MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

November 15, 1990
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met in Washington, D.C. on November 15, 1990. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Hodges called the meeting to order at 9:00 a.m. on Thursday, November 15, 1990 at the Administrative Office of the United States Courts. The following members were present for all or part of the meeting:

Hon. Wm. Terrell. Hodges, Chairman
Hon. James DeAnda
Hon. Sam A. Crow
Hon. Robinson O. Everett
Hon. Daniel H. Huyett, III
Hon. John F. Keenan
Hon. Harvey E. Schlesinger
Prof. Stephen A. Saltzburg
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Mr. Edward F. Marek, Esq.
Mr. Roger Pauley, Jr., designee of Mr. Robert S. Mueller, III, acting Assistant Attorney General

David A. Schlueter, Reporter

Also present were Hon. Leland C. Nielsen, past Chairman of the Committee, Mr. James Macklin and Mr. David Adair from the Administrative Office and Mr. James Eaglin from the Federal Judicial Center.

I. INTRODUCTIONS AND COMMENTS

Judge Hodges welcomed Judge Sam Crow as a new member of the Committee and on behalf of the Committee offered best wishes to the out-going chairman of the Committee, Judge Nielsen. The Chairman also excused the Honorable James Exum who had indicated a desire to be relieved from his membership on the Committee.

Mr. Macklin noted that he had distributed materials addressing the roles of the respective committees within the Judicial Conference and asked the Committee members to give some attention to those materials.

Judge Hodges noted that in the future the materials for each Committee meeting, including comments from the public on proposed amendments, should be prepared and distributed to each member in a single binder at least 30 days prior to the meeting. Exceptions could be made for last minute items requiring the Committee's immediate attention.

II. CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

A. Rules Approved by the Judicial Conference and Approved by the Supreme Court

The Reporter informed the Committee that the Supreme Court had approved amendments to two rules and had forwarded them to Congress for action.

1. Amended Rule 41(a), Authority to Issue Warrant. The Committee's proposed change, which would have granted authority to issue search warrants for property and persons within and outside a district, included a provision for issuing search warrants for property located outside the United States. The Supreme Court, however, approved only those amendments affecting searches within the United States with a short reference to its recent decision in United States v. Verdugo-Urquidez. In that case the Court had concluded that the Fourth Amendment did not apply to searches conducted in Mexico of property belonging to a Mexican national. The Reporter indicated that as of the date of the meeting, Congress had taken no action with regard to the amendments to Rule 41(a). (The Committee was subsequently informed that because Congress failed to take any action on this amendment before December 1, 1990, the amendment is final).

2. New Rule 58, Procedures for Misdemeanors and Other Petty Offenses. The Supreme Court approved the Rule without any changes and forwarded it to Congress. (The Committee was subsequently informed that because Congress had failed to take any action with regard to Rule 58 by December 1, 1990, the Rule is now final). Judge Schlesinger noted that recent legislation had changed the designation of "magistrate" to "United States Magistrate Judge" and that Rule 58 and other rules should be amended to reflect the changed terminology. (Judge Schlesinger subsequently determined that the term "magistrate" currently appears approximately 100 times throughout the Rules of Criminal Procedure).

B. Rules Approved by the Standing Committee and Circulated for Public Comment

The Reporter indicated that in January 1990, the Standing Committee had approved for circulation several amendments proposed by the Committee at its November 1989 meeting and in July 1990 it had approved for circulation an additional amendment to Rule 35. He also indicated that the comment period had expired on all of the rules and that the written comments had been distributed to the Committee.

1. Rule 16(a)(1)(A), Disclosure of Evidence by the Government. The Reporter briefly reviewed the public comments that had been received on the proposed amendment. The comments generally favored the amendment. Mr. Karas moved that the proposed amendment be forwarded to the Standing Committee with the recommendation that the amendment be adopted. Judge Keenan seconded the motion which passed by unanimous vote without further discussion. A copy of the Rule and the accompanying Committee Note are attached to these minutes.

2. Rule 24(b), Peremptory Challenges. The reporter, Mr. Macklin, and Mr. Adair provided a brief legislative update on the status of attempts by Congress to amend Rule 24(b). Although the Senate version of the Crime Bill (Senate Bill 1711) included a provision equalizing peremptory challenges at 6 in felony trials, the House version did not. Apparently the provision was deleted from the final version of the 1990 Crime Control Act during Conference discussions. The Reporter briefly related the general tone of the public's comments; although there seemed to be some support for equalization of the number of peremptory challenges, the defense bar (especially from several sections of the country) seemed greatly opposed to any reduction in the number of defense peremptory challenges.

Mr. Karas thereafter moved to amend the Rule to provide for equalized peremptory challenges with each side being entitled to 8 challenges in felony cases. Mr. Marek seconded the motion. In the discussion which followed, Professor Saltzburg indicated that he was opposed to the amendment in its entirety; the new rule would upset the balance which now exists and also expressed concern about the very limited ability of defense counsel to conduct voir dire in federal courts. Mr. Karas withdrew his motion and seconded Professor Saltzburg's subsequent motion to rescind the amendment in its entirety. Judge DeAnda stated his opposition to the motion, indicating that the proposed amendment should be submitted to the Standing Committee for its consideration. Mr. Pauley commented that carried to its

logical extreme, the argument for keeping the balance in peremptory strikes should be extended to readjusting the number of strikes in both capital and misdemeanor cases which are not equalized. Professor Saltzburg responded that the public comments were overwhelmingly negative against the amendment.

The Reporter briefly addressed some of the public comments which indicated an interest in equalizing the number of peremptory challenges, including the American Bar Association. He also noted that several commentators and recent cases have raised the issue of applying Batson to the defendant. Judge DeAnda added that he was aware that defense counsel will often strike a class of potential jurors.

Judge Hodges briefly reviewed the status of the proposed amendment and asked the Committee to consider whether it had any obligation to go forward with the amendment. Judge Huyett responded that perhaps the process had gone too far already and the Committee did have an obligation to go forward with the proposal. Judge Hodges observed that the purpose of the public comments is to determine whether an amendment is even appropriate and that it might be possible to rescind the amendment. He noted, however, that if the amendment was terminated, Rule 24(b) would remain as is and Congress might decide to attempt another amendment to the rule. Mr. Marek observed that there was precedent for rescinding a proposed amendment which had been published for comment. He pointed out that within the last several years the Committee had withdrawn one of its proposed changes to Rule 32 because of adverse public comments.

Mr. Pauley indicated that he would support a proposal to equalize the number of peremptory challenges at 8 for each side in a felony case and that he was concerned about the possible linkage by Congress of the number of peremptory challenges and the ability of counsel to conduct voir dire. Judge Keenan stated that he agreed with Judge DeAnda that the amendment should go forward as drafted and that the amendment would give judges discretion in multiple defendant cases to increase the number of peremptory challenges to the defense.

The Committee ultimately voted by a margin of 8 to 3 to reject the motion to rescind the proposed amendment.

Judge Everett suggested that the number of peremptories be equalized at 10 for each side. In response Judge Nielsen observed that increasing the total number of peremptories would exacerbate the problem; the purpose behind the

amendment was to not only equalize the number, but to also reduce the total number available. In response to Judge DeAnda's suggestion that perhaps 8 peremptory challenges would be supportable, Judge Hodges noted that doing so would keep the total number of peremptory challenges at 16, the number that currently exists. That would, however, have the effect of decreasing the defense challenges while increasing the government's challenges, a result likely to be even more distasteful to the defense bar than the initial proposal.

Judge Everett moved that the rule be amended to provide for 8 peremptory challenges in a felony trial. Judge DeAnda seconded the motion. The Reporter indicated that there were some arguments for proceeding with the amendment as drafted. First, the Judicial Conference had consistently attempted to reduce the total number of peremptory challenges and that the Standing Committee, the Judicial Conference, the Supreme Court, or Congress could change the number of peremptory challenges to 8 during the approval process. Judge Hodges indicated that the Committee had previously considered adopting a proposal which would have set the number at 8, the same number as that proposed by Congress, but that it had been rejected as not really saving time or resources.

Judge Everett withdrew his motion and Professor Saltzburg moved that the amendment be forwarded as approved with a minor change in the language, suggested in a letter by Judge Keeton, which changed one of the longer sentences into two shorter sentences. The Reporter questioned whether there was any interest in a proposal by several members of the public that a minimum number of peremptory challenges be available to an individual defendant in a multiple defendant trial; the consensus seemed to be that the currently proposed language would give trial judges the leeway to increase the number of peremptories in such cases and that a further amendment to the rule was not required.

The motion to recommend approval of the amendment as written and circulated passed by a vote of 7 to 4. The Reporter indicated that he would make some minor additions to the Committee Note to reflect the Judicial Conference's past interest in adjusting the number of peremptory challenges and recent case law which had applied Batson to the defendant. A copy of the amendment and the accompanying Committee Note are attached.

2. Rule 35(b), Reduction of Sentence. The proposed amendment, which had been circulated to the public, would permit the Government to make, and the court to rule upon, a motion to reduce a sentence for a defendant who had provided substantial assistance one year or more after imposition of

the sentence. The public comments were generally in favor of the proposal but a number of commentators recommended that the defendant be permitted to make a similar motion for reduction of the sentence. Judge Huyett moved that the amendment be forwarded, as published, to the Standing Committee with a recommendation to approve it. Professor Saltzburg seconded the motion which carried by a unanimous vote with no further discussion.

3. Rule 35(c), Correction of Sentence Errors (New). The Reporter provided a background discussion of the expedited consideration of the proposed amendment; A subcommittee consisting of Judge Hodges (chair), Judge DeAnda, Mr. Marek, and Mr. Pauley had met in Atlanta in May 1990 to consider recommended changes to Rule 35 which had been suggested in the 1990 Federal Courts' Study Committee Report. The Subcommittee subsequently distributed a proposed amendment, which the Committee later approved and which was approved for publication and comment by the Standing Committee at its July 1990 meeting. The period for public comment expired on October 31, 1990. The comments generally favored the proposed addition to Rule 35 but a number of commentators suggested that the Rule be expanded to permit the defense to move for reduction of the sentence and several pointed out potential jurisdictional problems where a notice of appeal has been filed before corrective action is taken.

With regard to the latter issue, Judge Hodges suggested that the matter be referred the Appellate Rules Advisory Committee for its consideration. With regard to the public suggestions that the Rule be amended to include consideration of new facts, Mr. Karas noted that the Federal Court Study Committee's recommendation should be considered. In response, Judge Hodges explained why the subcommittee had rejected that proposal; it believed that it would completely confound the implementation of the Sentencing Act. He further noted that an amendment to Rule 36 would not have been appropriate because that rule only addresses "technical errors" in the record. Mr. Marek addressed the issue of the amendment not going far enough to address changes in circumstances where the defendant would be entitled to relief on his sentence; he disagreed with the view that if such a provision were adopted that the government could also take advantage of it.

Judge Keenan moved that new Rule 35(c) be approved as published and forwarded to the Standing Committee. Judge Huyett seconded the motion.

In continued discussion on the proposed rule, Professor Saltzburg raised the issue of providing only 7 days for

correction of the sentence; Judge Hodges responded that the subcommittee had been concerned about leaving Rule 35 open ended and that a shorter period of time would help prevent abuse of the rule. Professor Saltzburg noted that § 2255 would probably provide relief if the 7-day period had ended and suggested that language to that effect be included in the Advisory Committee Note. Judge Hodges added, in response to further discussion, that Rule 35(c) would be more efficient and quicker than relying upon § 2255 and emphasized that the rule envisioned action by the trial court within 7 days. Mr. Marek raised the issue of whether the defendant would be required to be present; the consensus was that normally that would be the case and that no further amendment to the rule or the Committee Note was required. The motion to approve the amendment to Rule 35 was thereafter approved by a unanimous vote.

Mr. Marek moved that the Committee consider amending Rule 35 to adopt the 1990 Report of the Federal Courts' Study Committee to the effect that within 120 days of sentencing, the defendant could present new facts in an attempt to reduce the sentence. Mr. Karas seconded the motion. Professor Saltzburg agreed with the views expressed by Mr. Pauley that such a proposal would have to include the possibility of the government also being able to seek modification of the sentence upon the discovery of new facts. Citing double jeopardy concerns, Mr. Marek noted that the defendant needs some safety valve features in sentencing. Committee discussion focused on the absence of any hard evidence supporting the proposition that defendants would actually be able to show new facts and the fact that other measures of relief would be available to the defendant if in fact the sentence was not correct. The Reporter added that the Committee Note to Rule 35(c), which had been circulated to the bench and the bar, had specifically left open the door for the public to present evidence of actual cases involving unjust sentences and that to date none had been forthcoming. The Committee ultimately voted 8 to 3 to reject the motion to consider further amendments to Rule 35.

C. Proposed Criminal Rules Amendments

The Committee considered proposed amendments to a number of Criminal Rules:

1. Rule 4, Execution or Service; and Return. The Committee considered the issue of whether Rule 4 (arrest warrant) should be amended to conform to Rule 41 which permits telephonic search warrants. Judge Schlesinger noted that permitting such procedures would encourage reliance upon warrants and offered to research the issue and

determine whether any statistics exist on the level of reliance upon oral search warrants. Following further discussion the Committee focused on proposed changes to Rule 41 which would include provisions for transmitting the necessary information by facsimile machines.

Judge Crow suggested that it would be appropriate to consider adoption of a single rule which would provide guidance on using electronic means to secure and authorize both arrest and search warrants. Judge Hodges thereafter appointed a subcommittee consisting of Judge Schlesinger, Mr. Marek, and Mr. Pauley to consider the issue with a view toward drafting a single rule to be considered at the Committee's next meeting.

2. Rule 16(a)(1)(A), Disclosure of Evidence by Government. Judge Hodges raised the issue of application of Rule 16 to corporate defendants. He noted that the matter had arisen in a case pending in the 11th Circuit and that court was currently considering the issue in a case styled Royal Buick, Inc. v. United States. Following very brief comments, the matter was tabled.

3. Rule 17, Subpoena. The Reporter indicated that at its May 1989 meeting the Committee had considered the possibility of amending Rule 17 to address the ability a third parties to seek relief from subpoenas but had deferred the matter pending similar amendments to Civil Rule of Procedure 45, which is in the approval process. Judge Keenan moved to defer any proposed amendments to Rule 17 pending approval by the Supreme Court of Civil Rule 45. Judge Huyett seconded the motion which carried by a unanimous vote.

4. Rule 32, Sentence and Judgment. Mr. Marek moved that Rule 32(f) be amended to make Rule 26.2 (application of Jencks Act) applicable to sentencing proceedings. Mr. Karas seconded the motion. Following extended discussion about whether Rule 26.2 should be applied at pretrial hearings and detention hearings as well, Mr. Pauley believed that the sanction provision in current Rule 26.2 was too heavy and that the trial judge should have more discretion. Mr. Marek responded that the sanction is appropriate if the government has deliberately withheld the statement of one of its witnesses. After making minor amendments to the proposed rule, which incorporated suggested language in a letter from Judge Keeton, the motion carried by a unanimous vote. The proposed amendment and accompanying Advisory Committee Note are attached.

On further discussion, Judge Hodges appointed a subcommittee consisting of Judge Huyett, chair, Mr. Karas,

Mr. Marek, and Mr. Pauley, to consider the possibility of consolidating in one rule the application of Jencks Act statements at the various stages of trial and in related proceedings, i.e. detention hearings and § 2255 hearings.

(Note: Following the meeting, in an exchange of communications between the Reporter and Mr. Marek, the Committee member proposing the amendment to Rule 32(f), some uncertainty arose concerning the text of the amendment and especially the content of the last paragraph of the accompanying committee note. Accordingly, the Chairman (Judge Hodges) directed that the proposed amendment to Rule 32(f) not be sent forward to the Standing Committee until the report of the Subcommittee can be considered at the Advisory Committee's next meeting in May, 1991).

5. Rule 40(e), Arrest for Failure to Appear. The Committee had received a letter from a Magistrate raising a problem with application of Rule 40(e). The magistrate noted that a strict reading of that rule would not permit removal of a material witness to another district for failing to appear unless a subpoena had actually been issued. The Committee briefly discussed the point, including a possible amendment to Rule 40(e) which would cross-reference 18 U.S.C. § 3144 (subpoena not required where it would be impractical to do so). Ultimately, the Committee concluded that an amendment was not required. Judge Keenan moved that the matter be deferred to the Department of Justice. Professor Saltzburg seconded the motion. It passed unanimously.

6. Rule 41, Search and Seizure. The Committee briefly discussed possible amendments to Rule 41, in conjunction with amendments to Rule 4, which would address the availability of electronic means, including facsimile machines to transmit requests for search warrants. This matter is addressed at Rule 4, supra.

7. Rule 43, Presence of Defendant. The Committee had been informed that the Ninth Circuit recently ruled that Rules 10 and 43 barred arraignment by closed-circuit video, a procedure used in some state and local jurisdictions as a pilot program. The consensus of the Committee was that arraignment is a very important step in the trial process and that the defendant should stand personally before the judge or magistrate. Judge DeAnda noted that there is a danger in becoming too expedient. Following other generally negative comments about the prospects for such arraignments, Professor Saltzburg moved to reject any such amendments to Rules 43 and 10. Judge DeAnda seconded the motion. It passed unanimously.

8. Rule 52.1, Child Victim's Rights. The Reporter informed the Committee that although Congress had considered adding Rule 52.1, which would have provided additional guidance on dealing with child victims, it ultimately codified that material in Title 18 of the United States Code as part of the 1990 Crime Bill. Thus, there are no pending Congressional amendments to Rule 52.

9. Rule 54, Application and Exception. Mr. Roger Pauley pointed out to the Committee that due to legislative changes, Rule 54 was inaccurate; he indicated that Public Law 98-454 (1984) had effectively repealed the except clause in Rule 54(a) vis a vis the availability of grand juries in Guam and the Virgin Islands. It was thus necessary to conform Rule 54 with 48 U.S.C. §§ 1561 and 1614. He thereafter moved that Rule 54 be amended (as a technical amendment) to so reflect the changes. Judge Everett seconded the motion. The motion carried by a unanimous vote. The proposed change and Committee Note are attached.

III. EVIDENCE RULES UNDER CONSIDERATION

A. Evidence Rules Approved by the Supreme Court

1. Fed. R. Evid. 609, Impeachment by Conviction. The Reporter indicated that the Supreme Court had approved the Committee's final version of Federal Rule of Evidence 609 but as of the meeting date Congress had not taken any action on the Rule. (The Committee was subsequently informed that because Congress did not act on the Rule, it became effective on December 1, 1990).

B. Evidence Rules Approved by Standing Committee and Circulated to the Bench and Bar

1. Federal Rule of Evidence 404(b), Notice Provision. The Reporter indicated to the Committee that the general tone of the comments received from the public on the proposed amendment to Rule 404(b) had been positive although a number of commentators from the defense bar had urged the Committee to require more specific notice. He also noted that Judge Keeton, in a letter to Judge Hodges, had suggested rewriting the amendment to make use of shorter sentences.

Mr. Pauley expressed concern about the prosecutor's inability to know in advance of trial what type of evidence it will offer in rebuttal and Judge Hodges noted that the "good cause shown" language in the amendment would provide

an escape valve for the prosecution in those cases. Professor Saltzburg subsequently suggested that language to that effect be added to the Advisory Committee Note.

Judge Everett moved that the amendment be forwarded to the Standing Committee as written. Professor Saltzburg seconded the motion. In further discussion, Mr. Marek raised his concerns about the absence of specificity in the prosecution's notice and noted the overwhelming comments from the defense bar which urged the Committee to opt for a more specific form of notice requirement. Professor Saltzburg noted that there is growing concern about the availability of defense discovery in federal criminal trials and suggested that language be added to the Committee Note which would indicate that the amendment is not intended to limit the ability of the trial judge to require the prosecution, in limine, to provide the specifics of its Rule 404(b) evidence. Ultimately, the Committee voted unanimously to approve the amendment as published.

C. Proposed Evidence Rules Amendments

1. Rule 412, Sex Offense Cases; Relevance of Victim's Past Behavior. As a matter of information, the Reporter indicated that during the past session of Congress, Senate Bill 2754, a bill to "combat violence and crimes against women..." included a number of proposed amendments to Rule 412 which would have, inter alia, added an appeal provision, extended the limits on reputation and opinion evidence on a victim in cases not involving sex offenses, and extend the rule to civil cases as well. The bill apparently did not make it out of the Senate.

2. Article VII, Opinions and Expert Testimony. The Committee briefly discussed a proposal from Judge James Kelly of the Eastern District of Pennsylvania which suggested substituting the term "technical witness" for the term "expert" in the Article VII rules. In his view, use of the term expert implies to the jury that the judge has placed his or her imprimatur on the witness. The consensus of the Committee was that even assuming using the term placed undue emphasis on the witness, the judge could caution the jury in an instruction. Judge Keenan ultimately moved to reject the proposal and the motion was seconded by Judge Crow. The motion passed unanimously.

3. Rule 801, Co-Conspirators' Statements. Professor Myrna Raeder submitted a proposed change affecting statements of co-conspirators. The draft proposal would require a new Rule of Evidence, Rule 808, which would

provide comprehensive coverage of such statements. The proposal addresses burden of proof issues, notice issues, and corroboration requirements. After some discussion the need for such a major change, Professor Saltzburg moved to table the proposal and Judge Keenan seconded the motion. It carried by a unanimous vote.

4. Rule 803, Child Victim's Statements. The Reporter indicated that for the past several years Congress has attempted to codify an exception for child victims, but that to date no amendment had been forthcoming. Likewise, the Committee has determined that such an amendment was not necessary because of the availability of other hearsay exceptions such as 803(4) and the residual hearsay exception in 803(24) and 804(b)(5). However, the Supreme Court's recent decision in Idaho v. Wright, 110 S.Ct. 3139 (1990) raises questions about the use of the residual hearsay exception in those cases. Following further discussion, Judge Huyett moved that the Committee prepare a proposed amendment; Mr. Pauley seconded the motion which passed unanimously. The Chair asked the Reporter to draft language for an amendment for the Committee's next meeting.

IV. MISCELLANEOUS

Judge Hodges informed the Committee that Judge Keeton, the incoming chair for the Standing Committee had asked each of the Advisory Committees to give serious consideration to the way in which the rules of procedure are structured and arranged. He asked each member of the Advisory Committee to begin thinking about how the rules might be restructured to provide greater utility.

V. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Chairman announced that the next meeting of the Committee will be held in San Francisco, California on May 13 and 14, 1990.

VI. ADJOURNMENT

The meeting adjourned at 4:30 p.m. on November 15, 1990.