MINUTES OF THE SEPTEMBER 1967 MEETING
OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

The ninth meeting of the Advisory Committee on Criminal Rules convened in the Supreme Court Building on September 11, 1967, at 10:00 a.m. and adjourned at 1:25 p.m. on September 12, 1967. The following members of the Committee were present during all or part of the sessions:

John C. Pickett, Chairman
Joseph A. Ball
Edward L. Barrett, Jr.
George R. Blue
George C. Edwards
Walter E. Hoffman
Robert W. Meserve
Maynard Pirsig
Barnabas F. Sears
Fred M. Vinson, Jr. (unable to attend on Monday)
Alfonso J. Zirpoli
Frank J. Remington, Reporter

Honorable William F. Smith was unable to attend. Others attending were Honorable Albert B. Maris, Chairman, and Professor Charles A. Wright, member, of the standing Committee on Rules of Practice and Procedure; Honorable James M. Carter, United States District Judge at San Diego; Harold K. Koffsky, Chief of Legislation and Special Projects Section, Criminal Division, Department of Justice; and Nathaniel E. Kossack, First Assistant, Criminal Division, Department of Justice.

Judge Pickett called the meeting to order and welcomed the members and guests.

Professor Remington stated that the drafts fell into two categories: first, a number of issues which were fairly basic in nature and which were raised preliminarily by the Committee at the May 1966 meeting, and second, more specific proposals reflecting usually developments since the last meeting. With respect to the second category, the reporter wished to open a discussion on:

Agenda Item No. 4 - RULE 41 - SEARCH AND SEIZURE

Professor Remington stated that changes proposed in this rule reflected: the recent case of Warden v. Hayden; a suggestion from Judge Will that the rule ought to make it

explicit that a search warrant cannot issue on the basis of illegally obtained evidence; and the question of the issuance of a search warrant on the basis of hearsay evidence.

One question is whether it is desirable to amend Rule 41(b) to provide that search warrants may issue for evidence of the commission of the crime, and if it is, whether this is the way to do it. He said that the Department of Justice had suggested that it might be desirable to amend the rule to reflect the Hayden case.

A second question is whether it is desirable to provide the defendant with an alternative, i.e., of moving to suppress in the district in which the search is made as well as in the district where the prosecution occurs. Judge Hoffman asked if it would not be better to place it in the discretion of the court to entertain a motion to suppress. He said that it was his understanding that as Professor Remington proposed the revised rule, it would be mandatory to hear the search and seizure questions in the district court in the district in which the property was seized. Professor Remington said if that were so, then the rule was not clear, because he meant that they would be heard in the district in which the trial was to be held. He asked if it would be desirable to confine the defendant to the district of trial or to vary the place of trial giving a judge in the district of seizure the discretion to entertain a motion there. Judge Zirpoli suggested the following wording: "Until an indictment is returned on the information filed, the motion to suppress may be made in the district in which the articles were seized. Otherwise, all motions to suppress shall be made before the trial court."

Dean Barrett asked if the rule should be drafted so that the only time one could move in the district of seizure was where an indictment was not pending. Once there was a proceeding, then the move had to be made in the district in which the proceeding was held. He said that as the rule was proposed in the draft dated 8-17-67, it sounded as though the normal place to move is in the district where the property was seized, and that that is not what is meant. Following a short discussion, Mr. Ball moved that subdivision (b) be adopted.

Professor Wright suggested that the word "Which",in provision (3) of the subdivision, be changed to "That", and there was no objection to the change.

Judge Hoffman moved the adoption of Criminal Rule 41(b) as modified by Professor Wright. The motion was seconded.

Judge Edwards felt that the addition of the word "lawful" before "evidence" in provision (3) of the subdivision might save judges and magistrates some embarrassment. Judge Zirpoli suggested the addition of the words "which is not otherwise constitutionally privileged". Judge Pickett asked Judge Edwards if he had in mind that the commissioner or the magistrate should determine whether or not the evidence was lawful. Judge Edwards replied that he did not think that it could be determined in the trial court, but he supposed that the commissioner or magistrate had to make some preliminary determination as to whether the objective of the search is a constitutional objective. He said he guessed that was done every time a warrant was issued. He would be satisfied if there were just a sentence or two concocted by the reporter to point out that Warden v. Hayden did deal with a physical object and that the fifth amendment problems have not been completely spelled out. Professor Remington stated that on page 4 of his comment to this rule, he had covered the problem and that the explanation would appear in a note to the rule. Professor Pirsig suggested that subdivision (b) be redesigned by having the following language added after the word "or" in provision (2): "other property which is a proper object of search and seizure and which may constitute evidence of the commission of a crime." Mr. Ball said that he would like to see the language regarding the constitutional limitation put into a comment. There was discussion regarding the Commissioners Handbook, and Dean Barrett felt that the Administrative Office should be relied upon to see that the commissioners get copies of rules with notes. At this point, a vote was taken on the motion to approve Rule 41(b) as amended by Professor Wright. The motion was carried unanimously.

Professor Remington explained that, in view of the fact that the Federal Magistrates Act was still pending, the first part of subdivision (c) of Rule 41 would not be discussed at this meeting.

The first sentence of the underscored material on page 2 of proposed Rule 41, he said, reflected the suggestion of Judge Will, who had expressed the view that in the Northern District of Illinois there were some commissioners who were issuing warrants on the basis of evidence which was illegally seized. He said the question was whether it was desirable in the rule to make it clear that only lawfully obtained evidence be the basis upon which a search warrant may properly be issued. Judge Hoffman thought that the phrase "provided a substantial

basis for crediting the hearsay is presented" should be eliminated, as he felt that it would result in motions to suppress on the ground that there was no substantial basis presented to the commissioner and that this question might be difficult to review at a later time. There was a very brief discussion concerning reliable informers.

Judge Hoffman was disturbed over the proposed language. Mr. Sears said he would take out the first sentence; leave the second sentence in; and change the subdivision to read: "That may constitute admissible evidence." Judge Hoffman said that that would destroy the use of hearsay entirely. Mr. Sears replied that it would not, because the rule does not say that the finding of probable cause may not be based on hearsay. He felt, though, that if it were pointed out that the finding may be based on hearsay and no limitations were placed upon the language, the rule would be misleading.

During the discussion which ensued, Judge Zirpoli suggested that the language be: "A finding of probable cause may be based on hearsay evidence but may not be based upon unlawfully obtained evidence." Mr. Blue asked whether it was intended that the last sentence apply only in the case of a hearsay situation or whether it was intended that it apply as a general rule. Professor Remington replied that it was intended to apply as a general rule and that all of the proposed material for this rule was an effort to meet the suggestion that there ought to be more emphasis on the validity of the warrant at the time it is being issued rather than waiting until the warrant is challenged in the trial court on a motion to suppress.

Judge Zirpoli agreed with an earlier suggestion that the words "deemed reliable" be added in connection with hearsay evidence.

During the discussion about reliable informants and motions to suppress, Mr. Blue suggested that the type of problem presented was one that could be handled by a note to the amended rule. He suggested that the rule be boiled down to say: "A finding of probable cause may be based upon hearsay evidence but may not be based upon unlawfully obtained evidence.", and that a note to cover the fact that the commissioner may seek to inquire or look behind the affidavit if the affidavit on its face does not satisfy the commissioner's requirements. Mr. Meserve suggested that the language read: "A finding of probable cause may not be based upon unlawfully obtained evidence." He said that he would be in favor of leaving questions of hearsay evidence out of the rule entirely and leaving that to case law.

Judge Hoffman thought that there should be, either in the rule or in a note, a flag to the commissioners that they may base a finding of probable cause on hearsay evidence if it is deemed to be reliable. Mr. Sears suggested the following:

"A finding or probable cause may be based on reliable hearsay evidence, but may not be based on unlawfully obtained evidence." Judge Hoffman was opposed to that, because he said that the district judge may later find that the hearsay was not reliable. The question is whether on the face of the affidavit there is probable cause for the commissioner to issue the warrant on evidence he deemed to be reliable, not whether it was thought reliable on a subsequent review. Following general discussion, Judge Hoffman said the question now was whether the rule should be left as is and an explanatory note added. He thought that there was merit to Judge Will's letter and to letting the commissioners know that they may consider hearsay evidence deemed by them to be reliable. Mr. Sears moved that the rule provide the following: "A finding of probable cause may be based on reliable hearsay evidence but may not be based upon unlawfully obtained evidence." Mr. Blue said that he would second the motion if the word "reliable" were deleted. Mr. Meserve moved that the sentence be recast to read: "A finding of probable cause may not be based upon unlawfully obtained evidence.", and that a note about hearsay evidence be put in. Mr. Sears withdrew his motion. Judge Edwards said that his inclination would be to have the first sentence read: "A finding of probable cause may be based on hearsay evidence which the commissioner has reason to deem reliable.", and include the sentence which requires the affiant to appear personally. If the language could not be reduced simply to that stated by him, he would drop the whole section. Mr. Sears thought that maybe the whole problem could be solved by going back to Rule 41(b)(3) and having it read: "That may constitute admissible evidence of the commission of a crime." and leaving subdivision (c) alone. After a short discussion, Mr. Meserve withdrew his motion in order to permit a vote on an alternative, i.e., that the sentence be withdrawn. Judge Hoffman moved that the first sentence be deleted in its entirety. The motion was carried by majority approval. Judge Edwards dissented.

Mr. Blue moved that, in conjunction with the problem on hearsay, although the reporter's proposed language had been deleted, the question of alerting the commissioner to the issuance of warrants on probable cause based on hearsay be put into a note. Professor Pirsig was not sure about the wisdom of a note at this stage. He felt there would be some value in submitting a proposed rule or possibly even alternatives. Mr. Blue withdrew his motion. It was moved and seconded that the last sentence be retained (this is second sentence of proposed amended language).

Following a discussion as to the present status of the Federal Magistrates Act, Judge Hoffman moved that the matter of suggested amendments to Rule 41 - except for subdivision (b)(3) - be deferred pending passage or non-passage of the Act. Mr. Sears seconded the motion, and the motion was carried unanimously.

Professor Remington stated that some of the action taken would bear on Rule 4, and that there was one other issue. However, he wished to take up Rule 12 at this time, since Judge Carter was present.

Agenda Item No. 2 - RULE 12 - MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

Professor Remington stated that at the last meeting of the Committee, there had been proposals on Rules 16.1 and 41.1 to require the Government to give some notice of its intention to use certain kinds of evidence and then, in return, to require that the defendant make his objection prior to the trial. The reporter had been directed to rework proposed Rules 16.1 and 41.1, get the views of the Department of Justice, and to present the matter at a subsequent meeting. The first draft, he said, was a conservative one reflecting an effort to incorporate in subdivision (d) on page 2 a kind of a motion theory conforming as closely as possible with Rule 17.1. He said that the reaction which he got from ABA was that they considered it undesirable to merge the pretrial with the so-called omnibus hearings because they see the purpose of the omnibus hearing as quite different from pretrial. Alternative subdivision (d), Professor Remington said, reflects Judge Carter's procedure, and appendices A & B are the ABA and Judge Carter's check-lists. Appendix C is a letter from the ABA Reporter, Daniel Gibbens, dealing with the subject of pretrial procedure. Professor Remington said he thought the issue for the committee is whether a rule change is required to enable a court to do what Judge Carter is doing and whether district courts will be encouraged to use a so-called "omnibus hearing" if the rules provide for it. As reporter, he needs to know whether moving in the direction of an omnibus hearing is a good idea; if it is, whether it ought to be reflected in a rules change; and if so, whether this is the time to do it or whether it would be better to wait for more experience. Judge Zirpoli said that if the rule was put in some form of a mandate it might increase the number of 2255s. Judge Hoffman thought that the time limit in subdivision (c) of Rule 12 was too short, and he

suggested that the language be: "The court shall order the attorney for the Government to file with the clerk and serve on the defendant at the time specified by the court."

Upon request, Judge Carter explained the Omnibus Hearing Project. (Appendix B in the deskbook used at the meeting contains this information.) Judge Hoffman asked Judge Carter if he thought that the procedure could be placed into the Federal Rules of Criminal Procedure at this time. Judge Hoffman said that he thought it was an excellent format for a pretrial conference and could be widely distributed for the benefit of the federal judiciary - perhaps state judiciary as well. Judge Carter said he would not recommend that it be placed into the Criminal Rules until after there has been some additional experience with it. Mr. Ball stated that at the last meeting the Committee had come to the conclusion that it was advisable to have a pretrial hearing at which motions might be made. He said it seemed to him desirable to have the defendant, prior to trial, make his motion to suppress or any other motion which raises a constitutional issue. He said he thought that the Committee had affirmatively voted at the last meeting to instruct the reporter to prepare such a procedure. Professor Remington said he thought that the Minutes would show that he was mandated at the May 1966 Meeting to come in with a draft such as Rule 12(c). To the extent that the Committee wants to go further and encourage increased reliance upon pretrial disposition of issues, the drafts present a choice between using existing Rule 17.1 for that purpose or creating a new omnibus type hearing. If one went to an omnibus hearing, then whether a provision for notice by the Government is required is a question which would have to be discussed. If the rules are going to encourage the omnibus hearing, they are also going to have to encourage greater discovery.

Dean Barrett said that he liked the reporter's original subdivision (d) at this stage, but he thought he would delete the second sentence.

[Lunch period from 1:00 to 2:05 p.m.]

Following general discussion, Judge Zirpoli said that he was disturbed over the fact that if the Committee incorporated within its rules the equivalent of what Judge Carter has

on his omnibus hearings, it might create more 2255s rather than eliminate them. He said that if there was an enumeration of items incorporated within the criminal rules, the criminal offender immediately looks for a particular item and his next request, as a practical matter, is a request for all of the documents relevant to the proceeding. He just wondered, therefore, if that practice would better be left to the discretion of the judge.

Judge Pickett agreed that the Committee was not in a position to consider the matter or recommend a rule at this time. He said that the Committee had, from the time of its start, considered some device whereby there would be a record in the district court that would be sufficient to provide a disposition of post conviction motions without a hearing. He said that he did not know whether or not it could be done by rule, but it appeared to him that the procedure followed by Judge Carter would certainly have a tendency to provide such a record.

Mr. Ball suggested starting in with proposed Rule 12 in line with suggestions given and seeing how much could be adopted.

Judge Pickett stated that the specific issues before the Committee were 1) whether the Government should be required to give notice of intention to use certain evidence, and 2) whether it is desirable to move in the direction of encouraging the omnibus hearing. He said he took it that subdivision (c) could be adopted without anything being done about the omnibus hearing.

Professor Pirsig liked the idea of an omnibus hearing. He did not think that the California procedure would work in Minnesota. He also did not think the word "shall" should be in the rule (subdivision (d) - in line 2) as he felt the time set for hearing should be left to the discretion of the court. He moved that the Committee be in favor of retaining the subject of alternative subdivision (d) regarding the omnibus hearing on the agenda and not drop it at this time. Judge Edwards seconded the motion.

Judge Zirpoli did not want an enumeration of items incorporated into the rules. Professor Remington pointed out that the proposal was not to incorporate Judge Carter's check-list, but what was proposed was Alternative Subdivision (d). He said that the use of a check-list would be up to the individual judge. He read the language set out on page 4 in subdivision (d) regarding what the court on its own initiative should do at the hearing. During the discussion concerning paragraph (1) of subdivision (d), Judge Zirpoli asked if the Committee were to put something in the rule pertaining to the

omnibus hearing, would it not be much better to proceed on a permissive basis rather than on a mandatory one at the outset. He suggested that the word "shall" in the last line of the first paragraph of subdivision (d) be changed to "may".

At this time there was restated Professor Pirsig's motion, which was that the Committee be in favor of retaining the subject matter of the omnibus hearing on its agenda. This meant that the reporter would retain it on his agenda and come back with further suggestions in light of the day's discussion. Professor Wright said that he felt that Professor Pirsig's motion meant that the Committee thought that there was enough good in the idea of the omnibus hearing that it was worth the reporter's time to look into it further. Professor Pirsig agreed. The motion was approved unanimously.

(c) Notice by Government of Intention to Use Certain Evidence.

Mr. Koffsky said that from inquiries regarding this rule, it had been concluded that the following were problems presented by it: 1) the time element is entirely unrealistic, 2) the sanction, and 3) the fact that under Rule 16 defense counsel can get most, if not all, of the stuff that the Government will have to give them notice to produce here - objection is to "preparing the case for the defense".

There was a discussion centered around the use of electronic devices for purposes of surveillance.

Professor Remington stated that the original purpose of Rules 16.1 and 41.1 was dual - partly discovery and partly a device through which the Government could get these matters decided prior to trial. Mr. Kossack said that essentially the sanction is what the Department of Justice objects to most strenuously. Professor Remington said that the sanction is independent and something can be mandated in the rule without any sanction at all in the view that one important purpose of the rules is to say what ought to be done. Another alternative way of lessening the likelihood of the sanction being imposed is to make the rule read: "unless the court for good cause shown otherwise directs".

Following the discussion which ensued, Judge Hoffman proposed that subdivision (d) be put in where subdivision (c) is and read substantially as follows: "At the time of the arraignment or as soon thereafter as practicable, the court may set a time for the filing of pretrial motions, defenses,

or objections, and a later date for hearing. In advance of the filing of any motions, the court may, and at the request of the defendant shall, direct" and then follow that with the reporter's proposed language with the exception of the time limitation therein. Then work in something under 16(a) because the United States Government deals with many, many people and it ought only to be bound to disclose things within the possession, custody, control or known to the Government or the existence of which could be known with due diligence. Then add a continuing duty to disclose as in 16(g).

Mr. Sears suggested that the rule read, as far as the time limit was concerned, as follows: "within thirty days after the entry of a plea of not guilty or within such extended time as the court shall fix upon good cause shown, the Government shall advise the defendant whether it intends to offer at the trial (1) . . . .. If such evidence is to be offered, the Government shall within 15 days or within such further extended time as the court shall fix upon good cause shown file with the clerk and serve on the defendant." Judge Hoffman said that it would have to be done in every case, and there was no need for that. After a short discussion, Judge Hoffman moved that proposed Rule 12(c) be not mandatory upon either court unless requested by the defendant or his counsel. Mr. Ball seconded the motion, and he said the Committee was trying to eliminate, in the trial, a motion to suppress and a motion to exclude a voluntary confession.

Dean Barrett felt that, in light of the discussion, perhaps the whole rule should be sent back to the reporter for further study. Also, he felt that another significant thing was to put in something about pretrial motions on confessions.

After a recess, Judge Hoffman withdrew his earlier motion and then moved that, in light of the discussion, Rule 12 in its entirety, including the omnibus hearing matter, be recommitted to the reporter for further study and have the reporter give a report on it at the next meeting. Professor Remington said it seemed to him that there was general agreement that the sanction was inappropriate in its current form and that the time limitations were unrealistic. He said he felt that the proper handling of the omnibus hearing would solve the problems. A vote was taken, and Judge Hoffman's motion was approved unanimously.

Agenda Item No. 3: Explanatory Note to Suggested Procedure for Taking Guilty Pleas Under Rule 11

Professor Remington gave the background of these materials which suggest a procedure for the judge to follow in a plea of guilty case.

Professor Pirsig said that as he understood the reading of ABA's tentative report, they encourage pre-appearance discussion between the defense and the prosecution and the arrival at some agreement as to what the punishment shall be. They also recommended that the agreement be indicated to the court so that it could indicate whether or not it was in agreement with the punishment. He said he supposed that if those recommendations were to be followed, it would require some kind of a rule indicating that the defendant would have the right to have the judge indicate whether or not he agreed with the recommendation prior to pleading.

At this time, Dean Barrett suggested that the West Publishing Co. be mandated to publish the Committee's notes on revisions to the rules.

Professor Remington asked if it would be appropriate, at the next meeting, for him as a reporter to submit proposals for changes in the rule itself to reflect the thinking on pre-appearance discussions between counsel and their recommendations of agreed upon punishments.

During the discussion which followed, Dean Barrett asked if there would be any objection to having a rule that would permit the judge to see the pre-sentence report in advance with the proviso that if the ultimate plea is not guilty, then the judge cannot start a case.

Dean Barrett moved that material on the plea of guilty check-list be referred to the Committee on Criminal Law with the idea that they might want to use it in judge education as opposed to rule making. Mr. Blue seconded the motion, and it was approved unanimously.

At this point, Professor Remington suggested that the Committee return to

Agenda Item No. 1 - RULE 5 - PROCEEDINGS BEFORE THE ~~COMMISSIONER~~ MAGISTRATE

He explained the backgrounds of the draft dated August 18, 1967 and of the redraft dated September 1, 1967. He asked if it was agreed

that the rule should be left as drafted - that is - that the defendant be informed of his right to request the assignment of counsel if he is unable to obtain it. The other change which, he said, came as an informal suggestion from the Office of Criminal Justice, was to add that the United States commissioner advise the defendant of his right to pretrial release under 18 U.S.C. 3146. He said that, in reply to his question as to why the change was desirable, he was told 1) that apparently in the United States today it is not common to have counsel at this initial period but rather at some significant time later, and 2) it is also common that the defendant is not released during that period.

Judge Hoffman moved the adoption of the rule requiring that the commissioner advise the defendant of his right to a preliminary examination and to pretrial release under 18 U.S.C. 3146. The motion was seconded by Mr. Blue, and it was approved unanimously. Thereby, subdivisions (a) and (b) of proposed Rule 5 were adopted.

Professor Remington explained that old proposed subdivision (c), Preliminary Hearing, had been stricken, because it seemed to him that there had been a great deal of confusion resulting from the fact that Rule 5 deals with two separate stages in the proceedings - occurring usually on different days - the first when the defendant appears initially before the commissioner and the second, the preliminary hearing held at a later date.

If the Federal Magistrates Act does not pass, then new subdivision (c), Minor Offenses, will not be needed. An important question, whether or not the Act is passed, is the right to consult counsel at this initial appearance. It raises a problem because counsel is usually not available this early in the process. The rules ought either to assume that counsel will not be there or assume that he has to be there, and thus create pressure to devise ways and means for getting him there.

Dean Barrett said that it could not be assumed that counsel was going to be sitting in the commissioner's office when the F.B.I. agent brings a man in under arrest. But, he said, that was no reason for not saying that certain crucial decisions do not have to be made right then. He felt that anything that went beyond advising the defendant of his rights; arranging for counsel, and arranging release, should require counsel.

Judge Hoffman asked if it would not be better to see what this Congress does with regard to the Federal Magistrates Act before doing anything else with Rule 5. The reply was that it was felt if the Act were passed, it might be necessary for the Committee to take action expeditiously, and the present consideration was more or less preparatory for that. Going under the assumption that the Act would be passed, Professor Remington said that it was necessary for the Committee to discuss subdivision (c) but that subdivision (d) could be left. Professor Wright stated that,if the Committee were making technical and conforming changes, the material could be rushed through in the manner set by precedent (Civil Rules Committee - 1961); if the Committee were making substantive alterations, the material would have to be circulated, and that would take quite some time.

Dean Barrett suggested that it might be helpful if the decision was made to take the present rules on petty offenses and draft a separate set of rules dealing with the trial of minor offenses before the commissioners. Then most of the other material in Rule 5 should not stand or fall dependent on the passage of the Federal Magistrates Act.

Following a short discussion concerning the Act, Professor Remington stated that he felt it would be worth looking at subdivision (d) and he explained the background of the proposed draft. Mr. Koffsky said that one of the United States attorneys had written and said that he was greatly troubled by the time limits proposed in Rule 5(e) - namely that which requires a preliminary hearing within 10 days. Professor Remington asked if there had been any reaction to initial determination of probable cause. Mr. Koffsky replied that in the places where there are sitting grand juries, there was no problem at all; in others, where there is no sitting grand jury, it was pointed out that if hearsay could be used, the problem would be minimized; if hearsay could not be used, there was trouble getting the witnesses. Professor Remington said, assuming that the Federal Magistrates Act was not passed, that when the defendant comes before the commissioner, if there is a warrant the commissioner proceeds; if there is an arrest without a warrant, the commissioner has to determine whether the arrest was lawful when made and if there is probable cause to hold the person or require bail to be set. He said that he thought what the Committee had in mind was a very informal procedure much like the complaint procedure. The question had been raised as to whether the commissioners would see the rule as requiring a full preliminary hearing at this point.

During the discussion which ensued, Mr. Sears suggested that the words "under oath" should be added after the word "statement" in line 5 of Rule 5(d)(1), and the reporter agreed. Mr. Sears felt that it was a pretty important issue to decide whether the defendant was to be put into jail or put under bond. He said that there was a gap in Rule 5 in that it does not provide that on the date of arrest without a warrant there should be a finding of probable cause. Judge Hoffman said that the finding of probable cause is the commissioner's determination and the commissioner should be guided either to take hearsay alone or hearsay deemed to be reliable. He also felt that the rule should require that the defendant be advised to not make any statements and that he is not entitled to counsel at this stage of the proceedings.

Following discussion of the Miranda case and voluntary confessions, Judge Hoffman moved the adoption of "(1) Initial Determination of Probable Cause" with the following amendments: after the words "oral statement" add the words "under oath"; delete the words "provided a substantial basis for crediting the hearsay is presented" and substitute therefor the words "deemed to be reliable". The motion was seconded. There was a suggestion that the word "reliable" be placed before the word "hearsay" rather than to have the language read "hearsay deemed to be reliable", and this was agreeable to all. Judge Hoffman's motion was approved unanimously.

(d)(2) Right to Preliminary Examination.

Professor Remington gave the background of proposed Rule 5(d)(2).

At the risk of a slight detour in relation to this topic, Judge Edwards said that he thought he ought to call the Committee's attention to a reference made to the Committee from the Committee on the Administration of Criminal Justice. In that committee's report on the Tydings' Bill, Judge Bazelon raised the relationship between the preliminary hearing and discovery and the current practice of seeking indictment by grand jury as a substitute for going ahead with the preliminary hearing. Judge Edwards read the following recommendation made by the Committee on the Administration of Criminal Justice:

> "While agreeing that the Federal Magistrates Bill as approved by the Conference does not intend that discovery will be a primary function of the probable cause hearing, the Committee recommends that any further action on the subject of discovery and criminal cases await the study and recommendations of the Advisory Committee on Criminal Rules."

Judge Edwards said that the report on the Tydings' Bill makes it absolutely crystal clear that the Committee which recommended the Bill to the Senate did not consider the preliminary hearing to be a discovery mechanism and squarely said that whatever was done to expand discovery should be done through Rule 16.

Professor Remington said that the assumption that the preliminary should not be a discovery device seemed to him to be consistent with the Criminal Rules Committee's past actions.

The time limit can be changed if the Tydings' Bill does not pass, but Professor Remington thought that it might be helpful to look at the 10 and 20 day limits in light of paragraph (3). He then read the draft of that paragraph.

Judge Hoffman asked if the effect was not a cutting down, since Rule 46 had been amended. During the discussion, he read what the "bible", which he gives to new judges, provides regarding procedures for indictments and arraignments.

Mr. Meserve thought that the rule should have time limits particularly if coupled with judges' right to extend. Judge Edwards, too, thought there should be time limits. Mr. Meserve moved that paragraphs (2) through (6) of subdivision (d) of Rule 5 be adopted as drafted by the reporter. Mr. Blue thought that paragraph (5) should be modified so as to provide that the court upon proper showing, even after the elapsing of the time limitations, may extend them to satisfy this part. There was general discussion on practices in different districts. Judge Pickett stated that the motion on the floor would be voted on at the next day's session.

[The meeting was adjourned on Monday at 5:50 p.m. and was resumed on Tuesday at 9:00 a.m.]

Judge Hoffman suggested that the Committee find out what effect Rule 46 has had in connection with detentions, etc., before putting time limits in Rule 5. Professor Remington said that the reason for the time limits was that between the Committee's last meeting and this one, the Tydings' legislation had been drafted with a 20-day limit for the person not in custody and the Judicial Conference had expressed its approval of that limitation. He said it seemed to him that there was support of the time limits in both situations, and that at the last Committee meeting action had been taken to put time limits in the case where the person is in custody. Mr. Blue said that he had changed his views on time limits and that now he does not feel that they are wise. He was inclined to feel

that he would prefer to rely on previous admonitions provided by the Committee, and he was opposed to the approach proposed.

Judge Edwards said that the time limitations in the Tydings' Bill had not come from their committee, but that they had come from the United States Senate and they were insisted on with a good deal of determination. By now, he said, he was committed to these time limitations, because their committee had managed to get them changed and to get exceptional circumstance language added to the time limitation provision so that there was an escape hatch for the situation. He said that the Criminal Law Committee was more or less approving time limits according to the Tydings' Bill.

Mr. Pirsig said he was not convinced that the escape clause was adequate to meet the kind of case that was likely to arise - one in which the defendant is not in custody and has no particular problem and there is a legitimate reason on the part of the Government to ask for a delay. He did not think that the delay could be obtained under this clause. Professor Remington said the problem was that the pendency of the Tydings' legislation was the reason for the language. He thought that if a criteria was going to be set for extension, it was obviously desirable to have criteria consistent with the legislation. Professor Wright thought that at the present stage of the Committee's deliberation, the Committee ought to recommend what it thinks should be the rule and not rely on pending legislation.

Professor Pirsig suggested the following language: "A finding of exceptional circumstances warranting delay in the interests of justice". Mr. Meserve said he would be willing to accept Mr. Pirsig's suggestion as an amendment to his motion.

Judge Edwards said that what had concerned him was the Committee's rejection of any time limitations. He said that if the Criminal Rules Committee rejected any time limitations at all, he thought the result would be an impasse with at least the Senate sponsors of the Tydings' Bill. On the other hand, if there is a suggestion such as Professor Pirsig's, Judge Edwards said that he did not see any particular reason why some of his committee members could not take that back and say that the altered language on the exception made the rule easier to live with, and they could urge that it be given consideration at the time of the conference on the Bill, if it did go through the House.

Dean Barrett said he was very much in favor of time limits. He said that there may be a possibility for providing that under appropriate emergency circumstances such things as arraignments could be held before state judges. Mr. Blue felt that such a provision would foul up the processes more than the Tydings' Bill was going to do. He suggested that, if the time limitations were adopted, the reporter consider some sort of language for paragraph (5) that would be added to the provisions to provide that in the event a finding is made that the delay is unjustified, then a dismissal would follow. He could not see adopting a procedure rule which would in effect take the case away from the jurisdiction of the court just because certain events had not occurred within a fixed period of time. Professor Remington said there were two problems: 1) the statute of limitations and, 2) whether the times prescribed in the proposed rule would run. Absent a provision to the contrary, he thought that they would. This meant that if proceedings are instituted in a federal court and the defendant was in a state prison, failure to comply within the time limits would result in the charge being dropped, and it would have to be again instituted upon the defendant's release from the state institution. The ABA Minimum Standards Committee attempts to specify the situations in which the times does not run. The other alternative, Professor Remington said, and one which he feels is the thrust of the draft of the Tydings' Bill, is that the ten days runs subject only to the power of the judge to find that those conditions which the ABA draft specifies are extraordinary and thus the time may be extended. Mr. Meserve said that it seemed to him that if the Committee did not adopt reasonable escape clauses, they were putting a premium on their inefficiency.

Judge Zirpoli suggested the following in connection with paragraph (5): "If the defendant is not arraigned within the time limits prescribed above, the court shall issue an order to show cause returnable within seven days directing the United States attorney to show cause as provided in paragraph (4) above for a further extension of the time limitations. Failure to show cause shall result in the discharge of the defendant, . . .."

Judge Maris asked to be allowed to make a statement on another subject at this time, as he had to leave for a meeting of the standing Committee. With regard to Rule 46, he said that the standing Committee was about to finalize the draft of Uniform Rules of Federal Appellate Procedure. The problem was with rules regarding release from custody, under the Bail Reform Act and general provisions of that kind. The standing Committee was going to have to suggest to the Court that amendments be made to certain Civil and Criminal Rules which presently cover appellate procedure to some degree. Judge Maris said that there was to be a set of rules which will cover all

procedure from the filing of notice of appeal until the coming down of the mandate. That being so, it would hardly be appropriate to have duplication in the Civil and Criminal Rules. Therefore, the standing Committee would propose that certain Civil and Criminal Rules be abrogated and certain references to appellate procedures. Judge Maris said that bail is in both Civil and Criminal Rules. He just wished to bring these matters to the attention of the Criminal Rules Committee.

Judge Edwards said, in reference to the problem buried in Rule 46, that at the Conference of the Sixth Circuit the problem of bail pending appeal had been considered and it was the unanimously held view that currently the rule in relation to bail pending appeal is too liberal in relation to the convicted defendant and that the burden should be on the defendant, after conviction, to show that circumstances exist under which bail could be appropriately granted. Judge Edwards said that the present rule seemed to place the burden in the other direction. He felt that a convicted man should have the burden of showing that there is a sound appellate issue involved in his appeal and that he will not be a hazard to the community during the time he is out on bail. Judge Edwards said that the discretion used in allowing convicted defendants to be released on bond should be placed in the first instance in the United States district judge who tries the case and that it should be reviewable at the appellate level only upon a showing of abuse of that district judge's discretion in refusing bail. However, it was generally felt that this subject could not be discussed at this particular meeting, as there would not be enough time.

At this time, Professor Remington read Mr. Meserve's earlier motion, which was that the second sentence in paragraph (4) of Rule 5(d) read as follows: "In the absence of such consent by the defendant, the time limits may be extended only upon a finding of exceptional circumstances warranting delay in the interests of justice."

Judge Hoffman said that what he wanted to do was to put a proviso somewhere in the rule that it not be applicable if the accused is in any state or local custody away from the particular federal district, or if he has absented himself from jurisdiction. He said that what he wanted to do was to avoid the possibility that a statute of limitations question would come up.

Mr. Blue would like to leave the question of the extension of time limits just to the discretion of the court. If it were coupled with an amendment in connection with paragraph (5) that there is no automatic discharge; there is retention of jurisdiction; and in order for a dismissal to occur for failure to comply with the time limitations, there must be some process -

some showing that somebody had acted improperly. This is the philosophy that he would personally prefer to have engendered in the rules.

Judge Zirpoli suggested that paragraph (5) read: "If the defendant is not arraigned within the time limits above prescribed, the court shall issue an order to show cause to the United States attorney directing him to show cause as provided in paragraph (4) for a further extension of the time limitation. Failure to show cause for such further extension shall result in the discharge of the defendant from custody from the conditions of release pursuant to 18 U.S.C. § 3146, without prejudice, however, to the institution of further criminal proceedings against him upon the charge for which he was arrested."

Dean Barrett suggested that paragraph (5) have a period after "3146".

Following a short discussion, Mr. Meserve said he wished to amend his motion and have paragraph (5) end with "3146" and eliminate the "without prejudice" clause. There was a short discussion on the meaning of arraignment.

Judge Edwards said that he was against Mr. Meserve's motion to have paragraph (5) end with "3146", because he thought that there should be a penalty in the matter. He felt that there was far too great a delay in the prosecution of criminal justice, and that anything that could move in the way of expedition is in the interests of improvement in our system of justice.

Mr. Meserve felt that the essential thing was that a defendant shall not be held in custody or on bail for unreasonably long periods. He felt that it is up to the defendant's lawyer to move for dismissal, if there is unreasonable delay in the prosecution of the act.

Professor Pirsig said he was puzzled by some of the questions which would be raised if the proposed deletion in paragraph (5) was followed. He said that paragraph (3) in specifying time limits says "shall be arraigned", and if no provision is given for what happens if the defendant is not arraigned, does it mean that he cannot be arraigned after the specified time?

Dean Barrett said that the thing which concerned him was the system which permits, and it often happens in rural areas, people either being held in custody or out on some condition for long periods of time. Judge Edwards said he thought that the best thing the Committee could do, if a

majority of the Committee did feel that time limits should go into this rule, would be to indicate general approval of the time limit aspect of the rule and refer the matter back for further drafting consistent with what is ultimately done in relation to the Tydings' Bill.

When questioned on the motion being in order, Judge Edwards said he felt that there were enough amendments on the floor in relation to Mr. Meserve's motion, and he had a feeling that it would do more damage than good to take the positions which had been adopted up to that point. Mr. Meserve pointed out that the only amendments, which he had accepted were Dean Pirsig's. These were 1) a redefinition of "exceptional circumstances" in substance and then 2) the limitation of paragraph (5) to do away with the prospect of a dismissal of the indictment or complaint. He said he would like to get a vote on the draft as it stood with the two aforesaid amendments.

Professor Pirsig said he would like for the motion to be separated. A vote was taken on the motion to approve paragraphs (2), (3), (4), and (6) as amended. The motion was carried by majority approval.

Mr. Meserve then restated the second half of his motion, which was that paragraph (5) be approved with Dean Barrett's suggested amendment, which was to place a period after "3146" and eliminate the balance of the sentence.

Mr. Vinson said that he thought there was a division as to the ultimate objective of the rule. He heard 1) that it would merely operate as to conditions of custody, and 2) it should have the effect of litigant and Government start all over again.

Mr. Meserve moved that the only effect of this rule be to discharge the defendant from custody. Professor Pirsig moved that paragraph (5) be re-referred to the reporter for further study. Dean Barrett asked if Professor Pirsig would accept as an amendment that the rule be put into circulation but that it be put, as it was drafted, in brackets and have in the reporter's note that there had been a suggestion that the Committee look at the rule further with regard to ambiguities caused by the pending Tydings' Bill. Mr. Meserve seconded Professor Pirsig's motion.

Following a short discussion, Professor Pirsig's amended motion was voted upon and was carried unanimously. In reply to Professor Remington's question as to the effect of the passed motion, Dean Barrett said that he understood it to mean that if the Committee was going to circulate the rule after the present meeting, the rule would go out but that paragraph (5) would be bracketed as proposed by the reporter's language, i.e.,

under the assumption that the Tydings' Bill is passed, and that there would be a note stating that the Committee would look into the problem further following action taken on the Tydings' Bill.

RULE 5.1 - PRELIMINARY EXAMINATION

Professor Remington gave the background of Rule 5.1 as proposed in his draft of 8-15-67. During the ensuing discussion, Judge Hoffman suggested: "Affidavits based in whole or in part upon hearsay testimony may be submitted by the prosecution to establish probable cause but, if disputed, the hearing shall be continued to require the presence of the witnesses."

Following a discussion, Judge Zirpoli asked why the Committee did not just re-write the rule and have subparagraphs (a) and (b) by taking subparagraph (a) Probable Cause, skipping subparagraph (b) Evidence, and then say "The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf.", and strike out "Rules of evidence generally applicable to trial shall be followed."

Judge Hoffman moved that after the word "affidavit" in subdivision (b)(1) the words "based in whole or in part upon hearsay, testimony may be submitted, etc.,". He said that he thought that at the May 1966 meeting the Committee had arrived at the conclusion that if any of the affidavit evidence was disputed, the hearing would have to be continued to require the presence of the witnesses. The minutes of that meeting showed that this was so.

Mr. Blue said that he felt the more complicated the Committee made the preliminary hearing the less likely would it be utilized by the United States attorney, and the more available it was for discovery purposes the less likely that the United States attorney would permit a case to be in a position whereby the hearing could be utilized. Judge Edwards said that one of the issues involved was the question of whether or not there was inherent to the proposition that the preliminary hearing should in some sense be used for discovery purposes. He said that at least worth thinking about at that point was one device that might be used for (1) opening up the preliminary hearings for discovery purposes, and (2) having it counterbalanced by an advantage to the Government, which he thinks might well be in the interests of justice. He said that if the Committee made it possible for the defendant to move for a preliminary hearing and to have that right so that the Government could not eliminate the preliminary hearing by going for the grand jury indictment, it would seem appropriate that the Government in turn should be given the advantage of having the written record of the

preliminary hearing available for any subsequent proceedings at trial as substantive evidence upon which it could rely.

Judge Edwards stated that the change of the witness' testimony between the time of the preliminary hearing and the time of trial is one of the most consistent problems which the prosecution faces and one of the problems which really accounts for the fact that there is an enormity of a nationwide conspiracy of criminal nature with real power in every one of the big cities in this country. He said that here was one mechanism of granting that which the defendants want and at the same time avoiding the effect of perjury compelled by threat of violence which has defeated many a prosecution in the past.

Judge Zirpoli said that this sanction power exists at the present time as the prosecutor does not need to return his indictment; if he wants to get somebody on the stand he will delay the indictment, until such time as the actual preliminary hearing is held, for the purpose of pinning someone down by that process; and, he can also pin him down by bringing him even more effectively before the grand jury than before the commissioner. Judge Zirpoli said he thought the basic problem was in redrafting the rule in such a fashion that the commissioner will know that hearsay can be used by him, and that it is up to him to determine how reliable it is for purposes of holding the defendant to answer. He suggested that there be put into the rule words to the effect that motion to suppress evidence is applicable only in the district court.

There was a short discussion concerning defendants being transferred from one district to another. Judge Edwards said he felt obligated to raise the problem of the use of the preliminary hearing for discovery. He felt that the only useful device was to (1) make the preliminary hearing, in effect, mandatory, and (2) to make the additional revision which had just been discussed.

Following another general discussion, Judge Zirpoli stated that his final motion was that Rule 5.1 read as follows:

"(a) Probable Cause Finding. If from the evidence, based in whole or in part on hearsay, it appears there is probable cause to believe that an offense has been committed and that the defendant committed it, the magistrate shall forthwith hold him to answer in district court; otherwise, the magistrate shall discharge him. The defendant may cross-examine witnesses against him and may introduce in his own behalf. Rules excluding evidence on the ground that it was acquired by unlawful means are not applicable. Motions to suppress must be made to the trial court as provided in Rule 12.

"(b) Records. After concluding the proceeding the magistrate shall transmit forthwith to the clerk of the district court all papers in the proceeding. A record of the proceeding shall be taken down by a court reporter or recorded by suitable recording equipment. A copy of the record shall be made available at the expense of the United States to a person who makes an affidavit that he is unable to pay or give security therefor and the expense of such copy shall be paid by the director of the Administrative Office of the United States Courts."

The motion was seconded. Mr. Blue said he did not see the need for having a separate paragraph in Rule 5.1 as suggested by the reporter. It occurred to him that they could add the language to Rule 5(c) by making the same type of insertion and merely adding language to state that at the preliminary hearing hearsay evidence is acceptable.

Following a short discussion centered around the Tydings' Bill, Mr. Blue said that as he understood it, the Committee had the proposition of whether or not it wished to go on record as favoring some language which refers specifically to hearsay and makes hearsay evidence admissible in connection with preliminary hearings.

At this point, Professor Remington stated that the language proposed by Judge Zirpoli's motion was as follows:

"Rule 5.1. PRELIMINARY EXAMINATION.

"(a) Probable Cause Finding. If from the evidence, which may be based in whole or in part on hearsay, it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the magistrate shall forthwith hold him to answer in district court; otherwise, the magistrate shall discharge him. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. Rules excluding evidence on the ground that it was acquired by unlawful means are not applicable. Motions to suppress must be made to the trial court as provided in Rule 12.

"(b) Records. After concluding the proceeding the magistrate shall transmit forthwith to the clerk of the district court all papers in the proceeding. A record of the proceeding shall be taken down by a court reporter or recorded by suitable recording equipment. A copy of the record shall be made available at the expense of the United States to a person who makes an affidavit that he is unable to pay or give security therefor and the expense of such copy shall be paid by the director of the Administrative Office of the United States Courts."

The motion was carried by majority vote. There was one dissent.

Judge Hoffman said he understood that subdivision (b), Records, was contingent upon the passage of the Tydings' Bill, and if the Bill was not passed, the language would come out of the rule.

Professor Pirsig said he would like to see some reference in the record about the lack of coordination between the Congressional Committees that deal with procedural problems and the responsibilities of the Criminal Rules and other committees which have been appointed for the purpose of making rules. He said this has been a problem in state as well as in federal government, and he would not like to see an invitation to Congress to detail procedure, which is more carefully and more properly brought before the Criminal Rules and other committees.

Dean Barrett suggested that the Committee go ahead and do with this rule what was done with Rule 46. However, it was felt that the Committee was really not ready to circulate a set of proposals.

Agenda Item No. 5 - RULE 46 - RELEASE FROM CUSTODY PENDING FURTHER JUDICIAL PROCEEDINGS

Professor Remington stated that Rule 46 had to conform with recent appellate rules, and he gave the backgrounds of his drafts of 9-1-67 and the alternative draft of Rule 46(a)(2) dated 9-6-67 and submitted by Mr. Carl Imlay.

Judge Edwards said it seemed to him that if the reporter picked up language which had been suggested for paragraph (1), i.e., "be eligible for release", and in paragraph (2), since 18 U.S.C. § 3148 is quite different from U.S.C. § 3146, changed the word "shall" to "may", that those two changes would mean that all the Committee was doing was recognizing the existence of statutes, and with that, he said, they could call it quits.

Professor Remington said that one of the problems raised by both drafts was whether there should be a provision, which is not in the Bail Reform Act, for release during trial. He said that he had been told that the Appellate Rules Committee provided that upon notice of appeal, the application for bail is made to the district judge.

In reply to Dean Barrett's inquiry, Professor Remington stated that Rule 46(e), (f), (g), and (h), would remain as they were at present, and that the non-mention of them in the draft was an oversight.

Judge Hoffman said he was opposed to giving any right of a release of a person pending any habeas corpus or 2255 proceeding. Professor Remington said that the Department of Justice's informal position was that the only time that bail should be allowed was when the motion was granted. He said that the original impetus of the draft was not to expand the right of release but rather to limit it.

Judge Edwards moved that paragraph (3) on page 2 be stricken in toto. Judge Hoffman offered, as an amendment to the motion, that the last sentence of subdivision (c) likewise be deleted. Judge Edwards accepted that amendment. The motion was carried by unanimous approval.

Judge Edwards moved that the word "shall" be changed to "may" and that,in the language following,the words "where appropriate" in line 4 be stricken, and after the word "detained" the words "as is found appropriate" be inserted. He said the only purpose for this motion was to see that the rule gives effect to the statute and limits it entirely to that. The motion was seconded.

Mr. Vinson said that he had a discussion with two University of Wisconsin students, who had been riding in squad cars in the District of Columbia during the summer, and they said that everytime there was an arrest where there was scuffling and resistance to the arrest, it was when the arrest was made in response to an immediate situation on the street. There was never any trouble when the arrested person was one who was charged with a past felony, because the suspect knew he would again be released pending review of any conviction which might be achieved. Mr. Vinson said he felt that there had to be something done to make bond pending appeal less automatic. He would turn the rule around and say: "Pending appeal shall not be released unless . . . ."

After reading a portion of U.S.C. Title 18 § 3148, Judge Edwards said he would like to see that the person, who is asking for bail, establish that he is no hazard to the community.

Following a short discussion, Judge Edwards said he thought it would be appropriate for the Criminal Law Committee to make a suggestion, in relation to the Judicial Conference, for amendment of § 3148. He thought it could be raised at that committee's next meeting. He said at the moment the only motion before the Criminal Rules Committee was to conform the present proposed rule to the statute. In view of a discussion held and the suggestion that it be taken up with the Criminal Law Committee, Judge Edwards proposed that the matter be put on the agenda and suggested that § 3148 be amended.

A vote was taken on Judge Edwards' motion, which was stated as being that in the alternative draft of Rule 46 dated 9-6-67, the word "shall" be changed to "may" and that, in the language following, the words "where appropriate" in line 4 be stricken, and that after the word "detained" the words "as is found appropriate" be inserted. The motion was carried unanimously.

Judge Hoffman asked if it were desirable to draft a provision dealing with bail during the trial. Mr. Meserve said he was going to ask if that could be achieved by amendment of paragraph (1) so that it would read: "prior to trial and before judgment". Professor Remington said he took it that the Committee's view was that if something sensible could be done, that he come in with the results at the next meeting.

Judge Pickett announced that the next meeting would probably be held sometime in the spring of 1968.

[The meeting was adjourned at 1:25 p.m.]