MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

May 18-19, 1989
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met in Washington, D.C. on November 18 and 19. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Nielsen called the meeting to order at 9:00 a.m. on Thursday, May 18, 1989. The following members were present for all or part of the meeting:

Hon. Leland C. Nielsen, Chairman
Hon. Robinson O. Everett
Hon. James G. Exum, Jr.
Hon. William T. Hodges
Hon. Daniel H. Huyett, III
Hon. John F. Keenan
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Mr. Roger Pauley, Esq., designee of Mr. Edward Dennis, Assistant Attorney General
Mr. Edward F. Marek, Esq.

David A. Schlueter, Reporter

Also present were Judge Joseph Weis, Chairman of the Standing Committee on Practice and Procedure, Judge Charles Wiggins, and Professor Wayne LaFave, members of the Standing Committee; Mr. James Macklin and Mr. David Adair from the Administrative Office; and Mr. William Eldridge from the Federal Judicial Center.

INTRODUCTIONS AND PRESENTATIONS

Judge Nielsen introduced and welcomed Judge Wiggins as the liason from the Standing Committee and noted that Mr. Roger Pauley had been designated by the Department of Justice as its official representative. He also recognized Mr. James Macklin who awarded Mrs. Ann Gardner a certificate and pin for 25 years of federal service.

CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

Rules Approved by the Judicial Conference and Submitted to the Supreme Court

The Reporter noted that amendments in three rules had been approved by the Standing Committee at its January 1989 meeting

and subsequently approved by the Judicial Conference for submission to the Supreme Court.

1. Amended Rule 11(c)(1), which addresses the requirement that the trial judge apprise an accused during plea inquiries that the court is required to consider applicable sentencing guidelines.

2. Amended Rule 32, which addresses production of the sentencing report and deletion of 32(c)(3)(E).

3. Amended Rule 41(e), which addresses the return of seized property.

Rules Approved by the Standing Committee and Circulated for Public Comment

The Reporter also noted that an amendment in one rule and a new rule had been approved by the Standing Committee at its January 1989 meeting and that the two rules had been circulated for public comment. Public hearings on the rules will be held on July 24, 1989 in the Ceremonial Courtroom of the United States District Court in Chicago, Illinois.

1. Amended Rule 41(a), which addresses the authority to issue warrants for property within and outside the district. The Committee was informed that Rule 41(a)(3) includes an inadvertent reference to overseas searches for persons.

2. New Rule 58, which addresses the procedures for misdemeanors and other petty offenses which are currently located within the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates.

New Criminal Rule Amendments Proposed

Proposed amendments to Rule 6(e)(disclosure of grand jury proceedings). The Committee was informed that Congress is considering amendments to Rule 6(e) which are designed to overrule United States v. Sells Engineering, Inc. 463 U.S. 418 (1983) and United States v. Baggot, 463 U.S. 476 (1983) and provide for expanded disclosure of grand jury materials to other federal agencies (H.R. 1278 and S. 413). Mr. Pauley provided the background on the proposed amendments and explained that although the Department of Justice had sought broad amendments for disclosure, the amendments had been restricted so as to

apply only to violations of banking laws. He explained that the Department of Justice had seen an emergency backlog of several thousand cases involving violations of various banking laws. Although the Department believes that the Committee should be the primary avenue for changing the Rules, there are exceptions where there is an emergency or urgent need for an expedited consideration of changes in the Rules.

Mr. Karas expressed deep concern about the Department's lightning speed in seeking unilateral changes to the Criminal Rules. Judge Weis observed that since Congress had passed the Rules Enabling Act that there had been a change in the climate and that the Standing Committee would be willing to follow emergency procedures for considering needed changes in the Rules. The Committee discussed the background of Rule 6(e) and the fact that as recently as 1985, Congress had considered amendments to Rule 6(e) and had been urged by the Judicial Conference to give careful consideration to a number of sensitive factors, such as the primary purpose for grand jury secrecy. Mr. Tom Smith, a representative from the American Bar Association, indicated that the ABA was opposed to the amendments.

Ultimately, Mr. Karas moved that the Committee request both the House and the Senate to return the bills with the proposed amendents to the Department of Justice with a suggestion to follow the procedures established in the Rules Enabling Act. The motion was seconded by Judge Keenan. After further discussion concerning the utility of sending the matter back to the Department of Justice, Mr. Marek moved to amend the motion to read that Congress should be urged to table the amendments. The amendment was accepted. Mr. Pauley urged rejection of the motion, citing the emergency presented by complicated banking cases which would require civil attorneys to duplicate needlessly the efforts of criminal attorneys who had conducted grand jury proceedings. Judge Huyett moved to further amend the motion to offer expedited consideration of the proposed amendments by the Standing Committee. That amendment was also accepted. Following further discussion, the motion carried.

The matter was discussed extensively again on the second day of the meeting following some additional information on the status of the proposed amendments. The Committee learned that the House version of the rule was now part of proposed amendments to Title 18. The Chairman observed that things had

not really changed since the earlier discussion. Mr. Doar noted that any changes in Rule 6(e) would be dangerous and Mr. Pauley responded that under the amendments disclosure would not be made without the approval of the federal prosecutor and reiterated the extensive background and need for the changes. Judge Keenan expressed concern that prosecutors might use the grand jury process to work toward only a civil case. Judge Everett moved that the Committee express to Congress that confidence in the secrecy of the grand jury is so important that there are serious problems with amending Rule 6(e). The motion failed for want of a second. There was additional discussion about related problems with the proposed changes with the consensus of the Committee being that Rule 6(e) should not be amended.

2. Proposed amendments to Rule 12(b)(pretrial motions). At the suggestion of Judge Manuel Real, the Committee considered whether to amend Rule 12(b) to require litigation of entrapment defenses through a motion to suppress evidence illegally obtained. After brief discussion Judge Huyett moved to table the proposal and Mr. Karas seconded the motion. It carried unanimously.

3. Proposed Amendments to Rule 16 (Discovery). The Committee considered a number of proposed changes to Rule 16 which had been deferred from the November 1988 meeting in New Orleans.

a. Notice of "Other Offense Evidence:" Mr. Marek offered a proposed amendment to Rule 16(a)(1)(E) which would require the government to furnish the defense with particularized information about its intent to use evidence under Federal Rule of Evidence 404(b). The Committee believed that the issue would appropriately fit within that evidence rule and as noted, infra, adopted amendments to Rule of Evidence 404(b).

b. Witness Lists. The Committee considered an amendments to Rule 16 which would: first, require the prosecution to furnish to the defense a written list of names and addresses of all government witnesses; second, provide for reciprocal discovery of names and addresses of defense witnesses; third, prohibit comment upon the failure to call a witness on either list; and fourth, impose a continuing duty to disclose the names and addresses of witnesses. Mr. Marek noted that the proposed changes followed proposals approved by the Supreme Court in 1974. Mr. Pauley indicated that the Department

of Justice would strongly oppose any efforts to require the prosecution to disclose the names and addresses of its witnesses. He reiterated the dangers posed, i.e. intimidation and possible loss of life, by disclosing the names of government witnesses before trial. He noted that the Department was not questioning the ability of trial judges to decide when a witness' name should be disclosed but he observed that trial judges will inevitably err and in those cases, the life of a witness could be endangered. Mr. Karas responded that trials without adequate defense preparation cannot be fair trials. Mr. Marek moved that the proposed language be adopted and Mr. Karas seconded the motion. It failed by a 2 to 6 vote. Judge Everett subsequently moved that the Department of Justice provide the Committee with its views on a certification process which would require the prosecution to disclose a witness' name and address unless it certified to the court that doing so would pose a risk of injury or loss of life to the witness. Judge Hodges seconded the motion which carried unanimously with one absention noted.

c. Co-conspirators' Statements. Mr. Marek moved that Rule 16(a)(1) be amended to require the prosecution to disclose to the defense "any statement of a co-conspirator which the government intends to use in evidence against the defendant pursuant to Rule 801(d)(2)(E), Federal Rules of Evidence." The motion was seconded by Mr. Karas. Mr. Pauley indicated that the Department of Justice was strongly opposed to such a requirement noting the possibility of danger to the witness. Judge Hodges noted that there are tremendous pragmatic problems with this sort of requirement because of the complicated and interwoven conspiracy statements, many of which have not been recorded. The motion failed by a vote of 2 to 6.

d. Defendant's Statements. Following some discussion on the requirement in Rule 16(a)(1) that the prosecution disclose any relevant written or recorded statement made by the defendant, Judge Hodges moved that the Rule be amended to require disclosure of any oral statements made by the defendant which the prosecution intends to offer at trial or of which a written record has been made. The motion was seconded by Mr. Karas and passed by a unanimous vote. A copy of Rule 16, as amended, and the proposed Advisory Committee Note are attached to these minutes

e. Exculpatory Evidence. Mr. Marek urged the Committee to consider amending Rule 16(a)(1) by adding a new subsection (H) which would require the prosecution to disclose all exculpatory ("Brady") material to the defense. The Committee discussed the proposal with several members noting the

practical problem of moving back the period of disclosing the exculpatory material. The Committee decided to defer this proposal until its next meeting.

f. Witness Statements. Mr. Marek offered a proposed change to Rule 16(a)(1) by adding a new subsection (G) to require the prosecution to produce, before trial, any prior Jencks Act statements made by any prosecution witness. He moved that the Committee communicate to Congress that it would be appropriate to initate some action on amending the Jencks Act. Judges Weis and Hodges expressed the view that the Rules Enabling Act permits the Committee to initiate discussion on a particular rule by adopting amendments. Judge Weis recommended that the Committee recommend an amendment and thus give notice to Congress that the area needs some attention. Judge Hodges moved to table the proposal and Judge Huyett seconded the motion which passed.

4. Proposed Amendments to Rule 17 (Motions to Quash Subpoenas by Non-Party Witnesses). [The discussions on Rule 17 took place on the afternoon of May 18 and the morning of May 19. They are reflected here in their entirety for purposes clarity]. The Committee discussed the possibility of amending Rule 17 to reflect amendments being considered in Civil Rule 45 which permits non-party witnesses to move to quash subpoenas. The impetus for the change is apparently coming from the American Bar Association which is interested in the rights of witnesses. The Chairman suggested that the matter be deferred until the next meeting at which time the Committee could consider draft amendments prepared by the Reporter. Judge Everett suggested that the Reporter also consider problems associated with discovery of an expert's opinion. Mr. Pauley suggested that it would be prudent, in light of the differences in civil and criminal practice, to wait until amended Civil Rule 45 had been used to see how well it functions. Judge Keenan ultimately moved that the matter be deferred until the Committee's next meeting. Judge Everett seconded the motion which carried unanimously.

5. Proposed Amendments to Rule 24 (Voir Dire). The Reporter indicated that Senator Heflin had introduced legislation which would amend Rule 24(a) and Civil Rule 47(a) to provide counsel with a greater opportunity to conduct voir dire of prospective jurors. Judge Bilby, Chairman of the Judicial Improvements Committee, is taking the lead in opposing the legislation and in encouraging judges to allow questioning by attorneys. The Committee took no further action on this matter.

6. Proposed New Rule 52.1 (Child-Victim Testimony). The Committee reviewed a proposed Rule 52.1 being considered by Congress (H.R. 1303) which is part of a proposed "Federal Victim's Services and Protections Compliance Act." The new rule would provide comprehensive coverage of a number of problems which might arise when a child victim testifies. The Committee discussed the proposed rule and was generally opposed to it. Mr. Pauley indicated that the Department of Justice was preparing a memorandum on the proposed rule. Judge Everett moved that the Committee communicate its concerns about the rule to Congress. The motion was seconded by Judge Hodges and passed unanimously.

7. Report on Model Rules. Mr. William Eldridge of the Judicial Center noted that work was progressing on the model local rules and that a report on the project was being prepared.

EVIDENCE RULE AMENDMENTS UNDER CONSIDERATION

Evidence Rules Approved by the Standing Committee

Proposed Amendments to Federal Rule of Evidence 609(a)(Impeachment with Prior Conviction). The Committee was informed that the Standing Committee had approved the Committee's proposed amendments to Rule 609(a) at its January 1989 meeting but had decided to hold the proposed changes pending the Supreme Court's decision in Green v. Bock Laundry Machine Company (87-1816). [The Supreme Court decided Green on May 22, 1989, holding that Rule 609(a) requires the trial court to permit a civil litigant to impeach a witness or another party with a felony conviction without regard to possible prejudice to the witness or the party offering the testimony.]

New Matters -- Evidence Rules

1. Proposed Amendments to Federal Rule of Evidence 404(b)(Other crimes wrongs, or acts). [The discussion on proposed amendments to Rule 404(b) took place on both May 18 and 19 and is presented here in its entirety for purposes of clarity].

a. Notice Requirement. The Committee initially considered amending Rule 16 to require the prosecution to provide notice of an intent to use Rule 404(b)-type evidence but concluded after some discussion that it would be more appropriate to amend Federal Rule of Evidence 404(b). Discussion focused on whether the prosecution should be required to

describe with some particularity the evidence of uncharged misconduct which it intended to use. Mr. Pauley indicated that the Department of Justice would be opposed to imposing a particularity requirement and also requested that the Committee Note indicate that the Committee did not intend for the notice requirement to sidstep the Jencks Act. The Committee concluded that the prosecution should be required to disclose such evidence regardless of whether it intended to use the evidence during its case-in-chief, for impeachment, or for rebuttal. On motion by Judge Hodges, seconded by Mr. Doar, the Committee voted to amend Rule 404(b). The Rule, as amended, and the proposed Advisory Committee Note, are attached to these minutes.

b. Burden of Proof. The Committee considered an American Bar Association Resolution to amend Rule 404(b). The resolution urges that the rule be amended to provide that in criminal cases the questions of preliminary facts relative to extrinsic act evidence be decided by the trial judge using the preponderance of evidence standard. That proposed amendment would have the effect of overruling Huddleston v. United States, 108 S.Ct 1496 (1988). Professor Paul Rothstein, speaking on behalf of the ABA, expressed the Association's concern for prejudice to the accused and that a notice provision alone would not be satisfactory. Mr. Pauley indicated that the Department of Justice was stongly opposed to the ABA proposal and that it would be a mistake to carve out procedural rules for special categories of evidence. Judge Everett moved that Rule 404(b) be amended to reflect the ABA's proposal. The motion was seconded by Mr. Karas. During further discussion on the motion, several members raised the concern about whether the burden of proof issue was a procedural or substantive matter. Judge Hodges observed that there is a lack of empirical evidence to support the notion that Rule 404(b) evidence is being unfairly used and that there would be pragmatic problems with conducting mini trials to determine whether extrinsic act evidence was admissible. Citing the fact that Huddleston was only recently decided and in light of possible problems of incorporating a substantive burdern of proof provision in the Rules of Evidence, Judge Hodges moved to table the matter. Judge Huyett seconded the motion which carried by a vote of 5 to 4.

2. Proposed Amendments to Federal Rule of Evidence 803 (Hearsay exception for child-victim statements). [This matter was discussed on May 18 with the proposed legislation which would add new Rule 52.1, discussed supra. It is addressed here as a matter affecting the Federal Rules of Evidence]. The

Committee was informed that Congress is considering an amendment to Federal Rule of Evidence 803 which would add a specific hearsay exception for child-victim statements (H.R. 170). During a brief discussion on the proposal, it was pointed out that similar proposals have been rejected by the Committee in the past because other well-established hearsay exceptions seem adequate to address the problems often associated with child victms. Judge Huyett moved that the Committee express its concerns about the proposed amendment to Congress. Judge Keenan seconded the motion which carried unanimously.

DESGINATION OF TIME AND PLACE FOR NEXT MEETING

Thg Chairman announced that the next meeting would be in Washington, D.C. on November 16 and 17, 1989.

ADJOURNMENT

The meeting adjourned at 11:00 a.m. on May 19, 1989.

DAVID A. SCHLUETER
Reporter
June 6, 1989