MINUTES OF THE OCTOBER 1963 MEETING OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

The meeting of the Advisory Committee on Criminal Rules convened in the Supreme Court Building on October 14, 1963, at 9:30 a.m. The following, constituting the full membership of the Committee, were present during the session:

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

Others attending were Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure, James Wm. Moore, a member of the standing Committee, Mr. Harold Koffsky and Mr. Howard Willens of the Department of Justice, and Joseph F. Spaniol, Jr., of the Administrative Office.

Professor Barrett stated that he hoped, as a result of this meeting and another meeting in January, to have one set of proposed amendments ready for submission to the standing Committee and the Judicial Conference, and another set of proposals ready for publication in a preliminary draft for circulation to the bench and bar.

ITEM A. Rules Recommended for Approval Without Change

Rule 4. Warrant or Summons Upon Complaint

The Committee approved the proposed amendment without change.

Judge McBride suggested that the Reporter consider including a statement in Rule 3 to the effect that when an officer other than a commissioner issues a warrant or a complaint he shall follow the procedure prescribed for commissioners in Rule 4. The Reporter was requested to take this suggestion into consideration.

Rule 5. Proceedings Before the Commissioner

Mr. Fortas felt that some change was needed in Rule 5(b) to make it clear that the defendant has a right to be informed of any affidavits filed with the commissioner in support of the complaint. After some discussion Mr. Blue moved that wording be included in Rule 5(b) to conform to the amendment proposed to Rule 4, and to require that the defendant be informed of any affidavits filed with the complaint. This motion was carried, and the Reporter was requested to draft appropriate language.

Rule 6. The Grand Jury

Mr. Ball stated that in his opinion more discovery should be permitted of grand jury transcripts. Mr. Fortas agreed with this view. Professor Barrett stated that the Committee had previously decided to make no new recommendation in this area. Mr. Ball felt that there should be some standard in the rule which would promote uniformity in the practices of the circuits with respect to disclosure of grand jury transcripts. Professor Barrett agreed to make a further study of this question and report to the Committee at the January meeting.

Judge McBride felt that persons who have been investigated by grand juries should be informed of the investigation even when the attempt for indictment was turned down by the grand jury. Mr. Blue felt that the rule was drafted to protect the grand jury and also to protect persons against whom inquiries have been made. Judge McBride moved that the Reporter draft language to embody his proposal, as stated above, but there was no second to the motion.

Rule 6 was approved subject to further recommendations by the Reporter on the disclosure of grand jury transcripts.

Rule 23. Trial by Jury or by the Court

The Committee approved the proposed amendment to Rule 23(c) without change.

Rule 28. Expert Witnesses and Interpreters

The Committee discussed various suggestions for broadening the rule to include interpreters for deaf persons, and also interpreters to aid communication between parties and counsel. The Committee agreed that the general language of the rule should be retained as drafted, but the Reporter was instructed to expand the Committee Note to indicate the specific situations which the rule attempts to cover.

Rule 45. Time

The proposed amendment of Rule 45 was approved by the Committee without change.

Rule 56. Courts and Clerks

The proposed amendment of Rule 56 was approved by the Committee without change.

[Consideration of Rules 29, 33, 34, 35 and 54 was deferred so that the Reporter and the Committee could consider the comments and suggestions of the Department of Justice which were received at the beginning of the meeting.]

ITEM B. Rules Recommended for Approval with Minor Changes.

Rule 17. Subpoena

The Reporter recommended deleting the proposed amendment in the Preliminary Draft, and adding a sentence at the end of subdivision (d) which duplicates the statutory language: "Fees and mileage need not be tended to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof." On motion of Mr. Fortas, this substitution was approved by the Committee.

Rule 18. District and Division
Rule 19. Transfer Within the District

The Reporter stated that there have been some objections to the elimination of division venue, mostly from defense lawyers in Texas. He further stated that as a result of comments received, he recommended changing the proposed language to read "The Court shall fix the place of arraignment, plea, trial, and the proceedings within the district with due regard to the basic interests of the defendant and the convenience of the defendant and his witnesses."

The Committee discussed the question whether the interests and convenience of the government and its witnesses should be considered in setting the place of proceedings. Professor Glueck moved that the language read "...with due regard to the interests and convenience of the parties and their witnesses." Judge Maris favored the Reporter's proposed draft, as set out above. He felt that the rule should be written in terms of the

defendant's rights, and that the court could consider the interests of the government in making its decision. He suggested that if a change were made to include the government's witnesses in the judge's consideration, that the word "his" before "witnesses" be changed to "the".

Professor Glueck, after further discussion, amended his motion so that his proposed language would read "...with due regard to fairness of administration and the interests of justice." This motion was lost.

Professor Pirsig felt that the provision should be split into two sentences. The first would read: "The court shall fix the place of arraignment, plea, trial, and other proceedings within the district." The second sentence would state the considerations which should be made by the judges. He felt that the judge should consider the place where the crime was committed as an important factor in setting the place of trial, and that the preliminary proceedings could be held at any place within the district. In addition to considering the place where the crime was committed, Professor Pirsig felt that the judge should consider the convenience of the defendant, and the convenience of the prosecution and defense witnesses.

Judge Hoffman agreed with Mr. Fortas that the power of the court to change the place of trial should be made clear. Professor Barrett stated that he intended to change the Committee Note to indicate this power more clearly.

At Judge McBride's suggestion, Professor Barrett agreed that "arraignment" could be deleted from the proposed language, as the time of pleading is the important step, and arraignment and plea take place at the same time.

After further discussion, Judge Walsh moved that the proposal for amendment of Rule 18 be withdrawn, and that Rule 19 be reinstated. He felt that the Texas problem argued for the retention of division venue, and that the one-sided standard which the rule proposed was not a solution of the problem. Mr. Fortas seconded the motion. Professor Moore spoke in opposition to Judge Walsh's motion. He felt that a rule which set a standard for fixing the place of trial should be based on some other ground than on geographical division lines. Judge Maris agreed, and stated that the Judicial Conference has consistently held that it is best to get away from the division system and divisional procedure whenever possible in the interests of better administration of justice. After further discussion, Judge Walsh's motion was lost.

Mr. McBride moved that the provision in Rule 18 read as follows: "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in the district in which the offense was committed. The court shall fix the place of trial at that place within the district which is the place of holding court nearest to the place where the offense was committed." Judge Maris suggested amending Judge McBride's motion to read in part: "... the court shall fix the place of trial at that place within the district at which regular sessions of the court are held which is nearest to the place where the offense was committed." He would permit the arraignment and plea to be held at any place within the district, and would also include a provision that the defendant may request trial at some other place within the district. Judge McBride was in agreement with this restatement of his motion, and added that some provision for the defendant's consent should be included in the rule.

Judge Pickett stated that he felt it was the consensus of the Committee that something along this line be included in Rule 18, and that the precise language could be worked out and presented at a later time. Professor Barrett stated that the Committee might want to give final consideration to this in connection with Rule 21.

Rule 30. Instructions

Judge Hoffman moved that the Reporter's suggestion, as set out on page B-5 of the materials, be substituted for the proposal in the Preliminary Draft. This would change the last sentence of the rule to read as follows: "Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury." The motion was carried, and the rule was adopted as amended.

Judge Hoffman further stated that he felt a corresponding change should be made in the civil rule on instructions, and Professor Barrett was requested to write to Professor Kaplan, the Civil Rules Reporter, on this matter.

Rule 49. Service and Filing of Papers

After some discussion of the problem of serving papers in cases involving multiple defendants, Professor Barrett stated that he would favor adhering to the proposal contained in the Preliminary Draft, and leave it to the parties to handle with good sense cases involving multiple defendants. The Committee was in agreement with this view, and the proposed amendment contained in the Preliminary Draft was approved without change.

ITEM C. Amendments Recommended for Substantial Reconsideration

Rule 5. Proceedings Before the Commissioner
Rule 44. Assignment of Counsel

Professor Barrett asked whether the Committee would favor including a statement in the next Preliminary Draft explaining the fact that no recommendation has been made to meet the "Mallory" problem. Judge Maris opposed a statement of this type. He stated that the Committee's recommendations to the Judicial Conference on this subject would be reported and made public, and this would be sufficient in advising the bench and bar of the Committee's present position.

Mr. Fortas felt that the Committee should defer consideration of Rules 5(a) and 44 until the pending legislation in this area has been either passed or rejected by Congress. The Committee was in agreement with this suggestion, and a motion to this effect by Judge Hoffman was carried.

Rule 11. Pleas

Professor Barrett stated that there is unanimous feeling from the comments received on the Preliminary Draft that the judge need not satisfy himself that a person pleading nolo contendere actually committed the crime charged. This would destroy the usefulness of the plea. The Committee agreed that this requirement should be deleted from the proposal, but felt that the judge should make an inquiry on nolo contendere pleas to determine that the defendant understands the nature of the charge and has made the plea voluntarily.

The Reporter questioned whether the Committee wanted to retain the inquiry as to the commission of the crime in the case of guilty pleas. He stated that the Department of Justice opposed such a requirement, feeling that it may lead to proceedings and partial presentation of the case in order to satisfy the court on this point. Judge Smith favored Alternative B of the Reporter's proposals, which required this inquiry only in the case of defendants not represented by counsel. Judge Hoffman felt that the inquiry should be made in all cases, but that it should be made before sentencing rather than before the trial of the case. Judge Smith moved that Alternative B, on page C-11, be substituted for the present draft of Rule 11, and he favored the provision in B which included only defendants not represented by counsel. Judge Hoffman proposed an amendment which would require the court to make the inquiry before sentence was imposed, rather than before the plea of guilty is accepted.

At the suggestion of Mr. Blue, the Committee agreed to strike "If the defendant is not represented by counsel," from the second sentence of Alternative B. After further discussion, the Committee voted on Judge Smith's motion, which was amended to propose language as follows for adoption as the second sentence of Alternative B: "Notwithstanding the acceptance of a plea of guilty, the court shall not enter a judgment upon such plea without making such inquiry as may satisfy it that the defendant in fact committed the crime charged." The motion was carried, and Alternative B, as amended, was adopted in lieu of the proposed amendment appearing in the Preliminary Draft.

Rule 21. Transfer from the District for Trial

Consideration of this rule was deferred until further consideration of Rules 18 and 19.

Rule 24. Trial Jurors

The Committee agreed to delete the proposed amendment to 24(b) in the light of the unanimous disapproval in the comments from bench and bar.

After some discussion of the number of alternate jurors which should be permitted, the Committee voted, on motion of Judge Hoffman, to reaffirm its decision to provide for 6 alternate jurors, and approved this provision of subdivision (c) without change.

On motion of Mr. Fortas, the Committee agreed to make no recommendation on the question whether a juror may be replaced after the commencement of the jury's deliberations.

After some discussion of the added language "or are found to be" in 24(c), the Committee voted to approve the language as drafted.

Rule 32. Sentence and Judgment

On motion of Professor Glueck, the Committee voted to adopt the Reporter's recommended language for the last sentence of 32(a), proposed in accordance with a suggestion made by Judge Aldrich: "Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment."

32(c)(2). Disclosure of Presentence Report

The Committee discussed the draft of this subdivision and the comments received in opposition to compulsory disclosure of a summary of the presentence report. Judge Hoffman felt that disclosure of the prior criminal record of the defendant should be made, but that disclosure of other information in the report should be up to the discretion of the judge in each case.

Mr. Ball spoke in favor of the proposal as drafted. He did not feel that the sources of information would dry up if disclosure is permitted. Professor Pirsig agreed with this view, and stated that there is solid support in Minnesota for disclosure of the report. Some members of the Committee felt that the defendant has a right to know the information which the judge is considering in deciding on a sentence, so that he has an opportunity to correct any erroneous information. Mr. Fortas agreed with Judge McBride that the amendment contained in the Preliminary Draft represented a very desirable increase in the level of fairness to the defendant, and an upgrade in standards. He felt that requiring disclosure to the defendant or his counsel, and giving them an opportunity to comment on the report was a fundamental step in the Committee's endeavor.

Judge Maris stated that many probation officers sincerely feel that their efficiency and the sources of their information will be hampered by this amendment, but he felt that this was not supported by the fact that in some states and some districts where the reports are disclosed, this has not been found to be true.

After further discussion, Professor Glueck moved the adoption of Alternative 1, on page C-24. He felt that this draft met many objections to the original draft in that it provided that sources of information remain confidential, it eliminated the question as to the content and sufficiency of the "summary" by providing instead that the "essential facts" be communicated, and it eliminated the possibility of a hearing on the presentence report.

Mr. Blue expressed his disapproval of any change of the proposed amendment to 32(c)(2), but stated that if Alternative 1 was adopted by the Committee, the last sentence, referring to possible formal hearings by the court on material contained in the presentence report, be deleted. Professor Glueck accepted this amendment to his motion, and the Committee voted to adopt Alternative 1, as thus amended, as the amendment to Rule 32(c)(2).

32(f). Revocation of Probation

The Committee voted to accept the Reporter's recommendation of an additional sentence to this subdivision as follows: "The defendant may be admitted to bail pending such hearing."

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

ITEM D. Discovery

Rule 5(c).

Professor Barrett stated that some of the comments received favored enlarging the provisions of Rule 5(c) to require a preliminary hearing in every case, even though an indictment has been obtained, and that there was also a question whether a specific time period should be fixed within which the preliminary hearing should be held. The Reporter stated that his tentative conclusion was that these new requirements would not be necessary in every case.

Mr. Fortas felt that some change should be made in Rule 5(c) to insure that an effective inquiry is made at the time of the commissioner's hearing as to probable cause, and also that at that time a list of the witnesses against the defendant should be given him, to the extent that they are known by the prosecuting attorney. Mr. McBride felt that the commissioner should be satisfied that the evidence presented at the hearing, if true, would make a prima facie case against the defendant.

Judge Maris stated that he felt one of the purposes of requiring a case to be brought before the commissioner promptly is to bring the case before an officer of the court. The actual hearing as to probable cause may be continued until the United States attorney can get his evidence and his witnesses assembled.

Mr. Fortas moved that the fifth sentence of Rule 5(c) be amended to read as follows: "If the commissioner concludes that the evidence shows prima facie that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him." Mr. Ball felt that the rule should provide a 5-day time limit within which the defendant must be provided a hearing.

Judge Hoffman felt that when Rule 44 is amended to require representation of indigent defendants, this problem of the commissioner's hearing will largely be taken care of, since the defendant will be represented by counsel at this time. Mr. Walsh was not in favor of the proposed amendment, as he felt that making the hearing procedure more elaborate would cause delays in the procedure, and that the present procedure was not causing any injustice.

After further discussion, Mr. Fortas' motion to amend Rule 5(c) was not carried.

Mr. Ball moved that the fourth sentence of 5(c) be amended to read "...the commissioner shall hear the evidence within 5 days unless, for good cause, the commissioner extends the time for hearing." Judge Smith favored providing 10 days as the time limit. Judge Walsh felt that any time period would lead to further delays in the proceedings. The motion was not carried.

Mr. Fortas suggested that a new sentence be inserted after the present fifth sentence of 5(c) to read as follows: "If a defendant has been arrested he shall not be indicted nor shall an information be filed against him unless he has been held to answer or has waived preliminary examination pursuant to this rule." Mr. Ball favored this insertion. Judge Smith felt it would be a substantive change involving the jurisdiction of the grand jury, and should be dealt with by statute.

Professor Pirsig suggested that the Reporter give further thought to the question, and Mr. Blue moved that the motion of Mr. Fortas be tabled and the Reporter be requested to further study the problem. This motion was carried.

Rule 7. The Indictment and the Information

Professor Barrett stated that several of the comments received had expressed the view that district courts should be more liberal in granting motions for bills of particulars. He presented two alternative drafts of Rule 7(f), one of which provided an abstract standard for the courts, and one which attempted to give guidance to the courts in the standards they should apply in granting motions for bills of particulars. After some discussion, Judge Smith moved that the Committee adopt the first alternative expressing an abstract standard. The motion was carried. Judge Hoffman asked that the Reporter consider adding a statement in the Note to the effect that the request should be made reasonably in advance of the trial.

Rule 16. Discovery and Inspection

Professor Barrett raised some drafting problems which the comments brought up, set out on pages D-32 to D-35 of the materials. The Committee discussed these drafting problems briefly. Mr. Willens, of the Department of Justice, stated that the informal conclusions of the Department of Justice were that (1) the requirement of designation should remain, and (2) that the requirement of allowing discovery of all "relevant" items, whether or not the government intends to use them at the trial, is too broad, and only items which are intended to be used at the trial should be discoverable by the defendant.

Judge McBride felt that the defendant should not be confined to discovery of items intended to be used at trial, but that it is important to have access to items which the prosecution has decided not to use at the trial. Mr. Willens responded that in order to prevent surprise, it should only be necessary to afford the defense an opportunity to be adequately prepared to respond to the prosecution's case.

Judge Smith felt that the rule was too broad and created an ambiguity as to the application of the rule under the Jencks Act. After some further discussion, Judge Smith moved that the proposed amendments to Rule 16 be withdrawn. Judge Walsh seconded the motion. This motion was lost.

Judge Walsh then moved that the Reporter's new proposals for Rule 16 be tabled, and that the Committee make no further changes from those circulated to the public until further discussion at the January meeting of the Committee. This motion was carried.

Rule 17A (17.1). Pretrial Procedure

Professor Barrett stated that most commentators felt that this rule should deal with the question of the presence of the defendant at the pretrial conference. Most commentators felt that defendants should not be present, but could be adequately represented by counsel. There was some feeling expressed that a record be made of the pretrial conference. He also mentioned the Department of Justice proposal that the court "request" rather than "order" the parties to appear for the pretrial conference.

Mr. Ball felt that the compulsory language of the preliminary draft was preferable to a "request" to counsel. Judge Walsh moved that the Reporter's proposed redraft of Rule 17.1 on page D-65 be adopted, with "request" changed to "order" in the first sentence. This motion was carried.

After further discussion, Judge Walsh moved that a new sentence be added to Rule 17.1 as follows: "The court shall make an order reciting the actions taken at the conference." This motion was carried.

Rule 12A (12.1). Notice of Alibi

Professor Barrett asked the Committee whether it favored continuing to propose a notice of alibi provision, and if so, whether a general or more specific provision was favored. Judge McBride stated that he was in favor of retaining the proposal for a notice of alibi provision. He favored the Reporter's Alternative 2 draft, set out on page D-21, but felt that subdivision (f) should be deleted from Alternative 2. Judge Hoffman moved that the Committee approve in principle the retention of a notice of alibi provision in some form. This motion was carried.

Judge McBride and Mr. Ball felt that some provision should be made for the defendant to initiate the notice of alibi proceedings in some circumstances. Judge Hoffman felt that the rule should prevent the notice of alibi proceeding from conflicting in its time requirements with the date set for trial.

After some discussion, Judge Smith made the following motion: That Alternative 2 be adopted, and that the following points be made clear: (1) The proceeding should be initiated by the government essentially as outlined in alternative 2; (2) Consideration should be given to a procedure permitting the defendant to initiate the proceedings for an alibi defense; (3) The court should have discretion to issue a protective order preventing the disclosure of government witnesses for good cause shown; (4) The defendant should be permitted to initiate proceedings to obtain lists of government witnesses only in appropriate cases. This motion was carried.

After further discussion, it was the consensus of the Committee that subdivision (f) be deleted, and that the judge would treat the problem in the same way as any question of the admissibility of evidence.

Judge Walsh suggested that the Reporter consider the Department of Justice proposal that a similar provision be drafted with respect to the defense of insanity or mental incompetence, and that he draft a proposed rule to cover this procedure. The Committee approved this suggestion.

Rule 15. Depositions

Professor Barrett stated that some commentators expressed the view that the proposed amendment to Rule 15 may be used by prosecutors to arbitrarily use depositions in place of witnesses. He mentioned the suggestion of Dean Pye of Georgetown Law School that subdivision (a) be

amended to provide that the witness must appear unless he is dead, or too ill or infirm to appear, rather than permitting depositions when the witness is "unavailable".

After some discussion, Professor Barrett was requested to redraft the amendments to Rule 15 and to take into consideration the specificity of the notice to the defendant, the problem of willful failure of the government to insure the witnesses' availability, the question of requiring the filing of the deposition with the court whether or not it is actually used, and to consider a possible modification of the Jencks Act to require the government to give the defendant prior statements of the witness at the time his deposition is taken.

Rule 17. Subpoena

Professor Barrett stated that some comments raised the question of the admissibility of the defendant's affidavit under Rule 17(b) as to the testimony which he expects a witness to give. He stated that Judge Skelly Wright had suggested that the affidavit be made by the defendant's lawyer, thus making it inadmissable, unless the defendant was not represented by counsel. He felt that the problem of "equal protection" seemed insoluble. The indigent defendant must disclose the name and expected testimony of his prospective witnesses, while the defendant with sufficient funds can avoid disclosure of the witnesses he expects to use.

After some discussion, Judge Smith proposed that the rule provide that an indigent defendant may issue subpoenas to persons within a 100-mile radius of the district court without a showing that they are material to the defense, but that in order to subpoena a defense witness living beyond the 100-mile radius, a showing must be made that the nature of the testimony is material to the defense. Judge Hoffman approved this procedure, but added that the rule should provide that such motions can be acted upon ex parte by the court. The Reporter was requested to redraft Rule 17(b) in the light of the discussion.

ITEM E. New Proposals for Preliminary Consideration

Rule 8. Joinder of Offenses and of Defendants

Professor Barrett stated that after consideration of the problem of compulsory joinder of offenses, he had concluded that it would be best to leave Rule 8 as is. He offered a draft of a rule designed to permit compulsory joinder, and stated that this problem arises in part because in the federal system the indictment cannot be amended in any substantial way, and because the prosecution has no right to appeal in a criminal case.

Judge Smith stated that he favored leaving the rule as it is, with discretionary joinder. Professor Pirsig stated that Minnesota had recently adopted a rule on this subject providing that if a person has committed more than one offense he may be tried and punished for only one.

Judge McBride agreed with Professor Remington that the Committee should not permit two trials arising from the same offense. Judge Hoffman stated that some protection was afforded to defendants under Rules 13 and 48. Professor Barrett said that a dilemma exists because there are cases in which multiple prosecutions are beyond the reach of double jeopardy and would be appropriate. Under the present rule they are precluded, and his draft would attempt to permit the procedure in appropriate cases, and to prevent harassment of defendants in cases not appropriate for multiple prosecutions.

Professor Remington stated that the draft transfers the discretion which now exists in the Department of Justice to seek multiple prosecutions to the district court. He felt that the Department of Justice may want to express its views on this matter. Judge Smith moved that the Committee circulate a draft along the lines of that presented by the Reporter on page E-3. He felt it would be advantageous to have the comments of the bench and bar on this topic before coming to a final conclusion. Judge Hoffman suggested that the Reporter present his proposal to the Department of Justice for its consideration before January, and that the Committee reconsider the proposal in the light of their comments. The Committee voted to approve the principle of the proposal, and the Reporter was instructed to report back to the Committee at the January meeting.

The meeting was adjourned at 5:05 on October 15.
The meeting reconvened at 9:00 on October 16.

ITEM F. Proposals of Appellate Rules Committee

[Appellate] Rule 3. Appeal as of Right -- How Taken

The Committee expressed its approval of this rule as drafted.

[Appellate] Rule 4(d). Appeals in Criminal Cases.

Judge McBride felt that the fifth sentence of (d) needed clarification to insure that the motion for new trial extends the time for appeal from the judgment. Judge Maris suggested amending the sentence to read as follows: "A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made within 10 days after entry of judgment." The Committee

voted to recommend a possible modification along these lines.

The Committee next discussed the last paragraph of 4(d), which would require the judge to advise the defendant of his right to appeal and of the procedure for appealing in forma pauperis. Judge Hoffman opposed the provisions of the paragraph, feeling that it would lead to § 2255 proceedings. Professor Barrett stated that this provision was designed to protect a defendant whose trial lawyer considers his job done at the conclusion of the trial, to insure that the defendant may be informed of the proper steps to take in order to appeal. Judge Hoffman suggested that the Appellate Committee prepare a form which the clerk could provide for defendants giving them the information needed in order to appeal.

Judge Maris felt that this paragraph would more appropriately belong as part of Rule 32. Professor Barrett agreed, and directed the attention of the Committee to a proposed redrafting of Rule 32(a) set out on page F-4. Judge Maris felt that the draft should provide that the court advise the defendant of his right to appeal in forma pauperis rather than of the procedure for such an appeal. After some discussion, Mr. Fortas moved that the Reporter's draft read in part as follows:

> "(2) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant."

This motion was carried, and the Reporter was requested to advise the Appellate Committee of this action and request that the fourth paragraph of their Rule 4(d) be deleted.

The Committee next discussed the last sentence of the Reporter's proposed 32(a)(2). Mr. Fortas felt that "indicates a desire" in this rule and in Appellate Rule 24, specifically dealing with appeals in forma pauperis, might cause trouble in practice. On motion of Judge Smith, the Committee voted to delete the last sentence from the draft of 32(a)(2), and the Reporter was requested to inform the Appellate Committee of the view that "indicates a desire" should be clarified in Rule 24. The Committee also felt that the first sentence of Rule 24 should be amended to speak of the "right" to seek leave to appeal in forma pauperis. Another suggestion was that the title of the rule be changed by substituting "in Criminal Cases" for "from Judgments of Conviction".

The Committee discussed the problem of appointing counsel to assist the defendant in perfecting an appeal, and felt that the Appellate Committee should consider giving the court of appeal the power to appoint different attorneys or additional attorneys for proceedings in the court of appeals. Professor Barrett was directed to inform the Appellate Committee that it was the sense of the Criminal Committee that the trial court should appoint counsel for the purpose of perfecting the appeal, and the appellate court should have the right to either retain the attorney appointed by the district court, ~~or to substitute~~ or appoint additional counsel in the case.

Appellate Rule 4(d) was approved by the Committee, subject to the above recommendations.

[Appellate] Rule 9. Bail

This rule was approved by the Committee as drafted.

[Appellate] Rule 11. Transmission of the Record on Appeal
[Appellate] Rule 12. Docketing of the Appeal; Filing of the Record

Professor Barrett stated that these two rules cover material presently contained in Criminal Rules 37 and 39, but that the Appellate Committee has been given primary jurisdiction in formulating rules in this area. He opposed the suggestion of duplicating provisions of the Appellate Rules in the body of the Criminal Rules. Judge Maris stated that the question of the placement of the Appellate proposals had not been decided, and that it may be necessary to promulgate them as part of the Criminal Rules.

The Committee agreed to take no action on Rules 11 and 12, as these are within the Appellate Committee's jurisdiction.

Rule 49. Service and Filing of Papers

Professor Barrett stated that the Appellate Committee had approved the proposal of the Criminal Committee that failure of the clerk to mail notice of the entry of an order did not extend the time for appeal. This is similar to a provision of FRCP 77(c). The Appellate Committee felt that the provision should be contained in Criminal Rule 49, and the Committee voted to include the following sentence in Rule 49(c): "Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as otherwise permitted."

Rule 55. Records

The Appellate Committee approved the proposal that Rule 55 be amended to require the keeping of a criminal docket and to provide for notations of the dates of entry of judgments and orders. Without objection, the Committee approved the addition of the following sentence to present Rule 55: "Among the records required to be kept by the clerk shall be a criminal docket in which, among other things, shall be entered each order or judgment of the court. The entry of an order or judgment shall show the date the entry is made."

ITEM G. Rules 20 and 46.

Rule 46. Bail

On motion of Professor Glueck, the Committee voted to change the caption of subdivision (c) from "Amount" to "Terms".

Professor Barrett raused the question whether the defendant should have a right to bail after the verdict has been given but prior to sentence. After some discussion, it was the consensus of the Committee that bail now covers the defendant until the sentence is carried out or until an appeal is taken.

The Committee next discussed the proposal of the Department of Justice that the proposed sentence requiring the defendant to be informed of the bail-jumping statutes be deleted, as it might give rise to § 2255 proceedings. Professor Barrett stated that he had no objection to the deletion, and the Committee voted to delete the sentence reading "Each person admitted to bail shall have called to his attention the penalties imposed by law for willful failure to appear in accordance with the terms of the bond." The Committee felt that the Note might be amended to urge judges to advise defendants of these statutes.

Mr. Fortas stated that he felt the rule should provide that defendants may be released on their own recognizance without requiring an amount for security. He felt that in many cases persons could be released on their own undertaking that they will appear. Judge Maris and Judge Smith questioned whether he would object to requiring a person released on his own undertaking to pay a certain amount of money for failure to appear. Mr. Fortas replied that if a person is released on his own undertaking, that undertaking is the bail, and no money penalty could be imposed for failure to appear.

Judge Smith felt that there are three problems which the rule should cover: (1) The problem of the accused who has been apprehended and is unable to make bail. He is waiting in jail until the meeting of the grand jury. (2). The problem of the indigent defendant who is in jail awaiting trial and is unable to make bail. This man gets credit for the time spent in jail prior to trial, but the man presumed to be innocent has not been protected. (3) The problem of the material witness who is unable to make bail. He felt that persons held in jail under these conditions should be released on their own recognizance if appropriate action is not taken within a reasonable time.

Professor Barrett stated that the proposed rule would encourage judges to release a man on a cash deposit for less than the amount of the bond and to release a man without any security subject to conditions of the court. He stated that the Department of Justice has encouraged the United States attorneys to recommend release on these terms.

Mr. Fortas recommended that the Reporter draft a rule to make it clear that bail may include, in the judge's discretion, an undertaking that the defendant will appear in accordance with the order of the court. Judge Hoffman felt that if the bail-jumping statutes can be interpreted to apply to release where no security is given, he would be in favor of Mr. Fortas' proposal. Judge Smith stated that an amendment of the statutes would probably be required for this interpretation to be made.

Mr. Fortas suggested language to be inserted in line 24 of the preliminary draft along the lines of the following: "...upon his undertaking to appear and upon such further conditions as may be prescribed to insure his appearance." Judge McBride moved that the Committee approve in principle Mr. Fortas' proposal. This motion was carried, and the Reporter was requested to present a draft at the January meeting of the Committee.

Judge Smith suggested that an additional section be included in Rule 46 providing that a defendant held in jail awaiting trial because of his inability to make bail be released on his own recognizance, and the Reporter was requested to prepare a draft to cover this situation.

The Committee next discussed subdivision (h), and approved the draft with the deletion of the words "..., if any, including the amount of the bail,..." in the last sentence.

After some discussion of the Department of Justice proposal with respect to 46(e), the Committee requested that the Reporter correspond further with the Department on this subject and report back to the Committee at the next meeting.

Rule 20. Transfer from the District for Plea and Sentence

The Reporter requested that discussion of this rule be deferred til the next meeting in order that he might prepare a redraft taking the suggestions of the Department of Justice into account.

ITEM E. New Proposals for Preliminary Consideration.(continued)

Rule 14. Relief from Prejudicial Joinder

The Reporter was requested to give further consideration to the problem of co-defendants' statements against each other in connection with his study of Rule 16.

Rule 23. Trial by Jury or by the Court

Professor Barrett stated that one suggestion had been received to the effect that the consent of the government should not be required in order for trial by jury to be waived by the defendant. Mr. Willens stated that the government in this situation can represent the public interest in providing a jury trial in a criminal case. Professor Barrett felt that the consent of the judge should be retained, and that the judge can adequately represent the public interest.

Judge Smith felt that the rule should be retained as at present, and his motion to that effect produced a tie vote. The Committee agreed to reconsider this subject at the January meeting.

Rule 24. Trial Jurors

The Committee discussed the problem of limitation of voir dire examination of prospective jurors in connection with Rule 24(a). The Committee differed as to whether to present rule was broad enough, or whether the attorneys have a right to personally examine prospective jurors.

Mr. Fortas suggested that the second sentence of 24(a) be amended to read in part "... such further inquiry as the court deems reasonable and shall itself submit ..." This would give the attorneys the right to engage in appropriate questioning, and would not permit the court to deny this right. Professor Pirsig felt that this proposal would in many cases unnecessarily extend the examination of jurors. Professor Remington felt that there should be some safeguard against excessive voir dire examination.

After further discussion, the Committee voted to authorize Professor Barrett to prepare a draft which would amend Rule 24(a) so that counsel would have a right to question jurors on voir dire.

The Committee next discussed the question of making available to defendant's counsel FBI or other agency investigative reports on jurors which have been made available to the government attorneys in the case. Mr. Fortas felt that if these reports are being made available to the government attorneys they should also be provided to defendants' counsel. The Committee discussed generally the subject of investigation of jurors, and the Reporter was requested to give further thought to the problem and make a recommendation at the January meeting of the Committee.

Rule 25. Judge; Disability

Professor Barrett brought to the attention of the Committee the suggestion of Judge Lumbard that provision be made for substitution of a judge when the original trial judge becomes ill or disabled or dies. He stated that the Judicial Conference, at the September 1963 session, had approved the recommendation of the Committee on Court Administration that this substitution be authorized by appropriate rules. The Committee directed that the Reporter prepare a draft for consideration at the January meeting.

Rule 30. Instructions

The Committee considered several suggestions from lawyers that the judge prepare written instructions to the jury and also submit them to the attorneys in the case. Professor Barrett stated that the Civil Committee has not considered any change in the counterpart rule, FRCP 51. Judge Maris stated that the Judicial Conference has always opposed requiring written instructions. He felt that the main purpose of the instruction is for the judge to effectively communicate to the jury their duty in the case, and that oral instructions are more likely to be understood by all of the jury than are written instructions. The Committee voted to make no new proposal on Rule 30.

Rule 32. Sentence and Judgment

The Committee discussed the question presented by cases involving multiple defendants where one or several defendants plead guilty and others do not. Mr. William Walsh has suggested that those defendants who plead guilty should be sentenced promptly, without awaiting the outcome of the trial of the other co-defendants. After some discussion, the Committee voted to retain the rule as at present.

Rule 35. Correction or Reduction of Sentence

The Reporter stated that several comments received had pointed out a problem in notification of denial of a writ of certiorari by the Supreme Court. As a result of these comments and correspondence with the Clerk of the Supreme Court, Professor Barrett recommended an amendment to the second sentence of Rule 35 which would allow reduction of a sentence 60 days after entry of an order by the Supreme Court, rather than 60 days after receipt of the notice of entry. After some discussion, the Committee adopted the language of the amendment set out on page E-38, subject to possible revisions by the Reporter.

Rule 40. Commitment to Another District; Removal

The Committee agreed that the suggestion that Rule 40(b)(2) be amended to conform to the proposed amendment to Rule 5(b) should be deferred until a final recommendation is made concerning Rule 5(b).

Rule 41. Search and Seizure

Professor Barrett questioned whether the Committee felt there was a need to require the government to give pretrial notice to the defendant and his attorney of property seized without a warrant which it proposed to use in evidence. He also mentioned the suggestion made that a pretrial motion be required to suppress a confession.

The Reporter stated that it was not clear whether the case law permitted a pretrial motion to suppress a confession. Judge McBride stated that in his opinion if the question on the confession were a legal question, a pretrial motion to suppress it would be appropriate. If the question were a factual one, the court could not decide it.

Professor Barrett agreed to consider this problem further and present a draft to the Committee at the next meeting.

The meeting was adjourned at 4:00 on October 16.

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