MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

May 6-7, 2004
Monterey, California

The Advisory Committee on the Federal Rules of Criminal Procedure met at Monterey, California on May 6 and 7, 2004. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Carnes, Chair of the Committee, called the meeting to order at 8:30 a.m. on Thursday, May 6, 2004. The following persons were present for all or a part of the Committee's meeting:

Hon. Edward E. Carnes, Chair
Hon. Susan C. Bucklew
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. Harvey Bartle, III
Hon. James P. Jones
Hon. Anthony J. Battaglia
Hon. Reta M. Strubhar
Prof. Nancy J. King
Mr. Robert B. Fiske, Jr.
Mr. Donald J. Goldberg
Mr. Lucien B. Campbell
Ms. Deborah J. Rhodes, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. David Levi, chair of the Standing Committee, Hon. Mark R. Kravitz, member of the Standing Committee and liaison to the Criminal Rules Committee; Mr. Peter McCabe and Mr. James Ishida of the Administrative Office of the United States Courts; Mr. John Rabiej Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Mr. Jonathan Wroblewski of the Department of Justice; Ms. Laural Hooper of the Federal Judicial Center; and Mr. George Leone, Chief, Appeals Division, United States Attorney's Office, D.N.J.

Judge Carnes welcomed Ms. Deborah Rhodes as the new member representing the Department of Justice.

II. APPROVAL OF MINUTES

Judge Trager moved that the minutes of the Committee's meeting in Gleneden Beach, Oregon in October 2003, be approved. The motion was seconded by Judge Battaglia and, following corrections to the Minutes, carried by a unanimous vote.

III. STATUS OF PROPOSED AMENDMENTS TO RULES PENDING BEFORE THE SUPREME COURT

Mr. Rabiej informed the Committee that the package of amendments submitted to, and approved by the Judicial Conference in September 2003 (Rules Governing § 2254 Proceedings, Rules Governing § 2255 Proceedings, and the Official Forms Accompanying those Rules, and Rule 35) had been approved by the Supreme Court and were being transmitted to Congress.

IV. PROPOSED AMENDMENTS PUBLISHED FOR COMMENT AND PENDING FURTHER ACTION

A. Rule 12.2. Notice of Insanity Defense; Mental Examination. Proposed Amendment Regarding Sanction for Defense Failure To Disclose Information.

The Reporter stated that only four commentators had expressed views on the proposed amendment to Rule 12.2(d)—which is intended to fill a gap created in the 2002 amendments to the rule and include a sanction provision if the defendant fails to disclose any expert reports, as required under Rule 12.2(c)(3). First, he stated, Mr. Jack Horsley generally supports the proposed amendments to all of the rules, without any specific reference to Rule 12.2. Second, the Magistrate Judges Association supports the amendment and notes that the change "appropriately entrusts to the court to fashion an appropriate sanction." Third, he noted that the Federal Bar Association had expressed the view that the proposed amendment goes too far and that if defense counsel does not provide notice and the evidence is excluded, an appeal will follow on grounds of ineffective assistance of counsel. Instead of this amendment, the Association suggested that the government be given "ample opportunity" to have the defendant tested and to prepare a rebuttal. Finally, the Reporter stated that the Standing Committee's Style Subcommittee has offered brief comments on this rule.

Following brief discussion, Judge Bucklew moved that the Committee approve the amendment to Rule 12.2 and forward it to the Standing Committee with a

recommendation to forward it to the Judicial Conference. Judge Friedman seconded the motion, which carried by unanimous vote.

B. Rules 29, 33 and 34; Proposed Amendments Re Rulings By Court On Motions to Extend Time for Filing Motions Under Those Rules.

The Reporter stated the Committee had received comments on the proposed amendments to Rules 29, 33, and 34; those amendments are intended to remove the language from the current rules that impose a 7-day requirement on the court for setting a time for filing motions under those rules. A conforming change has been proposed for Rule 45. He noted that first, Professor Lushing noted a grammatical error in the Committee Note for Rule 34. Second, another commentator, Mr. Horsley, generally approved of the proposed rules package, but did not offer any specific comments on these particular rules. Third, the United States Courts Committee of the State Bar of Michigan suggested that any changes to Civil Rule 6 concerning time requirements for filings should also be reflected in Criminal Rule 45. The Committee apparently offers no specific comments on the current proposed change to Rule 45. And finally, the Reporter stated that the Magistrate Judges Association supports the proposed amendments to Rules 29, 33, 34, and 45.

During the brief discussion on the proposed amendments, Judge Levi noted that the Committee might wish to revisit Rule 45 following proposed amendments to Civil Rule 6. Judge Friedman moved that the Committee approve the proposed amendments and forward them to the Standing Committee with a recommendation to forward them to the Judicial Conference. Mr. Campbell seconded the motion, which carried by a unanimous vote.

C. Rule 32, Sentencing; Proposed Amendment Re Allocution Rights of Victims of Non-Violent and Non-Sexual Abuse Felonies.

Professor Schlueter reported that four commentators had offered views on the proposed amendment to Rule 32; that amendment would extend the right of allocution to all victims in non-violent, non-sexual abuse felony cases. He noted that Mr. Jack Horsley supported the package of amendments published in 2003, but offered no specific comments about the proposed change to Rule 32. Professor Schlueter added that Judge Robert Holmes Bell, Chief District Judge of the Western District of Michigan, opposed the amendment to the extent it requires the court to hear victim testimony. In his view, victims do not provide anything new because the Presentence Report is supposed to present the victim's perspective about the crime. Judge Bell also noted that that the definition of victim is so vague that many people will demand to be heard and suggested that that the entire section (B) should be rewritten to give the court the discretion to decide whether to hear from victims. Third, Professor Schlueter continued, the State Bar of California, Committee on Federal Courts, supports the amendment to Rule 32. Fourth, the Magistrate Judges Association supports the proposed change but identified two concerns. First, the Association noted that the amendment does not explicitly state who is

a "victim." Second, the amendment may unduly restrict the discretion of the court. Although the rule uses the term "must," the Association commented that the Committee Note seems to signal some discretion to the court. The Association offers the following as additional language:

> "In particular cases, the court, may, in its discretion, determine who are the victims of an offense, impose reasonable limits on the number of victims or classes of victims who may present information, and determine whether the information presented should be presented orally, in writing, or by some other means."

Finally, Professor Schlueter, noted that the Style Subcommittee had questioned why the term "Felony Offense" is used in the title of Section (C), rather than just the word "Felony." Following discussion, the Committee agreed with the Subcommittee's recommendation and changed that wording.

Professor Schlueter noted that the House of Representatives had passed an Act according a wide-range of rights to victims of crime and that the same measure was being considered by the Senate. He recommended that in light of the pending legislation and the fact that other rules would likely be affected, that the Committee defer consideration of the proposed amendment. During the brief discussion of the pending legislation and it possible effects on criminal trials, Judge Trager noted that he favored going forward with the proposed amendment. In his view, if Congress actually enacted the Victims Right bill, there would be time to pull the proposal from the process. He moved that the Committee approve the amendment to Rule 32 and forward it to the Standing Committee with the understanding that in the event Congress enacted the related legislation, that Committee could withdraw the proposal. Mr. Fiske seconded the motion, which carried by a vote of 10-2.

D. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed Amendments to Rule Concerning Defendant's Right of Allocution.

The Reporter indicated that the Committee had received only two written comments on the proposed amendment to Rule 32.1. The amendment, he explained, would provide allocution rights for a person who faces revocation or modification of probation or supervised release. He noted that first, Mr. Jack Horsley commented favorably on the package of published amendments, but did not comment on the specific amendment to Rule 32.1. Secondly, he stated that the Federal Magistrate Judges Association supported the amendment. Following brief discussion, Judge Bucklew moved that the Committee approve the amendment and forward it to the Standing Committee. Judge Bartle seconded the motion, which carried by a unanimous vote.

E. Rule 59; Proposed New Rule Concerning Rulings By Magistrate Judges.

Professor Schlueter reported that the Committee had received three written comments on the proposed new Rule 59, which is intended to parallel Civil Rule 72. First, he stated, Mr. Jack Horsley had commented favorably on the package or rule amendments but had offered no specific comments on Rule 59. Second, the Magistrate Judges Association had offered a number of suggested changes to the rule:

First, he reported, the Association believed that in order to avoid confusion, the Committee should consider addressing the question of whether the terms "dispositive" and "nondispositive" should be given the same meaning in both Rule 59 and Civil Rule 72. It suggested that the words, "matter not dispositive of a charge or defense of a party," is preferable and would be similar to the language in Rule 72. Following brief discussion, Judge Trager moved that the rule be amended to reflect that suggestion. Judge Bartle seconded the motion, which carried by a vote of 10 to 1.

Next, Professor Schlueter reported that the Association had noted some ambiguity in the rule regarding the time for filing objections. It had suggested that the language be changed to reflect the differences in those instances where the ruling is made orally on the record and where the ruling is written. The Committee discussed this point and by a vote of 8 to 2 initially decided to use the word "entered" on line 9 of the proposed rule. Following additional discussion, however, the Committee voted to reconsider that vote (by a margin of 9 to 1) and ultimately, on motion by Judge Trager, seconded by Professor King, voted by 9 to 1 to use the word "stated" instead on line 9.

Professor Schlueter noted that the Association had also suggested that Civil Rule 72 be changed to include the language in Rule 59, concerning the failure to object. The Committee agreed that that was a matter within the jurisdiction of the Civil Rules Committee.

Next, Professor Schlueter informed the Committee that the Association had stated that the provision in the rule that would permit the judge to alter the time for filing objections is problematic and recommends that the 10-day time limit in Rule 72 be added to Rule 59 or that if an extension is requested, it must be made within the 10-day period. The Committee discussed this suggestion and ultimately decided that the current language of the proposed new rule was sufficient to address those concerns.

Professor Schlueter also reported that the Association had suggested that it would be helpful to expand the Committee Note to address the differences in the scope of Rules 59 and 72, regarding referral of matters to magistrate judges. Following a brief discussion, the Committee agreed with Professor Schlueter's observation that it would be more appropriate for the Note not to include any discussion comparing the two rules, and instead focus on the scope and purposes of Rule 59.

Finally, he noted that the Association had written that the proposed rule does not address the effect of a report and recommendation in the absence of an objection. It suggests addition of a new Rule 54(b)(4) stating that where no objection is filed that the

report and recommendation is not self-executing and has no effect until the district court enters an order or judgment. The Committee discussed this proposal; a consensus emerged that the effect of the absence of a report and recommendation need not be reflected in the rule and that in keeping with other rules of procedure, it would be better not to state the effective dates for rulings.

Finally, Professor Schlueter reported that the Style Subcommittee had offered some suggested style changes to the Rule. Following brief discussion, most of those changes were included. In addition, Professor Schlueter suggested, at the urging of several members, additional language for the Note to address the issue of what constitutes a "dispositive" or "nondispositive" matter, terms which do not appear in the governing statute.

Judge Trager moved, and Judge Jones seconded, a motion to approve the proposed new rule and forward it to the Standing Committee for its approval. The motion carried by a vote of 10 to 1.

V. PROPOSED AMENDMENTS TO RULES UNDER ACTIVE CONSIDERATION

A. Report of Subcommittee on Rules 3, 4, 5.1, 32.1, 40, 41 & 58.

Judge Battaglia reported that the subcommittee, consisting of himself as chair and Mr. Campbell and Ms. Rhodes as members, had considered possible amendments to a number of rules. The subcommittee had been charged with reviewing the rules for the purpose, inter alia, of determining whether any provision should be made to codify the requirements of *Gerstein v. Pugh*; to provide for filing documents by electronic means, including facsimile transmissions; and about entitlement to preliminary hearings.

1. Issue of Whether to Adopt Rule Codifying *Gerstein v. Pugh*.

Judge Battaglia reported that as to the first issue, whether to codify *Gerstein*, that the Subcommittee had decided not to propose any amendments. A survey of the magistrate judges indicated a number of different procedures exist and although the magistrates stated that they believed that adoption of a national rule would be helpful, they also stated that it would be important to maintain as much flexibility as possible. The Subcommittee believed that promulgating a rule on the topic might create additional, and unanticipated, problems in application. Judge Battaglia moved that no action be taken at this time. Mr. Campbell seconded the motion, which carried by a unanimous vote.

2. Amendments to Rules 3 and 4 to Allow for Issuance of Arrest Warrants by Facsimile.

Judge Battaglia next reported that the Subcommittee had considered a recommendation from Judge Bernard Zimmerman to amend Rule 4 to permit issuance of an arrest warrant by facsimile transmission; currently, Rule 4 does not address any particular means of issuing an arrest warrant. Similarly, the Subcommittee also considered whether Rule 3, which addresses use of complaints, was silent on the manner of presenting the necessary information to a magistrate judge. The Subcommittee, he stated, decided not to propose any amendments at this time; in its view, there are no perceived problems with using the rules or with the traditional methods of issuing arrest warrants. Judge Battaglia moved that the Committee take no further action on this proposal at this time. Mr. Campbell seconded the motion, which carried by a unanimous vote.

3. Rules 32.1(a)(6) and Rule 40, Regarding Release on Bond.

The Subcommittee also considered a conflict between Rules 32.1 and 40 concerning the ability of the court to consider bail in out of district cases. Judge Battaglia reported that the Subcommittee agreed with a recommendation from Magistrate Judge Robert Collings, that although Rule 32.1(a)(6) permits a court to consider bail in out of district proceedings regarding revocation of release. Rule 40 does not. The Subcommittee recommended that Rule 40 be amended to conform to Rule 32.1. Judge Battaglia moved that Rule 40 be amended in that way and that the amendment be forwarded to the Standing Committee with a recommendation to publish it for public comment. Professor King seconded the motion, which carried by a unanimous vote.

4. Amendments Regarding Use of Other Reliable Electronic Means in Rules 5, 32.1, and 41.

Judge Battaglia stated that, at the suggestion of Judge William Sanderson, the Subcommittee had considered possible amendments to the rules regarding greater use of facsimiles or other electronic means in transmitting various documents. Although Judge Sanderson's proposal had focused only on Rule 32.1, the Subcommittee, at the direction of the Committee, had considered similar amendments to Rules 5 and 41. Those amendments would provide that the documents referenced in those rules could be transmitted by "reliable electronic means." During the brief discussion on these amendments, Judge Battaglia noted that the key here is that the term "reliability" focuses on the quality of the transmission and not necessarily on the authenticity of the underlying document. Judge Battaglia moved that the Committee approve the amendments to Rules 5, 32.1, and 41 and that they be forwarded to the Standing Committee with a recommendation to publish them for public comment. Mr. Campbell seconded the motion, which carried by a unanimous vote. Turning to a discussion of the proposed Committee Note, Professor King moved that the last paragraph of the Note, which addresses the factors that a court may wish to consider in using electronic means, be deleted. Judge Jones seconded the motion. The Reporter pointed out that the language used in the proposed Notes to Rules 5, 32.1 and 41, was similar to that used in recent

amendments to Rules 5 and 10 concerning video teleconferencing. The motion failed by a vote of 4 to 8.

5. Amendments Regarding Right to Preliminary Hearings; Rules 5 and 58

Referencing an e-mail from Magistrate Judge Nowak, Judge Battaglia reported that the Subcommittee had considered an amendment to Rule 58 that would resolve a conflict between that rule and Rule 5.1(a) concerning the right to a preliminary hearing. The Subcommittee noted that the right to a preliminary hearing is correctly stated in Rule 5.1, and rather than redrafting Rule 58 to clarify the issue, the Subcommittee recommended that Rule 58(b)(2)(G) be amended to delete the reference to those cases where the defendant is in custody and to simply refer the reader to Rule 5.1. Judge Battaglia moved that the amendment be approved and forwarded to the Standing Committee for publication. Judge Friedman seconded the motion, which carried by a unanimous vote.

6. Amendments to Rule 41 Regarding Expanded Use of Facsimile or Other Electronic Means

Finally, Judge Battaglia reported that in response to the survey regarding possible codification of *Gerstein*, a number of Magistrate Judges indicated an interest in expanding the use of facsimiles or other electronic means in obtaining or issuing search warrants. The Subcommittee recommended that Rule 41 be amended to permit transmission of the warrant itself. During the discussion, Mr. Campbell noted that during the recent restyling of the rule, the introductory language in Rule 41(d)(3), "If the court determines it is reasonable under the circumstances," had been deleted. Although the deletion of that language was not specifically mentioned in the Committee Note, it was apparently deleted because the Committee believed it was unnecessary. Mr. Campbell's motion to restore the language failed for lack of a second.

Judge Battaglia moved that the amendments to Rule 41 be approved and forwarded to the Standing Committee with a recommendation that they be published for public comment. Mr. Campbell seconded the motion, which carried by a unanimous vote.

B. Rule 29; Proposed Amendment Regarding Deferral of Ruling on Motion for Judgment of Acquittal Until After Verdict.

Judge Carnes introduced the subject of a proposed amendment to Rule 29, which would require the court in all cases to defer ruling on a motion for a judgment of acquittal until after the jury had returned a verdict. He noted that the issue had been discussed at the last several meetings and that the Department of Justice had been asked to address two issues raised at the Fall 2003 meeting—first, the problem of multiple counts and multiple defendants, and second, the problem of the hung jury. Mr. Rabiej also reported

that the Administrative Office had conducted an additional statistical study of cases during FY 2002 involving Rule 29 rulings. He noted that the study indicated that of the approximately 80,000 felony cases during that time frame and that of those, approximately 3000 cases were disposed of by trial and of those, the courts entered a pre-verdict Rule 29 motion in favor of approximately 37 felony defendants. Mr. Leone and Mr. Wroblewski both commented that in some regards those statistics might be underinclusive.

Ms. Rhodes reported that the Department had considered both of those issues and had drafted an alternate version of Rule 29 that would address the issue of the hung jury, but not the problem of multiple defendants or multiple counts cases. She also noted that Judge Levi had proposed a possible solution to the problem by suggesting that Rule 29 be amended to require waiver of double jeopardy objections as a prerequisite for pre-verdict rulings, and thus provide the possibility of a government appeal of an adverse ruling. She indicated that the Department would be willing to pursue that type of amendment and added that although the number of Rule 29 pre-verdict rulings was low, the numbers were still important to the Department. In addressing the proposed waiver provisions, Ms. Rhodes pointed out that from the Department's view, there are many benefits in proceeding to final verdict, noting that approximately 50 percent of cases are tried in one day and that approximately 96 percent are tried in nine days or less.

Judge Carnes noted that it would be difficult to articulate in a rule the competing interests in granting a pre-verdict motion, or continuing to a final verdict, especially in multi-count or multi-defendant cases. Mr. Fiske stated that the hung jury situation would be easier to address in a rule, and that in multiple defendant cases, the defendants who have their motions granted are out of the case. In the case of multiple counts, the matter becomes more complicated. Judge Levi added that in considering this issue, the Committee could expect a significant amount of opposition, for what some view as a highly controversial topic. He noted that the waiver provision might be a good middle ground for further discussion.

Professor King stated that in her view the statistics provided by the Administrative Office may not have sufficiently pinpointed the specific problems on the multiple defendant and multiple count cases. Judge Bucklew noted that there is no constitutional right for a defendant to obtain a pre-verdict ruling and that the whole issue had been complicated by the 1971 Appeals Act, which expanded the government's right to appeal, and the fact that there were a few cases in which the courts had apparently granted the motion for wrong reasons. Judge Bartle observed that he was not convinced by the Department's cost-benefit approach and that it seemed arbitrary.

Mr. Goldberg indicated that the Department should consider the waiver provisions because it appeared to be a way to obtain the change the Department wished to see —the ability to appeal a bad ruling by the court. Mr. Campbell stated that he still opposed any further amendments to Rule 29 and that to do so was part of an alarming trend to transfer the outcome of a case to one of the parties. He also noted that in his view

the low number of cases did not justify any further amendments to Rule 29. Mr. Fiske indicated that he supported an amendment to Rule 29 that would permit the defendant to waive any double jeopardy claims. Both Judge Jones and Judge Battaglia expressed the view that the costs of fixing the problem of erroneous Rule 29 rulings outweighed any possible benefits. Judge Jones stated that the costs of the amendment would include the possibility of the jury hearing evidence on all of the charges, regardless of how valid they were; in addition, prosecutors sometimes intentionally include many additional charges, which may or may not have merit. The proposed amendment requiring the courts to defer ruling on any Rule 29 motion until after verdict would deprive them of the ability to weed out bad counts. Professor King agreed with the view that there is no constitutional right to have the court rule on a pre-verdict motion, but that doing so makes good policy.

Judge Trager stated that he had originally supported the Department's proposal and that he supported Judge Levi's waiver proposals. He added that although the cases are few where the courts have erroneously granted Rule 29 motions, he believed that such rulings reflect poorly on the courts and the community.

Following additional discussion about the various options for amending Rule 29, Judge Jones moved that the Committee make no amendments to the Rule. Mr. Campbell seconded the motion, which carried by a vote of 9 to 3.

C. Proposed Amendments to Criminal Rules to Implement E-Government Act.

Professor Schlueter reported that the Committee has been asked to consider amendments to the Federal Rules of Criminal Procedure to implement provisions in the E-Government Act of 2002 (Public Law 107-347). He noted that Section 205 of that Act, requires, in part, that every federal court to make available access to docket information, the substance of all written opinions of the court, and access to documents filed with the court in electronic form. It also authorizes the courts to convert any document into an electronic form; any document so converted, however, must be made available to the public online.

He continued by informing the Committee that the Act requires that the Judicial Conference use the Rules Enabling Act procedures to prescribe the appropriate rules and that they are to be applied in a uniform manner throughout the federal courts. In order to respond to the mandate to draft privacy rules for all of the Federal Rules of Procedure (Appellate, Bankruptcy, Civil and Criminal), Judge Levi (Chair of the Standing Committee) appointed the E-Government Subcommittee, chaired by Judge Sidney A. Fitzwater. Professor Schlueter continued by stating that the Subcommittee includes liaisons from each of the Rules Advisory Committees and several other committees of the Judicial Conference; the Reporters of the Advisory Committees serve as consultants. Professor Dan Capra, Reporter to the Evidence Advisory Committee, is serving as the Lead Reporter for the Subcommittee. Judge Strubhar represents this Committee on the Subcommittee.

Professor Schlueter reported that the Subcommittee had met in Scottsdale Arizona in January 2004, to discuss the approach and scheduling for drafting uniform privacy rules. The Subcommittee had asked each of the Rules Committees for their input on what information should be deleted from filings. Another Subcommittee Meeting is scheduled for June 2004. He indicated that it would be important at this stage for the Committee to provide guidance to Judge Carnes, Judge Strubhar, or himself on what the Criminal version of the rule might look like.

He further stated that he had drafted proposed amendments to Rule 49, Serving and Filing Papers, using Professor Capra's original template.

During the ensuing discussion, the Committee indicated that any privacy filing provisions should be listed in a separate new rule, Rule 49.1. Later in the meeting, Judge Carnes appointed an E-Government Subcommittee consisting of Judge Strubhar (chair), Judge Bartle, and Ms. Rhodes.

D. Other Proposed Amendments to Rules.

1. Rule 11(c)(1); Proposed Amendment Regarding Provision Barring Court from Participating in Plea Agreements.

Judge Carnes informed the Committee that Judge David Dowd, a former member of the Committee, had written to the Committee again urging it to address the problems arising in those cases where a defendant pleading guilty has not been informed of a plea offer from the government. In his proposal, Judge Dowd included several decisions from the Sixth Circuit evidencing the problem. Judge Carnes noted that in his most recent proposal, Judge Dowd recommended that Rule 11 include a provision to the effect that a court may inquire of the defendant about whether the defendant has been fully apprised of any offered plea agreements, without violating the provision barring the court from taking part in the plea discussions.

Judges Trager and Bartle expressed the view that this has not been a problem in their courts. Judge Bucklew indicated that she does question the parties but does not view that as engaging in the plea discussions herself. Judge Friedman agreed that making the inquiry is not a violation of the provision in Rule 11 that prevents the court from taking part in the plea discussions, and added that he did not see a need for an amendment to that rule. Judges Jones and Battaglia also stated that they did not see the need for any amendments to Rule 11. Following additional discussion, a consensus emerged that no change should be made to the rule.

2. Rule 11 & Rule 16; Proposed Amendment Regarding Disclosure of *Brady* Information; Report of Subcommittee.

Judge Carnes stated that after the last meeting, the Committee had received a proposal from the American College of Trial Lawyers to amend Rules 11 and 16 to require prosecutors to disclose favorable information, similar to that required by *Brady v. Maryland*. He informed the Committee that he had appointed a Subcommittee consisting of Judge Bucklew (chair), Judge Trager, Mr. Campbell, Mr. Goldberg, and Mr. Wroblewski to study the proposal and report to the Committee.

Judge Bucklew reviewed the extensive written proposal from the College and stated that the Committee had met once and had been divided on whether to proceed with proposing any amendments to either Rule 11 or Rule 16. She indicated that one of the first issues that would have to be addressed is the definition of "favorable" evidence, noting that at this point, there is a large amount of case law that has interpreted *Brady*.

Judge Carnes noted briefly, the case law subsequent to *Brady*, which also includes an apparent change in the meaning of the term "materiality" and identified several potential problems of attempting to codify *Brady*. Mr. Fiske explained his role in the College's proposal; he indicated that as a past president of that organization he had spoken in favor of the proposal at the meeting during which it was considered. He also identified a number of issues that would have to be considered if the Committee was inclined to amend either Rule 11 or 16. Mr. Goldberg questioned the need for the rule, noting that he agreed with the Department of Justice's view that *Brady* is really a post-trial rule. He noted that prosecutors and judges apply a variety of timing requirements, and that perhaps it would be beneficial to adopt some sort of bright line rule for the time to disclose the information.

Mr. Campbell stated that the proposal was worth pursuing and that it would be possible for the Committee to draft an amendment that addressed the core obligations. Mr. Goldberg questioned whether any states had such rules; if not, he noted, a federal rule could serve as a helpful model. Ms. Rhodes stated that the government takes its *Brady* obligations seriously. These obligations have been set out under forty years of case law that provides a complete remedy, reversal and new trial, if an error occurs. She added that there had been no showing that the current law or practice is inadequate such that Rule 16 needs amendment. Further, the proposed amendment is inconsistent with the case law and would transform a trial right into a discovery right, which conflicts with the Jencks Act.

Judge Jones questioned what the Department's response might be to a proposed amendment that required the prosecution to state on the record that it had used due diligence in attempting to discover favorable information. Ms. Rhodes responded that she was not sure that including that in a rule would add any weight to the existing obligations. In the following discussion, several members focused on the question of whether government attorneys are ever disciplined for withholding information favorable to the defense and the underlying problem of attempting to define what information must be disclosed.

Mr. Goldberg expressed the hope that any consideration of an amendment would not flounder on the specifics of the rule itself. Judge Jones observed that the Committee could draft a rule that granted greater protections than *Brady*. Other members noted that attempts to codify the *Jencks* obligations in a rule had been unsuccessful.

Judge Friedman believed that it would be helpful to consider the issue further and that it might be time for an amendment to the rules. Other members agreed with that view, noting however that it would be important to address those issues that could be included in a rule. Mr. Goldberg moved that the Committee consider the College's proposal further. Mr. Fiske seconded the motion, which carried by a vote of 9 to 3. Judge Carnes appointed a subcommittee to give further consideration to the proposal: Mr. Goldberg (chair); Mr. Fiske, Mr. Campbell, Professor King, and Ms. Rhodes.

3. Rule 15; Discussion of Variance in Rule and Committee Note Regarding Payment of Costs.

Professor Schlueter informed the Committee that the Rules Committee Support Office had received information that there appeared to be an inconsistency between the text of Rule 15(d) and the Committee Note. The rule states that "if the deposition was requested by the government, the court *may*—or if the defendant is unable to bear the deposition expenses, the court must—order the government to pay…" (emphasis added). On the other hand, the Note states in relevant part: "Under the amended rule, if the deposition was requested by the government, the court *must* require the government to pay…" (emphasis in original). Professor Schlueter indicated that the general policy is to not amend only the Committee Note and that in the absence of an amendment to the rule itself, it would probably not be appropriate to change the language of the Note to conform to the clear text of the rule itself. Following additional discussion, Mr. Rabiej offered to contact the publisher and point out the issue, with the thought that some sort of notation could be added, noting the inconsistency.

4. Rule 16(a)(1)(B)(ii); Proposed Amendment Regarding Defendant's Oral Statements.

Judge Carnes indicated that the Committee had a proposal from Magistrate Judge Robert Collings concerning a possible amendment to Rule 16. Judge Collings had recently decided a case involving interpretation of Rule 16 vis a vis the obligation of the government to give to the defense an agent's rough notes of an interview with the defendant. Judge Carnes continued by stating that Judge Collings believed that Rule 16 could be clarified by placing all of the provisions dealing with a defendant's oral statements under one subdivision. Several members of the Committee observed that the law concerning disclosure of an agent's notes seemed settled, that revising Rule 16 would not change the substance of the law, and that there appeared to be no need for the change. Following additional discussion, a consensus emerged that no further action was required on the proposed amendment.

5. Rule 31; Proposal to Permit Less Than Unanimous Verdicts.

Professor Schlueter stated that the Committee had received a suggestion from Judge James Trimble suggesting that the Criminal Rules be amended to permit a less than unanimous verdict, as is used in some state criminal and civil cases. The suggestion was apparently triggered by the recent mistrial in the *Tyco* case. Following a very brief discussion, a consensus emerged that no favorable action would be taken on the proposal.

6. Rule 32; Proposed Amendment Regarding Requirement That Sentencing Judge Resolve Contested Information in Presentence Report.

Professor Schlueter reviewed a proposal from Judge Gregory Carman that Rule 32 be amended to require the court to resolve all objections to the presentence report, regardless of whether the matter would have an impact on the sentence. In support of his proposal, the judge had included a copy of his law review article entitled, "Fairness at the Time of Sentencing: The Accuracy of the Presentence Report." His proposal is grounded on the view that even if the sentencing court does not disapprove or modify the objected-to matters in imposing a sentence, the Bureau of Prisons considers all of that information in making decisions about the defendant's incarceration. Professor Schlueter noted that the issue had been considered in some detail by the Committee during the restyling amendments to the Rules in 2001. Mr. Campbell recognized that the Committee had considered a similar proposal but stated that the article made good sense and that it would be appropriate to reconsider the issue. He added that the Bureau of Prisons is not equipped to resolve incorrect information in the presentence report.

Ms. Rhodes noted that judges do make rulings on information that might have an impact on incarceration, even though the rule does not require them to do so; in her view, no amendment was required. Judge Carnes agreed with that assessment.

Following additional discussion on the various ways of dealing with information in the presentence report, a consensus emerged that no further action was required on the proposal.

III. RULES AND PROJECTS PENDING BEFORE CONGRESS, STANDING COMMITTEE, JUDICIAL CONFERENCE, AND OTHER ADVISORY COMMITTEES.

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure.

1. Possible Amendments to Rule 46 Regarding Bail.

Mr. Rabiej reported that Congress had continued to consider amendments to Rule 46 that would restrict the ability of the court to revoke bail on grounds other than a failure

to appear. He noted that the lobby for the Bail Bondsmen was extremely strong and that despite the clear opposition from the Judicial Conference on the issue, various congressional committees continued to discuss the issue and propose legislation to amend Rule 46. He added that Judge Carnes and Judge Davis, past chair of the Committee, had testified before congress on the matter and made known the Judicial Conference's position.

2. Possible Conforming Amendment to Rule 6.

Mr. Wroblewski reported that several years ago, Congress had voted to amend Rule 6 to provide for greater sharing of grand jury information vis a vis the war on terrorism. But the amendment was to an older version of Rule 6, which had gone into effect automatically under the provisions of the Rules Enabling Act. Because the amendment made no sense when applied to the new version of the rule, it had been considered a nullity. He added that the Department and the Administrative Office had continued to work with Congress in correcting the problem.

VI. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Judge Carnes indicated that his term as chair and member of the Committee expired in September 1, 2004, and that the Chief Justice would be appointing his successor during the summer. He thanked the members for their service and indicated that it had been a high honor to work on the committee.

The Committee tentatively agreed to hold its next meeting in the Fall 2004 at Santa Fe, New Mexico. Judge Carnes asked the members to contact Mr. Rabiej concerning dates during which they could not meet.

The meeting adjourned at 9:30 a.m. on Friday, May 7, 2004

Respectfully submitted

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