MINUTES OF THE MEETING OF THE ADVISORY COMMITTEE ON CRIMINAL RULES HELD AT THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, WASHINGTON, D.C., JANUARY 27 AND 28, 1977.

The meeting was called to order at 9:00 a.m., January 27, 1977, by the Chairman, Judge Lumbard. All members were present with the exception of Judge Smith and Judge Robb, who had court commitments. Also in attendance were Judge Roszel Thomsen, Chairman of the Standing Committee on Rules of Practice and Procedure; Judge John Peck, representing the Committee on the Administration of the Criminal Law; Mr. Thomas Hutchison, Counsel, House Subcommittee on Criminal Justice; Mr. Roger Pauley of the Department of Justice; Mr. Mike Mullen and Mr. Ken Feinberg of the Senate Subcommittee on Administrative Practice and Procedure.

I

Rule 35.1 - Appeal of Sentence

The Chairman reported that 76 communications had been received in response to the circulation of proposed Rule 35.1. A hearing conducted by the Committee was held January 13-14, 1977 and a transcript is available. Copies of the proposed Rule were also published in FRD and F.2d advance sheets.

The reporter, Professor Wayne LaFave, then summarized the comments received, which are set forth in more detail in his memorandum of January, 1977. These comments generally fall into two categories: (1) use of the rule-making power versus legislation and (2) suggestions with respect to specific procedures.

Judge Lumbard noted that the Advisory Committee on Federal Rules of Appellate Procedure had been kept advised and asked to comment, as well as the Committee on the Administration of the Criminal Law. He then made reference to letters received from Congressman Rodino and from Senator Kennedy. Congressman Rodino expressed great concern about the exercise of the rule-making power to achieve sentence review. Senator Kennedy referred to his bill S181, a sequel to S2699. He indicated general approbation of the solution suggested by Rule 35.1 and made reference to his own bill's provisions for a sentencing commission to establish standards and norms for sentencing. He noted that his bill likewise provided for a limited right of review which, in general, limited review to cases where the sentence was outside the established norm.

Judge Peck noted that the Committee on the Administration of the Criminal Law had endorsed Rule 35.1 in principle and had also endorsed the concept of enhancement of punishment. This had been without benefit of the final draft. Judge Thomsen expressed the hope that some form of common report incorporating the views of this Committee, Judge Zirpoli's Committee and Judge Aldrich's Committee on Federal Rules of Appellate Procedure could go forward to the Standing Committee.

Judge Lumbard then invited discussion and comments from each member of the Committee. Judge McCree stated that the Committee should take a firm position on whatever course it thought was appropriate. He did not think it mattered what form it took if Congress approved. Mr. Thornburgh stated that the Department of Justice preferred a legislative solution, primarily because of its interest in availability of enhancement; otherwise, it

approved in principle of Rule 35.1 and enchancement. Mr. Feinberg warned of a storm in Congress without an enhancement clause. He also noted that Senator Kennedy wants more benchmarks and guidelines. Mr. Hewitt inquired what kinds of records would be adequate under this procedure and how long would it take at sentencing to establish such a record. Professor Remington thought it was a good idea that such questions surface through the Advisory Committee. He expressed some reservations about the use of the rule-making process, stating that the power to do so seemed unclear at this point; he was at least personally satisfied that provisions for government appeal would not be possible without legislation.

Judge Nielsen noted that he had attended the Arizona meeting of the Committee on the Administration of the Criminal Law. He did not think that Congressman Rodino's letter should prevent action by the Judiciary, but recommended that the Rule be sent forward with the recommendation that it not go into effect unless and until enhancement provisions were adopted by Congress. Judge Webster suggested that, if possible, the foundation for use of the rule-making power expressed in the Advisory Committee Notes be beefed up. In those areas in which legislation rather than rule-making is required, he suggested that the Committee draft a model bill to compliment the Rule for consideration by the Congress.

Mr. Bedell expressed himself as personally in opposition to the right of the government to seek review. He felt that 10 days was too short a time in which to require filing of a petition and would extend this to 30 to 60 days. He agreed with the suggestion to submit a proposed act to Congress. Mr. Green stated that if

sentence review must be accomplished by statute, we should suggest areas where it can be demonstrated that rule-making is preferable, such as in the area of time limits. He agreed that 10 days was too tight, but thought 30 days might not be necessary in all cases. He favored use of the screening process.

Mr. Silverman noted the underlying uncertainty about the extent of rule-making under the enabling act and suggested that we modify the last sentence of the Advisory Committee Note to Rule 35.1 to reflect our actual uncertainty.

Judge Lacey thought that ten days for appeal was too short. He now thinks that the appellate court should impose the modified sentence rather than returning the case to the district court for further action. He expressed concern that use of rule-making in this area puts us on a collision course with Congress. He urged a suitable caveat in the Advisory Committee Notes indicating our input with deference and respect. We should either beef up the Advisory Notes or recognize our doubts. He agreed that the government appeal could not be accomplished by rule and that without enhancement provisions the Rule would lose some of its steam.

Judge Gordon expressed some question about our proceeding under the rule-making process, noting that Senator Kennedy's pending bill reflects some of our thinking. Judge Kaufman said that he once thought that sentence review should be by district judges. Based on the experience in Maryland, he is ready to go along with appellate review. He thinks the appellate court should have some power on remand to act specifically or wait on the district judge's discretion. He wonders why it is necessary

to start all over again in Congress after years of study by the Judiciary, minimal standards of criminal justice in the ABA, etc.

Mr. Mullen noted that Rule 35.1 presents a problem in light of Congressman Rodino's views. The Senate entertains a much broader approach to the use of the rule-making power. But he thinks it would be voted down if opposed by Congressman Rodino. Our report should reflect doubts about our authority to proceed under the rule-making power. Unless we have clear power to act, there may be a long-term detriment. He asked why the enhancement problem had been avoided and was told that it was probably outside the rule-making power. He agrees with Judge Lacey that the appellate court should set the sentence even if sent back to the district court for purposes of imposing it.

Mr. Hutchison opined that the proposed Rule would strain the enabling act since it may deal with substance as well as form. Recent history presents a warning. The legislative route could be more comprehensive; otherwise, "relitigation" through Congress is likely.

Judge Nielsen recalled that the whole study of sentence review had received its impetus from congressional demand. Judge Lumbard stressed the necessity for dialogue between Congress and the Judiciary in this area, citing the Speedy Trial Act as an example of the opposite. Professor LaFave opined that going through the enabling act process would probably create too great a strain. Judge Lumbard and Judge Thomsen expressed the thought that the wisdom of sentence review is for another forum, that if we have the power to proceed by rule, we should go forward.

Judge McCree adverted to the time for appeal requirement expressing support for 30 days rather then ten. This would help to avoid confusion with the notice of appeal and avoid unnecessary applications for extensions of time, which would impose another burden on the district court. He did not think the courts of appeal should impose sentences.

Mr. Feinberg stated that Senator Kennedy has not raised the rule-making issue posed by Congressman Rodino. He cautioned that the current legislation will be a long time in coming, and that it would take time to develop standards and norms, concluding that interim procedures should be available.

Judge Peck stated that the Committee on Criminal Law was enthusiastic about the "leave to appeal device." Judge Lacey argued that disparity is not as dramatic as some reports suggest and that the public is not as disturbed by disparity as by attenuation.

Judge Lumbard discussed the screening procedure, stating that he had in mind a petition on typed motion papers referred to a panel which would review those papers under the "clearly unreasonable" test, and anticipated that most sentences would clearly be seen to fall outside this test. The process should be expedited.

Professor Remington noted that there was accelerated support in the country for the "fixed sentence" approach. The effect of a fixed sentence is to shift discretion from the court to the prosecutor (who has the choice of charge), and this augurs even greater disparity potential. Therefore, our efforts should be to

make judge discretion more responsible. Judge Lumbard stated that judges would welcome guidelines which permit discretion in extraordinary cases, subject to some form of review. Judge Webster commented parenthetically that the parole board guidelines were having a significant outside impact on the sentencing process.

Mr. Mullen noted that Senator Kennedy was looking for input on his legislation from the Judicial Conference. Responding in part, Judge Lacey questioned the need for guidelines on terms of probation.

Discussion followed on how to approach the problem of putting this kind of sentence review into effect. A proposal to send on to the Standing Committee a recommendation that it be accomplished by statute was withdrawn, following the comment of Professor Remington that Congress could adopt the Rule as a Rule, rather than by use of the enabling statute. It was generally agreed that the rights of the defendant and the plaintiff should be found in one place. It was finally concluded that the draft Rule should be completed and sent via the Standing Committee to the Judicial Conference with a caveat on how best to transmit it to the Congress.

Technical changes in Rule 35.1 were next discussed. On motion of Judge Nielsen, the time within which to file a petition was expanded to 30 days by substituting 30 for 10 on page 1, line 12.

Treatment of death sentences was modified by amending the subject to "Appeal of Sentence Other than Death," striking

paragraph (a) and adding an appropriate comment at the end or in the Advisory Committee Notes.

There was mixed thought on whether reasons for sentence should be required. Judge Lumbard suggested that this should be in the judge's discretion and reference made in the Advisory Committee Notes. This was agreed to.

It was determined to insert as a substitute clause in line 26 after "production of" the words "any portion of the record in the district court" and delete the word "including" in line 27. Judge Lumbard noted that each court of appeals could adopt rules on what records and procedures were appropriate.

The sentence at line 30-32 was amended to read: "The court shall permit and may require the attorney for the government to file an answer in opposition to the petition."

Discussion followed on the need for oral argument in reference to paragraph (e). There was general agreement that there should be flexibility with respect for use of briefs, etc., as in motion procedure. Comment on this should be included in the Advisory Committee Notes. It was agreed that it was not necessary to add additional language to (e).

Following the luncheon recess, discussion of the proposed amendment to provide for government appeal followed. Mr. LaFave reviewed the conclusions reached at the meeting in August, 1976. The proposed draft was then reviewed and modified to reflect the changes already adopted. Judge Lumbard asked that the revised draft be recirculated to the Committee to eliminate any bugs.

Mr. Silverman expressed concern about the government taking appeals on fines of less than one-third the maximum. After general discussion about the lack of need for including fines, it was voted seven to four to delete the government's right of appeal in the case of a questioned fine.

Judge Lumbard emphasized the need to provide in the Notes that the courts of appeal would have discretion to adopt Rules to deal with various aspects of the petitions for review.

II

Habeas and §2255 Rules

Mr. Carl Imlay, general counsel for the Administrative Office, reported that Public Law 94-550 was now in effect, which made provision for treating unsworn statements under perjury provisions where an appropriate warning was given. Following his recommendation, it was voted to approve a new form for signature on the habeas forms, in lieu of oath, for both §2254 and §2255 petitions.

It was also called to the attention of the Committee that inasmuch as §2255 motions now purport to be an extension of the original criminal case, there was some question as to whether the Criminal Rules or the Civil Rules would govern with respect to right of appeal. In civil appeals in which the government is a party, each party has 60 days in which to appeal. It was voted to amend Rule 11 of the §2255 Rules to afford 60 days in which to appeal. Professor LaFave proposed to tie this in to FRAP 4(a). It was decided to go forward with the amendment to Rule 11 and to

refer the FRAP amendment to Judge Aldrich's Committee.

III

Rule 35 - Correction or Reduction of Sentence

Professor LaFave noted that earlier amendments had been voted on the premise that there would be panel review of sentences by district judges which would be incorporated in Rule 35. A re-look was now appropriate. Judge Gordon stated that he had no problem with the modified time limits. Judge Webster expressed his opposition to judges having defendants on the end of a string by being able to keep open the power to modify sentence indefinitely. Mr. Thornburg noted that the Board of Parole was opposed to giving this much discretion to the judges. After discussion, it was voted to rescind all previously proposed amendments to Rule 35 with the exception of the proposed addition of the last sentence in paragraph (b), which reads as follows: "Changing a sentence from a sentence of incarceration to a sentence of probation shall constitute a permissible reduction of sentence under this subdivision."

IV

Rule 40 - Commitment to Another District

Professor LaFave referred to his memorandum and noted that the rules now provide for different treatment between arrest in a nearby district and arrest in a distant district. (Compare Rule 5.) Discussion was tabled for one day.

V

Rule 44 - Right to and Assignment of Counsel

A proposed new paragraph (c) was presented dealing with

joint representation of multiple defendants. Discussion followed as to whether the court should order separate representation absent a clear waiver. The problem of waiver on advice of the counsel who caused the trouble was considered. Use of this procedure to delay trial was discussed. Concern was expressed by Judge McCree that the draft in its present form might be more in the nature of a "standard" than a rule of procedure. Judge Webster expressed a preference for a due process guidance rule such as is found in Rule 11. Judge Lacey thought this was a pressing problem which needed circulation. Discussion was deferred for one day to permit editorial work on the draft.

VI

HR 14666 - Privacy Protection for Rape Victims Act of 1976

A Subcommittee consisting of Professor Remington, Roger Pauley, James Hewitt and Professor LaFave had previously met to consider Congresswoman Holtzman's proposed bill. It was reported to this Committee that the Criminal Law Committee had likewise considered the bill, which proposed a new Rule 412 of the Federal Evidence Code. That Committee wanted no part of the Rule and viewed the matter largely as a policy issue. The view of the Department of Justice was that admissibility of past conduct by a rape victim was an issue for a judge to determine on the basis of whether the probable value outweighed the harmful effect. There were 78 rape cases prosecuted in federal court during the past fiscal year.

A serious question of symmetry is presented by this Rule since it deals both with evidentiary rules and procedure.

Professor Remington favors the use of an in camera procedure combined with the traditional balancing tests.

Judge Kaufman thought we should undertake to prepare a rule dealing with the procedural aspect of this subject. Judge Lumbard thereupon asked Professor Remington to draft a statement for the Standing Committee, to be transmitted after submission to this Committee on January 28. The meeting recessed at 5:00 p.m. and reconvened at 9:00 a.m. on January 28, 1977.

VII

Grand Jury

Professor LaFave called attention to Judge Smith's report on proposed HR 6207 which would amend Section 3323. Concern was expressed about the use of the term "fair cross-section of the community" in the bill. Judge McCree noted that this probably derived from 28 U.S.C. §1863(3). The general view was that the proposals contained in the bill were not necessary. A number of new members of the Committee had not received a copy of the previous report on the grand jury. Mr. Bedell expressed the opinion that putative defendants should not be denied the right to appear before a grand jury. Others expressed a contrary view. It was noted, with respect to the rights of witnesses, that the Committee had previously taken the position that there was no need for counsel in the room and that the Committee favored the use of a Fifth Amendment warning to the witness. It was the consensus of the meeting that nothing further could be done in the absence of Judge Smith and that the matters presented in Judge Smith's report need to be resubmitted to a subcommittee

for further study. The Chairman was thereupon authorized to appoint a new subcommittee able to act as needed.

VIII

Rule 44, Continued

The Committee next considered a revised draft of proposed Rule 44(c) prepared by Professor LaFave and a substitute discussion draft prepared by Judge Webster.

Mr. Bedell noted that money considerations often influence the selection of the same counsel by joint defendants not proceeding in forma pauperis. He suggested that it should be sufficient to make the waiver on the record and in writing, similar to a jury trial waiver. Mr. Bedell thought it appropriate to remind the lawyer of his duty to the court to disclose potential conflicts. Judge Lumbard expressed concern that provisions for waiver might provide an opportunity for an attorney to strong-arm his clients into waiver.

On motion of Judge Nielsen, it was voted to approve the revised draft of 44(c) prepared by Professor LaFave with instructions to revise the commentary to make appropriate reference to the advisability of a proper record of the court's determination which will support a finding of an intelligent and knowing waiver. Judge Lumbard directed that the revised draft and commentary be circulated to the Committee before submitting to the bench and bar.

IX

HR 14666, Continued

Professor Remington submitted a proposed draft of new Rule 12.3 prepared in accordance with the Committee's instructions. This Rule provides for a pretrial ruling on admissibility of evidence in rape cases and follows the pattern of pretrial motions in Rule 12, 12.1 and 12.2. He expressed the view that if a rule was desirable, we should undertake this work instead of Congress. Judge Webster thought that proposed Rule 12.3 was a superior way of dealing with procedural aspects of admissibility of prior conduct by rape victims. After discussion, it was agreed that references to specific Rules of Evidence should be deleted and that responsibility for disclosure be revised to track the approach used in Rule 16 discovery demands. It was determined that the revised Rule should be prepared for submission to the Standing Committee with a statement of our approach to the pending legislation.

The meeting adjourned at 11:45 a.m.