

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JOSEPH F. WEIS, JR.
CHAIRMAN

JAMES E. MACKLIN, JR.
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES

JON O. NEWMAN
APPELLATE RULES

JOHN F. GRADY
CIVIL RULES

LELAND C. NIELSEN
CRIMINAL RULES

LLOYD D. GEORGE
BANKRUPTCY RULES

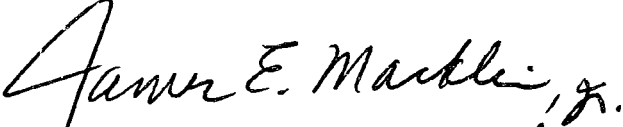
June 18, 1990

TO THE CHAIRMAN, MEMBERS AND REPORTER OF THE STANDING
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, CHAIRMAN AND
MEMBERS OF THE CRIMINAL RULES COMMITTEE, AND TO THE CHAIRMEN,
AND REPORTERS OF THE ADVISORY COMMITTEES

Enclosed is the Report of the Advisory Committee on
Criminal Rules for the meeting of the Standing Committee on
July 12-13, 1990. Also enclosed with the report are the
proposed amendment to Rule 35, an accompanying Committee Note,
and the minutes of the Subcommittee meeting in Atlanta,
Georgia on May 25, 1990.

The meeting will be held at the Holiday Inn Old Town, 480
King Street, Alexandria, Virginia, commencing at 9:00 a.m.
each day.

I look forward to seeing you there.


James E. Macklin, Jr. *AE*
Secretary

Enclosure

cc: Professor David A. Schlueter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JOSEPH F. WEIS, JR.
CHAIRMAN

JAMES E. MACKLIN, JR.
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES

JON O. NEWMAN
APPELLATE RULES

JOHN F. GRADY
CIVIL RULES

LELAND C. NIELSEN
CRIMINAL RULES

LLOYD D. GEORGE
BANKRUPTCY RULES

TO: Hon. Joseph F. Weis, Jr., Chairman
Standing Committee on Rules of Practice and
Procedure

FROM: Hon. Leland C. Nielsen, Chairman
Advisory Committee on Rules of Criminal Procedure

SUBJECT: Report on Pending and Proposed Amendments to Rules
of Criminal Procedure and Evidence

DATE: June 15, 1990

I. INTRODUCTION

In January 1990 the Standing Committee approved several amendments for circulation to the bench and bar. The Advisory Committee has also proposed an additional amendment to Rule 35 based upon the recent report of the Federal Courts Study Committee. This report briefly addresses the status of the proposed changes and recommendation.

II. RULES CIRCULATED FOR PUBLIC COMMENT

Amendments to four rules were approved by the Standing Committee in January 1990 and are currently out for comment by the bench and bar. They are as follows:

- A. Rule 16(a)(1)(A). Statement of Defendant.
- B. Rule 24(b). Peremptory Challenges.
- C. Rule 35(a). Reduction of Sentence.
- D. Fed. R. Evid. 404(b). Notice provision.

Three hearings are scheduled on these amendments: July 27th in Atlanta, August 9th in Chicago, and August 14th in Los Angeles. The comment period ends on August 31st.

III. PROPOSED AMENDMENT TO RULE 35.

At the suggestion of the Federal Courts Study Committee the Advisory Committee recently considered amendments to Rule 35 which would (1) permit the defendant to present new factual matters within 120 days of sentencing and (2) permit the sentencing court to correct a sentence. A subcommittee, chaired by Judge William T. Hodges, considered the proposals and recommended that the Advisory Committee adopt the provision relating to correction of a sentence. In the view of the subcommittee there was not a sufficient showing at this point of a need to permit the defendant to offer additional information after sentencing.

The Advisory Committee has concurred in the subcommittee's position and recommends that Rule 35 be amended by adding a new subdivision, Rule 35(c), which would permit the trial court to correct a sentence. The Committee also recommends that the amendment be circulated to the bench and the bar for comment with a shortened comment period ending on October 31, 1990. That would permit the Committee to consider any comments to the proposed change in conjunction with proposed amendments to Rule 35(a) which are already out for public comment. This recommendation for an abbreviated period for public comment is not based upon any perceived need for emergency action but rather to promote efficient consolidation of amendments to Rule 35.

Attached to this report are the proposed amendment to Rule 35, an accompanying Committee Note, and the minutes of the Subcommittee meeting held in Atlanta on May 25, 1990.

RULES OF CRIMINAL PROCEDURE

(DRAFT)

Rule 35. Correction or Reduction of Sentence

* * * * *

(c) Correction of Sentence by Sentencing Court.-- The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetic, technical, or other clear error.

COMMITTEE NOTE

(DRAFT)

Subdivision (c) is intended to adopt, in part, a suggestion from the Federal Courts Study Committee 1990 that Rule 35 be amended to recognize explicitly the ability of the sentencing court to correct a sentence imposed as a result of an obvious arithmetic, technical or other clear error, if the error is discovered shortly after the sentence is imposed. At least two courts of appeals have held that the trial court has the inherent authority, notwithstanding the repeal of former Rule 35(a) by the Sentencing Reform Act of 1984, to correct a sentence within the time allowed for sentence appeal by any party under 18 U.S.C. 3742. See United States v. Cook, 890 F.2d 672 (4th Cir. 1989) (error in applying sentencing guidelines); United States v. Baron, ___ F.2d ___ (2nd Cir. 1992) (failure to impose prison sentence required by terms of plea agreement). The amendment in effect codifies the result in those two cases but provides a more stringent time requirement. The Committee believed that the time for correcting such errors should be narrowed within the time for appealing the sentence to reduce the likelihood of jurisdictional questions in the event of an appeal and to provide the parties with an opportunity to address the court's correction of the sentence, or lack thereof, in any appeal of the sentence. A shorter period of time would also reduce the likelihood of abuse of the rule by limiting its application to acknowledged and obvious errors in sentencing.

The authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a). The subdivision is not intended to afford the court to reconsider the application or

interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence. Nor should it be used to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines. Furthermore, the Committee did not intend that the rule relax any requirement that the parties state all objections to a sentence at or before the sentencing hearing. See, e.g., United States v. Jones, 899 F.2d 1097 (11th Cir. 1990).

The subdivision does not provide for any formalized method of bringing the error to the attention of the court and recognizes that the court could sua sponte make the correction. Although the amendment does not expressly address the issue of advance notice to the parties or whether the defendant should be present in court for resentencing, the Committee contemplates that the court will act in accordance with Rules 32 and 43 with regard to any corrections in the sentence. Compare United States v. Cook, supra (court erred in correcting sentence sua sponte in absence of defendant) with United States v. Baron, supra (court heard arguments on request by government to correct sentence). The Committee, however, does contemplate that the court would enter an order correcting the sentence and that such order must be entered within the seven (7) day period so that the appellate process (if a timely appeal is taken) may proceed without delay and without jurisdictional confusion.

The Committee considered, but rejected, a proposal from the Federal Courts Study Committee to permit modification of a sentence, within 120 days of sentencing, based upon new factual information not known to the defendant at the time of sentencing. Unlike the proposed subdivision (c) which addresses obvious technical mistakes, the ability of the defendant (and perhaps the government) to come forward with new evidence would be a significant step toward returning Rule 35 to its former state. The Committee believed that such a change would inject into Rule 35 a degree of post-sentencing discretion which would raise doubts about the finality of determinate sentencing that Congress attempted to resolve by eliminating former Rule 35(a). It would also tend to confuse the jurisdiction of the courts of appeals in those cases in which a timely appeal is taken with respect to the sentence. Finally, the Committee was not persuaded by the available evidence that a problem of sufficient magnitude existed at this time which would warrant such an amendment.