MINUTES OF THE FALL 1961 MEETING OF THE
ADVISORY COMMITTEE ON CRIMINAL RULES
October 30-31 & November 1, 1961

The third meeting of the Advisory Committee on Criminal Rules convened in the Supreme Court Building on October 30, 1961 at 9:30 a.m. The following members, constituting the full membership of the Committee, were present:

John C. Pickett, Chairman
Joseph A. Ball
George R. Blue
Abe Fortas
Sheldon Glueck
Walter E. Hoffman
Maynard Pirsig
Frank J. Remington
William F. Smith
Lawrence E. Walsh
Edward L. Barrett, Jr., Reporter

Others attending the meeting were Professor James William Moore, a member of the standing Committee; and Aubrey Gasque, Assistant Director of the Administrative Office, who serves as Secretary of the standing Committee on Rules of Practice and Procedure and the Advisory Committees.

Rules 10 and 11

The Reporter briefed the members on his proposed recommendation for Rule 10, namely, that the rule make it clear that when the defendant

is represented by counsel having received a copy of the indictment, counsel can waive its reading in an informal proceeding. Judge Smith questioned whether there is a present need for the additional provision and, also, whether it would lead to confusion. Mr. Ball agreed, and after further discussion, it seemed to be the consensus of the Committee that the present language of the rule causes no unusual interpretation and that, unless events changed, the Rule should not be amended.

Professor Barrett suggested adding to the fourth line of the draft of Rule 11 after the word "without" the following: "addressing the defendant personally and determining."

Judge Smith read a draft of Rule 11 which he had prepared:

> "A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, or nolo contendere, and shall not accept such plea without having first inquired of the defendant and determined that he understands the nature of the charge and the possible consequences of the plea and that the plea is made voluntarily without any assurance or promise of leniency . . ."

Judge Smith stated that this proposed language requires a little more than the original rule in that the inquiry should be made of the defendant. He also said this language has in mind the more recent decisions of the Supreme Court and some of the Circuits.

Professor Remington expressed his views with relation to Judge Smith's draft by saying that the real issue is not whether the defendant hopes for leniency, but rather that there is enough basis to think the plea is supported on the facts of the case.

Judge Pickett stated that in his opinion the insertion in the rule of the requirement that the defendant he addressed personally and advised was sound. However, he was against using the language "without any assurance or promise of leniency," stating that this might cause insurmountable problems.

Mr. Fortas, addressing himself to Professor Remington's suggestion, thought that possibly there should be a requirement that the prosecutor make some statement of the facts to the judge so that on that basis the judge can satisfy himself that there is basis for the plea of guilty.

Judge Hoffman stated that in his view the possible consequences of the plea should not be emphasized by the judge.

Mr. Fortas summarized the proposals before the Committee, saying that he approved them in substance and principle, namely that (1) the court should address the defendant personally; (2) he should be informed of the consequences of his plea; and (3) that the judge should satisfy himself that there is a basis for the plea of guilty.

The second issue as listed by Mr. Fortas -- the possible consequences of the defendant's plea -- was discussed. Judges Pickett and Hoffman and Professor Glueck were against inserting such specific language. Mr. Fortas expressed his desire to have such specific language put in the rule and made a motion to that effect, asking the Reporter to develop a draft including this point for possible consideration on the following day. Judge Hoffman suggested amending Mr. Fortas' motion by confining it to the duty of the court to advise the defendant of the maximum term of imprisonment. Judge Walsh argued against the motion. Professor Moore, also, objected to having specific details in the rule and said this point could very well be expressed in an explanatory note. In his opinion, the less meticulous detail you get in a rule, the better.

Judge Walsh urged against making any change in the rule on the ground that no showing had been made of any accumulation of miscarriages of justice under it.

Professor Glueck then moved that Rule 11 incorporate the words "addressing the defendant personally and determining" after the word "without" in the fourth line of the draft. The motion was carried.

Mr. Fortas made and then withdrew a further motion that in principle and subject to submission of specific language, Rule 11 as submitted also be amended to require in appropriate form that the consequences of the possible maximum penalties flowing from the acceptance of the guilty plea also be stated to the defendant.

Subject to the adoption of Professor Glueck's motion, Judge Walsh moved to make no further change in the Rule. The Chairman's vote in favor of the motion broke the tie vote of 5 to 5 and it was carried.

With Judge Walsh's approval, Judge Hoffman amended the motion, in line with a suggestion made by Judge Smith, to the effect that the words "or nolo contendere" be added following the words "The court may refuse to accept a plea of guilty." Professor Glueck seconded the motion. The motion was carried.

Mr. Blue suggested the deletion of the proposed language in the first sentence of Rule 11 "and the government." Judge Smith put this in the form of a motion and without objection it was carried.

A motion was made and seconded that the proposed additional language in Rule 10 be rejected. The motion was carried.

In line with Professor Remington's earlier suggestion, Mr. Fortas recommended adding to the end of the second sentence of Rule 11 the following: "and has made such inquiry as may be satisfactory

to the court that there is a factual basis for the plea." It was agreed that action on the motion be deferred until consideration of Rule 32.

DISCOVERY

Mr. Ball began the discussion by stating the three areas which are most in need of discovery: (1) Right of the defendant to obtain prior to trial a copy of any statement made by him to a Government agent; (2) Right of the defendant to obtain prior to trial copies of any Government crime lab reports; and (3) that if a witness refuses to talk to the defendant and give him what information he knows, that upon motion at the discretion of the district judge, that witness can be required to come into court to be examined by defense counsel in the presence of Government counsel. Judge Smith pointed out that the proposed language of 15A would cover Mr. Ball's third area in need of discovery.

Judge Hoffman opposed proposed 15A stating that in the vast majority of cases it won't be needed. He wondered why this couldn't be handled in the pretrial.

Mr. Fortas warned that the proposed subsections (a) and (c) of Rule 15A as drafted may be construed to mean that the court would have to either authorize the taking of depositions or use one of the alternatives -- in other words, the court couldn't say "no." He

suggested changing the organization of 15A as follows: Upon the motion of the defendant, at any time after the filing of the indictment or information, upon a showing of cause, the court may order that the attorney for the Government furnish the defendant a summary of the probable testimony, or that the defendant be permitted to inspect a copy of the grand jury transcript, or that the deposition be taken in the event the witness has refused to disclose, or that the deposition be taken on written interrogatories. He explained that by using the language in this sequence, it would be clearer that the court could say "no" to any of these. He also indicated preference for the use of the words "facts within the possession of the person" in lieu of "probable testimony."

Judge Smith opposed the alternative procedure of the court directing a transcript of the testimony before the grand jury.

Judge Hoffman once again mentioned that the issues covered by the proposed Rule 15A could be handled in pretrial conference. Judge Smith pointed out that the original Criminal Rules Committee had proposed a pretrial rule for criminal cases and it was rejected by the Court. He stated also that most judges would be adverse to using a pretrial rule, even as they are in civil cases.

Mr. Ball moved that on motion of the defendant depositions be permitted to be taken of a witness who refuses to talk to the

defendant or defense counsel at the discretion of the court along the manner outlined in Section 15(a). Judge Pickett explained that the action on this motion would seem to determine whether the Committee wants to enter into any rule permitting additional discovery. The motion was seconded by Professor Glueck and carried.

Since the vote indicated the Committee's desire to add to the defendant's rights of discovery, the members resumed discussion of 15A. Mr. Fortas recommended that the taking of an oral deposition be limited to a situation where the witness fails to disclose the substance of his testimony, but that that limitation not apply to the alternative methods in subsection (c). In other words, the court would be empowered on motion of the defendant and upon showing of good cause to direct the attorney for the Government to furnish the defendant with a summary or to direct answers to written interrogatories. The court would also have power to take oral depositions, but only upon a showing that the witness has refused to disclose the substance of his testimony.

Judge Hoffman, who voted against Mr. Ball's motion, suggested that there be a provision that the court may direct a pretrial conference to deal with discovery motions.

Mr. Fortas' proposal was rephrased as follows:

"Upon motion of the defendant and upon a showing of good cause therefor, at any time after the filing of the indictment or information the court may order (1) that the attorney for the Government furnish the defendant a summary of the facts known to the Government which is in the possession of a witness, or (2) that a deposition on written interrogatories be taken of a witness, or (3) that relevant portions of the grand jury transcript as determined by the court upon examination of the transcript be furnished to the defendant, or (4) upon a showing that the witness has failed or refused to disclose the substance of relevant facts known to him, that a witness' deposition be taken."

Mr. Pirsig made a motion which would eliminate two of the provisions made in Mr. Fortas' proposal. His motion was that the Committee approve that "upon motion of any party, at any time after the filing of the indictment or information, the Court may (1) upon a showing of good cause therefor order that the deposition of a prospective witness be taken on written interrogatories, or (2) upon a showing that the witness has failed or refused to disclose the substance of his testimony to the moving party, order that an oral deposition may be taken under the procedures prescribed under Rule 15."

Mr. Fortas offered an amendment to the motion. He proposed to insert after the words "on written interrogatories" the phrase "or that the attorney for the Government furnish the defendant a summary of the facts in the Government's possession which are known to the witness." Mr. Fortas' amendment to the motion was not carried.

Judge Walsh suggested an amendment to the motion by recommending the insertion after the words "upon a showing of good cause," the words "and with due respect for the safety of the witness and the prompt and effective administration of justice." This amendment was not carried.

Judge Hoffman recommended that the motion be amended to read: "the Court may at its sole discretion." This language, too, was not carried.

Six members voting in favor of Professor Pirsig's motion, it was carried.

The issue of whether or not to exclude Government agents from being subject to depositions was raised by Mr. Ball. He recommended their exclusion. After a brief discussion, Professor Glueck moved that a sentence, appropriately drafted, be added excluding Government agents from being subject to depositions, written or oral.

Mr. Ball seconded the motion on principle. The question arose of how to define the word "agents." Judge Walsh suggested language as follows: "all Government officers whose sole information with respect to the case was obtained in the course of his official duties." The motion was carried.

Mr. Fortas expressed his reason for voting negatively by stating that whatever discovery rights are given to the defendant, in cases where the officer is a participant in the act, should be available as against him.

By adopting Professor Glueck's motion, the Committee approved the idea of attempting to draft an exception which would forbid getting into Government investigative files by deposition or interrogatories, but which would permit such procedures to get at the situation where the agent was an eye witness to or a participant in the alleged criminal transaction.

Judge Hoffman again stressed putting these discovery rights within the framework of the pretrial conference in order to reduce the burden of motions. The Reporter agreed to draft language overnight for consideration the following day.

RULE 14A(b), Notice of alibi

After a very brief discussion, Judge Smith moved to approve in principle the Reporter's draft of section (b), Notice of alibi (and to reject the alternative section (b)), but that he attempt to redraft it and set it up so that the Government may request. If Government does not request, defendant may serve notice of alibi to force the Government to tie down time and place. The motion was seconded and carried.

Adjourned 10/30/61 at 5:00 p.m.
Reconvened 10/31/61 at 9:30 a.m.

PROPOSED RULE 17A

This was the subject of a long discussion in which the members attempted to ascertain whether or not pretrial procedure should be covered by a rule and whether the discovery process should be consolidated with the pretrial conference as suggested by Judge Hoffman.

Professor Pirsig made a statement to the effect that the two processes should be handled separately. He said to combine the two would introduce a great deal of opposition, confusion and misuse of the pretrial conference.

Judge McBride also predicted difficulty in the blending of the two procedures, especially, in the metropolitan areas. He said the merging of the two functions might well require two pretrial conferences.

Mr. Fortas, on the other hand, was inclined to believe that the combination wouldn't be materially more burdensome than the discovery procedure without pretrial. He stated "this may be a good way to break fresh ground" and elaborated by stating that lawyers sometimes use the discovery process too lavishly on the civil side and assimilating it with the pretrial conference may be a deterrent to lawyers.

Judge Walsh, in spite of being an advocate of pretrial, spoke against the proposal. He said he would be for this proposal wholeheartedly if the judge who presided over the pretrial would also have the case for trial.

After much further discussion, Judge Hoffman moved that the Reporter be requested to endeavor to incorporate under Rule 17A or any alternative the general principles which are now set forth under Rules 14A, 15A and 16(b)(1) & (2) and that he submit a proposed redraft of Rule 17A and that the members be requested to comment in writing. The motion was seconded by Professor Glueck and carried.

RULE 15

A discussion was had in the endeavor to determine whether the question of who pays the cost of depositions should be in the rule

or in the statute. Judge Smith offered to have his Committee on the Administration of the Criminal Law consider this and perhaps recommend that the statute be repealed thereby leaving this issue in the rule only. Mr. Gasque expressed his opinion that the cost issue should be kept in the rule. Professor Moore suggested to Judge Smith that before any provisions were taken out of the statute by the Criminal Law Committee, it may be well to consult with the Civil Rules Committee.

Judge Hoffman reiterated his views set out in his memorandum commenting on the Reporter's proposals, namely, that the rule should apply also to a petitioner in any post-conviction proceeding. It was pointed out that such proceedings were presently regarded as civil, not criminal.

Professor Glueck made a motion that this issue should be turned over to the Committee on the Administration of the Criminal Law for study. The motion was seconded and carried.

The Reporter stated he would submit a redraft of Rule 15 in an attempt to clarify the expense provisions in (a), (c) and (d) in line with what had been discussed.

The Committee voted to eliminate proposed subsection (g) and to approve deleting the words "of a defendant" in subsection (a).

RULE 46

Following a brief discussion of the Reporter's draft of subsection (h), Mr. Fortas moved to adopt it suggesting the use of the ten-day provision in lieu of twenty. Professor Glueck seconded the motion. Judge Smith questioned the advisability of the last sentence in subdivision (h), stating that not only the bail issue should be presented here, but also any other reason for continued detention. Several of the members discussed Judge Smith's point after which Professor Barrett proposed the following new language for the last sentence: "As to each defendant so listed the attorney for the Government shall make a statement of the reasons, if any, including the amount of the bail, why the defendant is still held in custody." Mr. Fortas approved the amendment to his motion. The motion was put to a vote and carried.

RULE 46(c) and (d)

A discussion of the Reporter's drafts on subsections (c) and (d) brought consideration of the following issues: (1) whether to make any change in the considerations listed in (c) to be taken into account when fixing amount; (2) whether to accept the reporter's proposal in (d) about accepting cash in an amount equal to or less than the face amount of the bail; and (3) whether the proposal in (d) to authorize the release of the defendant without security upon his agreement to comply with conditions should be accepted.

Judge Smith spoke regarding the third point and suggested adding language authorizing the release of the defendant upon his own recognizance.

Mr. Fortas recommended the insertion of the policy favoring the release of defendants on their own recognizance in (d) unless there is some reason for fixing bail, and suggested deleting the reference to the policy favoring release of defendants pending trial in (c). In this way, the release of the defendant upon his own recognizance would be a primary choice instead of a secondary one.

Following discussion the Committee voted to approve the Reporter's amendments to section (d) with two changes:

(1) Page 27, line 4, after the word "security," substitute the following for the remainder of the sentence: "upon such conditions as may be prescribed to insure his presence."

(2) Replace the words in lines 8 and 9, p. 27 "in 18 U.S.C. §3146" with the words "by law." This was suggested by Professor Glueck.

In the discussion of section (d), attention was given to the revised Appearance Bond Form 17 and the problem arising from a condition in the form restricting the travel of a bonded defendant out of the jurisdiction without court permission. This problem was originally raised by Mr. Michael Keller, Clerk of the United States District Court for the District of New Jersey, in his letter to the Administragive Office of April 25, 1960 which was subsequently referred to the Committee. It was agreed that the

Reporter would make a study of this problem and report back to the Committee. Judge Smith said he would ask Mr. Keller to write further on this directly to Professor Barrett.

Judge Hoffman moved the adoption of the second alternative proposed in (a)(2). The motion was seconded and carried.

Professor Pirsig suggested an amendment to the proposed new language in (c), i.e., "and the policy against unnecessary detention of defendants pending trial." Professor Glueck moved that this amendment be adopted. The motion was carried.

RULE 29

Following some deliberation on whether or not to permit reservation of the decision on the motion, Judge Hoffman moved to retain the deleted first sentence of the old subsection (b) and to add it to the end of subsection (a). Mr. Fortas seconded the motion and it was carried.

Consideration was given to the Reporter's proposed language for a new subsection (b). At Mr. Fortas' suggestion, it was agreed to delete the last portion of the first sentence, namely, "and may be granted if required in the interest of justice."

The five-day provision in (b) was the next issue raised. Professor Moore stated that the comparable civil rule provided for 10 days and suggested it would be helpful to have the same time limit here.

Judge Smith suggested deferring consideration of the time limit until the Committee decides what provision should be made in Rules 33, 34 and 37.

Professor Pirsig raised a question in connection with the time limit in view of the Committee action to restore the first sentence of old subsection (b), stating that this might now be a renewed motion, rather than a new motion for acquittal. It was agreed to add the words "or renewed" after the word "may" in the third line of proposed (b).

Judge Hoffman moved to approve the Reporter's draft of subsection (b) subject to the change with respect to the number of days and the suggestions of Mr. Fortas and Professor Pirsig. The motion was carried.

RULE 33

The Committee voted to recast the first two sentences to read: "The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury, the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment."

There was some discussion as to the proposal to eliminate the two-year limit on the filing of a motion for a new trial based on the ground of newly discovered evidence. Judge Smith stated that he agreed with Judge Hoffman on this point that changing this language would be an open invitation to the filing of frivolous motions by prisoners serving long terms of imprisonment. Mr. Ball was inclined to favor a change, stating that two years is too long a period. Judge Walsh moved not to change the two-year language, and the motion was carried.

Consideration of the 5-day time limit in the last sentence was postponed.

RULE 34

The Committee voted to adopt the Reporter's revised proposal adding the words "of a defendant" after the words "on motion" in the first sentence and leaving open the time limits for the present.

Adjourned 10/31/61 at 5:00 p.m.
Reconvened 11/1/61 at 9:30 a.m.

RULE 37

Judge Smith distributed to the members a copy of his proposal for Rule 37. After discussion of Judge Smith's proposal and that of the Reporter, it was agreed that the two were reconcilable on matter of

language and that the Reporter would redraft the second sentence of 37(a)(2) to say, in effect -- "If a motion for a new trial or in arrest of judgment has been made within the time periods prescribed in Rules 33 and 34 and within the 10-day period after entry of the judgment, an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion."

Mr. Blue made the motion that the provision for the 5-day time period with the possibility of a 5-day extension in Rules 33, 34 and 29 should remain as is. Judge Hoffman seconded the motion and it was carried.

Mr. Ball suggested that the Reporter consider whether it should be made clear that the motions under Rules 29, 33 and 34 should be in writing or should be made orally. Judges Hoffman and Smith favored written motions.

The Reporter agreed that his proposed language relating to in forma pauperis appeals does not quite solve the problems involved here and agreed with the suggestion of Judge Walsh that he correspond with Mr. Robert Erdahl, Chief of the Appellate Section in the Criminal Division of the Department of Justice, soliciting his recommendations.

The Reporter explained that the sentence relating to the excusable neglect provision was identical, with one exception, to that in the Civil Rules, and provides for the extension by the District Court.

Judge Smith, in his draft, provided that the extension should be by the Court of Appeals. Judge Hoffman agreed. Judge Smith's draft also placed a limitation on the time in which the application should be made.

Mr. Fortas suggested the following language which would do away with a separate sentence for in forma pauperis appeals and would eliminate the 30 days limitation: "Upon a showing of excusable neglect or in the case of a petition for leave to appeal in forma pauperis, the court or a court of appeals may extend the time for appeal herein prescribed."

After discussion on whether or not the appellate court should have power to extend the time, it was agreed that this should be left for the Appellate Rules Committee.

Professor Glueck then moved that the language of the Reporter be left as is to imply that the district court alone shall have the right to extend the time of appeal. The motion was carried.

Judge Smith stressed that some requirement should be inserted making it clear that the court can act on the face of a verified motion. The Reporter agreed to look into this.

The Committee voted to approve the sentence dealing with a notice of appeal filed prior to entry of judgment.

The Committee voted to approve the last sentence proposed for the subdivision. The Reporter was directed to look into the question

whether Rule 55 should be amended to include the requirement of a criminal docket and the requirement that it show the actual date of entry of judgments, etc. Cf. Civil Rule 79.

RULE 45

On motion by Professor Glueck, the Committee voted to adopt the Reporter's proposal in 45(a) subject to a change suggested by Mr. Blue to substitute the words "these rules" for the words "this rule and in rule (56)."

A second motion was made by Professor Glueck to approve the Reporter's proposal in 45(b) subject to the following minor change: in the fourth line from the end of (b) insert after the word "Rules" the figure "29." The motion was carried.

The Reporter was directed to inquire why the Civil Rules Committee substituted the word "request" for "application" in subsection (b).

The Committee voted in favor of the adoption of the language in subdivision (c).

RULE 41

Professor Glueck moved that no change be made in subsection (c), but that in a note attention be called to the fact that under subsection (g) special statutes prevail. The motion was carried.

The Reporter, assuming that the Committee was not to go into the question of the grounds for issuance of a search warrant, suggested no change for subsection (b). However, after some discussion, the Reporter was directed to write a memorandum regarding possible problems involved in this subsection.

After some discussion, Judge Hoffman moved that the amendment to subsection (e) be approved in principle with the proviso that it should be made clear it does not apply to the non-defendant. Motion carried.

Professor Pirsig led a discussion on the propriety of the preference expressed for a pretrial motion in the last sentence of subsection (e). Mr. Blue's opinion was that the language was satisfactory as written. Judge Hoffman agreed with Mr. Blue and moved to leave the last sentence as written. The motion was adopted. It was also voted that no pretrial suppression procedure should be provided for claims regarding coerced confessions.

RULE 32

At the suggestion of Judge Smith and Mr. Fortas, the proposed last sentence of 32(a) was changed to read: "The defendant may be heard personally or by counsel." Subject to the change, Judge Hoffman moved to adopt the amendments to section (a). The motion was carried.

RULE 32(c)

Three major problems arise out of Rule 32(c):

(1) Whether defense counsel or the defendant should have access as a matter of right to the presentence report.

(2) Whether the report may be prepared prior to the finding of plea or verdict of guilt is entered.

(3) Whether judges should be permitted to see the presentence report before a verdict, finding, or plea of guilt is entered.

Mr. Louis Sharp, Chief of the Probation Division of the Administrative Office, was invited to attend and to express his views on Rule 32. The Reporter asked Mr. Sharp if he was cognizant of any problems arising out of 32(c)(1). Mr. Sharp replied that the reports from the various courts indicate no major problems in connection with this rule. Further, that it is a procedure which defense attorneys are very much in favor of. He suggested leaving (c)(1) as is.

It was voted after further discussion of Rule 32(c)(1) that no amendment was needed with relation to preparation of reports prior to finding of guilt.

Attention was then turned to the proposed language in (c)(2). Mr. Gasque reported Mr. Olney's opinion on this proposal stating that Mr. Olney understood what Professor Barrett's language was attempting to accomplish in this proposal. However, as a practical matter, judges

do exercise discretion as to whether or not to disclose the contents of the report and this procedure should be continued without changing the rule.

Mr. Sharp commented briefly on Rule 32(c)(2) stating that he was in favor of leaving the Rule unchanged.

Judge Walsh spoke against the proposal to force disclosure of presentence reports, stating in effect that the impetus behind the movement in favor of disclosure of presentence reports flows from the fact that it would turn sentencing into an adversary procedure and this procedure is the one procedure which lawyers know and trust. However, sentencing, probation and parole have traditionally not been adversary proceedings and it has always been the view that the individual required to make a decision as to these matters should be entitled to obtain the information which he needs to make a sound decision from whatever sources he desires and in whatever way he desires. In Judge Walsh's view, it is far better to continue the present practice of vesting discretion as to disclosure in the judge who is the individual who ultimately makes the decision on the basis of the information which he has received. While it has been suggested that disclosure of the presentence report to the defendant or his counsel would provide a means for correcting any error which may be found in the report, there is nothing to prevent

defense counsel from making his own presentence report to the sentencing judge. Counsel has the same avenues of information open to him as has the probation officer and has every reason to expect the sentencing judge to give full consideration to any report which counsel chooses to submit.

Mr. Blue stated that he did not know what effect an amendment of this kind would have on the effectiveness of a system which has been working very well. He further remarked that an amendment of this type could destroy the present effective system. Mr. Blue asked to be excused from the meeting, but requested that his vote be recognized as being definitely against the proposal. The Chairman consented to have Mr. Blue's vote recognized.

Judge Hoffman stated that to disclose the presentence reports to defense counsel or the defendant as a matter of right tends to turn the sentencing process into a trial of the specific facts set forth in the report. Inevitably, this means that a great deal of time and effort will be devoted to proving the accuracy or lack of accuracy of many unimportant details in the report. Judge Hoffman, as a matter of policy, has often disclosed the gist of certain portions of the presentence report to defendants. He believes such a procedure, which is permitted under the present rule, is most desirable. He suggested the following language to spell out the fact that disclosure of the presentence report lies at the discretion of the judge: "Before imposing the sentence, the court may,

in its discretion, furnish factual information contained within the report, or any part thereof, to the defendant or his counsel, but at no time shall confidential information or sources thereof be disclosed."

Mr. Fortas suggested the following language: "Upon request on behalf of a defendant, the court before imposing sentence shall, in such manner as it shall deem appropriate, advise the defendant or his counsel of the factual substance of the investigation report and shall afford to the defendant or his counsel an opportunity to comment thereon."

Professor Remington pointed out that there is a difference between good practice in sentencing and what should be in the rule regarding the procedure to be followed at sentencing. He senses a trend in the direction of disclosure of more and more items to the defendant. Therefore, Professor Remington feels that if the Rules Committee does not spell out the fact that the judge has discretion as to whether he will disclose the presentence report to the defendant, appellate courts may authorize a greater measure of disclosure than the Committee would regard as sound.

Mr. Ball pointed out that the whole purpose of the presentence report is to provide a sound factual basis for the sentencing action which is to be taken by the judge. Good probation reports necessarily

include important matters which may consist of hearsay, rumors, or reputation. If the judge is to have a sound basis for his action, there must be some way to insure that the facts in the report are correct. Disclosure of the essential facts in the report to defense counsel or the defendant is the only way to insure accuracy.

Judge Smith made the motion that subdivision (2) of Rule 32(c) not be amended. There was a tie vote -- 3 in favor and 3 opposed. It was the Chairman's decision to accept the tie vote and leave the matter for discussion at a later meeting.

Following a brief expression of views by several of the members on subsection (f) of Rule 32, Judge Hoffman, who opposed the requirement of a written notice, moved the adoption of the following language in lieu of the Reporter's proposal: "The court shall not revoke probation except after a hearing at which the defendant shall be present and advised of the grounds on which such action is proposed." The motion was seconded by Judge Walsh and carried.

Due to the limitation of time at the present meeting to give full consideration to Rules 5 and 44, it was the Reporter's suggestion that the materials prepared on these Rules be mailed to the members and that each member comment in writing thereon, and that discussion be deferred until the next meeting.

The meeting adjourned subject to the call of the Chairman.

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