Minutes of Meetings

Of

Advisory Committee On Rules

On Criminal Procedure

New York, New York,
February 20, 1943.

Stenographer's Minutes.

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Met pursuant to adjournment at 10:00 a.m., February 20, 1943.

THE CHAIRMAN: I will declare a quorum and we will start with the next rule, which is 6 (c). Are there any questions or suggestions with reference to the Rule 6(c)? If not, a motion is in order.

MR.LONGSDORF: I find there is a question I might ask. I put a notation to ask Mr. Holtzoff and Mr. Dean, and I have not the answer yet. There is no prescription in these rules that I could find for the oath of the grand jury and witnesses before the grand jury, and if the court should choose, as it did in that Smith case to give an oath to the grand jury in the form used in the State courts, it might be too broad for the Federal rules, and might come into conflict with the provisions of this Rule 6(e). I have not any view to express.

THE CHAIRMAN: It is Rule 6(c).

MR. LONGSDORF: Nothing on (c).

THE CHAIRMAN: It is moved and seconded that Rule 6(c) be adopted as stated. All those in favor say "Aye."

(Chorus of "Ayes."

THE CHAIRMAN: Opposed "No."

(No response.)

THE CHAIRMAN: Adopted. Rule 6(d).

MR. HOLTZOFF: I have a sort of verbal suggestion. Instead of "witnesses under examination" in lines 35 and 36, it ought to be "the witnesses", and instead of "interpreters" it ought to be "an interpreter."

MR. ROBINSON: That is your interpretation?

MR. HOLTZOFF: Yes. And in line 38 I suggest "except that" be changed to "but", and I move those changes be made.

MR. MEDALIE: There is one thing about the interpreter. You don't want him there except when actually working with a witness.

MR. HOLTZOFF: My objection was to the use of the plural. When ordered by the court.

MR. MEDALIE: Yes, but if he is ordered by the court he might hang around during the whole case.

MR. ROBINSON: The explanation, Mr. Chairman, is when you are ready for him.

THE CHAIRMAN: Yes. I am going to urge everybody today to state their propositions integrally and in as small sentences as possible because we just have to get through, gentlemen. The pace we made yesterday was not at all what we should have done.

MR. ROBINSON: The proposition is this as to

3mh

interpreters: I see no objection to having just one. The only point is under the present statute and under that rule as we had it in draft 5, we had "witness", singular and "interpreter", singular. The point has been suggested by members of the Committee that there might be times when it would be desirable to have more than one witness in the grand jury room in the presence of the grand jury, in the discretion of the court. Now if that is a possibility, this is the opportunity to put it in.

MR. HOLTZOFF: I never heard of such a thing.

MR. MEDALIE: It strikes me as a very unwieldy thing to have things depend on court direction while the grand jury is operating. It just does not work.

MR. HOLTZOFF: If you as district attorney have to have two witnesses in at the same time so that you could question them jointly you would not want the court to have the power to allow you to permit a second witness to be in the grand jury room.

MR. MEDALIE: Why should the court have the power about the operation of the grand jury. It is not a possible thing.

MR. HOLTZOFF: You could examine two witnesses jointly.

MR. MEDALIE: Confrontation, yes. But otherwise of course not.

4mh

MR. WAITE: Here it is "witnesses under examination" and it precludes the having of witnesses who are not under examination. I think we are quibbling over little things here that do not make any difference.

MR. HOLTZOFF: We adopted the other form in Tentative Draft 5, and I was wondering why the change. Draft 5 was acceptable to the majority.

MR. WAITE: Because members of the Committee recommended it be placed before the Committee for their consideration at this time. If they reject it, all right.

MR. HOLTZOFF: My motion really involves bringing it back to part of 5.

MR. SETH: How can two interpreters work at once? We do not need two at a time.

MR. GLUECK: Has there been a second to that motion?

MR. YOUNGQUIST: I move it be adopted.

MR. DESSION: Supported.

MR. SEASONGOOD: Just before I left home I noticed this Pelley case was affirmed in the Seventh Circuit, 132 Fed. (2d) 170, and apparently they have the special counsel present while the jury are deliberating. Of course I am opposed to that, but that was something new to me. The point was made that because the special counsel appointed by the Government had not been sworn,

that that invalidated the proceedings, and apparently the United States attorney is allowed to be present when the jury is sworn.

MR. HOLTZOFF: That is taken care of in the last clause.

MR. SEASONGOOD: I just call your attention to that. I do not think anybody in this room thinks that is good technique. I was amazed. I thought they always had to get out. That was one of the grounds of error assigned, and they said all right.

MR. McLELLAN: Mr. Chairman, I do not want to take your time or the time of the Committee, but I do not know what Mr. Seth just tried to say.

MR. SETH: I have presented cases with two interpreters; Navajo into Spanish and Spanish into English. I suppose that is a little unusual.

MR. MEDALIE: I move to amend the motion to adopt (d) by striking out the words "when ordered by the court" after "interpreters."

THE CHAIRMAN: You have heard the motion. All opposed say "No"; all in favor say Yes."

Carried. Are you ready for the question to adopt (d) as amended? All those in favor say "Aye"

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Carried.

MR. SEASONGOOD: Mr. Chairman, may I penalize the Committee for my lateness on (c) just a minute. I wondered about it. How will you know how any jurors voted? That is, how will you know whether the disqualified juror made up the necessary number for an indictment?

MR. HOLTZOFF: You will know how many voted to indict and you will know how many are disqualified, and by subtracting you get --

MR. SEASONGOOD: How do you know whether the disqualified man voted to indict?

MR. HOLTZOFF: You do not know whether he voted to indict or not. Suppose, for example, there were fifteen grand jurors present. Suppose one was disqualified, that leaves fourteen, and suppose there were twelve votes in favorof indictment. You know then by that calculation there must have been twelve qualified jurors who voted to indict.

MR. SEASONGOOD: But suppose you have twelve vote for the indictment and you do not know who voted for the indictment. How do you know that the disqualified man was one of the twelve that voted for the indictment?

MR. HOLTZOFF: I think it must appear affirmatively from the computation that there were twelve quali-

7mh

fied votes.

MR. MEDALIE: Is not sixteen a quorum?

MR. HOLTZOFF: I should have said sixteen. We do not say anything about that.

MR. McLELLAN: Oh, yes.

MR. MEDALIE: But the quorum is sixteen, I think.

MR. SEASONGOOD: I do not see that merely by keeping a record of the number of jurors concurring in the votes on the indictment how you will know whether the disqualified person is of that number.

THE CHAIRMAN: You cannot know. But on the other hand it would be improper, would it not, to keep a record of the way each juror voted?

MR. SEASONGOOD: Unless that was just a record the court would see and nobody else. How are you going to make this effective unless you know a disqualified juror voted for the indictment?

MR. MEDALIE: The point is good. The difficulty is the mechanics of it. On its face the calling of the rolls and calling for votes is a pretty tough job if you are moving fast. After all the records of the grand jury are kept by a layman, called the secretary or the clerk of the grand jury. It would impose a tremendous amount of paper work. It is difficult enough to get somebody

8mh

to act as clerk of the grand jury.

MR. ROBINSON: You know that is the present law. You are proposing to amend the present statute?

MR. SEASONGOOD: I am just asking how it is effective. How can you find whether a disqualified or biased man voted?

MR. HOLTZOFF: The point is, you know how many voted for the indictment.

MR. SEASONGOOD: Let us say twelve voted for the indictment.

MR. HOLTZOFF: If one is disqualified then you are not sure whether there were twelve qualified votes, but suppose thirteen voted for the indictment, and suppose there was only one unqualified man on the grand jury, so irrespective of how the unqualified man voted there were twelve qualified votes for the indictment.

MR. SEASONGOOD: But take the twelve, as I suggested.

MR. HOLTZOFF: In that case you cannot tell and there I think the Government would not have the advantage of this rule. I think the burden would be on the Government to show the qualifications.

MR. McLELLAN: Doesn't it come to this: if there are only twelve for the indictment and there is one unqualified man in the jury room, the indictment is bad?

9mh

MR. HOLTZOFF: Yes, it does, but if there are sixteen for the indictment and but one unqualified man, then you know it is good.

MR. SEASONGOOD: How do you know whether he was one of the twelve?

MR. McLELLAN: As to that the burden is on the Government.

MR. SEASONGOOD: If that is so, it does not appear in this statement or anywheres, does it? I would think it would be the other way; that is to say, until you know the unqualified man was one of the necessary number to make up the indictment, you have not proved your case.

MR. McLELLAN: The practical difficulty there is you cannot show. They do not keep a record of, and ought not to keep a record of how each member of the jury voted, and the only practical rule is to say if they can only get twelve votes and there is somebody there in the room who is unqualified and may have voted for it, that the indictment is bad.

MR. HOLTZOFF: Yes. I think that is clear from the language; if it appears that twelve or more jurors, after deducting the number of unqualified ones, concur in the finding of the indictment. In other words, the Government must show there were twelve qualified

10mh

votes.

THE CHAIRMAN: Then we will go on to 6 (e). You had a question, Mr. Longsdorf?

MR. LONGSDORF: Only what I said before. Unless we have some form of oath, not necessarily in the rules, but it might be in the forms, indicating what the form should be, it is not clear.

THE CHAIRMAN: You move the oath to the grand jurors be included among the forms?

MR. LONGSDORF: I have nothing to say pro or con about that. That should be taken up later, I think, but if we have a judge who used the State statutory form of oath, as in the ~~Smith~~ Schmidt case in Ohio - Mr. Seasongood knows a good deal about that - why that imposes a degree of secrecy greater than is imposed by these rules.

MR. HOLTZOFF: But this paragraph defines the degree of secrecy. Therefore no judge could impose any greater degree of secrecy it seems to me.

MR. LONGSDORF: I think that is entirely correct. I just raised the question so we would be clear on it.

MR. MEDALIE: I move to strike out the first sentence of (e).

MR. WECHSLER: Seconded.

MR. MEDALIE: Because occasions do arise when

11mh

a judge is interested in finding out what happened before the grand jury. There are motions made to quash an indictment on the ground of improper proceedings and sometimes it becomes relevant how the juror voted.

MR. ROBINSON: As a matter of information you are also voting to repeal the statute on that subject, is that it?

MR. WECHSLER: No. I call your attention to this fact: it is true that Section 554(a) of Title 18 says that no juror may testify how he voted, but that provision adds the very significant words that are omitted from this, "for this purpose." That is to say, any challenge on the ground of an unqualified juror where the statute provides that if twelve or more qualified jurors voted, the indictment is good, the statute forbids any juror to testify how he voted. But that is not the general rule of evidence. It is limited to that particular case and as put here it is made a general rule of evidence.

MR. ROBINSON: I believe that was all discussed when the fifth draft was considered. So you are moving to change the fifth draft?

MR. MEDALIE: Jim, I cannot remember that, but I know it was not the statute.

MR. ROBINSON: I am asking for information.

12mh

MR. MEDALIE: I always opposed this provision.

MR. DEAN: What would you think of putting in the second sentence "No juror shall disclose the testimony of witnesses or anything said by a juror or how he voted except when required or permitted by the court"?

MR. MEDALIE: I was just looking at that and I would prefer it to read "said or anything done by a juror" and I include that in my motion, if I may.

THE CHAIRMAN: In line 44?

MR. MEDALIE: Yes, sir. "Anything said or done by a juror."

MR. HOLTZOFF: And omit the first sentence?

THE CHAIRMAN: The motion is to strike the first sentence of Section (e) and insert in line 44, after the word "said" the words "or done." All those in favor say "Aye."

(Chorus of "Ayes.")

Opposed "No".

(No response.)

THE CHAIRMAN: Carried. Are there any other suggestions with respect to Section (e)?

MR. YOUNGQUIST: I object to the second sentence. I move that the second sentence be stricken.

MR. HOLTZOFF: You mean the new second sentence?

MR. YOUNGQUIST: Yes, the new second sentence

beginning on line 46, and ending on line 49. That is the sentence prohibiting any witness from disclosing to anyone, his counsel or anyone else anything said or done during the proceedings.

MR. MEDALIE: You do not mean the second?

THE CHAIRMAN: It is now the second sentence, lines 46 to 49.

MR. YOUNGQUIST: That I know is the practice in some of the districts of the Federal courts, but I think it is much too restricted. It is all right to prohibit a grand juror from disclosing what went on in the jury room except as it may be required in judicial proceedings, and they do disclose it, but when you muzzle the witness so he cannot even tell his counsel what he testified before the grand jury, that is going much too far.

MR. WAITE: This only says "no witness * * * shall obstruct the grand jury * * * by disclosing."

MR. YOUNGQUIST: Shall obstruct by disclosing. Who is to measure what constitutes the obstruction? Suppose, for instance, it be said that his telling his counsel what he testified before the grand jury is obstructing justice? It is up to him to determine in his own mind, and he cannot ask his attorney about it because he would have to disclose what happened, whether

he is or is not obstructing justice by disclosing something that he said before the grand jury.

MR. WAITE: Would not you have to leave it to the court, just as you always leave the question about obstruction of justice to the court?

MR. YOUNGQUIST: That is the trouble, He would not know whether a particular fact that he wanted to disclose would be held to be obstructing justice or not, and he cannot even ask counsel for advice about it, because when he asks the question he has made the disclosure.

MR. WAITE: Would not you have by implication, if we strike this out, that he may obsẗruct justice by disclosing?

MR. YOUNGQUIST: If that be the consequence, yes. I think there should be freedom on the part of the witness to disclose; that there should not be a restriction on the witness before a grand jury so severe that he may not disclose.

MR. ROBINSON: What was said and done in the grand jury room?

MR. YOUNGQUIST: What was said and done in the grand jury room.

MR. MEDALIE: Mr. Chairman, we discussed that very fully before, and I will only say in a few words what

15mh

I said on other occasions. An employee has a right to come back and tell his boss; a fellow director has a right to come back and tell his fellow director what has happened. What has happened here is that people in close personal relations cannot tell each other what happened before the grand jury when it is to their interest and the interest of their business; everything they are doing; they should know and exchange that information.

Now we have developed a notion about grand jury secrecy that is really perfectly absurd. After all, it is only an inquiry made by a judicial body. The secrecies are really for the protection of grand jurors, explicitly for the protection ofpersons not indicted, and supposedly also to prevent the escape of persons who might know they are being investigated. Now in practice it is not so. In New York, for instance, there is no prohibition in the statute on a witness telling what his testimony was before the grand jury. Nothing bad has happened, and the pretense of this secrecy simply produces a falsehood. The fact is there is not that secrecy.

MR. HOLTZOFF: Question.

THE CHAIRMAN: You have heard the motion to strike the sentence beginning in line 46. All in favor say "Aye". (Chorus of "Ayes.")

16mh

THE CHAIRMAN: All those opposed, "No".

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. All those in favor raise their hands.

(After a show of hands the Chairman announced the vote to be 11 in favor; 3 opposed.)

THE CHAIRMAN: It is carried.

Section (f).

MR. YOUNGQUIST: I have not finished.

THE CHAIRMAN: I beg your pardon.

MR. YOUNGQUIST: I have a suggestion as to line 49. I suggest the substitution of "the attorney for the Government" for "the United States attorney."

MR. ROBINSON: That was made again a discrimination to show the fact that really it was a place you should not allow a special attorney or private counsel.

MR. YOUNGQUIST: A special assistant?

MR. HOLTZOFF: I think a special assistant ought to be qualified to give the direction.

MR. YOUNGQUIST: Anyone who acts as attorney for the Government ought to have authority to do that or to do with respect to the prosecution what the United States attorney should do.

MR. ROBINSON: You do not think the court should have to say anything on that?

MR. YOUNGQUIST: No. You should not need to bother the court. Another suggestion I have is merely one of language. In line 53 strike out "to the extent that disclosure may be" and substitute the word "when".

MR. ROBINSON: That is a good one.

THE CHAIRMAN: That, I take it, is accepted. What is your pleasure with respect to the motion directed to the words "the United States attorney"?

MR. ROBINSON: Apparently that was received too.

THE CHAIRMAN: Is there any objection? If not, that will stand changed by consent to "the attorney for the Government."

Are you ready for a motion on (e) as amended?

MR. SEASONGOOD: I just want to present the question which did come up in the Smith case: Suppose there is something wrong or trouble that say the juror can only give in a court proceeding. The trouble is that you cannot have a court proceeding unless you have some basis to go on. That is, if you would file a request with the court and not have any evidence to support it. In the Medical case they held that was insufficient. The only way you can get it - you cannot listen at the keyhole - is from a juror as a basis for getting your motion to set aside.

18mh

THE CHAIRMAN: There is no limitation in these rules against the clerk telling, is there, or the stenographer?

MR. MEDALIE: I know what Mr. Seasongood has in mind because there has been experience with that kind of thing and there are cases of motions made to quash on the ground that things happened before the grand jury.

MR. SEASONGOOD: That is right.

MR. MEDALIE: The motion is based on investigation made after the indictment has been found and the defendants have been apprehended. And the cases that deal with that hold that no harm is done by the juror telling because the indictment has been found and the defendant is apprehended and public interest is not involved. Therefore the attorney, or his investigators, may go around and interview the grand jurors and use their affidavits that set forth what they were told, and the grand juror himself may make an affidavit. Generally speaking that has been approved by the cases.

MR. HOLTZOFF: In the Sixth Circuit that was held to be contempt of court.

MR. SEASONGOOD: And in the Fourth it was not.

MR. DEAN: It depends somewhat on the particular oath the judge imposes, the oaths being different in different jurisdictions.

19mh

MR. WECHSLER: I assume this rule as drafted would adopt the decision that held it to be contempt and reject the decision that held it not to be contempt.

MR. SEASONGOOD: If there is anything wrong with the jury it is an idle thing to say you have a remedy in court, and the court can order it to be heard, because in the Kentucky case they held unless you have something to prove it, your motion is no good.

MR. LONGSDORF: How often would that case arise?

MR. GLUECK: May I ask whether the wording in line 43 is broad enough to permit counsel to interview the grand jurors, "except when required or permitted in the course of judicial proceedings"?

MR. HOLTZOFF: No, that would not include counsel.

MR. DEAN: How about 45?

MR. MEDALIE: If we strike this sentence then we do not have the law as it appears in various district decisions.

MR. HOLTZOFF: I think we ought to have a uniform rule instead of letting the confusion that now exists continue.

MR. MEDALIE: The only way we could carry out the idea Mr. Seasongood has talked for is a provision that a juror should make no disclosure as to anything said even before or after the indictment and the apprehension of the

20mh

defendant except by direction of the court.

MR. SEASONGOOD: All defendants?

MR. MEDALIE: Yes.

MR. SEASONGOOD: I do not have any positive opinion on it but I am presenting the question which is a question in my mind.

THE CHAIRMAN: Your idea then is the remedy is futile?

MR. SEASONGOOD: Yes, it seems to me so. That is what they said in the American Medical case. I believe that was the case they said "We won't entertain a motion to quash if you do not have any evidence to support it."

MR. DEAN: Isn't that arguing for putting in a provision where you can request the court, without any showing at all, to examine the transcript of the grand jury?

MR. MEDALIE: But the court won't do it. The transcript alone won't do because unscrupulous prosecutors do things, and we had an assistant prosecutor in the Eastern District here who used to, in intervals, walk up to a juror and tell him a lot of things that were not in therecord. You know he was the subject of comment in another connection by the Supreme Court of the United States.

THE CHAIRMAN: Mr. Justice Stone.

MR. MEDALIE: We are entitled to protection against such people.

THE CHAIRMAN: Will somebody phrase this so we can get it in the form of a motion and get the vote of the Committee?

MR. MEDALIE: May I take a try at it?

THE CHAIRMAN: Will you, please.

MR. MEDALIE: "No juror shall disclose the testimony of witnesses or anything said or done by a juror during the proceedings before the filing of the indictment and the apprehension of the defendants except when required or permitted by the court."

THE CHAIRMAN: Is that motion seconded?

MR. WECHSLER: I second it.

MR. SETH: I second it.

THE CHAIRMAN: Is there any discussion?

MR. HOLTZOFF: Question.

MR. ROBINSON: Mrs. Peterson who has worked up on the figures on this oath of secrecy points out that in your comments on Rule 6, page 9, it is pointed out that no Act of Congress has required it, but in approximately 33 of the district courts such witnesses are required to take an oath of secrecy.

MR. HOLTZOFF: Question.

MR. McLELLAN: I am stupid, perhaps, but I am not

controversial about it. Do you mean to have it provided in substance, by implication, that jurors are entirely free to talk to their heart's content after the arrest of the defendant?

MR. HOLTZOFF: Apparently that would be the effect of this amendment.

MR. DEAN: That would be the effect.

MR. MEDALIE: I don't know what harm would come of it. In view of the advantages I think that the shock of tradition cannot be very serious.

MR. McLELLAN: That would be its effect, wouldn't it?

MR. MEDALIE: It would be its effect without question The jurors should no longer be told they should not talk about what they said and found and heard, but they may do it all they want to just as soon as the defendant is arrested.

MR. WECHSLER: Isn't this what we want. We do not want jurors to talk about what has happened before the grand jury except in the rare instance where they talk will reveal some improprieties. There we do want, or at least some members of the Committee want, the juror to be free to disclose improprieties. Could not we draft a rule in those terms so that the permissive disclosure is only for the disclosure of improprieties. I am not sure that that would be right.

MR. McLELLAN: That would be quite difficult.

THE CHAIRMAN: May we lay this on the table and ask the interested members to tackle it at lunch?

MR. MEDALIE: I am escaping at lunch for a little while to keep an engagement with which this session interfered.

MR. CRANE: So has the chairman and myself.

MR. MEDALIE: I tried to put it off but it was impossible. I was supposed to be engaged all day but I promised to be there for lunch.

MR. SEASONGOOD: Maybe Judge McLellan and Mr. Wechsler could draft something.

MR. WECHSLER: We could try it before lunch, Mr. Chairman, and if we get anything we will present it.

THE CHAIRMAN: We will pass 6(e) for the time being.

MR. SEASONGOOD: May I just ask, is there any reason why the United States attorney is allowed to tell what took place in the grand jury room, or the interpreter or stenographer?

MR. HOLTZOFF: He is not.

THE CHAIRMAN: The rules are silent.

MR. MEDALIE: They are silent, just like the New York practice.

MR. BURNS: Has there been any attempt to deal

with the problem of what the witnesses can disclose?

THE CHAIRMAN: That has been covered.

MR. SEASONGOOD: There was a case where the witnesses were sworn to secrecy and one told and I think he was held in contempt.

MR. BURNS: Then there is a practice in some districts to swear the witness to secrecy.

THE CHAIRMAN: Does anybody want to make a motion so that the Committee can start to work on it, dealing with the stenographer and the clerk and the interpreter and their secrecy?

MR. MEDALIE: I think you might look at the statute in that connection.

MR. SEASONGOOD: I mean if you have secrecy why not have complete secrecy. What is the point of having some people being able to blab and not anybody else?

MR. WECHSLER: The witness is a separate problem, isn't he?

MR. MEDALIE: As far as witnesses are concerned your main interest is there should not be wholesale publication and that it is not given to the press. You don't object to a witness coming and telling his wife what he has been up against, or telling his boss or his office associates about the investigation concerning the conduct of their office or telling the lawyer. In other words, what

we do not want is to have the thing get into the papers.

THE CHAIRMAN: All right. We will have all phases of this gone into.

Now let us go on, if we may, to 6(f).

MR. HOLTZOFF: I move that it be adopted.

MR. YOUNGQUIST: Seconded.

THE CHAIRMAN: All those in favor of the motion say Aye". (Chorus of "Ayes.")

Opposed "No. (No response.)

Carried.

Paragraph 6(g).

MR. HOLTZOFF: I have some verbal suggestions as to line 60. I move the word "dismissed" be changed to "discharged", because my understanding is that the word of art is "discharged" rather than "dismissed."

MR. YOUNGQUIST: That is all right.

MR. WECHSLER: Yes.

THE CHAIRMAN: That seems to be accepted. And the heading also?

MR. HOLTZOFF: Yes, the heading also. And the second sentence might have to read as follows: "the tenure or powers of a grand jury shall not be affected or limited by the expiration of a term of court." This does not change the substance. I think it just polishes up the phraseology.

26mh

MR. McLELLAN: Do we anywhere abolish terms of court so far as criminal proceedings are concerned?

MR. HOLTZOFF: We do not abolish terms but we have a rule to the effect that terms of court shall have no significance as limitations on ~~changes~~ of time.

MR. McLELLAN: Why doesn't that take care of this?

MR. HOLTZOFF: I think perhaps the general rule will take care of it but the reporter put this sentence in as a matter of precaution and I see no objection to it. I am only suggesting polishing up the phraseology.

THE CHAIRMAN: It has been the subject of quite a bit of litigation, hasn't it?

MR. HOLTZOFF: It has been.

MR. ROBINSON: That is right.

MR. LONGSDORF: I just want to call attention to the pending case of Evaporated Milk Association v. Roach - I forget the title of another case. They are now on certiorari and there was a grand jury continued by order of extension after the term to complete unfinished business. The objection was they took up new business that was not even begun. And in the Evaporated Milk case the program laid down by the grand jury was so vast I do not think it could have been accomplished within eighteen months by any grand jury. I just want the Committee to consider in connection with 6(g) that state of affairs. We are

27mh

going to have a decision on that one way or the other.

MR. HOLTZOFF: That is on a different point. 6(g) will abolish the difficulty that arises about a grand jury being allowed to continue old matters but not start new ones. We fix an eighteen months' limitation for all purposes.

MR. LONGSDORF: You put it in the power of the court to decide any time before eighteenmonths?

MR. HOLTZOFF: Yes, eighteen months is long enough for any grand jury.

MR. LONGSDORF: That is the point I want to make.

MR. MEDALIE: Even the Dies Committee requires renewal.

MR. WECHSLER: May I ask, Mr. Chairman, what the point of this question in the Court's Memorandum about United States vs. Johnson is?

MR. HOLTZOFF: I think that involved this question of a grand jury's term being extended for the purpose of continuing an investigation once begun, and the question in that case was whether the indictment resulted from a new investigation or continuation of the old investigation, and the first sentence of (g) will do away with that difficulty and controvery over that rather foolish point.

28mh

MR. WECHSLER: Thank you.

THE CHAIRMAN: You have heard the suggestions of Mr. Holtzoff which I take it are acquiesced in. Are you ready for the vote on 6(g) as amended?

MR. HOLTZOFF: Question.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Carried. We will now go on to Rule 7(a).

MR. HOLTZOFF: I note a verbal suggestion there. In the first sentence the rule speaks of prosecuting an offense and in the other sentence speaks of charging an offense. I think there ought to be uniformity and we want to use "charge in each instance or "prosecute". I rather like the word "prosecute" better than "charge", so I suggest that the word "charge" be changed to "prosecute" in line 5, line 7 and line 9. I make that motion.

MR. ROBINSON: May I state the reason for the present form before you act. The court, as you will notice in its Memorandum, objected to the repetition there of "accusation" and said the term "accusation might be open to objection, and apparently indicated that the repetition of the term "accusation" here would be objected to.

Therefore the effort was made in the drafting of this subdivision (a) to avoid any further criticism on the ground of repeating the same term, whether it is "accusation" or "charge" or "prosecution," and it was felt that it would be well not to use the same term all the way through.

Further, the term "prosecute" is used in line 3 because it is thought that it would be well to have a general sentence at the start. In other words it differs, you notice, from the second sentence, the third and the fourth, but particularly the second and third, where it is general, and the second and third are specific, and they deal with certain types of offenses. And the third point is that we not overuse the word "charge" because all through this draft we have had to watch the difficulty of the double use of the term "charge," as conflicting with the court's charge to the jury.

MR. HOLTZOFF: That is why I suggested the word "prosecute".

MR. YOUNGQUIST: I think there is a slight distinction between the use of the verb in the first instance and the verbs in the others. We are seeking in the first one of the entire course of the prosecution, a blanket term. Later although the form of the sentence is the same, you are talking only about the document by which

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the offense, or the contents of the document, by which the offense is charged.

MR. WECHSLER: That is true. Aren't we later also speaking of whether you begin by indictment or information? In the second sentence of (a).

MR. YOUNGQUIST: As I say, the difference is very slight but I think there is a difference sufficient to justify the distinction.

MR. HOLTZOFF: Here they are the same and I do not understand that the court's comment objected to the uniformity but objected to the word "accuse."

THE CHAIRMAN: You have the question, gentlemen. It is a matter of your preference for "charged" or "prosecuted." All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

All those opposed say "No".

(Chorus of "Noes.")

The Chair is in doubt. All those in favor raise their hands.

(After a show of hands the Chairman announced the vote to be 8 in favor and 7 opposed.)

The motion is carried, 8 to 7.

MR. WECHSLER: I would like to move a substitute for 7(a). It is set forth in the Memorandum and it is intended to do no more than to make it simpler reading.

MR. YOUNGQUIST: May I ask a question. You changed the word "charged" to "prosecuted" throughout, is that it?

MR. HOLTZOFF: Yes. Mr. Wechsler, before a vote is taken on your substitute, I wonder if you do not want to strike out the words "hard labor" because at present a person is not sentenced to imprisonment at hard labor.

MR. WECHSLER: Sure.

MR. HOLTZOFF: Before you do that I thought you might want to perfect your own substitute.

MR. WECHSLER: If that gets me in trouble on that issue I would rather have that a change later.

THE CHAIRMAN: Mr. Wechsler's draft is in the comment on Rule 7.

MR. WECHSLER: All I say is that it says entirely the same thing in less cumbersome language.

THE CHAIRMAN: This comment to Rule 7 is made a separate memorandum of comment of the members of the Committee.

MR. WECHSLER: I change that "charge" to "prosecute" in every instance.

THE CHAIRMAN: It reads "Offenses shall be prosecuted in the district court by indictment or by information as provided by these rules, Except as provided

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in section (b) of this rule, an offense which may be punished by death or imprisonment for a term exceeding one year at hard labor shall be prosecuted by indictment or by information."

That is proposed as a substitute for the present 7(a). Are you ready for the question?

MR. MEDALIE: You want to take it all together, don't you?

MR. HOLTZOFF: Before we take a vote on it I think we ought to strike out "at hard labor."

MR. WECHSLER: That is all right with me.

THE CHAIRMAN: By consent "at hard labor" is stricken from the substitute rule proposed.

MR. YOUNGQUIST: May I ask the purpose of the motion? I rather like this form which sets out seriatim what may be done under certain circumstances and how it shall be done.

MR. WECHSLER: And in answer to your question, I felt that the form as it was was cumbersome and I tried to get brevity and if I have lost clarity my purpose failed, but I thought I could get equal clarity without having to repeat a couple of times the point of waiver.

MR. ROBINSON: Do you think it is specially good to start a sentence "Except as otherwise provided"? I have tried to avoid a statement in our rules by the "ex-

cept" clause.

MR. WECHSLER: I do not share the antipathy to that form but I would be willing to transpose that clause to the end.

MR. YOUNGQUIST: I note there is only one reference to waiver of indictment and that is in lines 7 and 8. I do not think it is important.

THE CHAIRMAN: You have the motion, gentlemen, which is to approve Mr. Wechsler's substitute 7(a). All those in favor of the motion say "Aye".

(Chorus of "Ayes.")

All those opposed say "No."

(Chorus of "Noes.")

The Chair is in doubt. All those in favor raise their hands.

(After a show of hands the Chairman announced the vote to be 4 in favor and 11 opposed.)

THE CHAIRMAN: The motion is lost.

MR. MEDALIE: I understand then that on line 7 of Rule 7(a) "or at hard labor" goes out?

THE CHAIRMAN: By consent.

MR. HOLTZOFF: No. "or at hard labor" is all right.

MR. GLUECK: "at hard labor." Isn't that the same thing?

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MR. MEDALIE: I thought that that was accepted.

MR. HOLTZOFF: But there are some statutes, very old, which prescribe a sentence of imprisonment at hard labor. In the Wilson case, the Supreme Court held --

MR. MEDALIE: I know that. But we do not have hard labor any more in any jail that I know of in all the United States.

MR. HOLTZOFF: I know, but the statutes provide for it in some cases.

MR. ROBINSON: And the Supreme Court decision in the Wilson and Moreland cases --

MR. DEAN: Did the statute provide for it in any cases where the sentence could have been less than a year?

MR. HOLTZOFF: I am not sure.

MR. MEDALIE: If the Supreme Court approves of this they will get rid of this fiction.

MR. GLUECK: I think that is a good argument; that it ought to be put into the commentary. We ought to refer to the Moreland case and the Wilson case and the actual practices in Federal prisons and indicate why that was taken out.

THE CHAIRMAN: Are you moving to strike out "or at hard labor"?

MR. MEDALIE: Yes.

MR. YOUNGQUIST: I second the motion.

THE CHAIRMAN: All in favor of the motion to strike in line 7 the words "or at hard labor" say "Aye."

(Chorus of "Ayes.")

All those opposed sat "No."

(No response.)

THE CHAIRMAN: Carried. Are you ready for the motion on 7(a) as amended?

MR. ROBINSON: May I have it read?

THE CHAIRMAN: Just strike out the words "or at hard labor."

MR. BURNS: And every time "charge" appears change to "prosecute."

THE CHAIRMAN: That is right. All those in favor say "Aye".

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Carried.

MR. McLELLAN: I do hate to hold you up. I did not vote in favor but I want to ask one question: do we by this vote we have just passed impliedly change the law as to what is an infamous crime?

MR. SETH: We do.

MR. McLELLAN: We know we are doing that?

MR. GLUECK: Yes.

MR. MEDALIE: It is agreed we are changing it.

MR. DEAN: At the present time it would be infamous if you had a sentence over one year imprisonment at hard labor. As a practical matter you cannot sentence a man at hard labor because of the Federal penitentiary system which does not have hard labor, and in the absence of showing somewhere that makes it possible to confine a man for less than a year we would have no situation where a man was even punished at hard labor unless it was more than a year so we are saved by just saying imprisonment for more than a year.

MR. McLELLAN: It is still true, isn't it, that under some of the statutes there is a provision for imprisonment at hard labor?

MR. DEAN: That is true.

MR. HOLTZOFF: Yes, that is true.

MR. McLELLAN: And there are decisions to the effect that no matter whether a year punishment or not, if punishable at hard labor you have a crime that is infamous, and we have in connection with that the constitutional provision requiring an indictment.

MR. DEAN: Right.

MR. McLELLAN: In the case of a prosecution for an infamous crime. If we know what we are doing, I have

no objection.

MR. GLUECK: Of course, Judge, there may be other consequences of conviction for an infamous crime apart from the question of indictment. I do not know whether anybody has explored that.

MR. HOLTZOFF: I believe there is. The only distinction is as to prosecution by indictment or information.

MR. GLUECK: Such, for instance, time off for good behavior.

MR. HOLTZOFF: It is the same. That depends on the length of the sentence. I think it would be safer if we left those words in.

MR. LONGSDORF: Is it the understanding of the Committee that section 5041 would be superseded by this rule?

MR. DESSION: There is a possibility here: I think it is possible this is overruling the majority in the Moreland case.

MR. HOLTZOFF: Yes.

MR. DESSION: You remember that case where a six months' sentence to the workhouse was held by the majority to be hard labor. I do not think the case is much good today.

MR. WECHSLER: Suppose Congress passed a statute

tomorrow providing for punishment at hard labor.

MR. McLELLAN: That is my point. What harm can the words do in there and they might be of importance.

MR. HOLTZOFF: I move to reconsider the motion by which we struck it out.

MR. DESSION: Maybe we ought not to strike it out, but could we not put in a phrase something like that of "infamous punishment."

MR. HOLTZOFF: No, you leave it wide open then.

MR. MEDALIE: The Supreme Court made quite a mess of this as a matter of fact; that case from the district, selling the unused portion of a railroad ticket, 300 U. S.

MR. HOLTZOFF: The Clolands case?

MR. MEDALIE: That is right. It was three months or a fine, I think that was the penalty, and they went into a great discussion to the effect that you did not need a jury trial in many crimes even if the penalty was a public whipping, or standing in the stocks, and things of that sort. Well, frankly, those decisions are just a lot of nonsense if you deal with it in the terms of the particular kind of penalty, unless you decide once and for all you are dealing with that term.

MR. HOLTZOFF: But that related to a jury trial.

MR. MEDALIE: That is right, but they said it

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is a petty offense and therefore it cannot be an infamous crime; you might stand in the stocks for being a common scold, yet you do not call that an infamous crime. Really I did not mean that personally.

THE CHAIRMAN: The motion to reconsider has been made and seconded. Are you ready for the question?

All in favor say "Aye".

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Carried.

MR. McLELLAN: I did not vote.

MR. YOUNGQUIST: I did not either because I did not know.

THE CHAIRMAN: The question is now before us again.

MR. CRANE: I think there is quite a little in what the Judge says. The statute prescribes what the crime is and we cannot say what it may be. We simply say what that statute says.

MR. ROBINSON: I am thinking about fifty rules still ahead and if we stop to consider present legislation very extensively we won't get along very fast.

THE CHAIRMAN: Is there a motion to reconsider?

MR. SETH: I move that the words be restored.

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MR. CRANE: I second the motion.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion seems to be carried. The motion is carried.

All those in favor of adopting Rule 7(a) as presently amended say Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(No response.)

THE CHAIRMAN: Unanimously carried. Are there any suggestions on Rule 7(b)?

MR. HOLTZOFF: Mr. Chairman, I rather like the substitute suggested by Mr. Wechsler. The substitute reads:

"An offense not punishable by death may be charged by information if the defendant being represented by counsel waives indictment."

THE CHAIRMAN: Mr. Holtzoff moves and Mr. Wechsler seconds the substitute. Is there any discussion?

MR. SEASONGOOD: Are you going to use the same lamguage, "prosecuted" instead of "charged"?

MR. HOLTZOFF: That ought to be "prosecuted."

MR. ROBINSON: The reason for changing "prosecu-

tion" is you may have to go before Congress, and with our using the same term throughout, the same word, prosecute, prosecute, prosecute, they will think that we are inaugurating a series of persecutions.

MR. YOUNGQUIST: I think there is a good deal in that. And yet, without further reconsideration of 7(a) the appropriate way to deal with it is, when you are speaking of the proceeding as a whole, to use the word "prosecute" as is done in line 3, and should also be done in line 9, but where you are talking about the form of the document by which you start it, you ought to have "charge."

MR. GLUECK: I move that it be left to the Committee on Style.

MR. MEDALIE: Don't leave too much to the Committee on Style.

MR. GLUECK: That is the sort of problem they should consider.

MR. WECHSLER: Why not use the word "initiate" instead of "prosecute"?

THE CHAIRMAN: We should use a word of art if one is available.

Gentlemen, the words "prosecute" or "prosecuted" are embodied in 7(a). Now once you take them out the Committee on Style would have no authority, after you take

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take them out, to put them in.

Now unless there is a motion to reconsider, and we are now on 7(b), the substitute motion of Mr. Wechsler. It has been amended and the amendment has been accepted by the maker of the motion and the seconder to use the word "prosecute" in the second line. Are you ready for the motion?

MR. HOLTZOFF: Question.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

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MR. YOUNGQUIST: Just a minute. Will you read it?

MR. WECHSLER: "An offense not punishable by death may be prosecuted by information if the defendant being represented by counsel waives indictment."

MR. CRANE: Is this a substitution?

THE CHAIRMAN: Substitution for 7(b). The motion is carried, I believe.

MR. HOLTZOFF: Yes.

MR. WECHSLER: Mr. Chairman, Mr. Seth raises a question of substance which I think warrants attention. Should not the waiver of indictment have to be in writing?

MR. HOLTZOFF: Isn't it better to leave that

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open?

MR. WECHSLER: I do not know.

MR. HOLTZOFF: Ordinarily it would be in writing, of course.

MR. DEAN: I think in view of the split of the court itself on the whole subject of waiver a couple of months ago it behooves us to take every precaution. I am for putting it in writing.

THE CHAIRMAN: Is the motion made?

MR. WECHSLER: I move, Mr. Chairman, to change it to read:

"An offense not punishable by death may be prosecuted by information if the defendant being represented by counsel waives indictment in writing."

MR. DEAN: Seconded.

MR. HOLTZOFF: "in writing waives indictment"?

MR. WECHSLER: I would rather have it as read. I think my ear responds better to "waives indictment in writing," but I do not care what the order is.

THE CHAIRMAN: You have heard the motion. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried. I take it that 7(b)

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is then accepted as re-amended.

MR. WECHSLER: Mr. Chairman, I have a question on (a) and (b). We have in no way provided that an information may be filed only by the attorney for the Government. I ask the question whether it is necessary so to provide, assuming that that is what we mean.

MR. HOLTZOFF: I do not think it is, because there is no such thing as a prosecution in a district court except by the Government.

MR. WECHSLER: But that is what we do not want to change.

MR. HOLTZOFF: We do not want to change?

MR. WECHSLER: No. The reason why that is not true now is that the statute in its provision for information speaks of an information filed by the attorney for the Government; doesn't it?

MR. HOLTZOFF: I do not recall that.

MR. WECHSLER: Well, I am not sure either. And this difficulty that occurred to me could be easily met by inserting the words "filed by the attorney for the Government."

THE CHAIRMAN: We have no private informations in any State, have we?

MR. WECHSLER: I am not sure about that.

MR. ROBINSON: Filed just by an individual?

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THE CHAIRMAN: Yes.

MR. ROBINSON: Oh, yes. Indiana has it.

MR. MEDALIE: What happens? Does the court have to approve it?

MR. ROBINSON: No.

MR. HOLTZOFF: Who tries the case for the prosecution?

MR. ROBINSON: The prosecutor.

MR. HOLTZOFF: Suppose he does not approve of the prosecution?

MR. ROBINSON: Well, it is approved by the prosecutor, of course. The information is signed by a private individual.

MR. HOLTZOFF: Yes, but the prosecutor has to approve it.

MR. WECHSLER: What do we want on that? May a private individual under our rule file the information with the United States attorney?

MR. McLELLAN: There is something there which seems to me of some consequence. We have had a practice right along that even the United States attorney could not file an information until the court approved it.

MR. DEAN: That is true; in several districts they won't let you file it.

MR. McLELLAN: I am not sure that that would not

be a good thing.

MR. HOLTZOFF: May I ask a question, Judge: granting leave to file an information - is that a pro forma matter with the court, or does the court go into the matter?

MR. McCLELLAN: Some courts take the information when presented and read it and see what it is about, and then write on it "This may be filed."

MR. ROBINSON: We have tried to make a survey of the various districts on that, Judge, and our belief is that the majority would be the other way. In many districts the approval of the court is very much a formality.

MR. DESSION: But not everywhere, Jim. In some districts it is pro forma; in others there is a real showing.

MR. MEDALIE: I do not think judges have anything to do with the initiation of any cases.

MR. YOUNGQUIST: In our State an information may be filed only by leave of the court. I suppose the purpose of it is to protect a defendant from prosecution by one individual and prosecuting attorney in a case the court thinks ought to be submitted to the grand jury. I am assuming that is the reason for it.

THE CHAIRMAN: Well, we have two specific questions here: it is Mr. Wechsler's motion that private informa-

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tion be tabooed. Can we have a vote on that idea, getting the language later?

All those in favor of that motion say "Aye".

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried. That will go to the reporter for drafting.

Now may we have a vote on Judge McLellan's suggestion that information should not be filed without the consent of the court, getting language appropriate to that later. All those in favor of that motion say "Aye."

(Chorus of "Ayes.)

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. All those in favor raise hands.

(After a show of hands the Chairman announced the vote to be 9 in favor; 6 opposed.)

THE CHAIRMAN: The motion is carried.

That would be part, I take it, gentlemen, of this 7(b).

MR. MEDALIE: You can put the language in now. You do not need to leave it.

THE CHAIRMAN: I think we can let it go.

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Are there any suggestions on Rule 7(c)?

MR. HOLTZOFF: On line 23 the word "and" I suggest should be "or", and I so move.

MR. WECHSLER: What is it?

MR. HOLTZOFF: On line 23 the word "and" I suggest should be "or".

MR. YOUNGQUIST: I have the same comment.

MR. ROBINSON: I wonder why we left it that way the other time.

THE CHAIRMAN: If there is no objection, that will be the order. Any other suggestions?

MR. YOUNGQUIST: Yes. I think in lines 18 and 19, at the end of line 18, there should be substituted the word "matter" for "allegation". Those are not allegations at all.

THE CHAIRMAN: Any objection? (No response.) That will stand.

MR. YOUNGQUIST: And in line 19, referring back to 16, we have "and definite statement of the essential facts constituting the offense charged." I would suggest that line 19 read "not necessary to such statement."

MR. HOLTZOFF: That is a good idea.

THE CHAIRMAN: Any objection to that?

(No response.)

THE CHAIRMAN: Is there anything else, gentlemen?

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MR. SEASONGOOD: Did we decide at line 27, the way it is written there, that you could omit the citation if it did not prejudice the defendant? It seems kind of futile to me to say that you should have the customary citation.

MR. ROBINSON: Those are the words of Draft 5 as we decided before.

MR. HOLTZOFF: That matter was debated at length, Mr. Seasongood, if you recall, in connection with Draft 5, and that is the way it was agreed upon. The objection was made at that time --

MR. SEASONGOOD: Was there a division of opinion at any time?

MR. DEAN: Pretty sharp. We thought we might help the thing along a little in the form here indicating the citation of the statute as the better practice.

MR. HOLTZOFF: Under existing law we do not have to cite statutes in the indictment.

MR. SEASONGOOD: I thought, with all these regulations and rules and everything that makes one a criminal, why don't they tell him why he is a criminal? What is the difficulty?

MR. MEDALIE: The Government does not know.

MR. SEASONGOOD: I do not want to protract the thing, but I just move to strike the words "or its omission"

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in line 27.

THE CHAIRMAN: The motion is to strike the words in line 27, "or its omission".

MR. BURNS: Seconded.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: A show of hands is called for. All those in favor of the motion say "Aye."

(After a show of hands the Chairman announced the vote to be 7 in favor, 8 opposed.)

THE CHAIRMAN: Lost.

MR. LONGSDORF: Mr. Chairman, isn't our difficulty very largely in the use of the word "shall" in line 24, and then the negation of it in line 27? Suppose we change the word "shall" to "should". The civil rules have the same language.

MR. HOLTZOFF: I move we adopt --

MR. YOUNGQUIST: Alex, wait a minute. I have another suggestion: in lines 29 and 30 I move the striking of the words "if the proceeding was in fact supported by a statute, rule, regulation, or other legal provision."

MR. MEDALIE: I second the motion.

MR. YOUNGQUIST: It seems rather absurd to

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state it must be supported by such a thing.

MR. MEDALIE: And strike out the word "and" on line 31.

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed,"no."

(No response.)

THE CHAIRMAN: Are there any other suggestions?

MR. ORFIELD: In line 16, I move that the word "written" be incorporated before "statement". I think it ought to be clear that the indictment or information be in writing. Even though it has always been the rule, I think it ought to be stated expressly.

THE CHAIRMAN: What line is that?

MR. ORFIELD: That is line 16, - "and definite written statement".

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

MR. HOLTZOFF: Mr. Chairman, I move to adopt Rule 7(c) as amended.

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MR. WECHSLER: I have still got a problem, Mr. Chairman. We do not say anything about what the form of an information is. I mean, is it to be supported by the official oath of the United States attorney or by the attorney for the Government?

MR. HOLTZOFF: Of course, the present rule is that you do not have to have an oath to your information unless you are going to ask for a warrant. If you are going to ask for a warrant on it, why then you have to show probable cause by affidavit.

MR. WECHSLER: But this involves an extension of the use of informations.

MR. YOUNGQUIST: We provide that a warrant may be issued upon the filing of an information, do we not? We give an information the same dignity as an indictment. Why call for an oath on the information? I never heard of an oath on the information. That simply is an information signed and filed by the prosecuting officer.

MR. WECHSLER: I will withdraw it.

THE CHAIRMAN: All those in favor of Rule 7(c) as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

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Any suggestions on 7(d)? If not, all those in favor of 7(d) say"Aye."

(Chorus of "Ayes.")

MR. LONGSDORF: Wait a minute, there is something there. Suppose it is moved to strike a surplusage, and the court grants the motion and there is a mistake, isn't the indictment amended thereby?

MR. DEAN: You mean strike something other than surplusage?

MR. LONGSDORF: Yes.

MR. HOLTZOFF: I think this was discussed at great length in every draft we had, and we all felt there ought to be provision for striking surplusage.

MR. DEAN: It would be error for the court to so amend the indictment if it struck anything other than surplusage.

MR. YOUNGQUIST: He would be exceeding his power under the rule.

MR. DEAN: The Judge is going to have to use his pencil on the indictment very carefully.

THE CHAIRMAN: All those in favor of 7(d) say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

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THE CHAIRMAN: Unanimously carried.

Any suggestions on 7(e)?

MR. SEASONGOOD: The word "thereby" in line 39 should be stricken because it has no antecedents.

THE CHAIRMAN: Any objection? If not, "thereby" is stricken in line 39.

Any other suggestion? (No response.)

All those in favor of 7(e) as thus amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried. Rule 8(a).

MR. HOLTZOFF: Mr. Chairman, as to Rule 8(a), I move that we strike from lines 3 and 4 the words --

MR. MEDALIE: Excuse me. Something just occurred to me. I was just telling Mr. Wechsler something that I remember twenty-five years ago. A man has a right not to be prosecuted by a false alias.

MR. YOUNGQUIST: By a what?

MR. MEDALIE: By a false alias, calling a man "John Jones, also known as 'Mike the Slugger'". He is not known as "Mike the Slugger." He is entitled to protection against that. I think we ought to make provision for such correction.

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MR. DEAN: Isn't that surplusage?

THE CHAIRMAN: Is it common?

MR. MEDALIE: It is not uncommon.

THE CHAIRMAN: Isn't that surplusage?

MR. MEDALIE: It is not surplusage because you are supposed to describe a person by his name. The word "alias" simply means otherwise. He could have either of those names. A man might be known as John Smith or as Joe Brown.

MR. YOUNGQUIST: George, why wouldn't it be surplusage if one name sufficiently identifies him?

THE CHAIRMAN: Wouldn't any judge strike that out as surplusage?

MR. MEDALIE: I do not know whether he would call it a surplusage. He would say that is descriptive. He can't interfere with the description.

THE CHAIRMAN: We might just as well say "John Jones, the dirty dog."

MR. MEDALIE: That is exactly what the indictment states, and that is what it is intended to state. In setting forth aliases that is all they intend to imply.

MR. DEAN: The only other remedy would be to have it not read to the jury.

THE CHAIRMAN: Well, it gets in the paper anyhow.

MR. MEDALIE: Well, most indictments do not get

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into the newspapers. Most indictments are never heard of except around the court house, but it is very important to the defendant that twelve people should not hear this kind of thing. He would like a trial on what he did and not on what the district attorney says is his name.

MR. DEAN: I think that would be surplusage.

MR. YOUNGQUIST: I doubt, Mr. Chairman, that that is a sufficiently widespread evil to justify saying anything about it in the rule.

THE CHAIRMAN: Couldn't that be covered by a note?

MR. MEDALIE: All right, a note could do it.

MR. HOLTZOFF: I think that evil is limited to the Southern District of New York.

MR. MEDALIE: Is it?

MR. HOLTZOFF: Yes.

MR. MEDALIE: It is most widespread. A young district attorney who does not get a chance to throw in an alias here and there is a bitterly disappointed person.

THE CHAIRMAN: All right. Someone had a suggestion on 8(a).

MR. HOLTZOFF: I move that we strike out from lines 3 and 4 the words "in a separate count for each offense." Now this really is a substantive change.

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My point in making this motion is this, that if we leave out those words we would abolish all the abstruse learning that has accumulated through the years on the question of duplicity. Whether you can set forth two offenses in the same count, or whether you must have them in separate counts, - it is really needless so far as the protection of the defendant is concerned; but in years past the books have been full of it on the question of ~~deficiency~~ duplicity. It is immaterial, I think, whether you join offenses in the same count or whether you set them forth in separate counts.

MR. WAITE: If we merely strike out the words "in a separate count," that does not mean that they may be put in a single count. I would just leave the matter open.

MR. HOLTZOFF: I would be willing to go still further and provide that they may be put in a single count.

MR. WAITE: I do not know a blessed thing about this. I haven't any choice, but I do not think that would solve it.

MR. HOLTZOFF: I think it would. It would then read: "Two or more offenses may be charged in the same indictment or information if the offenses charged," etc.

MR. WAITE: Then the court would have to fight it

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out as to whether it would be in separate counts or not. I think we ought to say it one way or the other.

MR. HOLTZOFF: But my point is this: suppose they are not in separate counts; suppose there is a question as to whether they are separate offenses; then if you have this requirement, you have got an old-time controversy as to whether your indictment is duplicitous somehow - something that does not concern the defendant's real legitimate interest, but may be getting him involved in a technicality. What difference does it make whether they are in a separate count or not?

MR. ROBINSON: I might say that Mr. Holtzoff raised this point with me several months ago when I sent him the rule. As you know, our method of working in Washington is to send copies of the rules to all who are actively interested in them; and copies were sent to Mr. Dession and Mr. Holtzoff; and Mr. Holtzoff immediately raised that point. This was, I suppose, about two or three months ago.

Now I have made a very careful examination of all the cases that I think are the leading cases on the subject - that is a rather broad statement but I really made it with the assistance of a research assistant - and it seems to me that the words are not necessary. I would be glad to give you a brief on that, and I would

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like to refer you to the notes which are quite extensive and cite the authorities. Mr. Holtzoff was under the impression, he told me, at our previous meeting - you correct me, Alex, if I am wrong --

MR. HOLTZOFF: I just want to say before you proceed that Tentative Draft No. 5 did not have these words in.

MR. ROBINSON: That is right.

MR. HOLTZOFF: These words were put in --

MR. MEDALIE: Which words?

MR. HOLTZOFF: "in a separate count for each offense."

MR. ROBINSON: That is what I was leading to, Alex. You called attention to it and said that by leaving them out you thought the Committee abolished the defense of duplicity. I did not think it did anything of the kind. I thought it would be very poor to throw into the same count rape, migratory birds, arson, and things like that.

MR. McLELLAN: Didn't you find that there was responsible authority to the effect that if two single offenses were charged in the same indictment, that the indictment was bad?

MR. ROBINSON: Yes. In the notes you will find an abundance of authority.

MR. HOLTZOFF: That is what I want to do away with. I want to do away with the rule.

MR. McLELLAN: Well, I do not want a man to be put on trial on one count of an indictment that contains numerous offenses. When the jury finds him guilty, what do they find him guilty of?

MR. WAITE: We have got to say one thing or the other, Mr. Chairman. Either we have got to say that they may both be in one count or they must be in separate counts. It seems to me the only way we can say it is that they be in separate counts.

MR. McLELLAN: Of course, Mr. Waite, I agree with you that if you take out the words "in a separate count for each offense," the law still is that you cannot put two offenses in the same count.

MR. WAITE: But we are drawing pretty liberal rules, Judge, so no United States attorney can throw three or four offenses into one count.

THE CHAIRMAN: We have the question.

MR. WAITE: I move that (a) be adopted as is.

MR. DESSION: Before we vote, let me point out one practical difficulty about Alex's suggestion. If you adopt that you might not be able to avoid charging more offenses, if you wanted to. You might need to mention overt acts to define your conspiracy.

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MR. HOLTZOFF: You could say, in the process of carrying out the conspiracy the following overt acts were committed. That would be clearly one offense.

MR. DESSION: I am not so sure.

THE CHAIRMAN: I understand the motion is made and seconded to adopt Rule 8(a) as set forth. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, No."

(No response.)

MR. YOUNGQUIST: Mr. Chairman, I call attention to the fact that Alex overlooked the word "charged" in line 2, which I think is a perfect example of the propriety of its use.

MR. ROBINSON: That is right.

THE CHAIRMAN: All right. Are there any suggestions on Rule 8(b)?

MR. WECHSLER: Mr. Chairman, I have a question I would like to put. Is there any provision that authorizes the court to provide for separate trial?

MR. HOLTZOFF: Yes.

MR. WECHSLER: I know there is where there are several defendants, but where there is one defendant, to split an indictment into many counts?

MR. HOLTZOFF: Yes.

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MR. WECHSLER: Where is that?

MR. ROBINSON: 13 and 14. I suppose 14 is what you are referring to.

THE CHAIRMAN: Are there any suggestions on 8(b)?

MR. HOLTZOFF: One verbal suggestion. In line 13, strike out the last word on that line, the word "a" and substitute the words "one or more."

MR. ROBINSON: I think that is right. That is in line with our action yesterday.

THE CHAIRMAN: If there is no objection, that will be done.

MR. SETH: What was that?

THE CHAIRMAN: "one or more" at the end of line 13 in place of "a".

If there are no further suggestions, all in favor of 8(b) as thus amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. SEASONGOOD: In the Court's Memorandum they refer to Rule 8. Has there been any study of the abuse of indictments drawn with an excessive number of counts? Have we sufficiently considered their complaint or sugges-

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tion?

MR. ROBINSON: We made a careful study of that. I think that is mentioned in the notes, Mr. Seasongood, the reporter's memorandum.

MR. SEASONGOOD: Well, if you are satisfied that we have given it sufficient attention, that is all I am asking.

MR. WECHSLER: Well, my question was motivated by the same thing, but I think Rule 13 meets it.

MR. SEASONGOOD: All right.

MR. WECHSLER: I have a suggestion on (b), to strike out "in any manner" and everything thereafter on lines 14 and 15.

MR. YOUNGQUIST: Which rule?

THE CHAIRMAN: In Rule 8(b).

MR. CRANE: What are you striking out?

MR. WECHSLER: "in any manner indicating their respective participation in the offense or offenses."

MR. ROBINSON: I would like to oppose that suggestion very strongly. It will take quite a bit of time to go through the matter stated in the notes. All the reasons I would state are set forth in the note in the reporter's memorandum; and I would like to ask Mr. Wechsler to look into that and then speak to me about it. I would like to save the Committee the time, and it will take

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at least a half hour to go into that; and if the matter can be taken up this afternoon I would be glad to go into it. We have already passed this, haven't we?

MR. HOLTZOFF: Yes. Mr. Chairman, before you go into 9(a) I want to make a comment on the note in Rule 8. Page 10 of Rule 8, summarizes the present state of Federal authority. I think it is unwise for us to have that because then someone is likely to cite our Committee as an authority for what the present law is. The Civil Rules Committee has never done it, and we have avoided this sort of thing in other notes.

MR. MEDALIE: I think this is one subject on which you had better inform the bar.

MR. CRANE: What?

MR. MEDALIE: This is one subject on which the bar had better be informed. They are starting off, most of them, cold, on a subject they do not understand; and we are going to have a lot of trouble explaining this unless we tell them what the cases have held. It is a very troublesome subject and most prosecutors and defense counsel do not know the law.

MR. HOLTZOFF: I know the Civil Rules Committee was very careful in its note not to put in authority as to what the law is.

MR. MEDALIE: Well, that is another point. I

won't press it.

THE CHAIRMAN: 9(a), gentlemen. Are there any suggestions?

MR. HOLTZOFF: In line 7, the sentence commencing on that line, I have a suggestion: couldn't that sentence but "It is discretionary with the clerk to issue more than one warrant or summons." I feel it should be made mandatory on the clerk to do so if the United States attorney wants more than one. Therefore I move to strike out the words "He may" and to substitute therefor the following: "Upon like request or direction he shall". In other words, if the United States attorney --

MR. ROBINSON: Excuse me. What line is that?

MR. HOLTZOFF: Line 7. Strike out the words "He may" and insert in lieu thereof the following: "Upon like request or direction he shall".

MR. ROBINSON: I think that is satisfactory.

MR. McLELLAN: Do you want to change "United States attorney" to "attorney for the Government"?

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: I wonder whether in the same sentence it was intended to say merely that he shall issue more than one warrant or summons for the same defendant. I thought we had discussed the matter of issuing multiple warrants when there was more than one defendant.

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MR. HOLTZOFF: I think both situations apply.

MR. YOUNGQUIST: Wasn't it intended to cover both cases?

MR. ROBINSON: I thought so.

MR. YOUNGQUIST: Then why hadn't we better say "issue more than one warrant or summons upon the same indictment or information"?

MR. ROBINSON: Would that be understood by clerks and United States attorneys? It is a change in the practice, I think, for a good many of them.

MR. YOUNGQUIST: But here we have it only for the same defendant. Suppose we have two different defendants and want two separate warrants? This does not cover it.

MR. ROBINSON: Well, there are other provisions that do, aren't there?

MR. BURNS: You have got it in the third line, "a warrant for the arrest of each defendant charged."

MR. YOUNGQUIST: Yes, that is right. I overlooked that.

MR. LONGSDORF: Line 3, Mr. Chairman, the last word "shall". If that is mandatory he shall issue a bench warrant although the defendant is already in custody.

MR. ROBINSON: We thought we had that expressed as carefully as it could be done.

MR. YOUNGQUIST: I think that is a good sugges-

tion. I move that the word "charged" be stricken and the words "not in custody" substituted.

MR. ROBINSON: I am afraid we are leaving out something, Aaron. There is an awful lot of background on this section.

MR. HOLTZOFF: I second the motion.

MR. YOUNGQUIST: What could you leave out? You are simply adding something.

MR. ROBINSON: That question is raised, too, in the memorandum. We spent a good many hours trying to check on that point.

MR. CRANE: Who is going to ask for a warrant when the man is in jail?

MR. YOUNGQUIST: It is made mandatory.

MR. CRANE: I know, but he is in jail.

MR. ROBINSON: We can go into the Court's Memorandum on it, if you wish.

MR. CRANE: Of course, if the man is not in jail you get a warrant; if he is in jail you do not need it. He is there.

MR. ROBINSON: We spent so many hours on that one sentence, I sort of hate to start all over again.

MR. MEDALIE: I hate to raise any point, but the fact is that when all but professional criminals are indicted, the district attorney calls someone and says:

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"Come in a week from Wednesday," or something to that effect. You would not like to see those people arrested; the district attorney does not want to see them arrested; the F.B.I. does not want them arrested. Nobody seems interested in arresting them. They come in and they are told "Your bail is going to be $2500," or "$12,500" or whatever it may be.

MR. YOUNGQUIST: Isn't that taken care of by the first sentence, Judge, that he issues a warrant unless directed otherwise by the court?

MR. MEDALIE: Yes. All right. I am satisfied. As a matter of fact, we can put through all the rules we want to, but the district attorney will always do what he always did.

MR. CRANE: We have got to allow a little leeway for ordinary judgment.

MR. YOUNGQUIST: In the last sentence, last line, I think we should substitute "shall" for "may" to conform with what we did in the corresponding section.

MR. SEASONGOOD: The same with section 4(a), line 12.

THE CHAIRMAN: Have you all the amendments before you? Are you ready for the motion? All those in favor of 9(a) as amended say "Aye."

(Chorus of "Ayes.")

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THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried. 9(b) (1).

MR. HOLTZOFF: I move its adoption, Mr.Chairman.

MR. CRANE: Seconded.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried. 9(b) (2).

MR. YOUNGQUIST: We have the same question in the form of acknowledgment of service that we struck out in connection with commissioner's proceedings.

THE CHAIRMAN: You move to strike it here?

MR. YOUNGQUIST: Yes, the word "and", on line 20, to the end of the sentence.

MR. ROBINSON: Seconded.

THE CHAIRMAN: That is seconded by the reporter. All those in favor of 9(b) (2) as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. ROBINSON: There we need to correct the striking out of the corporation provision, as done before, or,

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rather, we will need to insert it here. We cannot incorporate by reference as to getting the corporation into the district court by a summons; so it will have to be written in here rather than --

MR. McLELLAN: Pardon me. Mr. Chairman, have we just passed (2)?

THE CHAIRMAN: Yes. Any question?

MR. McLELLAN: Well, I suppose it is foolish - "except that it shall summon the defendant." I think this is probably silly. Are you going to summon him and arrest him, too?

MR. CRANE: This relates only to the summons.

MR. McLELLAN: I know. "The summons shall be in the same form as the warrant." The warrant provides for an arrest.

MR. ROBINSON: We did make a comparison with the form of a summons and the form of a warrant to check each word on that, and I believe this does not provide for the arrest of a corporation.

MR. WECHSLER: I see the Judge's point. Suppose it were changed to read: "The summons shall summon the defendant to appear before the court at a stated time and place, otherwise it shall be in the same form as the warrant."

MR. McLELLAN: Yes, I think that is what it ought to be.

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THE CHAIRMAN: That would then read: "The summons shall summon the defendant to appear before the court at a stated time and place" --

MR. HOLTZOFF: "otherwise it shall be in the same form as the warrant."

MR. CRANE: Why do you need to put that in?

MR. ROBINSON: Because you are leaving out everything; you do not have anything left for your summons. You have stripped it down to your chassis and thrown your chassis in the river.

MR. MEDALIE: Well, the only other thing you want it to say is that it shall describe the offense.

MR. CRANE: Isn't this all right as it is? Except the summons shall summon the defendant to appear. It would be the same form as a warrant, except instead of an arrest it shall summon him to appear.

MR. BURNS: I think the contrast between a summons and a warrant is so clear that we do not have to go into it.

MR. ROBINSON: Yes.

THE CHAIRMAN: Have we covered (c) (1)? I think we have, have we not?

MR. YOUNGQUIST: That is to be revised.

MR. HOLTZOFF: I think it requires a provision.

MR. ROBINSON: Yes, because the provision for

summoning the corporation was stricken out in Rule 2 when we referred to it.

THE CHAIRMAN: Let us let it go and come back to it. 9(c) (2).

MR. HOLTZOFF: Mr. Chairman, we adopted the motion yesterday to change the --

MR. MEDALIE: Excuse me a moment before you get to that. Once a person is indicted, do you want to summon him by leaving a copy with a person of suitable age or discretion?

MR. ROBINSON: The Committee has voted on that before.

MR. MEDALIE: That is all right in proceedings before a commissioner. Now you are dealing with something else.

MR. ROBINSON: Couldn't that be left in the discretion of the court, the United States attorney?

MR. SEASONGOOD: I think so.

MR. MEDALIE: I won't press it. All right.

THE CHAIRMAN: Any question on 9(c) (2)?

MR. HOLTZOFF: On 9(c)(2), Mr. Chairman, we adopted a motion yesterday to change the provision as to returns of a warrant issued by the commissioner, and the same point is applicable to returns of warrants issued on indictment or information, namely, that there should not

be a requirement that warrants must be returned within a reasonable time if the defendant is not --

THE CHAIRMAN: Well, all right, make your motion addressed to the rule.

MR. HOLTZOFF: Well, I move that Rule 9(c) (2) be revised in the same manner as the corresponding rule relating to warrants before commissioners. I was directed to redraft the rule in accordance with the motion, and I have a draft ready whenever the Committee is ready to take it up.

THE CHAIRMAN: Shall we take it up now so we can pass this at the same time?

MR. ROBINSON: Take it up now.

MR. HOLTZOFF: What I have here would be a substitute for Rule 4(c) (4), the last paragraph of Rule 4. This would be a substitute for that whole paragraph:

> "The officer executing a warrant shall make a return thereof to the commissioner or other officer before whom the prisoner is brought pursuant to Rule 5(a). At the direction of the United States attorney any unexecuted warrant shall be returned to the commissioner by whom it is issued or cancelled by the commissioner. The officer to whom a summons is delivered for service shall make a return thereof prior to the return day to the commissioner before

whom the summons is returnable."

That takes care of Mr. Medalie's point that there should be a return of the summons so that the commissioner would know whether or not the defendant may be expected to appear. But it takes care also of the other point, namely, that it is not mandatory to return unexecuted warrants unless the United States attorney wants them returned.

MR. DEAN: I second the motion.

MR. SETH: Shouldn't you retain the last sentence of the original form?

MR. HOLTZOFF: If we do not require a return of the warrant it remains outstanding and we do not need that last sentence it seems to me.

MR. ROBINSON: I do not see why we don't. I am inclined to agree with Mr. Seth.

MR. SETH: I think so. That is a very important provision.

MR. HOLTZOFF: I have no objection to the last sentence being in. The one thing I did consider important is not to require the return of an unexecuted warrant.

MR. ROBINSON: What are you doing in connection with the F.B.I. request that was directed to you by a representative of that bureau in regard to taking care of the non est warrant?

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MR. HOLTZOFF: That refers to removal proceedings, and I think we could take that up in connection with the removal rule.

MR. ROBINSON: No, I do not think we can. I think that will have to be worked in here, and that is the importance of this provision as it is; it takes care of removal proceedings.

MR. SETH: I move that Mr. Holtzoff's motion be amended by including that last sentence.

MR. HOLTZOFF: I accept the amendment.

MR. ROBINSON: I would like to see a draft of that. Would you mind having it written out so we can see it before us?

MR. SEASONGOOD: I would like to see it. For instance, you said "to be delivered to the officer," didn't you?

MR. HOLTZOFF: Commissioner or officer.

MR. SEASONGOOD: Well, you have a provision for summonses - shall deliver to the marshal or other person authorized by law to execute it or serve it. Now that is not sufficiently --

THE CHAIRMAN: Well, shall we have it written out? That will save time. Now that brings us to Rule 10, which is the other volume. Suppose we take a five-minute recess. (Short recess.)

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THE CHAIRMAN: All right, gentlemen. Rule 10. All those in favor of it say "Aye"; opposed, "No." Carried.

Is there anybody who has any suggestion on --

MR. DEAN: Shouldn't "shall be" be used instead of "is" on line 4?

MR. HOLTZOFF: I think "is" is better because this is a descriptive rule.

MR. DEAN: I do not much care. I do not make must of a point. I just raise the question.

MR. LONGSDORF: I had a note here. "At any time." Does that mean "forthwith"? Line 5 "at any time," the last words.

THE CHAIRMAN: The first sentence seems to me like "is" but the second one, I have a feeling, calls for "shall be".

MR. ROBINSON: We carried "shall" through for two or three reasons.

MR. HOLTZOFF: Leave "is" in the first sentence and change the second to "shall be".

MR. McLELLAN: What is that "the arraignment shall be conducted"?

MR. HOLTZOFF: Yes.

MR. McLELLAN: Is that "open court" when the judge gets up and goes into another room and says "Open

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court"?

MR. HOLTZOFF: I do not think "open court" means courtroom necessarily.

MR. MEDALIE: I move to strike out the words in line 5, "at any time."

MR. HOLTZOFF: I second the motion.

MR. ROBINSON: Those are in there for this reason, George: we have had letters from Judge Schwellenbach of Washington, and other judges and district attorneys, raising the question, and I think the Court's Memorandum too indicates a question with regard to getting a copy of the indictment or information to a defendant before he is brought into court on arraignment date, and the Committee, not acting wisely, I think, has rejected a great deal of the extensive provisions for that. These three words are about all that is left of some three or four pages that accompanied former drafts, but I wonder whether you do not need something to indicate to a defendant that he can have a copy of the indictment or information at the time when he is arrested or at some time other than just when he is brought into court? That is about the way it works out in a great many of the district courts now, and he does not feel like asking for it.

MR. GLUECK: Wouldn't he have it then?

MR. ROBINSON: No; where could he get it?

MR. GLUECK: No, I meant with the words you have left in, "upon request made to the court." Doesn't that cover that contingency?

MR. ROBINSON: Theoretically so, but does it actually? Shouldn't a defendant be exactly informed by these three brief words?

I would like to know George's reason for striking them out. I do not think the burden of proof is on me to keep them in so much as on the person moving to strike them out.

MR. MEDALIE: Supposing he is negotiating for his return from another district?

MR. ROBINSON: Why shouldn't he be told to ask for it at any time before arraignment or immediately after he learns of the indictment?

MR. GLUECK: He should.

MR. HOLTZOFF: Does that mean at any time of the day or night? I think that is an awfully broad statement.

MR. GLUECK: At any stage of the proceedings.

MR. LONGSDORF: Why not transpose those words "at any time" to follow the word "request"? It is the time of the request, not the time of the delivery.

MR. ROBINSON: All right. Still that does not get it to him.

MR. SEASONGOOD: I want to raise the question whether he should not receive a copy of the indictment in all cases, and if you should not say who reads the indictment to him. If you say "arraigned by the clerk reading the indictment," all right. But if the defendant requests that the substance be stated to him, who is going to sstate the substance, and how do you know he states the substance correctly? What is the harm in giving him, the defendant, a copy of his indictment and letting him see what it is?

MR. HOLTZOFF: May I call your attention to this. You take an ordinary plea day where there might be forty or fifty defendants brought up to plead. Now, if you had to read the indictment in each case, in the first place it would take several days to complete one day's work; in the second place, it would not help a defendant, because the average defendant would not grasp the verbose language of an indictment. In some courts the clerk states the charge; in others, the United States attorney. I think you ought to leave that to the local practices. I think sometimes United States attorneys do better than the clerks. But anyway, I think that ought not to be covered. That is a matter of local variations.

MR. SEASONGOOD: Well, wouldn't it be at least fair to say that it should be read to him unless he con-

sents that the substance be stated?

MR. ROBINSON: Murray, you remember when we were discussing that before, somebody brought up a case of a defendant who wished to be obstreperous, and there was an indictment many pages long, and he insisted on it being read, so that the courtroom had to mark time for an hour or two, merely because of a defendant's obstreperousness.

MR. SEASONGOOD: They are not so busy. They have time. That is, I understand, the practice that Judge McLellan follows.

MR. McLELLAN: Yes, "Do you waive the reading of the indictment?" he says "No," you read it to him. With us, he always waives.

MR. YOUNGQUIST: Mr. Chairman, I suggested at a previous meeting, and I renew the suggestion, that the objections be met by merely providing that the defendant be given a copy of the indictment at the time of arraignment.

MR. SEASONGOOD: That is right.

MR. YOUNGQUIST: That was the practice in our State, and he ought to have a copy of the indictment. He is going to have it before he is through. If there should be cases where there is a large group of defendants, officers of corporations, where they do not need all to have

copies, then provision can be made for waiving a right to a copy.

MR. HOLTZOFF: When you have a lot of run-of-the-mine cases - you might have thirty, forty or fifty defendants on one pleading - there it is not the custom to hand each a copy of the indictment, and I do not think they would want copies of the indictment.

MR. YOUNGQUIST: They can waive it. Provide for a waiver. "Shall be furnished a copy of the indictment unless he waives it."

MR. ROBINSON: But you said at the time of the arraignment.

MR. YOUNGQUIST: Yes.

MR. ROBINSON: And you state that with full recognition of what is said at page 5 of the reporter's memorandum; and we have the Supreme Court Memorandum in which the court says, "Should there be a lapse of time between the reading of the indictment and the plea, unless the defendant announce he is ready to proceed" - there he has received a copy of the indictment in advance of trial.

MR. YOUNGQUIST: And in advance of arraignment.

MR. ROBINSON: Apparently so, and that is the way we took it.

MR. YOUNGQUIST: Of course, the court will give time to plead upon request. I do not think that we

should direct the court.

MR. ROBINSON: There seems to be some impression that some defendants would not know about requesting it.

MR. YOUNGQUIST: That is my suggestion. I haven't anything more to say about it.

MR. SEASONGOOD: The American Law Institute code requires the defendant should have the benefit of counsel before being required to plead to a charge of felony.

MR. ROBINSON: Yes.

MR. DEAN: Don't we provide for that?

MR. ROBINSON: That is our counsel rule, in the presence of counsel or something of the kind.

MR. DEAN: Plea to a felony.

MR. HOLTZOFF: How do you propose to change this, Aaron?

THE CHAIRMAN: Yes, may we get a specific motion?

MR. SEASONGOOD: I was thinking about inserting in line 1 after "by", "is arraigned by the clerk reading to him the indictment or information," and then, line 2, after the word "or", "if the defendant waives," so it would read,"A defendant is arraigned by the clerk reading to him the indictment or information or, if the defendant waives, stating to him the substance thereof, and by calling on him to plead thereto."

MR. HOLTZOFF: Do you want to prohibit having the United States attorney read the indictment, as they do in some districts, or make a charge?

MR. ROBINSON: You make it reversible error not to.

MR. HOLTZOFF: I think I would not change it, because, as a matter of fact, the average United States attorney knows more about the charge and he can explain it better than the clerk can.

MR. SEASONGOOD: Does he explain it all right?

MR. HOLTZOFF: Yes, I have seen it done very well.

MR. SEASONGOOD: Have you seen it done badly?

MR. HOLTZOFF: No, I have seen it done badly by the clerk, but the clerk is more apt to do it badly.

MR. SEASONGOOD: I defer to your knowledge on the subject.

THE CHAIRMAN: You have heard the motion by Mr. Seasongood.

MR. SEASONGOOD: Leave out "by the clerk" then. Strike that out.

THE CHAIRMAN: Mr. Seasongood withdraws the amendment on line 1, the words "by the clerk" and his motion now relates to line 2. All those in favor of the amendment --

MR. WAITE: Just a moment, Mr. Chairman. Would

that mean that if we adopt Mr. Seasongood's motion that there would be no provision for his having a copy before he is called upon to plead?

MR. SEASONGOOD: I would like that in, too.

MR. DEAN: Except as provided in the third sentence of the rule.

THE CHAIRMAN: We are merely dealing with that one sentence.

MR. YOUNGQUIST: That would require a reading in every case unless the defendant waives the reading in full.

THE CHAIRMAN: No; that was your practice, wasn't it?

MR. McLELLAN: Yes, the clerk gets up, and when the man gets up to be arraigned, and the clerk says"So-and-so, do you waive the reading of the indictment?" invariably he does. Then the clerk says to him, "This charges you with a violation of a certain statute which makes it an offense to unlawfully transport a motor car that has been stolen,' giving him a fairly good idea of what it is, and then he pleads.

MR. WAITE: Mr. Chairman, my question, I am afraid, is not answered. I strongly think that every man ought to have a copy of the indictment before he is called upon to plead to the charge, and I cannot vote for the motion if it does not include that; but if it does

include that, then I am for the motion.

MR. McLELLAN: I was not speaking against that. I was simply stating what the practice was.

MR. WAITE: I am not sure what the motion is.

THE CHAIRMAN: Doesn t the last sentence give him his indictment?

MR. WAITE: No, it says he shall get it upon request made to the clerk. A good many of those birds do not know how to request.

MR. SEASONGOOD: They do not know they can request.

MR. McLELLAN: I don't want to go overboard on this but I think it is of some importance. What I have in mind probably violates all our notions of what should be done, but why shouldn't a copy of the indictment be handed to the defendant at the time that either a warrant or a summons is served upon him? Then you know he gets it right at the very beginning.

MR. ROBINSON: The objection made when that point came up before was that some of these indictments are very long, and the anti-trust cases were mentioned.

MR. McLELLAN: All the more reason he should have a chance to know what is in it.

MR. DESSION: In that case you always give them to them anyway. That would not be any controversy.

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MR. ROBINSON: The further suggestion was made that the defendant might not want it; you would be pushing it at him when he really did not want to have it.

MR. YOUNGQUIST: There might be this difficulty with that, certain defendants may be fugitives from justice and the warrant does not name the fugitive. To furnish a copy of the indictment or the information would disclose the fact that they have been indicted and make it more difficult or impossible to apprehend them. It seems, wouldn't it, to be enough if a copy of the indictment is supplied to the defendant at the time of arraignment? He always asks time to plead, if he is going to do anything about it.

MR. BURNS: Does anybody know of any abuses?

THE CHAIRMAN: No.

MR. BURNS: Complaints that the present system does not work well?

MR. HOLTZOFF: No.

MR. ROBINSON: There are these requests that come to the Committee from some very high sources and, in addition, I have seen the sytem work in the Federal court myself and I would not consider it a proceeding conducive to a defendant getting his defense in order. I have seen some forty or fifty defendants come into a Federal courtroom and all of them called on for pleas --

MR. CRANE: If you will pardon me, I think all we need to do is state the element of right because the practice takes care of itself.

MR. ROBINSON: Well, the rule has it.

MR. CRANE: No man is going to plead to any charge he doesn't understand, and I cannot imagine anybody stating it to him in a wrong way, and I think if we had it here that when he is arraigned he should be told he has a right to have a copy of the indictment, if he wants it, and he gets it, he will plead not guilty, if he doesn't understand it; and, if so, and it is only when he thinks if over himself or talks to somebody, that he comes in and pleads guilty, he certainly should have a copy of the indictment when he wants it. I cannot imagine anybody being refused that.

MR. ROBINSON: Do you want the rule as it is?

MR. CRANE: I would support it as it is.

MR. WAITE: Is there a motion before us? If not, I would like to make one.

THE CHAIRMAN: I think there is no motion seconded.

MR. WAITE: I should like to move that Rule 10 be amended to read "A copy of the indictment or information shall be delivered to the defendant before he is called upon to plead." Then "a defendant is arraigned by reading

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to him the indictment or information," etc.

MR. LONGSDORF: Mr. Chairman, I would like to call attention in that connection, bearing on that motion, to the Committee's annotations on Rule 10, at page 3, wherein it is stated that this rule will supersede Title 18, section 562, and supersede completely Title 18, section 562a, which contains the provision for so many days after delivery of the copy before trial.

Now if we are going to entirely supersede those statutes, I think we ought to consider that part of them.

What do we do with the two or three days provided in the statutes? What becomes of them?

MR. ROBINSON: The rule, as you know now, Mr. Longsdorf, is Title 18, section 562, and Title 18, section 562a.

MR. LONGSDORF: That relates to time of trial, not to time of arraignment.

MR. ROBINSON: Yes, and the idea that was sought to be brought about here was, as we usually try to do, to bring about uniformity in statutes --

MR. LONGSDORF: Yes.

MR. ROBINSON: -- that are needlessly diffuse or self-contradictory, and this is a summary of them, as they are laid down there, (1), (2), and (3).

MR. LONGSDORF: I don't mean superseding the statutes, but I want to know if we supersede that part of them.

MR. ROBINSON: It would seem the last sentence already takes care of that.

THE CHAIRMAN: You have Mr. Waite's motion. Is there any further discussion? If not, all those in favor of the motion, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The Chair is in doubt. We will have a show of hands. All those in favor, raise hands.

MR. YOUNGQUIST: There are two or three out.

THE CHAIRMAN: Seven. Opposed, 5. The motion is carried.

MR. McLELLAN: Then what we have done is, Mr. Chairman, to vote that on arraignment day every indictment has to be read in full.

THE CHAIRMAN: No, no, that he gets a copy of the indictment.

MR. McLELLAN: Oh, I beg your pardon.

MR. HOLTZOFF: How about these Mexicans down on the border?

MR. McLELLAN: I am going to rely on my own memory

in this instance as to what Mr. Waite said. Didn't you say they should be read to them?

MR. WAITE: My first revision was that a copy of the indictment should be furnished him before he was called upon to plead.

MR. McLELLAN: Yes, and then?

MR. WAITE: And then the rest as it stands here.

MR. McLELLAN: Didn't you say it should be read to him, when you stated the motion?

MR. WAITE: Yes, because I put in as my second sentence the first sentence.

MR. BURNS: Mr. Waite, have we really considered the possible practical difficulties, just from the viewpoint of typing and clerical work for a United States attorney to have to give to every defendant, whether he wants it or not, a copy of the indictment? After all, what we should do is provide clearly what his rights are, and I think we have done that by the last sentence. He can get it any time he asks for it.

MR. HOLTZOFF: In New Mexico and Texas we have a lot of cases under the immigration laws, unlawful entry into the United States, and the defendants are all Mexicans. They cannot read and write any language, certainly not English. There will be fifty or a hundred of those cases in one day. Now they are informed by the clerk or the

United States attorney, as the case may be, what this charge is. To make it mandatory that a copy of the indictment be handed to each of them is futile. It just wastes time.

THE CHAIRMAN: Why, with a mimeographed paper with the only difference being the defendant's name on it? That is the simplicity of it, Alex.

MR. WAITE: Surely you are not suggesting that any question arises?

MR. McLELLAN: I would like to have that motion read, so I understand it.

THE CHAIRMAN: Will you read Mr. Waite's motion?

MR. YOUNGQUIST: I have it here. I took it down in shorthand. It was to insert at the beginning of rule 10 this language, "A copy of the indictment or information shall be delivered to the defendant before he is called upon to plead," and the rest of the rule stands as it is.

MR. BURNS: Except the last sentence.

MR. YOUNGQUIST: Yes, that is right.

MR. LONGSDORF: "Before he is called upon to plead." A considerable time before? How long before?

MR. YOUNGQUIST: This says "before".

MR. LONGSDORF: Well, "before" can be a long time.

MR. BURNS: Say he wanted it two weeks before he is going to be arraigned and the rule can be complied with

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by giving it to him ten minutes before he is arraigned.

THE CHAIRMAN: All that will accomplish will be that the man will have two weeks when he comes into court. The delivery of the copy then will only delay the proceedings two weeks.

MR. BURNS: Then the defendant is between Mr. Waite's amendment and this present rule, that there is an obligation on the district attorney to furnish it.

THE CHAIRMAN: In every instance.

MR. HOLTZOFF: Without request.

MR. BURNS: Can that be waived?

MR. HOLTZOFF: Yes, that can be waived, I suppose.

MR. GLUECK: And there is another difference.

MR. BURNS: Shouldn't we say so?

MR. HOLTZOFF: I think so.

MR. GLUECK: There is another difference in connection with this present rule. It says "At any time." That is the real difference.

THE CHAIRMAN: As I recall it, we voted on that, didn't we?

MR. McLELLAN: We did.

MR. SEASONGOOD: I move a reconsideration of it along the lines --

MR. DEAN: Seconded.

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MR. SEASONGOOD: Along the lines Mr. Burns suggested, if he asks for it, give it to him.

MR. McLELLAN: I was sidetracked on the suggestion that it should be read to him unless he waived it.

MR. WAITE: I would not object to the insertion of the provision that "a copy of the indictment or information shall be delivered to the defendant before he is called upon to plead, unless he waives such delivery." I see no objection to that.

MR. McLELLAN: Delivered to him and read to him.

MR. WAITE: Then the next sentence has to do with reading it to him unless he waives it.

THE CHAIRMAN: First you give him the document, unless he waives it.

MR. WAITE: Yes.

THE CHAIRMAN: Secondly, you read it to him unless he waives it. What more can you do for the man?

MR. SEASONGOOD: Nothing.

MR. McLELLAN: If you do that, nothing.

THE CHAIRMAN: Isn't that what we have agreed to?

MR. SEASONGOOD: No.

MR. McLELLAN: We haven't in this rule given him the right to have it read to him.

MR. ROBINSON: Or stated to him.

MR. McLELLAN: Yes; we ought to give him a right to have it read to him after he waives it.

MR. SEASONGOOD: That was my motion, to insert at line 2 --

THE CHAIRMAN: Maybe we had better go back and make haste a little more slowly.

MR. SEASONGOOD: I do not know if it had a second, but my motion was to insert in line 2 "or if the defendant consents, by stating to him," that is, have it read to him, or if he consents, that the substance of it be stated.

THE CHAIRMAN: Maybe we should go back and consider this matter over again. We first voted on Mr. Waite' motion, which is, in effect, to give him a copy of the indictment before he is arraigned, unless he waives it.

MR. YOUNGQUIST: Before he is called upon to plead.

THE CHAIRMAN: Before he is called upon to plea unless he waives it.

MR. SETH: Will you accept a substitute, "to read, if he requests it".

MR. WAITE: No.

MR. SETH: I am afraid you are raising a jur tional question.

MR. YOUNGQUIST: The waiver will take care

jurisdiction.

MR. HOLTZOFF: Yes, but how do you prove the waiver? We get so many habeas corpus proceedings, trying to review what happened at a trial five years ago, for example. How would you prove the waiver?

Now I am still thinking about the case of those hordes of Mexicans that are arrayed in the Federal court along the Texas border and New Mexico border.

MR. WAITE: They do not even know enough to ask for an indictment, and it is particularly important they should be given it without having to ask for it.

MR. HOLTZOFF: No; they want to be sent to jail. They come over in order to be sent to the prison farm.

MR. WAITE: That is silly, to say in one breath that a man ought to ask for it and in the next breath to say because he is too dumb to read it, if he gets it, he is too dumb to ask for it.

MR. ROBINSON: Mr. Chairman, may I say this: I seem to have some faith in what this committee did at the last meeting. This rule in Tentative Draft 6 says just what they say in Tentative Draft 5, after the same points were considered that are being taken up today, and it seems to me you did a fine job in the former draft, and the only thing that has been changed has been because of the Court's Memorandum. Those words were added "at any time" just

to make it clearer that he could get the indictment, or a copy of it, whenever he wanted it.

MR. HOLTZOFF: Suppose he requested it at night - at any time?

MR. ROBINSON: Isn't that silly? Isn't that absurd?

MR. YOUNGQUIST: I call for the question, Mr. Chairman.

MR. DEAN: What is the question?

THE CHAIRMAN: The question is on Mr. Waite's motion which is that the man may have a copy of the indictment before arraignment unless he waives it - in writing?

MR. WAITE: No, we haven't required that, I think.

MR. WECHSLER: I would like to state that, having voted for Mr. Waite's motion, I am going to vote against it now.

MR. DEAN: So do I.

MR. WECHSLER: Because I do not see, when you introduce the waiver point, I do not see that it accomplishes anything.

THE CHAIRMAN: All those in favor of the motion as made by Mr. Waite, say "Aye."

(Chorus of "Ayes.)

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: All those in favor, raise hands.

(After a show of hands the Chairman announced the vote to be 8 in favor; 7 opposed.)

MR. WAITE: In view of what Mr. Wechsler just said, I would like to move that substantial requirement and see this rule provide that he shall be given a copy of the indictment or information before he is called upon to plead.

THE CHAIRMAN: Your motion is carried.

MR. WAITE: With the waiver point?

MR. SEASONGOOD: That, I thought, was lost.

THE CHAIRMAN: No, it is carried.

MR. YOUNGQUIST: I thought it was lost.

MR. SEASONGOOD: I think it was lost.

THE CHAIRMAN: Let us call again. Please vote the same as you did before. All those in favor of the motion --

MR. WAITE: This is the one with the waiver in it?

THE CHAIRMAN: Yes. 7. Opposed? 8. Lost.

MR. DEAN: I would suggest one that might satisfy everybody as a new rule.

MR. WAITE: I make my other motion, Mr.Chairman, which I did make before, in view of what Mr. Wechsler said.

He voted against it because of the waiver - that this Rule 10 provide in substance, I am now not putting out the form of the words - that every defendant be given a copy of the information or indictment before he is called upon to plead.

MR. BURNS: Whether he wants it or not?

MR. WECHSLER: May I ask Mr. Waite if he would accept a substitute for that? I go back to the Court's Memorandum and things that have been said here. I would like to see a system under which, when the defendant appeared in court, the judge either read the indictment to him or, if he consented, stated the substance of the charge, told him that he was entitled to have a copy of the indictment, and then the rule provided that he could get it upon request at any time.

My difficulty, in other words, is that unless somebody tells him that he can have it, I do not see that you have really given him anything because, as you put it so well,in the case where it is important, he doesn't know.

I would like to see the judge tell him that he can have it.

MR. WAITE: My rule is that he should be given it without being told that he can have it.

MR. WECHSLER: I know, but my suggested substitute is, perhaps, as a method of reaching the same result, I think, better, because if it is just handed to him, as a

formal matter, if he hasn't a lawyer, it is not going to mean anything to him in a large number of cases.

I would like to see all that responsibility on the judge, to tell him what the charge is, see that he gets the papers that he is entitled to have, and, of course, if he wants time to examine the documents, any civilized judge would give it to him. That, it seems to me, would achieve the result you are after.

THE CHAIRMAN: Doesn't that impose an intolerable burden on the judge? I mean, just as a matter of physical energy.

MR. WECHSLER: What burden does it impose on him, when the defendant stands up?

MR. McLELLAN: Why not make the clerk do it?

MR. SEASONGOOD: Let the clerk read it and the judge tell him, if you want, that he is entitled to it.

MR. MECHSLER: Yes, if course, I accept that.

MR. HOLTZOFF: Does that suggestion mean must be read unless the reading is waived?

MR. WECHSLER: I follow Judge McLellan's suggestion on that.

MR. McLELLAN: And, without knowing it, this comment is suggesting the other thought with reference to the waiver, only require that he know what he is waiving.

MR. WECHSLER: That is right.

MR. MEDALIE: I assume that he knows what he is waiving. The waiving is the giving up of a known right.

MR. McLELLAN: But we have had trouble with that, and the question is, how you can be sure he knew it, and our whole trouble is that there hasn't been any formal way of being sure about that.

MR. MEDALIE: I agree.

MR. McLELLAN: Now, if the responsibility is focused, you get that.

MR. MEDALIE: I agree with all you say.

THE CHAIRMAN: Mr. Wechsler, will you put that in tentative language, so that we can have something to vote on?

MR. WECHSLER: Let us see, if we go to Rule 10, as it is, a defendant is arraigned by reading to him the indictment or information, or, if he consents, by stating to him the substance thereof, by advising him of his right to a copy of the indictment or information, and by calling on him to plead thereto.

MR. GLUECK: Except that the advice is not, technically, a part of the arraignment, is it?

MR. WECHSLER: I would like to make it part of the arraignment.

MR. GLUECK: You want to make it that?

MR. WECHSLER: Yes.

MR. WAITE: As it stands, he is called upon to plead before he had had a copy, even under that. He is told he can have a copy, but then he is immediately called upon to plead.

MR. WECHSLER: Not necessarily.

MR. WAITE: I do not think I would accept that.

MR. WECHSLER: I guess that is a weakness. Suppose we put it this way: let the first sentence stand as it is and change the second sentence to "The defendant shall be advised before he is called upon to plead that he may have a copy of the indictment or information."

MR. WAITE: Why isn't it easier to give him a copy than advise him?

MR. WECHSLER: I want to make the point that there are some fellows who don't want it.

MR. WAITE: It is rather appalling to me that we should suggest that when a man's life or liberty is in danger, the Government should be niggardly about the stenographic costs of getting up a copy of the indictment to give to him. I think that is penny wisdom that is perfectly astonishing in view of the amount of money that the Government is spending to have us here.

MR. HOLTZOFF: Mr. Waite, I think ninety per cent of the defendants today do not get copies of the indict-

ments; they don't ask for them, they don't want them.

MR. WAITE: If ninety per cent of them do not get copies of the indictment, they are pleading to something they have never seen? I think that is an absurdity.

MR. HOLTZOFF: No, because they are more anxious to know what the indictment contains in substance, and most of them can learn much better from an oral summary than they could by reading the indictment.

MR. WAITE: You are not telling me that a man can listen to an indictment read and plead --

MR. HOLTZOFF: Oh, no.

MR. WAITE: -- more accurately than he can after sitting down and reading it or having his lawyer read it?

MR. HOLTZOFF: In most cases the indictment is not read. What is done, the man is told"you are charged with transporting liquor from such and such a place, on such and such a date, involving such and such a statute."

MR. WAITE: That would be done, too, but I cannot see the possible objection, except your objection to cost, to giving the paper beforehand.

THE CHAIRMAN: There is no question of the cost. All it means is putting a sheet of carbon in and another piece of paper under it.

MR. YOUNGQUIST: Do I understand the motion to be this, that the first sentence remain as it is; the second

will be changed to read in substance "The defendant shall be advised before he is called upon to plead that he may have a copy of the indictment or information."

MR. WAITE: No, that was not my motion.

MR. YOUNGQUIST: I am speaking of Mr. Wechsler's.

MR. WECHSLER: As a substitute for John's motion, on which he turned me down.

MR. BURKE: Mr. Chairman, I dislike injecting another thought in the matter. I am not concerned with the expense of mimeographed copies, but I am just wondering if a group of forty or fifty people have pleaded, where they are given the option of waiving the right to receive the indictment or demanding it, just what proof you are going to make in later proceedings to indicate the return to those who actually received an indictment. Maybe one of them would come in and file a motion a few months later, saying he had not received it.

MR. BURNS: Then you would have a question of fact.

MR. YOUNGQUIST: Won't the clerk's minutes take care of that?

MR. WAITE: It would show waiver but it would not show delivery, unless it is consummated by a return, unless he actually made the delivery.

MR. YOUNGQUIST: That is what I mean.

MR. WAITE: It is easier to show it has been delivered than waived.

MR. LONGSDORF: Maybe if you filed a precipe for a copy, the clerk would make an entry of it; otherwise it is not likely.

THE CHAIRMAN: Gentlemen, we have had various suggestions but we haven't anything to vote on. If someone will make a motion, we will vote on it.

MR. ROBINSON: I would like to suggest this, Mr. Chairman. A minute ago we had a very close vote on Mr. Waite's motion, but I am not sure all of us understood what he was including in his first sentence, and then the second sentence, and the rest of the rule. I would like to ask Mr. Waite to prepare his motion in full and submit it to us for final action.

MR. WAITE: Yes, I will be glad to do that.

MR. SEASONGOOD: What is the objection, unless Mr. Wechsler wants to withdraw his motion? It seems to me perfectly plain that Mr. Wechsler meant that you read the indictment to the defendant, unless he waives, and give him a copy of the indictment, unless he waives.

MR. WECHSLER: And you tell him he has a right to have it.

MR. SEASONGOOD: And you tell him he has a right to have it.

MR. WECHSLER: That is would I would like, in substance, if we could vote on the substance of that.

MR. SEASONGOOD: I move that.

MR. WECHSLER: We might agree and get a draft on it. I make that as a motion.

THE CHAIRMAN: Will you state your motion.

MR. McLELLAN: You would not contemplate in the case of the feared failure to be able to prove that the indictment, copy of it, was given to him, that that would be a ground for a new trial?

MR. WECHSLER: No.

MR. HOLTZOFF: In the last couple of years we have had a lot of habeas corpuses which have been predicated on the proposition that the defendant was deprived of a certain right at the trial and we have had to take depositions of the trial judge, and of the United States attorney, and the clerk of the court, to determine whether or not the defendant was deprived of his rights. Now if you establish more rights, you give an opportunity for more habeas corpus proceedings.

MR. WECHSLER: If I was the trial judge in this district, when the defendant was standing there, and I got done reading the indictment and telling him about it, I would say "Did you get a copy of the indictment?" And if he said no, I would say "Well, you waived it?" and if

he said "Yes," there would be a record showing it.

MR. BURNS: That is not shown in the record.

MR. CRANE: Mr. Chairman, are we going to get lunch or are we going to wait for lunch until you settle this point?

THE CHAIRMAN: If that threat would settle it, I would say yes. Do you want to make a motion, to see if we can get it disposed of before we go to lunch?

MR. WECHSLER: All right. I move that the rule be redrafted so as to accomplish three things: first, to provide that a defendant is arraigned by reading the indictment or, if he consents, by stating the substance of the charge to him - given the right to read it; second, to provide that he be advised of his right to a copy; and, third, to give him that right to a copy before he is called upon to plead.

MR. GLUECK: And what about the recording of these facts? Is that included in your motion?

MR. WECHSLER: No, I am a little bit troubled about that in view of what has been said about making a record somehow, but maybe if we can get agreement on what we wanted to have happen, we could work out the next part.

MR. BURNS: If the clerk had the duty of delivering it, he would have a duty of making a record.

MR. WECHSLER: Just as when we ask a man if he

wants counsel?

MR. DEAN: That is right.

THE CHAIRMAN: You have heard the motion, as given in substance. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(Chorus of "Noes.")

THE CHAIRMAN: A show of hands.

(After a show of hands the Chairman announced the vote to be 10 in favor; 5 opposed.)

THE CHAIRMAN: Carried.

I suggest we adjourn for lunch.

(Recess from 12:35 p.m. until 1:15 p.m.)

1.15
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AFTERNOON SESSION

THE CHAIRMAN: Rule 11, gentlemen.

MR. DESSION: Before we get into that, there is an alternate proposal, which is in the nature of an addition to the present Rule 10.

THE CHAIRMAN: Where is that alternate rule, in the book?

MR. DESSION: Yes, it is in the Memorandum, on page 6, Rule 10. You will notice the only difference between that and the Rule 10 which we have worked through is that this would add an additional provision. The addition is to furnish the defendant at arraignment with a list of the witnesses on whose evidence the indictment or information was based.

I am thinking of this as one of a group of proposed rules, all of which are designed to give the defendant a little more notice in advance of trial of what the case against him is and, likewise, to give the Government more notice in advance of trial of what the defendant's evidence is.

I realize this is something of a departure, but I think if any further disclosure before trial is desirable, then it would be very important for us to consider that and see how far we might want to go. If it is neither feasible nor desirable, why, then,

we have gone as far as we want.

As it stands now, we are giving the defendant a copy of the indictment or information, and beyond that, I guess, we have not changed the law very much as to what he is entitled to receive beforehand. We have made provision for a pre-trial conference, which is pretty much permissive in terms. There is that. We have not dealt with one problem, I think, and that is the list of the witnesses to be called to trial.

The statute mentioned in the note to Rule 10 points out that in capital cases, by statute, the defendant gets a list of the jurors and witnesses; in non-capital cases, he does not. I wonder whether there is any justification for such distinction?

MR. HOLTZOFF: List of witnesses not to be called at the trial.

MR. DESSION: No; that would be the witnesses on whose evidence the charge was pressed.

MR. HOLTZOFF: Yes.

MR. DESSION: I suppose in capital cases, if there is any advantage in letting the defendant know who the witnesses are, the advantage would be at a maximum then, he has more to lose than in a non-capital case, so that is where we give it to him.

We get that, I think, from English practice,

but we do not give it to him in non-capital cases. It seems to me he ought to get that in both cases or in neither case because, I just do not see what basis there can be for such distinction.

Beyond that, in order to bring this whole question of policy to a head, I am proposing several rules. There is this one. There is a rule designed to afford inspection before trial, in the court's discretion, of documents, objects and so on, where a showing can be made that there is some good reason to have those in preparing a defense. I am also providing for an exchange of lists of trial witnesses before trial.

The purpose of all these rules is merely to try to get a little further away from surprise and to get a little more of the atmosphere that has become more customary in civil cases. You are all familiar, of course, with the extensive development along this line on the civil side. We have had no such development on the criminal side.

I want to raise that question of whether we ought to consider it.

MR. HOLTZOFF: Of course, on the civil side you do not furnish lists of witnesses, even in the pre-trial and discovery proceedings.

MR. DESSION: No, I know that. I was speaking generally of the whole problem rather than of that specific proposal.

So, in order to bring that up, I move that we add to Rule 10 the new matter which is contained in alternate Rule 10.

THE CHAIRMAN: On page 6?

MR. DESSION: On page 6.

THE CHAIRMAN: Is the motion seconded?

MR. BURKE: Seconded.

MR. WECHSLER: This is in substance rather than in form, George?

MR. DESSION: Yes, I think there would have to be slight corrections in form.

MR. WAITE: Would you require, in every case, furnishing of all the names and addresses?

MR. DESSION: That is right.

MR. LONGSDORF: I think, Mr. Chairman, from some inquiries which I have made that you will get very vigorous objection to this rule from district attorneys. I have even gone to the extent of inquiring of a leading defense attorney and I got the same comments. I am expressing no opinion of my own.

MR. HOLTZOFF: I think it is a highly undesirable rule. I cannot see why the defendant should be entitled

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to a list of witnesses who testified against him before the grand jury. I can see a lot of danger in it.

THE CHAIRMAN: What dangers?

MR. HOLTZOFF: Well, there are two dangers. In the first place, there is always the possibility --

THE CHAIRMAN: Of shooting them, you mean?

MR. HOLTZOFF: Yes, of doing away with the witnesses, or will facilitate the concocting of perjured testimony; and, second, a witness, if he so desires, is entitled to maintain secrecy as to the fact that he testified before the grand jury.

MR. WECHSLER: What is the present law on this?

MR. HOLTZOFF: In capital cases you get it.

MR. DESSION: In capital cases you get it, but you are not entitled to it in any others.

MR. HOLTZOFF: I agree; I do not see any reason for the distinction. I would like to see it abolished in all cases.

MR. LONGSDORF: This extends to information cases, including misdemeanors?

MR. HOLTZOFF: It could not be an information because there may not be any witnesses.

MR. DESSION: Well, the prosecutor would be supposed, under this rule, to give you a list of the witnesses on whose evidence it was based. To some

extent, of course, the court would have to take his word for that, but at least he would be getting something.

MR. WECHSLER: George, speaking of the present law, you said it referred to witnesses before the grand jury, but that is not true, as I read the statute.

MR. DESSION: Was I mistaken about that?

MR. WECHSLER: In treason and capital cases, it says the witnesses to be produced on the trial for proving the indictment.

MR. DESSION: I was in error then. That is trial witnesses. I am sorry. I have not seen that in some weeks. I was confused on that.

MR. WECHSLER: If it relates to witnesses at the trial rather than to witnesses before the grand jury, wouldn't it be well not to raise a question here in connection with arraignment but to raise it rather in connection with the other pre-trial rules that you have in mind?

MR. DESSION: We could do that, yes. I do not particularly care at which point it is raised.

MR. WECHSLER: I suggest that your motion be laid on the table until we get there, because it does not seem to me the important language is "witnesses before the grand jury," but rather the witnesses at the trial. I may be wrong.

MR. DESSION: I would rather leave it separate because in some cases those witnesses would overlap considerably; in others they might not. My thought is the need of maximum opportunity to test evidence before trial.

MR. WECHSLER: Maybe you want the witnesses before the grand jury. I do not propose to alter your suggestion.

MR. DESSION: I think, however, that we could defer consideration of that until later, so we could have the whole thing together. They are related.

THE CHAIRMAN: If there is no objection we will lay this over for consideration at a later point.

MR. DESSION: May I just make one more proposal, which involves harking back to the note to Rule 7 (c)? The proposal is before you in mimeographed form. It was distributed just this morning. Here, what this amounts to is inserting in the note a paragraph which indicates that we are not changing the present law with respect to bills of particulars. As I understand it, we nave no desire to change that law. At least, that is my impression.

We have no rule which anywhere refers to a bill of particulars, and I think there might be some virtue, and I do not think we need a rule on it, but I think

there might be some virtue in indicating in a note that we conceive that practice is continuing, and I think the one appropriate place for that note would be the note to 7 (c), the section which deals with the sort of description of the offense that the indictment or information shall contain.

THE CHAIRMAN: If there is no objection, that will be inserted in the notes to Rule 7.

MR. WECHSLER: Why should there be no rule on bills of particulars? I am lost on that.

MR. DESSION: Well, I haven't a very strong view on that. We have, of course, a general provision for motions, and it is drawn in such form that a defendant, on motion, may ask for anything he wants to ask for on the kind of relief he is entitled to. I suppose that ought to be enough to enable him to move for further particulars when he thinks he needs them.

MR. WECHSLER: Why shouldn't this note be moved from here to the rule on motions?

MR. DEAN: That would be my suggestion.

MR. DESSION: It could go there.

MR. WECHSLER: Well, I propose that.

MR. DEAN: I second that proposal.

THE CHAIRMAN: Is that acceptable?

MR. DESSION: That is entirely acceptable.

THE CHAIRMAN: All right.

Then we move on, if we may, to Rule 11.

MR. DEAN: Mr. Chairman, are we passing the question of whether we should require the names of the witnesses before the grand jury?

MR. DESSION: Yes, that is being deferred.

THE CHAIRMAN: That is passed for the time being.

MR. DEAN: Along with witnesses for the trial?

THE CHAIRMAN: Is there any comment on Rule 11, which I think we have pretty well rehearsed?

MR. WECHSLER: I move its adoption.

MR. DEAN: Seconded.

THE CHAIRMAN: All those in favor --

MR. SEASONGOOD: Wait a minute. What about the point I had on Rule 11? Why does the corporation get this special treatment? Why should they enter a plea of not guilty for a corporation? Why shouldn't they just go ahead and take judgment against it?

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MR. HOLTZOFF: You cannot take judgment by default in a criminal case. In case a natural person fails to appear, you cannot do anything about it but try to locate him, but in the case of a corporation, being an artificial entity, you cannot apprehend the

corporation and so enter a plea of not guilty.

MR. ROBINSON: Rule 11, page 3, there is a note that this follows Federal practice, see United States v. Beadon; that it is a common provision of state statutes; that the same provision is in the Criminal Justice Act.

It is a very common provision and I do not know of any reason for dropping it.

MR. YOUNGQUIST: You can proceed against them for contempt, can't you, if they disobey any lawful order or process?

MR. ROBINSON: We are talking about dropping this last sentence of Rule 11. That is the suggestion that something be done differently about a corporation.

MR. YOUNGQUIST: Yes, all you can do against a corporation is just enter a plea of not guilty for it.

Would that not inferentially exclude the possibility of proceeding against them for contempt for disobeying lawful process? I do not know about that, but I was wondering what suggestion you are making textually in Rule 11.

MR. DEAN: I do not think it would exclude anything in the way of contempt. I should not think so.

MR. BURNS: Is it important enough to dignify it by rule?

MR. DEAN: Would you say, "If a defendant refuses to plead, the Court shall enter a plea of not guilty"?

MR. HOLTZOFF: Yes.

MR. McLELLAN: I would be agreeable but --

MR. HOLTZOFF: It seems to lay an emphasis on "corporation" that is unnecessary.

MR. ROBINSON: I am afraid, if we do not mention it, it is not so awfully clear now, of course, because --

MR. BURNS: It would be clear by note.

MR. YOUNGQUIST: What good does it do to enter a plea of not guilty?

MR. ROBINSON: It just says what to do to the district judge. All of our rules are simply statements of what the Federal law is, designed to fill gaps and make the procedure complete, instead of leaving lawyers and others wondering what to do if you have a corporate defendant.

MR. YOUNGQUIST: Do nothing, if it fails to appear, the same as you would do with an individual defendant.

MR. HOLTZOFF: There is a difference. With an individual defendant you can send a marshal out and bring him to court, but you cannot do that with a corporation.

THE CHAIRMAN: The difference between answering a summons and being hailed into court on a warrant. I think that is a sound distinction, isn't it?

MR. HOLTZOFF: Yes.

MR. SEASONGOOD: Of course, if it makes it so they do not have to appear at all, the court can enter a plea of not guilty.

MR. HOLTZOFF: I think there is this to it, if a natural person does not appear, unless you can find him and bring him to court, you cannot impose a penalty, but the idea of this rule is to make it possible to impose a penalty on a corporation that does not appear.

MR. YOUNGQUIST: Enter a plea of not guilty and then what?

MR. HOLTZOFF: Set the case for trial.

MR. ROBINSON: Merely complete your issue and prepare for trial.

MR. YOUNGQUIST: Yes, that may be.

THE CHAIRMAN: Don't you actually have to get the defendant into court physically, or have him there by any contemplation of the law, in a criminal case?

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: I think the reason it has been followed is that every time the corporation is indicted, the president or some official of the corporation

is also indicted, so he is always in there and he is appearing for the corporation as well as for himself.

MR. HOLTZOFF: Oh no, I have known a lot of cases where the corporation has been indicted without an individual defendant.

MR. McLELLAN: In pure food cases that is often so.

MR. HOLTZOFF: I remember some pure food cases like that.

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MR. McLELLAN: I want to make trouble, Mr. Chairman. I hope I won't be sorry as I was this morning, because I felt a little bit strongly about it for reasons I will state briefly after I have made the motion.

I move that Rule 11 be amended to read:

"Rule 11. Pleas. A defendant may plead not guilty, guilty, or with the consent of the court nolo contendere," and strike out the second sentence.

Nolo contendere has become pretty unfashionable in this country I think, and has been abolished in New York because it was thought useless. I think it is a useful thing to have but I think the burden should not be put upon the judge when a man gets up to plead nolo contendere of telling him he cannot do it. I think the plea of nolo contendere should be something that a man may enter only with the consent of the court, and the court ought not to have to say to him when he starts to plead it, "You cannot plead that." We allow it in Massachusetts when, in the exceptional case, it is to prevent a man getting a record that could be used in court against him afterward.

MR. SEASONGOOD: You would have to say the court may refuse to accept the plea of guilty --

MR. McLELLAN: No. I would not have to say that. Yes, the court may refuse to accept the plea of guilty.

MR. CRANE: You know in one of our sessions I took a little time to plead the abolition of this nolo contendere plea and I was excited because I thought that there was a feeling against it, although everybody expressed themselves. I recognized the inconsistency of a man saying he is not guilty but he may go to jail. I do not know how you feel about it now. I am glad to know that Massachusetts recognizes the fact that it is an absurdity in some cases. I noticed in the press the other day, I think in some Federal court, it had some plea such as this because they said they were not guilty, and the judge did not feel he ought to try it out. But it is inconsistent. I think it is abolished in England, and why we keep it here I, for the life of me, do not know, except as it has been stated, a chance to get rid of a plea of this kind and then it cannot be used as having decided a fact in some other case, or as res adjudicata on some other case. But that seems to me absurd too. Anyhow I have a horror as we start out here with our fine preface and wonderful language, how we are going to simplify this, and then carry this in our courts where England has abolished it and it is not used anyway. It is so inconsistent for a man to say that he will go to jail because he is not guilty.

MR. McLELLAN: Just one moment more. I am not

finding fault with retaining the plea of nolo contendere, but what I do say is a defendant ought not to have a right to come in and on being asked what he says to the indictment say "nolo contendere" and then the court has to say "Well, I do not believe this is that exceptional case where you can plead nolo contendere." I would rather have the consent to enter that plea obtained first, from a practical standpoint.

MR. ROBINSON: Would the procedure then be changed? The defendant would move the court for leave to file a plea of nolo contendere?

MR. McLELLAN: The court is asked, under our practice, whether a plea of nolo contendere will be accepted, and the court frequently says, "No; this is not the kind of case." And then comes along a young fellow, 17 or 18 years old, who has gotten into trouble, and you intend to put him on probation anyway and you don't want to hamper him with a record that can be used against him, and you say in that case, "This is a proper case for the plea of nolo contendere ." It comes to the same thing, but to put it upon the court every time a man comes in and says "nolo contendere", you cannot do that.

THE CHAIRMAN: I thought I heard in a conference in Boston between two judges, one or both of them said

they never would accept the plea. If we put it in the form you recommend we make it very difficult for a judge with that slant to ever accept the plea.

MR. McLELLAN: I do not know who told you that.

THE CHAIRMAN: I heard him say it at the Judicial Conference. I cannot recall his name; one of the more recently appointed.

MR. BURNS: Sweeney?

THE CHAIRMAN: Sweeney.

MR. McLELLAN: If Ihad been there I would have dared, because I know him very well, to say "You have done it."

THE CHAIRMAN: Nobody took it up.

MR. McLELLAN: There are cases that lend themselves to it, but it ought to be a matter of special consideration, and not give the right generally to plead

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nolo contendere and then have to take it back because the court says he refuses to accept it.

MR. CRANE: May I ask, hasn't this matter been in any way questioned outside of what we are doing here? As to whether this plea should stand or not? It has been advocated in the magazines and law articles. Does the United States Supreme Court feel we ought to keep this plea?

MR. SEASONGOOD: They did not say one way

or the other in the Memorandum.

THE CHAIRMAN: It seems to be desired by the district attorneys, but no objection raised in the Supreme Court Memorandum, as I recall.

MR. McLELLAN: I do not mean to get into a discussion whereby it might follow that you would do away with the plea because I think it is useful in exceptional cases.

MR. BURNS: Judge, what are you going to do about that part of the second sentence which you have stricken out?

MR. McLELLAN: I did not mean that. That was a mistake. I should have said part of the second sentence be stricken out; the part remaining being "The court may refuse to accept a plea of guilty."

THE CHAIRMAN: You have heard Judge McLellan's motion. Is there any further discussion?

(No response.)

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

(Chorus of "Noes.)

THE CHAIRMAN: The motion is carried.

MR. CRANE: I am glad we have gotten something in the right direction.

THE CHAIRMAN: Are you ready for the motion on the rule as modified?

All those in favor of Rule 11 as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed "No."

(No response.)

THE CHAIRMAN: Carried unanimously.

12 now. 12 (a).

MR. ROBINSON: In that first line I suppose better construction would be to leave out "a" and make "proceeding" plural, and beginning with line 3 there is "The pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere." Would that be acceptable to the Committee?

THE CHAIRMAN: If there is no objection that is so amended.

MR. YOUNGQUIST: Is it intended by this to say that the pleas are pleadings? That is the way it reads.

MR. ROBINSON: That is right; just as it says. You remember we have had quite a bit of discussion in former meetings as to what is a pleading and what is not a pleading, and as in the case of the Civil Rules it seems it might be advisable specifically to say that the

pleadings shall be this type of information; pleas of not guilty, guilty, and nolo contendere. The reasons for that I believe are supported in the notes of Mr. Justice Gray in 151 U. S., Tucker v. United States, who seems to have indicated that.

MR. YOUNGQUIST: Yes, I read that comment.

MR. ROBINSON: And Mr. Longsdorf and other authorities.

MR. DEAN: The only problem is whether we later use the word "pleading" in the narrow, orthodox sense.

MR. ROBINSON: No, we do not, because I have checked it carefully.

MR. LONGSDORF: Before we proceed to vote on themotion I would like to suggest we take out the word "abolished" at the beginning of line 6 and instead use "shall not be used", which is the language of the Federal Civil Rules which dispense with those formal motions of pleading.

MR. ROBINSON: They abolish, do they not, too.

MR. LONGSDORF: Maybe they do, but they do not abolish all functions of them. They abolish just the names of them.

MR. ROBINSON: Yes, Civil Rule 7 (c) says that "Demurrers," and so forth, "are abolished." That is a

heading. And then the text says, "Demurrers, pleas, and exceptions for insufficiency of pleading shall not be used", so you have both there, do you see?

MR. LONGSDORF: Yes. Well, suppose somebody comes along and makes his motion in the form of a motion to dismiss or a plea in abatement and it is substantially good if he would only change the name of it to a motion. What are you going to do with it; throw it out because it is out of form?

MR. ROBINSON: I am afraid what you are suggesting, George, would take the niceties out of this rule if you are going to preserve the significance of the rule and merely change the name.

MR. LONGSDORF: In the beginning of line 8 you have riveted it down by the use of the word "only."

MR. ROBINSON: That is what the Committee has voted for.

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THE CHAIRMAN: Hasn't that been the process by which both at common law and under the civil rule we have gotten rid of demurrers and all the other antiquated pleadings?

MR. BURNS: Suppose you just said the term shall be abolished, because in 5 you say the statute shall continue in effect but this "shall be interpreted to mean 'motion raising a defense or objection' as

provided in this rule."

MR. HOLTZOFF: How about Mr. Longsdorf's suggestion "shall not be used"?

MR. ROBINSON: That is the trouble. You have your rule speaking of demurrer and all these other motions and there is no need to abolish the term and still leave the body continuing.

MR. HOLTZOFF: I don't think it makes any difference whether you say "abolished" or "shall not be used". I think they are the same, but if you want to use the words of the Civil Rules it would be "shall not be used".

MR. LONGSDORF: But, Mr. Chairman, there is another thing. The Congress of the United States since we voted on this rule at the last session has passed the Act of May 9, 1942, and continues to use the words. What are you going to do about it?

MR. ROBINSON: We are talking about two different things, when you talk about using them or not. Of course, for one thing, in May, 1942, these rules were not in effect, and I think our subdivision (b) (5), which is our paragraph (5) under subdivision (b) to which attention has been called, simply calls attention to the fact that you can interpret legislation by using in place of those terms the motion raising a

defense or objection.

MR. LONGSDORF: Although I don't want to be obdurate --

MR. ROBINSON: I don't think you are obdurate, but I do not believe we are getting anywhere if we change the phraseology and still say everything else continues.

MR. McLELLAN: I move, Mr. Chairman, the adoption of Rule 12 (a).

MR. BURNS: I second the motion.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

We will take up 12 (b) now, section (1).

MR. LONGSDORF: Mr. Chairman, there is a question in there in line 13: "The motion shall present together all defenses and objections then available to the defendant." Now the question arises in that Evaporated Milk case which leads me to call attention of the Committee to those words. If you are going to make an objection which goes to the jurisdiction of the court you can raise it at any time. But if you are going to make an objection that goes to the jurisdiction of the person you can waive it if you do not make it at

the right time. What happens if you make them all together? Then you combine them.

MR. HOLTZOFF: Isn't that taken care of in paragraph (3)?

MR. LONGSDORF: Well, maybe it does take care of it.

MR. HOLTZOFF: I think it does.

MR. LONGSDORF: I want to know.

MR. ROBINSON: I think so.

THE CHAIRMAN: It seems to be the consensus that paragraph (3) takes care of it. Any further questions on 12 (b) (1)?

MR. SEASONGOOD: As a matter of style could not you leave out "together" in line 13?

MR. ROBINSON: Murray, that is awfully important. We did have a word in there. We did have "shall present at the same time". That is just the nub of this whole rule. Just as Alex was telling me the other day about an assistant United States attorney in Chicago who was fuming about a famous case there, and he only got to the 21st plea in abatement in the case. In other words, what we are trying to do is to require, as the Civil Rules do, that all defenses and objections be presented at the same time and the court can consider them at the same time, and you do not have the sequence, month after

month, of one objection or defense being overruled and

4 then another being filed.

MR. SEASONGOOD: You would not, would you?

MR. DEAN: Aren't you trying to say that the same motion shall present. In other words, try to present them all in a single motion?

MR. YOUNGQUIST: The motion shall present all the defenses. Otherwise it is redundant.

MR. ROBINSON: I hope we are not leaving out something there.

MR. SETH: I think we ought to emphasize it.

MR. ROBINSON: I think with Mr. Seth, we should emphasize it.

MR. SETH: I would not say in one document.

MR. ROBINSON: We do not mean necessarily one. It does not make it a condition whether it is one piece of paper or half a dozen.

MR. SETH: No. It does not make any difference, but I do not like the word "together".

MR. DEAN: I do not either.

MR. YOUNGQUIST: Would it help if you say "The motion shall include all defenses"?

THE CHAIRMAN: Yes, "shall include all defenses and objections then available to the defendant."

MR. ROBINSON: I cannot imagine that the court

would refuse to accept a supplement or addition to the motion. We want to watch that to be sure if the defendant made a motion one day he might overlook objections.

MR. SETH: What does the civil rule say on that? Don't they have a rule on that?

MR. DEAN: If "together" means all at one time, whether in one document or many documents, then your rule has an objection.

MR. ROBINSON: Why?

MR. DEAN: For the reason that it just governs time and precludes the defendant from filing another motion. "Together" means something different than "the same time".

MR. ROBINSON: I had "at the same time" in the draft and I wish I could remember the gentleman who insisted that it be stricken out and we use instead the word "together".

MR. DEAN: What would you lose, as far as your objection goes, if you said "The motion shall include all the defenses"?

THE CHAIRMAN: Or if you want to make it doubly certain "all defenses and objections then available shall be presented in the motion"?

MR. LONGSDORF: Mr. Chairman, do you want to

add "known or available"?

MR. WECHSLER: Is it the purpose of this to put a penalty on a fellow who does not see he has a point until he gets a different lawyer?

MR. ROBINSON: I think not, Herbert. Do you?

MR. YOUNGQUIST: Isn't that protected in (3)?

MR. ROBINSON: There is your "togetner" again you see.

MR. YOUNGQUIST: No, it is not protected in (3), but it is protected by the note I had to (3) by which I added after the word "present" in line 29, "unless the court for good cause shown relieves him of it".

MR. ROBINSON: That is a good addition, isn't it?

THE CHAIRMAN: What line?

MR. ROBINSON: Line 29.

MR. WECHSLER: That is what we want is, he has to do it unless he has some good reason for not doing it?

MR. YOUNGQUIST: That is right.

THE CHAIRMAN: If you have that, then do you still need the word "together" in line 13? Or wouldn't it be the word "include"?

MR. ROBINSON: I am suspicious about it.

MR. GLUECK: Unless you use the word "embrace".

MR. HOLTZOFF: I think "include" is all right.

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MR. ROBINSON: We are not thinking just alone about the demurrers but we are thinking of the hearing on the motion.

THE CHAIRMAN: You are thinking of the motion itself which is a hearing and that seems to me, with that, plus (3) that you just agreed to amend, gives you all you need possibly hope for.

MR. ROBINSON: The objection to the two together is then tautology.

MR. BURNS: It may mean time, the bundle of papers, or it may mean one paper.

MR. ROBINSON: And if your word before that was "at the same time" that would be difficult because of the point just mentioned.

THE CHAIRMAN: It is moved that 12 (b) (1) be amended in line 13 to strike "present together" and substitute the word "include".

MR. WECHSLER: Seconded.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All opposed say "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

Are there any more changes in (1)? If not, the motion is to adopt 12 (b) (1) as amended.

All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Now 12 (b) (2).

MR. HOLTZOFF: Mr. Chairman, in lines 17 and 18

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I think we can leave out a few words of surplusage; the words "upon request of the defendant, of the government or upon its own initiative". They do not add anything. If you strike out all those words you still have the same meaning without them.

MR. GLUECK: That is it must still be in the opinion of the court anyhow?

MR. LONGSDORF: Seconded.

MR. HOLTZOFF: I move to strike out the words in lines 17 and 18, "upon request of the defendant, of the government or upon its own initiative".

MR. ROBINSON: I would like to ask Judge McLellan's view.

MR. McLELLAN: I do not think they add anything to it because the court can do it of his own initiative or on anybody's request.

MR. YOUNGQUIST: I second the motion.

THE CHAIRMAN: All those in favor of the motion

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say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. YOUNGQUIST: Do we need the word "immediate" in there?

MR. ROBINSON: I think so.

MR. YOUNGQUIST: He is given authority only to order an immediate hearing.

MR. BURNS: How about "forthwith"?

MR. ROBINSON: That is "whenever in the opinion of the court".

MR. HOLTZOFF: I second Mr.Youngquist's motion to strike out the word "immediate" and change the word "and" to "a".

THE CHAIRMAN: I wonder if that does not do violence to the thought, and you would not cure it all by starting with that subordinate clause, "whenever in the opinion of the court" and so forth "the court may order an immediate hearing of the motion"?

MR. HOLTZOFF: That is better.

MR. ROBINSON: That is acceptable.

THE CHAIRMAN: If there is no objection we can do that.

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MR. WECHSLER: But why should it be "immediate"? There may be a hearing in a week. What we really mean is a hearing of the motion before trial.

MR. ROBINSON: Well, is that all?

MR. WECHSLER: Sure.

MR. ROBINSON: Don't we have in mind to mean here what we say?

MR. DEAN: Suppose it is the opinion of the court that it would help dispose of the trial by having a hearing a week before then?

MR. ROBINSON: The word "immediate" itself calls attention to the fact that these rules are framed or designed to secure some expedition, if possible.

MR. HOLTZOFF: The court may order an immediate hearing or may order a hearing a week from now.

MR. WECHSLER: The court may order a hearing immediately or within a reasonable time.

MR. McLELLAN: Why don't you do what the Chairman says: "Whenever in the opinion of the court", and so forth,"the court may order an immediate hearing of the motion"?

THE CHAIRMAN: Yes.

MR. HOLTZOFF: I think the word "immediate" is out.

MR. ROBINSON: I would like to have the record

show a protest on that. I think our whole object here is to end unjustifiable delays that have occurred in criminal proceedings, and I think for the sake of style of saving a word here or there or a comma there, we better not get ourselves into a position where we are losing the real point we have in mind just in the interest of a little stylisticism.

MR. DEAN: What I object to is it does not require an immediate hearing. If you want to require an immediate hearing then require it, but if not then don't.

MR. ROBINSON: Where we use the word "may" we are putting discretion in the court to do what he thinks best, and I can hear you, Gordon, in court now before the district court under these rules - it is rather optimistic I suppose - say to the judge "I don't want a hearing on this motion for some time. We want to have quite a bit of time to deliberate." And the judge could say "The rule expressly directs me to order an immediate hearing. It means, the word 'immediate', what it says and it shows that it is designed to expedite this matter. Therefore I feel that I had better do so." Now if you don't want a rule having the court supported by that word, to that extent, all right. But let us be sure we know what we are doing before we strike it out.

MR. WAITE: It seems to me a word that cannot do any harm and, therefore, some good. Therefore it is advisable to leave it in.

MR. YOUNGQUIST: I have a more fundamental question in my mind, Mr. Chairman: If we do not have the sentence at all what would the court do? Having the sentence as it is the court may in its discretion hear the motion or refuse to hear the motion.

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THE CHAIRMAN: You think the word should be "shall" instead of "may"?

MR. YOUNGQUIST: If we are to have anything at all. I think as a matter of fact we do not need the sentence, because when a motion is made the necessary sequence is that it is heard.

MR. WECHSLER: It is not as simple as that, Aaron, I do not think, because if you go back to 12 (b) (1) you will notice that it says that the motion shall include all defenses. There was a time in the previous life of this rule when it said "all defenses that heretofore could be raised before trial." It does not say that any longer, and as a lawyer it would leave me a little uncertain as to what defenses had to be raised by motion of that group that stated affirmative defenses heretofore raised at the trial.

Now I understand the purpose to be that whenever

a defendant has, what heretofore has been called an affirmative defense, he has to put it in the motion. Some of those may be defenses that can properly be disposed of before trial and some the judge may have to hold for the trial.

MR. ROBINSON: That is right.

MR. LONGSDORF: I see another difficulty here I would like to mention. In the last three lines at the bottom of Rule 12 (b) (2) authority is given to order the defenses or objections raised by the motion to be submitted for determination at the trial of the general issue. You go to the trial of the general issue of "not guilty" and therewith you dispose of special motions in bar, on the ground of former acquittal, conviction, former jeopardy or limitations. If you allow that to be made that way, and especially the first three, are you going to give them to the same jury that disposes of the general issue?

MR. ROBINSON: Surely.

MR. HOLTZOFF: You do do it today.

MR. LONGSDORF: All the authorities I have been able to find said it was wrong, but it did not hurt in that particular case to have done it.

MR. HOLTZOFF: I think the Supreme Court allows it to be done.

MR. ROBINSON: I think that is right, George.

MR. WECHSLER: I wonder, going back to (b) whether we should not qualify the word "defenses" somehow in a way that we previously had it. The stuff that used to be a plea in abatement or plea in bar is the stuff that we mean to have raised by motion.

MR. LONGSDORF: The object of the former practice was to cut off the trial on as short and brief a provable issue of fact before you went into the general issue. If you are going to abandon that let us know it, and you go to the trial on the general issue and have the whole works in there.

MR. ROBINSON: The sentence you talk about goes with the sentence that precedes it. "The right to trial by jury shall be preserved to each party." We are getting into difficulty if we thereby multiply jury trials, so the object here is to put it in the hands of the district judge to say that an issue which has been raised, that is a defense or objection which has been raised, shall not be tried on this preliminary hearing by jury as he has requested, but will simply be tried by the same jury that tries the general issue.

MR. LONGSDORF: How will the judge instruct the jury the kind of verdict to bring in?

MR. ROBINSON: That will be easy if there is a right to jury trial now.

THE CHAIRMAN: Would not the jury dispose of this preliminary issue first and then go on to the main trial?

MR. HOLTZOFF: Oh no.

THE CHAIRMAN: Yes.

MR. HOLTZOFF: Not if you raise the issue of former jeopardy, for example, at the trial of the general issue. The jury brings in a verdict of not guilty --

THE CHAIRMAN: You mean you go on and try the whole case and these others all in one ball of wax?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: Horrible.

MR. DEAN: As I read this in the last three lines you could try on order of the court everything that could be raised on some kind of motion to the same jury on any issue as well as that of not guilty.

THE CHAIRMAN: I thought the practice was to let the jury hear the first issue first and render its verdict and then go on to the trial of the general issue if the first verdict does not dispose of the matter.

MR. YOUNGQUIST: I do not think it is right.

MR. ROBINSON: I have cases in which Federal judges have done exactly that and it seems to me it would be

desirable, if you had some issue there which makes the rest of the issue, the general issue of not guilty, usually relatively immaterial.

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MR. YOUNGQUIST: I am not questioning that, but I am only saying that the general practice, as I have known it, is to try them all at the same time.

MR. BURNS: It seems to me if you adopt the Chairman's transposition and strike out the word "immediate" you get what you want to get. The district judge having control of the issue, whether or not he should expedite secondary issues which might be determinable of the whole controversy should decide, and if he decides "no" he proceeds to have them all tried by the same jury that tried the general issue. I move that those limitations be adopted.

MR. ROBINSON: May I ask a question about that, Judge Burns: I understood the Chairman's suggestion about transposing the relief clause was mixed up with "immediately". If you strike out "immediately" we better keep the same order because we will have an awfully long tail on an awfully short horse.

THE CHAIRMAN: All right.

MR. YOUNGQUIST: Strike out "immediate" and what else?

MR. BURNS: And after the word "motion" strike out - but that has been voted upon.

THE CHAIRMAN: All right. You have heard the motion. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. CRANE: Doesn't that adopt (2) as it is?

THE CHAIRMAN: This is a motion to strike the word "immediately".

MR. CRANE: And adopt the rest of it?

MR. YOUNGQUIST: The whole of (2).

THE CHAIRMAN: Are we covering too much?

MR. WECHSLER: Mr. Chairman, I am really troubled about this whole thing and I have before me the Rule 15 as it was drafted by this Committee and it has got a lot of things in it that I do not see here now that were very carefully hammered out.

MR.ROBINSON: I shall be glad to explain all of them because they are all written out in the notes or in our supplementary papers.

MR. WECHSLER: I think if you will give me a minute you will see what I have in mind. Now that rule reads as follows, and I will start with what was

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15 (b) which is the substance of 12 (a):

"All demurrers, pleas in abatement, and pleas in bar are abolished and motions shall be used in their place."

And the second thought: "Any matter capable of determination before the trial of the general issue may be raised in advance of trial by motion."

So that told you definitely what the motion was for.

Then the next thought was: "Defects in the institution of the prosecution and objections to the form of the indictment or information other than that it fails to charge an offense or to show jurisdiction in the court shall be raised only by motion before trial."

The result was that all the freedom that a defendant heretofore had to deal with the matter at the trial as a defensive proposition was preserved, except defects in the institution of the prosecution and objections to the form of the indictment, other than failure to charge an offense, or jurisdiction. There was, in short, a device for requiring it to be raised before trial; any objection to the indictment or information, and it was permissive beyond that in allowing a defendant to raise before trial any other matter that was in its nature capable of determination

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before trial of the general issue. Now I think that is sound and I think what we have now is unsound and I move the substitution.

MR. LONGSDORF: And I second the motion.

MR. YOUNGQUIST: May I call attention to the fact that immediately after page 10, from which you read, appears another draft of the rule on page 11.

MR. ROBINSON: Yes. I need to call attention to the fact that this Rule 15 which Mr. Wechsler has read was not really approved by this Committee. In fact this Committee had so much difficulty with it that a sub-committee was called of which Mr. Youngquist, I believe, was chairman and there were two or three drafts prepared and we tried to prepare an alternative rule. Mr. Holtzoff and I talked it over quite carefully and Mr. Holtzoff thought in view of the status of the whole matter that the Rule 15 Mr. Wechsler just read really does not represent the conclusions of the Committee at its last meeting and he felt we should favor that rule you have before you.

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MR. HOLTZOFF: That is quite correct.

MR. WECHSLER: I am not making any point about it, having been foreclosed, but I think this is better than what we have got.

MR. YOUNGQUIST: I had not seen the (b) and (c)

until this draft came. I do not think I was Chairman of the sub-committee. We were just working together. Rule 15, as it appears on page 11 to the end of 12 is the rule as I last saw it. I worked a good deal on it at the time and we reported what I thought was an appropriate rule that would cover all situations and would provide for an orderly procedure for the disposition of motions by character, as to whether the objection was one that might be raised under the general issue or must be made as a step preliminary to trial. I am very much in doubt about 12 (b) (2). I confess that I do not know what it means. I have a number of questions in the margin about it.

MR. ROBINSON: Let us hear them as soon as you are ready.

MR. DEAN: I will give you one, and that is that a demurrer could be determined by the petit jury.

MR. McLELLAN: That is just what I was wondering.

MR. DEAN: Oh yes. The question whether it constituted a cause of action would go to the jury.

MR. ROBINSON: That is if there was a right to trial by jury or the court submitted it.

MR. McLELLAN: No. It says "may determine the motion or it may order that the defenses or objections raised by the motion may be submitted for determination at

the trial of the general issue."

MR. ROBINSON: And isn't that purely optional?

MR. HOLTZOFF: No, but it would be determined by the judge as a question of law, wouldn't it?

MR. McLELLAN: Of course it would, Mr. Holtzoff, but I am talking about what this says.

MR. LONGSDORF: If it means that why not change "submitted" in line 25 to "reserved"?

MR. WECHSLER: No. I want to know what the theory of the objection was. You see, as I understood it, we had this very technical problem: There are some things you can raise before trial under the present practice that you can also raise after trial, and there are some things you have to raise before trial that you cannot raise after trial. Then the whole right to trial by jury thing is inextricably bound up with these procedural details. You have a right to trial by jury on a plea in bar if you raise it before trial, and you also have a right to trial by jury if you raise it at the trial, but if you raise it on motion under the present practice you have not a right to trial by jury. So I thought we were trying to work it out so we would, to some extent, take account of all those points.

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MR. ROBINSON: We have done it. What you are

saying is this: What is absolute right? We have a 75-page memorandum on this subject. We have examined, we think, all the Federal cases that are in point on it and we have found that the present situation is extremely complicated and that the Johnson case and the Evaporated Milk case are now before the Supreme Court of the United States because there is such a confusion and split of authority in the Ninth Circuit and Seventh Circuit. We have gone into that very carefully, and this represents a safe presentation of the rule that will take care of the difficulties now existing, until the court speaks, of course. As Mr. Longsdorf has suggested, just as soon as the Supreme Court decides the Johnson case in the Seventh Circuit and the Evaporated Milk case in the Ninth Circuit all you or I may say does not make much difference, because the Court in that Evaporated Milk case I think will have to decide the question pretty squarely that we are dealing with.

MR. DEAN: What is the question the Court is going to determine?

MR. LONGSDORF: Whether you must determine a plea in abatement on Wednesday when the defendant claims it goes to the jurisdiction of the Court. The question thus called for is whether that plea must be determined as an issue of fact before you go to the trial of the

general issue. Now that is squarely up on the Evaporated Milk case.

MR. HOLTZOFF: Yes, I know, but if our rule says otherwise our rule would supersede that decision.

MR. LONGSDORF: Not necessarily, but the decision may contain matter which will make us very loathe to supersede it.

MR. ROBINSON: It doesn't, it seems to me. If we keep on suggesting how difficult the present problem is and how some things can be raised by plea in abatement, some by motion to quash, and others by demurrer, and some things can be tried by the jury and some cannot, then we get ourselves just hopelessly confused, because it is possible to cut a channel through all difficulties and resolve them by a rule, and I believe that this rule does do that thing.

MR. HOLTZOFF: I would like to say a word in support of what Mr. Robinson says. That last sentence beginning on line 23, I do not construe the way Mr. Dean suggested. I don't think this means that a demurrer may be submitted to the jury. I think it means that this refers to the time of the disposition of the motion and not the manner of it.

MR. McLELLAN: It says "at the trial of the

general issue".

MR. HOLTZOFF: At the trial. It does not mean necessarily by the jury. It means the judge may reserve decision on the motion to dismiss until the trial on the merits. I do not think that would mean he has to submit it to the jury, would it?

MR. McLELLAN: Oh no. I daresay the construction you put upon it would be the one at which the court would arrive.

MR. DEAN: I do not have any doubt about that. I don't think the court will ever submit a demurrer to the jury.

MR. HOLTZOFF: Maybe it is not the most felicitous phraseology.

MR. McLELLAN: So what would you say about that? The court may determine the motion or it may order that the defenses, and so on? Suppose the motion raises an issue of fact? Are you going to let the court determine the issue of fact; the judge?

MR. ROBINSON: Or a fundamental proposition, but I think Mr. Youngquist will bear me out on this, or if not, correct me, our fundamental proposition before us was with the word "heretofore" indicating to the judge what the practice had been as to whether an issue was to be tried by a jury or by the court and that the judge

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now would have to determine that, so we have made it in line 24 that the court may determine the motion. That would be the end of it if it is a demurrer raising simply a question of law; the judge would determine it.

MR. WECHSLER: May I interpose this: Let me show you how nicely the previous rule, the one we had before --

MR. ROBINSON: If the Committee wants the previous rule that is all right with me.

MR. WECHSLER: But they did not adopt it. On page 11 look at 15 (3).

MR. CRANE: We have all read it and I move that we adopt it.

MR. BURNS: As a substitute?

MR. CRANE: Yes. It embodied the same thing but it is a little clearer.

MR. WECHSLER: I think, Mr. Chairman, it would be worth talking it out. I think that that 15 (c) (3) answers this question of form precisely.

MR. YOUNGQUIST: That was the idea in drafting what appears now on page 11; to classify motions with respect to their subject matter and with respect to the method of trial of the issue raised by the motion.

MR. BURNS: Is it the motion that 15 (c) (3) be substituted for 12 (b) (2)?

MR. WECHSLER: I do not think you can quite handle it that way, Judge. All I can say on the comparisons thus far made I would like to see the substance and the language of 15 (c) (2) and (3), which seems to me the crucial matter, brought back.

MR. BURNS: Cannot we vote on that on the assumption that the Committee on Style would work it in?

THE CHAIRMAN: That is in place of 12 (b) (2) - that would include it all; (1) and (2) - we substitute what appears on page 11 of Rule 12 under the heading (c) (1), (2), (3) and (4). Is that correct?

MR. WECHSLER: Under the headings (c), isn't it?

THE CHAIRMAN: Under the headings (c) (1), (2), (3) and (4).

MR. WECHSLER: Would be substituted for --

MR. WAITE: That takes the place of (b) (1), (2), (3) and (4) assuming the Committee on Style will work into the new arrangement the provision that all motions shall be presented at the same time.

MR. HOLTZOFF: It seems to me you have taken out too much. I think paragraph 3 on the top of page 2 out to stand, relating to waiver. Rule 12 (b) (3)

10 ought to stand.

THE CHAIRMAN: All right. Then in place of (b) (1), (2) and (4).

MR. ROBINSON: Another point needs to be raised --

MR. WECHSLER: Even that is not as simple as that, Mr. Chairman, because 12 (b) (3) speaks of defenses and objections then available to him, and the very essence of 15 (2) was to preserve in the defendant the option to raise before trial or at the trial, as he chose, matters as to which that option has heretofore existed.

MR. ROBINSON: I don't think that is true, Mr. Wechsler. That certainly was not my idea.

MR. WECHSLER: Let me read you the language which, in my opinion, makes that clear.

MR. HOLTZOFF: That is the air raid signal.

THE CHAIRMAN: We have received permission not to be interrupted, - from the District Attorney.

MR. YOUNGQUIST: I was going to say with respect to that, the old 15 as we have it provides that all defects in the institution of the prosecution or in the indictment or information other than that it fails to charge an offense or to show jurisdiction in the court shall be raised only by motion before trial. So that clause is made limited.

MR. WECHSLER: And it also says "shall be made and heard together unless, for good cause shown, the court shall otherwise permit". So it is all there.

MR. ROBINSON: What about the word "together"?

We have to get rid of "together".

MR. YOUNGQUIST: "Shall be heard together." Isn't this what it amounts to, Mr. Chairman: I think we all understand the substance of the motion which will require the Committee on Style, or someone, to dovetail the provisions into what we now have by incorporating the content of the old Rule 15.

MR. ROBINSON: I think that will be fine. I think the result will be surprisingly like the present Rule 12.

MR. WAITE: I cannot vote on that.

THE CHAIRMAN: The Chair would like to make a motion that Mr. Wechsler, Mr. Youngquist and Mr. Waite be a committee of three and spend tomorrow getting the rule in shape.

MR. WAITE: I have the time tomorrow but I have not much knowledge on this subject matter. Hadn't you better put somebody else on it?

MR. YOUNGQUIST: I would suggest Mr. Robinson who is an ex officio member, I suppose, of the Committee.

THE CHAIRMAN: Of course.

MR. ROBINSON: I will be willing to be relieved of further labors on this rule. It has taken more time than all the other rules put together.

THE CHAIRMAN: It might as well go to the

Committee on Style then.

MR. ROBINSON: Right at this point is where the Civil Rules Committee had their big trouble. It is right in about this point where there are more decisions piling up in the Federal courts under the Civil Rules than on any other subject, according to the statement of Judge Clarke on the subject.

THE CHAIRMAN: I was suggesting referring it to the Committee on Style.

MR. YOUNGQUIST: I so move.

MR. ROBINSON: I second the motion.

THE CHAIRMAN: All those in favor of the motion referring it to the Committee on Style say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: With instructions to report on Monday.

All those opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. SEASONGOOD: I do not understand this. The court has a note on Rule 12 which does not seem to me to be at all related to Rule 12. It says "Should the rules require the presence on resentence" etc. "under an old and erroneous sentence?"

MR. ROBINSON: You have your numbers twisted

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there, haven't you, Murray?

THE CHAIRMAN: What page is that on?

MR. SEASONGOOD: Page 4.

MR. ROBINSON: Yes, you see you have the wrong number. It is No. 15 in the old rule, Murray, the top of page 5 of the court's notes.

THE CHAIRMAN: Rule 13, please; back in the other book.

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MR. HOLTZOFF: Mr. Chairman, I have some matters of phraseology to suggest. In lines 4 and 5 I think there is surplusage there and I move to strike out the words "whether by a multiplicity of counts or of defendants or otherwise".

And I also move to strike out from lines 5 and 6 the words "upon motion of the defendant, of the government, or of its own motion".

MR. ROBINSON: On the latter point if the Committee feels the question is the same as it was when last voted on I see no objection to that, but on the former point I feel the words would be very unfortunate, to have the "order" clause stricken out.

MR. HOLTZOFF: That is a dragnet clause and covers everything. I do not see that it adds anything to it.

MR. ROBINSON: You want to give the defendant

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plenty of room here for making his motion and for securing his relief.

THE CHAIRMAN: I am inclined to agree with your second point, Alex, but not with the first.

MR. HOLTZOFF: I will modify my motion accordingly.

MR. LONGSDORF: I would like to make a suggestion about the headline. I think the headline would better read "Prejudicial Joinder of Offenses or of Defendants; Election or Severance."

MR. ROBINSON: The note to the rule covers "other relief" in the last line.

MR. LONGSDORF: Put that in, but if you want to make the headline descriptive of the content of the rule --

MR. HOLTZOFF: If you make that heading too long you put the rule in the heading.

MR. LONGSDORF: Somebody is going to read this rule with an impression fixed in his mind as to what he gets out of the italicized lines and he has his eyes shut before he gets to the end of the rule.

THE CHAIRMAN: Just put in the words "Effect Of" at the end.

MR. BURNS: Why not say "Effect of Prejudicial Joinder" and so forth?

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MR. YOUNGQUIST: "Relief From Prejudicial Joinder"?

MR. LONGSDORF: That is better.

MR. HOLTZOFF: That is better yet.

MR. McLELLAN: What is it? Going out by consent?

THE CHAIRMAN: By consent in line 5, running into line 6 "upon motion of the defendant, of the government, or of its own motion". Just as we stmuck the same words out in the previous rule.

MR. McLELLAN: Yes, but you have a different question there. They ought to have been stricken out, but because that rule had to do with the setting of the time of the hearing upon a motion. But there are some things which courts cannot do of their own motion and I am not sure that this is not one of them.

MR. DEAN: You raised that point before.

MR. McLELLAN: I do not remember it.

MR. DEAN: That the court would have been reluctant to do it without some kind of indication he could do it on his own motion.

MR. McLELLAN: Yes, and I really doubt the power of the court to do that kind of thing on its own motion.

MR. ROBINSON: In other words, the considerations

are not the same as the last time. I think we better leave it in.

THE CHAIRMAN: Then why not say "upon motion of the party"?

MR. ROBINSON: I would expressly give the power to the court to do it.

THE CHAIRMAN: You want to save that?

MR. ROBINSON: Yes, but if you strike out the words you have not saved it.

THE CHAIRMAN: Then shall we leave the words in?

MR. ROBINSON: Yes.

MR. BURNS: Yes.

MR. HOLTZOFF: Mr. Chairman, on line 8 there ought to be an insert. It is now provided that the court may, as a relief, order an election of counts or grant a severance of defendants. Should it not only be permitted to grant a severance of counts, and insert "or counts"?

MR. WECHSLER: Yes.

THE CHAIRMAN: "Election or severance of counts"?

MR. ROBINSON: The term "severance" is not used correctly in that sense. You speak of severance of defendants but you do not speak of severance of counts according to the best cases I read on it.

MR. HOLTZOFF: What word do you use?

MR. ROBINSON: Election.

MR. HOLTZOFF: With election you compel the Government to elect one or the other, but I want to provide for the contingency where counts are separated and both are saved and a separate trial granted as to each.

MR. ROBINSON: Perhaps we then have to say "a separation of counts"?

MR. WECHSLER: That is all right. It is really

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a separate trial.

MR. YOUNGQUIST: I do not think "separation" is a word of art.

MR. HOLTZOFF: I do not either.

MR. ROBINSON: "Severance of counts" is not a word of art.

THE CHAIRMAN: What you mean is really an election of counts or separate trial of counts?

MR. HOLTZOFF: Why not say so?

MR. YOUNGQUIST: "Election or separate trial"?

THE CHAIRMAN: That, I think then, is the only correction that we have?

MR. HOLTZOFF: That is right.

MR. McLELLAN: Are you going to give the judge the right to dismiss an indictment for that reason - kick the whole indictment out?

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MR. ROBINSON: Why not?

MR. McLELLAN: I do not know. I am just asking.

MR. ROBINSON: Where else could you put the discretion? You have an indictment which is prejudicial and the defenses joined are in both. Why should not the judge have power to dismiss?

MR. WECHSLER: We meet all that by the remedies of separate trial or dismissal of counts, and I don't see any reason for the additional waiver.

MR. ROBINSON: There are lots of Federal cases where they do dismiss.

MR. HOLTZOFF: Because they cannot separate the counts.

MR. McLELLAN: Did you ever know of a case where a judge was permitted to dismiss the whole indictment because it had too many counts in it?

MR. HOLTZOFF: That is not the point here.

MR. McLELLAN: No, but I am asking that question.

MR. ROBINSON: I expect that would be too narrow if you put it that way.

MR. WECHSLER: I move that the words "dismiss an indictment or information" go out and that it read instead "may dismiss one or more counts of an indictment or information".

MR. HOLTZOFF: I second that.

MR. GLUECK: If the indictment consists of only one count then it, in effect, means dismissal of the indictment.

MR. McLELLAN: It ought to if it is as bad as that, by getting too much in one count.

MR. YOUNGQUIST: "Or more" includes all, doesn't it?

THE CHAIRMAN: Would it then read "or of its own motion may dismiss one or more counts of an indictment or information"?

MR. WECHSLER: Why don't we say "may dismiss these offensive counts" or "may dismiss unnecessary counts"?

MR. HOLTZOFF: "objectionable counts"?

MR. WECHSLER: Or may be "objectionable counts". This rule deals with a situation where a defendant may be prejudiced by one of three things; by a joinder of offenses, by a multiplicity of counts or joinder of defendants. That is all the rule deals with.

MR. HOLTZOFF: Why should we ever allow a dismissal of an indictment for violating this rule because the defendant gets all the relief he needs by severance or separate trials?

MR. WECHSLER: I agree with that and I therefore move that "dismiss an indictment or information or one or

more counts thereof" go out and it read "of its own motion order an election of separate trial".

MR. HOLTZOFF: I second the motion.

MR. McLELLAN: I think that is better.

THE CHAIRMAN: You have heard the motion. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed say "No."

(No response.)

THE CHAIRMAN: Carried.

If there are no further questions we are ready to vote on the rule.

MR. SEASONGOOD: Mine is just passing. I do not like the heading you have, "Prejudicial Joinder of Offenses".

THE CHAIRMAN: That is changed to "Relief".

MR. YOUNGQUIST: One thought I had, Mr. Chairman, is that in line 9 you strike out "is required" and substitute "as justice may require".

MR. ROBINSON: "provide whatever other relief as justice may require"?

MR. YOUNGQUIST: No, "provide whatever other relief justice may require".

MR. ROBINSON: That sounds nicer.

MR. YOUNGQUIST: I think it means more.

MR. SETH: What could require anything but justice?

MR. YOUNGQUIST: It might mean dismissal of the whole indictment too, but I think that is all right.

MR. WECHSLER: That reserves it for the most exceptional case though. I still think, Mr. Chairman, we can do better than "whether by a multiplicity of counts". Suppose we revise that to read "If it appears that a defendant or the government may be prejudiced by a joinder of offenses, a multiplicity of counts, or a joinder of defendants in an indictment or information"? Won't that give what we want?

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MR. ROBINSON: No, it will not. We would have to check through these notes and cases and see what we would get.

MR. WECHSLER: All this says is "multiplicity of counts or of defendants".

THE CHAIRMAN: "or otherwise" intended as a dragnet.

MR. YOUNGQUIST: It is much broader than that. You have joinder of offenses and defendants, and joinder of --

MR. WECHSLER: I do not press it.

MR. HOLTZOFF: "or otherwise" does not mean anything additional under the rules of statutory

construction.

MR. WECHSLER: I did not think it dealt with anything but those three pleas. If it does I will withdraw it.

THE CHAIRMAN: Are we ready on the rule with the two amendments? All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

We now come to Rule 14.

MR. HOLTZOFF: I move to modify the last sentence, beginning line 5, and this is by way of phraseology. It speaks now of an indictment being on trial. Of course that is inadvertence.

MR. YOUNGQUIST: I have suggested simply substituting "being tried".

MR. HOLTZOFF: You do not try the indictment. You try the defendant.

MR. YOUNGQUIST: No. You try the defendant.

MR. HOLTZOFF: You try him on an indictment. Here is the suggestion I have: "In such event the procedure shall be the same as if the offenses or the defendants were joined in a single indictment or information."

MR. ROBINSON: Let me try it this time and see what you think of this. I agree with you and Mr. Youngquist it should be changed. "The procedure shall be the same as if", and then substitute for the rest of the sentence this, "the proceeding were under such single indictment or information."

MR. HOLTZOFF: I think that would do it.

MR. WAITE: That seems to fix it up.

MR. HOLTZOFF: Would you mind reading that?

MR. ROBINSON: "The procedure shall be the same as if" and strike out the rest and substitute "the proceeding were under such single indictment or information."

MR. YOUNGQUIST: Wouldn't it be better to say "prosecution"?

MR. HOLTZOFF: I rather object to the use of the word "such" in that way.

MR. ROBINSON: It is right here. We are not using it in the sense of the "same" or "aforesaid". We are using it as referring to the particular type of indictment or information, namely, this type that would seem to combine, and that which could be consolidated.

MR. HOLTZOFF: All right.

THE CHAIRMAN: What about "such prosecution" instead of "proceeding"?

MR. ROBINSON: Is there anything we might leave out if we say "prosecution" instead of "procee ing"?

MR. YOUNGQUIST: This is a trial and certainly part of the prosecution. Will you read that again, please, Jim?

MR. ROBINSON: "The procedure shall be the same as if the prosecution were under such single indictment or information."

MR. GLUECK: Does that affect the number of challenges allowed, for instance?

MR. ROBINSON: No. I cannot see how it would.

MR. GLUECK: Why not say "The procedure thereafter, as well as the rights of the parties, shall be the same" and so forth and so forth?

MR. ROBINSON: The matter of challenges is involved, but I believe this takes care of it clearly.

MR. GLUECK: Does it, without some such inclusion, because you say only the procedure or the prosecution. Why not say "The procedure thereafter, as well as the rights of the parties, shall be the same as if" and so forth?

MR. ROBINSON: Our first trouble is more words unless we gain something by adding them.

MR. GLUECK: Don't we lose something by leaving them out?

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MR. McLELLAN: In that connection may I ask something, because I was thinking about the same thing.

14 Suppose A is the defendant in one indictment, and B is the defendant in another indictment, and the circumstances were such that they could have been indicted together in one indictment. Then the case comes on for trial and A demands all the challenges that the statute gives him. B demands all the challenges that the statute gives him. How many challenges is he going to have? Must they divide the challenges between them?

MR. ROBINSON: We have been expecting that question from you, Judge McLellan, because Massachusetts has, of course, some of such Federal cases going way back to Colonial times on this question of how many challenges. We have a collection of the statutes here, and we also refer to it in the note.

MR. McLELLAN: But what is the answer to that question?

MR. ROBINSON: I think the answer ought to be what it is now in the Federal cases; that they must join in their challenges.

MR. McLELLAN: When they are separately indicted?

MR. ROBINSON: That is all right, but they were mixed up in the same transaction.

MR. HOLTZOFF: You separately indict, but

consolidate for trial.

MR. ROBINSON: The Federal law is clear on that point; that they have to join where they are joint defendants.

MR. McLELLAN: Yes, where the statute says they are joint defendants but they are not separate defendants here; one against A and one against B. Are you going to change that when you say the procedure shall be the same?

MR. ROBINSON: The point is, Judge, as I understand the case, the best case from your Circuit, and other cases referred to here in the notes, as I understand a consolidation is permitted where the transaction is really the same transaction. There would be a waste of the court's time and officials' time to have to conduct two separate trials on a state of facts which are substantially the same. Now then you have got defendant A in indictment No. 1 and you have defendant B in indictment No. 2.

MR. McLELLAN: But you are not providing for the consolidation in this rule at all.

MR. ROBINSON: Oh, pardon me a second. The fact is this: The facts are so united that it means as though it were just one transaction and therefore it should have been possible to join the two indictments in

one indictment. Now you have one indictment, count 1 against defendant A, and count 2 against defendant B.

MR. McLELLAN: An indictment against A and an indictment against B.

MR. ROBINSON: The cases say it amounts to their being the same thing. I can give quotations on that.

MR. YOUNGQUIST: While you are looking that up doesn't it amount to this: The defendants could have been included in one indictment in the first place?

MR. ROBINSON: Yes, exactly.

MR. YOUNGQUIST: The court makes an order, the effect of which is to make a single indictment of what previously was two.

MR. HOLTZOFF: Suppose the court does not do that. Suppose the court consolidates two indictments for trial?

MR. McLELLAN: Leave out the word "consolidate" as that is not a word of art. But the defendants are tried together.

MR. HOLTZOFF: But each of the defendants.

MR. YOUNGQUIST: I am speaking of the rule. The rule says the court may order the indictments to be tried together. Now does that mean they are tried as one indictment?

MR. ROBINSON: That is right.

MR. YOUNGQUIST: Or as if there had been one indictment?

MR. ROBINSON: It is meant to say what it says.

MR. McLELLAN: May I interrupt and ask a question: Do you conceive there is any difference between the consolidation of cases and an order that they be tried together?

MR. ROBINSON: I am not sure I understand your question, Judge. I think I understand both "consolidation" and --

MR. McLELLAN: This does not consolidate the cases but it simply provides they may be tried together.

MR. ROBINSON: Yes, I am getting a bit refreshed on all this. You remember that term "consolidation" was one the Committee decided it would not allow to be stated in those words for the reason that "consolidation" has become an extremely artificial and confusing subject, largely because the Massachusetts case, which I am sorry to say was decided in the Second Circuit when Mr. Justice Oliver Wendell Holmes was a Circuit Judge, Putnam was another Circuit Judge, on the case --

MR. McLELLAN: When he went from the Supreme Court?

MR. ROBINSON: Yes, and a third judge whom I don't remember. It was a divided court; in the Betts case

which is cited here under Rule 14, page 7, and previously - you can get the citation from the notes - the Massachusetts judges there began raising the question of this very matter of the joinder in challenges to jurors. There were two defendants, I believe, in the case, and the judges were inclined to think that following the Massachusetts law there should have been in the trial below a separation in challenges, and so the reversed on that ground, overlooking the fact that the statute on which they were acting largely had been repealed so far as this point of challenges was concerned, and confusing too, it seems to me with due respect, on noticing the case and opinion, and other cases since under it, that they were getting consolidation in civil cases mixed up with consolidation in criminal cases. In civil cases consolidation has at least three different meanings. It does not have those in criminal cases. And the result has been that the Betts case, raising this same point of whether or not defendants joined together, or being tried together in consolidated cases, are entitled each to have his separate challenges, or all to have their challenges together,-- that case has been followed down through a lot of other decisions in other districts, always adding more confusion to the doctrine of consolidation, which is largely the reason

why this Committee voted the term "consolidation" as such an abused term and confusing term that we did not want to use it in these rules, and that was a vote of the Committee, so this rule is drawn with the term "consolidation" left out largely because of that confusion arising there in Massachusetts in the Betts case and coming down in the other cases.

MR. McLELLAN: My suggestion is that you pass the rule, perhaps, without putting in that last sentence.

MR. BURNS: What is the advantage of the last sentence?

MR. ROBINSON: The last sentence is essential. If you don't have that you don't have anything.

MR. HOLTZOFF: Don't you want to make certain that the defendants are indicted separately and the court just orders the indictments tried together and each shall have his own challenges?

MR. McLELLAN: You certainly do.

MR. ROBINSON: In the dissenting opinion in the Betts case the judge called attention to the fact, I think at that time, he had 20 challenges for the offense on which the defendants were charged. He says, in other words, if there are just enough defendants you can prevent justice being done because there would not be enough jurors.

THE CHAIRMAN: That is all changed now with the limitation of the number of jurors.

MR. HOLTZOFF: I do not think it is fair to deprive a man of challenges by joining him with somebody else.

MR. ROBINSON: You cannot join him unless it is the same offense.

MR. HOLTZOFF: So it was up to the United States Attorney to join him?

MR. GLUECK: My objection to this last sentence is that it is not clear on these various issues. We do not know whether the wording, even as amended, means that each defendant shall have the same number of challenges as before.

MR. ROBINSON: Pardon me. I will answer that. He does not have the same.

MR. GLUECK: What does it mean? We do not know whether he should or should not have.

MR. HOLTZOFF: My understanding of this last sentence is, in its present form, if you join different defendants, separately indicted, or, not join but order them tried together, you deprive them of their separate challenges and I don't think you should do that.

MR. GLUECK: I do not think that is our intention.

MR. HOLTZOFF: I don't think it ought to be.

MR. DEAN: I think we should vote on the principle whether we want to do it or not.

THE CHAIRMAN: Mr. Dean moves that in the event of this joinder for trial the individual defendants be allowed their separate challenges?

MR. DEAN: Yes, joinder under this rule.

THE CHAIRMAN: That is for the purpose of getting a principle stated.

MR. HOLTZOFF: I second it.

MR. WAITE: I am seconding it only for discussion as I have a question: As I understand the proposition about this rule it is that if they could have been joined in the same indictment to begin with, and the two indictments are then put together in a single trial, they shall be dealt with as far as challenges are concerned and that sort of thing exactly as though they had been joined in the same indictment to begin with?

MR. ROBINSON: That is right.

MR. WAITE: So they are not deprived of a blessed thing by this procedure. I second the motion in order to vote against it.

MR. ROBINSON: May I read Section 424 of the present Code, Title 26; Section 424:

"When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony the defendant shall be entitled to ten and the United States to six peremptory challenges, and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges, and in all cases where there are several defendants or several plaintiffs the parties on each side shall be deemed a single party for the purposes of all challenges under this section.

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"All challenges, whether to the array or panel or to individual jurors for cause or favor" --

MR. HOLTZOFF: That still does not cover this point.

MR. ROBINSON: That shows that in criminal trials as well as in civil all the parties on one side, that is the defendants on the one side and the United States on the other shall be deemed a single party.

MR. HOLTZOFF: That is only when you have a single case.

MR. McLELLAN: But not in a separate indictment.

MR. ROBINSON: But when you bring them together --

MR. McLELLAN: No you don't. You just try the cases together.

THE CHAIRMAN: Judge McLellan makes the distinction between an actual consolidation, which is a civil matter to make two cases one, and the common instance where there is a suit by a plaintiff against eight or ten insurance companies and the trial of those causes are ordered together because they involve a common fire.

MR. McLELLAN: And in that case the defendant is entitled to his challenges.

MR. DEAN: I vote for this principle because of our rule of joinder. You mean joint defendants, although there has been no joint participation?

MR. HOLTZOFF: The United States Attorney has the privilege of joining them in one indictment if he wants to. If he did not make that choice I do not think the court ought to deprive the defendants of the challenges.

THE CHAIRMAN: You have the question very clearly put. Those in favor of the motion made by Mr. Dean say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: I will call for a show of

hands.

(After a show of hands the Chairman announced the vote to be nine in favor and six opposed.)

THE CHAIRMAN: The motion is carried nine to six.

MR. DEAN: That only covers one of many points of procedure. The challenges happens to be one.

MR. GLUECK: Before you go ahead may I suggest again the following language to cover not only this point but any others that may be involved merely to protect the rights of individual defendants once a case against several is ordered to be tried as one case. In the last sentence "The procedure thereafter, as well as the rights of the parties, shall be the same as if such single indictment or information were on trial." That provision including all rights of the parties is broad enough to cover any other rights.

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MR. HOLTZOFF: No, but you are defeating by that language the motion which has just been carried.

MR. ROBINSON: Let me give you a citation that helps us, I think, Judge McLellan --

MR. HOLTZOFF: We voted on this motion.

MR. ROBINSON: I do not care. We have still got the problem about what we are going to do about challenges. In Kettenbach v. United States, the opinion says this; the effect of consolidation of indictments upon the number of peremptory challenges allowed is determined in these words: "The consolidated indictments having become in legal effect separate counts of the same indictment" -- that is, in one indictment --

THE CHAIRMAN: Jim, you do not need to go any further. If they are consolidated indictments, that follows. But if they are merely indictments joined for trial, that is something entirely different.

MR. ROBINSON: That brings me to this question: Do we have to use the term "consolidation" which this Committee has eliminated in order to get that same effect?

MR. McLELLAN: Why do you want the effect for?

MR. ROBINSON: For the same purposes.

MR. YOUNGQUIST: That is the whole question.

MR. CRANE: May I ask this: If you make a motion to be tried together, is there any objection to the judge consolidating them?

MR. ROBINSON: If you want to go back and use the term "consolidation" --

MR. CRANE: No, I am taking your view of it. But you say "tried together." Now, suppose they are tried together and they are all there in the courtroom and the evidence goes in. Now, what happens? Is it just the formal words we are using? What is consolidation? Is it just a word? Do you say they are going to be tried together, and the next thing, they are going to be consolidated? Now, what is the difference between the two? What is the difference between the two?

THE CHAIRMAN: There is this difference, as I see it, Judge. In a consolidation you get one verdict at the end. If it is several indictments being tried together you will get a series of verdicts.

MR. ROBINSON: I beg your pardon, Arthur, that is not it.

MR. CRANE: You are coming back to what this really means, and it says that the man can join them together or separate them. Why should he separate them or why should he join them? You are back to that. What rule governs consolidation? What rule governs separation?

MR. McLELLAN: The reason I have talked so much about this is because I had this situation once, and you will be ashamed of me when I tell you this: Some people down in Fall River held up a mail man and took away his money, and they were clearly guilty; and there were several indictments, and there were a lot of defendants, and it was perfectly patent to me, because I knew counsel for the defendants, that they were going to try to exhaust our panel by the use of challenges; and the Government made a motion to try the cases together. And I said, "Clearly the cases ought to be tried together. Why shouldn't they be consolidated, gentlemen?" And they finally said they should be. And I said, "All right, then, these cases are consolidated for trial, and together you will have the same challenges as if you were single defendants."

Now, that was a wicked thing to do, but the circumstances warranted it, and that is how I knew the distinction between a consolidation and trying together.

MR. CRANE: Judge, we haven't a thing in here in our rules about the distinction between consolidation and separation; and before you go to work and make changes dependent upon whether it is consolidation or whether it is separation, you, at least, ought to describe those terms. I do not care what you do. I am in

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favor of giving challenges to defendants. But I do not think it should depend upon such an airy thing which we haven't attempted to describe. What is a consolidation and separation? Which is which, and which is it?

MR. BURNS: Could you strike out the last sentence and have this apply only to trial together, which has to do with the convenience of the court, etc., and then possibly have another rule which will define consolidation as resulting in the same situation as though they had been indicted jointly, and then let your challenges depend upon whether it was a trial together - there will be no substantive rights affected - or a consolidation, which would be the same as though they had been indicted jointly.

MR. McLELLAN: Why isn't that pretty good?

MR. YOUNGQUIST: I was wondering, Judge, in view of the illustration you gave us, whether the rules should make provision for the accomplishment of the sinister purposes you mentioned?

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MR. McLELLAN: It was a wicked thing to do, but if you had been there you would have done the same thing. That is the question I am asking, whether these rules should be so framed as to permit that practice.

MR. ROBINSON: That is just what we are trying to do in this rule.

MR. McLELLAN: No, the rule does not say so.

MR. YOUNGQUIST: When it says, Judge, that it shall be the same as if the prosecution were under a single indictment, that does throw the defendants into one group for challenge purposes.

MR. ROBINSON: Exactly.

MR. YOUNGQUIST: That, as I understood it, is the whole purpose of the rule.

MR. ROBINSON: That is right.

MR. YOUNGQUIST: We say they shall be tried together, and then we say what the effect of the trial together is, - that is, that it shall be as though they had all been indicted together.

MR. CRANE: May I ask a question? I am learning something this afternoon about the intricacies of Federal procedure. We do not have anything like this in the State. If these indictments were separate, and an order could be made to try the indictments together, could an order also be made legally to consolidate them? Or, take it this way, dealing with your indictments which you are speaking of as separate indictments, could they, in the first instance, all have been included in one indictment?

THE CHAIRMAN: Surely.

MR. CRANE: Then there is no distinction that

I can see between a consolidation and a separation.

MR. ROBINSON: There is this distinction in the cases that we have to follow. The Federal courts are much more liberal in the rules as to consolidation than they are in the rules as to joinder in one indictment. In other words, they will allow, especially in the Fifth Circuit - it is a minority opinion, really - that is, they will allow different defendants to be indicted on different counts; and count 1 in the indictment may be against A; count 2 in the indictment may be against B, and count 3 may be an indictment against A, B and C. That is, you allow consolidation in cases of that kind in most of the Circuits. But in most of the Circuits they do not allow that kind of a joinder of counts.

MR. CRANE: Shouldn't we cover it by a rule so as to have some uniformity?

MR. ROBINSON: I think we should.

MR. CRANE: I think it is ridiculous for us to sit here and speculate upon what separation is which one court follows and what consolidation is and others do not follow; and we are making rules and saying nothing about it. We are trying to get uniformity. If we are at that impasse let us deal with it. It simply flows from your premise. We should deal with it.

MR. HOLTZOFF: We decided a few moments ago as

to which policy we wanted to follow, and it seems to me, in order to effectuate that policy, we have to drop the second sentence from this rule.

MR. CRANE: When we were talking about it before I had no idea there was such separation.

THE CHAIRMAN: I think what went before is this: Where the district attorney does not know his job and it has to be left to the court to do the consolidating, then the defendant shall have the advantage of multiplicity of challenges. But where the district attorney does know his job and is on the job and indicts them together, the defendants just have one batch of challenges. That is what underlay our decisions.

MR. CRANE: What are we making rules for, deficient district attorneys or efficient ones?

THE CHAIRMAN: Well, maybe we had better reconsider.

MR. DEAN: I think Judge Crane's question is very much in point. Is there any legal distinction between trying the two together and consolidating?

MR. McLELLAN: What is that, Mr. Dean? I could not hear you.

MR. DEAN: As I understood Judge Crane's question, is there any legal difference, in the actual mechanics of the trial, between consolidation and trying together?

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If there is I would like to know what it is.

MR. McLELLAN: You are trying one case when you have consolidation, and you are trying two when you have two cases together.

MR. BURNS: That talks about the results of it. But those flow from a concept of consolidation which strikes me as being artificial and synthetic; and I am asking the question, is there anything about the administration of justice that calls for that kind of a concept? I cannot see it. It seems to me that convenience of the trial is the thing you are aiming at, and the judge has that when you can try the people together, as limited by this rule with the last sentence taken out.

MR. McLELLAN: Can't you conceive of a situation where counsel on one side asked you to order cases tried together, that you might do it in order to save time; but if he asked you to make the two cases one, that you might not do it?

MR. BURNS: I would like to take away the power to make the two cases one. I would like to eliminate that because of its synthetic quality.

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MR. WAITE: Mr. Chairman, I have written a suggestion here which perhaps will bring us together. I have tried to listen to the various ideas to see if I could pick up the threads of it. How would this

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be:

"If the court finds that the charges in two or more indictments or informations could have been joined in a single indictment or information, and that the interests of justice will be served by trying the defendants therein named as though they had been joined in a single indictment or information, he may order that they be so tried."

MR. ROBINSON: That is satisfactory.

MR. McLELLAN: It is satisfactory to Mr. Robinson, but the truth is that the grand jury has not seen fit to unite the defendants in a single indictment.

MR. ROBINSON: Maybe the question has not been before them.

MR. McLELLAN: I do not care whether it has been before them or not. They have not done it. Now, I have a little feeling about it. I do not know whether I can express it; but where a grand jury has said "Here are two cases," I do not think there is anything we can do about it. If the grand jury makes one case of them and indicts them together, that is one thing. But to say that you will treat the case just as if the grand jury had done something it did not do is a little bit against my sense of what is right. I feel that A

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indicted alone, being entitled on that indictment, which is the only one he is concerned with, to a certain number of challenges, ought not to be deprived of his right to challenges because somebody else happens to be indicted and there be an order consolidating the cases. If they are ordered to be tried together I haven't the slightest doubt that each retains his right to challenges.

MR. CRANE: May I ask a question, Mr. Chairman?

THE CHAIRMAN: Yes.

MR. CRANE: Assume, Judge, as an illustration, that two grand juries indicted men separately. Could you or would the court have power to consolidate as distinguished from separate trials? Stop and think.

MR. McLELLAN: I can answer that by saying that I don't know.

MR. CRANE: That is just it.

MR. ROBINSON: The statute squarely says so, doesn't it? 18557.

MR. SEASONGOOD: What is wrong with Judge Crane's suggestion? Do you want consolidation or don't you? If you want consolidation, why don't you say they may be joined together in the trial, but the right to challenges should be preserved.

MR. ROBINSON: Here is 18557. It reads: "Joinder of Charges: When there are several

charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

MR. DEAN: That is a case of a single defendant. That is only one defendant.

MR. CRANE: If it should happen, as a district attorney has a right to do, and he is an efficient district attorney, such as the Chairman has selected as an example, and you have got three or four or ten defendants all in one indictment, and it is legal, does our rule provide that they have to divide the challenges?

MR. HOLTZOFF: No.

MR. McLELLAN: They must exercise them jointly. If they cannot agree on them they do not get them.

MR. CRANE: Then what is all the fuss about it when you try them together? Let us get to the realities of it. I will do whatever anybody wants, but, I will say this, let us clear about it. If in one indictment there are ten men charged with the same offense, and by our rule those ten men have to join in a challenge,

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it is just as unjust as it is when you consolidate indictments. Let us change that rule then. If men are tried together by a joinder or having indictments tried as one indictment, and then they are entitled to several challenges, the rule applies, in all equity and justice and fairness just the same as if they are all embodied in one indictment.

MR. ROBINSON: That statute I read needs to be supplemented --

MR. CRANE: Just a minute. Isn't it fair, if you have got separate indictments, you have got a right to consolidate them, and you have got a right to try them; and you are saying here in all fairness and justice they should have separate challenges, - isn't it just as fair and isn't it just as right that they should have those separate challenges when they are all put in one indictment?

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MR. McLELLAN: Yes; but when that first indictment against A came out of the grand jury he had a right to his 10 challenges if he were put to trial.

MR. CRANE: They ought to change the fundamental rule. It is unjust and unfair.

MR. McLELLAN: It seems to me by consolidating by an order to try the cases together you are taking away from A, who is a single defendant in an indictment, the

right to those challenges. If you want to do it and risk it, it is all right. I have talked too much about it already.

THE CHAIRMAN: If the Chairman may speak again, we have a different situation that prevails when an individual plaintiff brings a suit on the civil side. But the right of the state to go ahead and try this man goes back to the grand jury action, which is against this one man individually. Then you go to the next term of court and another grand jury brings in an indictment against another fellow, and it may even bring a third grand jury into the thing. Now, those successive grand juries might have been unwilling, for one reason or another, to have indicted A, B and C together; and I do not think it should be in the power of the district attorney at a later date to do it, or to empower the court to do it, except for convenience of trial because of the common witnesses that may be involved, and whatever rights they had at the time of their indictment ought to be preserved to them.

MR. CRANE: I will take everything you say, and I will agree with it, but doesn't the same thing apply if it were all put in one indictment by one grand jury? What is the reason back of it?

THE CHAIRMAN: There is a sound reason back of

that. Take the oil indictments out in Wisconsin where there were 300-odd attorneys and I don't know how many individual defendants. If they had all had their challenges you could not have had a jury.

MR. CRANE: That is just exactly why the rule is adopted now when they join them. Suppose every one of those defendants had a separate indictment against him, as he could have from the law, and then they said for convenience we will join them, what comes to your mind?

THE CHAIRMAN: If they indicted those men out there separately and then wanted to join 60 or 70 or 80, or how many there were, for trial, I think counsel could have made a very sound case against a joinder because --

MR. CRANE: Now you are coming back to what the judge should do.

THE CHAIRMAN: -- because of the fact that the district attorney got separate indictments, and perhaps he could not get a joint indictment.

MR. CRANE: You are coming back to what the judge should do. If the judge is in error, of course, that is not our fault. But the reason applies just as much in one case as in the other. I do not see how you can answer it.

THE CHAIRMAN: Is there any law for consolidating

indictments against different defendants?

MR. ROBINSON: Oh, yes, by the case law. Plenty of law.

MR. McLELLAN: But it is subject to limitations that can't be stated in words. There are many cases where a judge would be warranted, in the exercise of his discretion, in ordering cases to be tried together which he would not be warranted in consolidating. But whichever view is right there is something ailing with the rule.

MR. CRANE: I have no objection. I do not want you to think I am opposing. I want to make our rule sensible. If you want to say that if there had been separate indictments and if they are tried together each is to preserve his challenges, I have no objection to it. I think that is all right. But I am only saying this. Do not take the absurd position - excuse my language - the absurd position by saying that if they are consolidated, however, that does not apply. When you do that, then it is ridiculous, because we have then got to explain what consolidation is as distinguished from trying them together.

MR. YOUNGQUIST: In order to bring this to a head, Mr. Chairman, and in line with the vote that was taken, I would suggest in behalf of the opposition, or,

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rather, I would make this motion on behalf of the opposition, that there be substituted for the last sentence the following:

"The procedure and the rights of the defendants shall in all other respects be the same as if the indictments or informations were tried separately."

I think that would cover it.

THE CHAIRMAN: That covers the prevailing philosophy.

MR. HOLTZOFF: May we have it again?

THE CHAIRMAN: Yes.

MR. YOUNGQUIST: "The procedure and the rights of the defendants shall in all other respects be the same as if the indictments or informations were tried separately."

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MR. BURNS: This is in addition?

MR. YOUNGQUIST: No, a substitution for the last sentence.

MR. BURNS: What is the antecedent to the word "other"?

MR. YOUNGQUIST: Tried together.

MR. DEAN: May I speak in behalf of that motion? It seems to me you could get this sort of a situation once in a while. Now, our joinder rule as to defendants is very broad. You can join men

who are not jointly participating if they are in the same series of transactions. Now, take the illustration of this Murder, Inc. in Brooklyn where you had a whole series of murders. In one sense it was probably a series of transactions. They were all separate murders performed by certain cliques out of the big group. Now, in his discretion and out of a sense of fairness I can see a prosecutor saying, "It would be unfair - although by the joinder rule I could do it - it would be unfair to join these men in the same indictment, because everything that goes against one goes against both." So he separates them for trial. Then he comes up before the judge, and the judge really takes your position. He consolidates them. And that is a situation where the judge should not consolidate them, for reasons of fairness. Now, if the judge does do it, I do not know what action you can take.

MR. CRANE: I agree with you on that. I am saying this. What is consolidation? It is just a word.

MR. DEAN: I am assuming that "consolidation" as used means the same as joinder.

MR. CRANE: I do not see anything but a myth and a ghost. What is consolidation? It is the scratch of a pen. The actual reality is nothing different from

trying together. But I am saying, let us be fair, or, at least, have it in the notes, if it applies to the same as consolidation, that there is no distinction under our rules between consolidation and trying people together, then we are not dealing with realities; we are dealing with shams.

MR. DEAN: I agree. I do not see any difference between consolidation and joint trial, or consolidation and trial together.

MR. BURNS: Before the question, will it be understood that there will be in the notes a statement to the effect that consolidation, as a technical concept, having significance quite apart from the reality of trial together, is not looked upon as having any vital force in these rules?

MR. DEAN: I think it should be.

MR. McLELLAN: Look at your rules, Judge. It says that the judge may order the cases tried together and that the procedure shall be the same as if they had been consolidated.

MR. HOLTZOFF: No, the other way.

MR. McLELLAN: You are talking about Mr. Youngquist's motion?

MR. HOLTZOFF: Yes.

MR. ROBINSON: Now, Mr. Youngquist's motion

included your point about multiplicity.

MR. McLELLAN: I know that it did.

MR. ROBINSON: Well, I beg your pardon. I wanted to say, it goes far beyond your point of multiplicity of challenges, multiplying the number of challenges by the number of defendants. He is saying after you have consolidated them you just unconsolidate them, and you do not get anywhere by what you have done.

MR. YOUNGQUIST: I undertook to incorporate in the amendment the philosophy of the vote that we recently took that the joint trial shall be only for the convenience of presenting the evidence in one case.

MR. ROBINSON: It is no convenience --

MR. YOUNGQUIST: You will have one trial. I am not arguing for it, you understand, Jim. But for all other purposes, for purposes of challenges and motions, and appeals, and everything else, each defendant goes his own way. I disagree with it completely; but that is what you have got to do in order to carry out the idea behind that vote.

MR. ROBINSON: You would not call it reductio ad absurdum?

MR. YOUNGQUIST: No.

THE CHAIRMAN: You all have the motion, I think, clearly before you.

MR. GLUECK: I would like to ask, Mr. Chairman, why not make that read "the rights of the parties", because the prosecutor has some rights here too.

MR. YOUNGQUIST: All right.

THE CHAIRMAN: You accept that, Mr. Youngquist?

MR. YOUNGQUIST: Yes.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: A show of hands is indicated.

(After a show of hands the Chairman announced the vote to be five in favor; six opposed.)

THE CHAIRMAN: The motion is lost.

MR. CRANE: Mr. Chairman, tell me, if you had carried that motion, and you had had these men all having these challenges and tried them all at once - now you have got 30 or 40 or 50 challenges, but if they had been written on one paper instead of on five they would not have had them - doesn't that seem silly?

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THE CHAIRMAN: Not to me when I bear in mind that these indictments have to originate through a grand jury.

MR. CRANE: Well, what is a grand jury?

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You know if you go to bring the vote in, they vote. There is no other person there except the district attorney, and they come in and he talks and they listen.

THE CHAIRMAN: Suppose, as a practical matter, the district attorney did not dare to ask that grand jury for a joint indictment, but he preferred to get them seriatim, and then, having them put through that way he then wanted them all brought together: Now, it seems to me he ought not to have that right to do that. True, there is no objection to consolidating them for purposes of trial, but they should remain on the docket as individual cases, and verdicts should be entered in those cases, and appeals separately conducted. Now, it would be a very unfortunate thing for, say, a pretty decent citizen, who is brought in, say, on the fifth indictment, to be joined with four scoundrels; whereas if the district attorney had tried to get an indictment against the fifth man with the other four he probably never could have got it. Now, those situations arise.

MR. ROBINSON: Many of the cases, though, Mr. Chairman, show that the only reason why the second and third and fourth defendants were not indicted with the first is because they got away faster, before the grand jury could get them. They got away.

THE CHAIRMAN: There is no problem there. You can have a superseding indictment and bring them all in, if the district attorney dared to do that.

MR. ROBINSON: Well, the statute of limitations may run on part of them. It makes quite a mess.

MR. CRANE: Well, as long as you have heard me, and as long as I have made it plain to you, showing you what you are doing, I will go along with it.

MR. BURNS: Jim, is it your theory, where in any case by the terms of your rules they can be tried together, they must be considered to be consolidated in the sense that there is just one trial?

MR. ROBINSON: That is not the Federal Criminal Law in the Federal decisions. You are talking Civil Law.

THE CHAIRMAN: You mean when you consolidate them, they are still separate cases?

MR. ROBINSON: They are not one case.

MR. McLELLAN: That is just what consolidation is. It makes them as if they were one case.

MR. ROBINSON: It is a kind of a merger. It is a ghostly sort of thing.

MR. YOUNGQUIST: I want to make another motion, having lost my last one, in order that we may dispose of this and proceed.

I move that the following be substituted for the last sentence:

"The procedure shall be the same as if the prosecution were under such single indictment or information." That is the language used by the Reporter a while ago.

MR. WAITE: I support it.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: A show of hands.

(After a show of hands the Chairman announced the vote to be eight in favor; seven opposed.)

THE CHAIRMAN: Carried. Eight to seven.

Are you ready for the question on the entire --

MR. McLELLAN: Do I understand we have passed this rule?

THE CHAIRMAN: Yes.

MR. SETH: In line 3 the word "or" I think should be "and". Rule 14.

MR. HOLTZOFF: I think this ought to be "or". This is two kinds of cases, one where you have multiple offenses against the same defendant, and one where you

have multiple defendants.

MR. SETH: It may be both then.

MR. ROBINSON: Then you have to use "and/or". That reminds of a rule in 52 which is good for a half day's argument when we get to it. We are trying to avoid this "and/or" controversy. There are many places where we need "and/or", but I think this is a point where we better use the "or".

MR. SETH: I do not think so.

MR. DEAN: Perhaps it would be better to have two sentences.

MR. ROBINSON: I do not think so. That is the way it is, and it has been passed by the Committee. I would like to have it stay that way for at least a little while.

MR. DEAN: I do not think that issue that Mr. Seth raised has been raised before.

MR. HOLTZOFF: I think you lose the contingency if you change it.

MR. ROBINSON: Look it over and read the notes and the cases cited before you decide.

MR. SETH: I have read them, and I think it should be "and".

MR. YOUNGQUIST: I think you had better add the words "or both" at the end of that line.

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MR. ROBINSON: That is better.

MR. HOLTZOFF: That is better. Keep the word "or" and then add "both".

MR. YOUNGQUIST: That is what you must do.

MR. SEASONGOOD: What is going on?

THE CHAIRMAN: Mr. Seth moves in line 3 of Rule 14, at the end of the line, to add the words "or both".

Is that seconded?

MR. HOLTZOFF: I second it.

THE CHAIRMAN: It is accepted by consent and made part of the preceding motion.

Rule 15(a).

MR. SEASONGOOD: I do not want to fuss about it, but it would not be correct, would it, to say "two or more indictments or both"? "Both" would mean two or more indictments and two or more informations.

MR. ROBINSON: You are in the wrong line, aren't you?

MR. SEASONGOOD: No, coming back to lines 2 and 3. "And it may order two or more indictments or two or more informations, or both."

MR. ROBINSON: "Tried together." You are on the wrong line.

MR. SEASONGOOD: I am bringing something else

up. "Both" can only refer to what has preceded, and what has preceded is two or more indictments and two or more informations.

MR. HOLTZOFF: I think the "or both" there is used to indicate that you can join an information or an indictment.

MR. SEASONGOOD: Surely.

MR. HOLTZOFF: How can we change that?

MR. SEASONGOOD: I do not know. Let the Committee on Style do it. It is not a correct statement.

MR. ROBINSON: That is the closest you can get to it, Murray.

THE CHAIRMAN: Will you have that in mind, Mr. Youngquist, for the Committee on Style?

MR. YOUNGQUIST: Yes.

MR. HOLTZOFF: I move its adoption, Mr. Chairman.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Carried.

Rule 15 (a).

MR. WECHSLER: I would like to stick to that, Mr. Chairman. I would like to move that Rule 15 (a) be eliminated entirely. I think that is in accord with the Reporter's conclusion that there is no basis

for it, no need for it; and what troubles me even more is that in having a single rule on pleading special matters which exists only because it is in the Civil Rules, there may be adverse implications with respect to other pleas about special matters that we have not touched. Therefore I think the sound solution is to eliminate the whole thing.

MR. BURNS: I second the motion.

MR. ROBINSON: I say it is open to question, though I would rather not take the position that it should be thrown out here --

MR. HOLTZOFF: I raise the question.

THE CHAIRMAN: It is moved and seconded that Rule 15 (a) be stricken out.

All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Rule 15 (b).

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MR. WECHSLER: Same motion.

MR. BURNS: Seconded.

THE CHAIRMAN: Those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Rule 16 apparently is --

MR. WECHSLER: I move its adoption.

MR. ROBINSON: It is the same one we had before.

MR. HOLTZOFF: Yes, we had that before. That has not been changed. That is 16, the pre-trial rule.

MR. SEASONGOOD: You say the defendant "may be present" in line 4. Oughtn't he have to be present, on the theory, that he might say he was not present at the trial? This is part of the trial.

MR. HOLTZOFF: I don't think that is part of the trial.

MR. SEASONGOOD: Why, surely, it is.

MR. HOLTZOFF: Pre-trial.

MR. BURNS: It may have some of the most important incidents, which may eliminate a whole defense.

MR. HOLTZOFF: That is like a conference at which a stipulation is agreed on. The defendant does not have to be present on an occasion of that kind, unless

he wants to.

MR. BURNS: If this were not dignified by rule, you could say it could be done but it wasn't part of the trial, but where you make it a part of the pre-trial procedure, query, if he should not be present?

MR. YOUNGQUIST: I hadn't thought it was so, but I am wondering whether it is not, because it is provided that the order to be entered - the order should be a certificate or something other than order - at the pre-trial conference shall control the subsequent course of the proceedings.

MR. HOLTZOFF: Isn't that the same thing as a motion, or the disposition of a motion. At the disposition of a motion the defendant does not have to be present, although a motion is part of the trial proceedings.

MR. YOUNGQUIST: No, I shouldn't think so. Suppose there is a stipulation as to what the evidence will be on some certain point at issue? When the defendant comes to trial, no evidence need be introduced except the court's order or certificate. That is part of the trial and it becomes part of the trial only by reason of the pre-trial conference.

MR. WECHSLER: Aaron, suppose it said, "at which the defendant shall have the right to be present"?

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Would that meet your point? He would not have to be there.

MR. BURNS: Yes.

MR. SEASONGOOD: "May" is the same.

MR. YOUNGQUIST: "May" is the same thing.

MR. HOLTZOFF: Suppose there are a number of defendants scattered all over the country and you want to have a pre-trial conference? Shall you require all defendants to appear and say that unless they do appear, you cannot have a pre-trial conference?

THE CHAIRMAN: They can certainly waive.

MR. YOUNGQUIST: I suppose they could waive it.

MR. HOLTZOFF: Well, if they could waive it, then "shall have the right to be present" is all you need and not "shall be present".

MR. BURNS: Make that in the form of a motion, "shall have the right".

MR. WECHSLER: I move the substitution of the words "shall have the right to" for the word "may" on line 4.

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. McLELLAN: May the invitation extended to the defendant be declined?

MR. WECHSLER: Yes.

MR. SEASONGOOD: That is why we said "invite".

MR. DEAN: I would like to raise a question, Mr. Chairman, as to what we mean by this "action taken at the conference". By whom is that action taken? Does that contemplate joint action by counsel for both sides and the judge?

MR. HOLTZOFF: Yes.

MR. DEAN: Or does that include orders of the judge alone without consent of counsel?

MR. HOLTZOFF: On consent of counsel. Everything done at the pre-trial conference is done by the consent of all the parties.

MR. DEAN: Let me read that. "The court shall make an order, which recites the action taken at the conference and the agreements made by the parties". Do we mean something different by "the agreement of the parties" and the action taken by counsel?

MR. HOLTZOFF: No, we don't.

MR. WECHSLER: Wouldn't that be met by striking "the action taken at the conference"?

MR. DEAN: I think it would.

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MR. WECHSLER: Might not the judge rule that you should not have more than three character witnesses, or something, without agreement of the parties?

MR. DEAN: I think he might.

MR. WECHSLER: At the pre-trial conference.

MR. DEAN: I think that disposes of the difficulty, under this rule, of making orders without the consent of counsel which go beyond his present power to make.

MR. BURNS: Suppose he made an order that "we won't permit the Government to have more than five victims in a mail fraud case; we won't permit the defendant to have more than five character witnesses"? Now, that would be taken down and there would be a certificate to that, and if the defendant tried to put in a sixth character witness, there would be a ruling in connection with that character witness that would be reviewable.

MR. DEAN: Except I imagine the other side, the Government, would come back and say "But in your pre-trial procedure you have waived the right to take such an exception at the trial, because you have given to the court here the right to make any order relating to the four above-named subjects".

MR. BURNS: Have you?

MR. DEAN: Yes.

MR. BURNS: Is there anything in our rules that says you have to waive your right to any action taken at the pre-trial conference?

MR. HOLTZOFF: It is subject to review, of course, if there is a discretion.

MR. BURNS: Is it subject to review if you have
2 empowered him to take the action in the four above-named --

MR. HOLTZOFF: Yes, certainly, because every order of court is subject to review in case of discretion.

MR. YOUNGQUIST: But he cannot make the order unless you accept the invitation.

MR. HOLTZOFF: By accepting the invitation you do not waive your right to object to the order.

MR. YOUNGQUIST: That is the question Mr. Dean raises, whether you don't.

THE CHAIRMAN: Aren't you on safe ground, as in a civil case, if you confine this order to reciting the agreement itself?

MR. DEAN: That is my suggestion.

MR. YOUNGQUIST: Isn't that enough?

MR. DEAN: I think it is plenty.

MR. BURNS: Then you would strike out "the action taken"?

MR. DEAN: "The court shall make an order, which

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recites the agreement".

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: Should we use the word "order" there? Well, I do not suppose it makes any difference.

MR. DEAN: That is what they get used to doing.

THE CHAIRMAN: Is there a question?

MR. YOUNGQUIST: No; I merely asked whether we should use the word "order" or "certificate".

MR. HOLTZOFF: It is an order in the civil rules.

THE CHAIRMAN: The motion is to strike out, lines 13 and 14, the words "the action taken at the conference and". All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

The motion is to adopt Rule 16 as amended.

MR. McLELLAN: May I ask one question without taking too much time? Suppose the judge determines, in the light of (3) above, that there shall be not more than 20 character witnesses? That would not go into this order, because that would not be an agreement of the parties, would it?

MR. DEAN: It would, if they agree.

MR. McLELLAN: Yes, if they agreed, but if he wanted to say "Well now, I think 30 character witnesses are all that either side should call," that the defendant, in the first instance, would call, or the other side, why, that would not get in unless they agreed to it.

MR. DEAN: I think that is the way it should read. Of course, discretion is the better part of valor and you probably would not call over 30, if the judge suggested it.

MR. McLELLAN: I had 50 in Philadelphia last summer.

THE CHAIRMAN: There are very few cases in which they produce the whole Sunday School class.

MR. HOLTZOFF: They apparently helped out a little.

MR. McLELLAN: Yes, they got some of them.

MR. GLUECK: Mr. Chairman, is it clear what you mean by (4) in lines 11 and 12? Isn't that rather broad?

THE CHAIRMAN: That is a catch-all, dragnet, whatever you want to call it. There are a thousand things that may come up; you might want to agree on a surveyor or appraiser, or a thousand other things.

All those in favor of the motion on the rule as amended say "Aye."

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(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

MR. WECHSLER: Was (4) changed?

THE CHAIRMAN: No.

(Short recess.)

THE CHAIRMAN: All right, gentlemen, the motion is made and seconded to pass Rule 17, is that right?

MR. ROBINSON: I believe that is right.

MR. GLUECK: I think there is something there I would like to call to the attention of the Committee. In line 3, "a continuing offense". Perhaps that should be changed so that the rule could apply to offenses which were not continuing but were ubiquitous, if I may use that word, being carried on in more than one place at the same time. Wouldn't you, in that situation, want to specify the place as well as the time? Isn't the rule incomplete unless you do that?

MR. MEDALIE: Instead of saying, "other than a continuing offense", I would suggest you say "an offense which it is charged to have been committed at one time and place".

MR. YOUNGQUIST: What about a conspiracy?

MR. MEDALIE: Of course, you could not give an

alibi on a conspiracy; you are all over the lot then, you are conspiring everywhere, from the cellar to the roof, indoors and out, and in every State of the Union.

MR. GLUECK: You can have an alibi as to an overt act.

MR. MEDALIE: Isn't that pressing it a little too far? Isn't it enough to limit this to a post office robbery and the like?

I move that the language be changed to read, on line 3, "an offense alleged to have been committed at a single time and place".

MR. WECHSLER: Seconded.

THE CHAIRMAN: Any discussion? All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

Are there any further suggestions with respect to Rule 17?

MR. YOUNGQUIST: I have one question, Mr. Chairman. In line 12 - 11 and 12 - "The court shall grant the motion except for cause shown." Does this rule contemplate that the defendant must, as a part of his motion, disclose his alibi?

MR. ROBINSON: No. Doesn't say so, does it?

MR. YOUNGQUIST: Well, I haven't seen it, so I don't know. What I was trying to guard against was the possibility that after he has disclosed his alibi, the court exercised discretion and refused to require the Government to show its hand.

MR. ROBINSON: This is put in, you know, Aaron, on your suggestion that it ought to go through the court.

MR. YOUNGQUIST: Oh, yes, that is all right.

MR. ROBINSON: I do not believe there would be any need to require the defendant to disclose his alibi --

MR. YOUNGQUIST: Oh, no. It's all right, the Government specifies first. It is all taken care of.

MR. ROBINSON: Yes.

MR. WECHSLER: I have this question, Mr. Chairman. The words "place and time the Government may propose to establish". Shouldn't that be "place and time alleged"?

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MR. ROBINSON: No, that is not what the defendant wants to know.

MR. YOUNGQUIST: He has that.

MR. ROBINSON: No, but it is put in this way that

if he plans to offer evidence that he was not present at whatever time and place the Government may propose to establish, now, shouldn't he be permitted to assume at the start that the time and place are those alleged by the indictment?

MR. SETH: That may be in one district which may cover several thousand acres.

MR. ROBINSON: But he does not know whether to plan to prove that he wasn't where the Government proposes to prove he was unless he has some initial information as to what the Government's proposal is.

MR. SEASONGOOD: We assume he is an innocent man. He knows he wasn't there at the commission of the crime.

MR. HOLTZOFF: Let me put it this way, the Government alleges that in the Southern District of New York on January 1, 1943 the defendant did so and so. Now, he wants to ask where in the Southern District of New York and at what hour and, if possible, what minute you claim this to have happened.

MR. ROBINSON: That is right, he has to ask for those details, and that is what the Government proposes to establish, isn't it, as its venue and date? Isn't that right, Herbert?

MR. WECHSLER: I must be missing a trick.

I thought there ought to be something in here that permits him at the start to find out what the Government intends to prove. Can he get that by a bill of particulars?

MR. MEDALIE: This comes to a bill of particulars. This is a kind of bill of particulars. Let me put it this way, Herbert: The defendant knows that he committed the crime at the corner of Pearl and Lafayette Streets on January 1 at 4 o'clock, and he wants to pin the Government down to that because he has his alibi ready for January 1 at 4 o'clock, as to Pearl and Lafayette Streets. So the Government says, "All right, if you want to do that, tell us where you were."

MR. WECHSLER: Suppose he has not committed the crime and doesn't remember where he was?

MR. HOLTZOFF: Oh, he will remember.

THE CHAIRMAN: All those in favor of Rule 17 as amended say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

MR. SEASONGOOD: I just wanted to raise a question, which I did not get to.

THE CHAIRMAN: Pardon me.

MR. SEASONGOOD: It does not amount to anything. Lines 9 and 11, you say the motion has to be made at the time of the arraignment unless the court order gives you more time. Isn't that too summary? Can you make that motion right when you are arraigned?

MR. ROBINSON: You will assume the court is fair and reasonable and will suggest that more time may be taken.

THE CHAIRMAN: Isn't that a bit early?

MR. SEASONGOOD: It seems to me, you get called up there and they tell you the substance of the indictment; you don't even know what is in the indictment, and you have to make the motion.

THE CHAIRMAN: Why fix that as the normal time?

MR. SEASONGOOD: That is what I have in mind.

MR. ROBINSON: Do you want to fix it ten days after arraignment?

MR. SEASONGOOD: No.

MR. HOLTZOFF: May I suggest this, why not use the same phrase as in Rule 12?

MR. MEDALIE: That is the normal time for all motions.

MR. BURNS: "Within a reasonable time after arraignment"?

MR. MEDALIE: Why do we need make any provision?

I move to strike out that sentence.

MR. DEAN: The defendant is going to make it whenever he wants to get the information. He is the first mover.

MR. YOUNGQUIST: We have to guard against this: He may make the motion a few hours before the trial.

MR. ROBINSON: That is it.

MR. YOUNGQUIST: Wouldn't it do to simply say, "motion shall be made at such time as the court may permit"? Would that meet your point?

MR. SEASONGOOD: Yes, or "at the court's direction".

MR. DEAN: You say, "may be made at such time as the court will permit". It might foreclose him from making it.

MR. HOLTZOFF: Why not use the same phrase as in Rule 12 for all the other motions as to the time when the motion shall be made? We say there, "motion shall be made at arraignment or at such other time as the court or these rules provided". Rule 17 is, in its present form, practically the same.

MR. ROBINSON: In order to have a uniform time. That is the idea.

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THE CHAIRMAN: Then why do we say it? Because this sort of carries with it to my mind the feeling that

the court should say, "You should have made it at arraignment," and put the burden on him for not making it.

MR. HOLTZOFF: Defense counsel will ask at the arraignment for permission to make any motions that he sees fit and the court will grant him a certain time.

MR. ROBINSON: Yes.

THE CHAIRMAN: That is so in an anti-trust case, where you have counsel around, but I am thinking of many cases where they do not know of their rights yet.

MR. YOUNGQUIST: The alibi would be pertinent to those cases rather than to the others.

MR. SEASONGOOD: Couldn't you say, "The motion shall be made in such time as the court directs"?

MR. YOUNGQUIST: That might be more unreasonable, that is, if you are relying on the reasonableness and fairness of the judge. You would not improve this sentence by that, would you?

THE CHAIRMAN: Why not rely on Rule 12 and strike it, so this is not singled out?

MR. YOUNGQUIST: I so move.

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: Any remarks? If not, all those in favor of the motion say "Aye" - Mr. McLellan?

MR. McLELLAN: Mr. Chairman, I do not suppose

I am entitled to, but I had trouble just as Mr. Wechsler did with that. I do not know how the defendant knows what time and place the Government proposes to show. That first sentence there is just meaningless to us.

MR. MEDALIE: I have been laughing at it ever since. It is funny. The defendant makes a motion in which he offers to show that, if you will tell him at whatever time and place you are going to establish the offense was committed, he wasn't there.

MR. McLELLAN: In my opinion it is perfectly absurd.

MR. ROBINSON: Oh, no.

MR. HOLTZOFF: All he wants to do is take a position.

MR. WECHSLER: I feel vindicated. Thank you, Judge.

MR. SEASONGOOD: If he is not guilty --

MR. McLELLAN: Why not say, if the defendant is not going to confess guilt, he must do so and so?

MR. DEAN: He wants to stand trial.

MR. McLELLAN: But how does he know what the Government proposes to fix as the time and place?

MR. DEAN: He just knows he wasn't there, whatever time and place they fix.

MR. ROBINSON: That is all. That is fair enough.

MR. MEDALIE: I think we can meet what the Judge is asking about in very simple language. Where the indictment or information alleges the offense to have been committed at a single time and place, the defendant may move the court to order the Government, etc. That takes care of all that.

MR. ROBINSON: We had that in a former draft, George. I don't know how many drafts back.

MR. MEDALIE: What, the language?

MR. ROBINSON: That you are using.

MR. MEDALIE: The language that later caused the derision?

MR. ROBINSON: The language causes derision just as it aroused derision when it was first suggested, if you will think it through.

MR. SETH: May I call your attention to this, and this may throw some light on it: The defendant makes his motion. Thereupon the Government is required to specify the time and place that it intends to prove. Thereafter the defendant may do one of two things: He may submit a statement of the time and place he was, in which event he may admit evidence; he may do nothing and, in that event, he may proffer evidence of alibi only if the court lets him, because - doesn't that really answer it? - he is asking the court upon his motion to specify the

time and place, and after he has that information, he makes his choice as to whether he does anything or not.

MR. BURNS: Wasn't that Mr. Medalie's suggestion, that you take out all this matter which has to do with his offering evidence that he was not present at whatever time and place?

MR. MEDALIE: Yes.

MR. HOLTZOFF: Leave out lines 4, 5 and 6 and the first three words on line 7.

MR. WECHSLER: I agree; strike out from "plans" to "time" on 7.

MR. HOLTZOFF: Yes.

MR. MEDALIE: Start at the beginning.

MR. HOLTZOFF: Then it would read, "If a defendant is charged in an indictment or information with an offense alleged to have been committed at a single time and place, he may move the court to order the Government to specify" --

MR. MEDALIE: That is what I suggested.

MR. DEAN: That seems useless language because every indictment will charge a time and place. We so prescribe.

MR. MEDALIE: "A single time and place".

MR. DEAN: Oh, I see.

MR. ROBINSON: That will be just the way it was back in our May 1942 draft, which we rejected.

MR. HOLTZOFF: Maybe it is not a good idea to go back to that.

MR. ROBINSON: Maybe it is not.

MR. DEAN: Suppose the indictment does not state a single time?

MR. McLELLAN: It is rare, the kind of offense you are referring to, the one that has double time. In the case of a single time and place, such as in the case of murder, the defendant does not know the time and place alleged by the Government --

MR. HOLTZOFF: He does not know unless he is told.

MR. ROBINSON: Of course he does. You are charged with murder, don't you know whether you killed the fellow or not?

MR. HOLTZOFF: Yes, but I don't know whether I was at the scene of the murder or not.

MR. ROBINSON: A murder couldn't take place under your nose without knowing about it.

MR. MEDALIE: Mr. Chairman, may I point out that one may have been present at the time and place where a crime was committed and be innocent for a number

of reasons. One, he may not have participatel; secondly, he may have acted in self-defense, like justifiable homicide.

MR. DEAN: This really does not apply to him, if he plans to prove he wasn't there.

MR. HOLTZOFF: That is it.

MR. MEDALIE: The rule would apply. In that case he would say, "Sure, I was there, and I saw John Smith killed." So your illustration does not hold.

MR. HOLTZOFF: But I did not, because he was shooting at me.

MR. YOUNGQUIST: Was Alex's motion to strike out all of line 3 except the first two words, with the substitution we have, and all of lines 4, 5, and 6 and four words on line 7?

MR. HOLTZOFF: Yes.

MR. YOUNGQUIST: I second it.

THE CHAIRMAN: Any discussion?

MR. HOLTZOFF: Then we could also omit the words in the second line, "in an indictment or information", which are surplusage.

MR. YOUNGQUIST: In the second line?

MR. HOLTZOFF: Yes, "in an indictment or information", and just say "If a defendant is charged" --

MR. DEAN: Could you state the whole change again?

MR. HOLTZOFF: "If a defendant is charged with an offense alleged to have been committed at a single time and place, he may move the court to order the Government to specify in writing as exactly as possible the place and time which it proposes to establish".

MR. DEAN: My trouble is with that "single time and place". You are moving a motor vehicle in interstate commerce, is that single time and place?

MR. HOLTZOFF: No, but I do not think the alibi defense would be applicable.

MR. DEAN: Oh, yes. He picks up the car at one point and takes it to another.

I have a suggestion, if you want to get rid of the objectionable language in the beginning. Why don't you start down on line 7 and simply start out, "A defendant charged with a continuing offense may move the court to order the Government to specify in writing as exactly as possible the time and place where it is proposed to establish that the crime was committed", and then go on, "The court shall grant the motion except for cause shown." Leave out all the first six lines.

MR. ROBINSON: Because you will have all the United States attorneys in the country opposing this

rule.

MR. DEAN: Why?

MR. ROBINSON: It would just be requiring a bill of particulars.

MR. BURNS: No; if he made that move, he has to go on, and he has to specify. That is the thing that will limit it.

MR. ROBINSON: But you start off in a kind of bob-tail way. You don't say this is going to be an alibi defense.

MR. YOUNGQUIST: This is all descriptive. What he plans to do is a matter in his own mind.

MR. DEAN: That is right.

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MR. YOUNGQUIST: I would suggest leaving out "charged in an indictment or information" is too much, because, after all, he may be charged in loose bar-room talk as having done this. You have to nail it down to "information or indictment", "If a defendant charged in an indictment or information".

MR. DEAN: That is easy. Just say this, "A defendant charged in an indictment or information with an offense other than a continuing offense" --

MR. YOUNGQUIST: That has been amended.

MR. DEAN: -- "may move the court", dropping down to line 7, "to order the government to specify in

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writing", and so forth, and leaving out lines 3, 4, 5 and 6.

MR. BURNS: That is all right.

MR. GLUECK: And part of 7.

THE CHAIRMAN: Was Mr. Dean's motion seconded?

MR. GLUECK: I second the motion.

THE CHAIRMAN: Any discussion on the motion?

MR. ROBINSON: I would like to have it read now, so we know just what it is.

THE CHAIRMAN: Read it again, Gordon.

MR. DEAN: Beginning on line 2, scratch "If" and start "A defendant charged in an indictment or information with an offense other than a continuing offense" --

MR. YOUNGQUIST: Wait a minute, right at that point. That has been amended. You want to leave it that way?

MR. DEAN: I do not see any objection.

MR. BURNS: That was voted through.

MR. YOUNGQUIST: That was changed "single time and place", and I think "single time and place" is very difficult in view of your illustration of the stolen car and so forth.

MR. DEAN: All right; line 2 is as is; then starting "A defendant charged in an indictment or

information with an offense other than a continuing offense", and scratch "plans to offer" and all of line 4, and all of line 5, and all of line 6.

MR. MEDALIE: Excuse me for interrupting you. You are transporting a motor vehicle. That is a continuing offense. It runs over considerable territory. You transport it from the Southern District of New York to the District of Columbia.

MR. DEAN: Suppose you are operating three stills?

MR. HOLTZOFF: That is a continuing offense.

MR. DEAN: Is that a single time and place?

MR. HOLTZOFF: Operating a still is.

MR. MEDALIE: But it is a continuing offense to run it. You start in, in New York, and you run your stolen motor car up to Vermont. That is a long, long pull.

MR. BURNS: Why shouldn't that fellow be entitled to establish his alibi because he was in Florida?

MR. MEDALIE: He should be, but I am kicking about the language "continuing offense". I am not objecting to giving it to him, but the language "other than a continuing offense" would bar him.

MR. DEAN: It is a question of finding language to cover what we mean by "continuing offense".

MR. SETH: Why not come out and say "charged with an offense where alibi would be a defense"?

MR. ROBINSON: We try to keep away from the term "alibi" as much as possible, for the reasons stated in the note.

MR. SETH: I know, but you cannot get away from it.

MR. ROBINSON: "Alibi" is ambiguous, and certainly, the courts would say, an inartistic term.

MR. DEAN: I think that is good English. I would have no objection to it.

MR. CRANE: Wait a moment. Why not say, "state to the defendant when the district attorney claims it happened"?

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MR. DEAN: We are thinking about the conspiracy cases.

MR. CRANE: If it is impossible for him to state, he can state why he cannot give it; or he can state what it was. If the charge is transporting a car, and he were traveling around, if that was the case, he could state that it would take a month to get it all together.

This just calls upon the district attorney to state what he claims as the time and place.

MR. DEAN: That is agreeable to me. I think that is all right. If it was a continuing offense,

he would say, "Well, I frankly covered 28 States."

MR. ROBINSON: Judge Morris of the District of Columbia suggested the word "continuing". He thought that would include only offenses --

MR. DEAN: Continuing in time?

MR. ROBINSON: Yes, like a nuisance, and just simple things.

MR. DEAN: Leave out the reference to "continuing offense" and make it to read "A defendant charged in an indictment or information with an offense", scratch "other than a continuing offense" --

MR. WECHSLER: You don't need "with an offense".

MR. DEAN: Just need "A defendant", as a matter of fact.

MR. SETH: Now, I think you ought to keep this procedure away from the commissioners. Better limit it to the indictment and information.

MR. DEAN: "A defendant charged in an indictment or information", scratch "with an offense" and drop down to line 7, "may move the court to order the Government to specify in writing as exactly as possible the place and time".

MR. HOLTZOFF: "at which it claims the offense was committed".

MR. YOUNGQUIST: No; "which it proposes to

establish" is the way it ought to be.

MR. HOLTZOFF: Establish what? You see, the sentence --

MR. YOUNGQUIST: Oh, I see. Did that go out?

MR. WECHSLER: "The place where and the time when it proposes to prove that the offense was committed".

MR. HOLTZOFF: Yes.

MR. ROBINSON: "The place where and the time when it proposes to prove that the offense was committed"? That is certainly ambiguous. "The time when" it is intended to prove it doesn't mean trial, grand jury or when they will offer proof. That was in the former draft too.

MR. CRANE: "Time and place it proposes to establish of the commission of the offense".

MR. MEDALIE: I would like to make the further point that a man charged with mail fraud does not get any right to make this motion, because he has been operating a fraudulent scheme for a year, or two, or three or four or five years.

MR. YOUNGQUIST: Wouldn't that be taken care of by the provision that the court shall grant the motion except for cause shown?

MR. CRANE: The district attorney will say it covered a year.

MR. GLUECK: Why not say, "the place and time of the offense it proposes to prove"?

MR. DEAN: That is good.

MR. SETH: What does it mean by "place", a town or a county or a state?

MR. ROBINSON: Says "as exactly as possible".

MR. MEDALIE: "80 Foley Square."

MR. GLUECK: It means for the purpose of alibi, which means something specific.

MR. SETH: I think you ought to get in the word "exactly".

MR. WECHSLER: It says, "as exactly as possible".

MR. ROBINSON: Lines 4, 5 and 6, that was only used on those lines to help show it was the time and place the Government is proposing to establish.

MR. HOLTZOFF: I would suggest changing line 9 to "place where and the time when it is claimed the offense was committed".

MR. YOUNGQUIST: "it is claimed"?

MR. HOLTZOFF: No, you don't want that.

MR. YOUNGQUIST: You want what the Government is going to prove.

MR. DEAN: What is the matter with this language, "place and time"?

MR. McLELLAN: What is the matter with saying, "if

the defendant relies upon an alibi"?

MR. DEAN: Why isn't Mr. Glueck's suggestion a good one? Read that.

MR. GLUECK: "the time and place of the offense it proposes to prove".

MR. HOLTZOFF: I think that is a little ambiguous, isn't it?

*8 MR. DEAN: "time and place of the offense".

THE CHAIRMAN: May I suggest we ask Mr. Dean to try to state it from the beginning? Let us see if we cannot all agree, we have such a multitude of suggestions.

MR. DEAN: All right, line 2, "A defendant charged in an indictment or information", dropping to line 7, "may move the court to order the Government to specify in writing as exactly as possible the place and time of the offense it proposes to prove."

MR. ROBINSON: You want a "which" there, "offense which it proposes to prove". No?

MR. YOUNGQUIST: I second the motion.

THE CHAIRMAN: Is that acceptable?

MR. MEDALIE: You know, maybe we should have the procedure there. The just thing would be for the defendant, not through someone else, but on his own affidavit - he can support it, if he wants to - to swear he was at a certain place, where he was conducting himself

quite innocently. Therefore he would like the district attorney to specify precisely the time and place where the district attorney claims the crime was committed, and you have started with something, and you are entitled to get something, and he is already committed. All you ask him afterwards is the names of the witnesses.

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MR. ROBINSON: You can ask that.

MR. YOUNGQUIST: I should think you could from choice; that there are 14 different States that have this provision and you could always copy --

MR. ROBINSON: We are a lot better than they are.

MR. YOUNGQUIST: Doesn't that become a matter for the Committee on Style then? We are agreed, I think, what it ought to be.

THE CHAIRMAN: Will someone make a motion that we accept the suggestion last made by Mr. Dean, in principle?

MR. ROBINSON: I will make the motion.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

MR. MEDALIE: No. May I state my objection. The discussion has been stimulating. I believe the defendant ought to have the specification as a matter of right when he makes an affidavit and has committed himself to time and place. If he wants something he ought to give something.

MR. DEAN: Why should not he get it anyway and couldn't he get it by a bill of particulars possibly?

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MR. MEDALIE: Why, of course that is the fair thing, but we abandoned that undertaking to draw an alibi statute.

MR. YOUNGQUIST: I think you are laboring under a misapprehension. He does not in his motion specify anything. He asks that the Government specify.

MR. MEDALIE: But he ought to specify when he asks for something.

MR. BURNS: Oh, if he asks he has to specify.

MR. MEDALIE: No, not quite. He wants it in taking his evidence anyhow.

MR. WECHSLER: Why put that burden on him?

MR. MEDALIE: He is asking for something and if he is asking let him come in after all his ablutions.

THE CHAIRMAN: Let the Committee on Style struggle with this an hour earlier than they expected.

MR. MEDALIE: I do not think it is a matter for the Committee on Style. I think that is a matter of principle.

THE CHAIRMAN: I think you are a majority of one on this.

MR. MEDALIE: All right.

MR. SEASONGOOD: Page 7, Rule 17, and page 2, I call the attention of the Reporter to the fact that you refer to Throckmorton's Ohio Code Annotated. In one

place you have Throckmorton and one place Paige. Actually what you now refer to is the Ohio General Code which is the official volume and this is only the unofficial annotation, and my objection to representing Paige's Code with that of Throckmorton's was that Throckmorton's was a copyright infringement or steal. Why put in something like that?

MR. ROBINSON: I would like to state that Mr. Seasongood's suggestion already has been put into effect. The reason it is this way is because the Civil Rules' note used both Throckmorton and Paige.

MR. SEASONGOOD: I was not on that.

May I just mention one more thing on page 3, just so you would note it: You say the statute has been held constitutional and quote the case of State v. Thayer, 124 Ohio State. We have a peculiarity in the Ohio law that only the syllabus is the law of the case and actually in the syllabus of that case there is not a word on this subject.

MR. ROBINSON: But in the case of course there is.

MR. SEASONGOOD: Well, the opinion is only the opinion of the judge writing the opinion.

MR. McLELLAN: It is no part of the decision in Ohio?

MR. SEASONGOOD: No. What is official is the syllabus, which is the law of the case, and the opinion is the opinion of the judge writing the opinion.

THE CHAIRMAN: Is that constitutional?

MR. SEASONGOOD: No, but it is a rule of court which has been in effect for over 80 years.

MR. BURNS: Who writes the syllabus? The judge who writes the opinion?

MR. SEASONGOOD: I do not know.

MR. MEDALIE: Cannot he write an opinion and say "As I well said in such an opinion"?

MR. SEASONGOOD: If you want to leave it in it is all right.

THE CHAIRMAN: I think the Reporter would want to correct that.

MR. ROBINSON: We will just put a "See Syllabus."

THE CHAIRMAN: Rule 18 (a). Any suggestions?

MR. HOLTZOFF: I move its adoption.

MR. SEASONGOOD: I want to call attention to line 12, "the court on the application of the witness shall direct that his testimony be taken by deposition." I think sometimes personal appearance is much better than a deposition and I wonder whether the court ought --

MR. HOLTZOFF: Isn't that taken care of in the next sentence, "After the deposition has been taken and

subscribed, the court may discharge the witness from

2 custody"? It is mandatory.

MR. LONGSDORF: Why is it mandatory to direct that his deposition be taken?

MR. HOLTZOFF: I think Judge McLellan made the motion on which this language was adopted, and my understanding of the theory of the motion was that the defendant has a right to have his deposition taken and then after his deposition is taken the court, in its discretion, after seeing the deposition can determine whether he should be discharged or whether he should be used by personal appearance at the trial. I wonder if I am correct?

MR. McLELLAN: I am not sure.

MR. LONGSDORF: Why cannot the defendant move that his deposition be taken?

MR. McLELLAN: This is to protect the witness who has been committed.

MR. YOUNGQUIST: It is a personal privilege.

MR. LONGSDORF: To have his deposition taken?

MR. YOUNGQUIST: No. To be discharged.

MR. SEASONGOOD: And you let him out and never get his personal testimony.

MR. HOLTZOFF: That is in the discretion of the court whether or not he might. Well, I have presented it,

and if everybody thinks it is all right it is all right with me.

MR. HOLTZOFF: There is no change in this paragraph from the former draft?

MR. DEAN: If there is any danger of his getting away --

MR. HOLTZOFF: I think you make that representation at the time and the court, in its discretion, probably would not turn him loose.

MR. SEASONGOOD: He was talking of the deposition.

MR. McLELLAN: To find out what he can really say so the court may have that.

MR. SEASONGOOD: If he is committed for failure to give bail he can ask the court to take his deposition and maybe he can get out.

MR. HOLTZOFF: It is not mandatory to release him though.

MR. SEASONGOOD: No. I know it is not.

THE CHAIRMAN: Are there any further questions on 18 (a)?

MR. WAITE: Yes, Mr. Chairman. For the sake of the record I want again to make the motion that Section 18 (a) be so amended as to provide that a witness whose deposition has been taken must be released from custody after a reasonable time, either on bail or

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otherwise. I think this business of holding a witness for eight or ten months while they are hunting for the alleged defendant is travesty on justice. I have had that up before so I won't push it, but I want to bring it into the record.

MR. HOLTZOFF: It does not happen often.

MR. WAITE: It can happen, and Mr. Medalie very effectively pointed out the evils of it in an article in the Panel a year ago.

MR. MEDALIE: I cannot live this down because my children look it up in the card index to find out if I wrote anything and then they find out.

MR. HOLTZOFF: Question, Mr. Chairman.

MR. CHAIRMAN: Is Mr. Waite's motion seconded?

MR. WECHSLER: I second it.

THE CHAIRMAN: The question: All those in favor say "aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

MR. YOUNGQUIST: What is the motion?

THE CHAIRMAN: Mr. Waite's motion is, in substance, to provide after the deposition is taken that the witness may be released within a reasonable time.

MR. WAITE: Either on bail or otherwise.

MR. HOLTZOFF: He has always the right to be released on bail. The question is whether he should be released without bail.

MR. WAITE: No. This does not provide they may be released on bail.

MR. HOLTZOFF: Under the statute you cannot commit a witness except subject to bail.

MR. WAITE: But you have many cases where the witness cannot get bail. That is why I put in "otherwise". He must be released on bail or otherwise.

MR. MEDALIE: Let me point this out: The scandal is more an administrative scandal than anything else.

MR. WAITE: Yes. This does not provide for it. It says he may be released. I want to make it mandatory.

MR. HOLTZOFF: What you want is to change the word "shall"?

THE CHAIRMAN: Shall be released within a reasonable time.

MR. YOUNGQUIST: This applies only to a witness who is committed for failure to give bail?

MR. WAITE: That is right.

THE CHAIRMAN: And after he has given his

deposition. Are you ready for the motion?

MR. SEASONGOOD: Is that what you want to do? Of course you have that in the comment on page 5. That is the existing law "may be taken after which the witness must be discharged from custody".

MR. ROBINSON: That is a mistake. That was a mistake made in the office and it ought to be corrected. That word "must" should be stricken and the word "may" put in there. That was called to my attention afterwards; Rule 18, page 5.

MR. SEASONGOOD: Then you are changing the existing law?

MR. HOLTZOFF: No. Under existing law if the witness is committed he has no right to have his deposition taken. Now where we are changing the existing law here is to give him the opportunity to have his deposition taken; make it mandatory upon his request to take his deposition. Then after the deposition is taken it is discretionary whether or not torelease him.

THE CHAIRMAN: Mr. Waite moves that it not be discretionary, but after the deposition has been taken that the witness must be released within a reasonable time by the court on bail or otherwise.

MR. HOLTZOFF: Not on bail or otherwise.

MR. WAITE: This says he may be discharged.

My provision is that he must be released on bail or otherwise. I dictated "discharged". That "discharged" means he is not held on bail. I think he should be held on bail.

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THE CHAIRMAN: We have the motion. Let us have it put.

MR. HOLTZOFF: Let me explain: I think under the existing law he has the right to be released on bail. What we are trying to give is an additional right to be released without bail.

MR. WAITE: But you disregard my statement "or otherwise". There are many who have a right to be released on bail who cannot get bail and therefore are held. A poor devil who has not money to pay a bondsman I want released.

MR. HOLTZOFF: But he is already committed for want of bail and therefore you are not giving him anything when you say he may be released on bail. To accomplish your object all you need is change the word "may" to "shall".

MR. WAITE: No, because that word following "may" is "be discharged" and I am not suggesting that he be completely discharged.

MR. McLELLAN: Question.

THE CHAIRMAN: You have heard the motion.

All those in favor say "Aye."

MR. WAITE: Aye.

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion seems to be lost. The motion is lost.

MR. CRANE: Are we opposed to the substance of what Mr. Waite said, or just that word "bail"? Is there any objection to saying a man must be discharged?

THE CHAIRMAN: Will you put it in that form?

MR. WAITE: I move that Rule 18 (a) contain a provision, in substance, that after a witness has had his deposition taken he must be released from imprisonment either on bail or otherwise.

MR. SETH: That is the same motion.

MR. WAITE: Except I said "in substance", and the Judge just suggested he was perturbed about the phraseology.

MR. CRANE: Yes. He is there because he does not give bail. But I think after the man has had his deposition taken he should be discharged within a reasonable time.

THE CHAIRMAN: You make a motion, do you, Judge, that after he has given his deposition the witness

must be discharged within a reasonable time?

MR. CRANE: Yes.

MR. DEAN: I second the motion.

MR. MEDALIE: May I ask why so long if the only purpose is to get him out after he has given him his deposition? Why hold him any longer?

MR. CRANE: That may be just five minutes.

MR. MEDALIE: That is not what you mean by "reasonable time".

THE CHAIRMAN: Question. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: All those opposed say "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion seems to me to be carried but we better have a show of hands.

(After a show of hands the Chairman announced the vote to be nine in favor; six opposed.)

THE CHAIRMAN: The motion is carried.

MR. DEAN: I move to strike out the words "within a reasonable time."

MR. HOLTZOFF: I second the motion.

MR. WECHSLER: What line?

MR. DEAN: "the court shall release the witness

from custody".

MR. HOLTZOFF: "shall discharge the witness from custody".

MR. SETH: Why not change the word "may" to "shall"?

MR. HOLTZOFF: I want to say that originally in this draft it was "shall" and at the last meeting the Committee voted to change the "shall" to "may". I originally favored "shall" and I am glad to see it go back to "shall".

MR. MEDALIE: There is no law that compels a judge to commit a person who is a witness. The court has always the power to release a person who is a witness without any statute or rule giving him that power.

MR. GLUECK: But this provides after a deposition has been taken he shall definitely discharge the witness from custody.

MR. ROBINSON: It was pointed out at the last meeting the reason for changing from "shall" to "may" was that this put the power in the defendant to give a deposition which merely amounts to nothing. Having gone through the form of giving a deposition it was felt by the Committee it should not be made mandatory.

MR. HOLTZOFF: This is not a defendant but only

a material witness.

MR. ROBINSON: That is what I mean; a witness.

MR. McLELLAN: When you get all through with it and you have a judge who knows how important it is to have a witness in the case before the jury he is going to avail himself of the permissive part of the rule and not order the deposition to be taken, if he is going to be permitted to take the deposition.

MR. SEASONGOOD: That is why I wanted it made direct that he give his testimony, but you voted that down.

MR. McLELLAN: I did not.

MR. SEASONGOOD: It was voted down. I do not want to protract the discussion but if you get some scalawag witness he says "I did not give bail, but the court, you see, must take my deposition" and then let him go.

MR. McLELLAN: No. You say the court may take his deposition and must let him go.

MR. SEASONGOOD: But you say the court must take his deposition and then let him out. That is a very serious thing for a proposal.

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MR. HOLTZOFF: I move to reconsider the vote just taken. I voted with the majority so I suppose I am qualified to move to reconsider the vote by which the

word "may" was changed to "shall" in line 14.

MR. GLUECK: It seems to me you are putting an awful burden on the many decent witnesses when you emphasize the occasional scalawag.

MR. HOLTZOFF: Very few witnesses are committed in the Federal courts, and most of those committed are not decent.

MR. MEDALIE: May I make a comment on this, and it is based on what actually goes on: In this rule you are providing that when the witness wants to get out the court must take his deposition. Let us look at it practically. Those who have prosecuted or who have had connection with it know perfectly well that many a witness who is held, a material witness, does not want to testify and does not want to tell the truth, and furthermore many a witness held as a material witness is really suspected of being in cahoots with the defendant. You are, in effect, telling some earnest prosecutors who are not trying to embarrass people, that the man who is being held, and who might finally be induced to tell the truth, shall get out of the clutches of the law and get away from the district attorney as fast as he can without any trouble whatever. He is in a week or ten days. He has not gotten tired of jail yet, and now he comes in and testifies "I was

not there. I do not know nothing. I didn't see nothing" and so forth and so forth, and he must be discharged. Now I think there will be a roar from the vigilant prosecutors on this. They will say you are selling them out.

MR. McLELLAN: And it is not abused very much.

MR. MEDALIE: That is right. It is not abused very much, but it is abused. Some of the youngsters never let go.

MR. McLELLAN: It is pretty serious to have a man come in, or let him come in, and say he does not know nothing and then the judge lets him go.

MR. CRANE: I see much force in that argument and I would like to ask something I had in mind reference to some other matters. They have different terms of court. Is it possible a witness is kept in six or eight months before they have a trial?

MR. SETH: It frequently happens.

MR. CRANE: I do not mind keeping him in, but I hate to think we have to feed him.

MR. McLELLAN: One thing, Mr. Chairman, the only particular experience we had, so far as I remember, with reference to holding a witness in Massachusetts was where he was brought in on habeas corpus, and I said "You cannot hold him any longer," whereupon they indicted him for

murder and within three months he was convicted of murder and was later electrocuted. Those are the kind of things you have to think of in connection with that kind of person. But the thing is not abused very much I do not think.

MR. HOLTZOFF: Mr. Chairman, I move to reconsider then this last vote so as to restore the word "may" in line 14 instead of "shall".

MR. CRANE: I second it.

MR. LONGSDORF: Seconded.

THE CHAIRMAN: It is moved and seconded that the motion be reconsidered. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

MR. HOLTZOFF: I move we adopt Rule 18 (a).

THE CHAIRMAN: You have to have a vote on that motion first.

MR. HOLTZOFF: I move we adopt 18 (a) as written.

THE CHAIRMAN: We have to cover a lot of ground now. Let us keep the motion now to the first one. The motion is to rescind the motion previously adopted; to restore "may" for "shall". All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Now we are free to move on.

MR. MEDALIE: Having raised the question I will move that "may" be substituted for "shall" in line 12.

MR. DEAN: Seconded.

THE CHAIRMAN: All those in favor of the motion to substitute "may" for "shall" in line 12 say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Are there any further amendments to Rule 18 (a)?

MR. LONGSDORF: I would like to ask whether the Reporter wishes to put a paragraph mark on line 15 after the period. It seems to me there is a paragraphic change of sense there.

MR. ROBINSON: You will notice our system is not to separate into paragraphs unless we have a separate subdivision with headings.

MR. LONGSDORF: I notice that.

MR. ROBINSON: Does it take up a separate matter, George?

MR. LONGSDORF: The sentence beginning on line 15 obviously speaks of the process of giving notice between the parties at whose instance the deposition is to be taken.

MR. GLUECK: I think your heading under (a) is incomplete.

MR. ROBINSON: So you think line 15 as George suggests should be "How Depositions Are To Be Taken"?

THE CHAIRMAN: If that suggestion is taken.

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MR. LONGSDORF: One other provision I want to inquire about and know whether this provision for counsel for taking depositions is clear and understood by the Committee? I do not know. I am just asking. Suppose he has counsel at the place where he is detained, and the deposition is to be taken elsewhere and his counsel does not want to go?

MR. HOLTZOFF: But it says in line 24 that the court must assign counsel. Naturally the court must assign counsel who will be present at the hearing.

MR. LONGSDORF: Can the court assign counsel in another State where the deposition is to be taken?

MR. HOLTZOFF: That is clear; otherwise there is no counsel.

MR. LONGSDORF: Or can he ask for counsel resident where the prisoner is?

MR. HOLTZOFF: That is in the discretion of the court. He must arrange for counsel who can be present.

THE CHAIRMAN: All those in favor of Rule 18 (a) say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Those opposed say "No."

(No response.)

THE CHAIRMAN: Unanimously carried.

MR. YOUNGQUIST: May I ask a question about (b)? I have not been able to find here any provision for taking depositions other than that of the material witness committed for failure to give bail.

MR. HOLTZOFF: Oh no. This applies to anyone, any witness. I think the first sentence of (a) indicates that any witness's deposition may be taken.

MR. WECHSLER: Mr. Chairman, may I make a motion based on the previous discussion?

THE CHAIRMAN: Yes.

MR. WECHSLER: The previous discussion brought out that we have no rule dealing with the material witness problem. Is that right, Mr. Chairman?

MR. ROBINSON: That is right.

MR. WECHSLER: The provisions of the Code that deal with this matter are apparently Sections 657, 658 and

659 of Title 28. It seems to me it is an important matter and there ought to be a rule on the subject. Moreover, Mr. Medalie and I are just examining Section 659 and note that it provides that any judge of the United States on the application of a district attorney and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial may compel such person to give recognizance with or without sureties at his discretion to appear and testify therein. In other words, there is no condition at all on when a judge may require a prospective witness to give bond to appear. It is at least questionable, I think, whether that provision is not too broad as it stands.

MR. ROBINSON: Of course are you bearing in mind our Rule 24 on evidence there; lines 4 and 5 "Competency and Privileges of Witnesses"?

MR. HOLTZOFF: I don't think this applies.

MR. WECHSLER: This is a rule on arrest and bail. That is what this is.

MR. MEDALIE: In other words, the point Mr. Wechsler makes is that a man ought not to be committed or required to give bail as a material witness unless there is a showing that there is danger that he will not appear; either that he is a vagabond or derelict and runs

around different places, or is about to depart the jurisdiction or has indicated some hostility indicating intent to get out of the jurisdiction.

MR. HOLTZOFF: As a matter of fact isn't this what happens: They do not commit reputable persons who are not going to run away?

MR. MEDALIE: I think since most codes make the provision; that a comprehensive set of rules might do the same.

MR. ROBINSON: Well, it is true we have no rule on this subject but Mrs. Peterson calls my attention to Rule 52 (3) which says expressly we do not disturb Section 659.

MR. MEDALIE: But it is not a good statute for the reasons pointed out.

MR. ROBINSON: That is our only provision.

MR. WECHSLER: I stand by the motion that there be a rule drafted on it.

THE CHAIRMAN: May we have that motion again. I did not get it.

MR. WECHSLER: The motion is that there be a rule drafted to cover the subject dealt with by Sections 657 to 659 of Title 28, namely, when a witness may be required to give bond to appear at the trial or be committed for failure to give bond.

MR. SEASONGOOD: How can you do that? Isn't it discretionary with the court?

MR. MEDALIE: There should be a showing. The court should require an affirmative showing that there is danger the witness would not appear.

MR. YOUNGQUIST: Does not the court do that? I cannot imagine the court committing a witness without a showing that there is good reason for committing him or requiring him to give bail. I think the courts would resent a rule which would require them to exercise their discretion, and that is what it amounts to, on an application of that sort.

MR. WECHSLER: Well, without considering whether the present law should be changed, which had not been so much in mind, ought not the thing be in for the sake of completeness?

MR. YOUNGQUIST: I am wondering whether it is within our jurisdiction.

MR. HOLTZOFF: Yes, that is procedural.

MR. WECHSLER: If the arrest of a defendant and provisions on bail for the defendant are within our jurisdiction this should be.

MR. MEDALIE: I think this is a procedural as a provision in the Civil Practice Rule for arrest and attachment.

MR. ROBINSON: We do provide this in our Rule 52, at page 2, that the procedure shall be made to conform to these rules so far as applicable, although we do not alter the power of the judges to require bail for the appearance of witnesses under 679 and 657 and 660.

MR. WECHSLER: I would be happier to see a rule because it would mean we would look at it and the proposal might change the law.

MR. ROBINSON: Would you mind drafting such a rule and submit it to us for adoption?

MR. YOUNGQUIST: The question is whether we want one.

THE CHAIRMAN: The motion is to have a rule prepared on the subject of bail for witnesses.

MR. ROBINSON: I would not know how to vote on that motion.

THE CHAIRMAN: Just the matter of principle; whether there should be a rule of this kind. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is carried. I suppose that carries with it the suggestion that we require the

Committee on Style to prepare a rule tomorrow.

MR. WECHSLER: Without any special notion what should be in the rule we decided there should be a rule.

THE CHAIRMAN: On that particular subject matter. That is correct.

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MR. WAITE: Mr. Chairman, before we adopt 18 (b), I have a suggestion.

THE CHAIRMAN: I do not think we have adopted it yet, have we?

MR. WAITE: No. I say, before we adopt it.

"The officer having custody of a defendant shall be notified of the time and place set for the examination, and shall produce him at the examination and keep him in the presence of the witness during the examination."

That, I concede, is fully necessary; but I wonder if that needs to be done if the witness is willing to waive that privilege.

MR. HOLTZOFF: You mean the defendant.

MR. WAITE: Yes, if the defendant is willing to waive that privilege. It seems to be an unnecessary thing. This, as it stands, is mandatory. It says that the officer shall produce him. Therefore I suggest that we add to that sentence the words "unless the

defendant waives in writing the right to be present."

MR. McLELLAN: Suppose he waives in writing the right to be present at the trial, you are getting a substitute here for trial, aren't you?

MR. MEDALIE: That is right.

MR. HOLTZOFF: You can waive a constitutional privilege of confrontation. If you can waive a trial by a jury, you can waive confrontation, can you not?

MR. McLELLAN: Not at all. The only kind of a case where they can go on without the defendant is where he absconds.

THE CHAIRMAN: That is the law, unquestionably.

MR. McLELLAN: Aren't we getting a deposition here that is going to be used at the trial?

THE CHAIRMAN: That is right.

MR. McLELLAN: Then isn't it a part of the trial?

MR. WAITE: Is there any constitutional provision waiving the right of confrontation? I never heard of it.

MR. MEDALIE: What you are dealing with is the practice of the courts. Let a defendant fail to come back after a recess, and the district court will wait and wait and wait and won't allow a witness to be asked a question. Now, that is the attitude of every district judge, practically.

MR. WAITE: That may be the practice, but there is no reason why we should not change it by rule if we think a change is desirable. It seems to me if the accused is willing to waive in writing the privilege of being present when the deposition is taken, and have it done by his counsel --

MR. McLELLAN: Pardon me. Let me ask you this question: Suppose he does waive it, and is not there, and then at the trial the deposition is offered in evidence, and he objects to it. If you were the judge would you let the deposition in?

MR. WAITE: Yes.

THE CHAIRMAN: It is hard to see why a man can waive a jury at a trial and not be able to waive being present at the taking of a deposition.

MR. McLELLAN: Could he waive being present at the trial?

THE CHAIRMAN: I do not see why not if he can waive these other things.

MR. WECHSLER: Could he be tried in absentia?

THE CHAIRMAN: Yes, with his consent. I cannot see why, if he can waive indictments and waive trials by jury, which are constitutional privileges, he cannot say, "I am willing to let my attorney try the case because he is a better looking and better talking

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man than I am."

MR. McLELLAN: You are perfectly right as a matter of logic. But they are all afraid of it.

THE CHAIRMAN: Well, if we put it in the rules --

MR. McLELLAN: To cover it they have got an express statute, as I remember it, to the effect that if he skips out during the trial that you can go on without him, which is an intimation that you could not otherwise.

MR. MEDALIE: Let me put it this way, Judge McLellan. I would like to get an answer on it. The defendant is on bail, and the Government is taking a deposition under the conditions stated here. Now, what he does is just not show up, and just sends his lawyer. The deposition cannot be taken because the defendant chooses not to be present. That would be a bad situation, would it not?

MR. WAITE: Let me call your attention to what is in the next sentence, because the next sentence says that if he is not in custody he simply has the right to be present at the examination, and if he does not choose to come to the examination, I suppose, the statute is

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perfectly good. Now, it seems to me if a defendant who is not in custody can properly waive the right to be present, a defendant who is in custody might properly

be permitted to waive the right.

MR. WECHSLER: The real question is what kind of waivers you get from defendants in custody.

MR. WAITE: I think if it is in writing I would not have any doubt about it.

MR. HOLTZOFF: I think there is always an implication that any right can be waived. I do not think you need an express provision for waiving this kind of right, do you?

MR. ROBINSON: I second it.

MR. WAITE: Well, if there is no harm in putting it in, I think it is good.

MR. SEASONGOOD: I think there is harm in putting it in. You are introducing a new procedure here. Ordinarily the evidence has to be adduced in open court; he is entitled in a criminal case to have it adduced in open court. That is one hurdle you are jumping over, and here you are putting another one, introducing another constitutional question as to whether he can waive it. The more of those you pile on there the less chance there is of anything being adopted.

MR. HOLTZOFF: I call for the question.

THE CHAIRMAN: All those in favor of the motion permitting a waiver of the defendant's presence, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: A show of hands.

(After a show of hands the Chairman announced the vote to be five in favor; eight opposed.)

THE CHAIRMAN: The motion is lost.

MR. WAITE: Now I am going to ask if you are going to allow a waiver in the case of a defendant who is not in custody, which is the next sentence.

MR. WECHSLER: I am satisfied with the sentence as it stands.

MR. WAITE: You are allowing one to waive but you are not allowing another to waive.

MR. WECHSLER: I am not sure that the effect of the rule as it is is to preclude a waiver even of a defendant in custody.

MR. WAITE: Then it seems to me absurd. If we think it does not preclude it, it seems to me we are sticking our heads in the sand if we are not willing to express ourselves clearly about it. That, to my notion, is pretty faulty draftsmanship.

MR. WECHSLER: Mr. Chairman, I move we adopt 18 (b) in its present form.

THE CHAIRMAN: Mr. Waite raises a question. I do not know whether he wants to press it.

MR. WAITE: Well, I just seem to think it is very poor draftsmanship to leave it that way.

THE CHAIRMAN: All those in favor of the motion to adopt 18 (b) say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is carried.

18 (c).

MR. HOLTZOFF: Mr. Chairman, I move to strike out the clause commencing after the semicolon on line 53 --

MR. MEDALIE: Before you get to line 53, may I touch upon an earlier line?

MR. HOLTZOFF: Surely.

MR. MEDALIE: In lines 50 and 51 it states, "or that the witness is unable to attend or testify because of age, sickness, or infirmity". I never thought that age was an excuse for not testifying, or that it rendered a person unable to testify. We agree that infirmity might, whether the person is 21 years of age or 92. But age does not determine that.

MR. HOLTZOFF: Unless it is accompanied by infirmity.

MR. MEDALIE: Then it is the infirmity that counts, not the age. I move to strike "age".

THE CHAIRMAN: By consent, gentlemen?

MR. HOLTZOFF: Yes.

THE CHAIRMAN: All right, now line 53.

MR. HOLTZOFF: I move to strike out the clause beginning with the word "but" after the semicolon, down to the end of the sentence at line 55.

MR. YOUNGQUIST: I second the motion.

MR. HOLTZOFF: I want to call attention to the fact that this is a new clause that was not in the former draft. Just very briefly, this clause would permit the judge in his uncontrolled discretion to prevent a party from using a deposition even though the deposition has been taken and all the conditions for its use have been complied with. For that reason I think it ought to be stricken.

MR. YOUNGQUIST: I have the same notion.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Are there any further questions or suggestions? If not, the motion is to adopt 18 (c) as amended. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

3 THE CHAIRMAN: Carried.

18 (d): Any questions?

MR. HOLTZOFF: I move its adoption.

MR. DEAN: I have one little question. If we have (b) sub-headed "How Depositions May Be Taken," I wonder if (d) should be "Manner of Taking Depositions."

MR. HOLTZOFF: Suppose the headings be left to the Committee on Style, if that is satisfactory?

THE CHAIRMAN: Yes. Make a special note of that. All those in favor of 18 (d), say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

18 (e).

MR. HOLTZOFF: I move its adoption.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

18 (f): All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

19. This is a new rule suggested by Mr. Dession, and I think it comes under the general scope of those you outlined earlier this afternoon.

Any suggestion?

MR. HOLTZOFF: I move that this rule be not adopted, Mr. Chairman.

MR. MEDALIE: Why put a motion on a rule in the negative? That has not been done previously.

MR. HOLTZOFF: I see.

THE CHAIRMAN: I would like to hear a motion that it be adopted.

MR. DESSION: I so move.

MR. WECHSLER: I would like to hear cases.

MR. DESSION: I think there are frequently occasions in criminal courts when some inspection should be allowed, and at the present day I think that is recognized in case law. Now, it is true that in the Federal court an inspection of objects is not granted very freely, but from time to time it is, and should be, I think.

MR. WECHSLER: Mr. Chairman, as I read the

learned memorandum circulated this morning, this seemed to be the law of the United States since the trial of Aaron Burr; and if that is so I do not see what the objection to it is.

MR. HOLTZOFF: I do not understand that the United States attorney may be directed to produce for inspection prior to the trial --

MR. DESSION: He certainly may. He has been.

MR. CRANE: It is done right along.

MR. HOLTZOFF: I move we strike out the words "grand jury minutes" from this rule.

MR. MEDALIE: I second it.

MR. DESSION: You mean there should never be a time when grand jury minutes should be shown?

MR. HOLTZOFF: No, but I do not want to invite motions to inspect the grand jury minutes by putting it in at this point.

MR. DESSION: Yes, but if you exclude it now there might be an inference that you are changing the existing law.

MR. CRANE: I move we take out the words "and exhibits" as well.

THE CHAIRMAN: Do you accept that suggestion, Mr. Dession?

MR. MEDALIE: I think that is a good idea.

THE CHAIRMAN: The motion then is to adopt Rule 19 as amended by deleting the first five words in line 8.

All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

MR. WECHSLER: Do "exhibits" go out too?

THE CHAIRMAN: Yes. The motion seems to be carried.

MR. SEASONGOOD: I had some questions. In line 5 - "government to produce and permit the inspection". I think the word "produce" then is unnecessary and probably should not be in there. In other words, you are going to order him to bring or take things out; and when you come to line 12 and following, it states "The order shall specify the time, place, and manner of making the inspection".

THE CHAIRMAN: Do you agree to that, Mr. Dession?

MR. DESSION: Yes.

THE CHAIRMAN: The motion will be so amended.

MR. SEASONGOOD: Now, another thing. While it may seem very trivial, it states here "tangible objects". We have "things" in the Civil Rules, if

you are going to follow the Civil Rules. Is there any reason for not using the same word? It is "things" in the Civil Rules.

MR. DESSION: I think "things" would do just as well.

MR. SEASONGOOD: I would rather have it made conform to the Civil Rules.

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THE CHAIRMAN: That is agreeable.

MR. SEASONGOOD: Then in line 9 - "showing in good faith". Well, upon a showing is enough, isn't it?

THE CHAIRMAN: What line?

MR. SEASONGOOD: 9. I would like to strike out "in good faith".

MR. DESSION: I would agree to that too.

THE CHAIRMAN: Accepted.

MR. SEASONGOOD: In line 11, I think it should be "that the request is reasonable". I would leave out "otherwise".

MR. DESSION: I am thinking of some instances where the stuff you wanted might be highly material, that there might be other reasons why it would be a considerable burden and difficulty to produce either in the way of expense, or something else. Now, in a case like that I think some adjustments sometimes have

to be worked out.

MR. WAITE: If I remember correctly, a gentleman here in New York named Snitkin used to have a habit of making such motions as this, which were not in good faith, and were definitely not reasonable. It seems to me we ought to inquire into that very definitely.

MR. HOLTZOFF: I would like to remind the Committee of that. My recollection distinctly is that we voted down a rule on discovery.

MR. YOUNGQUIST: I thought we did.

MR. HOLTZOFF: Yes.

MR. MEDALIE: The Government permits a discovery in two ways. One by unlawful search and seizure, and the other by running a grand jury which has not anything pending before it except the defendant's witnesses. And, Mr. Chairman, I want to point out another thing which has been pointed out again and again. What the Government does in many important cases is to seize the books, papers and records of the defendant company and then hold them on the theory that they are grand jury minutes, exhibits. Now, practically, what this gets at is that the defendant is given an opportunity to look at his own papers.

MR. HOLTZOFF: I vote for this rule if it is limited to the defendant's own papers.

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THE CHAIRMAN: Mr. Dession, do you accept the deletion of the word "otherwise" in line 11?

MR. DESSION: Yes.

THE CHAIRMAN: I think we have covered that rule except with respect to the grand jury minutes and exhibits.

MR. HOLTZOFF: It was agreed to take that out.

THE CHAIRMAN: Was there a suggestion that that be covered otherwise?

MR. DEAN: That was adopted.

MR. HOLTZOFF: The opposition calls for a show of hands, I think. I am not sure.

THE CHAIRMAN: All those in favor of the rule, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed?

(Chorus of "Noes.")

THE CHAIRMAN: Any motion, Mr. Dession, on grand jury minutes and exhibits?

MR. DESSION: I now move that a rule be prepared to provide for a limited privilege of inspection in the discretion of the court.

MR. HOLTZOFF: My understanding is, so far as today's practice is concerned in the Federal courts, unlike in the New York courts, such a motion is hardly

ever granted, if at all. Am I not correct on that?

MR. DESSION: Very rarely. But there are cases where it should be. They are rare but important.

THE CHAIRMAN: We all know the issues. All those in favor of Mr. Dession's motion, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

MR. CRANE: May I say this. I understand that motion to be similar to what we have here, that a motion to inspect the grand jury minutes may be made. Now, it is seldom granted, but there are cases - it was done in Buffalo by a Supreme Court judge in a very important case - a motion was made to dismiss the indictment because there wasn't any crime at all.

MR. HOLTZOFF: I do not think it is ever granted.

MR. MEDALIE: I think I can summarize what happens to show you how we have covered all you are asking for. In New York State there was a prevailing practice at one time of having motions made on a showing - that is, oral statements of witnesses - that they had testified to certain things; then you moved on the basis of that for an inspection of the grand jury minutes for the purpose of making a motion to dismiss the indictment

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on the ground that the grand jury had no right to indict, because it is provided in the New York Code of Criminal Procedure that the grand jury must not indict unless as petit jurors they would have voted for a conviction even though they had not heard the defendant. All that comes in. Now, the only advantage the prosecution has is, the defendant did not have to be called. Now, at that time there used to be endorsed by statutory requirement the names of the witnesses on the back of the indictment. That has been abolished. They do not get that, and therefore it is almost impossible to make the motion, and it is made very, very rarely.

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Now, in the Federal courts those motions are not made. In other words, when made - that is, a motion for the purpose of inspecting minutes on the ground that you are going to prove that the grand jury should not have indicted, that is, that there was not evidence - it is practically ignored. Courts pay no attention to it. But grand jury testimony or the proceedings before grand juries are obtainable when you move to quash an indictment because the wrong thing happened in the grand jury. Now, in those cases we have provision here - and we passed on it yesterday - that is, in the proper case testimony can be given, the court can permit the giving of testimony by grand jurors as to what occurred

before the grand jury. For example, the improper presence of an unauthorized person. That is covered, isn't it?

MR. HOLTZOFF: Yes.

MR. MEDALIE: And that is the only thing that we would want to cover. Those things came up on motions to quash or on these various pleas.

MR. GLUECK: What about exhibits?

MR. HOLTZOFF: In most districts they do not take grand jury minutes. In the Federal courts in most districts there are no grand jury minutes because there is no stenographer.

MR. MEDALIE: Obviously it could apply only if there were such minutes.

MR. GLUECK: How about the exhibits mentioned here?

MR. DESSION: Suppose a witness is giving very different testimony on the trial from what he gave in the grand jury. Suppose the defendant suspects this. He moves to inspect for that purpose. Under the practice in some states the court takes a look. If there really is a serious discrepancy, then you get that portion of the minutes for purposes of impeachment. Now, do you want to do that?

MR. MEDALIE: It would be a good thing. We have

never done that. The only time you get a look at grand jury minutes under those circumstances is when the district attorney gets a witness who is not helping him, and then he pretends to refresh his recollection by asking him to read a paper which is a transcript of his grand jury testimony, and says, "Doesn't that refresh your recollection?" In fact, he frequently has the unprofessional temerity to read it and ask, "Didn't you testify so and so before the grand jury?" Then the court is required to permit counsel for the defendant to look at that testimony to see whether he can't rehabilitate him. That was the rule in the Socony Vacuum case and has been the rule in this Circuit for some time.

MR. HOLTZOFF: We do not want a rule that could be applicable in very few districts because the vast majority do not have minutes.

MR. DESSION: Might we not adopt this motion, because we don't know what it is going to contain, and if George will produce something then we will have something to argue about.

THE CHAIRMAN: Well, the motion is that Mr. Dession be directed to draft a rule on this. All those in favor say "aye."

(Chorus of "Ayes.")

MR. WECHSLER: What is the motion?

To have Mr. Dession consider it, or --

THE CHAIRMAN: The motion is that there be a rule ordered, and he be requested to draft it.

MR. WECHSLER: The rule to authorize inspection?

THE CHAIRMAN: Yes.

MR. WECHSLER: If you are against inspection you vote against it?

THE CHAIRMAN: Yes. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: A show of hands.

(After a show of hands the Chairman announced the vote to be five in favor; nine opposed.)

THE CHAIRMAN: Lost, five to nine.

We come now to Rule 19.1.

MR. LONGSDORF: May I ask a question. I have no objection to make, nor have I anything to say in favor of it either, but wouldn't it be feasible to combine this with alternative Rule 10? They embrace different subjects; but would it be possible to put them in one rule?

MR. DESSION: I think it probably would.

MR. HOLTZOFF: I would like to ask a question about this Rule 19.1. Of course, I am opposed to it.

I will say very frankly, I do not believe parties ought to be required to exchange lists of witnesses in advance. Even the broad discovery civil rules do not provide for exchange of lists of witnesses. They do not go that far; and I see no reason why you should have a broader discovery in criminal cases than you do in civil cases. But I also want to call attention to the fact that it cannot operate in actual practice. Every trial lawyer knows that he frequently is not sure of what witnesses he is going to call until the trial develops. And it certainly is not fair to ask him to furnish a list of witnesses in advance. That is one type of impracticability. The other type of impracticability is this: We know that in lots of criminal cases defense counsel does not get ready until the last minute, especially assigned counsel; and you are going to put an awful burden on him.

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MR. MEDALIE: Even if he does he is surprised by some of the testimony, and he is going to do a lot of scurrying around to see if he can find a witness.

MR. HOLTZOFF: And it certainly does not go in country districts where you indict a group of persons today and try them all tomorrow.

MR. WAITE: I can imagine one rather interesting development. If the Government attorney omits a witness

or two, it is ground for continuance. If the defense counsel omits a half dozen witnesses the Government attorney does not even dare ask for a continuance because that is exactly what the defendant wants in the way of delay.

MR. HOLTZOFF: That is right.

THE CHAIRMAN: Are there any suggestions on 19.1?

MR. LONGSDORF: I said I had no objections, but I want to repeat what I said a while ago, that I am sure you will get earnest objections from the United States attorneys and some defense attorneys.

MR. HOLTZOFF: I am not afraid of objections from United States attorneys but I am afraid of objections from Congress.

MR. WAITE: Mr. Chairman, I move that 19.1 be stricken.

MR. HOLTZOFF: I second the motion.

THE CHAIRMAN: It is not adopted yet. Let us follow the usual practice and first have a motion to adopt it.

MR. DESSION: I so move.

THE CHAIRMAN: Mr. Dession moves and it is seconded that 19.1 be adopted.

MR. DEAN: Might we not divide the list of the

jurors and the list of witnesses? I think they present two different problems. I am against 19.1 because, as a practical matter, you do not know your witnesses in advance. But I think there is a lot to be said for getting a list of the jurors.

MR. HOLTZOFF: You can get them from the court clerk. That is a public document.

MR. WECHSLER: How about the existing law on treason in capital cases which requires a list of jurors and witnesses three days before trial? Is it intended to repeal that? I would be very reluctant to repeal that.

MR. MEDALIE: Let me point out something about this district. The rule as to jurors' lists would not work in this district because we have a jury pool for all civil and criminal cases, and you can get the telephone directory every month, you ask for it, and you go up and look at it. It would not do you any good.

MR. DEAN: I agree. It would not.

MR. HOLTZOFF: I move the question.

THE CHAIRMAN: All those in favor of the motion say "Aye." The motion is to adopt 19.1.

(No response.)

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

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THE CHAIRMAN: It seems to me to be unanimously lost.

Rule 20 (a).

MR. WECHSLER: Mr. Chairman, I would like to make a motion. I would like to move that at the very least we retain the existing law on treason and capital offenses which deals with the Government providing a list of witnesses, and in that connection we might consider broadening that provision which, I think, is not subject to some of the objections that led to the defeat of 19.1.

THE CHAIRMAN: May I ask, if that motion prevails, that the Style Committee bring in something on that.

MR. MEDALIE: I think we will have to find out something. In this district there have recently been treason trials. I do not know what practice was followed. I think we ought to find out. Mr. Correa is not here. His chief assistant, Mr. Corcoran, can give us the information as to what occurred. We ought to get the benefit of some experience on that.

MR. YOUNGQUIST: It occurs to me, on Mr. Wechsler's motion, that the statute now provides for furnishing a list of witnesses in those cases, and that might be enough. Of course, the rules won't affect that

statute.

MR. HOLTZOFF: The rules do not affect any statute except those that are inconsistent.

MR. YOUNGQUIST: That is right.

THE CHAIRMAN: Well, we have the motion befor us. All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The response is very faint on both sides.

MR. DEAN: I think there is some question of what you want to do. Do you want to put in a footnote saying we do not want to repeal that present statute, or do you want to go further than that?

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MR. WECHSLER: What I really had in mind is, we ought to consider whether we want to continue that statute. I think it is clear it should be continued, and from that premise I think it might be thought about, as to whether the statute should be broadened at all, and then get the benefit of Mr. Dession's thinking on this witness list problem.

MR. HOLTZOFF: Haven't we defeatel the witness list problem?

MR. WECHSLER: I don't know. If the

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Committee by voting against 19.1 meant to eliminate any disclosure of witnesses, then there is no use talking about it. But I voted against 19.1 because I thought that mutual disclosure was no good; but I am uncertain as to what disclosure ought to be required of the Government.

MR. SETH: Couldn't we follow the suggestion made a while ago to get somebody here who has had some recent practice and experience and talk to him about it?

THE CHAIRMAN: Would it be agreeable to let that motion lay over? I am in doubt as to whether it is carried or lost. I think you voted for it and I think Mr. Holtzoff voted against it, and it is a tie, and I would prefer not to break that particular tie. So let us leave it that it might be brought up on Monday or Tuesday.

MR. LONGSDORF: Mr. Chairman, isn't it now in order to consider Mr. Dession's alternative Rule 10? I understand that was reserved to be considered with 19.1.

MR. HOLTZOFF: Let us pass that for the time being.

MR. WECHSLER: That is a related problem, the problem of witnesses before the grand jury. That is

what you mean Mr. Longsdorf?

MR. LONGSDORF: Yes.

THE CHAIRMAN: Rule 10, on page 6 of Rule 10, alternative Rule 10?

MR. LONGSDORF: Yes, that is the one.

MR. HOLTZOFF: All of it is covered in the rule we adopted, except the requirement of furnishing names of witnesses who appear before the grand jury.

MR. DESSION: That is right.

MR. MEDALIE: I take it there is a motion that alternative Rule 10 be substituted for the approved Rule 10.

MR. DESSION: I also move conformity to what was done with Rule 10 in the course of these meetings.

MR. WECHSLER: Couldn't we have it as a motion to adopt the provision dealing with the names of witnesses before the grand jury, and thus get away from other complications in Rule 10?

MR. DESSION: I think that is the best way to do it.

MR. LONGSDORF: Would the motion then be to add that 10 as already adopted?

THE CHAIRMAN: Yes.

MR. MEDALIE: May I state that that practice has existed in New York, and it has been trying. In

other words, the tendency is against it.

THE CHAIRMAN: Are you ready for the motion?

MR. MEDALIE: Yes.

THE CHAIRMAN: All those in favor of alternative Rule 10, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is lost.

MR. CRANE: Mr. Chairman, may I ask a question? I do not want to interrupt your going ahead; I just want to ask you to think of something, if you will, and not answer it. In connection with Rule 6 I have a query, (b) (1). I spoke to Mr. Holtzoff about it and he thought there was something in it. You see, you do not say the challenges shall be made. A challenge may be made on the ground that a state of mind exists on his part which may prevent him from acting impartially. Now, who makes the challenge, and when, and how, and how do you discover the state of mind unless you can question him? In the Federal courts there is a system that permits lawyers to question the grand jury. We do not in the State.

MR. MEDALIE: May I answer that, Mr. Chairman?

THE CHAIRMAN: Surely.

MR. MEDALIE: We do not in New York interrogate grand jurors in advance for the purpose of determining prejudice or bias. The fact is, however, that the district attorney after 23 names have been pulled out of the box from the panel that has come there asks them "Do you all live in -" and then he names the eleven counties. Then he asks if each of them possesses at least $250, that is, in property, and so forth, and then he stops. That is all he needs to ask about their qualifications. Also he asks them if they are citizens of the United States. And when he is through with that he has done all the interrogating necessary. Now, no one else does any interrogating.

Now, in our State practice, which is not sanctioned by law, by the way, there is the habit when 12 men get into a box, of asking each man a lot of fool

8 questions.

MR. CRANE: That is a petit jury.

MR. MEDALIE: Yes, petit jury.

Now, the Code of Criminal Procedure has a provision for challenging jurors on the ground of bias and other disqualifications. It also provides that that challenge shall be filed - you have to write a challenge under the law - and then you try the challenge if it is traversed. That is all in the Code of Criminal

Procedure, and I will bet you now that outside of yourself, whom I have just told it to, and me, there are no other two lawyers who know about it. Now, because that practice was provided for by statute they got the habit of interrogating jurors to find out if there was a ground for challenge. It was an illegal procedure.

MR. CRANE: Well, you are not speaking about what I am speaking about.

MR. MEDALIE: If it is illegal in the case of petit jurors it is illegal in the case of grand jurors.

Now, if you know that a grand juror has a bias you can go ahead and challenge him, and then you can try that challenge, and go prove it yourself.

MR. CRANE: But how? You never heard of a grand juror being questioned by the lawyers in a case. Now, here you have provided everything with respect to challenges of a petit juror in these rules, and that the questions may be asked by counsel with the permission of the court, and so on. We have passed all that. But now you come to the grand jury which you say shall consist of 16 to 23 men, and then you go on and say that the juror may be challenged by the attorney for the Government or the defendant. You are providing for a challenge by the defendant, and I agree with you it should not be. The attorney for the defendant

who has been held to answer in the district court may challenge the array, or he may challenge a grand juror or an individual juror on the ground that the juror is not qualified. When does he do it and before whom? And the defendant may do it when a state of mind exists on his part which may prevent him from acting impartially. How does he find that out? Except we impliedly say there that when the grand jury is called the defendant's counsel, who knows he is going to be taken up by that grand jury, may appear and question it to find out its state of mind, and challenge a juror because he is not qualified. We ought not to have any such implication at all if he does not have any such right.

MR. MEDALIE: Don't we have that in New York?

MR. CRANE: I never knew a grand jury to be questioned by any lawyer in the court, and I have had plenty of them.

MR. MEDALIE: Isn't that in the Code of Criminal Procedure in New York?

MR. CRANE: I am just stating what happened. I never knew a lawyer to come and question a grand juror. In the first place, he does not know his client is going to be indicted.

MR. ORFIELD: I believe it can be done in some States.

MR. CRANE: That is the trouble. Some States have that, and that will leave an implication here that they can appear when the grand jury is called. They may think they have the right.

MR. MEDALIE: We intended that. It is a universal practice to challenge to the array.

MR. CRANE: Yes, but you are going to question as to his state of mind.

MR. MEDALIE: You can't question him. You must first challenge him.

MR. CRANE: How are you going to challenge him as to his state of mind unless you question him?

MR. MEDALIE: If you do not know about it you can't challenge him.

MR. CRANE: How can you know about it without asking him?

MR. SEASONGOOD: If he has gone around and said "So and so is a such and such" --

MR. MEDALIE: That is exactly it. For the same reason you cannot file an affidavit of prejudice against a judge unless you specify something and know what you are talking about.

THE CHAIRMAN: Well, we have voted on that. Unless there is a motion to reconsider may we go on to Rule 20 and finish that perhaps tonight, and the one additional rule

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that Mr. Wechsler suggests.

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THE CHAIRMAN: Rule 20 (a), are there any suggestions?

MR. HOLTZOFF: I don't think there are any changes in that from the previous drafts. These are just routine provisions, Mr. Chairman.

THE CHAIRMAN: Rule 20 (a). All those in favor, say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Rule 20 (b).

MR. SEASONGOOD: As a matter of style, on lines 13, 16 and 20, "objects" should be "things".

THE CHAIRMAN: Is that accepted, change "objects" to "things" in lines 13, 16 and 20?

MR. ROBINSON: That is in harmony with the civil rules.

THE CHAIRMAN: And also in the title.

Are there any further suggestions? If not, all those in favor of Rule 20 (b) say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

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THE CHAIRMAN: Carried.

Rule 20 (c).

MR. SEASONGOOD: I do not want to open the discussion again, but I do not favor serving subpoenas by persons other than officers. The return of an officer is prima facie evidence of correctness. Here you get some other fellow to serve a subpoena and the question is whether he did or whether he did not.

MR. MEDALIE: It has been followed successfully in New York and for years there has never been any trouble over it.

MR. SEASONGOOD: It isn't in our jurisdiction. Nobody serves a subpoena but an official.

MR. MEDALIE: You remember we discussed that last time?

MR. SEASONGOOD: If it has been finally settled, I do not want to open it again, but I want to register my views.

MR. MEDALIE: And I won't say anything this time, because I defended it at the session three drafts ago and I don't want to do it again.

THE CHAIRMAN: All those in favor of Rule 20 (c) say "Aye."

MR. WAITE: I want to ask a question about the last sentence, "When the subpoena is issued on behalf of

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the United States fees and mileage need not be tendered." Does that mean a man in Michigan can be suopoenaed to come down here to New York and not have his mileage tendered to him in advance?

MR. ROBINSON: He knows he will get his money, of course, doesn't he?

MR. WAITE: He may not have the money.

MR. MEDALIE: The New York practice is, when he cannot do anything about it and tells the marshal he cannot come, the local marshal who served him makes some arrangement with the marshal in the district in which he is to appear to advance the money.

MR. HOLTZOFF: We thrashed this out at the last meeting, Mr. Waite.

MR. WAITE: Did we? I didn't know. This is just formal, I move that the last sentence be stricken, and I will accept defeat.

THE CHAIRMAN: All those in favor of Mr. Waite's motion say "Aye."

(Single "Aye.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: The motion is lost.

MR. CRANE: May I ask, what do they do, don't they get anything at all?

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MR. HOLTZOFF: Yes, but they get paid afterwards. The marshal pays them after they testify.

MR. CRANE: As a matter of grace?

MR. HOLTZOFF: No, it is required, but the only thing is that they do not have it tendered in advance.

MR. SEASONGOOD: Mr. Chairman, I should like to ask whether in line 28, "or by leaving copy at his usual place of residence" provides for the service of subpoena only by serving it on him?

THE CHAIRMAN: Isn't that the general rule in most States? Service of the subpoena must be personally made as distinguished from a summons, which may be served by leaving it with a member of the family.

MR. YOUNGQUIST: That is my understanding.

MR. HOLTZOFF: That is the civil rule, and we certainly do not want to have a different rule on the serving of subpoena.

MR. MEDALIE: We don't want a man committed for contempt.

MR. YOUNGQUIST: Disobedience is contempt, isn't it?

MR. MEDALIE: Yes.

THE CHAIRMAN: Rule 20 (d0 (1), any suggestions?

MR. HOLTZOFF: I move its adoption.

MR. WECHSLER: Seconded.

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THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

20 (d) (2).

MR. YOUNGQUIST: I move its adoption.

MR. McLELLAN: I second the motion.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

Rule 20 (e) (1).

MR. HOLTZOFF: I move its adoption.

THE CHAIRMAN: All those in favor say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

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THE CHAIRMAN: Carried.

20 (e) (2). Are there any suggestions?

MR. HOLTZOFF: I move its adoption.

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(No response.)

THE CHAIRMAN: Carried.

20 (f).

MR. LONGSDORF: Mr. Chairman, I have an objection to that. Failure to obey a subpoena served upon him may be deemed a contempt. We are not providing what constitutes contempt. We are telling how to proceed when the witness so behaves. I suggest that "deemed" be changed to "may be prosecuted as".

MR. YOUNGQUIST: Wouldn't it be better, Mr. Longsdorf, to say, "shall be deemed"?

MR. McLELLAN: No.

MR. LONGSDORF: That is just what I do not want to do.

MR. McLELLAN: That raises a question of whether the witness knew anything.

THE CHAIRMAN: Mr. Longsdorf, it is in the civil rules.

MR. HOLTZOFF: This is the language of the civil rules.

MR. LONGSDORF: I am sorry, but I remain unmoved, Mr. Chairman.

MR. YOUNGQUIST: So do I.

MR. McLELLAN: I think the question might arise

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as to whether the evidence he has to give is material or immaterial.

THE CHAIRMAN: The motion is to adopt the section, following the civil rules.

MR. HOLTZOFF: There is an amendment. Mr. Longsdorf wants to change "deemed" to "prosecuted".

MR. LONGSDORF: I put it in the form of a motion.

THE CHAIRMAN: State the motion.

MR. LONGSDORF: I move that the word "deemed" be stricken out and the words "prosecuted as" be substituted.

MR. YOUNGQUIST: I did not hear that.

THE CHAIRMAN: The motion is to strike out the word "deemed" in line 55 and substitute the words "prosecuted as".

MR. GLUECK: I second the motion.

THE CHAIRMAN: We are changing the civil rule, and I think they may deem it --

MR. HOLTZOFF: In contempt of court.

THE CHAIRMAN: -- supercilious on our part to pass on a similar provision that the court has already approved. That is the only thing which is troubling me.

MR. YOUNGQUIST: I wouldn't want to do that either.

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THE CHAIRMAN: I would not say Mr. Longsdorf is not right, but this is not only the work of the Civil Rules Committee but it has been approved by the court.

MR. YOUNGQUIST: There should not be any difference between contempt in one case and the other.

MR. SEASONGOOD: That is true, except you have a set criminal statute on contempt, and disobedience of any lawful order of court is a contempt under - what is it? - 325. So here you say it may be a contempt, whereas the other says it is a contempt.

MR. McLELLAN: Does it say it is a contempt not to answer a subpoena?

MR. SEASONGOOD: This says it is a contempt to disobey any lawful order.

THE CHAIRMAN: This follows the exact language of the civil rule.

We have the motion of Mr. Longsdorf to amend. All those in favor say "aye".

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed,"No" --

MR. McLELLAN: What is that?

THE CHAIRMAN: Mr. Longsdorf moves to amend by striking out the word "deemed" on line 55 and substitutin in place of it "prosecuted as a contempt". The section

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as is follows a corresponding section of the civil rules.

Now may we have the vote again? All those in favor of the motion will say "Aye."

(Chorus of "Ayes.")

THECHAIRMAN: Opposed,"No."

(Chorus of "Noes.")

THE CHAIRMAN: A show of hands.

(After a show of hands the Chairman announced the vote was five in favor and opposed nine.)

THE CHAIRMAN: The motion is lost.

All those in favor of 20 (f) in its present form say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Opposed, "No."

(Chorus of "Noes.")

THE CHAIRMAN: Carried.

Mr. Wechsler has an additional Rule 11 (b) that he desires to propose. Mr. Wechsler, would you read it?

MR. WECHSLER: Yes. Rule 11, you will recall, is the rule on Pleas, and I propose that what is now Rule 11 be called Rule (a) and that we add Rule 11 (b) to read as follows: "The court shall not accept a plea of guilty without previously determining that the indictment or information charges an offense and that the

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plea is entered voluntarily, with understanding of the nature of the charge."

I understand this to be the law as it is in any well-administered court, but I think it well to articulate it in a draft that deals as fully as ours with matters of procedure.

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Secondly, I have a deeper purpose. The Supreme Court in its concern with matters of this sort has taken the tack of what seems to be an almost unreasonable extension of the right to counsel as a remedy. I think a better remedy is the traditional one of vesting in the sitting judge the responsibility that any judge feels for protecting against oppression and assuring that the defendant knows what he is doing. We cannot change what the Supreme Court has done in the matter of counsel, but we can, I think, articulate this responsibility that I feel any judge would appreciate now that he has.

MR. McLELLAN: I second the motion.

THE CHAIRMAN: You have heard the motion.

MR. YOUNGQUIST: May I make a suggestion? We have already in Rule 11 that "The courtmay refuse to accept a plea of guilty." How does that tie in with your suggestion?

MR. WECHSLER: This is really a setting out of what is involved in the statement that the court need

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not accept a plea of guilty.

MR. YOUNGQUIST: Why don't we strike out the language in the present rule?

MR. WAITE: Couldn't we leave that to the Committee on Style, as to how they shall be related to each other?

MR. YOUNGQUIST: All right.

MR. HOLTZOFF: It seems to me what is in this rule is so understood you do not have to spell that out. Obviously every judge wants to know whether the defendant knows what he is doing when he is pleading guilty. I do not think you have to direct the judge to be sure that he does.

MR. WECHSLER: I do not think the courts of the United States will take offense at it, Alex.

MR. HOLTZOFF: I am not suggesting that anybody will take offense. I am suggesting that it is surplusage.

MR. WECHSLER: It is a fundamental thing but it relates to the procedure of the courts on plea of guilty, and that procedure varies.

MR. CRANE: Can we have this put over until tomorrow morning?

THE CHAIRMAN: Not tomorrow morning.

MR. YOUNGQUIST: I have another question there. Why impose on the court the duty of determining whether the

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indictment or information charges an offense?

MR. WECHSLER: That is part of my substantive proposal, I mean to impose that obligation.

MR. CRANE: A judge is not going to make a ruling on that and say that he finds it defective as a matter of fact. And if the man has pleaded guilty to a bad indictment, he can always get out on habeas corpus.

MR. HOLTZOFF: No.

MR. MEDALIE: You cannot test an indictment with a habeas corpus, even in the State courts, Judge.

MR. CRANE: I don't know; are you sure about that?

MR. MEDALIE: Yes.

MR. CRANE: A verdict of guilty would not cure the defect.

MR. HOLTZOFF: You can go up with a defect but you could not go up on habeas corpus.

MR. CRANE: You can raise it at some point, can't you?

MR. MEDALIE: No, the only thing you can raise with a habeas corpus in connection with an indictment is jurisdiction of the court.

MR. CRANE: If it doesn't say, it doesn't state any crime at all, the court hasn't jurisdiction.

MR. HOLTZOFF: Yes, it has jurisdiction.

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Under the recent decision, the Supreme Court says you can raise other questions, like fairness of the trial.

MR. MEDALIE: That is something else.

MR. HOLTZOFF: But you cannot raise the sufficiency of the indictment, as I understand it.

MR. McLELLAN: I do not want to interrupt anybody, but may we have the question?

THE CHAIRMAN: All those in favor of the motion say "Aye."

(Chorus of "Ayes.")

THE CHAIRMAN: Contrary, "No."

(Chorus of "Noes.")

MR. WAITE: That is Mr. Wechsler's motion?

THE CHAIRMAN: Mr. Wechsler's motion.

I will call for a show of hands on that.

(After a show of hands the Chairman announced the vote was nine in favor and opposed five.)

THE CHAIRMAN: The motion is carried.

Gentlemen, we have concluded the chapter on trial We have done a little better today than we did yesterday, but may I suggest that we ought to plan a long session Monday, to last day and evening, and may we start at nine o'clock sharp?

(Discussion off the record.)

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MR. MEDALIE: I move 9.30.

MR. WECHSLER: Seconded.

THE CHAIRMAN: I won't even put the motion. I see I am overruled.

(Adjourned to February 22, 1943, 9.30 a. m.)

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