MINUTES OF THE MAY 1965 MEETING OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

The meeting of the Advisory Committee on Criminal Rules convened in the Supreme Court Building on May 3, 1965, at 9:30 a.m. The following members of the Committee were present during all or part of the session:

John C. Pickett, Chairman
Joseph A. Ball
George R. Blue
Abe Fortas
Sheldon Glueck
Walter E. Hoffman
Maynard Pirsig
Frank J. Remington
Barnabas F. Sears
Lawrence E. Walsh
Edward L. Barrett, Jr., Reporter
Rex A. Collings, Jr., Associate Reporter

Judge William F. Smith was unable to be present during the meeting. Others attending were Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure, Professor Charles Alan Wright, member of the standing Committee, William E. Foley, Deputy Director of the Administrative Office, and Will Shafroth, Secretary of the Rules Committees.

Judge Pickett opened the session with a tribute to Honorable Thomas D. McBride, a member of the Committee who died on April 4, 1965. He then introduced Mr. Sears of Chicago who had been appointed by the Chief Justice to fill the existing vacancy.

Judge Pickett announced that the purpose of this meeting was to consider the comments and suggestions received from the bench and bar regarding the proposed rules.

RULE 4. WARRANT OR SUMMONS UPON COMPLAINT

The Reporter stated that this rule had been circulated in both the first and second preliminary drafts and that there had been no significant objections from the bench and bar. Upon motion made by Judge Hoffman, the Committee approved the proposed rule as circulated in the Second Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts.

RULE 5. PROCEEDINGS BEFORE THE COMMISSIONER

The Reporter stated that there are still unresolved problems concerning this rule. In addition to Mallory there is the problem of whether the defendant should have a right to a full preliminary hearing and he thought consideration to this rule should be given as a priority item for the future. He further stated that the changes recommended for this rule were to conform with changes made in Rules 4 and 44. He stated that several comments had suggested the inclusion of the word "financially", in line 6 to precede the word "unable", but he thought it unwise to do so. Judge Hoffman expressed the opinion that the Criminal Justice Act had clarified this problem. Upon motion duly made and seconded Rule 5(b) was adopted as circulated in the Second Preliminary Draft with the inclusion of a reference in the Advisory Committee's Note to Rule 44, if the Reporter thinks this necessary.

RULE 6. THE GRAND JURY

The Reporter stated that three things had been done for this rule. Subdivision (d) introduced the recording device for the grand jury; subdivision (e) broadened the secrecy requirement to make it explicit that the operator of the recording device or the typist who transcribes recorded testimony is under the secrecy injunction; and subdivision (f) proposed to make sure that a defendant who has been arrested but not "held to answer" gets notice when his case is "no-billed" by the grand jury.

The Reporter further stated that the suggestions had been received for additional amendments: (1) to require that testimony before grand juries be recorded; (2) to provide for the right of a grand jury witness to disclose his grand jury experience to his own lawyer; and (3) at the request of the Department of Justice, explicitly to authorize disclosure of grand jury transcripts to other Federal grand juries.

Inasmuch as the Committee felt discussion had been previously held on the first two points and that the third point would require circulation to the bench and bar, it was duly moved and seconded that Rule 6 be adopted as circulated in the Second Preliminary Draft. The motion carried.

Mr. Fortas inquired, in view of the changes made in the sections pertaining to bail, whether the Reporter should check all the references to the use of the word "bail." The Reporter stated that he would look into this to see if any revisions were necessary.

RULE 7. THE INDICTMENT AND THE INFORMATION

The Reporter stated that the main problem is to draft language to control discretion of the judge in dealing with motions for a bill of particulars.

He further stated that several comments had been received on the proposal for this rule suggesting that it should continue to embody in some way the principle that the court will not act unless the moving party has pointed to good reasons why the requested relief should be provided. Upon motion duly made and seconded the Committee approved the rule as circulated in the Second Preliminary Draft.

RULE 11. PLEAS

After discussion of this rule, Mr. Fortas moved adoption of Rule 11 as circulated in the Second Preliminary Draft with the inclusion of the following amendments:

(1) Insertion in line 8 of the words "and the consequences of the plea" after the words "nature of the charge."

(2) The inclusion of the paragraph recommended by the Reporter for the Advisory Committee's Note to include the following amendment from the floor:

> "For a variety of reasons it is desirable that in some cases entry of judgment be permitted upon a plea of nolo contendere without inquiry into the factual basis of the plea. The new third sentence is, therefore, not applicable to pleas of nolo contendere. It is not intended by this omission to reflect any view upon the effect of a plea of nolo contendere in relation to a plea of guilty. That problem has been dealt with by the courts. See, e.g., Lott v. United States, 367 U.S. 421, 426 (1961)."

RULE 12.1. NOTICE OF INSANITY

The Reporter stated that in the first draft there had appeared a proposed rule for "Notice of Alibi" and a proposed rule for "Notice of Insanity" but the Committee at its last meeting had recommended deletion of the "Notice of Alibi" clause. He further stated that the purpose of this rule is to eliminate the interruption of trial for the purpose of psychiatric examinations. Upon motion duly made, and seconded, the Committee approved unanimously this rule with an amendment to the second sentence reading as follows:

> "The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or may make such other order as may be appropriate."

RULE 14. RELIEF FROM PREJUDICIAL JOINDER

The Reporter stated that the reason for this proposal was particularly in response to the group of Fifth Circuit cases which found "reversible error" in cases where judges had denied motion for severance and co-defendants' confessions were used in the trial. In Rule 16, it was decided not to give defendant right to discover co-defendants' confessions in advance of trial. The Reporter further stated the Committee should decide whether it approved the amendment as circulated or whether it wants in this rule and in connection with Rule 16 to take another look at decisions made earlier with reference to discovery of the co-defendants' confessions.

Discussion was held as to possible prejudice of the witness. Judge Hoffman moved approval of this rule as circulated in the Second Preliminary Draft subject to the Committee's decision on Rule 16. The motion was seconded and carried.

RULE 15. DEPOSITIONS

The Reporter stated that the basic problem of this rule is whether to authorize the government to take depositions. If the Committee does authorize government depositions, then details must be worked out for government depositions that are allowed. He stated that this proposal has drawn relatively little response. The Government, not the Department of Treasury and the Department of Justice, has approved it. The similar version in the preliminary draft was approved by the House of Delegates of the American Bar Association, with the suggestion about attorney's fees, and comments have been received from the American College of Trial Lawyers and several individuals. Judge Hoffman moved that the Committee retain the right to take depositions at the instance of the government or a witness. The motion was seconded and carried.

Subdivision (c). Discussion was held on this subdivision and it was voted to add the following sentence just ahead of the last sentence of the subdivision:

> "If the deposition is taken at the instance of the government or a witness, the court shall direct that the expenses of travel and subsistence of the defendant's attorney and of a defendant not in custody for attendance at the examination be paid by the government."

Subdivision (d). The Reporter stated that the important problem here is the matter of style to make clear that cross reference to civil proceedings includes the filing requirement as well as the requirements on the taking of the deposition. This subdivision was approved as circulated.

Subdivision (e). This is protective language to tighten up the rule to protect against the possibility of cases where the government prefers to depose the witness and have him unavailable at the trial in order that the jury doesn't have a chance to see the person and only sees his testimony. A question was raised as to whether some provision should be made in a case where the government didn't subpoena a man until the day before trial and he is scheduled to leave the following day for a foreign country.

Upon motion of Mr. Fortas, the Committee approved the restoration of the phrase in lines 32, 33, and 34 of the Second Preliminary Draft that had been previously deleted "unless it appears that the absence of the witness was procured by the party offering the deposition"; adding in line 37 after the word "unable" the phrase "despite the exercise of reasonable diligence"; and deleting the entire sentence on lines 39-44.

Subdivision (g). The government has inquired whether a defendant in custody should not be able to waive his right to be present -- under the present language the statute gives him no choice. The United States Attorney for the District of Columbia suggests there may be cases due to old age, ill health, etc. where the defendant would not want to be present. Professor Barrett stated that the defendant on bail has a choice but the defendant in custody does not. After discussion, and upon motion duly made and seconded, the Committee approved the following phrase to be inserted in line 60 after the word "examination", to read as follows:

> "unless the defendant and his counsel elect in writing that the defendant not be present"

Judge Maris called attention to the fact that in the sentence beginning on line 62 the word "waive" is used instead of the term "elects" and suggested that the terminology for line 60 coincide. Mr. Ball stated that in view of conformity this sentence should commence parallel to the sentence beginning on line 62. It should read "a defendant in custody" and "a defendant not in custody" rather than start the sentence with the "officer having custody." Professor Barrett suggested that a sentence be inserted as the reference to the officer is also needed. Professor Barrett further stated he would redraft this including all suggestions from the floor. [As redrafted and adopted these suggestions were not followed because they would require substantial rewriting of the subdivision.]

Discussion was held of the sentence beginning on line 66 relative to the expenses of the defendant. Questions were raised as to whether the attorney should also get attorney's fees under these circumstances. Discussion was held on these points and the Committee decided that because of the Criminal Justice Act the Advisory Committee would not have authority to propose any rule to pay the attorneys fees. It was agreed, however, that

the sentence in lines 66-69 should be transferred to subdivision (c). Professor Wright questioned whether, under the rule-making power, the government could be required to pay money. He stated the Civil Rules Committee had dealt with this and that under Section 2412(a) it was determined that it would have to be by an act of Congress.

Further discussion was held concerning the last sentence of this subdivision, lines 69-76, as to whether the Committee should say that if the government takes the deposition of a witness that the defendant should be given access to all prior statements of that witness. Mr. Fortas questioned whether we should go further than the Jencks Act. After discussion and upon motion of Judge Hoffman, the Committee moved that the language of the last sentence, lines 69-76 be left in the proposed rule as circularized by the Second Preliminary Draft.

RULE 16. DISCOVERY AND INSPECTION

Subdivision (a). The Reporter stated that this subdivision had the approval of the Department of Justice with the exception that the lack of a designation requirement in Rule 16(a)(1) and (2) posed some problems to them. He also stated that the Treasury Department objected to most aspects of the draft.

Subdivision (b). Professor Barrett stated that this subdivision presented several problems which had been covered in his draft in the Deskbook for the meeting on pages 12, 13 and 14. After full discussion by the Committee, the rule was redrafted by the Reporter and presented for further discussion. The Committee upon motion duly made and seconded, approved the following wording for subdivision (b):

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

The Committee felt that some reference should be shown in subdivision (b)(3) of the Note that "The Advisory Committee concludes that if any change is to be made with respect to this subject matter, it should be made by Congress." The Reporter was asked to change the other portions of the Note to accord with the changes made for subdivision (b).

Subdivision (c). The Committee discussed the matter of government discovery: (1) whether they want to leave it in, (2) the conditional alternative or the absolute alternative; and (3) the problem concerning parallelism. The topic of government discovery was discussed and upon motion duly made and seconded the Committee decided to retain subdivision (d), Discovery by the Government. Mr. Sears cast the only opposing vote. Parallelism was then discussed and the Reporter stated the problems which he had covered in the Deskbook on page 10. Judge Hoffman inquired why "buildings and places" had been left out and Professor Barrett stated it had been inadvertent.

A redraft of subdivision (c) was distributed which incorporated all suggestions made during the meeting and upon motion duly made, and seconded, the Committee approved the following wording for this subdivision:

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

Chief Judge Alfred P. Murrah, Chairman of the Judicial Conference Committee on Pretrial Procedure, transmitted on behalf of the Committee a suggestion stating that the portion of proposed Rule 16(c) which provides that a court may "condition its order," etc., should provide an exception generally to the effect "except in situations where the defendant is entitled as a matter of right or justice to the discovery sought by him". The Committee, after discussion, disapproved this suggestion.

Subdivisions (d) (e) and (f). Inasmuch as there had been little comment on these subdivisions, Mr. Fortas moved their adoption as circulated. The motion was seconded and carried unanimously.

Subdivision (g). A few minor comments were received concerning the technical wording to make clear the scope of the obligation imposed in the first sentence. The Committee upon motion duly made and seconded approved the insertion of the words "or ordered" after the word "requested" in line 90 of this subdivision.

RULE 17. SUBPOENA

Upon motion made by Mr. Fortas, the Committee approved the following language for line 6 of subdivision (b) to read

"and upon a satisfactory showing that the defendant . . . ."

The question was raised as to whether the phrase in line 2 "the court or a judge thereof" should be changed to read "The court shall order . . . ." The members of the Committee felt that the present terminology is ambiguous. Upon motion made and seconded, the Committee directed that the Reporter eliminate this phrase wherever a rule is being revised and could be so done. Attention was called that this would have to be taken care of in line 19 also.

Professor Glueck suggested that the Reporter go through all the rules and make them consistent with the preceding motion. However, the Reporter stated that he would hesitate to do this without further consideration of the Committee because in some cases it may indicate the judge was acting in another capacity.

Professor Barrett called attention to the last sentence of subdivision (b). He stated that subsequent to this rule's adoption the statute was changed to provide that when a subpoena was issued on behalf of the United States, fees and mileage need not be tendered. In (d) it is proposed to bring in the statutory language and this might be construed to mean that if the court ordered a subpoena to be served upon defendant's witness under subdivision (b), where a person has a long distance to travel the government might not have to advance money for travel. He thought it unlikely, however, that the Government would do so. Judge Hoffman moved that 17(b) as amended, and (d) be approved. The motion was seconded and carried.

RULE 17.1. PRETRIAL PROCEDURE

The essential question on the pretrial rule is whether we should leave it as general and undirective as it is and give judges chance to work out experiments in various modes of handling pretrial or whether we should move in other directions.

Professor Pirsig raised the point that the rule permits only counsel to appear and also that possibly more encouragement of reducing what is agreed to some form of order which would have more effect than a memorandum. Judge Hoffman felt there was no constitutional question about pretrial on matters of procedure and general discussion, but stated that there is a constitutional question as to anything which may be introduced by way of evidence. He further suggested that some caveat be stated in the Note about the defendant waiving his right to be present or that he should be present at the pretrial conference.

Mr. Fortas moved that the wording in lines 3 and 4 of the proposed rule be changed to read "or upon its own motion may order one or more conferences." The motion was seconded and carried unanimously.

Mr. Sears thought this rule was too general and that it did not lay down any specific regulations to be followed during the pretrial conference. Mr. Fortas did not think it well to lay down strict rules for the judge to follow in the pretrial conference. He thought the pretrial conference should be suited to the temperament of each judge, otherwise it is not effective.

The Committee approved the following paragraph to be added to the end of the Advisory Committee's Note together with any additional citations:

> "This new rule is cast in broad language so as to accommodate all types of pretrial conferences. In pretrial conferences which involve substantive or factual matters it may be desirable and necessary for the defendant to be present at the conference. See the report of Committee on Pretrial Procedure of the Judicial Conference of the United States, Recommended Procedure in Criminal Pretrials (1964)."

The Judicial Conference Committee on Pretrial Procedure approved this proposed rule but considers it preferable that stipulations agreed upon at a pretrial conference in a criminal case be reduced to writing and signed by the legal counsel for Government and by the defendant and his counsel and approved by the pretrial judge in a "pretrial stipulation and order." The Pretrial Committee recommended the following language be included in the rule:

> No admissions against interest made by the defendant or his attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and his attorney.

The Committee, upon motion of Judge Hoffman, moved adoption of the substance of this suggestion with the deletion of the words "against interest" and asked that the details be left up to the Reporter. The motion was seconded and carried.

RULE 18. DISTRICT AND DIVISION
RULE 19. TRANSFER WITHIN THE DISTRICT

Professor Barrett stated the Committee had received a comment or two expressing fear that a defendant from a rural area may be prejudiced if division venue is eliminated and he is tried in an urban setting.

After discussion of this point, Judge Hoffman moved the adoption of Rule 18 as circularized in the Second Preliminary Draft and the deletion of Rule 19 as shown in the Second Preliminary Draft, leaving the problem of renumbering caused by the deletion of the rule up to the Reporter. The motion was seconded and carried.

Professor Wright stated that the Civil Rules Committee had found it undesirable to renumber because of the problem it causes in legal research. When one rule is deleted it is better to leave the number out than to move another rule up into the unused number.

Meeting recessed at 5:00 p.m.
Reconvened at 9:30 a.m., May 4, 1965

RULE 20. TRANSFER FROM THE DISTRICT FOR PLEA AND SENTENCE

This rule received general approval but the Department of Justice had three comments which the Reporter covered in the Deskbook material on pages 20 and 21. Discussion was held on the matters raised by the Department of Justice and upon motion duly made and seconded the Committee approved this rule in entirety as circulated in the Second Preliminary Draft. An explanation is to be made in the Advisory Committee's Note stating that under subdivision (d) consent of only the United States Attorney in the district of arrest is required because of the necessity of handling juvenile cases expeditiously.

RULE 21. TRANSFER FROM THE DISTRICT OR DIVISION FOR TRIAL

The Reporter stated that the Department of Justice had questioned whether by the use of the word "may" in subdivision (c) the Committee intended to give the court discretion to refuse a transfer consented to by both parties. They felt the Committee's Note was stronger than the rule. The Committee's consensus was to leave the word "may" but to change the Committee's Note in accordance so that it would not read so strongly. After further discussion of subdivision (b) the Committee decided to broaden it to permit a transfer in any case on motion of the defendant when such transfer would be in the interests of justice, and approved the following language for this subdivision:

(b) TRANSFER IN OTHER CASES. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts to another district.

RULE 23. TRIAL BY JURY OR BY THE COURT

The Reporter stated that no comments had been received on the proposed amendment for this rule but that several lawyers had suggested that the requirement of government consent to a jury trial be eliminated. After discussion, and upon motion made by Judge Hoffman, the Committee approved adoption of this rule as circulated.

Judge Walsh presented a draft of Rule 23(b) (Jury of Less Than Twelve) which had been discussed at length during this session and stated that he thought this draft would resolve the problem of the juror being incapacitated. He explained the draft and stated the parties could stipulate in writing at any time before verdict that an alternate juror may replace a juror after the jury retires.

Judge Walsh moved adoption of an amendment to Rule 23(b) as below stated:

(b) JURY OF LESS THAN TWELVE; USE OF ALTERNATE JUROR AFTER JURY RETIRES. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that, notwithstanding subdivision (c) of Rule 24, an alternate juror may replace a juror after the jury retires. In the latter case, upon retirement of the jury the alternate juror selected pursuant to subdivision (c) of Rule 24 who has not theretofore replaced a regular juror and who was first called on the remaining alternate jurors shall not be discharged and shall be held apart from the jury but otherwise subject to the same conditions as though a member of the jury and he shall replace a juror who thereafter becomes unable or disqualified to perform his duties.

The motion was seconded. At this point Judge Maris was asked to address the Committee as to whether in terms of procedure this would be appropriate without circulation. Judge Maris stated that he thought this was borderline; however, the basic proposal, (not this modification) had been widely discussed even though not in the pamphlet. He felt it was a question of constitutionality whether this could be done without more basic study. Mr. Blue thought the Committee could determine as a matter of policy

whether this type of suggestion was acceptable but not actually incorporate it in the rule and to perhaps write a covering letter or recommendation for the Conference to consider.

After lengthy discussion the Committee approved Judge Walsh's motion to be submitted to the standing Committee as an alternative and let them decide whether to circulate it or to recommend it to the Judicial Conference. The motion was approved with the exception of one dissenting vote cast by Mr. Sears.

Professor Barrett called attention to the caption and the Committee asked the Reporter to handle this as an editorial problem.

RULE 24. TRIAL JURORS

The problem of a trial being declared a mistrial because of the incapacity of a juror serving during the deliberations for reason of illness, etc. was discussed at length. The case of the Second Circuit was offered as an example. Judge Walsh moved that as a separate subdivision of Rule 24 a section be included permitting alternate jurors be held on the standby and used in event a juror becomes unable to perform his duties during deliberations. The motion was seconded and discussion was opened. After the discussion was concluded the motion was restated by the Chairman and the vote was 4 in favor of the motion and 5 voting against it. The motion was lost.

Mr. Fortas moved that Rule 24 in its entirety as circulated in the Second Preliminary Draft be adopted. The motion was seconded and carried.

RULE 25. JUDGE: DISABILITY

The Committee approved the rule as circulated in the Second Preliminary Draft. Mr. Sears cast his vote in opposition inasmuch as he felt this was a radical departure from the basic fabric of the trial and he did not think that a judge should be allowed to preside when hearing the testimony of only part of the witnesses.

RULE 26.1. DETERMINATION OF FOREIGN LAW

Professor Barrett stated that this Committee had followed the lead of the Civil Committee and Professor Kaplan had recently said they did not anticipate any changes. No other comments had been received. The Committee, upon motion duly made and seconded, approved the rule as circulated in the Second Preliminary Draft.

RULE 28. EXPERT WITNESSES

The Reporter stated that the essence of the recasting is to give the judge power to assess some of the costs of the parties in addition to directing that payment out of funds be made as provided by law. Judge Maris stated this also gives power to appoint impartial witnesses.

Subdivision (a). Judge Hoffman stated that he did not agree with the subdivision in lines 10, 11 and 12 as he did not think it practical to have a witness attend the conference where the parties are participating. After discussion of this point, the Committee adopted the insertion of the words "in writing or" to appear after the word "court" and before the words "at a conference" in line 11.

Subdivision (b). The Committee moved upon motion duly made and seconded that subdivision (b) be amended to read as follows:

> "INTERPRETERS. The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government as the court may direct."

RULE 29. MOTION FOR ACQUITTAL

The Reporter stated several minor suggestions had been received for this rule. It was suggested that the caption be changed to read "Motion for Judgment of Acquittal," and the caption of subdivision (a) to read "Before or At the Close of All the Evidence." The Reporter stated that the Department of Justice had approved this rule with the suggested changes mentioned above. The Committee approved the following wording for the captions:

Rule 29. MOTION FOR JUDGMENT OF ACQUITTAL

(a) Motion Before Submission to Jury

RULE 30. INSTRUCTIONS

The Reporter stated that this rule appears to meet with general approval. The Committee approved the rule as circulated in the Second Preliminary Draft.

RULE 32. SENTENCE AND JUDGMENT

The Reporter stated that subdivisions (a)(1) and (2) and subdivision (f) seem to have general approval. Upon motion made, the Committee approved the adoption of these subdivisions as circulated in the Second Preliminary Draft.

Subdivision (c)(2) - Presentence Investigation - Report. Lengthy discussion was held on this subject. Some of the members felt that due process requires disclosure of facts in the presentence report and others felt that the report should remain confidential.

Professor Glueck stated that in view of certain aspects of the rule such as implementation of the judges commenting and allowing defense counsel to comment on certain items that neither the white nor the black has at this stage the absolute answer but the essentials of this field are clothed in ambiguity and that it would be wise to take an intermediate position as suggested by the Reporter to see what is disclosed. He further suggested that there be a continuing checkup on these controversial rules to see what a few years would disclose. He hoped that a grant may be secured through some law school to continue this work.

The Chair called for the question for the adoption of the rule as circulated in the Second Preliminary Draft. The vote was taken and 5 members voted in favor of the motion and 4 against. The Chairman stated that if he had a vote it would be in opposition. Judge Walsh stated that he voted "no" on the merits but on tactics he would vote as the majority rules as he would like to see the rule go up to the standing Committee.

The Committee further approved, upon motion made by Mr. Ball, an alternative rule for a subsection to be known as Alternative B to be sent up to the standing Committee so that it would have both points of view of the equally divided Committee:

> The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

The Note should also show the alternative paragraph.

RULE 33. NEW TRIAL

The Reporter stated general approval of the proposed changes but he did suggest an inclusion in the Note to indicate that the power of the court, on its own motion, to declare a mistrial and order a second trial will not be affected. After discussion the Committee approved the rule as circulated in the Second Preliminary Draft with the following paragraph to be inserted in the Advisory Committee's Note:

These amendments will not, of course, change the power which the court has in certain circumstances prior to verdict or finding of guilty to declare a mistrial and order a new trial on its own motion. See. e.g., Gori v. United States, 367 U. S. 364 (1961); Downum v. United States, 372 U. S. 734 (1963); United States v. Tateo, 377 U. S. 463 (1964).

RULE 34. ARREST OF JUDGMENT

Professor Barrett stated this rule had received general approval and the Committee recommended approval as circulated in the Second Preliminary Draft.

RULE 35. CORRECTION OR REDUCTION OF SENTENCE

The Reporter stated general approval as circulated and the Committee adopted this rule as circulated in the Second Preliminary Draft.

RULE 38. STAY OF EXECUTION, AND RELIEF PENDING REVIEW

Professor Barrett stated this rule had envoked some comment. The Department of Justice has indicated its support of the proposed changes. The Committee on Administration of Bail of the Junior Bar Section of the Bar Association of the District of Columbia had suggested several changes which were covered in the Deskbook material on page 36. Other suggestions received were also mentioned in the Deskbook.

Professor Barrett thought the rule should be broader and say that the defendant be retained at or transferred to a place of confinement near the place of trial or the place where the appeal is to be heard.

The Committee, upon motion of Judge Hoffman, approved adoption of Rule 38 as circulated in the Second Preliminary Draft and to include an amendment for deletion of the last sentence beginning on line 5 through line 11 and the insertion therefor the following sentence with changes in the explanatory Note to correspond:

> If the defendant is not admitted to bail the court may recommend to the Attorney General that the defendant be retained at or transferred to a place of confinement near the place of trial or the place where this appeal is to be heard for a period reasonably necessary to permit the defendant to assist in the preparation of his appeal to the court of appeals.

RULE 40. COMMITMENT TO ANOTHER DISTRICT: REMOVAL

The Reporter circulated an amendment to the first sentence of subdivision (b)(2), to conform to the changes made in Rule 5. The Committee approved amending the sentence to read:

> "The commissioner or judge shall inform the defendant of the charge against him, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a hearing or to waive a hearing by signing a waiver before the commissioner or judge."

RULE 44. ASSIGNMENT OF COUNSEL

The Reporter stated that the Committee spoke earlier about the "financially unable" problem and the Note should reflect that it is contemplated that the power of the court to appoint shall extend to those situations where the defendant cannot get counsel although he is able to pay. Judge Hoffman moved adoption of the proposed rule as amended by the recommendation of the Reporter and that the Note should reflect the changes to conform with the Criminal Justice Act. Subdivision (b) to read as follows:

> (b) Assignment Procedure. The procedures for implementing the right set out in subdivision (a) shall be those provided by law and by local rules of court established pursuant thereto.

The Committee further decided that the Note should carry a reference to Escobedo v. United States. Also, that the Committee make clear in the Note that it has not considered the problem of right to counsel prior to the commissioner stage.

Judge Hoffman moved adoption of the proposed rule as circulated in the Second Preliminary Draft and with the above mentioned changes. The motion was seconded and approved unanimously.

RULE 45. TIME

The Reporter stated this rule has posed no problems. Upon motion duly made and seconded the rule was approved as circulated.

RULE 46. BAIL

This rule raises several problems. One is the jurisdictional problem with respect to Congress. The Senate may pass statutes with respect to bail. They propose to encompass in the statutes some things which the Committee proposes to do. They are dealing with the bail jumping statute, attempting to parallel it, and may pass statutes which

indicate the preference for release on one's own recognizance as a preferable alternative to bail. The Reporter recommended that the Committee continue along its usual course as he feels it unlikely that Congress will pass a bill before next January when possibly the rules may become effective.

Judge Hoffman suggested that we proceed as if Congress is not going to act. Mr. Fortas moved adoption of subdivisions (b) (c) and (h) as circulated with the exception that in line 34 of page 52, subdivision (h), the word "biweekly" be substituted for the word "weekly". The motion was approved unanimously.

RULE 46.1. RELEASE WITHOUT BAIL

The Reporter stated that he had considered the suggestions from the floor that the rules be reviewed concerning a person being admitted to bail. He further stated he had gone through these rules and felt the Committee would be wise to let the common law prevail because there are ten or twelve places where the question comes up concerning "admitting someone to bail" and if "admitting to bail" or "releasing without bail" is added to the rules it would be an awkward set of changes.

After discussion of this matter Mr. Fortas moved the elimination of 46.1 and recommended the substitution of Rule 46(d), line 24, the words "his written agreement to appear at a specified time and place and upon" after the word "upon" and before the word "such."

The motion was seconded and approved.

RULE 49. SERVICE AND FILING OF PAPERS

The Reporter suggested we broaden the Note as suggested by the Department of Justice concerning the exchange of unnecessary papers. After discussion the Committee approved the adoption of the proposed rule as circulated in the Second Preliminary Draft but without any reference in the Advisory Committee's Note to the Department's suggestion.

RULE 54. APPLICATION AND EXCEPTION

The Reporter stated that there had been no problems raised concerning this rule and the Committee approved its adoption as circulated.

RULE 56. COURTS AND CLERKS

There were no problems raised concerning this rule and the Committee approved its adoption as circulated.

Judge Maris addressed the Committee concerning the suggested amendments of Federal Rules of Criminal Procedure to incorporate proposals of the Appellate Rules Committee for changes in procedure in appeals in criminal cases. He stated that the Appellate Committee had proceeded in the belief that all matters having to do with appeals ought to be found in appellate rules. It has incorporated within its proposed Uniform Rules of Federal Appellate Procedure the provisions of FRCrP 37 and 39, with such changes as it considered necessary or appropriate. It was thought the Criminal Rules and the set of Appellate Rules could be promulgated simultaneously in which event the only changes necessary in the Criminal Rules would have been deletions and cross references to the Appellate Rules. However, it now seems doubtful that the proposed Appellate Rules can be promulgated simultaneously with the amendments to the Criminal Rules, and thought it feasible that the proposals for change in the present Criminal Rules should be proposed as amendments to the Criminal Rules along with the amendments proposed by the Criminal Rules Committee.

The Reporter presented the proposals to Criminal Rules 36, 45, 49 and 55. After full discussion by the Committee, it was suggested that the Committee need not vote on these but only advise of any parts they were not in agreement with.

Professor Barrett stated he did not think any forms were affected by the changes except the Note of Appeals Form and would suggest leaving the Bail Form until after Congress acts.

The Reporter further stated that he would prepare a mock-up report to be circulated to the Committee members before going to the standing Committee. A transmittal letter will discuss any points to be brought to their attention.

The Committee recommended that the Reporter continue his work on the rules and the next meeting would be held sometime around the end of next year to study any suggestions recommended by the Reporter.

There being no further business the meeting was adjourned at 5:00 p.m., May 4, 1965.