MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 19-20, 1998

Cape Elizabeth, Maine

The Advisory Committee on the Federal Rules of Criminal Procedure met at Cape Elizabeth, Maine on October 19th and 20th, 1998. 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 19, 1998. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. George M. Marovich
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Tommy E. Miller
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. Anthony J. Scirica, Chair of the Standing Committee on Rules of Practice and Procedure; Hon. William Wilson, member of the Standing Committee and liaison to the Advisory Committee; Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. John Rabiej and Mr. Mark Shapiro from the Rules Committee Support Office of the Administrative Office of the United States Courts; Mr. Daniel Cunningham of the Legislative Affairs Office of the Administrative Office; Ms. Laurel Hooper from the Federal Judicial Center; Ms. Nancy Miller, Judicial Fellow at the Administrative Office; and Ms. Mary Harkenrider and Stephan Cassella from the Department of Justice. Judge Davis, the Chair, welcomed the attendees and thanked Judge Marovich for his years of service to the Committee. He also welcomed the new member, Judge Bucklew. Later in the meeting, Judge Davis presented a certificate of appreciation to Judge Marovich.

II. APPROVAL OF MINUTES OF OCTOBER 1997 MEETING

Mr. Josefsberg moved that the Minutes of the Committee's April 1998 meeting in Washington, D.C., be approved. Following a second by Judge Miller, the motion carried by a unanimous vote.

III. RULES APPROVED BY SUPREME COURT AND PENDING BEFORE CONGRESS

The Reporter informed the Committee that the Supreme Court had approved the following amendments and that absent any action from Congress, they would become effective on December 1, 1998:

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); and
6. Rule 43 (Presence of Defendant; Presence at Reduction or Correction of Sentence).

IV. RULES APPROVED BY STANDING COMMITTEE AND JUDICIAL CONFERENCE AND PENDING BEFORE THE SUPREME COURT

The Reporter informed the Committee that both the Standing Committee and Judicial Conference had approved and forwarded to the Supreme Court the amendments to the following 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 54. Application and Exception.

The Standing Committee, however, rejected proposed Rule 32.2, Criminal Forfeitures. As a result, Judge Davis had withdrawn the following proposed amendments that would have been conforming changes required by Rule 32.2: Rule 7. The Indictment and Information (Conforming Amendment); Rule 31. Verdict (Conforming Amendment); Rule 32. Sentence and Judgment (Conforming Amendment); and Rule 38. Stay of Execution (Conforming Amendment).

V. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE[(1)]

A. Rule 10. Arraignment & Rule 43. Presence of Defendant.

Judge Miller briefly explained the background of proposed changes to Rules 10 and 43 that would permit the defendant to waive his or her appearance at the arraignment. He noted that he and Mr. Martin had agreed on some proposed language in a new (c)(i) that would make it clear that the defendant's ability to waive an appearance is available only where he or she is entering a plea of not guilty and that a waiver may not be used where the defendant, under Rule 7(b), must appear in open court to waive an indictment where he has been charged with a criminal information in a felony case.

There was general agreement among the Committee members to the proposed changes. The Reporter was asked to draft up the proposed language and conforming amendments for the Committee's April 1999 meeting.

B. Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.

The Reporter provided a brief background on the proposed changes to Rule 12.2, which would make three changes. First, the amendment would require the defendant to provide notice of an intent to introduce expert testimony in a capital case sentencing proceeding. Second, the amendment would authorize the defendant, who had provided such notice, to undergo a mental examination. And third, the proposed change would place some limits on the ability of the government to see the results of that examination before the penalty phase had begun. The Reporter noted that as a result of the Committee's discussion at the October 1997 meeting, he had conducted some additional research into the questions of the impact of the Rule on the defendant's privilege against self-incrimination and whether early disclosure should be permitted.

With regard to the self-incrimination issue, the Reporter indicated that the law seems clear that requiring the defendant to provide notice of an intent to present evidence of his mental condition does not amount to a waiver of the privilege. And, requiring a defendant to undergo mental testing as a condition for introducing such

evidence does not violate the privilege. Regarding the issue of disclosure of the report to the government, the Reporter informed the Committee that the routine practice seems to be that the trial court will seal the results of the compelled examination until the penalty phase of the trial. He observed, however, that there was support for the position that sealing was not constitutionally required. Finally, there is support for the proposition that the court need not wait until the defendant actually introduces evidence of his mental condition before disclosing the results of the examination to the government.

Judge Davis commented that in framing the issues, it should be noted that if the trial judge orders early disclosure, time will be taken for the government to show that no taint has resulted from that early disclosure. On the other hand, he noted, if the government must wait until sentencing to see the report for the first time, there will be delays while the defense and government review the report.

Professor Stith observed that the defendant could always waive holding the report, and Judge Bucklew observed that timing is important in these issues, especially if a jury is involved. Chief Justice Wathen noted that there are really no good choices in this situation; the issues must be decided in a short time frame. Judge Roll commented that mental examination reports include all sorts of information and that the opportunity to investigate those matters is usually not available.

Mr. Martin stated that federal capital cases are usually high profile cases with a great deal of psychiatric testing. He noted, however, that during compelled examinations the defense counsel is not permitted to be present and that that can lead to abuse. He noted that in many cases the results of the examination are sealed because it is believed that there is no reason to disclose it earlier to the defense. He also observed that when the defense sees possible rebuttal evidence in the report, it may withdraw the mental health defense. Finally, he stated that early release to the government could pose dangers and that there is a risk that the government's knowledge of the results might be used against the defendant on the merits portion of the case.

Mr. Josefsberg observed the defendants are already suspicious of the government and the early release of the report simply fuels that belief and undermines trust in the system. He noted that in his experience in State courts, both sides get the results before sentencing begins and that it does take time to review the report. Ms. Harkenrider responded that the typical delay in a federal trial is five days. Other Committee members raised questions about the issue of delay and Judge Marovich urged the Committee to support changes that speeded up the discovery process. Judge Roll commented that he would be concerned about the impact of such delays on the jurors, especially in high profile cases.

The Committee ultimately voted 9 to 2 to amend the Rule to require the trial court to seal the results of the mental examination until the penalty phase.

On the issue of when the results should be disclosed earlier to the defense, Mr. Josefsberg observed that the report might be very beneficial to the defense and in that instance the defense might wish for the government to see it as well. Where the defendant is facing the death penalty, he observed, more time should be given to the defense. Judge Dowd questioned what the States have done on this issue and whether any States provide for earlier release. Following additional brief discussion the Committee voted 7 to 4 to amend the Rule to provide that if the trial court provides the report to the defense earlier than at the penalty phase, the government is entitled to disclosure as well.

C. Rule 26. Taking of Testimony.

The Reporter provided background information on the proposed changes to Rule 26, which had originally been proposed by Judge Stotler as a means of conforming the Rule to Civil Rule 43. The proposed amendment would permit the court to hear testimony being transmitted from a remote location. The Reporter indicated that in response to the Committee's questions at the last meeting, he had done some additional research on the question of whether such an amendment would implicate Confrontation Clause concerns. He noted that of the few cases dealing with the issue, it seemed clear that reception of testimony from a remote location does not per

se violate the defendant's right to confrontation. In particular, he noted that a recent decision by Judge Weinstein in United States v. Gigante, 971 F.3d 755 (E.D.N.Y. 1997) had addressed the issue in some detail, and had cited Civil Rule 43 and the accompanying Committee Note.

He further explained that the most recent draft of the proposed amendment stated no preference for remote transmission over deposition testimony and that the requesting party must establish compelling reasons for that transmission.

The Committee approved the draft by a unanimous vote. The Reporter was asked to make style changes to the Rule.

D. Rule 30. Instructions.

Judge Davis provided background information on the proposed amendments to Rule 30. He noted that as published for public comment in 1997, the Rule only addressed the question of the timing of providing requested instructions. However, after the comment period ended, the Committee learned that the Civil Rules Committee was considering broader amendments to the Civil Rule counterpart, Rule 51. At the suggestion of the Committee, the Reporter had discussed with the Reporter for the Civil Rules Committee the possibility of coordinating a common rule on the issue. Judge Dowd added that perhaps the Rule should include a specific provision authorizing or requiring that the instructions be given before arguments are made. Following additional brief discussion, the Committee decided to wait with any further amendments to Rule 30 pending action by the Civil Rules Committee.

E. Rule 32. Sentence and Judgment.

Judge Davis reminded the Committee of the request from the Criminal Law Committee that the Committee consider whether any provision should be made in either a national rule or local rules concerning release of presentence and related reports. He also indicated that he had appointed a subcommittee consisting of Judge Smith (Chair), Chief Justice Wathen, Mr. Pauley, Ms. Harkenrider, and Mr. Martin. Judge Smith reported that the subcommittee had conferred on the issue and had concluded that no rule changes should be made--either in a national or local rule. He added that they believed that the fact that individuals or organizations might seek access to the reports was not reason enough to make them readily available. He also noted that Judge Kazen, Chair of the Criminal Law Committee, tended to agree with that position. On the motion of Judge Dowd, seconded by Judge Miller, the Committee unanimously approved the Subcommittee's report that no amendments be made.

F. Rule 32.2. Criminal Forfeiture.

Judge Davis provided a brief overview of the questions that had been raised by the Standing Committee in rejecting the Committee's proposed Rule 32.2. He noted that one of the chief concerns focused on the proposed removal of the jury from any forfeiture decisions at trial. Another concern, he stated, was whether the defendant would be permitted to offer any evidence at the forfeiture hearing conducted by the judge. Beyond that, no member of the Standing Committee had voiced any strong concerns about the remainder of the Rule. Judge Wilson added brief comments which echoed Judge Davis' assessment.

Judge Dowd (Chair of Subcommittee on Rule 32.2) explained that since the Standing Committee's meeting in June, the Department of Justice had proposed a number of revisions to Rule 32.2, with a view toward possibly presenting it to the Standing Committee at its January meeting. He briefly noted the changes proposed by the Department and observed that although he personally favored removing the jury from the forfeiture decision, he recognized that there were important reasons for retaining that role.

Mr. Pauley offered reasons for adopting the revised Rule. First, he noted that it was important to recognize that the forfeiture issue was a sentencing matter and that the Rule reflected that point. Second, current

procedures provide for redundant forfeiture decisions and can be very time-consuming and may involve complicated decisions under property law. He noted that under the proposed Rule, the ancillary proceeding would become the primary locus for determining the rights of any third parties to the property to be forfeited.

Mr. Stephan Cassella, an Attorney with the Department of Justice, added to Mr. Pauley's comments and briefly reviewed the current procedures for deciding forfeiture issues. He noted that the ancillary proceeding is governed by statute and gave a brief historical overview of how that proceeding had developed. He added that the proposed Rule would bifurcate the forfeiture proceeding--the first proceeding following the verdict would determine whether any nexus existed between the property and the offense. In that proceeding, the parties would be entitled to request that a jury make that determination. If a third party asserts an interest in that property, the court would conduct an ancillary proceeding.

Mr. Pauley raised the question of whether the Rule should be republished and noted that the Standing Committee's concerns had caused the Department of Justice to rethink its proposal and address the concerns raised by that body. He added that the Department was still very interested in pursuing the adoption of a clear, single Rule to address forfeiture procedures.

Judge Dowd moved that the Committee approve the Department's most recent draft of Rule 32.2. Mr. Pauley seconded the motion.

In the discussion which followed, Mr. Pauley explained the differences in the original (the one presented to the Standing Committee) and the revised draft of Rule 32.2 (dated October 13, 1998). He noted that one of the changes was in Subdivision (a) where the Department proposed that the language be changed to reflect current caselaw interpreting Rule 7(c); that caselaw does not require a substantive allegation that certain property is subject to forfeiture. The defendant need only receive notice that the government will be seeking forfeiture under the applicable statute.

He noted that (b)(1) had been revised to clarify that there are different kinds of forfeiture judgments: forfeiture of specific assets and money judgments. To the extent that the case involves forfeiture of specific assets, the court or jury must find a nexus between the property and the crime for which the defendant has been found guilty.

Under the revised (b)(2), the Rule makes it clear that what is deferred to the ancillary proceeding is the question of whether any third party has a superior interest in the property. Former language regarding what the court should do if no party files a claim has been moved to (c)(2).

Mr. Pauley noted that (b)(3) had been changed to make it clear that the Attorney General could designate someone outside the Department to seize the forfeited property.

The major change, he observed, rested in (b)(4) which retains the right of either the defendant or the government to request that the jury make the decision whether there is a nexus between the property and the crime. This provision, he noted, was designed specifically to address the concerns raised by some members of the Standing Committee.

Next, Mr. Pauley informed the Committee that (c)(1) had been revised to reflect that no ancillary proceeding is necessary regarding money judgments and that (c)(2) had been revised to simplify what had appeared at (b)(2) in the original version. That provision, he observed, preserves two tenets of current law: that criminal forfeiture is an in personam action and that if no third party files a claim to the property, his or her rights are extinguished. Under the revised language, if no third party files a claim the court is not required to determine the extent of the defendant's interest. It is only required to decide whether the defendant had an interest in the property.

Finally, Mr. Pauley noted that (e)(1) had been revised to make it clear that the right to a bifurcated

procedure does not apply to forfeiture of substitute assets or to the addition of newly-discovered property to an existing forfeiture order.

Judge Wilson indicated that the right to jury trial is a broad concern but that other members of the Standing Committee might approve of the Department's changes.

The ensuing discussion focused first on the issue of procedures for forfeiting "specific assets" in (b)(2) and its relationship to (c)(2). Mr. Cassella noted that forfeiture procedures can create complicated issues and that the Rule is intended to simplify the process by recognizing a presumption that if no third party comes forward, the defendant is presumed to have an interest in the property. Following additional discussion, the Committee agreed that any language about presumptive interests should go in the Note and not in the Rule itself.

Judge Roll raised a question about the proposed change to (a) that would permit the government to simply provide notice to the defendant in the indictment. Following brief discussion concerning clarification of the "notice" provision, the Committee voted 6 to 3 to adopt the Department's suggested change in subdivision (a).

In (b)(4), with regard to the issue of distinguishing money judgments from forfeiture of specific assets, the Committee voted 7 to 4 to use the term property instead of "specific assets." And by a vote of 4 to 3, the Committee approved the jury provision in (b)(4).

The Committee generally discussed the issue of whether to recommend that the Rule be republished for public comment on the proposed changes. A consensus emerged that the changes were in effect largely conforming changes resulting from comments from the Standing Committee and that the Chair should present the Rule to the Standing Committee for its determination on whether the changes required additional publication.

Thereafter, the Committee voted unanimously to present the revised Rule to the Standing Committee at its January 1999 meeting.

G. Rule 43. Presence of Defendant.

The Reporter provided a brief overview of the proposed changes to Rule 43 that would permit the defendant to appear before an initial appearance and arraignment through teleconferencing. The proposal had been raised in a letter from Judge Fred Biery (W.D. Tex.) recommending that Rule 5 be amended to permit such appearances. The Reporter stated that the Committee had published a proposed amendment in 1993 and 1994 that would have accomplished the same result. But the matter was tabled pending the outcome of an FJC pilot program involving teleconferencing. Judge Roll noted that although the proposal focused on Rule 5, amendments to Rules 10 and 43 would also be required. Following further discussion, Judge Davis appointed a subcommittee to study that matter and report back to the Committee: Judge Roll (Chair), Judge Bucklew, Judge Miller, and Mr. Pauley.

H. Rules Governing Habeas Corpus Proceedings.

Judge Davis indicated that as a result of its study of the Rules Governing Habeas Corpus, the Subcommittee consisting of Judge Carnes (Chair), Judge Miller, Mr. Jackson, Mr. Pauley and Ms. Harkenrider was prepared to recommend changes to those Rules. Judge Miller, speaking on behalf of the Subcommittee in the absence of Judge Carnes, explained the need for a number of changes to the Rules.

First, it was necessary, he said, to change the reference in Rule 6(c), Rules Governing § 2254 cases and Rule 8(c), Rules Governing § 2255 cases which contain an outdated reference to 18 U.S.C. § 3006A(g). The Committee voted unanimously to change the reference to § 3006A.

Judge Miller also noted that the Subcommittee believed that potential conflicts created between the time requirements in Civil Rule 81 and the Rules Governing Habeas Corpus might be best resolved by recommending that the time provisions in Rule 81 be deleted. Following brief discussion the Committee voted unanimously to so recommend.

With regard to Rule 2(e) in the Rules Governing § 2254 Proceedings and in Rule 2(d) for the Rules Governing § 2255 Proceedings, the Subcommittee recommended that the word "receives" should be changed to "filed" to bring those rules into conformity with Civil Rule 5(e). The Committee voted unanimously to make the change.

Judge Miller next noted that language in Rules 3(b) in the Rules Governing § 2254 Proceedings and § 2255 Proceedings contains language that conflicts with Rule of Civil Procedure 5(e) and current practice. As written, Rule 3(b) refers to the clerk filing the papers when in fact the practice is for the clerk to file the petition and refer it to a judge for consideration of any defects in the petition. Proposed language to resolve the problem was presented to the Committee and approved by a unanimous vote.

Regarding Rule 2(c) in the Rules Governing § 2254 Proceedings and in Rule 2(b) for the Rules Governing § 2255 Proceedings, Judge Miller noted that the Subcommittee had considered proposing an amendment that would require that a petitioner indicate in his or her petition whether a previous petition has been filed. He noted that several magistrate judges had opposed this change and that upon further consideration, the Subcommittee was withdrawing its proposal.

Turning to Rule 5 in the Rules Governing § 2254 Proceedings and Rule 5(a) for the Rules Governing § 2255 Proceedings, Judge Miller informed the Committee that the magistrate judges who had responded to the proposed amendments disfavored the proposal which would require the government to state in its answer whether other petitions had been filed and whether or not the petition complied with the statute of limitations. During the ensuing discussion, several Committee members observed that the proposed changed appeared to be substantive in nature. Others noted that the judge is capable of reviewing the petition to determine if it complies with the statute. Judge Miller noted that the proposed amendment was a reaction to provisions in the Antiterrorism Act. The Committee rejected the proposed amendment by a vote of 4 to 7.

Judge Miller explained the Subcommittee's proposal that Rule 9(b) in the Rules Governing § 2254 Proceedings and Rule 9(b) for the Rules Governing § 2255 Proceedings be deleted. The subcommittee believed that those provisions, which address second or successive petitions, have been superseded by provisions in the Antiterrorism and Effective Death Penalty Act of 1996. The Committee voted 9 to 0 (1 abstention) to adopt that recommendation.

Judge Miller noted that the Reporter had suggested that some consideration be given to consolidating the Rules Governing § 2254 Proceedings and the Rules Governing § 2255 Proceedings. He believed that that was possible and following brief discussion by the Committee received approval to attempt a consolidation.

Finally, he stated that the Subcommittee had recommended that Rule 1 of both sets of Rules should be amended to reflect that habeas cases filed under § 2241 should be governed by those Rules. The Committee approved the proposal by a vote of 8 to 0, with 1 abstention.

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

A. Rules Governing Attorney Conduct.

Professor Coquillette provided background information on the Standing Committee's attempt to bring some guidance on what, if any, rules could be adopted regarding attorney conduct in federal courts. He informed the Committee that a bill was pending before Congress that would make attorneys for the government

subject to State disciplinary rules and that as a result of that legislation, matters were temporarily on hold to see if any further action would be required by the Standing Committee.

B. Electronic Filing of Comments on Proposed Rules Changes.

Mr. Rabiej reported that the Rules Committee Support Office was prepared to receive the public's comments on proposed changes to the Rules through electronic mail. Because the Committee has no pending amendments out for comment, it will be some time before that process is used for Criminal Rules.

C. Status Report of Proposed Restyling of Criminal Rules.

Judge Davis informed the Committee of the pending project to "restyle" the Criminal Rules. The current plan, he noted, was for the Style Subcommittee of the Standing Committee to complete its draft of the Rules and present them to the Advisory Committee at the first of the year. He noted it might be more efficient to divide the Rules among two subcommittees and that it would probably be necessary to hold several extra meetings to finish the project. He also noted that the Reporter had suggested a breakdown of the assignment of the Rules and that Professor Saltzburg had been retained by the Rules Committee Support Office to assist the Style Subcommittee in its work. He expressed concern that the Committee might make unintentional substantive changes to the Rules in the process and reminded the Committee that special attention should be paid to this potential problem.

Judge Davis appointed the following subcommittees to review the style changes: Subcommittee A: Judge Smith (Chair), Judge Bucklew, Judge Miller, Professor Stith, Mr. Jackson, Mr. Pauley, and Ms. Harkenrider. Subcommittee B: Judge Dowd (Chair), Judge Roll, Chief Justice Wathen, Mr. Josefsberg, Mr. Martin, Mr. Pauley, and Ms. Harkenrider.

D. Status Report on Legislation Affecting Criminal Rules; Pending

Amendments Affecting Grand Jury Proceedings.

Mr. Dan Cunningham, from the Office of Legislative Affairs, briefed the Committee on pending legislation that would require action by the Judicial Conference and possibly the Advisory Committee. The pending legislation would permit defense counsel to attend grand jury proceedings. Following a brief discussion on the issue, Judge Davis appointed a subcommittee to review the legislation and prepare any necessary response from the Committee. The Subcommittee consists of Judge Dowd (Chair), Judge Smith, Mr. Jackson, and Mr. Pauley.

Mr. Cunningham also gave an overview of the function and duties of that office and noted that Congress' increased interest in the Rules of Criminal Procedure had resulted in changes to the Rules. He noted that Congress may affect the Rules by first, directly amending the Rules themselves, second, enacting legislation that affects the Rules, or directing that a study be conducted on a possible amendment to the Rules, as is the case with the pending Grand Jury issues. He indicated that the Office has attempted to persuade Congress to simply send a letter to the Advisory Committees requesting consideration of possible amendments. Finally, he reviewed a number of recent examples of where Congress has shown an interest in amending the Rules of Procedure or Rules of Evidence.

VII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING.

The next meeting of the Committee will be on April 22 and 23, 1999 in Washington, D.C.

Respectfully Submitted,

David A. Schlueter

Professor of Law
Reporter, Criminal Rules Committee

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1. **The material is presented here in the order it appeared on the Committee's agenda and not necessarily in the order it was discussed at the meeting.**