MINUTES

of

THE ADVISORY COMMITTEE

on

FEDERAL RULES OF CRIMINAL PROCEDURE

October 13-14, 1997

Monterey, California

The Advisory Committee on the Federal Rules of Criminal Procedure met at Monterey, California on October 13th and 14th, 1997. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, October 13, 1997. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair

Hon. D. Lowell Jensen

Hon. Edward E. Carnes

Hon. George M. Marovich

Hon. David D. Dowd, Jr.

Hon. D. Brooks Smith

Hon. John M. Roll

Hon. Tommy E. Miller

Hon. B. Waugh Crigler

Hon. Daniel E. Wathen

Prof. Kate Stith

Mr. Robert C. Josefsberg, Esq.

Mr. Darryl W. Jackson, 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; Mr. Peter McCabe and Mr. John Rabiej from the Administrative Office of the United States Courts; Mr. David Pimentel, Judicial Fellow at the Administrative Office, and Ms. Mary Harkenrider from the Department of Justice.

The attendees were welcomed by the incoming chair, Judge Davis, who welcomed the two new members to the Committee, Judge Roll and Magistrate Judge Miller

II. APPROVAL OF MINUTES OF APRIL 1997 MEETING

Judge Marovich moved that the Minutes of the Committee's April 1997 meeting be approved. Following a second by Professor Stith, the motion carried by a unanimous vote.

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

The Reporter informed the Committee that at its June 1997 meeting, the Standing Committee had approved the publication of a number of amendments to the Criminal Rules:

1. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment)

2. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.)

3. Rule 24(c). Alternate Jurors (Retention During Deliberations)

4. Rule 30. Instructions (Submission of Requests for Instructions)

5. Rule 32.2. Forfeiture Procedures.

6. Rule 54. Application and Exception.

The Reporter added that the Standing Committee had modified the proposed amendment to Rule 6 to permit all necessary interpreters to be present during grand jury deliberations--and not just interpreters for the hearing-impaired. The Committee believed that it would be beneficial to obtain public comments on an amendment which would expand the list oft those permitted to remain in the deliberations. Finally, the Reporter informed the Committee that a hearing on the proposed amendments has been tentatively set for December 12, 1997 in New Orleans. The Comment period ends on February 15, 1998.

IV. RULES APPROVED BY STANDING COMMITTEE AND FORWARDED TO JUDICIAL CONFERENCE AND SUPREME COURT

The Reporter informed the Committee that at its June 1997 meeting, the Standing Committee had approved and forwarded to the Judicial Conference the amendments to the following rules:

1. Rule 5.1 (Preliminary Examination; Production of Witness

Statements);

2. Rule 26.2 (Production of Witness Statements; Applicability to Rule

5.1 Proceedings);

3. Rule 31 (Verdict; Individual Polling of Jurors);

4. Rule 33 (New Trial; Time for Filing Motion);

5. Rule 35(b) (Correction or Reduction of Sentence; Changed

Circumstances);

6. Rule 43 (Presence of Defendant; Presence at Reduction

or Correction of Sentence).

V. CRIMINAL RULE APPROVED BY SUPREME COURT

AND PENDING BEFORE CONGRESS

The Reporter informed the Committee that the Supreme Court had approved an amendment to Rule 58 and that absent any further action by Congress, the amendment would become effective on December 1, 1997.

VI. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION

BY ADVISORY COMMITTEE

A. Report of Subcommittee on Victim Allocution Legislation; Possible

Amendments to Rules 11, 32, and 32.1.

Judge Davis offered introductory comments on pending legislation which would amend a number of criminal rules to provide for notice to victims and victim allocution when the accused enters a plea, at sentencing, and at revocation of probation proceedings. He noted that in the past the Committee had been reluctant to provide for victim allocution but that the proposed legislation provided the Committee with an opportunity to re-examine its position. He noted that a subcommittee consisting of Judge Dowd (Chair), Judge Smith, Mr. Josefsberg, and Mr. Pauley had been appointed to study the legislation and recommend a course of action to the Committee.

Speaking for the subcommittee, Judge Dowd provided additional information on the legislation, and the fact that it had apparently been offered as an alternative to a move to amend the Constitution. He added that under the legislation, the Judicial Conference would be given a short period of time to respond to the proposed changes and that the role of the subcommittee had been to review the proposed changes and be prepared to recommend changes to the full Committee for its consideration.

Mr. Rabiej believed that the legislation was not going to be passed in the current session of Congress. Mr. Pauley agreed but indicated that the legislation might be passed in the next session. He believed that the Committee might be overreacting to the proposed legislation because it disregards the legislation proposed by the President and the it disregards the fact that the legislation will only move at the behest of the chairs of the congressional committees on the judiciary. He agreed, however, that the subcommittee should continue to monitor the legislation.

Judge Jensen observed that the legislation put the committee in the unique posture of requiring the Judicial Conference to react to specific amendments. Judge Stotler echoed that view and indicated that once again there was a question about the fundamental role of Congress in the rule-making enterprise. Justice Wathen noted that from a State's perspective, there was concern that the victim's movement might result in a constitutional amendment. Mr. Josefsberg opined that the proposed legislation seemed to require very little, e.g., notice to victims of pending hearings and an opportunity to be heard. Judge Marovich agreed with that assessment and saw little danger in the legislation. Several members indicated that under the circumstances, it would be wise to keep the subcommittee in place and ready to react to the legislation. Judge Jensen added that for the most part the federal system was catching up to what was already in place in many state and local jurisdictions. Judge Davis indicated that it would be appropriate, absent the need for more immediate action, to discuss the subcommittee's proposals at the Spring meeting. Following additional discussion concerning the definition of "victim" and "alleged victim" in the proposed legislation, Judge Carnes moved that the Committee express the view that it was not opposed to addressing the legislation. Mr. Josefsberg seconded the motion which carried by a vote of 10 to 1, with one abstention.

B. Rule 5(c). Initial Appearance Before the Magistrate Judge.

Proposed Amendment.

Judge Davis provided a brief overview of a proposed amendment to Rule 5(c) which would permit a magistrate judge to grant a continuance in a preliminary examination over a defendant's objection. He noted that the Committee had previously considered the matter at its April 1997 meeting and that because the amendment would have directly contradicted 18 U.S.C. § 3060, that it had been referred to the Standing Committee with a recommendation that the Committee take steps to initiate an amendment to the statute. The Standing Committee responded by referring the proposal back to the Advisory Committee and indicating that the most appropriate method of effecting a change would be to follow the procedures in the Rules Enabling Act. Following brief discussion on proposed style changes to the rule, Mr. Josefsberg moved that the rule be amended. Judge Miller seconded the motion. Following additional discussion on the motion, several members questioned whether the amendment was even necessary. Judge Crigler observed that he had never seen the problem but Judge Miller indicated that in larger cities, it would help if a magistrate judge had the authority to act on a continuance opposed by the defendant. Judge Dowd indicated that in his 15 years of experience, he had never experienced a problem with the rule. Ultimately, Mr. Josefsberg withdrew his motion to approve the amendment.

Professor Stith moved to approve the amendment. Judge Miller seconded that motion which failed by a vote of 5 to 7.

C. Rule 6. The Grand Jury. Legislative Proposal to Reduce Size of Grand Jury.

The Reporter indicated that at its April 1997 meeting the Committee had briefly discussed pending legislation (sponsored by Congressman Goodlatte from Virginia) which would reduce the size of grand juries. The matter had been carried over as an agenda item to permit additional research and discussion of the issue.

Mr. Josefsberg indicated that if the grand jury system were to continue, that the current size should be retained. Justice Wathen noted that Maine had reduced the size of its grand juries and that many regretted that reduction. Judge Carnes added that in his experience reducing the size of the grand jury would risk the danger of runaway prosecutions. Both Mr. Martin and Judge Jensen shared the view that it was important to get more, rather than less, people involved in the grand jury process. Ms. Harkenrider added that the Department of Justice had sent a letter to Congress last year recommending that the current size of grand juries be retained.

Judge Carnes moved that the Committee oppose any reduction of size in the grand jury. Professor Stith seconded the motion, which carried by a vote of 12 to 0.

D. Rule 11. Pleas. Report of Subcommittee on Proposed Amendments re

Notice to Defendant of Relevant Sentencing Information.

Judge Marovich provided an overview of the Rule 11 subcommittee's work on Rule 11 issues. He noted that a number of proposals were in the process of approval and that one issue remained for discussion--the question of whether the Government should be required to notify a defendant of the sentencing factors it intended to rely upon during sentencing, following a plea of guilty. Judge Marovich noted that Professor Stith had provided a memo detailing reasons for such a requirement and that the Department of Justice had responded with reasons for rejecting that requirement. He noted that over the last several years the Committee had touched upon the issue of whether anything more should, or could, be done to insure that a defendant was entering a voluntary and knowing plea of guilty, in the context of guideline sentencing.

Professor Stith provided a lengthy explanation of why Rule 11 should be amended to provide for some form of notice to a defendant on what sort of sentencing information the prosecution would be relying upon. She noted that the sentencing procedural rules had not kept pace with actual practice and that there was two particular problem areas. First, the question of what the Government would consider to be "relevant conduct." And second, whether the defendant had been a leader or organizer in the alleged criminal activity. It is unrealistic, she said, to assume that a defendant would be able to calculate the effect of such factors, even with the assistance of a defense counsel. She noted that her proposal requiring notice would simply shift the sentencing calculus to pre-plea stages.

Judge Marovich responded by observing that defendants typically want the trial judge to make factual decisions earlier in the process and cannot understand why the judge cannot take a more active role in the plea bargaining stage. Professor Stith suggested that the Rules Enabling Act procedures would be an appropriate means of obtaining debate and comment on her proposal.

Judge Dowd indicated that there seems to be a diversity of practice developing with regard to what should be included in a plea agreement. There was not, in his view, any uniform system of dealing with sentencing guideline issues in such agreements. The real issue, he said, is what constitutes a knowing and voluntary plea of guilty.

Judge Davis observed that in those jurisdictions where there is a heavy caseload, the trial judges generally permit the defendant to withdraw a plea under Rule 32 if there is any real question about whether the plea is knowing and voluntary. Judge Marovich, however, noted that there is some dispute as to what constitutes a fair and just reason for withdrawing a plea and that sentencing proceedings had become more adversarial. And that, said Judge Dowd, leads to a lack of uniformity in practice.

Ms. Harkenrider expressed the view that a system of government notice was not required. Under the current procedures, the prosecutors cannot control what ultimate sentence will be imposed by the court. She added that it would be difficult to draft a rule which would adopt such a notice provision. On the other hand, she noted, it would be better to rely upon the experience and advice of defense counsel to inform the defendant of what, if any, factors or facts, would impact on the sentence.

Mr. Josefsberg observed that in his experience as a defense counsel that defendants do not always

understand, or believe, what might happen during sentencing. Amending Rule 11, he stated, would not help.

Ms. Harkenrider continued by noting that if a defendant wants more certainty in sentencing, he or she is free to agree to a specific sentence under Rule 11(e)(1)(C). And the Committee has already taken steps to provide for more certainty in sentencing. In most cases, she added, an amendment to Rule 11 would not fix any problems with a lack of certainty.

Mr. Martin noted that generally most agreements do not cover a specific sentence under Rule 11(e)(1)(C). He urged the Committee to consider providing for more notice in Rule 11 and to approve, in concept, an amendment to the rule. He noted that a study by the Federal Judicial Center has indicated that private practitioners were at the bottom of the list in understanding the sentencing guidelines. He noted that he would prefer to see the prosecutors more involved in the sentencing decisions, rather than probation officers.

Judge Roll was opposed to any proposal to require more notice to the defendant. He noted that it would be difficult to determine what would constitute adequate notice because of the variances in application of the sentencing guidelines among the judicial circuits. He observed that the Committee might be aspiring to certainty which does not exist.

Judge Marovich responded by noting that he did not disagree with the comments opposing an amendment and that he agreed with the point that some problems are not capable of a solution.

Judge Jensen reviewed some of the amendments which have already been made to Rule 11 and that the Committee's work had already focused to some extent on disclosure, even though the current rule lacks any enforcement mechanism. He agreed with those who believed that it would be difficult to craft an enforceable notice provision in the rule.

Professor Stith responded that in her view, any notice provision would not be binding on the trial court and that it could consider facts or factors presented by the probation officer, but not the prosecutor.

After Judge Carnes questioned the advisability of tinkering with the rule, Mr. Martin observed that adding a notice provision would not increase the number of not guilty pleas.

Mr. Pauley observed that intuitively, there are bound to be withdrawn pleas of guilty and that there must be a balance with the fairness to the defendant--who should know as much as reasonably possible--and the fairness intended under the Sentencing Reform Act--which was intended to reduce unwarranted sentence disparity. In short, he said, similarly situated defendants should receive similar sentences.

Following additional brief comments, the Committee agreed do take a "straw" vote on whether to proceed with drafting an amendment to Rule 11. The motion failed by a vote of 5 to 7.

E. Rule 12.2. Notice of Insanity Defense or Expert Testimony of

Defendant's Mental Condition.

On behalf of the Department of Justice, Mr. Pauley presented a proposed amendment to Rule 12.2 which would address the authority of the trial court to order a mental examination of the defendant under 18 U.S.C. § 4247. He explained that as a result of *United States v. Davis*, 93 F.3d 1286 (6th Cir. 1996), there is a real question whether a court may order a custodial mental examination under Rule 12.2(b). To remedy the problem, he indicated that Rule 12.2(c) could be amended to provide for such an examination by adding a reference to § 4247.

Professor Stith questioned whether the proposal would extend to any mental evidence or only expert testimony. Mr. Pauley explained how the rule would work and what would trigger the need, or request, for such a mental examination. Judge Miller observed that the rule would be narrower if the defendant intends to introduce the expert testimony of his or her mental state.

Mr. Martin observed that that the amendment would raise a number of significant constitutional issues and questioned whether there was really a problem to be fixed. He pointed out that the Government got what it wanted in the *Davis* case.

Judge Davis observed that this was a complex issue and noted the interplay between the defendant's notice of an intent to introduce mental evidence and a government requested mental examination. If an examination is held, the Government has the statements of the defendant, regardless of whether the defendant testifies or otherwise introduces evidence of his or her mental health.

Mr. Pauley noted that whatever the merits of the proposal, there should be a balance of opportunity for both the defense and the prosecution to present evidence on the defendant's mental condition. Mr. Martin, however, questioned whether simply adding a reference to § 4247 would remedy whatever gap existed; there was still the problem of custodial examination.

Following additional discussion, the Committee voted 11 to 1, with one abstention, to consider a proposed draft amendment to Rule 12.2 at its next meeting.

F. Rule 23. Trial by Jury or by the Court. Discussion re Possible

Reduction of Size of Jury.

The Reporter indicated that pending legislation would reduce the size of juries in federal criminal trials. Mr. Rabiej indicated that there had apparently been no real movement on the proposal. Mr. Josefsberg noted that even with a provision permitting the defendant to agree to a smaller jury, there was the risk that a judge would lean on a defense counsel to waive a 12-person jury. Following brief discussion Judge Carnes moved that the Committee oppose the legislation. The motion, which was seconded by Judge Dowd, carried by a vote of 12 to 0.

G. Rule 24. Trial Jurors.

1. Discussion re Possible Amendments re Number of Peremptory

Challenges.

The Reporter informed the Committee that pending legislation (Section 501) in the Crime Control Act of 1997 (S. 3) would amend Rule 24(b) by equalizing the number of peremptory challenges. He informed the Committee that in 1990 and 1991, the Committee had proposed a similar amendment, that it had been published for public comment, and that the Standing Committee unanimously rejected the proposal at its February 1991 meeting. Since then, the Committee had made no further attempts to equalize the number of challenges, although there had been numerous attempts to do so through legislation. But the Standing Committee's rejection of the Committee's proposal had generally been used to convince Congress not to amend Rule 24(b).

Mr. Pauley indicated that the current status of the legislation was murky but that Crime Bills do tend to get through during the second session of Congress.

Mr. Josefsberg moved that the Committee oppose any attempt to equalize peremptory challenges. Judge Miller seconded the motion.

Following a brief discussion about the benefits and costs of amending the Rule, the motion failed by a vote of 6 to 7.

Judge Roll moved that Rule 24(b) be amended to provide for 10 peremptory challenges for each side in a noncaptial case. Following a second by Judge Dowd, the motion carried by a vote of 7 to 6. The Reporter indicated that he would draft appropriate amending language for the Committee's Spring 1998 meeting.

2. Proposed Amendments re Randomly Selected Petit and Venire

Juries and Deletion of Provision for Peremptory Challenges.

The Reporter informed the Committee that Judge William M. Acker, Jr. (N. Dist. Alabama) had recommended that the Rules be amended to abolish peremptory challenges and to provide for random selection of both the venire and petit juries. Following brief discussion, a consensus emerged that no action should be taken on the proposal.

H. Rule 26. Taking of Testimony. Report by Subcommittee re Taking of

Testimony from Remote Location.

Judge Davis indicated that Judge Jensen had appointed a three-member subcommittee to study a proposed amendment to Rule 26 which would permit transmission of testimony from a remote location: Judge Carnes (Chair), Mr. Josefsberg, and Mr. Pauley. Judge Carnes reported that the Subcommittee had considered the issue and that it proposed that Rule 26 be amended to permit contemporaneous transmission of testimony from a remote location where the court concluded that there were compelling circumstances (and good cause shown) and that the witness was unavailable, as that term is defined in Federal Rule of Evidence 804. He noted that there were potential confrontation clause issues and that requiring a showing of "unavailability" was designed to address that point. He also noted that the Committee might wish to address the issue of the potential interplay between using depositions versus contemporaneous transmission and whether one should be preferred over the other.

Judge Davis questioned whether the amendment should cover audio-only transmissions and Judge Crigler raised concerns about relying only on an audio transmission where the fact-finder and defendant would not be able to observe the witness.

Following additional brief discussion on possible confrontation issues, the Committee voted 12-0 to proceed with drafting an amendment to Rule 26 to provide for contemporaneous transmission. The Reporter indicated that he would draft appropriate language for the Committee's consideration at the Spring 1998 meeting.

I. Rule 32. Sentence and Judgment. Proposal to Provide for Mental

Examination of Defendant.

Continuing an earlier discussion, *supra*, concerning a Department of Justice proposal to regarding mental examinations of the defendant, supra at Rule 12.2, Mr. Pauley proposed that Rule 32 be amended to permit a trial court to order such an examination for purposes of sentencing. (This discussion actually took place in conjunction with the discussion regarding Rule 12.2, but is presented here to coincide with the numbering of the Rules).

Judge Jensen questioned whether the defendant's mental condition or health was a sentencing factor and Ms. Harkenrider indicated that it would be in a capital case. Judge Carnes observed that even in capital cases, the defendant's mental condition would normally have been raised during the cases-in-chief. Mr. Martin gave examples of how the judge may act in capital cases regarding sealing of the mental examination.

Following additional brief discussion, the Committee voted 10 to 1, with one abstention, to proceed with drafting an amendment to Rule 32 which would provide for mental examinations in capital cases, including a notice provision and a provision for sealing the record.

J. Rule 43. Presence of the Defendant. Proposal to Permit Defendant to

Waive Presence at Arraignment.

The Reporter stated that the Committee had received a recommendation from Mr. Mario S. Cano (an attorney in Coral Gables, Florida) to amend Rule 43 to permit the defendant to waive his or her presence at an arraignment. He provided some background information on similar amendments which had been previously considered by the Committee in 1992-93 regarding in absentia arraignments from remote locations.

Mr. Rabiej reported that although several pilot programs had been initiated, they had not yet provided any useful empirical data concerning in absentia arraignments. Judge Crigler noted that the Committee's earlier proposals had been opposed by defense counsel because it would have limited their opportunity to meet with their clients at the arraignment proceedings. Mr. Josefsberg responded that in many cases the arraignment is not a critical proceeding and that in his experience his client has waived presence at arraignment. Judge Marovich agreed that in his experience, the arraignments are routine and that he rarely encounters an arraignment where a major issue is raised. Other members shared that view and Mr. Martin indicated that he could probably support a waiver of appearance but not an in absentia arraignment from a remote location.

Judge Dowd indicated that he uses the arraignment to conduct other inquires and in response several members suggested that any amendment for waiver include a provision for obtaining the trial court's approval.

Ultimately, the Committee voted 11 to 1 to proceed with consideration of an amendment to the Rules. The Reporter indicated that he would draft language for amending both Rules 10 and 43 for the Committee's next meeting.

K. Rules Governing Habeas Corpus Proceedings.

Judge Davis reported to the Committee that the Civil Rules Committee had asked the Committee to consider the possibility of amending the Rules Governing § 2254 and § 2255 Proceedings. In memos provided by the Reporters of the Civil Rules and Criminal Committee, he noted two potential problems. First, a technical, conforming, amendment was probably required in Rule 8 to reflect a change in statutory cross-referencing. Second, the timing requirements for filing a response to a habeas petition appear to be inconsistent in Civil Rule 81, § 2243, and Rule 4 of the Rules Governing § 2255 Proceedings and Rule 4 of the Rules Governing § 2254 Proceedings.

Considering the issues involved, and the fact that recent legislation affecting habeas proceedings may

have created additional issues, Judge Davis indicated that he would appoint a subcommittee to study the problems. He later appointed Judge Carnes (Chair), Judge Miller, Mr. Jackson, and Mr. Pauley or Ms. Harkenrider.

VII. RECOGNITION OF OUT-GOING MEMBERS

During the meeting, Judge Davis recognized the outstanding contributions of two out-going members of the Committee: Judge Jensen, who had served the Committee's chair and Magistrate Judge Crigler. He thanked both for their dedicated service and their contributions to the Committee and on behalf of the Committee wished them well.

VIII. RULES AND PROJECTS PENDING BEFORE STANDING COMMITTEE AND JUDICIAL CONFERENCE

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

Mr. Rabiej informed the Committee that Congress was considering a Civil Forfeiture Act which would exactly following the language in proposed Rule 32.2, which is currently out for public comment. He stated that no action would be taken on the proposed legislation until the second session of Congress.

B. Status Report on Restyling the Appellate Rules of Procedure.

Mr. Rabiej also reported that the restyled Appellate Rules of Procedure had been approved by the Judicial Conference and had been delivered to the Supreme Court for its consideration. He added that the Appellate Rules Committee had received 25 comments on the proposed changes and that all but one of them had been positive in nature.

C. Status Report on Electronic Filing in the Courts

Mr. McCabe informed the Committee that as a result of amendments to several federal rules of procedure which permit courts to accept electronic filings, that a number of federal courts had begun identifying and acquiring appropriate technology to accept such matters. He noted that a number of questions

remained to be addressed and introduced Ms. Karen Molzen, who provided an audio-visual presentation on how the District of New Mexico is handling such filings.

IX. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee decided to hold its next meeting on April 27 and 28, 1998 at a location to be determined.

Respectfully submitted,

David A. Schlueter

Professor of Law

Reporter