

**MINUTES  
ADVISORY COMMITTEE  
FEDERAL RULES OF CRIMINAL PROCEDURE  
NOVEMBER 19, 1987  
Washington, D.C.**

The Advisory Committee on the Federal Rules of Criminal Procedure met in Washington, D.C. on November 19, 1987. 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, November 19, 1987. The following members were present:

Hon. Leland C. Nielsen, Chair  
Hon. James De Anda  
Hon. Sherman Finesilver  
Hon. William Terrell Hodges  
Hon. William L. Hungate  
Hon. William C. O'Kelley  
Hon. Harvey Schlesinger  
James F. Hewitt, Esq.  
Richard A. Green, Esq.  
Frederick B. Lacey, Esq.  
Edward F. Marek, Esq.  
Roger Pauley, Esq. (designated by William Weld)  
Leon Silverman, Esq.  
Stephen A. Saltzburg, Reporter

Also present were James E. Macklin, Jr., Deputy Director of the Administrative Office, together with David Adair; Tom Hutchison, Counsel for the Subcommittee on Criminal Justice of the House of Representatives Judiciary Committee; Ray Smietanka, Associate Counsel of the same Subcommittee; Stef Cassella, Staff Counsel to the Senate Judiciary Committee; Anthony Partridge of the Federal Judicial Center, and Drew Areena, who accompanied Roger Pauley. Judge Gerald Tjoflat, Chair of the Committee on Probation Services, was present during the morning session for the discussion of Rule 32.

**INTRODUCTION OF NEW MEMBERS**

Judge Nielsen invited all of the members present to introduce themselves, which they did. Judge Nielsen then explained that the Chief Justice had made new committee assignments and that some members of the Committee would no longer serve, others would serve an additional year, and some members would serve for a somewhat longer period. Mr. Macklin explained that the Chief Justice had adopted suggestions made by a committee studying the structure of the Judicial Conference's committees

and had decided to designate limited terms of service on committees in order to spread the work and to permit more judges to be involved with committees. Judge Nielsen indicated that Richard Green, Judge Finesilver, Judge Hungate, Judge O'Kelley, and Leon Silverman would leave the Committee after this meeting, and that he, James Hewitt, and Frederick Lacey would serve another year. The names of new Committee members were announced, and a list of the new Committee membership is attached to these minutes. Judge Nielsen ruled that all members, new and old, could vote on all issues at the meeting, and he thanked the members who were leaving the Committee for their excellent service and hard work over many years.

## CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

### Changes Previously Approved

The Committee's agenda noted that the Committee had approved four amendments to the Criminal Rules: Rule 30 (timing of the court's charge took effect on August 1, 1987); Rule 6 (a) (selection of alternate jurors took effect on August 1, 1987), gender neutral changes (took effect on August 1, 1987), and Rule 12.3 (notice of public authority was forwarded to the Standing Committee). No further action was needed or possible at this time.

### New Criminal Rule Amendments Proposed

1. Proposed Amendments to Rule 32 (Sentencing Procedures). Consideration was given to possible amendments to Rule 32 to take account of the Sentencing Act of 1984 and the guidelines that took effect on November 1, 1987. Judge Tjoflat, Chairman of the Probation Committee, was present to discuss possible amendments, and to follow up on his meeting with the Committee in May, 1987. He reported that the Model Local Rule, which had been discussed in May, had been circulated to all Chief Judges (Circuit and District Courts) for comment on August 28, 1987. The rule received widespread support, although some districts proposed to make changes in their version of the local rule. Judge Tjoflat recommended that the Committee wait at least one year to amend Rule 32 in order to see how the rule works, where the problems are, and what amendments, if any, are needed. The year also would test the success of the Model Local Rule. Mr. Pauley reported that the Justice Department concurred in the recommendation. Mr. Hutchison and Stef Cassella discussed the possible congressional reaction to rule changes, with Mr. Hutchison suggesting that Congress intended modifications of the rule to be developed in case law and Mr. Cassella indicating that rulemaking might be appropriate. Both congressional representatives reported that a statute was about to be enacted to make the guidelines

applicable to post-November 1, 1987 crimes. [The statute, in fact, was enacted. Reporter.] Mr. Green moved to table proposed amendments to Rule 32, and Judge Lacey seconded the motion. It carried unanimously.

The discussion indicated the Committee's understanding that the Committee would, by various means, make known to the bench and bar that the Committee will welcome comments on problems with Rule 32 and suggestions for amendments to the Rule during the year. The Committee expressed interest in having "The Third Branch" report the Committee's interest in receiving input regarding Rule 32, and Mr. Partridge indicated that the Federal Judicial Center would be made aware of the Committee's interest. Also, Mr. Marek asked that Rule 11 be examined in connection with Rule 32, since there is reason for concern as to the special parole term language in the rule.

2. Proposed Amendment of Rule 6 (e) (Disclosure to Foreign Governments). Mr. Areena explained the way in which information is exchanged between the United States and other nations in criminal investigations. He discussed the Justice Department's interest in amending Rule 6 (e) to permit disclosure of grand jury material to foreign countries. Mr. Pauley also offered support for the amendment. Following discussion which focused on the advisability of having the proposal submitted to Congress for consideration, Judge O'Kelley moved to table the amendment, and Judge Hungate seconded the motion. The motion carried with Mr. Pauley dissenting.

3. Proposed Amendment to Rule 33 (Timing of New Trial Motions). The Reporter had been directed to examine the background and the developments of new trial motions under Rule 33, and also motions under Rules 29 and 34. He reported that the time limits had been 3 days, were extended to five and then to seven. Notwithstanding an occasional difficulty like the one that occurred in United States v. Del Bono, which Chief Judge Gibbons circulated to the Committee and is discussed in the Reporter's memorandum, the time limits generally have worked well and served their purposes. The memorandum circulated by the Reporter explained that even in Del Bono the court of appeals could have granted a new trial in the interests of justice. Magistrate Schlesinger moved to table the amendment, and Mr. Marek seconded the motion. It carried unanimously.

4. Proposed Amendment to Rule 41 (a) (Search Warrants For Property and People Outside the District). This amendment was proposed by the Justice Department. The Committee discussed separately the proposal to permit execution of warrants outside the United States and outside the district in which the warrant is issued. Judge Lacey moved to approve a rule in principle that would permit the issuance of warrants that may be executed in another district but reserved the issue of execution outside

the United States, and Mr. Hewitt seconded the motion. Following discussion, the motion was withdrawn, and Judge Hungate moved to approve an amendment permitting warrants to be issued that may be executed in another district. This motion was passed unanimously. Subsequently, the Reporter circulated a draft of an amendment to cover both executions in another district and outside the United States. Judge Finesilver moved to adopt the amendment, and Mr. Pauley seconded the motion. The motion carried unanimously, with the Committee agreeing to approve the rule subject to reconsideration when it is circulated together with a proposed Advisory Committee Note.

As amended Rule 41 would read as follows:

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district where the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government. If property or a person is located in, but is moving or may move outside, a district, a federal magistrate in that district may issue a warrant for the property or person, to be executed either within that district or where the property or person is found. If property relevant to a criminal investigation within a district is located outside the United States and is lawfully subject to search and seizure by the United States, a federal magistrate in that district may issue a search warrant for such property.

New material underlined.

5. Proposed Amendment to Rule 41 (e) (Return of Property). The Justice Department recommended an amendment of Rule 41 (e) to clarify the exclusionary rule contained therein and to provide guidance to judges with respect to the return of lawful property belonging to a non-defendant. The Reporter's memorandum contained language proposed by the Department and the Reporter's suggested alternative. After discussion, Mr. Pauley indicated that the Department would willingly accept the alternative as long as the Advisory Committee's Note clearly indicated its purpose. He moved adoption of the alternative amendment, Judge Lacey seconded the motion, and it carried unanimously. The Committee indicated, however, that approval was subject to reconsideration when the amendment is circulated together with the Advisory Committee's Note. With respect to this amendment and the amendment to Rule 41 (a), the Reporter agreed to circulate the final language and proposed Notes to the Department of Justice, which had asked for the amendments, to see whether the Department objects to the final rules and Notes. Thereafter, the drafts would be circulated to the entire Committee.

The language of the amended rule is as follows:

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property [which was illegally seized]. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be [restored] returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings [and it shall not be admissible in evidence at any hearing or trial]. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

New material underlined; deleted material in brackets.

#### EVIDENCE RULE AMENDMENTS UNDER CONSIDERATION

##### Amendments Previously Approved

1. Amended Fed. R. Evid. 609 (a) (Impeachment of Witnesses in Civil Cases and Prosecution Witnesses). The Committee had approved an amended Rule and a Note in May, 1987, subject to securing approval of the Civil Rules Committee. The Civil Rules Committee confirmed its approval on November 20, 1987. The Committee unanimously recommended sending this amendment to the Standing Committee. The approved Rule and Note are attached to these minutes.

##### New Evidence Rule Amendments Proposed

1. Proposed Amendment to Fed. R. Evid. 801 (d)(2)(E) (Restore Independent Evidence Requirement for Conspirator Statements). The Committee discussed a proposed amendment to restore the independent evidence requirement to Fed. R. Evid. 801 (d)(2)(E) to prevent a court from considering conspirator statements, which are challenged as hearsay, as part of the foundation when deciding whether they satisfy the co-conspirator exemption from the hearsay rule. Judge Lacey suggested that this the issues posed by the amendment were different from those raised by the amendment to Rule 609(a), since the proposed amendment to Rule 609 would change something that Congress wanted, according to the Supreme Court's decision last term in Bourjaily v. United States, whereas the amendment to Rule 609 clarified an ambiguity. Without discussing the merits of the amendment, Judge Lacey suggested that Congress was the appropriate forum to consider the proposal, not the Committee.

He moved to table the amendment, and Judge Hodges seconded the motion. The motion passed over the dissent of Mr. Hewitt.

2. Proposed Amendment to Fed. R. Evid. 803 (Child Abuse Cases). The Committee discussed a possible amendment to Fed. R. Evid. 803 to create some hearsay exception for statements by children who are alleged to be victims of abuse. The discussion indicated great concern over the problem of dealing fairly with children while preserving confrontation rights. The evidentiary issue, the Committee found, has not been a tremendous problem in federal courts, and confrontation issues are currently before the Supreme Court. Mr. Pauley moved to table the amendment. Mr. Hewitt seconded the motion, and it carried unanimously.

#### AMENDMENTS TO SECTION 2254 AND SECTION 2255 RULES AND MISDEMEANOR RULES UNDER CONSIDERATION

##### Section 2254 and 2255 Rules

1. Gender Neutralization--The Committee approved gender neutral rules and forwarded them to the Standing Committee. No further action is required.

2. Proposed Amendment to Section 2254 and Section 2255 Rules (Time Limits). For the second time, the Committee considered a proposed amendment that would impose time limits for judicial action in habeas corpus and section 2255 cases. The discussion led to a unanimous opinion that time limits were impracticable and disadvantageous in some cases--e.g., cases brought by death row inmates. Mr. Hewitt moved to table the amendment, Judge Hodges seconded the motion, and it passed unanimously.

##### Misdemeanor Rules

1. Proposed Abrogation of Misdemeanor Rules and Amendment of Federal Rules of Criminal Procedure. Magistrate Schlesinger suggested abrogation of the misdemeanor rules and amendment of the Criminal Rules to take account of petty offense cases. He indicated that the great majority of magistrates favor abrogation. Mr. Pauley pointed out that the legislation pending in Congress lowered the fines for petty offenses and infractions, thus removing a concern that a right to jury trial might be recognized in such cases. The Committee agreed that no action was required at this time and left the matter in Magistrate Schlesinger's hands to be returned to the Committee with further suggestions at any time.

**NEXT MEETING**

Judge Nielsen announced that the next meeting would be May 19-20, 1988 in Washington, D.C.

**ADJOURNMENT**

The meeting adjourned at 3:00 p.m.

**STEPHEN A. SALTZBURG**

Reporter

Advisory Committee on Criminal Rules

December 19, 1987

[Attached to these minutes are three items: 1. Mr. Weld's designation of Roger Pauley as the Justice Department's representative. 2. Current Roster of Committee membership. 3. Approved Rule 609 (a) and Advisory Committee's Note.]