MINUTES

of

THE ADVISORY COMMITTEE

on

FEDERAL RULES OF CRIMINAL PROCEDURE

April 7, 1997

Washington, D.C

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. on April 7, 1997. These minutes reflect the actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Jensen, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, April 7, 1997. The following persons were present for all or a part of the Committee's meeting:

Hon. D. Lowell Jensen, Chair

Hon. W. Eugene Davis

Hon. Edward E. Carnes

Hon. George M. Marovich

Hon. David D. Dowd, Jr.

Hon. D. Brooks Smith

Hon. B. Waugh Crigler

Prof. Kate Stith

Mr. Darryl W. Jackson, Esq.

Mr. Robert C. Josefsberg, Esq.

Mr. Henry A. Martin, Esq.

Mr. Roger Pauley, Jr., designate of the Asst. Attorney General for the Criminal Division

Professor David A. Schlueter, Reporter

Also present at the meeting were: Hon. Alicemarie Stotler, Chair of the Standing Committee on Rules of Practice and Procedure; Hon William R. Wilson, Jr., a member of the Standing Committee and a liaison to the Criminal Rules Committee; Professor Daniel R. Coquillette, Reporter to the Standing Committee; Mr. Peter McCabe and Mr. John Rabiej from the Administrative Office of the United States Courts; Mr. Jim Eaglin from the Federal Judicial Center, Mr. Joseph Spaniol, Consultant to the Standing Committee, and Ms. Mary Harkenrider from the Department of Justice.

The attendees were welcomed by the chair, Judge Jensen, who indicated that the press of court business had prevented Chief Justice Daniel Wathen from attending the Committee's meeting.

II. APPROVAL OF MINUTES OF APRIL 1996 MEETING

Judge Marovich moved that the Minutes of the Committee's October 1996 meeting be approved. Following a second by Judge Smith, the motion carried by a unanimous vote.

III. RULES APPROVED BY THE STANDING COMMITTEE AND FORWARDED TO THE JUDICIAL CONFERENCE

The Reporter informed the Committee that at its January 1997 meeting, the Standing Committee had approved minor, technical amendments to Rule 58 which conformed the rule to the Federal Courts Improvement Act. That legislation had amended 18 U.S.C. § 3401(b) and (g) and 28 U.S.C. § 636(a). Those amendments removed the requirement that the defendant consent to trial before a magistrate judge in those cases where the defendant is charged with a petty offense, a class C misdemeanor, or an infraction. The amendments now also permit a defendant to consent to trial before a magistrate judge in all other cases either orally on the record or in writing. Given the fact that the amendments simply conformed Rule 58 to the new legislation, the Standing Committee approved the changes without requiring a public comment period. Mr. Rabiej indicated that the Judicial Conference had approved the changes to Rule 58 at its Spring meeting, and that they were currently pending before the Supreme Court.

IV. RULES PUBLISHED FOR PUBLIC COMMENT AND PENDING FURTHER REVIEW BY THE ADVISORY COMMITTEE

The Reporter informed the Committee that to date, 20 written comments had been received on the Committee's proposed changes to the following rules: Rule 5.1 (Preliminary Examination; Production of

Witness Statements); Rule 26.2 (Production of Witness Statements; Applicability to Rule 5.1 Proceedings); Rule 31 (Verdict; Individual Polling of Jurors); Rule 33 (New Trial; Time for Filing Motion); Rule 35(b) (Correction or Reduction of Sentence; Changed Circumstances); and Rule 43 (Presence of Defendant; Presence at Reduction or Correction of Sentence). In addition, he indicated that the Style Subcommittee of the Standing Committee had reviewed the proposed changes and had submitted its suggested style changes to the Committee for its consideration.

A. Rule 5.1. Preliminary Examination

The Reporter informed the Committee that 12 written comments had been received on the proposed amendment to Rule 5.1, which would extend the Rule 26 requirement to produce statements at preliminary examinations. Only one of the commentators opposed the adoption of the amendment. He also indicated that the Style Subcommittee of the Standing Committee had proposed several changes to the rule but that as it was published for comment, the Rule mirrored almost identical language in Rules 32.1, 32, and 46. He noted that using different language in Rule 5.1 might cause confusion in applying the other rules. Following discussion concerning the pending restyling of all of the Criminal Rules, Judge Carnes moved that the proposed amendment be forwarded to the Standing Committee as published for comment. Professor Stith seconded the motion, which carried by a unanimous vote.

B. Rule 26.2. Production of Witness Statements

The Reporter informed the Committee that as of the date of the meeting, 12 written comments had been received on the proposed amendment to Rule 26.2(g) which would extend the production-of-statements requirement to preliminary examinations conducted under Rule 5.1, *supra*. The Style Subcommittee's suggested changes were discussed by the Committee, which was inclined to save the proposed changes until all of the Criminal Rules were restyled. Professor Stith moved that the proposed amendment be forwarded to the Standing Committee as published. Judge Carnes seconded the motion which carried by a unanimous vote.

C. Rule 31(d). Polling of Jury

Following a brief report from the Reporter on the written comments submitted on the proposed amendment, which would require that whenever a polling of the jurors was conducted, that each juror be polled individually. Following brief discussion of the proposed style changes, Professor Stith proposed that the proposed amendment be forwarded with those changes; Judge Davis seconded the motion. During the ensuing discussion on the motion, Judge Carnes noted that the suggestion from one of the commentators concerning the timing of the polling had merit and that perhaps the rule should be amended to reflect that polling must take place before the verdict is recorded. That in turn led to additional discussion about whether under the proposed amendment the judge had any discretion whether to conduct an individual polling. A consensus emerged that the intent of the proposed amendment was to require individual polling when a polling is requested or ordered by the court. Thereafter, Judge Smith

moved to amend the motion to read that the rule be amended to reflect that the jury must be polled before it is discharged. That motion was seconded by Mr. Josefsberg and carried by a unanimous vote. The main motion to forward the proposed amendment to the Standing Committee, as amended and restyled, also carried by a unanimous vote.

D. Rule 33. New Trial

The Committee was informed that of the twelve comments received, ten were opposed to the proposed change to Rule 33. The Reporter summarized the comments received and indicated that those in opposition to the proposed amendment argued that there is no real need for the amendment and that the amendment would in effect reduce the amount of time for filing a motion for new trial. Following brief discussion concerning the suggested style changes, Judge Dowd moved that the proposed amendment to Rule 33 be changed to reflect that motions for a new trial on grounds of newly discovered evidence must be filed within three years, rather than two years, as the rule currently provides. Mr. Martin seconded the motion which carried by a unanimous vote. Thereafter, Judge Dowd moved that the proposed rule, with the style changes, be forwarded to the Standing Committee. Mr. Martin seconded the motion which also carried by a unanimous vote.

E. Rule 35(b). Reduction of Sentence

The Reporter indicated that the Committee had received eight written comments on the proposed amendment to Rule 35(b) which would permit the judge to consider both pre-sentence and post sentence assistance in determining whether a defendant had provided substantial assistance to the government. All eight comments favored the proposed amendment. Following brief discussion about the proposed restyling changes to the rule, Judge Davis moved that the amendment, as restyled, be forwarded to the Standing Committee. Judge Dowd seconded the motion, which carried by a unanimous vote.

F. Rule 43(c). Presence of Defendant Not Required

The Reporter informed the Committee that of the nine written comments received on the proposed amendment to Rule 43, seven commentators were opposed to the amendment, which would clarify the issue of when the defendant's presence is required at various post-sentencing proceedings. Following brief comments by Mr. Pauley who explained the rationale of the rule, Mr. Martin expressed deep concerns about the amendment. He noted that Rule 35(b) is the only real hope of sentence reduction and that the defendant should be present at that proceeding, especially where a different judge is involved. He recognized the problem and costs of transporting prisoners to court and noted that even where the judge has discretion as to do so, he or she may not require the defendant's presence. Following brief discussions on the proposed style changes, during which the Reporter indicated that the rule as it now appears had been restyled during a Standing Committee just several years earlier, Judge Crigler moved that the proposed amendment be forwarded as published. Judge Dowd seconded the motion, which carried by a vote of 7 to 3.

V. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Rule 5(c). Proposed Change Re Authority of Magistrate Judge to Grant a Continuance

The Reporter indicated that the Committee had received a letter from Magistrate Judge Ervin Swearingen who recommended, on behalf of the Federal Magistrate Judges Association (FMJA), that Rule 5(c) be amended to permit a magistrate judge to grant a continuance for a preliminary examination even in those cases where the defendant does not consent. The current rule, which conforms to 18 U.S.C. § 3060(c), indicates that only a district judge may grant such continuances when the defendant does not consent.

The Committee's discussion of the proposed change recognized that the unless there was a change to the underlying statute the rule could not be changed. Judge Jensen suggested, however, that the Committee could discuss the merits of the proposal and that if it believed that the amendment had merit to forward it to the Standing Committee. Mr. Josefsberg moved and Judge Crigler seconded, a motion to forward the proposed amendment the Standing Committee with the recommendation to seek a legislative change to § 3060(c). The motion carried by a unanimous vote.

B. Rule 6. The Grand Jury

The Reporter indicated that the Department of Justice had proposed two amendments to Rule 6. The first related to Rule 6(d) concerning the ability of interpreters to be present during deliberations to assist a deaf juror. And the second related to who may return the indictment.

1. Rule 6(d). Who May be Present

The Reporter informed the Committee that Mr. John C. Keeney, Acting Assistant Attorney General had written to Judge Jensen suggesting a change to Rule 6(c) which would permit interpreters to accompany a deaf grand jury member into the deliberations. Judge Dowd raised the question whether the proposed amendment was necessary; he questioned whether there is now a problem with deaf persons serving on grand juries. Mr. Pauley responded that there is some concern in the Department that clerks may be eliminating deaf persons from those eligible to serve on grand juries. Judge Crigler observed that the same rationale might extend to any other jury members needing assistance during deliberations; Professor Stith noted the amendment might be a first step onto the slippery slope. Judge Jensen observed that the amendment would potentially open the door to grand jury deliberations. Judge Carnes indicated support for the amendment, noting that deaf persons are generally excluded from the judicial process. He

then moved that the words "when necessary" be changed to read "when needed," and that the amendment be forwarded to the Standing Committee for publication and public comment. Mr. Martin seconded the motion, which carried by a unanimous vote. It was suggested that the Advisory Committee Note should reflect the importance of insuring that any interpreters accompanying a deaf person into the deliberation room be reminded of the paramount need for maintaining the secrecy of the jury's discussions.

2. Rule 6(f). Finding and Return of Indictment

The Reporter indicated that Mr. Keeny's letter to Judge Jensen also included a recommendation that Rule 6(f) be amended to avoid the problem of bringing the entire grand jury to court to return an indictment. Following a brief discussion about proposed style changes to the amendment, which in the view of some members of the committee would have made substantive changes, Judge Dowd moved that proposed amendment be forwarded to the Standing Committee. Professor Stith seconded the motion which carried by a unanimous vote.

C. Rule 11. Pleas.

The Reporter indicated that several interrelated matters affecting guilty pleas and the sentencing guidelines were on the agenda for the meeting as continuation of discussions at the Committee's October 1996 meeting in Oregon.

1. Rule 11(c)(6); Advice to Defendant Regarding Waiver of Right to Appeal

The Reporter stated that at its October 1996 meeting the Committee had approved an amendment to Rule 11(c) which would require the court to discuss with the defendant any terms or provisions in a plea agreement which would waive the right to appeal or collateral attack the sentence. Judge Dowd moved that the proposed amendment be forwarded to the Standing Committee for publication and comment; Judge Davis seconded the motion which carried by a vote of 11 to 1.

3. Rule 11(e)(1)(B), (C). Rejection of Plea Agreement.

The Committee engaged in a lengthy discussion concerning several issues arising from the interplay of the sentencing guidelines, plea bargaining and the court's role in accepting or rejecting any resulting plea and plea agreement. Speaking for the Subcommittee which had been charged with addressing those issues, Judge Marovich provided a general background discussion of the issues and indicated that the subcommittee had addressed three primary areas. First, with regard to the ability of the court to accept a plea agreement which is outside the sentencing guidelines; although at least one court has held that the parties are free to reach a sentence agreement which is outside the guidelines, Judge Marovich indicated that for now the subcommittee believed it better not to amend the rule to address that issue. Second, he

addressed the issues raised by the decisions in *United States v. Harris*, 70 F.3d 1001 (8th Cir. 1995) and *United States v. Hyde*, 82 F.3d 319 (;9th Cir. 1996). The Committee, he noted had already addressed the *Harris* decision by considering changes to Rule 11(e)(1)(B) and (C) to make it clear that an plea agreement under Rule 11(e)(1)(B) is not binding while a (e)(1)(C) agreement is binding. With regard to the *Hyde*, he indicated that regardless of what the Supreme Court decides in *Hyde*, the Court will probably not address the issue of what a defendant is to do if he or she discovers that they have not received the sentence they thought they had agreed to. Finally, Judge Marovich indicated that the Subcommittee had considered the question of providing notice to the defendant and that Professor Stith had provided some suggestions.

Professor Stith noted that she generally agreed with Judge Marovich's assessment of the current problems involving the sentencing guidelines and plea bargaining. She noted that a real problem exists with regard to providing sufficient notice to the defendant of what sentencing factors might be considered by the court. She noted that after talking with a number of prosecutors that there were two possible avenues. First, a rule could be devised which would permit a defendant to withdraw a plea of guilty if non-noticed sentencing factors were considered by the court in sentencing. Or, she said, a rule could be drafted to indicate that a judge could not make any use of non-noticed sentencing factors.

Mr. Martin noted that he generally agreed with Judge Marovich's description of the problems but added that it would be beneficial if the Committee could devise solutions to the problems of providing fair notice regarding the role of various sentencing factors.

Mr. Pauley indicated that the Department of Justice was also concerned about fairness and that under § 3553(b) the courts are required to impose sentences which comply with the Sentencing Guidelines. Regarding the issue of notice to the defendant of what sentencing factors might come into play, he noted that under the old laws, the defendant generally had no idea what sentence might be imposed. Under the Sentencing Guidelines, the defendant now at least has some idea of what will happen at sentencing. In his view, it is not the responsibility of the prosecutor to inform the defendant of what sentencing factors might be binding on the court.

Judge Jensen provided a brief overview of the possible amendments to Rule 11 and stated that the Sentencing Commission had sent a letter which suggested some minor changes in the Committee's proposed language in Rule 11(e)(1)(B) and (C). The Committee agreed with the suggested changes; Judge Dowd moved that the proposed changes to Rule 11(e) be approved and forwarded to the Standing Committee. Judge Marovich seconded the motion which carried by a unanimous vote.

During a brief discussion of the *Hyde* case pending before the Supreme Court--in which the Ninth Circuit had held that a plea of guilty was not finally accepted until the plea agreement was also accepted--a consensus emerged that any possible amendments to Rule 11 to address that problem should wait until the Supreme Court had decided the case.

The Reporter indicated that Mr. Pauley had suggested a change in Rule 11(a)(1) which would change the term "defendant corporation" to "defendant organization as defined in 18 U.S.C. § 18." Judge Carnes moved proposed amendment to Rule 11(a) be approved and forwarded to the Standing Committee. Judge Dowd seconded the motion, which carried by a unanimous vote.

Judge Jensen thanked the Subcommittee's for its work, which he believed had been very helpful to the Committee, and asked them to continue their study of Rule 11 issues.

D. Rule 24(c). Retention of Alternate Jurors During Deliberations

The Reporter indicated that as a result of the Committee's action at its October 1996 meeting, he had drafted proposed changes to Rule 24(c) which would permit the court to retain alternate jurors--who do not replace jurors--during the deliberations. The suggested changes, he noted, had resulted from *United States v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996) where the First Circuit concluded that the trial judge committed harmless error in not discharging the alternate jurors. Mr. Pauley suggested that the Committee Note recognize more clearly the potential tension that may exist between Rule 23(b), which permits a verdict of less than 12 jurors, and the proposed change, which would permit the judge to substitute a juror who could not continue to serve during the deliberations. He suggested that in that case the preferred method would be to continue with only 11 jurors. It was also suggested that the Committee Note reflect that it is assumed that courts will instruct the alternates not to discuss the case amongst themselves and that it might be helpful to explain in the Note what the term "retain" means in the Rule. Finally, the Committee discussed the proposed style changes from the Style Subcommittee of the Standing Committee.

Judge Carnes moved that the proposed amendment to Rule 24(c), as restyled, be approved and forwarded to the Standing Committee. Judge Smith seconded the motion which carried by a unanimous vote.

D. Rule 26. Taking of Testimony

The Reporter informed the Committee that he had drafted a proposed amendment to Rule 26 to reflect the Committee's action at the October 1996 meeting, which would conform that rule to Civil Rule 43. The latter rule permits the taking of testimony through means other than simply oral testimony in court, e.g., through the use of sign language and transmission of testimony from outside the courtroom. Judge Dowd moved that the proposed amendment to Rule 26 be forwarded to the Standing Committee, Mr. Josefsberg seconded the motion, which carried by a unanimous vote. Several Committee members, however, noted that as drafted, the proposed amendment to Rule 23 only covered the issue of "oral" testimony in the courtroom and the important issue of transmission of testimony into the courtroom. The proposed amendment was thereafter withdrawn from the list of those being forwarded to the Standing Committee with the understanding that the issue would be on the Committee's agenda for the Fall 1997 meeting. Judge Jensen indicated that he would appoint a subcommittee to study the question in preparation for that meeting.

E. Rule 30. Instructions

The Reporter informed the Committee that Judge Stotler had suggested a possible change to Rule 30 concerning the timing of submitting requested instructions. She had noted that a number of courts are inclined to require, or permit, counsel to file their requests pretrial and although the Committee had earlier rejected a proposed change which would have provided a uniform rule requiring early filing, she recommended that the rule be changed to permit courts to require early filing of requests. The Committee briefly discussed the Reporter's draft changes and the Style Subcommittee's suggested changes. Ultimately, Judge Dowd moved that the amendment be forwarded, as restyled, to the Standing Committee for publication and comment. Judge Smith seconded the motion which carried by a unanimous vote.

F. Rule 32.2. Forfeiture Procedures

The Reporter provided a brief review of the Committee's previous consideration of the Department of Justice's proposed new rule on forfeiture procedures--Rule 32.2--which would replace several existing rule provisions and provide a more detailed guide on forfeitures. He noted that as a result of the Committee's discussion at its October 1996 meeting the Department had redrafted the rule and that the Style Subcommittee had recommended a number of changes to the draft.

Mr. Pauley briefly explained the redrafted rule and noted that the Department was satisfied that the new rule would not violate the Seventh Amendment rights of any third persons whose property might be forfeited. He also noted that under the proposed rule the jury would not have a role in decisions regarding forfeiture, just as the jury is currently not involved in other sentencing issues. Drawing the Committee's attention to subdivision (b) of the new rule, he noted that the Department had presented alternative provisions dealing with the situation if no third party filed a petition claiming an interest in the property to be forfeited. The first alternative, he explained, would provide that if no third party petition was filed that it would be presumed to be the property of the defendant(s) and would be forfeited in its entirety. The second alternative would provide that if no third party files a petition, the property may be forfeited in it entirety only if the court finds that the defendant had possessory or legal interest in the property. Following brief discussion, Judge Carnes moved that the Committee adopt the second alternative. Judge Crigler seconded the motion, which carried by a majority vote.

Mr. Pauley and Mr. Stefan Cassella, also of the Department of Justice, addressed the proposed style changes section by section, noting that some of the proposed changes would make substantive changes in the rule. During that discussion, a number of minor changes were made to the draft rule.

A number of the Committee's members observed that the proposed new rule would dramatically change the procedures for dealing with forfeitures in criminal trials but believed that the rule should be forwarded for publication. Ultimately, Judge Marovich moved that the rule as modified and restyled be forwarded to the Standing Committee. Judge Davis seconded the motion which carried by a unanimous vote.

G. Rule 54(a). Application of Criminal Rules

The Reporter informed the Committee that Mr. Pauley had recommended that Rule 54(a) be amended to delete the reference in the rule to the District Court in the Canal Zone, which no longer exists. Following brief discussion about whether the references to the Courts of Appeals and the Supreme Court should be deleted (which was ultimately rejected), Judge Davis moved that the amendment be forwarded to the Standing Committee. Judge Crigler seconded the motion which carried by a unanimous vote.

VI. ORAL REPORTS; MISCELLANEOUS

A. Status Report on Crime Control Act

Mr. Rabiej informed the Committee that a proposal in the Crime Control Act would provide for six-person juries in criminal trials. A number of members were of the view that any changes to the size of juries should be first addressed under the provisions of the Rules Enabling Act and that the matter should be added to the Committee's Fall 1997 meeting. There was also discussion concerning changing the number of peremptory challenges available to the prosecution and the defense. Ultimately, Judge Dowd moved that those two issues be added to the Fall 1996 agenda. Mr. Josefsberg seconded the motion which carried by a unanimous vote.

There was also some brief discussion about legislative proposals which would reduce the size of grand juries. That item will also be added to the October 1997 agenda.

B. Status Report of Proposed Changes to the Rules of Evidence

Judge Dowd, as the Committee's liaison to the Evidence Committee, reported that the Committee was considering a number of possible changes to the Rules of Evidence and that he would keep the Committee apprised of further developments.

VIII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee decided to hold its next meeting in Monterey, California on October 13 and 14, 1997.

Respectfully submitted

David A. Schlueter

Professor of Law

Reporter