MINUTES

of

THE ADVISORY COMMITTEE

on

FEDERAL RULES OF CRIMINAL PROCEDURE

October 16-17, 1995

Manchester Village, Vermont

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Equinox Hotel in Manchester Village, Vermont on October 16 and 17, 1995. These minutes reflect the actions taken at that meeting.

I.CALL TO ORDER & ANNOUNCEMENTS

Judge Jensen, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, October 16, 1995. The following persons were present for all or a part of the Committee's meeting:

Hon. D. Lowell Jensen, Chair

Hon. W. Eugene Davis

Hon. Sam A. Crow

Hon. George M. Marovich

Hon. David D. Dowd, Jr.

Hon. D. Brooks Smith

Hon. B. Waugh Crigler

Hon. Daniel E. Wathen

Mr. Robert C. Josefsberg, Esq.

Mr. Darryl W. Jackson, Esq.

Mr. Henry A. Martin, Esq.

Mr. Roger Pauley, Jr., designate of the Asst. Attorney General for the Criminal Division

Professor David A. Schlueter, Reporter

Also present at the meeting were: Judge Alicemarie H. Stotler; Chair of the Standing Committee on Rules of Practice and Procedure; Judge William R. Wilson, Jr., a member of the Standing Committee on Rules of Practice and Procedure and a liaison to the Committee; Professor Daniel R. Coquillette, Reporter to the Standing Committee; Mr. John Rabiej and Mr. Paul Zing from the Administrative Office of the United States Courts; and Mr. James Eaglin from the Federal Judicial Center.

The attendees were welcomed by the chair, Judge Jensen, who noted that Professor Saltzburg's, whose term on the Committee had expired, had made invaluable contributions to the Committee and would be recognized at the Committee's Spring 1996 meeting.

II.APPROVAL OF MINUTES OF OCTOBER 1994 MEETING

Judge Crow moved that the minutes of the Committee's April 1995 meeting in Washington, D.C., be approved. Following a second by Judge Marovich, the motion carried by a unanimous vote.

III.CRIMINAL RULES APPROVED BY THE SUPREME COURT AND FORWARDED TO CONGRESS

The Reporter informed the Committee that the Supreme Court had approved and forwarded to Congress proposed amendments to four rules, which will become effective on December 1, 1995, absent any further action by Congress: Rule 5(a) (Initial Appearance Before the Magistrate Rule 43 (Presence of Defendant); Rule 49(e) (Repeal of Provision re Filing of Dangerous Offender Notice); and Rule 57 (Rules by District Courts). The Reporter noted that in its consideration of the rules, the Supreme Court had changed the word "must" to "shall" in order to maintain consistency within all of the rules.

IV.RULES CONSIDERED BY THE JUDICIAL CONFERENCE AND FORWARDED TO THE SUPREME COURT

Judge Jensen reported on the disposition of Rules 16 and 32 which had been forwarded by the Committee to the Standing Committee for action.. After considerable discussion at its July 1995 meeting, the Standing Committee had approved a modified version of the Committee's proposed amendments to Rule 16, which would have required the government to produce the names and statements of its witnesses prior to trial. In order to avoid any conflict with the Jencks Act, the Standing Committee deleted any requirement to produce a witness' statement. The Standing Committee had approved, without change, the

Committee's proposed amendment to Rule 32 regarding forfeiture procedures.

Although the Judicial Conference approved Rule 32 for transmittal to the Supreme Court, it rejected altogether the proposed amendments to Rule 16 regarding production of witness names and statements. Although it was not clear from the Judicial Conference's action whether they specifically intended to reject the amendment to Rule 16 which addressed disclosure of expert witness testimony, the consensus of the Committee was that that amendment had also been implicitly rejected because the changes to Rule 16 had been treated as single unit by the Conference.

V.RULES APPROVED BY STANDING COMMITTEE

FOR PUBLICATION AND COMMENT

The Reporter informed the Committee that at its July 1995, meeting, the Standing Committee had approved for publication an amendment to Rule 24(a) which would provide for attorney-conducted voir dire of jurors. The final language was the result of a compromise with a provision presented by the Civil Rules Committee for amending Civil Rule 47.

Judge Jensen indicated that hearings on the proposed amendment have been set for December 15, 1995 in Oakland and February 9, 1996 in New Orleans. He added that any members of the Committee interested in attending those hearings should contact the Rules Committees Support office.

During the discussion on Rule 24, Judge Jensen raised questions about the appropriate role of the Chair and Reporter at the Standing Committee meetings when proposed amendments are offered to the Committee's proposed versions. He noted that for amendments in which the Advisory Committee has invested a great deal of debate and time, it is not always possible to know just what amendments to agree to at the Standing Committee level. That point was made clear during the discussion at that Committee's meeting regarding the proposed amendments to Rules 16 and 32. In both instances, major changes were made to the rules as the result of negotiation and compromise in an attempt to go forward with some amendment, rather than remanding the issue to the Advisory Committee for further action. During the ensuing discussion, the consensus of the Committee was that the Chair and Reporter should have some reasonable discretion to assess the Standing Committee's proposed actions and agree to changes which they believe are in accordance with the Committee's views. Several members expressed concern that if the Standing Committee makes drastic changes to a rule published for comment, there may changed votes at the Advisory Committee level upon further consideration.

Judge Jensen also raised the related question of the appropriate role of the Committee vis a vis lobbying Congress for or against a particular amendment. Mr. Rabiej indicated that the legislative liaison office coordinates any such efforts with the chairs of the respective committees.

The discussion also raised the issue of the relationship between the Advisory Committees and the Standing Committee. Mr. Pauley noted that rarely does the Standing Committee expand on a Committee's proposed amendment; if any changes are made, they usually result in narrowing the Advisory Committee's proposal. Several members also observed that there is a difference in making

changes to a rule which has been forwarded for possible publication and comment. In those instances, the Advisory Committee will have another opportunity to review the rule and may decide not to pursue any amendments to the rule. Judge Stotler noted that survey forms had been provided to the Advisory Committee to solicit its views on a wide range of issues, including the relationship between the Standing Committee and Advisory Committee.

VI.CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Rule 11(e). Provision Barring Court from Participation in Plea Agreement Discussions

The Reporter and Judge Jensen informed the Committee of the practice used in the Southern District of California to expedite plea agreements. A judge, other than a sentencing judge, works with the parties to reach a plea agreement and recommends a particular sentence. The Ninth Circuit apparently became concerned about the procedure and the District now makes the procedure voluntary; the defendant may request that the first judge inform the sentencing judge of the latter's recommendation. The procedure may be in violation of Rule 11(e) which indicates that the "court" may not participate in plea discussions. The question, said Judge Jensen, is what is meant by the term "court?"

Mr. Pauley noted that while the Department of Justice probably would not oppose such a procedure, there would be concern that such would create unanticipated problems. Judge Dowd noted that there would be problems if the defendant was not present during such plea discussions and Judge Crigler observed that the provision in Rule 11 was for protecting the judge; he recognized, however, that need for disposing of high numbers of criminal cases was a high priority in some courts.

Justice Wathen stated that in state practice it is sometimes hard to avoid the situation. Although it is rare that the judge becomes involved, it may arise where the issues are close and the parties ask the judge for assistance in clarifying which way the case will go.

A number of members noted the apparent need for expediency but questioned whether getting a judge involved was proper. Judge Jensen noted that even if there is a consensus that a judge's participation is helpful, the Committee should nonetheless be sensitive to potential constitutional issues. Mr. Pauley observed that changing Rule 11 might raise other problems in that the change would be viewed as a blessing on other innovative procedures.

Several judges questioned whether the criminal case dockets were so heavy as to require such procedures. Judge Dowd noted that the smaller the court, the more frequently the judge sees the defense counsel in the courtroom. The rule, he noted, was designed to keep the judges out of the plea agreement discussions. Judge Marovich observed that plea bargaining is sometimes viewed negatively but that there

is nothing wrong with it and that there should be no problem with some judge, other than the sentencing judge, helping the parties reach an agreement. Mr. Martin expressed mixed feelings about the process used in the Ninth Circuit. He noted that the presence of a judge in the bargaining process can be intimidating and is not excited about opening the door to greater judicial participation at that stage.

Mr. Josefsburg indicated that he did not see any need for a change at this point and Mr. Jackson observed that it was important to first address the underlying policy issue in the rule and determine if there might not be another way to address the problem of moving cases along.

Judge Crow stated that he was disturbed by the view that counsel might not be trusted to successfully negotiate a plea agreement and noted that there might be a problem if it is the senior judge who is helping negotiate a settlement. Judge Wilson opined that he could not envision a judge forcing a defendant into a plea agreement. Judge Marovich stated that where the parties do not reach a plea agreement because of a disagreement over the sentencing guidelines, the parties would like to know what the judge is likely to do regarding those guidelines. Justice Wathen noted that there may be cases where there is a legitimate need for judicial intervention. But he was also troubled about judges becoming involved with decisions affecting strategic delay. Mr. Josefsburg stated that there should not be any problem with one judge telling another judge what he or she thinks about the case and that the rule is designed to protect the parties where there is not an agreement.

Judge Dowd moved that the Chair appoint a subcommittee to determine the need for an amendment to Rule 11(e). Judge Davis seconded the motion which carried by a 6 to 5 vote. Judge Jensen subsequently appointed the following members to the subcommittee: Judge Marovich (Chair); Mr. Martin, and Mr. Pauley. Any proposed amendments will be discussed at the Spring 1996 meeting.

B. Rule 12. Proposal to Abolish Rule

The Reporter informed the Committee that a Mr. Paul Sauers had proposed abolishing Rule 12 as being unconstitutional. Following a very brief discussion, the Committee unanimously agreed not to take any action on the proposal.

C. Rule 26.2 Production of Witness Statements

1. Rule 26.2(g). (Scope of Rule)

The Reporter indicated that the Committee had received a suggestion from Mr. Michael R. Levine, an Assistant Public Defender, to make Rule 26.2(g) applicable to preliminary hearings. The Reporter also informed the Committee that he had searched the materials accompanying the most recent amendments to Rule 26.2, which had extended the production of statements requirement to other proceedings, and that he could find no reference to extending that requirement to preliminary hearings. Magistrate Judge Crigler noted that in his experience preliminary examinations are rarely encountered, an observation

shared by Judge Jensen. Mr. Pauley noted that if the preliminary hearing includes testimony from a live witness, it would be logical to extend the production requirement to that proceeding. Mr. Martin added that there seems to be an increase in preliminary proceedings in some districts.

Following additional brief discussion, Magistrate Judge Crigler moved to extend Rule 26.2(g) to preliminary hearings under Rule 5.1. Mr. Martin seconded the motion which carried by a unanimous vote. The Reporter informed the Committee that he will draft the appropriate language for consideration at the Committee's next meeting.

2. Rule 26.2(f). (Definition of "Statement")

The Reporter also indicated that at its prior meeting the Committee had indicated an interest in addressing the question of what constitutes a "statement" for purposes of Rule 26.2. During the brief discussion which followed, Judge Stotler observed that the question of whether Rule 26.2 does not seem to raise any real questions; in most cases, the court is simply required to apply the facts to the definition which already exists in the rule. Mr. Pauley observed that the question sometimes arises as to whether an agent's recitation of what a witness has said, in a "302" falls within the definition. He added that the definition of statement in Rule 26.2 follows the definition in the Jencks Act. Judge Jensen observed that there is sometimes an issue as to whether an agent's notes about what a witness said amounts to a statement and Judge Davis noted that in his experience most 302's are excluded from the definition because they are not sufficiently verbatim. Finally, Judge Wilson noted that he believed that the FBI no longer asked witnesses to sign the 302's. No further action was taken on amending Rule 26.2.

D. Rule 31(d). Polling of Jurors

The Reporter noted that Judge Brooks Smith had raised the possibility of amending Rule 31(d) to permit the court to poll jurors individually, a procedure not specifically provided for in the current rule. Judge Smith noted that the issue had arisen in a recent opinion in the Third Circuit, *United States v. Miller*, ____ F.3d ____ (3d Cir. 1995). Mr. Josefsburg moved that Rule 31(d) be so amended. Following a second by Judge Davis the vote to amend the rule was unanimous. The Reporter indicated that he would draft the appropriate language for the Committee's consideration at its next meeting.

E. Rule 33. Motion for New Trial

At the suggestion of Mr. Pauley, the Committee considered an amendment to Rule 33 to address the issue of what event should start the clock for filing a motion for a new trial and how long a defendant should have for doing so. Mr. Pauley indicated that the Department of Justice was recommending that the rule be amended to reflect that the clock starts with some event in the District Court. He noted that if the time

runs from an appellate court's affirmance, the time may vary greatly from case to case because of the time consumed by an appeal. He noted that a two-year time limit would send the message that after guilt has been determined, the courts have two years to consider claims of innocence. Mr. Pauley added that to the best of his knowledge, the Department of Justice has no statistics on how many cases are processed under Rule 33. The purpose of the amendment, he said, would be to promote uniformity.

Mr. Martin expressed concern about the shortening the time for filing a motion for new trial, especially in capital cases where a new lawyer may be appointed to handle the appeal.

Following additional brief discussion about what should trigger the timing of a motion, Mr. Pauley moved that Rule 33 be amended to require that motions for new trials must be filed within two years of some event in the District Court, e.g. judgment. Judge Davis seconded the motion which carried by a 10-1 vote. Mr. Pauley indicated that he would draft language for the Committee's consideration at its next meeting.

Rule 35(b). Reduction of Sentence

At the suggestion of Judge T.S. Ellis (a member of the Standing Committee), the Committee considered a proposal to amend Rule 35(b) regarding reduction of a sentence where the defendant has provided pre-sentencing assistance. In his view, a defendant's cooperation may not separate easily into pre-sentencing and post-sentencing cooperation even though Rule 35(b) permits sentence reduction only for post-sentencing assistance. That rigid line, Judge Ellis indicated, raises problems of fairness.

Judge Wilson observed that a defendant who provides pre-sentencing cooperation would normally receive favorable consideration, if any, under the appropriate sentencing guideline, USSG § 5K1.1. Post-sentencing cooperation is covered under Rule 35(b). Mr. Pauley indicated that the current rule seems to be working well. He noted that Rule 35(b) had been amended by Congress to include the word "subsequent." Following additional discussion on the history of the rule, Judge Crigler noted the problem of accumulating presentence and post-sentence assistance, where neither, standing alone, would be substantial. Mr. Josefsburg indicated that the word "subsequent" should be removed from the rule; it is difficult to accept, and explain to a defendant, the reason for such a rigid rule. In response to a question from Judge Dowd as to why the Rule includes a one-year provision, Mr. Pauley indicated that the language had been intended to encourage early cooperation and that the provision encouraged certainty and finality.

Following additional discussion about the history of Rule 35, Judge Davis moved that the rule be amended to include the language, "In evaluating whether substantial assistance has been rendered, the court may consider the defendant's presentence assistance." Mr., Josefsburg seconded the motion. The motion carried by a 7-3 vote.

Mr. Pauley raised concerns about a defendant being able to benefit twice from the same assistance; under the sentencing guidelines and also under Rule 35(b). The consensus of the Committee that the Reporter

should draft alternative language in an attempt to meet the concerns raised by Mr. Pauley, and shared by others.

G. Local Rules Project; Proposed Amendments

The Reporter indicated that the Local Rules Project had completed its survey of local rules governing criminal cases and that Professor Mary P. Squiers had provided, first, a list of rules which might be worthy of consideration by the Committee as proposed amendments to the national rules and second, a proposed uniform numbering system for local rules. Professor Coquillette provided background information on the project which had begun in 1986. He observed that similar studies and compilations had already been conducted on the civil and appellate rules and that the criminal rules had not presented nearly the number of problems encountered in those two sets of rules. He noted that a uniform numbering system for all of the rules would be especially critical in the age of computerized access by counsel and the courts to both the national and local rules.

Mr. Rabiej informed the Committee that his office had received inquires from district courts as to the effective date of any uniform numbering system and that it appeared that the issue would be presented to the United States Judicial Conference in March 1996, with an effective date one year later.

Following additional brief comments, Judge Dowd moved that a subcommittee be appointed by the chair to study the local rules and report back to the Committee. Judge Marovich seconded the motion, which carried by a unanimous vote. Judge Jensen later appointed the following persons to that subcommittee: Judge Davis (Chair), Judge Crow, and Judge Crigler.

VII.RULES AND PROJECTS PENDING BEFORE STANDING COMMITTEE AND JUDICIAL CONFERENCE

A. Status Report on Crime Bill Amendments Potentially Affecting Criminal Rules

Mr. Rabiej reported that there were no imminent amendments in the pending Crime Bill affecting the Criminal Rules.

B. Status Report on Federal Rules of Evidence 413-415

Mr. Rabiej indicated that the Judicial Conference's proposed changes to Federal Rules of Evidence 413-415 had gone into effect on July 9, 1995, without any changes by Congress. He stated that

representatives of the Evidence Committee and the Administrative Office had met with members of Congress in an attempt to convince Congress to accept the Judicial Conference's proposed changes.

VIII. MISCELLANEOUS

A. Appointment of Advisory Committee Members to Other Committees

Judge Jensen noted that Judge Dowd had been appointed as the Committee's liaison to the Evidence Advisory Committee, to replace Professor Saltzburg.

B. Restyling the Rules of Criminal Procedure

The Reporter informed the Committee that it appeared that Mr. Bryan Garner was prepared to draft restyled criminal rules, as part of the Standing Committee's long range plan to modernize and streamline the language of all of the rules of procedure. Judge Jensen noted the potential problem of inadvertently making substantive changes in the rules. Professor Coquillette noted the value of restyling the rules, including catch-up changes or minor changes which may have been deferred. The Reporter observed that for the last several years, a number of rules had already been restyled. i.e., Rule 32 which had been completely reorganized.

Mr. Pauley shared the concern raised by Judge Jensen that restyling changes might result in substantive changes. He queried whether the Supreme Court had been informed the pending major changes in the rules. Judge Stotler indicated that she would be meeting with Chief Justice Rehnquist and that the issue would be addressed. She noted that Mr. Garner had endeavored to assist the Supreme Court by informally submitting proposed changes to the Court's redraft of its own rules.

Judge Jensen and the Reporter indicated a possible method of addressing the proposed changes: Subcommittees could be appointed to review Mr. Garner's drafts and report to the Committee. Judge Jensen subsequently appointed two subcommittees to review those drafts: Subcommittee A (Rules 1-30): Judge Smith (Chair), Mr. Josefsburg, and Mr. Martin. Subcommittee B (Rules 31-60): Judge Dowd (Chair), Mr. Jackson, and Chief Justice Wathen.

C. Comments on Long Range Planning Subcommittee Report.

Judge Stotler requested that the Committee members complete the survey provided by the Standing Committee which would assist that Committee in analyzing potential long-range issues.

The Reporter indicated that the Committee had been asked to address two key issues: the role of the Advisory Committee Notes and the respective roles of the Standing and Advisory Committees. The second issue had been addressed at the beginning of the meeting. With regard to the Committee Notes, the Reporter stated that it did not appear that there would be two sets of notes, one for the Advisory Committee and one for the Standing Committee, which would reflect a sort of legislative history for any particular amendment. Judge Stotler indicated that the Chair and Reporter of the Advisory Committee should have the option of revising the Committee Notes to reflect any later amendments by the Standing Committee of the underlying Rule of Procedure.

D. Report by Justice Department on Proposed Amendments

Mr. Pauley informed the Committee that in the future the Department of Justice would be asking that several items be placed on the agenda: a possible amendment to Rule 6(e) regarding disclosures of grand jury information to state and federal authorities; and a possible amendment to Rule 41 to provide for searches of computers and for "sneek and peek" warrants.

IX. CONCLUDING REMARKS; DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee was reminded that its next meeting would be held at the Administrative Office of the United States Courts in Washington, D.C. on April 29 and 30, 1996. The Committee also decided to hold its Fall 1996 meeting in Portland, Oregon on October 7-8, 1996.

On behalf of the Committee, Judge Jensen expressed deep appreciation to Mr. Rabiej and his staff for making arrangements for the meeting

Respectfully submitted,

David A. Schlueter

Professor of Law

Reporter