MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

September 26-27, 2002
Cape Elizabeth, Maine

The Advisory Committee on the Federal Rules of Criminal Procedure met at Cape Elizabeth, Maine on September 26 and 27, 2002. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Carnes, Chair of the Committee, called the meeting to order at 8:30 a.m. on Thursday, September 26, 2002. The following persons were present for all or a part of the Committee's meeting:

Hon. Edward E. Carnes, Chair
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. David G. Trager
Hon. Harvey Bartle III
Hon. Tommy E. Miller
Prof. Nancy J. King
Mr. Robert B. Fiske, Esq.
Mr. Donald J. Goldberg, Esq.
Mr. Lucien B. Campbell
Mr. Eric Jaso, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. A. Wallace Tashima, member of the Standing Committee and liaison to the Criminal Rules Committee; Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. Peter McCabe and Mr. James Ishida of the Administrative Office of the United States Courts, Mr. John Rabiej Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Ms. Laurel Hooper, of the Federal Judicial Center; and Mr. Jonathan Wroblewski from the Department of Justice.

Judge Carnes welcomed Mr. Eric Jaso to the Committee, as the designated representative of the Assistant Attorney General for the Criminal Division of the Department of Justice.

II. APPROVAL OF MINUTES

Judge Roll moved that the minutes of the Committee's meeting in Washington, D.C. in April 2002 be approved. The motion was seconded by Judge Miller and following minor corrections to the Minutes, carried by a unanimous vote.

III. RULES PENDING BEFORE THE CONGRESS

Professor Schlueter informed the Committee that the package of Style amendments to Rules 1-60, the proposed substantive amendments to Rules 5, 10, 12.2, 12.4, 30, and 35; and the more recently proposed amendments to Rules 6 and 41, were pending before Congress. He noted that if Congress makes no changes to the Rules, they would be effective December 1, 2002. He stated that language missing from Rule 16, concerning reciprocal discovery of certain expert testimony, would hopefully be re-inserted into Rule 16 through pending legislation. He explained that the language had been added to Rule 16 in 1997, shortly before the style consultants worked up their first draft of the restyled rules; because the new language had not been in their working draft, the language was inadvertently deleted from later drafts and the final product.

IV. RULES PUBLISHED FOR PUBLIC COMMENT: RULE 41 AND THE HABEAS RULES.

Professor Schlueter informed the Committee that in June the Standing Committee had approved the Committee's recommendation that Rule 41 (tracking-device warrants) and the restyled habeas rules be published for public comment. He added that the proposed amendments had been published in August and that the deadline for public comments was February 15, 2003, and that a public hearing is currently scheduled for January 31, 2003 in Atlanta, Georgia.

V. PENDING PROPOSED AMENDMENTS TO RULES

A. Rule 12.2. Sanctions for Failure to Discovery Provisions

The Reporter noted that Mr. Pauley had written to the Committee in July 2001 suggesting that the revised Rule 12.2, currently pending before the Supreme Court, was missing a sanction provision for those cases where the defense fails to disclose the results of a mental examination conducted by the defense expert. The issue had been discussed briefly at the April 2002 meeting and Judge Carnes had asked him to draft language for the Committee's consideration.

The Committee discussed the proposed language and noted that the suggested language might be overbroad, which in turn raised the question whether the current sanction provisions are also overbroad. Following additional discussion, Judge Carnes appointed a subcommittee consisting of Mr. Campbell and Mr. Jaso to work with the Reporter in drafting alternative language that could be considered by the Committee at its Spring 2003 meeting. There was also some discussion about whether the Committee Note for that amendment should address the issue of granting a continuance in order to provide for review of reports compiled under the Rule.

B. Rules 29, 33, and 34; Proposed Amendments re Rulings by Court

Judge Carnes noted that published agenda for the meeting included continued discussion of proposed amendments to Rules 29, 33, and 34. In the absence of Judge Friedman, however, he indicated that those proposals would carried over until the Spring 2003 meeting.

C. Rule 32. Victim Allocution

Judge Miller raised the question about whether Rule 32 should be amended to provide for victim allocution in felony cases not involving violence or sexual abuse. He pointed out that a recent law review article by Professor Joyce W. Barnard in 77 Notre Dame L. Rev. 1 (2001) made a good case for expanding the right of victims to be heard during sentencing. Judge Bucklew responded that victims in economic crimes generally wish to be heard and that she normally permits them to address the court. Judges Trager and Bartle agreed with that view. Mr. Goldberg noted, however, that he is aware of judges who do not permit victims of non-violent crimes to address the court.

The Reporter provided some historical background on the current provision in Rule 32, noting that Congress had added it in 1994. Mr. Campbell believed that the author of the article had not made a case for those situations where the judge denies a victim the right to allocution and that the article seems to broaden the purposes of Rule 32 itself; for example, to permit victims to regain their sense of dignity. Mr. Fiske stated that the issue should be left to individual judges. Professor King agreed with Mr. Campbell's assessment of the proposal and was reluctant to draft a "must" requirement into the rule, for fear of generating litigation in those cases where the judge, for a variety of reasons, decides to limit allocution.

Following additional comments, Mr. Fiske moved to amend Rule 32 to expand victim allocution to non-violent and non-sexual abuse felonies. Judge Miller seconded the motion, which carried by a vote of 8 to 2. The Reporter was asked to draft the proposed language for consideration at the Committee's meeting in Spring 2003.

Mr. Jaso noted that the Sentencing Commission was in the process of reviewing the issue of how to best handle those cases involving a large number of victims.

D. Rule 32.1; Right of Allocution

Judge Carnes stated that in March 2002, he had provided the Committee with a copy of *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002), where the court observed that there is no explicit provision in Rule 32.1 for the defendant's right to allocution; he pointed out that the court had recommended that the Advisory Committee might wish to address that issue. At the April 2002 meeting, the Committee had voted 12-0 to amend Rule 32.1. In response to that vote, the Reporter had drafted proposed language, that would add a new Paragraph (E) in Subdivision (b)(2).

The Reporter observed that although the Committee had addressed only the question of allocution rights at revocation hearings, a similar provision might be appropriate at proceedings to modify a sentence. The Committee agreed with that view and suggested that there were several possible alternatives: first, to blend Rule 32.1(b) and (c) together; second, to simply add language in existing (c)(1) that would parallel new language in Rule 32.1(b)(2)(E); or third, cross-reference the rights listed in (b)(2). Judge Carnes asked the Reporter to work up an additional draft and present it to the Committee at its Spring 2003 meeting.

E. Rule 35; Definition of Sentencing.

The Reporter provided a brief history of the pending amendment to Rule 35. Although the restyled Rule 35 had been approved by the Supreme Court and forwarded to Congress, the Advisory Committee believed it important to move forward with another amendment to Rule 35 that would more clearly spell out the starting point for the 7-day period for correcting a clear error in the sentence. Thus, the proposed new Rule 35(a), published for comment in 2001, includes a definition of "sentencing"—only for purposes of Rule 35. In response to that published amendment, the Committee had received seven written comments, which were mixed. The Department of Justice, the Federal Bar Association, the Committee on the U.S. Courts of the State Bar of Michigan, and the NACDL opposed the amendment. On the other hand, the State Bar of California Committee on Federal Courts, the Federal Magistrate Judges Assn., and Judge David Lawson endorsed the amendment.

He pointed out that, as reflected in the comment submitted by the Department of Justice, the Circuits are split on the question of what the term "sentencing" means in relation to the 7-day rule in Rule 35. The majority view (six circuits) is that the 7-day period is triggered by the oral pronouncement of the sentence. The minority view (one circuit), and the one adopted in the proposed amendment, is that the period commences with the entry of the judgment. He noted that the Committee had opted for the latter position in order to make the rule more consistent with Appellate Rule 4 and any other rules that might specify when the right to appeal is triggered.

The Reporter continued by noting that at the April 2002 meeting a motion to adopt the minority position and substitute the term "entry of judgment" throughout the rule had failed by a vote of 4 to 6. But a motion to revise the amended rule by dropping the definitional provision in proposed Rule 35(a) and use the term "oral announcement" throughout the rule, passed by a vote of 6 to 4. At that meeting the Reporter responded that he would make the necessary changes in the Rule and the Committee Note and circulate the draft for the Committee's consideration. However, after attempting to implement the Committee's vote, it became apparent that simply substituting the term "oral announcement of the sentence" throughout the rule would be very awkward.

The Committee again briefly discussed the problems of drafting the amendment and reaffirmed its desire to adopt the view held by six circuits that any changes to the sentence must be made within 7 days of the oral announcement of the sentence. Judge Roll moved that the proposed amendment be altered to include a definitional provision that would indicate that for purposes of Rule 35, the term "sentencing" means "oral announcement of the sentence." That motion carried by a vote of 7 to 2, with one abstention.

F. Proposed Rule Addressing Review of Magistrate Judges' Decisions

1. Requirement for Moving Party to Object to Magistrate Judge's Rulings in Order to Preserve Issue for Review

Judge Miller provided a brief history of the proposed new rule that would address the issue of review of magistrate judge decisions: Judge Tashima had originally proposed that the Committee consider adding a new rule to the Rules of Criminal Procedure that would parallel Rule of Civil Procedure 72(a). The Civil Rule addresses what counsel must do to preserve an issue for appeal from a magistrate judge's rulings on nondispositive, pretrial matters. The issue had been raised in *United States v. Abonce-Barerra*, 257 F.3d 959, 969 (9th Cir. 2001) (court noted absence of such a rule and concluded that in criminal cases, unlike civil cases, a defendant is not required to appeal a magistrate judge's decision to the district judge in order to preserve the matter for appeal). At its April 2002 meeting, the Committee had voted 11 to 1 to consider the issue further. In response to that vote, Judges Miller and Roll had been asked to draft appropriate language for the Committee's consideration.

In a memo on the subject, Judges Miller and Roll, had recommended that the proposed language be placed in a new Rule 12(i).

Judge Miller explained that the draft distinguished between rulings on dispositive and non-dispositive matters. Judge Carnes raised the question about the status of the proposed revisions to Civil Rule 72; Judge Trager thought it best not to wait on any potential revisions to that rule. Following a brief discussion on the question of whether a magistrate judge's rulings on Batson would be considered non-dispositive or dispositive, Judge Roll commented that he believed that there seemed to be no statutory impediment

to drafting a rule and that the Committee should proceed with proposing language for public comment.

Mr. Campbell observed that the cure of drafting a rule could be drastic and costly. He expressed concern about whether a rule could adequately address all of the issues and that the practice varies greatly from district to district and from judge to judge. He added that depending on how the rule was drafted, a District Court might have to rule on an issue twice. Judge Miller responded that less than 5% of motions are challenged on appeal in civil cases. The Committee also briefly discussed potential problems with placement of the rule.

Judge Roll moved that the Committee approve a rule that would specify that in order to preserve an objection to a magistrate judge's ruling on a nondispositive matter, an objection to that ruling would be required, and that the rule specify the procedure for filing an objection. Mr. Goldberg seconded the motion, which passed by a vote of 9 to 1.

Following additional brief discussion, Judge Miller moved that the Committee approve a similar rule for addressing dispositive matters. Mr. Fiske seconded the motion, which carried by a vote of 10 to 0.

The Committee discussed possible style changes to the language proposed by Judges Miller and Roll and also decided to include language from Rule 30(d), addressing reviewability of objections not raised.

2. Authority of Magistrate Judges to Take Felony Guilty Pleas

Judge Miller stated that the proposed draft of the new magistrate's rule included explicit recognition of the ability of magistrate judges to take guilty pleas in felony cases —a matter of some controversy. He noted that in 46 Districts, taking guilty pleas in felony cases is significant part of a magistrate judge's duties. Judge Roll added that the Circuits are not uniform in their approach to the ability of magistrate judges to take guilty pleas. The majority view, he said, is that if the magistrate judge takes a change of plea, the magistrate is required to prepare a report and recommendation. If the defendant objects, the district judge conducts a de novo review. That is similar he said, to a magistrate judge's disposition of a matter following an adversarial-type hearing on a dispositive motion or matter. In contrast, the Ninth Circuit requires de novo review in every case. Judges Miller and Roll noted that over the years the various Committees of the Judicial Conference had taken different positions on the issue. In a response to a question from Judge Carnes, Judge Roll indicated that the percentage of cases where there is an objection is very small.

Judge Tashima observed that because there is no specific statutory authorization for magistrate judges taking felony guilty pleas, there may be a real issue of whether a rule could authorize that practice. He stated, however, that an argument could be made that under the catchall provision in § 636, a magistrate judge would probably be

authorized to take such pleas. Several members commented that if the Committee were to draft a rule, it would be important that the Committee Note address the possible interplay between conditional pleas and filing objections to the magistrate judge's actions in taking the plea. Several members noted that the rule could affect literally thousands of cases, considering the volume of felony guilty pleas being heard by magistrate judges.

Judge Bartle commented that the Ninth Circuit may be taking a position on substantive law regarding the ability of a magistrate judge to take a felony guilty plea; he added that he was not sure what the Third Circuit's position would be on the issue. He was concerned in general with the issue of whether the Committee might be exceeding its authority. Professor Coquillette pointed out that on the merits, the idea of including reference in the rule to the ability of a magistrate to take a felony guilty plea was worthwhile. Nonetheless, it seemed clear to him that the Supreme Court would review the constitutionality issue before forwarding any amendment to Congress. Thus, he noted, the Committee should be prepared for a constitutional attack.

Judge Bucklew stated that in her practice the magistrate obtains the defendant's waiver, takes the plea, and prepares a report and recommendation which is forwarded to the district judge. If no objection is made, the judge accepts the plea. In three of four years of using that practice, there had not been any objections.

Mr. Campbell observed that he had not detected any pressure in either direction, either to waive or not waive the right to plead guilty before a district judge. Mr. Jaso indicated that the position of the Department of Justice would be that the defendant's consent would avoid the constitutional question. Judge Miller responded that he had provided a draft to the Magistrate Judges division and that they had suggested including a specific provision on waiver. He added that the only objection had come from magistrate judges in the Tenth Circuit, which recommended leaving out any language regarding guilty pleas.

Mr. Goldberg commented that although there seemed to be a clear trend to permitting magistrate judges to take felony guilty pleas, from the defense standpoint he could not imagine not wanting to see the judge who would do the sentencing. He also questioned whether a defendant could ever truly consent to letting a magistrate judge take the plea. In that regard, several members of the Committee commented on whether including a period for filing any objections would protect a defendant who had a change of heart about letting the magistrate judge take the plea.

Judge Carnes noted that there were some potential issues regarding the jurisdiction of the Committee to draft the rule. He added that if the Committee were inclined to address the topic of guilty pleas in the proposed "magistrate's rule," the matter would be forwarded to the Committee on the Administration of the Magistrate Judges System for its comments and suggestions.

Following additional discussion, Judge Trager moved that the Committee include a specific reference to the ability of magistrate judges to take felony guilty pleas. Mr. Jaso seconded the motion, which carried by a vote of 9 to 1.

VI. OTHER RULES AND PROJECTS PENDING BEFORE ADVISORY COMMITTEES, STANDING COMMITTEE AND JUDICIAL CONFERENCE

A. Congressional Consideration of an Amendment to Rule 46.

Mr. Rabiej briefly reported that Congress was considering an amendment to Rule 46, urged by bail bondsmen that would potentially limit the ability of judges to forfeit bonds for reasons other than for failure to appear in court. That issue, he explained, had been raised before and the Committee had presented its view through former chair, Judge Davis, who had asked Congress to defer to the Rules Enabling Act process. The Committee, in turn, had rejected any such limitation in the rule itself. Mr. Rabiej added that the bail bondsmen were concerned that if left intact, Rule 46 might serve as the basis for similar treatment in state practice.

Judge Carnes indicated that he would testify on the matter and back the Committee's version of the Rule. Following additional discussion, there was a consensus that the Committee would not present any alternative language or position to Congress.

B. Civil Rules Style Project; Experiences with Criminal Rules

Judge Carnes informed the Committee that the Civil Rules Committee was proceeding with its restyling of all of the civil rules and that they had asked for comments and suggestions from the Criminal Rules Committee, based on its experiences in restyling the criminal rules. During the ensuing discussion, the members made the following summarized suggestions and comments:

- Be mindful of continuity issues, which are critical. Someone should insure that the approach in rules restyled early in the process are carried forward to later rules.
- Make decisions and stick with those decisions, rather than constantly changing positions.
- Develop a Committee "style book" that reflects Committee decisions made early in the process;
- The Department of Justice representative provided helpful continuity;
- Decide whether the proposed change is substantive or stylistic in nature;
- Prepare written history or record of changes made to rules throughout the process, in order to better track language that was either deleted or included;
- It was helpful to use subcommittees to do the initial reviews of the drafts;

- It was helpful to use the computer during the Committee meetings to make the changes to the various drafts; that process permitted all of the participants to follow the suggested changes;
- It was important to permit the subject matter experts to take the lead in discussing amendments to the rules;
- It was frustrating to deal with last-minute changes to the rules; the Committee should consider adopting "drop-dead" deadlines for phases of projects;
- Encourage the Chief Justice to extend terms of members involved in the project in an attempt to provide continuity during the project; and
- Overall, restyling the Criminal Rules was a very worthwhile project and a very satisfying work product.

Judge Carnes stated that he and the Reporter would pass those comments along to the Civil Rules Committee.

VII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee tentatively agreed to hold its next meeting in April 2003, at a location to be determined, depending on availability of accommodations.

Respectfully submitted

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Professor of Law
Reporter, Criminal Rules Committee