

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of September 12, 1975 Meeting

The Committee on Rules of Practice and Procedure met in the 6th Floor Conference Room of the Administrative Office of the United States Courts in Washington, D. C. The meeting convened at 9:00 a.m. on Friday, September 12, 1975. The following members were present during the meeting:

Roszel C. Thomsen, Chairman
Charles W. Joiner
Richard E. Kyle
Francis N. Marshall
Frank J. Remington

Judge McGowan and Professor Wright were unable to attend, however, they sent letters commenting on the proposed amendments to the criminal rules. Judge Wilson who was also unable to attend, conveyed his views by telephone to Judge Thomsen. Others attending the session were Judge William H. Webster, member of the Advisory Committee on Criminal Rules, Professor Wayne LaFave, reporter of that committee and Mr. William E. Foley, Secretary, Committee on Rules of Practice and Procedure.

Proposed Amendments to the Federal Rules of Criminal Procedure

Rule 6. The Grand Jury

(e) Secrecy of Proceedings and Disclosure and (f) Finding and Return of Indictment. The committee agreed with Judge McGowan's written observation that since "given bail" was stricken from line 27, the phrase should also be stricken from line 37. Therefore, "and in that event" was stricken and "Thereupon" was added to line 27. To replace "the defendant is in custody or has given bail" in line 37, "a complaint or information is pending against the defendant" was added. It was also noted that through inadvertence the words, "in writing" were left out of line 39 before "forthwith." Subdivisions (e) and (f) were approved as amended with a conforming change in the Advisory Committee Note.

Rule 23. Trial by Jury or by the Court

(b) Jury of Less Than Twelve and (c) Trial Without a Jury. Judge Joiner felt it was unnecessary to include the suggested form in the Advisory Committee Note and moved to delete "a copy of which is attached." Mr. Marshall suggested that "from continuing" be amended to read "to continue." The members approved the subdivisions as submitted by the Advisory Committee and the Note as amended.

Rule 24. Trial Jurors

(b) Peremptory Challenges. In his letter, Professor Wright supported the changes but questioned the statement in the Advisory Committee Note that a somewhat similar proposal in 1962 received a negative reaction from the bench and bar. The committee concurred and deleted the reference on pages 4 and 5 of the Note.

Rule 35. Correction or Reduction of Sentence

Judge Webster reported on the views of the Advisory Committee. This included the results of the questionnaire produced at the request of the Chief Justice by the Federal Judicial Center and the comments of the Committee on the Administration of the Criminal Law that some form of sentence review is a political reality in view of the proposed legislation.

In his letter, Judge McGowan pointed out an ambiguity between subdivisions (b) and (c) regarding the time within which the motion must be filed. To broaden the meaning of the language on line 25, Mr. Marshall suggested changing it to "after disposition of a motion made under." The committee agreed.

The new language at the top of page 2 was redrafted to make specific references to Rule 11(e)(1)(B) and (C) based on the changes made by Congress in Rule 11. Judge

Joiner moved approval of the redraft as follows:

There shall be no such right of review where the sentence was part of a plea agreement by the judge and the sentence was no greater than the sentence which the attorney for the government agreed to recommend or not to oppose under Rule 11(e)(1)(B) or was agreed to by the attorney for the government and the defendant under Rule 11(e)(1)(C).

His motion carried.

The committee considered Judge Wilson's question regarding the references on lines 38 and 39, and decided to add a reference to § 294(c) to the proper place on page 8 of the Note. They also considered his suggestion to add "with or without formally convening" to line 57 after "panel" but Judge Webster pointed out that it is unnecessary in view of the preceding sentence. The other members agreed.

(c)(4) Powers of Panel; Finality of Decision. At the suggestion of Judge Wilson the opening phrase was amended to read, "If a majority of the panel determines." Mr. Marshall felt using "it" in line 71 to refer to two different words was misleading and suggested the first "it" be changed to "the panel" and the second "it" be changed to "the sentence." The committee concurred.

Judge Wilson's suggestion to change the term "confirm the sentence" to "shall stand affirmed" was considered but rejected.

Professor Remington called attention to the question of notification of inmates and after a brief discussion suggested a reference be added to the Note stating that the clerk shall give notice to the parties pursuant to Rule 49(c). The members agreed.

Mr. Marshall questioned the last paragraph of the Note on page 10 and Judge Webster replied that it is necessary in view of the changes made in Rule 32 by Congress. Professor Remington suggested adding a reference to Rule 32(a)(2) which was approved by the members.

The Advisory Committee pointed out in the Note that the review panel should be given the power of enhancement at the request of the government and included suggested language, however, the standing Committee voted against its inclusion. Judge McGowan and Professor Wright stated in their letters that no provision of power to increase the sentence was circulated to the bench and bar, therefore, they did not recommend making such an amendment at this time. The other committee members agreed and after discussion, Professor Remington suggested deleting pages 11 and 12 of the Note and adding a statement in the report of the committee to the Judicial Conference that this question is being studied by the Advisory Committee on Criminal Rules and will be circulated to the bench and bar before any proposals are made. The members agreed.

Rule 40.1. Removal from State Court

There was discussion of Professor Wright's objection to keying the time for removal to "the arraignment in state court" but no suggestions for a change were made. With regard to his second objection about cutting down the time on removal, Professor Remington indicated that it had been considered by the Advisory Committee. After a brief discussion the committee approved subdivisions (a) and (b) as drafted.

Mr. Marshall suggested a stylistic change in subsection (c)(1) appearing on lines 24-27 and Professor Remington called attention to a further amendment as recommended by the Association of the Bar of the City of New York to make the rule more neutral. Mr. Marshall moved that subparagraph (1) be amended to read as follows: "The district court to which the petition is directed shall examine it promptly. If it clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal." His motion carried.

Rule 41. Search and Seizure

(c)(a)(A). Method of Issuance. Mr. Marshall found the language at the top of page 2 and the corresponding explanation in the Note confusing. Judge Joiner then suggested

that the third sentence be moved to the top of the page and Professor LaFave indicated he would revise the Note on page 7. It was also pointed out that since Rule 41(c)(2) is new the language taken from the preliminary draft should not appear. Rule 41(c)(2) was approved as amended.

Rule 43. Presence of the Defendant

Judge Joiner pointed out that there is no way to determine if the defendant was absent from the trial by an involuntary or voluntary reason and suggested subdivision (b)(1) be revised to indicate that the defendant forfeits his right because he is absent unless it is shown that the absence was not voluntary. He also suggested a similar change in subsection (3). The members agreed that this provision would be a help to the judge and the meaning of voluntary should be clearer but in view of the fact that the new provision requiring personal notification to the defendant that the trial may commence in his absence has not been circulated, Professor Remington suggested Rule 43 be returned to the Advisory Committee for further study. The members agreed.

Rule 50. Calendars; Plans for Prompt Disposition

The amendments to subdivision (b) to accommodate the Speedy Trial Act of 1974 were approved.

RULES GOVERNING SECTION 2254 CASES
IN THE UNITED STATES DISTRICT COURTS

Rule 1. Scope of Rules

Mr. Marshall suggested the addition of a comma after "court" in subsections (1) and (2). The members agreed.

Rule 2. Petition

Approved as submitted by the Advisory Committee on Criminal Rules.

Rule 3. Filing Petition

There was discussion regarding the deletion of "He shall thereupon serve, by certified mail, a copy of the petition together with a notice of its filing on the attorney general of the state involved" as recommended by the Advisory Committee. The standing Committee made no change.

Rule 4. Preliminary Consideration by Judge

The second sentence was amended by striking, "who shall thereupon make an order for its summary dismissal" and adding, "the judge shall make an order for its summary dismissal and cause the petitioner to be notified."

Rule 5. Answer; Contents

Approved as submitted by the Advisory Committee.

Rule 6. Discovery

Approved as submitted by the Advisory Committee.

Rule 7. Explanation of Record

Approved as recommended by the Advisory Committee.

Rule 8. Evidentiary Hearing

Approved as submitted by the Advisory Committee.

Rule 9. Delayed or Successive Petitions

The first sentence was amended by the addition of "in its ability to respond to the petition" before "by delay" to clarify the meaning of "prejudiced." Also, the third sentence was amended by the addition of "probation or," before "parole."

Rule 10. Powers of Magistrates.

Approved as submitted by the Advisory Committee.

RULES GOVERNING §2255 PROCEEDINGS
FOR THE UNITED STATES DISTRICT COURTS

Professor Remington explained that the changes made by the standing Committee in the 2254 rules will be made in the corresponding 2255 rules. Mr. Marshall called attention to a change made by the Advisory Committee in Rule 2 of the 2254 rules which was not made in Rule 2 of the 2255 rules. Therefore, "one copy of such motion" on lines 41-45 was changed to "a copy of the motion."

The standing Committee agreed that the forms be issued upon approval of the rules and after review for style such

as providing more space for replies. The committee expressed its preference for the alternative Forma Pauperis Affidavit form which had been developed by the Federal Judicial Center and Mr. Marshall pointed out that the word "redress" should be changed to "relief." He also noted in item (7) of the instructions for completing the model form for motions under 28 U.S.C. §2255, the reference should be to motion rather than to petition.

The members approved the submission of the proposed amendments to Criminal Rules 6, 23, 24, 25, 35, 41 and 50, with the exception of Rule 43, and the submission of the proposed Criminal Rule 40.1 and the 2254 and 2255 rules to the Judicial Conference of the United States. The meeting adjourned at 3:45 p.m.