deleted from the rule. First, that term should not act as a limitation of those who are not able to speak orally and second, a court may wish to entertain motions through electronic means. Deletion of the term also comports with a similar change in Rule 26, regarding the taking of testimony during trial. In place of that word, the Committee decided to substitute the broader phrase "by other means."

Several members raised the question of whether Rule 47(b), regarding affidavits, might be better placed in Rule 12. Another option mentioned was the possibility of cross-referencing Rule 47 in Rule 12. This matter will be studied further.

### H. Rule 48. Dismissal.

During the discussion of the proposed changes to Rule 48, it was pointed out to the Committee that the phrase, "leave of the court," in Rule 48(a) was apparently inserted by the Supreme Court when it reviewed the rule during an earlier process, although it might not be apparent from the face of the rule why that language was necessary. Mr. Pauley indicated that it would be appropriate to change the word "government" in that

same subdivision, to "attorney for the government." He also noted that there might be a question of whether Rule 48(b) was still necessary. That provision, he stated, preceded the Speedy Trial Act, and to his knowledge, there has been no case where the court dismissed the case under Rule 48(b), which otherwise met the requirements of the Act. Some members pointed out the Act would not necessarily cover pre-arrest delays, and thus Rule 48(b) had some utility. After further discussion, the Committee decided to conduct further research on the issue. Judge Davis asked Mr. Campbell and Mr. Josefsberg to consider whether to retain Rule 48(b).

### I. Rule 49. Serving and Filing of Papers.

The Committee briefly discussed the proposed style changes to Rule 49 and agreed with those changes.

### J. Rule 50. Calendars; Prompt Disposition.

The Committee discussed the need for the first sentence in Rule 50(a) and agreed that that sentence simply states a truism and was no longer necessary.

Mr. Rabiej and Mr. Shapiro had pointed out to the Committee that Rule 50(b) simply mirrored 18 U.S.C. § 3165. They noted that the provision had been added in 1971 under an accelerated amendment procedure to meet congressional concerns about deadlines in criminal cases. Although there was apparently some discussion in 1975 regarding deletion of the rule (after enactment of the Speedy Trial Act), no action was taken. The Committee agreed that the provision seemed out of place and served no purpose. With the deletion of this provision, the Committee agreed that the Rule should be retitled, "Prompt Disposition" and that some additional thought should be given to deleting Rule 50 entirely.

### K. Rule 51. Preserving Claimed Error.

The Committee provided additional style changes to those recommended by the Style Subcommittee and added a sentence at the end of the Rule, clarifying that any rulings regarding evidence would be governed by Federal Rule of Evidence 103. That sentence was added because of concerns about the Supercession Clause and the belief that an argument might have been made that Congressional approval of this rule would supercede that Rule of Evidence.

### L. Rule 52. Harmless and Plain Error.

During its discussion of the proposed style changes to Rule 52, the Committee agreed that use of the word "noticed" in the current rule was an anachronism. In its place, the Committee inserted the word "considered."

**M. Rule 53. Courtroom Photographing and Broadcasting Prohibited.**

The Committee briefly discussed the proposed changes to Rule 53 and agreed that the word "radio" could be deleted without changing the scope of the rule. The Committee also noted that the Note should discuss the narrow exceptions to this rule, i.e. Rules 5 and 10 regarding video teleconferencing of certain proceedings.

**N. Rule 54. Application and Exception.**

The Reporter indicated that the provisions of Rule 54 had been moved to Rule 1 or deleted from the Rules altogether.

**O. Rule 55. Records.**

The Committee made only minor changes to the recommended version of Rule 55.

**P. Rule 56. When Court Is Open.**

The Committee briefly discussed the proposed style changes to the Rule and concluded that no additional changes were necessary. Based upon the earlier discussion at Rule 45(a) (regarding use of the term "Presidents' Day) the Committee agreed to use that term in Rule 56 as well.

**Q. Rule 57. District Court Rules.**

The Committee reviewed the proposed style changes and in Rule 57(a)(1) substituted the words "federal statute" for the words, "Acts of Congress."

**R. Rule 58. Misdemeanors and Petty Offenses.**

The Committee changed the title of the rule to "Petty Offenses and Other Misdemeanors." In Rule 58(c)(2)(B) (regarding waiver of venue), the Committee changed to rule to require that the "district clerk," instead of the magistrate judge, to inform the original district clerk of the defendant's waiver of venue. During the discussion of that change the Committee voted 8 to 0 to use the term "district clerk" throughout the rules, rather than "clerk of the district court."

And in Rule 58(g)(1) and (g)(2)(A), the Committee deleted the word "decision." In the Committee's view deletion of that term does not amount to a substantive change.

In addition to several other minor style changes, the Committee discussed whether initial appearances and detention hearings should be addressed in this rule, or cross-referenced in other rules. The Committee referred those issues back to the Subcommittee.

**S. Rule 59. Effective Date.**

No changes were made to the proposed style changes in Rule 59.

**T. Rule 60. Title.**

The Reporter noted that Rule 60 has been deleted from the rules.

## V. DESIGNATION OF TIME AND LOCATION OF NEXT MEETINGS

Judge Davis reminded the Committee that its next regularly scheduled meeting would be held in New York City on April 25 and 26, 2000. Mr. Rabiej announced that after consulting with the chairs of the subcommittees, that Subcommittee A will meet in Washington, D.C. on Tuesday, February 29, 2000. Subcommittee B will meet in Washington , D.C. on March 9, 2000.

Respectfully submitted,

David A. Schlueter
Reporter, Criminal Rules Committee