Agenda F-7
Criminal Law
September 1974

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REPORT OF THE COMMITTEE ON THE ADMINISTRATION OF THE CRIMINAL LAW

To the Chief Justice of the United States,
Chairman, and the Members of the
Judicial Conference of the United States

The Committee on the Administration of the Criminal Law consisting of:

Honorable Ruggero J. Aldisert
Honorable Richard B. Austin
Honorable Jean S. Breitenstein
Honorable William B. Bryant
Honorable W. Arthur Garrity, Jr.
Honorable Earl R. Larson
Honorable Lloyd F. MacMahon
Honorable John W. Peck
Honorable Adrian A. Spears
Honorable Alfonso J. Zirpoli, Chairman

met on May 20 and 21, 1974, and after due consideration of the items hereinafter set forth, reports as follows:

Although the Congress has before it a number of bills which are of substantial interest to the Conference and to our Committee, none of these bills, other than the few which we have reported to previous sessions of the Conference, have been referred to us for our recommendations. No action of the Conference is required on any of the items herein reported. The first three were referred to us by other committees for an expression of our views. Those views, herein set forth, have been transmitted to the appropriate committees of this Conference and it is assumed that any recommendations to be

submitted to the Conference on these items will be presented at the proper time. The fourth item is a report for purposes of information on the progress made by the district courts in the disposition of criminal cases under district court plans adopted pursuant to the provisions of Rule 50(b) of the Federal Rules of Criminal Procedure.

ITEM I

Review of Sentences

In our continuing study of the question of review of sentences imposed by district courts in criminal cases, the Committee is now firmly convinced that unless the judiciary itself makes provision for review of sentences through its rule-making power Congress will enact legislation providing for appellate review of sentences.

Faced with such an alternative we favor the proposed amendment to Rule 35 of the Federal Rules of Criminal Procedure with certain suggested modifications which we have submitted to the Advisory Committee on Criminal Rules. These suggested modifications are: (1) that the panel of review judges shall consist of one circuit judge and two district judges of the circuit; (2) that membership on the

panel shall be rotated in such manner as is practicable in the discretion of the assigning judge; and (3) that the motion to review such sentences shall apply to any sentence which may result in imprisonment, regardless of the period thereof.

ITEM II

Grand Jury Reform

At the request of the Chief Justice and the Advisory Committee on the Criminal Rules, we have reviewed the recommendations of the Advisory Committee for improvements in the grand jury process through the rule-making power and have submitted to that committee the comments that hereinafter follow as an expression of our views.

Size of Grand Jury.

We approve the suggested reduction in the number of grand jurors (preferably not less than nine nor more than fifteen, with the concurrence of two-thirds of the members required for return of an indictment) provided proper recognition is given to the need to resolve special geographic problems that exist in certain districts. See In re May 1972 San Antonio Grand Jury, 366 F. Supp. 522. Any change in the size of the grand jury calls for an amendment to

Rule 6(a) of the Federal Rules of Criminal Procedure and a revision of Title 18 U.S.C. section 3321. We approve the revisions suggested by the Advisory Committee. The mechanics for such statutory revision and change of Rule 6 should be so timed that each becomes effective on the same date.

Rule 6(e). Reporting Grand Jury Proceedings.

We approve the recommendation that Rule 6(e) of the Federal Rules of Criminal Procedure be amended to require the recording of all testimony and oral statements before the grand jury. We recognize that the responsibility of recommending any amendment to the rule to provide for the recording and disclosure of testimony before the grand jury rests primarily with the Advisory Committee, yet, by divided vote, we express serious reservations as to the wisdom of providing the alternative of electronic recording.

Rule 7(g). Motion to Dismiss.

The Advisory Committee suggests that Rule 7 of the Federal Rules of Criminal Procedure be amended by adding the following:

(g) Motion to Dismiss Indictment.
A motion to dismiss the indictment may not be based upon the ground that it is not supported by sufficient evidence.

Again, while submission of the suggested amendment is the responsibility of the Advisory Committee, we respectfully suggest that Rule 7(g) should not be adopted. It is not a precept that should be codified by rule or statute. It should be left to case law. See United States v. Calandra, 414 U.S. 338 (January 7, 1974). We feel that this is a matter that could be better handled by an advisory committee note and thus avoid conflict with the principle that an indictment shall be returned only upon a showing of probable cause that a federal offense has been committed.

Making Unauthorized Disclosure of Matters Before Grand Jury.

We reviewed the suggested statute found on page 32 of Professor La Fave's report to the Advisory Committee which would make it an offense to knowingly disclose matters appearing before the grand jury. The two considerations which prompted the suggested

statute are (1) unauthorized disclosure is becoming a serious problem, particularly with regard to grand jury inquiries focusing on public figures, and (2) the limited reach of Rule 6(e) of the Federal Rules of Criminal Procedure and the contempt power are not adequate to deal effectively with unauthorized disclosure.

To illustrate the type of statute which would be appropriate the Advisory Committee suggests the following:

> (a) Whoever knowingly discloses any matter occurring before any grand jury summoned by a court of the United States, or, with intent that such disclosure be made, commands, induces, entreats, or otherwise attempts to persuade another to make such disclosure, shall be fined not more than $500 or imprisoned not more than six months or both.
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> (b) Subsection (a) shall not apply to -
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> (1) disclosure to an attorney for the government for use in the performance of his duties;
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> (2) disclosure directed or permitted by a court, or

(3) disclosure by a witness who has appeared before such grand jury of any matter concerning which the witness has testified or produced other information before the grand jury.

(c) As used in subsection (b) -

(1) "attorney for the government" includes the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, and such other governmental personnel as are necessary to assist the attorneys for the government in the performance of their duties.

(2) "disclosure by a witness" includes disclosure by others of matter the witness has previously disclosed when made as a consequence of such disclosure by the witness.

(d) Nothing contained in this section shall be construed to affect the power

of the court to punish any person for contempt for violation of any rule or order of the court.

While we are of the view that the matter of disclosure by witnesses of testimony given before a grand jury should be the subject of further study, it is our present thinking that paragraph (3) of subsection (b) of the above proposed statute should be revised to require witnesses not to disclose matters occurring before a grand jury when specifically directed not to do so by the court. If requested, we are prepared to draft the language to be employed for this suggested revision, otherwise we are pleased to leave it entirely to the discretion of the Advisory Committee.

ITEM III

Voluntary Surrender of Certain Sentenced Offenders to Bureau of Prison Institutions

At the request of the Probation Committee we reviewed its proposed statement of procedures to provide for the voluntary surrender of selected sentenced offenders to the Bureau of Prison Institutions (see Exhibit A attached hereto) and the

proposed implementing legislation (see Exhibit B attached hereto) which would provide a penalty for failure of a convicted person to surrender himself to the Attorney General when ordered to do so by the court. We join in the recommendation of the Probation Committee that the Conference approve the proposed surrender procedures and that it recommend enactment of the proposed implementing legislation.

ITEM IV

Report on the Operation of Rule 50(b) Plans

We respectfully submit as an appendix to this report Exhibit D, a statistical analysis prepared by the Administrative Office of the United States Courts, which, on an accounting system based on individual defendants rather than cases, reflects that in the calendar year 1973 for defendants in all districts the median time interval from the time of the filing of the indictment or information to the date of actual disposition is 3.9 months. For disposition, where there is a dismissal or acquittal the date of dismissal or acquittal is used and for those convicted the date of the actual sentence imposed by the court is used. While this

figure represents a slight increase over the median time for the calendar year 1972 which was 3.7 months, such increase is understandable and was to be expected because of the substantial change in calendar mix that occurred between 1972 and 1973. The major changes in calendar mix were:

(1) The fact that in 1973 more than 2,000 cases of defendants charged with violations of the immigration laws were transferred from the district courts to the magistrates. Prior to such transfer and based upon reports for the fiscal year 1971 (heretofore all accounting was on a fiscal year basis) we know that the median time for the disposition of these cases was only 0.8 months. As a supplement to the report and as Exhibit D-1 we have attached tabulations of time intervals from filing to disposition when all immigration violators are eliminated for both calendar years 1972 and 1973.

(2) The continued growth of drug-related cases from 7,989 in 1972 to 8,181 in 1973. Such cases tend to drive the median time interval upward. Yet with two out of each ten filings comprising

a drug offense, the median time of 3.3 months for marihuana violators and 4.7 months for other drug violators in 1971 is probably on the low side in 1972 and 1973.

(3) Selective Service Act violators, though dropping in filings, still comprise a large segment of the pending case load, many of whom are fugitives, with a resultant overall median time of 6.5 months. The time for filing to disposition for Selective Service Act cases under present recording practices includes all fugitive time. On December 31, 1973, of the 4,473 pending Selective Service Act cases 72 percent were cases wherein the defendants were fugitives.

When one considers that in the median time figure of 3.9 months for the disposition of criminal cases for all defendants we have a built-in period of approximately one month from the time of conviction or plea of guilty or nolo contendere to the time of sentence and further consider that an almost equal period transpires before the United States Attorney secures authorization for dismissal from the Attorney General,

the time limits presently being met for the disposition of criminal cases compares favorably with those advocated by Senator Ervin in S. 754, particularly during the first three years after enactment (see Exhibit C attached hereto).

Because of the change in the case mix between 1972 and 1973, reflected in part above, we feel that it is too early to measure the effectiveness of the 50(b) plans and a more meaningful measure can be made at the close of the calendar year 1974, at which time we can compare 1973 and 1974 by the same controlled standards. We are satisfied that given the "additional resources, personnel and facilities" suggested by Senator Ervin, all of his speedy trial objectives could be fulfilled under the Rule 50(b) plans without the need of additional legislation.

The Committee noted with great interest and with its approval the proposal of the Subcommittee on Judicial Statistics which sets forth specific procedures for the establishment of an inactive suspense docket in each district either by local rule or by a general or administrative practice. The establishment of such inactive suspense dockets would materially and favorably affect the median time

statistics for the disposition of criminal cases.

Respectfully submitted,

Alfonso J. Zirpoli
Chairman
Committee on the Administration
of the Criminal Law