MINUTES OF THE JANUARY 1964 MEETING OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

The meeting of the Advisory Committee on Criminal Rules convened in the Supreme Court Building on January 13, 1964, at 9:30 a.m. The following members of the Committee were present during all or part of the session:

John C. Pickett, Chairman
Joseph A. Ball
Abe Fortas
Sheldon Glueck
Walter E. Hoffman
Thomas D. McBride
Maynard Pirsig
Frank J. Remington
Lawrence E. Walsh
Edward L. Barrett, Jr., Reporter
Rex A. Collings, Jr., Associate Reporter

Others attending were Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure, Warren Olney III, Director of the Administrative Office, Will Shafroth, Secretary of the Rules Committees, and Mr. Herbert J. Miller and Mr. Harold Koffsky of the Department of Justice.

Professor Barrett stated that since many of the new proposals for amendments are closely related to those circulated in the December 1962 pamphlet, it would facilitate consideration by the bench and bar to include the old and new proposals in one pamphlet, even though the Committee has reached final conclusions regarding some of the amendments circulated in December 1962. The Committee voted to adopt Professor Barrett's recommendation that the old and new proposals be circulated together.

Rule 4. Warrant or Summons Upon Complaint

On motion of Mr. Fortas, the Committee voted to amend the first sentence of Rule 4(a) to read as follows: "If it appears from the complaint or from an affidavit or affidavits filed with the complaint . . .". Rule 4 was approved for circulation as thus amended.

Rule 5. Proceedings Before the Commissioner

Mr. Fortas stated that in his opinion the new language in Rule 5(b) requiring the commissioner to inform the defendant of any affidavits filed with the complaint was merely a conforming amendment to the amendment of Rule 4. He felt that the contents of the affidavit should be communicated to the defendant.

Mr. Koffsky stated that there are problems under this proposal in districts where there is more than one commissioner -- the affidavits may not be available at the time of the first appearance before the commissioner. Judge Hoffman felt that in this case the commissioner could grant a continuance until the affidavits were available. After further discussion, the Committee voted, on motion of Mr. Fortas, to include "and of any affidavit filed therewith" in the first sentence of Rule 5(b).

The Committee next discussed the proposed language in Rule 5(b) relating to the assignment of counsel. Professor Barrett stated that he felt the language of the draft would be consistent with the provisions of the Criminal Justice Act in any of its versions. The Committee voted, on motion of Judge Hoffman, to adopt the new language as drafted.

Mr. Fortas pointed out that the Reporter's proposed addition to Rule 6, which would require a preliminary hearing before indictment in every case, should apply only to defendants in custody. Professor Barrett felt that the proposal may not be feasible for economic reasons, and after some further discussion, the Committee voted to reject this proposal.

Rule 6. The Grand Jury

The Committee voted to approve for circulation the proposed amendments to Rule 6(d), (e) and (f) as they appeared in the December 1962 draft.

The Committee discussed the question of secrecy of grand jury minutes, in connection with Rules 6 and 26, and considered the Reporter's alternate drafts of Rule 26. Judge Hoffman pointed out that in many cases testimony which has been recorded is not transcribed, and he felt that the defendant should not be permitted to cause delay in the trial in order that the grand jury testimony be transcribed for his use.

Mr. Fortas and Mr. Ball felt that the grand jury testimony of witnesses could be disclosed with no breach of secrecy after the witness has testified at the trial. Judge Pickett pointed out that since there is no requirement for all grand jury proceedings to be recorded, any rule in this area would be difficult to apply in every case.

After further discussion, the Committee agreed to defer decision on this matter until the Reporter and the Department of Justice have

studied the matter further. Professor Barrett felt that the Committee's letter of transmittal to the bench and bar should state that this matter is still under study by the Committee.

Rule 7. The Indictment and the Information

After a brief discussion the Committee voted, on motion of Judge Hoffman, to amend the first sentence to read as follows: "The court may direct the furnishing of a bill of particulars." At the suggestion of Judge Maris, the word "reasonable" was stricken from the second sentence of the draft. The Reporter was directed to include language in the Advisory Committee Note to indicate that bills of particulars may be given orally in the presence of a court reporter. Rule 7(f) was approved for circulation as amended.

Rule 8. Joinder of Offenses and of Defendants

Professor Remington stated that he favored the Department of Justice view that no change in Rule 8 should be made. He felt that the strict rule against amendment of the indictment by the Government might lead in some cases to spearate trials of offenses arising out of the same act or conduct, but in view of the Department of Justice policy against such multiple prosecutions, he felt that no proposal should be made in this area. Judge Hoffman agreed, and moved that no amendment be proposed to Rule 8.

Mr. Ball and Mr. Fortas felt that this policy of the Government should be incorporated into the Rule. Judge Hoffman felt that this would be a substantive change, and should be dealt with by statutory amendment. He suggested that the problem be referred to the Criminal Law Committee of the Judicial Conference.

Mr. Fortas moved a substitute motion -- that the Reporter be instructed to draft a rule to the following effect: That the indictment or information shall be dismissed when the offense charged arises from the same conduct as an offense for which the defendant has been previously convicted or acquitted. The Chairman voted in the negative following a tie vote of the Committee, and this motion was lost.

The Committee next voted on Judge Hoffman's motion to make no proposal regarding Rule 8. The Chairman broke a tie vote by voting in favor of the motion. Accordingly, there will be no proposal circulated for amendment of Rule 8.

Rule 11. Pleas

Professor Pirsig objected to the language of the last sentence of the Reporter's draft stating that the court should be satisfied that the "defendant in fact committed the crime charged." He felt that it would often be difficult for the court to make such a determination without a trial on the merits. Several other members agreed and also expressed the view that the last sentence was unnecessary.

Judge Hoffman moved that the third sentence be amended to read as follows: "...such inquiry as may satisfy it that there is factual basis for the plea of guilty", and that the last sentence of the draft be deleted. This motion was carried, and Rule 11 was approved for circulation as amended.

Rule 12.1 Notice of Alibi

The Committee discussed the Reporter's draft, which did not carry out the Committee's direction at the last meeting to provide in the rule for the initiation of the notice of alibi procedure by the defendant. Professor Collings stated that the defendant will almost always initiate his own alibi defense if it is a good one. Judge Hoffman felt that the defendant will in most cases be permitted to introduce his alibi evidence whether or not he has responded in the affirmative to the government's demand. Mr. Koffsky stated that the requirement that the Government serve a list of witnesses with the demand may inhibit the Government from making the demand for notice of alibi in some cases.

Professor Pirsig moved that Rule 12.1 be deleted from the Committee's proposals, and the Chairman broke a tie vote by voting in favor of the motion.

Rule 12.2. Notice of Insanity

Judge Hoffman stated that notice of insanity is not a problem in cases involving indigent defendants, since they are not able to retain experts at their own expense to establish a defense of insanity. Mr. Miller felt that the court should have discretion to grant a continuance in order to allow evidence to be obtained on the issue of insanity. Mr. Fortas agreed, and suggested that the last sentence of the Rule read as follows: "Unless such notice has been served, the court shall exclude evidence tending to establish such insanity or mental disease or defect or shall make such other order as may be appropriate."

Professor Remington questioned the need for pretrial notice of partial insanity, and the Committee agreed to strike the words "or otherwise show that he was suffering from a mental disease or defect" from the first sentence of the draft.

Mr. Miller suggested that the last sentence of the draft be deleted, and that the preceding sentence be amended to read as follows: "The court may for cause shown allow late filing of the notice and may make such other order as may be appropriate." This suggestion was adopted by the Committee, and the draft of Rule 12.2 was approved for circulation as amended.

Rule 14. Relief from Prejudicial Joinder

Judge Hoffman stated that he felt that the court may want to inspect a statement of the defendant as well as the statement of a co-defendant, and moved that the language of the last sentence read "...by the defendant or a co-defendant". Judge Maris agreed that this concept should be included, and suggested that the language read "...by any defendant".

Mr. Fortas felt that the defendant should also have an opportunity to inspect statements which support a motion for severance, and opposed the inspection of these documents in camera. After further discussion, the Committee agreed to defer consideration of this rule until after discussion of Rule 16. Following the discussion of Rule 16, the Committee approved the draft of Rule 14, with the last two lines amended to read as follows: "for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

Rule 15. Depositions

After a lengthy discussion of the drafting problems of Rule 15(d) through (g), the Reporter presented a draft incorporating the Committee's decisions. At a later time Judge Maris submitted a redraft of subdivision (e), which the Committee voted to substitute for the Reporter's draft. The following draft represents the final decision of the Committee. Subdivision (a) was approved as originally drafted.

> "(d) How Taken. A deposition shall be taken and filed in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.

"(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if the court is satisfied that the appearance of the witness cannot be obtained because the witness is dead, or is out of the United States, or is unable to attend or testify because of sickness or infirmity, or because the party offering the deposition has been unable to procure the attendance of the witness by subpoena. A deposition may not be used, however, if it appears to the satisfaction of the court that the absence of the witness was procured by the party offering the deposition, unless part of the deposition has previously been offered by another party. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only part of a deposition is offered in evidence by a party, another party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

"(g) At Instance of the Government or Witness. The following additional requirements shall apply if the deposition is taken at the instance of the government or a witness. Both the defendant and his attorney shall be given reasonable advance notice of the time and place set for the examination. The officer having custody of a defendant shall be notified of the time and place set for the examination, and shall produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall have the right to be present at the examination but his failure to appear after notice and tender of expenses shall constitute a waiver of that right. The government shall pay to the defendant's attorney and to a defendant not in custody expenses of travel and subsistence for attendance at the examination. The government shall make available to the defendant for his examination and use at the deposition any statement of the witness being deposed which is in the possession of the government and which the government would be required to make available to the defendant if the witness were testifying at the trial."

Rule 17. Subpoena

The Committee approved the proposed amendment to Rule 17(d) as drafted and directed that it be circulated.

17(b). Indigent Defendants. Professor Glueck suggested that the heading of the subdivision be changed, as the phrase "indigent defendant" does not appear in the proposed text of the rule. The Reporter was requested

to substitute a more appropriate title. On motion of Judge Hoffman, the text was approved as proposed, with the bracketed material deleted.

Rule 17.1. Pretrial Procedure

Mr. Olney stated that he felt it might be necessary for the defendant to be present at the pretrial conference if an order is made by the judge as a result of the conference. The Committee discussed this briefly, and Judge Maris suggested that the provision be amended to read as follows: "At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon." This would eliminate the necessity for the defendant's presence. The Committee adopted Rule 17.1 as thus amended.

Rule 20. Transfer from the District for Plea and Sentence

The proposed amendment to Rule 20(a) was adopted as drafted, with the new language in lines 10-11 to read "...was arrested or is held...".

The last sentence of subdivision (c) was amended to read as follows: "The defendant's statement that he wishes to plead guilty or nolo contendere shall not be used against him."

The Committee discussed the suggestion of the Department of Justice that the approval of the United States attorney be required in addition to approval by the court for transfer of the trial of a juvenile to the district in which the crime was committed. Professor Pirsig stated that these transfers should be encouraged in his opinion, and the Committee voted to amend the first sentence of 20(d) to read "...with the approval of the United States attorney and of the court...".

The Reporter's proposed new subdivision (e) was approved as drafted, and Rule 20 was approved for circulation as amended.

The meeting was adjourned at 5:05 on January 13th.
The meeting reconvened at 9:30 on January 14th.

Rule 16. Discovery and Inspection

Professor Barrett explained that the draft which he presented to the Committee was based on the draft suggested by the Department of Justice.

Subdivision (a). The Committee discussed the provision of (a)(1) permitting the defendant to inspect "any designated written or recorded statements or confessions made by the defendant to an agent of the Government, or copies or portions thereof". Mr. Ball felt that if the Government had copies of the defendant's statements to State or municipal agents, they should be made available to the defendant. Mr. Miller felt that these extra-governmental sources were also available to defendant's counsel in order to obtain copies of defendant's statements. Mr. Fortas agreed with Mr. Ball that if these statements were in the control of the Government they should be made available to the defendant, and he moved that the words "to an agent of the Government, or copies or portions thereof," be stricken from the draft of (1).

In a separate motion Mr. Fortas moved the deletion of "designated" from (a)(1). Mr. Miller stated that if "designated" were removed, serious problems would result from the Department of Justice's point of view. There may be many statements of a particular defendant to various Government agents, and some of these statements may not be relevant to the case. Or it may be that the United States attorney in charge of the case is not aware of a relevant statement to a Government agent. He felt that the elimination of "designated" would result in appeals based upon an obscure statement by the defendant which was not uncovered during the trial, and could also result in a time-consuming process of gathering many non-relevant statements by a defendant in an effort to obtain "any written or recorded statements".

Mr. Fortas felt that inclusion of "designated" would defeat the purpose of the proposal, since the defendant may have forgotten about a statement he made to an agent which would be important to his defense. He suggested that the draft could provide for discovery of any statements of the defendant which are known to the attorney in charge of the case.

Judge McBride suggested that the language of (a)(1) be amended to read as follows: "Any written or recorded statements or confessions made by the defendant, or copies thereof, which are known by the attorney for the Government to be within the possession, custody or control of the Government". On motion of Mr. Fortas, this language was adopted.

Mr. Fortas moved that in subdivision (a)(2) the words "to be produced by the Government at trial for proving the indictment or information against the defendant" be stricken. He felt that all physical and mental tests should be produced, whether or not the Government intends to use them at trial. Professor Barrett felt that this provision must be stated in terms of relevance to the case, and Judge Maris suggested inserting language similar to that inserted in (a)(1) -- "which are known by the attorney for the Government to be within . . .".

Mr. Miller opposed drafting the rule so that the relevance is a matter for the United States attorney to determine. He felt this should be a decision for the court. After further discussion, and drafting suggestions from various Committee members, the Committee voted to adopt the following as subdivision (a)(2): "(2) the results of reports of any physical or mental examinations, and of any scientific tests or experiments related to the particular case, or copies thereof, which are known by the attorney for the Government to be within the possession, custody or control of the Government".

Professor Barrett stated that in view of the Committee's discussion on the problem of disclosure of grand jury testimony, subdivision (a)(3) should be amended to read "(3) the minutes of any previously transcribed testimony...". Mr. Miller stated that the Department of Justice was opposed to permitting discovery of the defendant's grand jury testimony, as it would in some cases enable the defendant to more faithfully perpetuate a perjury before the grand jury.

Judge Hoffman felt that since a request for grand jury minutes will be made reasonably in advance of trial, there would be an opportunity to transcribe the grand jury testimony, and he favored retaining the language as drafted. Professor Barrett stated that there is also a problem of defendants either forgetting their testimony before the grand jury, or refusing to accurately report their testimony to their attorney. He felt that disclosure of the grand jury testimony may lead in many cases to an early plea of guilty. After further discussion, the Committee approved (a)(3) as drafted.

Subdivision (b). Judge Hoffman moved that this subdivision be approved as drafted. Mr. Fortas felt that "desiganted" should be deleted, and Judge Maris agreed, since the subdivision provides that a showing must be made that the objects requested are material to the defense. Judge Hoffman's motion, amended to include the deletion of "designated", was carried.

Subdivision (c). On motion of Judge Hoffman, this subdivision was approved as drafted.

Subdivision (d). After a brief discussion, the Committee agreed to change the phrase "denied or delayed" to "denied, restricted or deferred". Professor Glueck suggested that the last phrase in the first sentence be amended to read "or make such other order as is appropriate." Mr. Fortas felt that this subdivision did not adequately cover the question of a protective order for national security matters. He felt that "would not be in the interest of justice" did not cover the national security problem, and after a short discussion, the first sentence was amended to read as follows:

> "Upon a sufficient showing by the Government, the court may at any time order that discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate."

Mr. Fortas felt that the second sentence of (d)(1) should be amended so that the application of the attorney for the Government be made in writing, and delivered to the court for inspection in camera. This document would then be available to the court of appeals for review in the event of an appeal. Mr. Miller expressed approval of this suggestion, and the Reporter was requested to formulate a draft along these lines.

Mr. Fortas expressed approval of the principle of the draft of (d)(2), providing it is valid under the Constitution. He further stated that (2) should be made a separate subdivision, as it is not related to protective orders. Judge Hoffman moved that (d)(2) be made a separate subdivision of Rule 16, and the motion was carried.

Professor Remington suggested that under (d)(2) the Government be permitted to inspect only those statements, etc., which the defendant intends to use at the trial. This would give the defendant control over the disclosure of materials in his possession, and would serve the purpose of preventing surprise. This suggestion met with general approval from the Committee. Mr. Fortas suggested that this provision be broadened to provide that the Government may request discovery of the defendant's materials whether or not the defendant has requested discovery of the Government's materials. Mr. Miller felt that this broadening might raise constitutional questions. Professor Remington disagreed, and explained that this would require disclosure at this time only of materials which the defendant planned to disclose at the trial in order to prevent surprise. Professor Barrett suggested that the provision could begin as follows: "Upon motion of the Government, the court may order the defendant to permit the Government to inspect, . . .".

Judge Hoffman stated that in his opinion relief under (d)(2) should be conditioned upon a prior request by the defendant for discovery, and he further stated that only material which the defendant intends to produce at the trial, which would prevent surprise to the Government at the trial, should be included in the provision. Mr. Fortas agreed, and withdrew his suggestion that the government be permitted to initiate discovery.

Professor Barrett proposed the following language for the subdivision on this subject:

> "If the court grants relief sought by the defendant under this rule, it may condition its order by requiring that the defendant permit the Government to inspect, copy or photograph statements, scientific or medical reports, books, papers, documents or tangible objects, which the defendant intends to produce at the trial and which are within his possession, custody or control."

The Committee approved this draft subject to seeing it in written form.

Subdivision (f). The Committee was in agreement that this subdivision should apply both to the defendant and the government, and that the words "previously requested" be substituted for "subject to discovery and inspection" in the first sentence. The Reporter was directed to make appropriate drafting changes in this subdivision, and to present a redraft of all of Rule 16 on the following day.

On the following day the Reporter presented a redraft of Rule 16, and after further discussion of drafting problems, the following rule was adopted for circulation:

Rule 16. Discovery and Inspection

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the Government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, which are known by the attorney for the Government to be within the possession, custody or control of the Government, (2) results or reports of physical or mental examinations, and scientific tests or experiments made in connection with the particular case, or copies thereof, which are known by the attorney for the Government to be within the possession, custody or control of the Government, and (3) recorded testimony of the defendant before a grand jury.

(b) Other Books, Papers, Documents or Tangible Objects. Upon motion of a defendant the court may order the attorney for the Government to permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects, or copies of portions thereof, which are within the possession, custody or control of the Government, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. This subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal Government documents made by Government agents in connection with the investigation or prosecution of the case, or of statements made by Government witnesses or prospective Government witnesses (other than the defendant) to agents of the Government except as provided in 18 U.S.C. § 3500.

(c) Discovery by the Government. If the court grants relief sought by the defendant under this rule, it may condition its order by requiring that the defendant permit the government to inspect, copy or photograph statements, scientific or medical reports, books, papers, documents or tangible objects, which the defendant intends to produce at the trial and which are within his possession, custody or control.

[The Committee voted to include an alternate draft as part of the Advisory Committee Note. This proposed language would present Mr. Fortas' suggestion of unconditional discovery by the Government. Subdivision (c) above would be amended to read "On motion of the Government, the court may order the defendant to permit the Government to inspect, ...".]

(d) Time, Place and Manner of Discovery and Inspection. The order of the court granting relief to a defendant under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(e) Protective Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the Government, the court may permit the Government to make such showing, in whole or in part, in the form of a written statement to be inspected in camera. If the court enters an order granting the relief

following a showing in camera, the entire text of the Government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(f) Time of Motions. A motion under this rule may be made only within ten days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought by the defendant under this rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(g) Continuing Duty to Disclose; Failure to Comply. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested which is subject to discovery or inspection under the rule he shall promptly notify the other party, or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

Rule 32. Sentence and Judgment

Judge Thomas M. Madden, Chief Judge of the District of New Jersey, appeared before the Committee to express the views of the Judicial Conference Committee on Probation on the proposed amendment to Rule 32(c)(2). Judge Madden stated that he expressed the opposition of the Probation Committee and also of the judges of the District of New Jersey. He stated that the subcommittee on presentence reports of the Probation Committee had disapproved the proposed amendment for the following reasons: (1) there is no violation of the defendant's constitutional rights under the present practice; (2) there has been no demonstrated need for change in this area; (3) the proposed amendment would tend to close up sources of information normally available to the probation officer; (4) adoption of the proposed amendment might lead to fewer suspended sentences; and (5) disclosure of presentence reports might have a detrimental effect on rehabilitation because of the disclosure of the recommendations of the probation officer.

Various members of the Committee expressed approval of the proposed amendment as drafted. It was felt that the favorable experience in districts which now require disclosure argued for inclusion of this practice in the rules. Mr. Ball and Judge McBride felt that disclosure is very important in clearing up any possible misinformation contained in the presentence report. Professor Remington stated that the Advisory Council of Judges of the National Council on Crime and Delinquency has consistently favored disclosure, and Judge Maris added that the American Bar Association's Criminal Law Section has approved the Committee's proposal. Professor Pirsig stated that disclosure of presentence reports was a new feature in the Criminal Code in Minnesota, and that no complaints have been registered either by the judges or probation officers after a year of experience with this practice.

Judge Hoffman stated that he favored disclosure, but felt it may be better to give the judge discretion in this area, in order to gain acceptance of the proposal by judges and the Judicial Conference. Professor Remington opposed this compromise position, and Judge Hoffman's motion to make disclosure discretionary was not carried.

Professor Glueck moved that the Reporter's draft be adopted without change, and this motion was carried. Judge Maris suggested that the report also be made available to the United States attorney in the case, and the Committee approved this suggestion. At a later time, Professor Barrett proposed the addition of the following sentence at the end of the draft: "Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the Government." The Committee voted to approve the inclusion of this sentence.

Rule 32(a)(1) and (2) and 32(f) were approved by the Committee as drafted.

Rule 18. District and Division

Judge Maris opposed the Reporter's draft of Rule 18 on the ground that it would impose restrictions on districts in which none now exist. In large districts such as Montana, where there are no divisions, there are many statutory places of holding court. At the present time there is no requirement as to which of these statutory places (some of which are never used) must be fixed as the place for proceedings. He felt that the fixing of the place for proceedings should be an administrative determination by the district court.

Judge Hoffman moved that the Reporter's draft be adopted, with two amendments: to substitute "period of detention" for "held-for-trial detention", and to substitute "reasonably near" for "nearest to". Judge Maris argued that the fixing of the arraignment, plea and sentence should be part of the

internal administration of the district, and should not be covered by the rule. Judge McBride added that this provision may imply that the arraignment, plea and sentence would all have to be held at the same place, and he felt this implication would not be desirable.

Judge Maris stated that he favored the draft presented in the December 1962 draft, with the substitution of "the witnesses" for "his witnesses" in the last sentence of the draft. After a brief discussion, the Committee voted in favor of Judge Maris' suggestion, and approved Rule 18 for circulation. The Committee also approved the elimination of Rule 19.

Rule 21. Transfer from the District for Trial

Subdivision (a) was approved for circulation as drafted.

Judge Maris suggested that language be included in the Note to Rule 18 to make clear that transfers within the district to avoid prejudice are appropriate under the provisions of Rule 18, and this suggestion was adopted. The Committee agreed that this language should also be retained in the Note to Rule 21.

The Committee considered the Reporter's proposed new subdivision (c), providing for transfer by mutual consent of the defendant and the Government. On motion of Judge Hoffman, the Committee voted to include the new subdivision, using "may" instead of "shall".

The Committee discussed briefly the Reporter's proposed alternate to subdivision (b), which would effect a broadening of the present (b). Professor Barrett stated that this would give the court power to transfer the proceedings to another district over the objections of the Government. Judge Hoffman moved that the December 1962 draft of (b) be approved, and that Rule 21, as amended, be approved for circulation. This motion was carried.

Rule 23. Trial By Jury or By the Court

The Committee approved the December 1962 draft of 23(c) for circulation.

Professor Barrett stated that he had prepared a draft of Rule 23(a) which eliminated the requirement of Government consent to waiver of a jury trial by the defendant. This draft was requested by the Committee for reconsideration after a tie vote on the question at the last meeting.

Judge Hoffman moved that this proposed amendment be withdrawn, and that no change be made in present 23(a). Mr. Koffsky stated that the power of the Government to refuse trial by the court was used sparingly, but served as a check on the judicial process. Professor Pirsig stated that he favored eliminating the requirement of consent by the Government, as the right to a jury trial was a matter for the defendant alone to determine, without the possibility of being overruled by the Government. After further discussion Judge Hoffman's motion to retain the present language of 23(a) was carried.

Rule 24. Trial Jurors

Following a brief discussion of the phrase "or are found to be" in Rule 24(c), the Committee voted to circulate (c) as drafted, and to reconsider the phrase in the light of future comments.

The Committee discussed the comments received which suggested that there should be more participation by defense counsel in voir dire examination of prospective jurors. Professor Barrett stated that he felt this was a matter which applied equally to the Civil and Criminal Rules, and that the Criminal Committee should not take independent action on the problem. Mr. Ball stated that in his opinion the present Federal practice worked well, and that judges permitted limited examination by counsel in most cases. Professor Barrett recommended that unless the Committee had strong feelings on the subject, no suggestions for change or study be made, and the Committee adopted this recommendation.

Rule 25. Judge: Disability

Judge Hoffman suggested that in 25(b) the words "or division" be added after "district". He felt that this would solve the problem arising when a judge from another division within the district conducts a trial and is out of the trial division at the time of sentencing. Under the present rule it would be necessary for the judge to return to the place of trial, or for the defendant to be transported to the judge's home division for sentence. Judge Maris felt that this proposal would create a different situation than that which the present rule is directed to, and he thought these questions should be left for internal district administration. Professor Remington suggested that the words "from the district" be stricken from the first sentence of 25(b). The sentence would then apply both to judges absent from the district or from the trial division. The Committee was in agreement that this phrase should be deleted, and felt that the possibilities for abuse were slight.

Judge McBride argued strongly against permitting the substitution of a judge under subdivision (a) in a case tried without a jury. He felt that the new judge would not be able adequately to determine the credibility of witnesses who appeared before the disabled judge, or to evaluate evidence presented before his substitution. The Committee agreed and voted to amend subdivision (a) by inserting "jury" before "trial" in the second line of the draft.

Rule 26.1. Determination of Foreign Law

Judge Hoffman moved adoption of the draft of 26.1, with the substitution of "reasonable written notice" for "reasonable notice thereof in writing" in the first sentence of the rule. This change brings the text into conformity with the Civil Rules amendment. This motion was carried.

Rule 28. Expert Witnesses and Interpreters

The Committee approved the Reporter's amendment to the Advisory Committee Note, spelling out in more detail the types of interpreters which the rule intends to cover, and the Rule and Note were approved for circulation.

Rule 29. Motion for Acquittal

Professor Barrett stated that he had proposed substitution of 10 days for 5 days in 29(b), since the elimination of Saturdays as business days automatically extends the 5 day time periods over the weekend. He also pointed out the suggestion of the Department of Justice that the last sentence of (b) be eliminated. The Committee seemed in agreement that the last sentence of (b) was not necessary, and Judge Hoffman moved that the sentence be deleted and that the time periods in (b) be changed to 10 days. Judge Maris pointed out that the Appellate Rules Committee had been consistently recommending 7 day periods rather than 5 day periods, since a time period beginning on a business day will then almost always end on a business day. The Committee approved the substitution of 7 days for 10 days in the draft, and voted in favor of Judge Hoffman's motion as amended. Subdivision (a) was approved as drafted.

Rule 30. Instructions

This rule was approved by the Committee for circulation as drafted.

Rule 33. New Trial

The Committee voted to change 10 days to 7 days, and approved Rule 33 for circulation as thus amended.

Rule 34. Arrest of Judgment

The Committee voted to substitute 7 days for 10 days in this rule.

Professor Barrett pointed out the comment of Professor Wright, who expressed the view of the Fifth Circuit Advisory Committee that the words "on motion of a defendant" should be deleted from the rule, as no problem of double jeopardy exists in this area. Professor Remington argued that there would be a double jeopardy problem if the judgment was arrested improperly, and felt that the language should be retained. The Committee voted to continue to recommend inclusion of "on motion of a defendant" and approved the rule for circulation as amended.

The meeting was adjourned at 5:00 on January 14th.
The meeting reconvened at 9:30 on January 15th.

The Committee first considered redrafts of Rules 15 and 16. The discussions and actions taken are reported under the prior discussion of these rules.

Rule 35. Correction or Reduction of Sentence

The Committee approved the amendment of the first sentence of the rule contained in the December 1962 preliminary draft. Professor Barrett recommended adoption of the proposed language which would amend the timing provisions of Rule 35 so that the 60-day period for reduction of a sentence would begin with the entry of an order of the Supreme Court denying review of the judgment of conviction. The Committee approved the Reporter's proposed draft without change.

The Committee next discussed the proposal of Mr. Bennett, Director of the Bureau of Prisons, that the time period for reduction of sentences be extended to 120 days. Mr. Bennett stated in his letter to Judge Pickett that this extension would give more time for consideration by the judge, and for the gathering of information by the defendant or by the Bureau of Prisons, to support a reduction of sentence. Professor Remington felt that adoption of the proposal might lead to the imposition of longer sentences, since the judge may feel there is a greater opportunity for subsequent reduction. Mr. Ball favored the longer period, as he felt it would lead to

greater uniformity in sentencing due to the longer period allowed for consideration of each case. Judge Hoffman moved approval of the 120-day time period, and his motion was carried. Rule 35 was approved for circulation as amended. *

Rule 38. Stay of Execution, and Relief Pending Review

The Committee voted, on motion of Judge Hoffman, to approve the proposed amendment to Rule 38 which would permit the defendant to be confined at a place near to the place of trial, in order to assist in the preparation of his appeal, without delaying the commencement of service of the sentence.

Judge Hoffman suggested that the Committee consider recommending that Federal sentences be permitted to run concurrently with State sentences. The Committee agreed that this change would necessitate a statutory amendment, and voted to make no recommendation on this subject.

Rule 44. Right to and Assignment of Counsel

Professor Barrett stated that the draft he presented is essentially that proposed by the Department of Justice. He felt it would conform to any of the versions of the Criminal Justice Act, and should not be held awaiting passage of that legislation.

Mr. Fortas felt that the language "or from any subsequent stage at which counsel is appointed" was unnecessary, since this is covered by the initial statement of the right to have counsel at every stage of the proceedings. Mr. Koffsky explained that this language had been included to specifically refer to persons able to retain counsel up to a certain point in the proceedings.

Several members of the Committee felt that the language "from his initial appearance" created an ambiguity as to whether the defendant was entitled to representation at the initial appearance before the commissioner. Professor Barrett stated that it is clear that this is not contemplated when Rule 44 is read with Rule 5. Mr. Fortas suggested that the language be amended to read as follows: "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings before the commissioner and the court, unless he waives such appointment." Judge Maris felt that this language would cause problems since it could be construed to require counsel at the time of advising the defendant of his right to counsel andthe enlargement of the defendant on bail.

The Committee discussed several other suggestions for language, but later agreed that the Reporter's draft, using "from his initial appearance", would be clear when read in the light of the provisions of Rule 5(a) and (b). On motion of Professor Glueck, the Committee voted to adopt the following as Rule 44(a), and requested that the Reporter make any changes in the Note which would clarify the possible ambiguity of the rule.

> "(a) Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or court through appeal, unless he waives such appointment."

Rule 45. Time

The Committee voted to approve Rule 45 for circulation as drafted.

Rule 46. Bail

The Committee first discussed the provision suggested by Mr. Fortas for release without bail. Professor Barrett pointed out that there is some question whether the bail-jumping statutes would apply to this new provision. Judge Maris felt that Mr. Fortas' suggestion could be incorporated into the draft of 46(d) by amending the language to read "without security or without bond". This would cover the present intent of (d) and also the suggestion of Mr. Fortas. After further discussion, the Committee was in agreement that since the bail-jumping statue implies a forfeiture of money, it would be best not to incorporate this suggestion into the rule on bail. The Committee voted to adopt the following as new Rule 46.1 -- Release Without Bail.

Rule 46.1. Release Without Bail

> The commissioner or court or judge or justice may release a defendant without bail upon his written agreement to appear at a specified time and place, and upon such conditions as may be prescribed to insure his appearance.

The title of Rule 46 was changed to "Release on Bail."

The Committee considered Judge Smith's suggestion for release of defendants on bail without security when detention prior to trial or prior to the filing of an indictment exceeds a certain period of time. The Committee seemed in agreement that Rule 46(h) would provide an adequate control over the period of detention of defendants, and on motion of Judge Hoffman voted to reject the language suggested to carry out Judge Smith's suggestion. Rule 46(c), (d) and (h) were approved for circulation as drafted.

Rule 49. Service and Filing of Papers

The Committee approved the Reporter's revision of the Advisory Committee Note, and voted to approve the Rule and Note for circulation as drafted.

Rule 54. Application and Exception

The Committee voted to approve the rule and Note for circulation as drafted.

Rule 56. Courts and Clerks

This rule was approved for circulation as drafted.

Miscellaneous Suggestions

(1) Order of Closing Arguments. Professor Barrett stated that the order of closing arguments was within the discretion of the trial judge. Judge Hoffman felt that the defendant could get a pretrial order as to the order of closing arguments, and in that way could obtain review if he were required to make the first closing argument. The Committee voted to make no recommendation for change in the rules in response to this suggestion.

(2) Summary Judgment Procedure. The Committee discussed the possibility of a summary judgment procedure for the defense. It was the view of the Committee that the incidence of unfounded indictments is low, and that if a change were contemplated it would require statutory implementation. The Committee voted to make no recommendation in this area.

(3) Recommendation for Study of Abuses of Conspiracy Proceedings. The Committee was in agreement that although this problem calls for study, it is a question of substantive law, and should not be dealt with by this Committee.

(4) Statement of Court's Reasons for Sentence. The Committee briefly considered the suggestion of the Department of Justice that Rule 32(a) require the court to give the reasons for its sentence, and voted to take no action at this meeting on the suggestion.

Professor Barrett stated that there would be no need for another meeting of the Committee until after the period for comment on the second Preliminary Draft had elapsed, which will probably be in March or April, 1965. The meeting was adjourned at 1:20 on January 15th.

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