MINUTES OF THE MEETING OF
THE ADVISORY COMMITTEE ON
THE FEDERAL CRIMINAL RULES
HELD AT THE LAFAYETTE BUILDING,
ROOM 638, WASHINGTON, D.C.,
ON WEDNESDAY, AUGUST 27 AND
THURSDAY, AUGUST 28, 1975

The meeting was opened at 10:00 a.m. by Judge Lumbard, Chairman of the Advisory Committee, who introduced those in attendance. All of the members of the Advisory Committee were present, with the exception of Judge Gesell and Mr. West. In addition to the reporter, Professor Wayne LaFave, the following persons were also present: Judge Roszel C. Thomsen, Chairman, Committee on Rules of Practice and Procedure; Mr. William E. Foley, Secretary, Committee on Rules of Practice and Procedure; Professor Frank J. Remington, Member, Committee on Rules of Practice and Procedure; Judge Walter E. Hoffman, Director, Federal Judicial Center; Mr. Carl Imlay, General Counsel, Administrative Office; Mr. Hosea M. Ray and Mr. Roger Pauley, Department of Justice; Mr. J. G. Sourwine, Counsel, Senate Judiciary Committee; Mr. Thomas Hutchinson, Counsel, House Judiciary Committee; Mr. Arthur P. Endres, Jr., Counsel, House Judiciary Committee; Judge Alexander Harvey, Representing the Committee on Administration of the Criminal Law (sometimes herein referred to as Judge Zirpoli's Committee).

Newly Adopted Amendments

Professor LaFave reported on the status of rules adopted by the Congress following additional amendments. That summary is as follows:

Rule 4. The summons concept was rejected. Definition of probable cause is included. Leaving a copy of the summons and mailing a copy are both required in nonpersonal service summons cases.

Rule 9. Summons concept was rejected.

Rule 11. Warnings were expanded to include right of counsel and Boykin statements. Plea agreements under (e)(1) now explicitly include a promise for a term. The requirement in (e)(3) that the judge advise that the sentence "may be more favorable" was deleted, and in (e)(6) the rule provides that statements made during the plea may be used in a subsequent perjury case if the statements were made under oath, on the record and in the presence of counsel.

Rule 12. Now provides that motions shall not be deferred if such deferral would prejudice the appeal.

Rule 12.1. Notice of alibi is now prosecution triggered. The fact of withdrawal of an alibi defense is not admissible.

Rule 12.2. In the defense of mental defect, the statement of the psychiatrist is not admissible on the issue of guilt.

Rule 15. Now provides for the disruptive defendant and specifies payment of costs of transportation and expenses, which the Comptroller is already doing.

Rule 16. Discovery is now defendant triggered. Provisions for disclosure of witnesses have been deleted.

Rule 17. Provides for selection of place of convenience of parties.

Rule 20. Removal requires approval of both U. S. Attorneys involved.

Rule 29.1. No change.

Rule 32. Modifies the sentencing process to expressly permit the prosecution to comment at allocution.

Rule 43. Modifies the draft rule to require defendant be warned of the consequences of disruption.

I

THE GRAND JURY

The Committee study and report on the grand jury was reviewed in light of the comments and reactions from Judge Zirpoli's Committee.

Part 1. Size of the Grand Jury. The Zirpoli Committee favors a maximum of 15 rather than 13 grand jurors. A motion by Judge Smith, seconded by Judge Robb, to conform our study to this recommendation, was approved.

Part 2. Recording of Grand Jury Proceedings. The Zirpoli Committee concurs in the study but has some reservations about the use of electronic recording. Mr. MacCarthy expressed concern that the government may decline to provide a transcript and instead refer the defendant in all cases to the recording. He argued that it is more expensive to have an appointed attorney listen to the tape than to provide the defendant with a transcript; and that in any event a transcript would be needed for

impeachment purposes. Judge Lumbard pointed out the delays involved in holding up proceedings in all cases for a transcript. Professor Vorenberg suggested deleting the example on page 20 of the report. Justice Weintraub suggested instead insertion of the words "in an appropriate case" after the word "discretion" in line 15, which was approved. Mr. Thornburgh, Assistant Attorney General, inquired whether the expense of recording would be borne by the Department of Justice or the Administrative Office. Judge Hoffman noted that the recording equipment would be supplied by the Administrative Office but was of the view that any transcript would be the obligation of the government. Part 2 was approved, as modified, supra.

Part 3. Challenge of Adequacy or Competency of Evidence Produced Before Grand Jury. Judge Zirpoli's Committee would prefer elimination of the recommendation to add subparagraph (g) to Rule 7 precluding sufficiency or competency of evidence as grounds to dismiss indictment. The Zirpoli Committee preferred to leave this area to state law. A motion to adopt the Zirpoli suggestion failed for lack of a second. Judge Smith observed that we did not want to build into the federal system a second trial on the competency of the grand jury testimony. After discussion, on motion of Judge Nielsen, seconded by Judge McCree,

the report was modified to revise proposed Rule 7(g) to read as follows:

> (g) MOTION TO DISMISS INDICTMENT. An indictment may not be dismissed upon the ground that the evidence before the grand jury was not sufficient or competent.

Professor Vorenberg suggests that the commentary be re-enforced to make clear that the objective is to avoid a double trial and to avoid delay. The revision was referred to the reporter.

Part 4. Grand Jury Secrecy. The Zirpoli Committee observed that the suggested statute making disclosure a criminal offense was not as broad as the illustration contained on page 31 of the draft report. The illustration would reach solicitation, whereas the proposed statute would not. An extensive discussion on the philosophy of disclosure followed. Mr. Sourwine noted that it was unlikely that Congress would enact any legislation which would prohibit newspaper reporters from seeking information. Judge Webster thought that there should be no offense for third party soliciation without an element of specific intent. Judge Robb moved that the words "except for good cause stated on the record" in line 17 on page 35 be deleted. The motion was adopted, the sense of the meeting being that a witness should not be

precluded from conferring with his lawyer on matters relating to his testimony. A motion by Judge Robb was adopted, substituting on line numbered 1 on page 31 the words "evidence introduced or statement made" for the words "matter occurring" and deleting from lines numbered 2, 3 and 4 the words "or, with intent that such disclosures be made, commands, induces, entreats, or otherwise attempts to persuade another to make such disclosure,". At the suggestion of Justice Weintraub the words "or by" were inserted after the word "to" in line numbered 8.

Part 5. Other Matters Considered.

(1) Requiring prospective defendant to appear. Mr. Bedell was opposed to calling prospective defendants for the purpose of prejudicing the grand jury if the defendant invoked the Fifth Amendment. Judge Lumbard noted that the witness might not be a prospective defendant at the time he was called. It was noted that many witnesses are making improper use of the Fifth Amendment claim in order to maneuver for use immunity. Judge Thomsen asked whether a hearing to grant immunity should be held in camera. The Committee considered, but was not in agreement, as to whether or not to refer to the ABA Standards (Section 3.6), but following extensive discussion, it was the sense of the meeting that no reference should be made to it.

(2) Right of appearance. The Committee was in agreement that the defendant should not be accorded a right of appearance.

(3) Warning witness of his Fifth Amendment rights. The Committee was still in agreement that no such warning was required, noting, however, that this question is now before the Supreme Court on certiorari, based upon constitutional grounds.

(4) Right of grand jury witnesses to counsel. The Committee was agreed to make no change in the present draft which rejects counsel as a matter of right. Mr. MacCarthy expressed concern that we may be creating a monster because many defense counsel are now using the ploy of having the witness retire to consult with counsel on each and every question no matter how simple. Mr. Bedell did not think this was a problem of great moment.

(5) Requiring showing of grounds to call a witness. The Committee reiterated its approval of the draft which does not require such showing.

(6) Challenge of questions on grounds of irrelevancy. The Committee approved the draft conclusions rejecting proposals to permit irrelevancy objections.

(7) Suppression of testimony as fruit of violation of the constitutional rights of witnesses. The Committee's view that no departure from the Calandra rule rejecting the right of a witness to refuse to answer upon this ground was reaffirmed.

(8) Transcript of testimony for grand jury witnesses. The Committee agreed that there need be no change in the present procedure. Mr. Bedell would accord the defendant this right in the interest of protecting against perjury. Judge Webster noted that a witness is always accorded the opportunity to recant, if an inconsistency should develop.

(Luncheon recess 1:05 p.m. - 2:00 p.m.)

At this juncture, Judge Robb asked the Committee to refer back to page 13 of the report with reference to proposed Rule 6(e). He inquired with respect to the necessity of recording "off the record" statements where the witness is present. Mr. Bedell stated that not only should this be done, but he would like the Committee to reconsider and provide that all proceedings shall be recorded except during the deliberations of the grand jurors in the absence of the prosecutor. Judge Weintraub thought this suggestion went too far. The prosecutor may wish to discuss a matter of law with the jurors. Mr. Pauley noted that the

purpose of a recording was not to monitor the prosecutor. The sense of the Committee was to make no change in the proposed Rule 6(e).

(9) Access to grand jury testimony in advance of trial. Mr. Bedell thought it was unrealistic to think that judges would hold back until testimony had been taken. Judge Webster stated that the Jencks Act was an expression of congressional policy that such statements not be disclosed until after testimony and, therefore, it would be inappropriate to reach this problem by rule making. Judge McCree suggested that the reference to ABA Standards on page 50 be deleted since it suggested a practice which was prohibited by the proper application of the Jencks Act. Professor Remington opined that the Committee could make recommendations to Congress, suggesting that provisions should be made for good cause shown, and that such early disclosures might facilitate a speedy trial. Justice Weintraub indicated willingness to recommend that the Jencks Act be amended if this were necessary. Mr. Thornburgh thought a change would have an adverse impact upon witnesses who feared early disclosure of their testimony. [At this point the meeting recessed from 2:47 p.m. to 3:08 p.m. in deference to a building fire alarm.] After further discussion, a motion was offered to require disclosure in advance of trial at a time and in a manner within the trial court's

discretion, which would require both a change in the statute and in Rule 16. Eight members voted in favor, with five opposed.

(10) Selection of grand jurors. Judge Hoffman observed that in the Fifth Circuit each jury plan provides that the grand jurors must be from within the division where drawn. Referring to Part 1 of the report, at page 3, he suggested that the words "or any division thereof" be added after the word "district" in line 6. Cost is a factor in restrictive interpretations of 18 U.S.C. §3321. Mr. Ray suggested that we incorporate the proposal contained in proposed Section 102 of S-1 which provides as follows:

> A grand jury may be summoned from the entire district, or from any statutory or nonstatutory division or divisions thereof, and a grand jury so empanelled shall be empowered to consider offenses alleged to have been committed at any place in the district.

This recommendation was approved. Mr. Imlay reported that the Jury Commission has a subcommittee to consider this issue, including limits of jurisdiction of juries from less than the full body of the district. This may be a joint problem requiring liaison.

(11) Recalcitrant witnesses. The Zirpoli Committee had reported that by a vote of six to two it favored legislation limiting second confinement for a second refusal to answer ques-

tions. After discussion, the Committee voted to reapprove subsection (11) without change.

(12) Immunity. The Zirpoli Committee approved this subsection by a six to four vote. The Committee reapproved subsection (12).

(13) Independent grand jury inquiry. Judge Nielsen moved, and Judge McCree seconded, that this section of the report, which opposes expanding independent grand jury inquiry, be approved. Judge Robb favored placing limitations on reports without indictment. Justice Cutter thought it best to oppose bills like those under consideration, but not to move out and prohibit such reports by rule or statute. Professor Remington noted that if S-1 passes, there will be changes in the grand jury. S-1 provides for 24 months service. Judge Lumbard suggested that this be laid on the table until the next meeting.

A discussion of how Joint Resolution 46 would eliminate the grand jury as an indicting agency followed. Judge Smith noted that objective data is not available, and that it would be necessary to go forward on the basis of experience. His own view was that the investigatory function should be retained, but that it might be best to supplement by alternative means. Mr. MacCarthy

expressed the view of some members that the grand jury should be abolished. He attacked its use to wash out cases by means of a no true bill, asserted that the "protection of the accused" function is a fiction and argued that the investigatory function could be handled by another agency. He asserted that the grand jury was costly in time and money ($3.5 - $4 million per year), created inconvenience to jurors and was subject to abuse. Judge Robb referred to the importance of citizen participation, a purpose previously identified by Judge Gesell in an earlier meeting. Mr. Bedell noted that the information system worked well in Florida. Professor Vorenberg was in general agreement with Mr. MacCarthy, objecting to the phoniness of a grand jury system which fooled the public. He recommended consideration of the ALI proposal contained in the Prearraignment Code which would give the defendant an absolute right to a preliminary hearing with no right to indictment if he takes this route. Judge Nielsen observed that the grand jury was essential in some types of investigations, such as criminal anti-trust and organized crime. Judge Webster supported the statement contained in paragraph 5 of the Zirpoli Committee report which opposed abolition of the grand jury, but favored a constitutional amendment which would permit the use of informations as an alternative. After further discussion, Judge Lumbard asked Judge Smith to draft our own proposal for consideration and possible use.

At this point consideration was given to a proposed new Rule 6(f) which would permit indictments to be returned to a federal magistrate. It was noted that this function is primarily ceremonial, and it was further observed that a district judge who preferred to retain the ceremony would not be required to delegate this function to his magistrate.

II

REVIEW OF 1973 PROPOSED RULES

Rule 6(e). Secrecy of Proceedings in Disclosure. It was agreed that Rule 6(e) should be modified slightly to permit a federal magistrate to direct that an indictment be kept secret, in light of Rule 6(f). It was observed that at the last meeting it was the sense of the Committee that the amendment should not be sent forward until the Advisory Committee had advanced in its overall work on the grand jury. The Committee now feels that while it could become a part of the grand jury report, it should go forward to the Standing Committee at this time. It was also agreed that new Rule 6(f), which was ministerial in nature, could likewise go forward subject to a clearing with the House of Representatives on the need for circulation.

Rule 23(c). Trial by Jury or by the Court. It was voted to

send this previously approved rule forward.

Rule 24. Trial Jurors. The Standing Committee preferred that provision for waiver of a jury less than twelve, due to an excused juror, which the Committe had previously placed in Rule 24(c), should be contained in Rule 23(b). It was so voted.

The Committee on Jury System prefers the present system of selecting alternate jurors to proposed Rule 24(c). Judge Webster expressed opposition to what remained of new Rule 24(c) in view of the elimination of alternate jurors after the case was submitted, and recommended that proposed Rule 24(c) be abandoned. A vote on this motion was deferred, pending the night recess. The meeting recessed at 5:37 p.m.

The meeting reconvened at 9:00 a.m. on August 27, 1975. The motion to abandon proposed Rule 24(c) as an amendment was adopted by a vote of seven to two.

Rule 35. Professor LaFave stated that the major remaining questions are, if we proceed, (1) the makeup of the panel and (2) the 120-day period limitation for filing a Rule 35 motion, which would reduce the number of those who would be able to prove parole eligibility within such period.

Judge Hoffman reported on the status of the questionnaire produced at the request of the Chief Justice by the Federal Judicial Center, noting that it did not deal with the makeup of the panel. As of August 21, 1975, 436 of the 625 questionnaires, or 70%, had been returned. There will be a follow-up on those who did not answer. Of this number, 59% favored some form of review; 59% preferred panel review to appellate review.

If review is to be appellate review, 26% favored review of all sentences; 31% favored review of sentences greater than two years; 39% favored review of sentences in excess of some term of years; 4% did not answer the question. 42% of those answering would permit enlargement of sentence; 57% would have the judge state his reasons for sentencing. In this category, 51% of the district judges voted yes; 48% voted no.

If review is to be by district panel, 27% would apply review to all sentences; 33% would apply review to sentences greater than two years; and 36% would apply review to sentences on some other basis. 73% would permit enlargement of sentence and 57% would require reasons.

It was noted that the Zirpoli Committee, recognizing that some form of sentence review is a political reality, favors the

proposed amendment to Rule 35, with certain suggested modifications: (1) that the panel of review judges consist of one circuit judge and two district judges of the circuit; (2) that membership on the panel be rotated in such manner as is practicable in the discretion of the assigning judge; and (3) that the motion to review sentence shall apply to any sentence which may result in imprisonment regardless of the period.

Judge Lumbard noted that the climate has changed and that it is now less a matter of whether to nave sentence review and more a question of which type of review, panel or appellate. The Crime Control Act, 18 U.S.C. §§3575 and 3576, now provides for appellate review on the issue of special offender.

Judge Hoffman inquired how the rule would accommodate a district judge who granted a de minimus reduction in order to preclude effective review.

Mr. Thornburgh stated that the government wanted the same access to the process as the defendant, in the event it concluded that the reduction was excessive, and possibly if the original sentence was insufficient. Justice Cutter reported that the procedure in Massachusetts which utilizes a panel selected from the trial court and which permits enhancement of sentences has

worked very well for over 35 years. It was noted by Judge Hoffman that the State of Georgia has recently placed into effect a form of sentence review taken from proposed Rule 35. Experience in Georgia had resulted in a reduction of sentences in approximately 11% of the cases.

Judge Webster explained that the present draft did not provide for enhancement of sentence in order to avoid the procedural due process requirements which the Committee felt would be invoked if the defendant stood the risk of having his sentence increased. There was general agreement that in such case the defendant would be entitled to counsel and to appear and confront any witnesses who should testify at the hearing.

Discussion with respect to sentencing councils followed. Several judges reflected that this was an independent means of policing disparity, but was not a substitute for review. Defendants were often resentful of participation by judges who did not hear the allocution or participate in the trial, with no particular record to review. Judge McCree observed that lawyers complain that sentencing councils cut into the role of the advocate at allocution since the sentence has largely been pre-determined.

A discussion followed on whether or not the sentencing judge

must be required to give reasons. The proposed rule does not so provide because, as Judge Webster explained, the Committee was opposed to the development of a so-called substantive law of sentencing and would prefer to leave exposition of standards to appellate courts where such challenges as an inflexible application of a mechanical standard or gross abuse of discretion would continue to be made.

A discussion of timing followed. Mr. Thornburgh was concerned that the automatic running of the 120-day period from date of sentencing would present a problem with cooperating convicted defendants. After discussion, however, Mr. Thornburgh indicated that the government could live with a proposal which permitted extension with the consent of the government. Mr. Ray spoke in favor of cutting off petitioning at some time, both in the interest of the prisoner and of the government. Mr. MacCarthy agreed that the judge should not be allowed to sit on a motion.

Judge McCree thought the new rule gave the judge a reasonable time in which to act. Judge Hoffman suggested that there be a 60-day limitation on the time in which to act, otherwise the motion would be deemed denied (thus permitting review). Professor Remington noted that counsel may want to give the judge an opportunity to deal with the Parole Board, which frustrates the A-2

sentence. Judge McCree disagreed. Rule 35, in his view, was for the purpose of permitting the judge a change of heart and not to follow or react to subsequent events; subsequent matters should be taken into consideration by the Parole Board and relief sought in that quarter.

Judge Lumbard called for an expression of opinion on these matters. Judge McCree's proposal to approve Rule 35 at lines 19-22 (providing that an appeal should not extend the time within which a motion to reduce sentence may be made) be approved as drafted. The motion carried by a vote of 6 to 5.

Judge Hoffman then moved to add after line 22 of Rule 35(b) the following: "The motion shall be acted upon within 60 days of date of filing of the motion, and if not acted upon shall be deemed denied." This motion was adopted by a vote of 10 to 1.

An additional amendment was adopted by a vote of 9 to 2 as follows: In line 25 substitute for the words "denial of" the words "court has acted upon"; and at the end of line 31 add "but action thereon may be deferred until after the disposition of an appeal".

Judge Nielsen, seconded by Judge Smith, moved for the

retention of the two-year limitation in Rule 35(c)(1). The motion carried 7 to 2.

Mr. Thornburgh asked that the government be given the right to seek review of sentences at the district court level with a view to increasing inadequate sentences. Judge Robb expressed sympathy for the proposal but was concerned that such a provision might be the basis for shooting down the entire plan for sentence review. On the question whether the government should have the right to trigger review, the Committee voted in the negative. On the question whether if the defendant moves for review, the panel should have power to increase the sentence, the majority of the Committee supported this concept on the theory that the defendant waived his right to challenge enhancement by seeking review. It was thereupon moved that Rule 35 be sent forward without enhancement powers but that the commentary should provide that the Committee was of the view that the panel should be given the power of enhancement at the request of the government, provided no sentence would be enhanced without having provided the prisoner the right of counsel and the right to appear and confront witnesses. It was further agreed that the commentary could suggest early consideration of such a change with suggested language on how to accomplish it.

The Committee next discussed whether a circuit judge should be a member of the panel. It was agreed that the commentary could reflect the inherent power of the chief judge to designate circuit judges to sit as district judges.

Judge Robb proposed that Rule 35(c)(2) be amended at line 39 to provide for the designation of the panel by the chief judge of the circuit "with the concurrence of the circuit Judicial Council". This proposal was adopted.

Mr. Thornburgh suggested that 20 days be provided as a time for triggering any due process requirements in the event that the Justice Department should seek enhancement of sentences. Mr. Thornburgh reminded the Committee that he had no guidance at this time from the Attorney General on the Department's position on review of sentences. Judge Lumbard informed Mr. Thornburgh that the Committee did not expect the Department to accept the position of the Committee but to be aware that it had an opportunity to attend and participate.

The recent congressional changes to Rule 11 amendments prompted the Committee to insert, for specificity, after "Rule 11" in c(1) "(e)(1)(c)".

It was determined that Rule 35 should go forward with the amendments noted.

(Luncheon recess 12:05 p.m. - 1:05 p.m.)

Judge Smith presented, and the Committee approved, modifying language to the Grand Jury Report with respect to the Committee's approach to House Joint Resolution 46 as follows:

> Our Committee is of the opinion that:
>
> The Judicial Conference of the United States should recommend to Congress the modification of H.J.R. 46, 94th Congress, 1st Session. Our Committee believes that the Grand Jury method of charging crime should be [illegible]issible but not be exclusive and that the [illegible]ution should vest in Congress power to provide that crimes may be charged by information and the conditions under which such information may issue.
>
> Our Committee is in agreement with H.J.R. 46 insofar as it does not disturb the authority of Congress to enact legislation relating to the investigatory function of the Grand Jury.
>
> At this time, we express no opinion as to which of several alternative methods of charging crimes should be employed by Congress in implementing such a constitutional change, should it occur, except to express the concensus of the Committee that alternative methods of charging crime are being successfully employed in many states.

Rule 40.1. The modifications suggested by the Standing Committee as reflected in the revised draft were considered,

approved and incorporated in the draft amendment.

Rule 41. The Standing Committee had asked about (1) need for a face-to-face affidavit and (2) what would happen if an officer were not available the next day to supply it. The Committee discussed these considerations and concluded that in view of the importance of the rule as a working tool it should go forward. Approved.

Rule 43. Rule 43(a) was amended by inserting in line 1 after the word "shall" the words "have a right to" in order to make the language consistent with changes in succeeding sections. The rule was further amended at line 37 by substituting the word "proceeding" for the words "reduction of sentence". As thus amended, the rule was approved for forwarding.

III

HABEAS CORPUS RULES

Judge Hoffman noted that there may still be some aspects of future custody which are open to treatment by rule or statute. He referred to a recent Fourth Circuit case in which a divided panel dealt with the forum for initiating §2255 cases. He suggested that a small committee be designated to study and resolve

these matters. Judge Lumbard thereupon appointed an Editorial Committee consisting of Judge Webster, Chairman, Professor Remington and Professor LaFave, with Judge Hoffman as ex officio adviser. Professor Nielsen urged that the habeas rules go forward as they are badly needed.

It was noted that the Standing Committee recommended that three, rather than two, copies of the petition be required in both §2254 and §2255 cases. Judge Hoffman observed that there may be some problems in the District of Columbia in view of the formation of the Superior Court. This task of reconciliation properly belongs to the Committee on Administration of Criminal Laws. Professor Remington observed that Rule 8 dealing with use of magistrates may require further consideration in light of Wingo.

Rule 1. Professor Remington noted that detainer problems were creating situations which were not technically §2255 problems. As now cast, Rule 1 would permit use of the rules under a habeas corpus action brought pursuant to §2241, when §2255 was otherwise inappropriate.

Rule 7. It was determined to modify 7(b) by deleting the words "if not controverted" in line 14, as suggested by the

Standing Committee but noting in the commentary that this does not change the law with respect to disposition on a record in which material facts are controverted.

Professor Remington noted that the Advisory Committee notes need to be updated in view of the passage of time. He also noted that Professor Wright had expressed opposition to the five-year limit contemplated by the presumption of prejudice contained in Rule 9.

A question was raised with respect to the use of the magistrate to recommend an evidentiary hearing in Rule 8(b). It was explained that district judges now frequently have these reports filed as a part of the record, which then permits the judge to enter a brief order approving the recommendation.

It was the sense of the meeting that the suggested forms for use in §2254 and §2255 cases do not require approval of the Standing Committee and can be published and used forthwith.

Mr. Pauley, speaking for Mr. Thornburgh, then stated that the Department of Justice had not arrived at a position on the need for §2255 rules. The Department of Justice thinks that if §2255 is a part of the criminal case, it is possible that such

rules might have an adverse effect upon the Department of Justice's efforts to limit the scope of review. Justice Cutter, joined by Judge Nielsen and Judge Hoffman, inquired why the Department of Justice has not developed this position in the past. Mr. Ray, United States Attorney from the Northern District of Mississippi, would like the Advisory Committee Note to say that the rules did not disturb existing case law with respect to the burden of proof. Judge Lumbard asked the Editorial Committee to keep these points in mind.

It was voted that the rules should go forward, subject to editorial modifications.

IV

NEW MATTERS

(1) Rule 50(b). Plans for Achieving Prompt Disposition of Criminal Cases. A proposal to modify existing Rule (b) by deletion of lines 8 through 38 and substitution of a phrase incorporating the provisions of Chapter 208 of Title 18, United States Code, was adopted in order to properly reference the Speedy Trial Act.

(2) Rule 18. Judge Hoffman suggested, in light of the

amendment to Rule 50(b), that Rule 18 needs to be amended to accommodate speedy trial demands. He thinks that fixing the place for trial "with due regard to the convenience of the defendant and the witnesses" is too limiting. Mr. Ray stated that this was considered and pointed out to Congress at the time of the Speedy Trial Act. Judge Lumbard suggested that we let this matter develop.

(3) Consideration was next give to the resolution adopted by the House of Delegates of the American Bar Association supporting the concept of voir dire by counsel as a matter of right. There was strong support for retaining flexibility within the federal system. No action was taken on this proposal.

(4) Rule 17(b). Expert Witnesses. Mr. Imlay pointed out that at present the Department of Justice pays for the expenses of expert witnesses under Rule 17(b) and the Administrative Office pays for expert witnesses under the Criminal Justice Act §3006A(e). Rule 28(a) disappeared upon the adoption of the Federal Code of Evidence, §706. In a §4244 competency proceeding, the Department of Justice pays for the hearing. The Administrative Office pays for the test conducted by the psychiatrist. Mr. Imlay thought a new rule was needed dealing with experts. Judge Nielsen questioned whether the accounting problem was properly

the subject for rule making. Mr. Imlay stated that his office needed a clearer description of procedures for calling experts than we presently have. Judge Lumbard suggested that this problem be taken up through Judge Bonsal's Committee with liaison with the Department of Justice, a representative of the Criminal Rules Committee and a representative of the accounting office. The matter will be explored further in accordance with his suggestion.

(5) Rule 32(f) and 40. (Re parole revocation). Judge Smith suggested that these rules be circulated. Judge Nielsen questioned 32(f)(1)(C), affording the opportunity to question witnesses. Professor Remington suggested that the term "federal magistrate" be considered as an editorial matter.

The Standing Committee had requested that the Committee rethink Rule 40 (commitment to another district). It was suggested that further editorial work be done and then the rule be circulated to all judges. Judge Nielsen raised a question under 40(c) permitting the magistrate to reduce a bond previously set by a district judge.

(6) Rule 43.1. Exclusion of the Public. In the absence of Judge Hoffman, who had suggested consideration of this rule,

further consideration was laid over until the next meeting.

RECAPITULATION

The Grand Jury Report will be revised in accordance with decisions reached at this meeting and will be submitted in the manner designated by the Chief Justice to Judge Lumbard. Judge Harvey suggested that the Zirpoli Committee letter go forward with the report.

The Committee authorized the following rules to go forward as approved, reapproved or further amended: 6(e), 6(f), 23(c), 24, 35, 40.1, 41, 43, habeas 2254 and 2255.

Modified Rule 50(b), which has not previously been circulated but which merely makes the rule consistent with the statute, shall likewise go forward.

Further consideration will be required for the balance of the rules discussed.

Judge Lumbard expressed his appreciation to the subcommittees, the Editorial Committee and those who had participated in testimony before the Senate and House of Representatives.

Mr. Bedell, still expressing concern with respect to recordation of grand jury testimony, suggested a comment in the notes requiring the equipment to be tamper-proof and that the recording be made under supervision identified by voice of the supervisor at the beginning and at the end of the recording. Mr. Sourwine said that there were techniques for doing this. Judge Lumbard asked Mr. Ray to investigate.

Judge Lumbard indicated that there may be a meeting prior to March, 1976, depending on the state of business at hand.

The meeting was adjourned at 3:35 p.m.