MINUTES

of

THE ADVISORY COMMITTEE

on

FEDERAL RULES OF CRIMINAL PROCEDURE

April 10, 1995

Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at Administrative Office of the United States Courts in Washington, D.C. on April 10, 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, April 10, 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

Prof. Stephen A. Saltzburg

Mr. Robert C. Josefsberg, Esq.

Mr. Darryl W. Jackson, Esq.

Mr. Henry A. Martin, Esq.

Mr. Roger Pauley, Jr., designate of Ms. Jo Ann Harris, Asst. Attorney General

Professor David A. Schlueter, Reporter

Also present at the meeting were: Judge William R. Wilson, Jr., a member of the Standing Committee on Rules of Practice and Procedure and a liaison to the Committee, Mr. Peter McCabe and Mr. John Rabiej 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 introduced a new member of the Committee, Mr. Josefsberg. Judge Jensen also noted that he had asked Judge Crow to serve as the Committee's liaison to a subcommittee of the Court Administration and Case Management Committee; that subcommittee is studying the issue of management of criminal cases. At this point, he noted, no action was required by the Advisory Committee.

II. APPROVAL OF MINUTES OF OCTOBER 1994 MEETING

Judge Marovich moved that the minutes of the Committee's October 1994 meeting in Santa Fe, New Mexico, be approved. Following a second, 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 became effective on December 1, 1994: Rule 16(a)(1)(A) (statements of organization defendants); Rule 29(b)(Delayed ruling on judgment of acquittal); Rule 32 (Sentence and Judgment); and Rule 40(d) (Conditional release of probationer). The final version of the amendments to Rule 32 included a victim allocution provision inserted by Congress.

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

The Reporter informed the Committee that the Judicial Conference had approved several proposed amendments and forwarded them to the Supreme Court for its review: 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). As of the date of the Committee's meeting, the Supreme Court had not acted on the proposed amendments.

V.RULES APPROVED BY STANDING COMMITTEE

FOR PUBLICATION AND COMMENT

The Committee was informed by the Reporter that written comments and testimony had been submitted on the two rules which the Standing Committee had approved publication and comment: Rule 16(a)(1)(E), (b)(1)(C) (Discovery of Experts); Rule 16(a)(1)(F), (b)(1)(D) (Disclosure of Witness' Names and Statements); and Rule 32(d) (Sentence and Judgment; Forfeiture Proceedings Before Sentencing). He informed the Committee that the deadline for submitting written comments on the proposed amendments was February 28, 1995 and that a public hearing on the proposed amendments was held on January 27, 1995 in Los Angeles, California.

A. Rule 16(a)(1)(E), (b)(1)(C) (Discovery of Experts);

Rule 16(a)(1)(F), (b)(1)(D) (Disclosure of Witness' Names and Statements)

The Reporter informed the Committee that although several commentators approved of all of the changes in Rule 16, almost all of the comments specifically addressed the proposed amendments in Rule 16(a)(1)(F) and (b)(1)(D) dealing with disclosure of witness names and statements. All of the comments expressed support for the proposed amendments; but some suggested changes to the text. No commentator expressed disagreement with the provision governing discovery of experts in Rule 16(a)(1)(E) and 16(b)(1)(C)..

Following a brief summary of the written comments and testimony, Judge Crigler raised the question of whether the provision addressing disclosure of witness names and statements should apply to misdemeanor cases. He noted that the trial of petty offense and misdemeanor cases does not lend itself to the notification provision proposed in the rule. Other members agreed with Judge Crigler, who ultimately moved that the rule be limited to felony trials. Judge Davis seconded the motion. Following additional brief discussion, which focused on the issue of whether the disclosure provision would ever be practicable in misdemeanor cases, because of the highly abbreviated pretrial processing times, the Committee adopted the proposed change to the amendment by a unanimous vote.

Regarding the seven-day provision in the proposed amendment, Mr. Pauley urged the Committee to reduce the time to three days. He noted that United States attorneys often do not know for sure who their witnesses will be within seven days of trial. In those cases, he stated, the defense will argue that the government has not complied with the rule. He recommended that preclusion of testimony should only take place where the government has intentionally failed to disclose the information. In response to a comment from Professor Saltzburg, Mr. Pauley stated that the Department of Justice's proposed changes were not being offered as a compromise, but rather to improve the rule. Even if all of the amendments were adopted, he said, the Department's opposition to the rule would remain.

Judge Marovich expressed concern about any further delays in considering DOJ proposed changes. The question, he said, is whether the federal courts should adopt a system which is widely used and accepted

in the state courts and in most federal trials. In his view, the current draft of the amendment gives the government absolute control over disclosure. The timing issue, he said, was simply a red herring.

Judge Smith echoed the concerns expressed by Professor Saltzburg and Judge Marovich but observed that the Department of Justice had a right to be heard on the issues being discussed. Judge Wilson responded that the Department was making a political issue out of the proposed amendment.

Judge Dowd indicated that perhaps the rule should be amended to extend the time to a period of 14 days before trial. Judge Jensen noted that other rules include a 10-day notice provision. Judge Marovich indicated that at worst, a late disclosure would delay the trial. Mr. Pauley reminded the Committee that Congress has adopted a three-day notice provision in capital cases. Judge Jensen observed that the Department had supported 15-day notice provisions in newly enacted rules of evidence governing use of propensity evidence in sexual assault cases -- Rules 413-415.

Professor Saltzburg observed that the Department of Justice did not oppose the seven-day notice provision in the amendments to Rule 32 dealing with sentencing and he encouraged the Committee to reject any amendment which would focus on the willfulness of delayed notification. Mr. Pauley responded that the Department was not as concerned about losing discovery motions as it was about the practicality of the seven-day provision. Justice Wathen observed that in his experience the parties deal with a more realistic list of witnesses. Judge Marovich added that the hallmark of a federal prosecution should be a good witness list.

Mr. Pauley moved that the rule be amended to reflect a three-day notice provision. The motion failed for lack of a second.

Responding to several commentators who urged the Committee to include provision for disclosure of government witnesses' addresses, Judge Jensen reminded the Committee that the provision had been in an original draft but removed at the urging of the Department of Justice. Judge Crigler expressed serious reservations about requiring the government to produce the witnesses for defense interviews. And Mr. Martin indicated that the Committee Note is silent regarding the Department's assurance that it would assist the defense in speaking to witnesses.

In the absence of any motion to change the draft with regard to disclosure of witness addresses, the discussion turned to the question of whether the rule or the accompanying note should specifically include reference to FBI 302's which may include witness statements. Several members questioned whether such documents were statements within the meaning of Rule 26.2. Judge Jensen pointed out that including such reports within the definition at this point might be considered a major change to the proposed amendment which would probably require re-publication for public comment. Following further discussion, the consensus was that the matter should not be included in the current amendment.

Judge Jensen advised the Committee that several commentators had raised the issue of what was meant by "unreviewable" in the proposed amendment; a number expressed concern that that language placed too much power in the hands of the prosecutor. Judge Wilson responded that the current language was a workable package which would be acceptable to Congress. Judge Marovich noted that the current

language was a major compromise. Mr. Martin raised the question of whether a judge might see nondisclosed evidence in such nonreviewable statements which might later be considered on sentencing. Judge Jensen responded that if the sentencing judge is considering such factors, he or she must disclose that information to the defense.

Following a discussion on how much information the prosecutor should disclose under the amendment, the Reporter suggested a minor amendment in the language. The Committee ultimately voted 9 to 0, with two abstentions, to substitute the following language: "an unreviewable written statement indicating why the government believes in good faith that either the name or statement of a witness cannot be disclosed."

Mr. Pauley expressed concern that in certain types of cases, such as in civil rights cases, a witness may fear economic reprisals, which is not a reason under the proposed amendment for not disclosing the witness' name or statement. Professor Saltzburg pointed out that the Department's position would swallow the rule because the exception proposed would be entirely too large. Judge Marovich noted that the names will become known when the witnesses are called so at the most, the witness may receive some pretrial protection from disclosure. Judge Crigler noted that the Department should protect its witnesses and Judge Smith noted that the same potential problem exists with regard to disclosing the names of jurors. Mr. Jackson observed that the defendant has a strong interest in being presumed innocent.

In the absence of any motion to amend the proposal, Mr. Pauley commented on his continuing concern with the potential conflict with the Jencks Act. He stated that the Advisory Committee had not yet tested the supersession clause in the Rules Enabling Act and argued that the judiciary should pursue the legislative process for seeking a change. Mr. Martin responded by pointing out that the Department's argument had been implicitly rejected in the procedures for establishing and amending the sentencing guidelines. Professor Saltzburg added that the Standing Committee's amendment several years ago to Federal Rule of Evidence 609 was clearly an example of offering an amendment to rules specifically promulgated by Congress.

Judge Dowd raised again the question of whether FBI 302's would be covered under the proposed amendment to Rule 16. Judge Jensen suggested that the matter should be considered at the Committee's next meeting as a possible amendment to Rule 26.2(f). Judge Dowd moved that the Rule 16 be amended to substitute the words, "a brief summary of the witness' testimony." The motion failed for lack of a second. The Reporter indicated that the issue could be addressed in the Committee's report to the Standing Committee.

The discussion turned to the issue of reciprocal discovery under the proposed amendment. The consensus was that the proposed language presented a workable compromise. Mr. Martin moved that the amendment requiring reciprocal defense discovery be revised to make an exception for "impeachment witnesses." The motion failed for lack of a second. Judge Dowd noted that the defense may not always know who its witnesses will be and Professor Saltzburg responded that both sides have a continuing duty to disclose.

Judge Marovich moved that the amendments to Rule 16 be forwarded to the Standing Committee with a recommendation to approve and forward them to the Judicial Conference. Judge Crow seconded the motion which carried by a vote of 11 to 1.

C. Rule 32(d) (Sentence and Judgment; Forfeiture Proceedings Before Sentencing)

The Reporter summarized the few comments which had been received on the proposed amendment to Rule 32, including a number of proposed changes from the Department of Justice. Mr. Pauley noted the Department's changes focused on three areas. First the newer version of the rule would permit the forfeiture proceedings to begin earlier in the process; second, the newer version of the amendment would remove the requirement of a hearing; and third, the rule would require the judge to enter an order as soon as practicable. He explained that the newer version tracked a version sent to Congress by the Department.

Professor Saltzburg raised the question about the political reality of the Department's proposal. Mr. Pauley responded that he was not sure what Congress would do with the Department's proposed amendment.

Judge Dowd noted that the question about forfeiture proceedings only arises if the indictment raises the issue; the Ninth Circuit has ruled that if the forfeiture proceeding is conducted separately it violates double jeopardy. Following brief discussion about whether the proposed changes by the Department of Justice amounted to major changes, Judge Crigler moved that the amendment, as changed, be forwarded to the Standing Committee. Judge Davis seconded the motion, which carried by a vote of 11 to 0, with Mr. Josefsberg abstaining. It was also suggested that the Committee Note include reference to the fact that the final order might include a modification of the court's preliminary order and that the amendment would benefit the defense because counsel will now know what procedures are to be used.

VI.CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Rule 11(d). Questioning Defendants re Prior Discussions with Attorney for the Government

The Reporter informed the Committee that Judge Sidney Fitzwater had suggested that the Committee consider amending Rule 11(d), which currently requires the court as part of the providency inquiry to ask whether the defendant has engaged in prior discussions with an attorney for the government. Judge Fitzwater believes that the question is often confusing to the defendant. The Reporter provided a brief overview of the requirement, which was added in a 1974 amendment to Rule 11 in an attempt to insure that guilty pleas are voluntary.

Judge Jensen observed that the purpose of the requirement in Rule 11 seemed to serve a sound purpose. Other members expressed the same view.

There was no motion to amend Rule 11.

B. Rule 24(a). Trial Jurors; Proposal re Voir Dire by Counsel

The Reporter and Judge Jensen reviewed the topic of possible amendments to Rule 24(a) regarding attorney participation. They noted that a similar proposal had been considered by the Civil Rules Committee, that a considerable amount of material, including relevant articles and survey materials, had been sent to the Committee members. They added that opposition had been expressed to any attempts to increase the level of participation by attorneys or the parties. Judge Crigler noted that there was strong opposition from the judges in the Fourth Circuit.

Judge Jensen also noted that Judge Easterbrook had forwarded the results of his poll of Seventh Circuit judges; but Judge Jensen raised the questioned whether there should also be some input from the practicing bar. Mr. Josefsberg agreed that non-judges should be polled. Judge Wilson pointed out that there was another important issue which should be addressed, the perception of justice. He noted that people generally do not believe that they are being treated fairly when they cannot take part. Judge Davis agreed with that position but noted that many judges fear the slippery slope of counsel participation. Judge Jensen added that he could not agree with the apparent competition to reduce the time used to select a jury because picking a jury was much too important for that.

Judge Crigler stated that in his experience all judges do permit some supplemental questioning, a point to which Mr. Josefsberg responded that as with the amendments to Rule 16, there was a need to promote consistency re questioning by counsel. Justice Wathen observed that his state does not permit voir dire by counsel, but trial judges permit it anyway.

Judge Marovich provided additional comments about the background of attorney-conducted voir dire and Professor Saltzburg stated that while he believes in participation by counsel, he was generally not in favor of any amendment to Rule 24. He subsequently moved that a draft amendment presented by the reporter be considered by the Committee. Mr. Jackson seconded the motion. Following additional discussion on the draft and possible amendments to it, the Committee voted 9-2 to forward the amendment to the Standing Committee with the recommendation that the amendment be published for public comment.

C. Rule 26. Proposed Amendment to Require Notification to Defendant of Right to Testify.

The Reporter informed the Committee that Mr. Robert Potter had written to the Committee recommending that the Federal Rules of Criminal Procedure should be amended to require the trial court to advise the defendant of the right to testify. Mr. Potter noted that such an amendment would greatly reduce post-conviction attacks based on the ground that the defendant was never told, by counsel or the court, of the right to testify at trial.

Judge Jensen raised the practical question of how the trial court is supposed to learn whether or not a defendant has been advised of the right. And Judge Marovich observed that it is normally assumed that the defendant is aware of his or her right to testify. While Judge Wilson noted that he might start asking defendants if they are aware of the right, Judge Davis noted that doing so might unnecessarily infringe upon the attorney-client relationship. Mr. Pauley added that the majority of the cases do not support the proposed amendment. While such questioning by the court might be sound practice, if it is started, how could it be determined that failure to give the advice was harmless error. Justice Wathen believed that the proposal was illusory and Judge Dowd indicated that if the court believes that there may be a problem, it may consult with the defense counsel in the same way that counsel may be consulted about proposed instructions where the defendant has not taken the stand. Mr. Josefsberg stated that he was not sure that there was a problem worthy of an amendment; he added that to inquire into whether the defendant had received the advice would be very delicate vis a vis the role of counsel, especially where the defendant wants to be untruthful.

There was no motion to amend the Rules.

D. Rule 35(c). Possible Amendment to Clarify the Term "Imposition of Punishment."

The Reporter indicated that in response to a recent decision from the Ninth Circuit, *United States v. Navarro-Espinosa*, 30 F.3d 1169 (9th Cir. 1994), a question had been raised whether the timing requirements in Rule 35(c) for correcting a sentence ran from the date of the court's oral announcement of the sentence or from the formal entry of the judgment. He noted that his review of the Committee's notes and correspondence had failed to provide any definitive answer to what the Committee had intended. He added that in any event, a specific amendment to Rule 4 of the Appellate Rules of Procedure provided that filing a notice of appeal does not divest the trial court of jurisdiction to correct its sentence. Following brief additional discussion, it was decided that if any amendment was to be made, it could be made during any subsequent global amendments of the rules.

E. Rule 58. Possible Amendment to Clarify Whether Forfeiture of Collateral Amounts to Conviction.

Magistrate Judge Lowe had recommended that the Committee consider an amendment to Rule 58 to clarify whether forfeiture of collateral amounted to a conviction. Judge Crigler noted that the issue is not covered by Rule 58 and recommended that because the practice seems to vary, it might be better for now not to address the issue in Rule 58. The Committee generally agreed with that view.

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

A. Status Report on Local Rules Project; Compilation of Local Rules for Criminal Cases

The Reporter indicated that Professor Coquillette was still working on the project of compiling local rules dealing with criminal trials. At this point no further action was required by the Advisory Committee.

B. Status Report on Pending Crime Bill Amendments Affecting Rules of Criminal Procedure.

Mr. Pauley and Mr. Rabiej provided a brief review of possible amendments pending in Congress. None required action or attention by the Advisory Committee.

C. Status Report on Federal Rules of Evidence Pending in Congress.

Mr. Rabiej indicated that the Judicial Conference's proposed changes to Federal Rules of Evidence 413-415 had been forwarded to Congress and that although there had been some initial discussions with staffers about the proposals, no action had yet been taken by Congress on the matter.

VIII. MISCELLANEOUS

A. Appointment of Liaisons to Advisory Committees.

The Reporter indicated that the Committee had been contacted by members of the American Bar Association that a formal liaison be recognized by the Committees. Mr.` McCabe noted that the matter had been considered by the Civil Rules Committee and that it was not possible to formally appoint any liaisons to the Advisory Committees. Instead, the Committee could informally treat certain persons as points of contact with a particular organization. He indicated that a letter to that effect had been prepared.

B. Forums Conducted by Advisory Committees

The Reporter indicated that the Civil Rules Committee had conducted a successful forum discussion on the Rules of Civil Procedure and questioned whether the Criminal Rules Committee might be interested in a similar project. The Committee members generally agreed that the matter was worth pursuing.

C. Comments on Long Range Planning Report.

Finally, the Reporter reminded the Committee that any comments about the Long Range Planning Subcommittee's Report should be forwarded to Professor Baker. Following brief discussion on the matter, there was a general consensus on the key points raised in the report, especially those portions dealing with the respective roles of the Standing and Advisory Committees.

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

The Committee was reminded that its next meeting would be held at the Equinox Hotel in Manchester, Vermont on October 16th and 17th.

Respectfully submitted,

David A. Schlueter

Professor of Law

Reporter