

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON, D. C. 20544

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RULES OF EVIDENCE

REPORT

TO THE JUDICIAL CONFERENCE OF THE UNITED STATES:

Your standing committee and its advisory committees have continued their work during the past six months. The work will be aided by the recent appointment by the Chief Justice of Professor Bernard J. Ward, former reporter to the Advisory Committee on Appellate Rules, as reporter to our standing committee.

Civil Rules

The Advisory Committee on Civil Rules is continuing to receive comments and suggestions from the bench and bar on the tentative draft of revised discovery rules which were published in November 1967. The Committee hopes to complete its consideration of these suggestions and comments during the coming winter and to present a definitive draft to our committee in the spring.

Criminal Rules

The Advisory Committee on Criminal Rules is continuing to study those phases of criminal procedure on which it has not heretofore reported, particularly the arraignment and other pre-

trial procedures and the Committee will meet at the end of this month to give further consideration to these problems.

Admiralty Rules

The Advisory Committee on Admiralty Rules, with the assistance of its newly appointed reporter, Professor Preble Stolz, is giving consideration to the operation of the unified civil rules with respect to maritime cases and is also studying the supplemental admiralty rules with a view to their improvement and enlargement, if needed.

Bankruptcy Rules

The Advisory Committee on Bankruptcy Rules is working very hard and holding frequent meetings on its major task of preparing uniform rules of procedure not only for normal bankruptcy cases but also for proceedings brought under the reorganization and adjustment provisions of chapters 10, 11, 12 and 13 of the Bankruptcy Act. To study and report to the Advisory Committee proposed procedural rules under these chapters Professors Lawrence P. King and Vern Countryman have been appointed associate reporters to the Committee. Professor Frank R. Kennedy continues as reporter in general charge of the work but with special responsibility for the procedure in ordinary bankruptcy cases. The Committee is also reviewing the provisions of the Bankruptcy Act to determine which of them will be superseded by the new bankruptcy rules and should accordingly be repealed in the interest of simplicity and clarification of the procedural law.

MINUTES OF THE MAY 1966 MEETING
OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

The meeting of the Advisory Committee on Criminal Rules convened in the Supreme Court Building on May 23, 1966, at 10:00 a.m. The following members of the Committee were present during all or part of the sessions:

John C. Pickett, Chairman
Joseph A. Ball
George R. Blue
Sheldon Glueck
Walter E. Hoffman
Robert W. Meserve
Maynard Pirsig
Frank J. Remington
Barnabas F. Sears
Lawrence E. Walsh
Edward L. Barrett, Jr.

Judge William F. Smith was unable to be present during the meeting.

Others attending were Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure; Judges Claude F. Clayton, Alfonso J. Zirpoli and Olin H. Chilson, members of the Subcommittee on the United States Commissioner System of the Judicial Conference Committee on Administration of the Criminal Law; Honorable Ernest C. Friesen, Jr., Assistant Attorney General for Administration, Department of Justice; Harold K. Koffsky, Deputy Chief of Legislation and Special Projects Section, Criminal Division, Department of Justice; Richard Braun, Second Assistant, Criminal Division, Department of Justice; William T. Finley, Jr., General Counsel, and M. Albert Figinski, staff attorney, of the Subcommittee on Judicial Machinery of the Committee on the Judiciary of the United States Senate; Professor Charles A. Wright, member of the standing Committee; William E. Foley, Secretary to the Rules Committees; Carl H. Imlay, Administrative Attorney, and Gilbert W. Lentz, attorney, of the Administrative Office of the United States Courts.

The Chief Justice of the United States and Mr. Justice Fortas were both present for brief periods during the sessions and spoke to the members.

Judge Pickett called the meeting to order by welcoming the newest member, Mr. Meserve, to the Committee and by introducing the guests.

Dean Barrett stated there were two alternatives: (1) force either indictment or preliminary hearing within a brief time and then decide the corollary question who is to handle the preliminary and (2) how to reduce the custody periods.

Judge Chilson expressed the opinion that a system which works in one area will not work in another. He felt the important thing should be that the man be not put away for 120 days when he has an opportunity to be heard. He felt the best thing to do is to put a time limitation in which would require a man to be indicted or waive indictment with an information upon it and then authorize each district court to follow the procedure which will best work in its area. He also thought it would be wise to give courts authority to use state magistrates or to hold preliminary hearings -- using the number of commissioners they desire. He felt the only argument against continuing the present system is the fee basis, but that could be taken care of by a salary commensurate to the work performed. Aside from the matter of discovery, he could find no one who feels the commissioner system isn't doing what it is supposed to in each particular area and the defense lawyers he had talked to felt that they should have greater leeway for discovery. Judge Chilson thought this could be handled by a revision of the discovery procedure.

Discussion was centered around the matter of calling the grand jury at least once a month if needed and what implications this would have.

Professor Remington raised a question concerning a case of arrest without warrant being brought before a commissioner, and to the basis for holding him. The matter of arrest in a non-warrant situation was discussed fully.

Mr. Finley and Mr. Figinski entered the meeting at 12:00 noon and Mr. Finley spoke briefly about the proposed legislation of Senator Tydings. He made the following comment:

I want to speak to the Advisory Committee quite briefly about some features in our commissioner bill which affect the rule-making power of the Court and Mr. Figinski will also speak about the problem of not guilty pleas and not guilty by reason of insanity.

Everyone here has seen a copy of Senator Tydings' proposed bill to overhaul the commissioner system. We have not introduced this bill yet, we want to circulate it more or less off the record among those who have a knowledge and interest of the subject so that we can have the benefit of their advice and counsel before

actually introducing the bill. We received a lot of comments from the approximately 75 or 80 people to whom it has been sent, including all the people who have testified before the Subcommittee at the three sessions of hearings. This includes people of the Justice Department, Administrative Office, all the members of the Advisory Committee, a number of people on the Criminal Law Advisory Committee, some other district and circuit judges, and a number of United States commissioners as well. All Senators on the Subcommittee have taken a look at this too. In particular, I wanted to discuss the rationale behind those two provisions of Sections 3.03 and 3.04 of the bill dealing with preliminary hearings and discovery. We have had a mixed bay of reactions particularly to Section 3.04, which would direct the Supreme Court to make adequate discovery rules in every criminal case, taking into account not only the benefit in broad and criminal discovery dealing with the criminal defendant and the likelihood of the fact that would enhance appearance in trial, but also national security interests and well-being of witnesses. We were at first reluctant to get into the business of telling the Supreme Court what it should do with respect to criminal discovery and while we have had a lot of complimentary comments about this approach we have had very well-meaning and very thought-out cautionary criticisms. The two main divisions which the criticisms fell were: first, concern this direction coming at the present time, as it does, might be thought to reflect adversely on new federal Rule 16, which is about to go into effect; secondly, that the Congress ought not to be in the business of telling the courts specifically what to do in this area, having given the Court the rule-making power to govern procedure of this nature. With respect to the first, we did not intend it to be a judgment upon adequacy of new Rule 16 and we will be at pains, if this provision stays in the bill, if the bill is enacted to make this quite clear in the legislative history behind the bill. That is not meant to say, however, that we think federal Rule 16 is adequate in all respects. There is some concern from the Court and in the Senate whether Rule 16 covers some situations it should cover and there is a tendency to point to the scope of discovery that is different in a civil case and compare that with what is given here. Secondly, with the criticism that we ought not to be in the business of telling the court what it should do in this area, we are not sure we shouldn't be either. And particularly that point is what I wanted to talk to you about. I thought it might

be a little clearer why we resorted to this device if I explained the tactical considerations behind this approach. On the one hand, we have concluded that the preliminary hearing as it currently exists, both in theory and practice, is not a meaningful device. Certainly not uniformly meaningful, and there is some doubt as to whether it is very meaningful even where it is utilized as the rule seems to contemplate that it will be utilized. Certainly this is true for discovery purposes as probable cause devices might be considerably more applicable. Feeling that the preliminary hearing in any event is not a satisfactory discovery device for a number of reasons -- because it is not uniformly given, because it could at least under present law be preempted by their being grand jury indictment, because of the amount of discovery that the defendant gets dependent on how much discovery the commissioner or other judicial officer thinks the government must put forth to show probable cause, and because the arrest when counsel wishes a preliminary hearing is given -- doesn't bear any necessary relation to the counts the defendant will be tried upon and usually there is a preliminary hearing when probable cause has been established with respect to one count that is deemed sufficient to find the defendant for the grand jury or for district court and where there is not a preliminary hearing held with respect to other counts. All these considerations have led us to believe that the preliminary hearing should be restricted to the probable cause issue alone -- Section 3.03 of the bill does that. Having arrived at this finding and having emasculated the preliminary hearing as even a slight discovery tool, we felt that as a tactical matter it would be advantageous to demonstrate to those who were defense minded, civil libertarianism minded, or whatever, that we were not trying to restrict the scope of the present discovery devices and therefore we thought it appropriate for the bill to specifically set out some discovery procedure. When we got to this junction we felt that we were not the best people to do this -- not as well equipped as this Committee to set out what should be put into a procedure to allow a defendant criminal discovery. We thought that something could be gained by directing the Supreme Court to do this. I have off the record, some official conversations with people involved in this process and the subject came up to whether, first of all, the court itself is satisfied with the new rule. And, secondly, whether they would

be offended if this provision of the bill, a mandate to the Court, were enacted. It seems to be some thought, without getting into detail, that the Court, far from being offended by this, might even welcome it because I believe common knowledge in this room, if not elsewhere, is that the Court does not sit and review these rules with any degree of specificity. It feels that after the rule has run the gamut that it has run once it gets to the Court, unless there is something drastically wrong with it, the rule should be promulgated as it is recommended to the Court by the Conference, even if there is a consensus of the Court that if they were writing the rule they would write it a bit differently. There seems to be a feeling first of all (a) that the Court itself would not feel that this is a directive to the Court in a way to restrict its scope of operation and (b) to the extent that it might prompt this Committee to promulgate effective discovery rules, then it might even be welcomed by the Court. At this point, I am open to any comment anyone would care to make. We are not at all firmly committed to having this added feature of the bill. It may or may not remain in the version of the bill that is introduced in about a week or 10 days. Even if it does remain in the version of the bill introduced, we will be sympathetic to well-intentioned constructive criticism that this is not a proper thing for us to do and if this appears to be the result of the hearings then we will not be adverse to take it out by amendment at that time. I just wanted you to have in mind what is in our minds when we resorted to this tactic. We had a mind not only to what we felt the Court's reaction would be but also to what the reaction of the Congress would be to those who might be critical of our narrowing the scope of the preliminary hearing without, so to speak, any physical clause. If there are any comments I might just leave that with you and allow you to communicate with me any further thoughts that anybody has on individual basis. I would appreciate as much guidance as we can obtain from the people here in this room as I know the people here have more knowledge about this than probably any other group we can get together.

Judge Hoffman inquired of Mr. Finley whether he had some note, that the Advisory Committee had not been advised of, that the Committee did not go far enough in its developments under Rule 16.

Mr. Finley stated that he did not want to make any judgment on that -- that he wanted to make it perfectly clear in the legislative history that this division is not intended to be a judgment on Rule 16. He stated that he had heard some comments to this effect, which he had not adopted necessarily as his own viewpoint. He thought the rule is a substantial improvement over the old rule but mentioned that another consideration is that the Court itself might be in a position (stated he had heard this suggested by someone who should know) of wanting broader discovery than even Rule 16 gives but it might feel reluctant to change the advice of the Advisory Committee and might welcome a mandate from the Congress that it could rest upon in effect directing the Advisory Committee to effectuate its desires.

Judge Pickett stated that it seemed to him the Court is confronted with the same thing the Advisory Committee is -- that the Committee had what it thought available help in connection with the rule and that it had spent approximately five years of study on the rules, none receiving more consideration than Rule 16. He also expressed the opinion that he would doubt if you could find any multiple group who would agree upon as to what the rule should be but that the rule was a result of continuous study for over five years. Mr. Finley stated two things in particular which he recalled were mentioned to him in conversation about Rule 16. First, that it seems permissive rather than directive, where it says "may," rather than using "shall," even though there is a clause in subsection (e) which would allow the court to accept certain categories of cases presumably in national security to the survivor. Secondly, it doesn't provide for any discovery apart from the matters that may actually be in the hands of the government; it doesn't allow for depositions to non-parties and witnesses especially where the government does not have the materials in some possession. He stated however that he had not considered these at great length.

Judge Hoffman commented that the Department of Justice was invited in on this rule and there was a sharp conflict about this, as everyone on the Committee would remember. The Committee decided it was best to put in a protective situation about revealing who the witnesses were. He expressed the opinion that the Committee could go over it again and would probably not come up with anything different. He felt there are certain cases where it wouldn't make any difference if you revealed the witnesses but in others it would.

Judge Maris stated that he was one of the people who wrote to Mr. Finley in a somewhat deprecatory manner -- with respect to Section 3.04 -- because it seemed to him it is ambiguous. He felt Section 3.04 of the proposed bill was not adding anything that wasn't already taken care of by what the Court had already done.

Mr. Finley stated he recognized the validity of this and that if the provision stays in the bill there would be some attempt to make it more specific in terms of what consideration does it take into fact but without promulgating the rule itself, still leaving the rule up to the Court.

Judge Maris stated that if that were done it would serve a useful purpose. He still felt that it may not be the appropriate thing to do but it would be understandable why it had been done.

Dean Barrett stated that it seemed to him if the Court wanted the Committee to know something he did not feel there would be reticence on the part of the Court to communicate it, and that it would not need Congress to go back and suggest to the Committee.

Mr. Finley stated this provision was not a response of something to them from the Court -- it was initiated by the Subcommittee.

Mr. Ball stated that he was one of those who was for wide open discovery but he still felt the Committee had given thorough consideration to the rule and also that the Committee was in a better position to work this out than Congress.

Mr. Finley stated the other consideration which he mentioned is really on the basis of merits whether this should or should not be in the bill and that is whether it is a tactically desirable adjunct of the statute on the standpoint of getting the entire commissioner bill passed by the Congress and he asked for comments on this.

Judge Maris expressed the opinion that inasmuch as the Court has now for the first time adopted Rule 16, giving discovery, that he felt this was the basis for something that could be taken hold of.

Mr. Finley stated it might be tactically advantageous for them to introduce the bill in its present form and then have a number of people testify that this is not necessary in light of new Rule 16. Thereby spreading on the record the fact that the scope of the preliminary hearing has not been narrowed without some mindfulness of this other problem and the tactical matter might help out some. He asked if Senator Tydings did something along this line whether it would embarrass the Advisory Committee.

Professor Wright stated that he felt this was purely a procedural point -- it is not even like the broad question of policy regarding the discovery but that he hoped Congress would not, unless it has lost all confidence in the Advisory Committee and the Supreme Court, intrude in this area.

Mr. Finley stated that he differed with Professor Wright insofar as his statement that this is a matter of procedure and not vitally a matter of policy so far as discovery is concerned. It seemed to him the need for prompt judicial determinations of the problem for a prompt determination of one's peers, if not by judicial officer, of probable cause is a matter of law immediately after arrest especially considering that the arrest may have been made without a warrant. This is very much a fundamental policy. He felt the present rules have not done a very satisfactory job in solving this problem and the new rules don't seem to make any changes. He stated it may be that the Advisory Committee is contemplating further rules that do make some sense out of this theory and if that is so that subsequent rules repeal any inconsistent prior legislation and this may be the answer to the problem.

Mr. Figinski then addressed the Committee stating that he wanted to talk about a problem which several judges had written to Senator Tydings about, as follows:

Outside of the District of Columbia when insanity defense is raised at trial and the person is found not guilty he walks free from the courtroom, regardless of whether that mental condition which causes him to be relieved of criminal responsibility persists or not and the Senator is very interested in trying to find some solution to the problem. I think that at the outset we would need a verdict of not guilty by reason of insanity at the very least and then some type of triggering device whether for commitment of examination purposes or for a hearing to determine whether or not the person is dangerous to himself and others and then commitment or set time until he regains his sanity, so to speak. The problem at least requires change in statute relating the types of verdicts that can be handed down in federal criminal courts, probably to require additional treatment facilities and at least a procedure for habeas corpus provisions once a person is under treatment. The districts in this area use St. Elizabeth's for pretrial commitments; perhaps the districts in this area could continue to use St. Elizabeth's for post-trial commitments. We have facilities in Springfield, Mo., where people could be held and perhaps state institutions could be used to some extent. The problem of what to do with a person is very acute even if you decide you want to handle it. I don't think it is a problem we can close our eyes to and we would like to introduce legislation in this area. We are trying to get the views of people who know the most about criminal law to help us draft a solution to this

problem. We get the feeling that there are a number of people today in federal institutions who are there primarily because they can't be tried, for if they were tried and found "not guilty" they would walk out free -- creating a problem both to themselves and society. Having this violence, so to speak, hang over a person while he is in pretrial commitment is vital, it certainly doesn't seem to be a desirable way to handle the thing. We are trying to get advice to achieve a solution to the problem.

Judge Zirpoli stated that there are no provisions in the present magistrates act for section 4244, that is as it is right now, and this will apply in the minor offense cases - perhaps 50 percent of the criminal cases.

Mr. Figinski said this had been called to their attention and they hoped to amend the bill for this purpose.

Further discussion continued and Mr. Finley and Mr. Figinski departed at 12:50 p.m.

The Committee gave full consideration to the matters presented by Messrs. Finley and Figinski and the Committee decided that the Chairman should write a letter to Senator Tydings stating the appearance of Mr. Finley and Mr. Figinski was appreciated and that the Committee will continue to study the matter and propose such amendments as may be necessary. Also, that in light of this, the Advisory Committee felt that Section 3.04 of the proposed bill is unnecessary.

Dean Barrett stated that the next matter for consideration was whether the Committee felt it should, within the immediate future, propose rules changes for circulation dealing with the matters considered thus far at the meeting. He felt there were two problems: (1) what happens at the moment the defendant first appears before the commissioner in terms of some kind of probable cause determination, and (2) what should be done about preliminary hearings -- whether there should be time limits, etc., and more generally whether the Committee should try to build into the rules a series of time limitations designed to encourage the general expediting of the process, more frequent grand juries for processing cases to alternate disposition.

Discussion was confined to the first part of Dean Barrett's proposal as to probable cause.

Mr. Ball moved that the Committee establish the requirement of probable cause upon filing of the complaint and this could be done by affidavit in accordance with the Giordenello standard. The Reporter stated this would probably have to be done in Rules 3

and 5. Discussion was then held as to the amount of work this would add to the United States Attorneys' offices. It was felt this would be requiring the attorney to do this in a large number of cases where probable cause may never arise as an issue and may add a trap to the proceedings that will have little or no value.

Mr. Braun said he would like to check to see if this would be a problem for the attorneys' offices.

Judge Walsh inquired whether Mr. Ball would amend his motion to be subject to a check being made to see what burden this would create. Mr. Ball was agreeable.

Mr. Sears also thought there was an added matter in the problem of arrest without warrant as in the arrest without warrant there is also involved the question of validity of arrest.

The Committee further discussed the matter and Dean Barrett thought the Committee should determine to what extent the magistrate should, at this stage of the proceeding, pursue this issue and if so in what form he should pursue it. Dean Barrett stated the issue is whether the officer should be sued for damages having made an illegal arrest and since there is no assurance for criminal charge should the magistrate be pushed into looking at the issue of probable cause to hold the man for further proceedings determined on the basis of what was known when he came before the magistrate and not what the officer knew at the point in which he made the arrest.

Judge Pickett stated the Committee understood the motion to mean that the Reporter be asked to study the matter and prepare draft amendments for the Committee to consider. The motion was duly acted upon and unanimously carried.

The Committee then considered the second portion of the problem related by Dean Barrett as to whether it should make any changes in the rules governing the question as to what should be done at the present time regarding preliminary hearings. The present rule merely says there shall be a preliminary hearing within reasonable time and no rules [other than the very general reading of the time rule (Rule 48)] with reference to the timing after the first point in which he is brought without unreasonable delay before the commissioner. He stated this is included in all the drafts, including the Tydings' proposal. He thought it might be wise to work toward a rule, without regard to what Congress does, that would permit a man unless indicted within some period (presumably longer period not in custody and shorter period if in custody) to have a preliminary hearing.

There was also discussion as to the matter of preliminary examination. Dean Barrett stated it is generally agreed that at

the level of the warrant and first appearance before the commissioner affidavits and hearsay are permitted to determine issue of probable cause. But as to preliminary examinations, when you determine probable cause, whether the man should be held for the other determination of probable cause by a grand jury and what kind of evidence shall be required.

During the discussion a suggestion was made to rewrite the rule to permit cross-examination of those who actually appear as witnesses as you can't cover affidavits, and another suggestion was made to leave the rule as written and add Judge Zirpoli's suggestion on time limitations.

Judge Hoffman moved that after the sentence where the defendant may cross-examine the witness who may introduce evidence in his behalf to add the phrase "affidavits submitted by the prosecution to establish probable cause may be considered and if controverted the hearing may be continued to require the presence of witnesses." He did not restrict his motion to any definite terminology but was agreeable to any language to be worked out by the Reporter.

The Committee discussed the word "controverted" and whether it applies in offering proof. A suggestion was made that the word "disputed" be used instead of the word "controverted." Judge Hoffman was agreeable.

Mr. Blue differed with Judge Hoffman because he was afraid this would open a door to the introduction of affidavits at a commissioner hearing where the rule does not now state they are admissible.

Judge Pickett stated he understood the motion to mean that the Reporter should make a study and submit this type of amendment to the rule and then the Committee will consider whether it should be adopted. Dean Barrett stated he did not like this type of motion asking the Reporter to make a study. He thought the Committee should offer concrete direction.

Mr. Blue offered a substitute motion to leave the rule as adopted.

Judge Hoffman stated that in order to get the motion on the floor he would withdraw his previous motion and move that the rule be left as it is.

The motion was duly acted upon and lost by a vote of 5 against the motion to 4 in favor of it.

Judge Hoffman then restated his motion that the Reporter give consideration to the rule with the insertion of the phrase "affidavits submitted by the prosecution to establish probable cause

may be considered and if disputed the hearing may be continued to require the presence of witnesses."

The motion was duly acted upon and carried unanimously.

Dean Barrett, for point of clarification, stated the consensus, as he understood it, to mean that he was to draft an appropriate rule which would take care of specific time limits for a man in custody, the preliminary examination shall be held within 7 or 10 days (or whatever number of days is decided upon) unless he has been indicted, subject to good cause shown the judge may extend, and he inquired how long the Committee wanted to state before requiring the indictment?

After discussion, Dean Barrett stated he understood the consensus to be 10 days for the man in custody, reasonable time for the man not in custody, an extension for good cause by the commissioner.

It was pointed out that this should be incorporated in Rule 5(d).

The next matter for discussion was that of an alternative model for federal procedure to the present one which would be a model with another set of problems and would say as soon as the man has had his first appearance before the commissioner he is to be transported to the seat of the court and handle everything from there on. This matter was discussed and it was pointed out that this would solve some of the logistic problems, but on the other hand create other problems in taking the man several hundred miles away from his home.

Judge Hoffman moved that 10 days be allowed for the party in custody and reasonable time for one not in custody. The motion was duly acted upon and unanimously carried.

The matter of extensions of time being decided by a commissioner was also considered. Judge Zirpoli stated this is already done in habeas corpus cases and he did not feel the defendant would be satisfied if the commissioner granted extension of probable cause without going before the district judge.

Mr. Ball moved that the Committee adopt Judge Zirpoli's position that the time be extended at request of the defendant or request of prosecution for good cause shown. The motion was duly acted upon and unanimously approved.

The matter of whether rules should put some time limits between holding to answer indictment was considered. The matter was discussed in relationship with the districts having only two grand jury sessions a year to those districts having grand juries subject to call.

Judge Hoffman moved for a 60-day provision with the idea that the man must be released at the end of that time unless a reasonable time in advance of the 60 days (10 or 15) the United States attorney show cause why the defendant shouldn't be released, or why his case cannot be presented to the grand jury within the 60-day period. If either one of these reasons are shown, the court may extend the time.

The motion was duly acted upon and unanimously carried.

Meeting was adjourned at 5:00 p.m., and reconvened at 9:00 a.m., May 24, 1966.

The Reporter suggested that the next major problem to be considered was that of pretrial disposition of trial issues, particularly the products of search and confession. He stated the two main problems were (1) problem of pretrial disposition of issues which are evidentiary issues -- issues as to which there would be at the trial motion to exclude or suppress, and (2) the problem of having pretrial examination by the judge into issues of illegal police behaviour which do not result in evidence that might be excluded. Discussion was held on the drafts of Rules 16.1 and 41.1 in the May 18, 1966 memorandum by the Reporter, to provide for pretrial hearings on the admissibility of the product of searches and of statements or confessions by the defendant.

Dean Barrett stated he put one item in Rule 16.1 which he felt there was no authority for but he wanted to call it to the attention of the proper committee and thought it may come under the jurisdiction of the Committee on Administration of the Criminal Law. He stated the point is picked up in the New York procedure and is drafted as subdivision (b) of his draft on page 26 of his memorandum. It is a simple provision that if a man makes a pretrial motion and loses that he can raise the issue on appeal by simply pleading guilty and appealing for his conviction on a plea of guilty.

Judge Clayton suggested that this rule be adopted if a provision were made paralleling this by a proper statute enacted to give the government the right to appeal in advance of the trial on merits.

Discussion continued and Judge Hoffman moved that the Committee abandon any further consideration of the Reporter's draft of Rules 16.1 and 41.1, contained on pages 26-28 of the memorandum. The motion was duly acted upon and lost by a vote of 5 against the motion to 3 in favor of it.

Dean Barrett stated he thought there were some separable issues which should be considered for guidance in future drafting. One being whether the Committee wanted to cover notice procedure

in Rule 16.1 to require disclosure of evidence derived from the search of the person or someone other than the defendant. Another being confessions and whether this should include confession to anything or confession made to agent of the government.

Consideration was given to these matters and Judge Hoffman thought this should have further consideration on it at least of the drafting as to the proper terminology. He questioned whether the Department of Justice would have time to consider implications that would come up from use of present language requiring the government to come up within 7 days of arraignment and plea and the use of the words "statement or confessions." He thought it might be an impossible task unless limited to confession taken by agent of the government such as FBI, Secret Service, etc. Judge Zirpoli thought there was some danger in the use of the word "statement." Mr. Braun suggested that in Rule 16.1 with respect to statements to say any statement or confession made by a defendant to an agent of the government or government official or agent. Dean Barrett felt this would narrow it but did not see how it would help on the side problem. He further stated he felt the consensus of the Committee was that it had not decided whether Rule 16.1 proceedings are wanted, but if so, the confession issue should be limited to an agent or officer of the government and the time provision should be redrafted to permit the judge to set a later time.

Judge Zirpoli suggested that a determination be made as to the experience under Rule 17 for pretrial and based upon that experience then determine whether the other factors should be written in.

Dean Barrett stated that in addition to the other matters discussed on Rule 16.1, Mr. Imlay had suggested to write it on the search issue to include wiretap motions where the motion is to exclude the product of the wiretap. Another matter is whether the second sentence of the rule is too broad or how much of a burden it puts on the government when you enrichen it by saying that they have to give notice that they are going to introduce certain evidence derived from the search; that they have to give a notice of time, place, circumstances and list of participants in or witness to the search.

Mr. Koffsky stated that the Department is troubled by a number of things. One is the assumption that all their assistants are experienced to recognize statements or confessions and will know what to put down in time, place, circumstances of the search. He would, however, like to get their advice on how much of a burden it would be for the Department, and whether the Department is against it. He further stated he would be prepared, if the Committee so desired, on the next draft to circulate it to the United States attorneys and to the various divisions of the Department of Justice because of the antitrust and tax problems.

Consideration was given to doing this on a search issue and whether the Committee wants the pretrial government issue.

Judge Hoffman moved that the Reporter be requested to rework proposed Rules 16.1 and 41.1 and that the Department of Justice be asked to circulate the redrafts in order to obtain views of the prosecuting branch of the government and that the matter be presented to a subsequent meeting of the Committee.

The motion was seconded and passed by majority vote. Dean Barrett stated the consensus of the Committee to be that there were a few problems but he would bring them back in alternate form.

RULE 11

The Reporter presented a draft of Rule 11 in his memorandum, dated May 2, 1966, page 5. The problem concerning this rule is how to take care of what happens in the guilty plea so that you can get a full resolution of the issues of fact then, so as to avoid having to deal with them again on Section 2255 or to have a record to deal with them so as not to have to rely on memory some years later. One suggestion made was to require the judge to make a record determination of the representation issue in the theory that this might help later on. If the appellant court, getting the 2255, were to get a record to show that counsel was appointed some days in advance as opposed to counsel appointed 10 or 20 minutes before the plea of guilty, it might make the posture of the latter collateral attack easier.

Judge Clayton thought the record already shows this, but Judge Pickett stated this may be true in assignment of counsel but post-conviction cases create problems and it seems that if there was a record of what transpired at the time of his plea, hearings could be eliminated and it may eliminate the requirement for district judges holding a hearing in connection with allegations in a motion which are without substance. Judge Zirpoli said his court covers this by a check list both at the time of plea and at the time of judgment.

Mr. Sears called to the attention of the Reporter that the words "and the consequences of the plea" had been left out after the word "charge" in line 5. Dean Barrett stated it was inadvertent.

Judge Hoffman further stated that he did not feel Rule 11, as revised by the Committee to go into effect July 1, is going to be aided by this suggested language, as every district judge knows that you have to give an adequate opportunity to confer with counsel and knows that if he has some illiterate person who

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**MINUTES OF THE JUNE 1965 MEETING OF THE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

The sixth meeting of the standing Committee on Rules of Practice and Procedure convened in the Supreme Court Building, Washington, D. C., on June 28, 1965, at 10:00 a. m.

All of the members of the standing Committee were present:

Albert B. Maris, Chairman
George H. Boldt
Peyton Ford
Mason Ladd
James Wm. Moore
J. Lee Rankin
Bernard G. Segal
Charles Alan Wright
J. Skelly Wright

Others attending the meeting were Senior Judge Walter L. Pope, Chairman of the Advisory Committee on Admiralty Rules; Professor Brainerd Currie, Reporter for the Advisory Committee on Admiralty Rules; Honorable Dean Acheson Chairman of the Advisory Committee on Civil Rules; Professor Benjamin Kaplan, Reporter for the Advisory Committee on Civil Rules; Professor Maurice Rosenberg, Director of the Columbia University Project for Effective Justice; Senior Judge Phillip Forman, Chairman of the Advisory Committee on Bankruptcy Rules; Professor Frank R. Kennedy, Reporter for the Advisory Committee on Bankruptcy Rules; Judge John C. Pickett, Chairman of the Advisory Committee on Criminal Rules; Dean Edward L. Barrett, Jr., Reporter of the Advisory Committee on Criminal Rules;

Rule 16. Discovery and Inspection

- (a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony
- (b) Other Books, Papers, Documents, or Tangible Objects
- (c) Discovery by the Government
- (d) Time, Place and Manner of Discovery and Inspection
- (e) Protective Orders

Professor Barrett summarized the background of the rule stating the present draft was developed out of good will and consultation with the government and with one or two exceptions the Department of Justice approved it. The Treasury Department, however, did not.

The matter of the government's having the burden of producing statements was discussed and several of the members thought the government should have this burden as well as private practice. *10/15/50*

Professor Barrett stated that Rule 16 had been a very difficult problem for the Committee and that no one thinks this is the end product but that it is a very substantial jump in the direction of discovery for the defendant. He stated that the Committee had come out with the general feeling to compromise some but to propose a rule which would aid the defendant and the government stated it would accept it and try to make it work. He felt that the proposed rule was a good balance.

Mr. Segal moved that the words in subdivision (a), lines 22 and 23 "known by the attorney for the government to be within" should be deleted and the word "in" be inserted therefor. Judge Boldt moved a substitute motion which Mr. Segal accepted as follows:

the existence of which is known by the exercise
of due diligence may become known to the attorney
for the government

Judge Boldt's motion was seconded and approved. This phrase will appear in subdivisions (a) (1) and (2).

After discussion of the rule, the Committee, upon motion of Mr. Segal, approved subdivisions (a), (b), (c), (d) and (e) as stated in the Deskbook with the modification to subdivision (a) (1) and (2).

Rule 17. Subpoena

(b) Defendants Unable to Pay (d) Service

Professor Barrett explained the background of the rule and after discussion it was approved as stated in the Deskbook.

Rule 17. 1 Pretrial Conference

The Reporter stated the Committee tried to encourage the use of pretrial conferences to set a general framework and not to put in too many procedural type limitations at the present time. The Committee approved the rule as stated in the Deskbook.

Rule 18. Place of Prosecution and Trial

Rule 19. Transfer Within the District

The Committee approved the amendments to Rule 18 as stated in the Deskbook, and rescinded Rule 19 as being unnecessary in view of the amendments to Rule 18.

Rule 20. Transfer From the District for Plea and Sentence

(a) Indictment or Information Pending
 (b) Indictment or Information Not Pending
 (c) Effect of Not Guilty (d) Juveniles (e) Summons

The purpose of this rule is to clean up the procedure to take care

EXHIBIT D

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CIRCUIT JUSTICE
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CIRCUIT JUDGES

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Cheyenne, Wyoming
May 28, 1965

Honorable Albert B. Maris
United States Circuit Judge
United States Court House
Philadelphia, Pennsylvania

Dear Judge:

I transmit herewith to you for presentation to the Committee on Rules of Practice and Procedure a series of amendments (with accompanying Advisory Committee's Notes) to the Rules of Criminal Procedure for the United States District Court as recommended by the Advisory Committee on Criminal Rules.

The Advisory Committee on Criminal Rules has met seven times since its formation in 1960. It has canvassed all of the Rules and has circulated both a Preliminary Draft and a Second Preliminary Draft of proposed amendments to the Rules. Widespread comment has been received from members of the bench and the bar which has been most helpful to the Committee in its deliberations.

The Advisory Committee is submitting to you all proposals for change upon which the Committee has thus far agreed. Many suggestions were rejected by the Committee and are not reflected in its report. Other proposals require further study and it is anticipated that the Committee will have amendments to propose to your Committee in the future.

Two comments are necessary to explain specific portions of the attached draft of amendments:

(1) Alternative formulations of an amendment to Rule 32(c)(2) are presented. The Committee was evenly divided and voted to send both formulations forward so that your Committee could choose between them.

(2) Amendments to Rule 37 are submitted incorporating changes proposed by the Appellate Rules Committee in order that action may be taken on them pending final action on the Uniform Rules of Appellate

EXHIBIT D

The purpose of the amendment is to provide a procedure whereby the issue of possible prejudice can be resolved on the motion for severance. The judge may direct the disclosure of the confessions or statements of the defendants to him for in camera inspection as an aid to determining whether the possible prejudice justifies ordering separate trials. Cf. note, Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure, 74 Yale L.J. 551, 565 (1965).

Rule 16. Discovery and Inspection

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books; papers; documents or tangible objects; obtained from or belonging to the defendant or obtained from others by seizure or by process; upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time; place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just:

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of

physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

(b) Other Books, Papers, Documents, or Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

(c) Discovery by the Government. If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not

authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(d) Time, Place and Manner of Discovery and Inspection. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(e) Protective Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court enters an order granting relief following a showing in camera, the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(f) Time of Motions. A motion under this rule may be made only within 10 days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(g) Continuing Duty to Disclose; Failure to Comply. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

Advisory Committee's Note

The extent to which pretrial discovery should be permitted in criminal cases is a complex and controversial issue. The problems have been explored in detail in recent legal literature, most of which has been in favor of increasing the range of permissible discovery. See, e.g. Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth, 1963 Wash. U.L.Q. 279; Everett, Discovery in Criminal Cases - In Search of a Standard, 1964 Duke L.J. 477; Fletcher, Pretrial Discovery in State Criminal Cases, 12 Stan.L.Rev. 293 (1960); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149, 1172-1198 (1960); Krantz, Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice, 42 Neb. L. Rev. 127 (1962); Louisell, Criminal Discovery, Dilemma Real or Apparent, 49 Calif. L. Rev. 56 (1961); Louisell, The Theory of Criminal Discovery and the Practice of Criminal Law, 14 Vand. L. Rev. 921 (1961); Moran, Federal Criminal Rules Changes: Aid or Illusion for the Indigent Defendant?, 51 A.B.A.J. 64 (1965);

Symposium, Discovery in Federal Criminal Cases, 33 F.R.D. 47-128 (1963); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L.Rev. 228 (1964); Developments in the Law--Discovery, 74 Harv. L.Rev. 940, 1051-1063. Full judicial exploration of the conflicting policy considerations will be found in State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953) and State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958); cf. State v. Murphy, 36 N.J. 172, 175 A.2d 622 (1961); State v. Moffa, 36 N.J. 219, 176 A.2d 1 (1961). The rule has been revised to expand the scope of pretrial discovery. At the same time provisions are made to guard against possible abuses.

Subdivision (a). The court is authorized to order the attorney for the government to permit the defendant to inspect and copy or photograph three different types of material:

(1) Relevant written or recorded statements or confessions made by the defendant, or copies thereof. The defendant is not required to designate because he may not always be aware that his statements or confessions are being recorded. The government's obligation is limited to production of such statements as are within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government. Discovery of statements and confessions is in line with what the Supreme Court has described as the "better practice" (Cicenia v. LaGay, 357 U.S. 504, 511 (1958)), and with the law in a number of states. See, e.g., Del. Rules Crim. Proc., Rule 16; Ill. Stat. Ch. 38, § 729; Md. Rules Proc., Rule 728; State v. McGee, 91 Ariz. 101, 370 P.2d 261 (1962); Cash v. Superior Court, 53 Cal. 2d 72, 346 P.2d 407 (1959); State v. Bickham, 239 La. 1094, 121 So.2d 207, cert. den. 364 U.S. 874 (1960); People v. Johnson, 356 Mich. 619, 97 N.W.2d 739 (1959); State v. Johnson, supra; People v. Stokes, 24 Misc.2d 755, 204 N.Y.Supp.2d 827 (Ct. Gen. Sess. 1960). The amendment also makes it clear that discovery extends to recorded as well as written statements.

For state cases upholding the discovery of recordings, see, e.g., People v. Cartier, 51 Cal. 2d 590, 335 P.2d 114 (1959); State v. Minor, 177 A.2d 215 (Del. Super.Ct. 1962).

(2) Relevant results or reports of physical or mental examinations, and of scientific tests or experiments (including fingerprint and handwriting comparisons) made in connection with the particular case, or copies thereof. Again the defendant is not required to designate but the government's obligation is limited to production of items within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government. With respect to results or reports of scientific tests or experiments the range of materials which must be produced by the government is further limited to those made in connection with the particular case. Cf. Fla. Stats, § 909.18; State v. Superior Court, 90 Ariz. 133, 367 P.2d 6 (1961); People v. Cooper, 53 Cal. 2d 755, 770, 3 Cal. Rptr. 148, 157, 349 P.2d 964, 973 (1960); People v. Stokes, supra, at 762, 204 N.Y.Supp.2d at 835.

(3) Relevant recorded testimony of a defendant before a grand jury. The policy which favors pre-trial disclosure to a defendant of his statements to government agents also supports, pretrial disclosure of his testimony before a grand jury. Courts, however, have tended to require a showing of special circumstances before ordering such disclosure. See, e.g., United States v. Johnson, 215 F.Supp. 300 (D.Md. 1963). Disclosure is required only where the statement has been recorded and hence can be transcribed.

Subdivision (b). This subdivision authorizes the court to order the attorney for the government to permit the defendant to inspect and copy or photograph all other books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession,

custody or control of the government. Because of the necessarily broad and general terms in which the items to be discovered are described, several limitations are imposed:

(1) While specific designation is not required of the defendant, the burden is placed on him to make a showing of materiality to the preparation of his defense and that his request is reasonable. The requirement of reasonableness will permit the court to define and limit the scope of the government's obligation to search its files while meeting the legitimate needs of the defendant. The court is also authorized to limit discovery to portions of items sought.

(2) Reports, memoranda, and other internal government documents made by government agents in connection with the investigation or prosecution of the case are exempt from discovery. Cf. Palermo v. United States, 360 U.S. 343 (1959); Ogden v. United States, 303 F.2d 724 (9th Cir. 1962).

(3) Except as provided for reports of examinations and tests in subdivision (a)(2), statements made by government witnesses or prospective government witnesses to agents of the government are also exempt from discovery except as provided by 18 U.S.C. § 3500. The Advisory Committee concludes that if any change is to be made with respect to this subject matter, it should be made by Congress.

Subdivision (c). This subdivision permits the court to condition a discovery order under subdivision (a)(2) and subdivision (b) by requiring the defendant to permit the government to discover similar items which the defendant intends to produce at the trial and which are within his possession, custody or control under restrictions similar to those placed in subdivision (b) upon discovery by the defendant. While the government normally has resources adequate to secure the information necessary for trial, there are some situations in which mutual

disclosure would appear necessary to prevent the defendant from obtaining an unfair advantage. For example, in cases where both prosecution and defense have employed experts to make psychiatric examinations, it seems as important for the government to study the opinions of the experts to be called by the defendant in order to prepare for trial as it does for the defendant to study those of the government's witnesses. Or in cases (such as anti-trust cases) in which the defendant is well represented and well financed, mutual disclosure so far as consistent with the privilege against self-incrimination would seem as appropriate as in civil cases. State cases have indicated that a requirement that the defendant disclose in advance of trial materials which he intends to use on his own behalf at the trial is not a violation of the privilege against self-incrimination. See Jones v. Superior Court, 58 Cal. 2d 56, 22 Cal. Rptr. 879, 372 P.2d 919 (1962); People v. Lopez, 60 Cal. 2d 223, 32 Cal. Rptr. 424, 384 P.2d 16 (1963); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U. L. Rev. 228, 246 (1964); Comment, The Self-Incrimination Privilege: Barrier to Criminal Discovery, 51 Calif. L. Rev. 135 (1963); Note, 76 Harv. L. Rev. 838 (1963).

Subdivision (d). This subdivision is substantially the same as the last sentence of the existing rule.

Subdivision (e). This subdivision gives the court authority to deny, restrict or defer discovery upon a sufficient showing. Control of the abuses of discovery is necessary if it is to be expanded in the fashion proposed in subdivisions (a) and (b). Among the considerations to be taken into account by the court will be the safety of witnesses and others, a particular danger of perjury or witness intimidation, the protection of information vital to the national security, and the protection of business enterprises from economic reprisals. For an example of a use of a protective order in state practice, see People v. Lopez, 60 Cal.2d 223, 32 Cal. Rptr. 424, 384 P.2d 16 (1963). See also Brennan, Remarks on Discovery, 33 F.R.D. 56, 65 (1963); Traynor,

Ground Lost and Found in Criminal Discovery, 39
N.Y.U. L. Rev. 228, 244, 250.

In some cases it would defeat the purpose of the protective order if the government were required to make its showing in open court. The problem arises in its most extreme form where matters of national security are involved. Hence a procedure is set out where upon motion by the government the court may permit the government to make its showing, in whole or in part, in a written statement to be inspected by the court in camera. If the court grants relief based on such showing, the government's statement is to be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant. Cf. 18 U.S.C. § 3500.

Subdivision (f). This subdivision is designed to encourage promptness in making discovery motions and to give the court sufficient control to prevent unnecessary delay and court time consequent upon a multiplication of discovery motions. Normally one motion should encompass all relief sought and a subsequent motion permitted only upon a showing of cause. Where pretrial hearings are used pursuant to Rule 17.1, discovery issues may be resolved at such hearings.

Subdivision (g). The first sentence establishes a continuing obligation on a party subject to a discovery order with respect to material discovered after initial compliance. The duty provided is to notify the other party, his attorney or the court of the existence of the material. A motion can then be made by the other party for additional discovery and, where the existence of the material is disclosed shortly before or during the trial, for any necessary continuance.

The second sentence gives wide discretion to the court in dealing with the failure of either party to comply with a discovery order. Such discretion will permit the court to consider the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances.

**MINUTES OF THE JANUARY 1964 MEETING
OF THE ADVISORY COMMITTEE ON CRIMINAL RULES**

The meeting of the Advisory Committee on Criminal Rules convened in the Supreme Court Building on January 13, 1964, at 9:30 a. m. The following members of the Committee were present during all or part of the session:

John C. Pickett, Chairman
Joseph A. Ball
Abe Fortas
Sheldon Glueck
Walter E. Hoffman
Thomas D. McBride
Maynard Pirsig
Frank J. Remington
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, Warren Olney III, Director of the Administrative Office, Will Shafroth, Secretary of the Rules Committees, and Mr. Herbert J. Miller and Mr. Harold Koffsky of the Department of Justice.

Professor Barrett stated that since many of the new proposals for amendments are closely related to those circulated in the December 1962 pamphlet, it would facilitate consideration by the bench and bar to include the old and new proposals in one pamphlet, even though the Committee has reached final conclusions regarding some of the amendments circulated in December 1962. The Committee voted to adopt Professor Barrett's recommendation that the old and new proposals be circulated together.

Rule 4. Warrant or Summons Upon Complaint

On motion of Mr. Fortas, the Committee voted to amend the first sentence of Rule 4(a) to read as follows: "If it appears from the complaint or from an affidavit or affidavits filed with the complaint . . .". Rule 4 was approved for circulation as thus amended.

Professor Remington questioned the need for pretrial notice of partial insanity, and the Committee agreed to strike the words "or otherwise show that he was suffering from a mental disease or defect" from the first sentence of the draft.

Mr. Miller suggested that the last sentence of the draft be deleted, and that the preceding sentence be amended to read as follows: "The court may for cause shown allow late filing of the notice and may make such other order as may be appropriate." This suggestion was adopted by the Committee, and the draft of Rule 12.2 was approved for circulation as amended.

Rule 14. Relief from Prejudicial Joinder

Judge Hoffman stated that he felt that the court may want to inspect a statement of the defendant as well as the statement of a co-defendant, and moved that the language of the last sentence read "... by the defendant or a co-defendant". Judge Maris agreed that this concept should be included, and suggested that the language read "... by any defendant".

Mr. Fortas felt that the defendant should also have an opportunity to inspect statements which support a motion for severance, and opposed the inspection of these documents in camera. After further discussion, the Committee agreed to defer consideration of this rule until after discussion of Rule 16. Following the discussion of Rule 16, the Committee approved the draft of Rule 14, with the last two lines amended to read as follows: "for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

Rule 15. Depositions

After a lengthy discussion of the drafting problems of Rule 15(d) through (g), the Reporter presented a draft incorporating the Committee's decisions. At a later time Judge Maris submitted a redraft of subdivision (e), which the Committee voted to substitute for the Reporter's draft. The following draft represents the final decision of the Committee. Subdivision (a) was approved as originally drafted.

"(d) How Taken. A deposition shall be taken and filed in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.

Rule 16. Discovery and Inspection

Professor Barrett explained that the draft which he presented to the Committee was based on the draft suggested by the Department of Justice.

Subdivision (a). The Committee discussed the provision of (a)(1) permitting the defendant to inspect "any designated written or recorded statements or confessions made by the defendant to an agent of the Government, or copies or portions thereof". Mr. Ball felt that if the Government had copies of the defendant's statements to State or municipal agents, they should be made available to the defendant. Mr. Miller felt that these extra-governmental sources were also available to defendant's counsel in order to obtain copies of defendant's statements. Mr. Fortas agreed with Mr. Ball that if these statements were in the control of the Government they should be made available to the defendant, and he moved that the words "to an agent of the Government, or copies or portions thereof," be stricken from the draft of (1).

In a separate motion Mr. Fortas moved the deletion of "designated" from (a)(1). Mr. Miller stated that if "designated" were removed, serious problems would result from the Department of Justice's point of view. There may be many statements of a particular defendant to various Government agents, and some of these statements may not be relevant to the case. Or it may be that the United States attorney in charge of the case is not aware of a relevant statement to a Government agent. He felt that the elimination of "designated" would result in appeals based upon an obscure statement by the defendant which was not uncovered during the trial, and could also result in a time-consuming process of gathering many non-relevant statements by a defendant in an effort to obtain "any written or recorded statements".

Mr. Fortas felt that inclusion of "designated" would defeat the purpose of the proposal, since the defendant may have forgotten about a statement he made to an agent which would be important to his defense. He suggested that the draft could provide for discovery of any statements of the defendant which are known to the attorney in charge of the case.

Judge McBride suggested that the language of (a)(1) be amended to read as follows: "Any written or recorded statements or confessions made by the defendant, or copies thereof, which are known by the attorney for the Government to be within the possession, custody or control of the Government". On motion of Mr. Fortas, this language was adopted.

Mr. Fortas moved that in subdivision (a)(2) the words "to be produced by the Government at trial for proving the indictment or information against the defendant" be stricken. He felt that all physical and mental tests should be produced, whether or not the Government intends to use them at trial. Professor Barrett felt that this provision must be stated in terms of relevance to the case, and Judge Maris suggested inserting language similar to that inserted in (a)(1) -- "which are known by the attorney for the Government to be within ...".

Mr. Miller opposed drafting the rule so that the relevance is a matter for the United States attorney to determine. He felt this should be a decision for the court. After further discussion, and drafting suggestions from various Committee members, the Committee voted to adopt the following as subdivision (a)(2): "(2) the results of reports of any physical or mental examinations, and of any scientific tests or experiments related to the particular case, or copies thereof, which are known by the attorney for the Government to be within the possession, custody or control of the Government".

Professor Barrett stated that in view of the Committee's discussion on the problem of disclosure of grand jury testimony, subdivision (a)(3) should be amended to read "(3) the minutes of any previously transcribed testimony...". Mr. Miller stated that the Department of Justice was opposed to permitting discovery of the defendant's grand jury testimony, as it would in some cases enable the defendant to more faithfully perpetuate a perjury before the grand jury.

Judge Hoffman felt that since a request for grand jury minutes will be made reasonably in advance of trial, there would be an opportunity to transcribe the grand jury testimony, and he favored retaining the language as drafted. Professor Barrett stated that there is also a problem of defendants either forgetting their testimony before the grand jury, or refusing to accurately report their testimony to their attorney. He felt that disclosure of the grand jury testimony may lead in many cases to an early plea of guilty. After further discussion, the Committee approved (a)(3) as drafted.

Subdivision (b). Judge Hoffman moved that this subdivision be approved as drafted. Mr. Fortas felt that "desiganted" should be deleted, and Judge Maris agreed, since the subdivision provides that a showing must be made that the objects requested are material to the defense. Judge Hoffman's motion, amended to include the deletion of "designated", was carried.

Subdivision (c). On motion of Judge Hoffman, this subdivision was approved as drafted.

Subdivision (d). After a brief discussion, the Committee agreed to change the phrase "denied or delayed" to "denied, restricted or deferred". Professor Glueck suggested that the last phrase in the first sentence be amended to read "or make such other order as is appropriate." Mr. Fortas felt that this subdivision did not adequately cover the question of a protective order for national security matters. He felt that "would not be in the interest of justice" did not cover the national security problem, and after a short discussion, the first sentence was amended to read as follows:

"Upon a sufficient showing by the Government, the court may at any time order that discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate."

Mr. Fortas felt that the second sentence of (d)(1) should be amended so that the application of the attorney for the Government be made in writing, and delivered to the court for inspection in camera. This document would then be available to the court of appeals for review in the event of an appeal. Mr. Miller expressed approval of this suggestion, and the Reporter was requested to formulate a draft along these lines.

Mr. Fortas expressed approval of the principle of the draft of (d)(2), providing it is valid under the Constitution. He further stated that (2) should be made a separate subdivision, as it is not related to protective orders. Judge Hoffman moved that (d)(2) be made a separate subdivision of Rule 16, and the motion was carried.

Professor Remington suggested that under (d)(2) the Government be permitted to inspect only those statements, etc., which the defendant intends to use at the trial. This would give the defendant control over the disclosure of materials in his possession, and would serve the purpose of preventing surprise. This suggestion met with general approval from the Committee. Mr. Fortas suggested that this provision be broadened to provide that the Government may request discovery of the defendant's materials whether or not the defendant has requested discovery of the Government's materials. Mr. Miller felt that this broadening might raise constitutional questions. Professor Remington disagreed, and explained that this would require disclosure at this time only of materials which the defendant planned to disclose at the trial in order to prevent surprise. Professor Barrett suggested that the provision could begin as follows: "Upon motion of the Government, the court may order the defendant to permit the Government to inspect, ...".

Judge Hoffman stated that in his opinion relief under (d)(2) should be conditioned upon a prior request by the defendant for discovery, and he further stated that only material which the defendant intends to produce at the trial, which would prevent surprise to the Government at the trial, should be included in the provision. Mr. Fortas agreed, and withdrew his suggestion that the government be permitted to initiate discovery.

Professor Barrett proposed the following language for the subdivision on this subject:

"If the court grants relief sought by the defendant under this rule, it may condition its order by requiring that the defendant permit the Government to inspect, copy or photograph statements, scientific or medical reports, books, papers, documents or tangible objects, which the defendant intends to produce at the trial and which are within his possession, custody or control."

The Committee approved this draft subject to seeing it in written form.

Subdivision (f). The Committee was in agreement that this subdivision should apply both to the defendant and the government, and that the words "previously requested" be substituted for "subject to discovery and inspection" in the first sentence. The Reporter was directed to make appropriate drafting changes in this subdivision, and to present a redraft of all of Rule 16 on the following day.

On the following day the Reporter presented a redraft of Rule 16, and after further discussion of drafting problems, the following rule was adopted for circulation:

Rule 16. Discovery and Inspection

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the Government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, which are known by the attorney for the Government to be within the possession, custody or control of the Government, (2) results or reports of physical or mental examinations, and scientific tests or experiments made in connection with the particular case, or copies thereof, which are known by the attorney for the Government to be within the possession, custody or control of the Government, and (3) recorded testimony of the defendant before a grand jury.

(b) Other Books, Papers, Documents or Tangible Objects. Upon motion of a defendant the court may order the attorney for the Government to permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects, or copies of portions thereof, which are within the possession, custody or control of the Government, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. This subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal Government documents made by Government agents in connection with the investigation or prosecution of the case, or of statements made by Government witnesses or prospective Government witnesses (other than the defendant) to agents of the Government except as provided in 18 U.S.C. § 3500.

(c) Discovery by the Government. If the court grants relief sought by the defendant under this rule, it may condition its order by requiring that the defendant permit the government to inspect, copy or photograph statements, scientific or medical reports, books, papers, documents or tangible objects, which the defendant intends to produce at the trial and which are within his possession, custody or control.

[The Committee voted to include an alternate draft as part of the Advisory Committee Note. This proposed language would present Mr. Fortas' suggestion of unconditional discovery by the Government. Subdivision (c) above would be amended to read "On motion of the Government, the court may order the defendant to permit the Government to inspect, ...".]

(d) Time, Place and Manner of Discovery and Inspection. The order of the court granting relief to a defendant under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(e) Protective Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the Government, the court may permit the Government to make such showing, in whole or in part, in the form of a written statement to be inspected in camera. If the court enters an order granting the relief

following a showing in camera, the entire text of the Government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(f) Time of Motions. A motion under this rule may be made only within ten days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought by the defendant under this rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(g) Continuing Duty to Disclose; Failure to Comply. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested which is subject to discovery or inspection under the rule he shall promptly notify the other party, or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

Rule 32. Sentence and Judgment

Judge Thomas M. Madden, Chief Judge of the District of New Jersey, appeared before the Committee to express the views of the Judicial Conference Committee on Probation on the proposed amendment to Rule 32(c)(2). Judge Madden stated that he expressed the opposition of the Probation Committee and also of the judges of the District of New Jersey. He stated that the subcommittee on presentence reports of the Probation Committee had disapproved the proposed amendment for the following reasons: (1) there is no violation of the defendant's constitutional rights under the present practice; (2) there has been no demonstrated need for change in this area; (3) the proposed amendment would tend to close up sources of information normally available to the probation officer; (4) adoption of the proposed amendment might lead to fewer suspended sentences; and (5) disclosure of presentence reports might have a detrimental effect on rehabilitation because of the disclosure of the recommendations of the probation officer.

BEST AVAILABLE COPY

Mr. Herbert J. Miller, Jr., Assistant Attorney
General, Criminal Division

October 21, 1963

Howard P. Willens, Second Assistant
Harold D. Koffsky

Meeting of the Advisory Committee on Criminal Rules
October 14-16, 1963.

This memorandum will supplement our oral reports to you regarding the meeting of the Advisory Committee on Criminal Rules held October 14-16, 1963, which we attended as representatives of the Department of Justice. Specifically, we would like to bring to your attention the projected schedule of the Committee, the specific actions taken during these meetings, our general appraisal of the Committee's work and attitudes, and our recommendations regarding action which should be taken by the Department prior to the next meeting of the Advisory Committee in January 1964.

I - Membership and Schedule of Advisory Committee.

As you know, the Advisory Committee is chaired by John C. Pickett, Judge of the Tenth Circuit Court of Appeals, and includes the following members: Joseph A. Ball (California attorney); George R. Blue (former United States Attorney who currently practices in New Orleans); Abe Fortas (Washington attorney); Sheldon Glueck (Professor of Law at Harvard); Walter A. Hoffman (District Court Judge for the Eastern District of Virginia); Thomas D. McBride (Philadelphia attorney); Maynard Pirsig (Professor of Law at Minnesota); Frank J. Remington (Professor of Law at Wisconsin); William F. Smith (Judge of the Third Circuit Court of Appeals); and Lawrence E. Walsh (New York attorney and former Deputy Attorney General). The Reporter of the Committee is Edward L. Barrett, Jr., Professor of Law at the University of California, and the Associate Reporter is his colleague, Professor Rex A. Collings, Jr.

cc: Mr. Foley ✓
Mr. Wilens
Mr. Koffsky
All Section Chiefs, Criminal Division

* 4. Rule 16 (Discovery and Inspection). The weight of opinion received by the Committee regarding its proposed amendments to Rule 16 was to the effect that the amendments did not go far enough in permitting discovery by defendants of materials in the possession of the Government. As a result, the Reporter tendered for the consideration of the Advisory Committee two alternative drafts extending the right of discovery beyond that contained in the proposed amendments circulated to the public. At the request of the Department of Justice, further consideration of these alternative drafts was postponed until the January meeting. The Department obligated itself to submit specific comments and alternative drafts to the Advisory Committee in time to be circulated to the members of the Committee prior to this meeting. It was clear from the discussion which took place that the majority of the Committee is strongly in favor of extended revision of this rule.

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 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.