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AMENDING THE FEDERAL RULES OF CRIMINAL PROCEDURE†

The Advisory Committee which drafted the Federal Rules of Criminal Procedure had its last meeting in June 1944. The Rules went into effect in February¹ and March² of 1946, and thus are now three years old. In 1947 the Department of Justice formally suggested to the Supreme Court that Rules 5 (a) and 17 (d) be amended. The Federal Rules of Civil Procedure, one of the chief sources of the Criminal Rules, were materially amended in 1948. Titles 18 and 28 of the United States Code were also revised and brought up to date in 1948. The Judicial Conferences of the Fourth, Fifth, and Ninth Circuits discussed the Rules and possible amendments in 1948.

The procedure of amendment as to the Rules of Civil Procedure is obviously of great relevance. The Advisory Committee on Rules of Civil Procedure did not assume the initiative as to proposal of amendments, and proceeded to recommend amendments only after being asked by the Supreme Court.³ However, in its Preliminary Draft of 1936, the Committee set up a rule for a continuing committee; and in its Report of 1937, while it did not recommend the specific rule, it referred to it as being desirable. On recommendation of its Standing Committee on Jurisprudence and Law Reform⁴ the American Bar Association, in 1942, adopted a

† Address before the Crimes Round Table of the Association of American Law Schools at Cincinnati, Ohio, December 28, 1948. Professor Orfield was also a member of the Council of the Crimes Round Table.

¹ Rules 32-39, dealing with sentence, judgment and appeal, were placed into effect by a court order of February 8, 1946. 327 U.S. 825, 66 S.Ct. CLXXVIII.

² The remaining rules went into effect on March 26, 1946, following inaction by Congress.

³ That the Advisory Committee should be active rather than passive is suggested by James W. Moore, Moore, *The Supreme Court: 1940-1941 Terms—The Supreme Court and Judicial Administration*, 28 VA. L. REV. 861, 903-906; Charles E. Clark, Jr., *The Proper Functioning of the Supreme Court's Federal Rules Committee*, 28 A.B.A.J. 521 (1942).

⁴ The report is set out in 67 A.B.A. REP. 200, 201-202 (1942).

favorable resolution.⁵ In 1942 the Supreme Court reconstituted the Committee to consider the recommendation of amendments.⁶

Federal Judge Charles E. Clark, Reporter of the Civil Rules Advisory Committee, has suggested four activities in which an advisory committee of a continuing character may engage:

. . . the correction of any mistakes of draftsmanship which may have crept into the rules; the clarification of policy as to rules which may have appeared as ambiguous, at least to some courts; the review in the light of experience of some of the choices of policy originally made; and the consideration of provisions to cover some matters outside the scope of the present rules.⁷

There can be little doubt that such an approach must ultimately involve amendment of the present Criminal Rules.

As to the proper time interval after adoption before amendments should be considered, the experience of the Civil Rules Committee is also helpful. The Civil Rules went into effect in September, 1938. Only a year later in November, 1939, the Court asked the Committee to submit amendments.⁸ In its report the Court on December 28, 1939, adopted a limited amendment making clear the applicability of the Rules to review proceedings of the Longshoreman's and Harbor Workers' compensation orders.⁹ This would

⁵ "RESOLVED, That the continuing advisory Committee on Rules of Civil Procedure for the District Courts of the United States, created by Supreme Court Order of January 5, 1942, should periodically survey the functioning of the Federal Rules; to that end should invite suggestions and criticisms from the American Bench and Bar, meet at least annually to consider the functioning of the Federal Rules and to determine whether amendments are desirable, and make a formal report to the Court at the opening of each term of the Court (or at such other time as the Court may direct) of the results of its survey, together with amendments, if any, recommended by it." It is set out in 67 A.B.A. REP. 131 (1942).

⁶ 314 U.S. 720, 62 S.Ct. CLXXIV, 86 L.Ed. 1786, App. XI (1942). See Charles E. Clark, J., *The Influence of Federal Procedural Reform*, 13 L. AND CONTEMP. PROB. 144, 150-151 (1948).

⁷ Charles E. Clark, J., *The Proper Function of the Supreme Court's Federal Rules Committee*, 28 A.B.A.J. 521, 522 (1942).

⁸ 308 U.S. 641, 60 S.Ct. CLV, 84 L.Ed. 1424, App. V (1939).

⁹ 308 U.S. 642, 60 S.Ct. CLIX, 84 L.Ed. 1427, App. XIII (1939):

seem to establish a precedent for the authority and the procedure to amend.¹⁰ The Committee was again invited to submit amendments by an order of January 5, 1942.¹¹ It was at that time, almost four years after the adoption of the Rules, that the Committee began seriously to meet and consider amendments.

There is precedent even more closely in point. Pursuant to the Act of February 24, 1933, as amended March 8, 1934, the Supreme Court on May 7, 1934, promulgated the Federal Criminal Appeals Rules governing appeals after pleas of guilty, verdict or finding of guilt.¹² It is significant that these rules were amended several times. The first amendment came three years after the promulgation of the original rules,¹³ the second, four years later,¹⁴ the fifth, six years later,¹⁵ and the sixth, seven years later.¹⁶ It should not be forgotten that the Supreme Court, by an order of November 17, 1941, authorized and directed the Advisory Committee to make such recommendations as might be deemed advisable with respect to amendments to the Criminal Appeals Rules.¹⁷ As one authority stated within a year after the

¹⁰ Charles E. Clark, J., *The Influence of Federal Procedural Reform*, 13 L. AND CONTEMP. PROB. 144, 150-151 (1948).

¹¹ 314 U.S. 720, 62 S.Ct. CLXXIV, 86 L.Ed. 1786, App. XI (1942).

¹² 292 U.S. 661, 54 S.Ct. XXXVII, 78 L.Ed. 1512, App. IV (1934). The Court was assisted by the Solicitor General instead of by an advisory committee. See Orfield, *The Federal Criminal Appeals Rules as Interpreted in the Decisions*, 21 N.C.L. REV. 28 (1942).

¹³ 301 U.S. 717, 57 S.Ct. LXII, 81 L.Ed. 1373, App. X (1937). The following sentence was added to Rule 1: "The judgment setting forth the sentence shall be signed by the judge who imposes the sentence and shall be entered by the Clerk."

¹⁴ 304 U.S. 592, 58 S.Ct. CXXVIII, 82 L.Ed. 1561, App. XXI (1938). Rule II (3) was amended so as to add at the beginning of the paragraph: "Except in capital cases" and to add to the end of the paragraph: "In capital cases the motion may be made at any time before execution of the judgment." The subject of the rule was motion for new trial solely on the ground of newly discovered evidence.

¹⁵ 311 U.S. 731, 61 S.Ct. CLII, 85 L.Ed. 1555, App. II (1940). Rule V as to supersedeas was amended so as to spell out a rule in considerable detail.

¹⁶ 312 U.S. 721, 61 S.Ct. CLIII, 85 L.Ed. 1560, App. X (1941). The Rules were made applicable to the federal territorial courts.

¹⁷ 314 U.S. 719, 62 S.Ct. CLXXIV, 86 L.Ed. 1784, App. VII (1941). I suggested several changes in the Criminal Appeals Rules, some of which eventually

Federal Rules of Criminal Procedure went into effect: "It may as well be admitted that the Rules will eventually require some revision."¹⁸

Proposals by Department of Justice

Prior to December 10, 1948, only two proposed amendments to the Rules had been formally presented to the Supreme Court.¹⁹ Both of these were proposed by the Criminal Division of the Department of Justice. The Supreme Court has not in any way indicated its disposition as to them. One amendment seeks to revise Rule 5 (a) to eliminate doubt as to whether the officer who makes an arrest must personally take the defendant before the nearest available commissioner, or may instead turn him over to a marshal to do so. It is thought that to require F.B.I. agents to spend valuable time travelling in pairs to transport prisoners is inefficient, and is work which the marshals should perform.

The other proposed amendment would amend Rule 17 (d) so as to relieve the United States of the requirement of tendering attendance and mileage fees to witnesses subpoenaed in its behalf. This would accord with the Report of the Advisory Committee which was, however, rejected by the Supreme Court. The present rule seems to require that each deputy United States marshal be authorized to carry several hundreds of dollars of cash at all times. Perhaps this problem is solved by a provision of the new Judicial

were adopted. See my article, Orfield, *Improving Procedure on Judgment and Appeal in Federal Criminal Cases*, 27 MINN. L. REV. 169, 2 F.R.D. 573 (1943).

The Committee also had authority to recommend amendments to the Petty Offenses Rules set out in 311 U.S. 733, 61 S.Ct. CLV, 85 L.Ed. 1556, App. III (1940), though it did not exercise such authority, largely due to their recency.

¹⁸ Fred E. Strine, *The New Federal Criminal Rules in Action*, 8 FED. B. J. 190 (January 1947). Mr. Strine was a research assistant to the Advisory Committee, and later came into close contact with the application of the Rules while serving in the Criminal Division of the Department of Justice.

¹⁹ Orfield, *Two Years of the Federal Rules of Criminal Procedure*, 21 TEMPLE L. Q. 299, 303, 320 (1948). I am indebted for this information to Leland L. Tolman of the Administrative Office of the United States Courts.

Code.²⁰ Section 1825 of Revised Title 28 reads in part as follows: "Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof."²¹ This specific provision should create an exception for government witnesses in Rule 17 (d) the same as in Civil Rule 45 (c).²²

Integration with the Amended Civil Rules

In the past year the Federal Rules of Civil Procedure were amended to a considerable extent.²³ The amended Civil Rules of significance for criminal procedure are: 6 (b) and (c), 28 (a), 45 (d) (2), 52 (a), 60 (a), 73, 75 and 84. The Criminal Rules which might be affected are: 15 (d),²⁴ 17 (f) (2),²⁵ 23 (c),²⁶ 36,²⁷ 39,²⁸ 45 (b) and (c)²⁹ and 58.³⁰

²⁰ 28 U.S.C. as revised by Public Law 733, ch. 646, 80th Congress 2d Sess. (1948), 28 U.S.C. *et seq.*, 1 U. S. CODE CONG. SERV. A3 *et seq.* (1948).

²¹ The reviser's note explanatory of this provision (*Report of the Committee on the Judiciary, House of Representatives, on H.R. 3214*, H.R. REP. No. 308, 80th Cong. 2d Sess. (1948), U. S. CODE CONG. SERV. (Unbound Title 28, Appendix) 1879 (1948).

"The second paragraph is new. It conforms to Rule 45 (e) of the Federal Rules of Civil Procedure but is inconsistent with Rule 17 (d) of the Federal Rules of Criminal Procedure and supersedes that rule as to Federal criminal cases. The Department of Justice suggests that Rule 17 (d) is unworkable. To attempt compliance each deputy marshal serving process must carry, on the average, \$500 in cash on trips to serve process.

"The marshal must advance money from his personal funds. The Comptroller General has not been able to set up any procedure to make it feasible to advance fees to government witnesses.

"If a witness is served but fails to appear, the marshal is out of pocket the money advanced and has no recourse. In the exceptional cases of real necessity, the marshal supplies transportation to an indigent witness under established regulations which protect the disbursement."

²² It seems to me that this is true in spite of the provision that was added by the Senate to revise Title 18 of the United States Code, which was enacted at the same time as Title 28. That provision, as enacted by Public Law 772, ch. 645, 80th Congress 2d Sess. (1948), is set out in 18 U.S.C. 3771, 1 U. S. CODE CONG. SERV. A540 (1948).

²³ They are set out in 6 F.R.D. 229 (1947). The Report of the Advisory Committee and the explanatory notes of the Committee appear in 5 F.R.D. 433 (1946). See also Albert A. Ridge, J., *Amendments to the Federal Rules of Civil Procedure*, 7 Mo. B.J. 131 (1948).

²⁴ Compare Civil Rule 28 (a).

²⁵ Compare Civil Rule 45 (d) (2).

²⁶ Compare Civil Rule 52 (a).

Some of the Criminal Rules refer to the Civil Rules as their bases. The question naturally arises whether the amended Civil Rules automatically change the Criminal Rules so referring.^{30a}

No categorical answer may be given. There are three possible answers: (1) that all the Criminal rules involved are automatically changed; (2) that none of them is changed; and (3) that some are changed while others are not.

A possible approach is as follows: When the Criminal Rules refer generally to the Civil Rules, the Criminal Rules are automatically changed, otherwise not. For example, Criminal Rule 39 (b) (1) refers generally to the Civil Rules³¹ and should therefore include them in their present amended state. On the other hand Criminal Rule 39 (b) (2) is a special rule for the use of the typewritten record, which would cast in doubt the applicability of the present new Civil Rule 75 (c), providing for appeal on the original papers sent up from the district court.^{31a}

Careful study will be necessary to achieve full integration of the two sets of rules.³² In some cases there may be need of integration even as to Rules of Civil Procedure which have not been amended. Reference has already been made

²⁷ Compare Civil Rule 60 (a).

²⁸ Compare Civil Rules 73 and 75. Criminal Rule 37 may also be affected.

²⁹ Compare Civil Rules 6 (b) and (c).

³⁰ Compare Civil Rule 84.

^{30a} That there is no automatic change seems suggested in Rule 35 of the Tenth Circuit Rules, 170 F. (2d) XXIV (1948).

³¹ "*Preparation and Form.* The rules and practices governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules."

Similarly Criminal Rule 15 (d) provides:

"A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions."

^{31a} Compare 32 J. AM. JUD. SOC. 118 (1948).

³² I am indebted to Federal Circuit Judge Charles E. Clark for letters of April 21 and May 10, 1948, suggesting prompt action to secure the removal of the ambiguities which have arisen.

as to the relation between Criminal Rule 39 (b) (2) and Civil Rule 75 (o). Another problem arises with respect to Criminal Rule 39 (c). Clerks of the circuit courts of appeals are still charging the docket fee as of old when the notice of appeal is sent up from the district court, and not when the record is filed as it properly should be. Civil Rule 73 (g) provides for filing the record and docketing the appeal within forty days from the date of the notice of appeal; and other provisions tie the docketing down to the filing of the record; for example, 75 (j), providing for a skeleton record by appellee for motions to dismiss and other purposes. The conclusion that not until the record is filed is a civil appeal to be docketed seems to be accepted by almost all the clerks except in the third circuit, where the fee is claimed from counsel on receipt of notice of appeal.

Criminal Rule 39 (c) has the same provision as to filing the record and docketing within forty days, and the note to the rule states that the rule changes the existing practice by prescribing the same procedure as in the Civil Rules. It therefore seems a fair conclusion that the rule above stated applies in criminal appeals also. Yet only the clerks in the second circuit agree. The majority of the clerks hold otherwise, some with hesitance, others vigorously as in the fourth circuit.^{32a}

Their contention is based chiefly upon Criminal Rules 37 (a) and 39 (a). The former continues the older practice of requiring the district court clerks to forward immediately to the appellate court clerks the duplicate notice of appeal and the statement of the docket entries.³³

The latter, Rule 39 (a) provides, among other things, for supervision and control of the proceedings on appeal in the

^{32a} See Rule 32 of Tenth Circuit, 170 F. (2d) XXIV (1948).

³³ One may as an original matter question the utility of the sending of the notice of appeal by the district court clerk to the clerk of the circuit court of appeals. This requirement, apparently meaning little, is but indifferently performed, achieves no affirmative benefit, and raises a problem as to the time of docketing.

appellate court from the time that the notice of appeal is filed with its clerk. These differences do of course create a problem, and make more difficult a uniform procedure. But even taking these differences into account, it would seem that the clerks are practically nullifying Rule 39 (c). Criminal Rule 39 (a) seems to be merely a somewhat differently worded provision from Civil Rule 73 (a) which provides that failure to take other steps after the notice of appeal does not affect its validity, but is ground only for remedial steps by the appellate court. The requirement for forwarding the notice of appeal to the appellate court seems more by way of general notice than one of actual docketing. To be sure, a proceeding such as a motion for bail, like a motion to dismiss, would seem to require some sort of record, as well as docketing. But until some affirmative step of that kind is taken, docketing seems unnecessary and undesirable if not unfair to a litigant who might not perfect his appeal. If there be no docketing, he ought to get his twenty-five dollars back, but could he secure a refund from the United States? It would seem that the action of the clerks ought to be uniform among the circuits as to both civil and criminal practice. The matter is now in issue because it was raised through reports to the Committee on Judicial Statistics of the Senior Circuit Conference. As to time intervals on appeals in the different circuits, the committee discovered the lack of uniformity in docketing when it asked for explanations of the considerable discrepancy in the figures among the circuits.

Along this same line mention should be made of the slight difference in Criminal Rule 39 (c) from Civil Rule 73 (g). Criminal Rule 39 (c) provides for extension of time for filing and docketing, not only by the district court but also by the appellate court. Civil Rule 73 (g) provides for such action only by the district court.³⁴

³⁴ The above difficulties as to Criminal Rules 37 and 39 can be solved immediately by the Supreme Court since these rules and amendments to them need not be referred to Congress.

Some federal courts have had difficulty as to amended Civil Rule 58 for entry of judgment, and its use to determine definitely the entry of judgment in criminal cases. There have been several cases involving the question of when a judgment was actually made on a denial of a motion for new trial.

Federal Criminal Rule 15 (d) provides: "A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions."³⁵ Civil Rule 28 governing persons before whom depositions may be taken was amended in 1948, so as to allow depositions to be taken ". . . before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony." The added language provides for the situation, occasionally arising, when depositions must be taken in an isolated place where there is no one readily available who has the power to administer oaths and take testimony according to the terms of the rule as originally stated.³⁶ I assume that Federal Rule 15 (d) now is based on the amended Civil Rule 28 (a).

Criminal Rule 23 (c) provides: "In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts especially." Civil Rule 52 (a) was amended in 1948 so as to provide that if an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein; and that findings of fact are unnecessary on decisions of certain motions.³⁷

Criminal Rule 36 on clerical mistakes was identically phrased with Civil Rule 60 (a). Civil Rule 60 (a) was

³⁵ The notes of the Advisory Committee as to this provision state: "The procedure prescribed is similar to that in civil cases, Rules' 28-31, Federal Rules of Civil Procedure."

³⁶ See Notes of the Civil Advisory Committee 5 F.R.D. 456 (1946).

³⁷ See Advisory Committee Note 5 F.R.D. 471-472 (1946).

amended in 1948 so as to add the following sentence: "During the pending of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court." This provision permits corrections after docketing, with leave of the appellate court.³⁸ In civil cases some courts had thought that upon the taking of an appeal the district court lost its power to act.

Criminal Rule 45 (c) as to effect of expiration of the term is substantially the same as the old Civil Rule 6 (c). Civil Rule 6 (c) was amended in 1948 so as to prevent reliance upon the continued existence of a term as a source of power to disturb the finality of a judgment upon grounds other than those stated in the rules.³⁹

Civil Rule 45 (d) (2) as to subpoena for taking deposition and place of examination gives the court the same power in the case of *residents* of the district as is conferred in the case of non-residents to fix a place for attendance which may be more convenient and accessible for the parties than that specified in the old rule.⁴⁰ Perhaps Criminal Rule 17 (f) (2) should be amended to secure the same effect.

Criminal Rule 58, somewhat resembling Civil Rule 84, provides that: "The forms contained in the Appendix of Forms are illustrative and not mandatory." Civil Rule 84 was amended in 1948 so as to provide: "The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." The amendment seems to emphasize that the forms are sufficient to withstand attack under the rules under which they are drawn,

³⁸ See Advisory Committee Note 5 F.R.D. 477 (1946). This criminal rule can be amended immediately by the Supreme Court as it need not be referred to Congress.

³⁹ See Advisory Committee Note 5 F.R.D. 437, 439 (1946).

⁴⁰ See Advisory Committee Note 5 F.R.D. 467, 468 (1946).

and that the practitioner using them may rely on them to that extent.⁴¹

Integration with Titles 18 and 28, United States Code

A number of the Criminal Rules expressly refer to Titles 18 and 28 of the United States Code.⁴² Both of these titles were materially changed on September 1, 1948.⁴³ Some of the old sections were renumbered, some were transferred from Title 28 to Title 18, and some were omitted. One reading the Criminal Rules will not therefore in some cases be directly and accurately referred to the present governing statutes. I shall take up these instances in detail.⁴⁴

As I have indicated previously,⁴⁵ Section 1825 of Title 28 alters Criminal Rule 17 (d) so as to relieve the United States of the obligation to tender attendance and mileage fees to witnesses subpoenaed in its behalf. The reference in Rule 17 (e) (2) as to place of service of subpoena abroad will henceforth be to 28 U.S.C. sections 1783-1784 instead of to 28 U.S.C. sections 712-714. The reference in Rule 41 (b) (3) as to the grounds for issuance of a warrant will now be to

⁴¹ See Advisory Committee Note 5 F.R.D. 498 (1946).

⁴² Even more numerous references are made in the Notes of the Advisory Committee.

⁴³ See Albert B. Maris, J., *New Federal Judicial Code: Enactment by 80th Congress a Notable Gain*, 34 A.B.A.J. 863 (1948); Clarence G. Galston, J., *An Introduction to the New Federal Judicial Code*, 8 F.R.D. 201 (1948). Judge Maris informed me that on December 10, 1948, he submitted amendments to the Rules to the Supreme Court. They were approved on December 27, 1948. U.S., S.Ct., 93 L.Ed. 261 (adv.) (1948).

⁴⁴ But no reference will be made to the changes necessitated in the Notes of the Advisory Committee. It is of interest that the Supreme Court amended Rule 38½ of its Rules because of a change in 28 U.S.C. § 2101 (c). See 69 Sup. Ct. IX (1948).

In form 1 the citation will now be to 18 U.S.C. §§ 1111, 1114, instead of 18 U.S.C. §§ 452, 53; in form 2 to 18 U.S.C. § 1111 instead of 18 U.S.C. §§ 451, 452; in form 3 to 18 U.S.C. § 1341 instead of 18 U.S.C. § 338; in form 4 to 18 U.S.C. § 2154 instead of 50 U.S.C. § 103; in form 6 to 18 U.S.C. § 2312 instead of 18 U.S.C. § 408; in form 7 to 18 U.S.C. § 2313 instead of 18 U.S.C. § 408; in form 8 to 18 U.S.C. § 912 instead of 18 U.S.C. § 76; in form 9 to 18 U.S.C. § 912 instead of 18 U.S.C. § 76; in form 10 to 18 U.S.C. § 287 instead of 18 U.S.C. § 80; in form 15 to "Under Rule 41" instead of "Under 18 U.S.C. sec. 287."

⁴⁵ See footnotes 20-22, *supra*.

18 U.S.C. section 957 instead of to 18 U.S.C. section 98. The reference in Rule 4 (g) on scope and definition with respect to search and seizure, to 18 U.S.C. sections 611-616, 620, 621, 623-626, is no longer needed as these sections are omitted in the new Title 18 U.S.C.

The reference in Rule 54 (b) (2) as to offenses outside a district or state will now be to 18 U.S.C. section 3238, instead of 28 U.S.C. section 102. The reference in Rule 54 (b) (3) as to peace bonds will now be to 18 U.S.C. section 3043 instead of 28 U.S.C. section 392. The reference in Rule 54 (b) (4) as to trials before commissioners will now be to 18 U.S.C. sections 3401 and 3402 instead of 18 U.S.C. sections 576-576 (d).

Rule 54 (b) (1) and all the forms should be amended to use the term "United States district courts" instead of "district courts of the United States," to conform with the nomenclature under 28 U.S.C. section 132 (a). To conform with the same provision the title of the Federal Rules of Criminal Procedure should be amended to read as follows: "Rules of Criminal Procedure for the United States District Courts."

To conform with Title 28 U.S.C. section 43 (a) the word "circuit" should be removed from Rules 37 (a) (1), 38 (a) (3), 38 (c); 39 (b) (2), 54 (a) (1), 56, 57 (a), and Form 26.

Rule 54 (a) (1) should be amended to eliminate special reference to the district courts for the District of Columbia, Hawaii, and Puerto Rico which are now United States district courts for all purposes under 28 U.S.C., sections 88, 91, 119, 132, 133, and 451; and to eliminate special reference to the Court of Appeals for the District of Columbia which is now a United States court of appeals for all purposes under 28 U.S.C. sections 41 and 45.

The references in Rule 54 (b) (5) as to proceedings under the Federal Juvenile Delinquency Act should now be made

specifically to 18 U.S.C. Chapter 403—Juvenile Delinquency; and to proceedings against a witness in a foreign country should now be to 28 U.S.C. section 1784, instead of 26 U.S.C. sections 711-718.

In the light of changes in the Judicial Code, it would seem that the three sentences of Criminal Rule 54 (c) referring to “justices” from the District of Columbia might be omitted. Justices of the District Court of the District of Columbia are now called judges, the District of Columbia is now made a circuit, and the chief justice of the United States Court of Appeals of the District of Columbia is now called “chief judge” in common with the former senior circuit judges of other circuits.⁴⁶

Rule 55 calls for the keeping of records as prescribed by the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of Senior Circuit Judges. Under the new judicial code the latter body is to be known as the Judicial Conference of the United States.⁴⁷

It seems that some of the gaps in Criminal Rule 33 as to new trial have been filled in by the new Judicial Code.⁴⁸ As Judge Parker has pointed out:

Congress has not attempted to take away the right to make collateral attacks in violation of constitutional rights.

⁴⁶ See 28 U.S.C. §§ 41, 44 and 45; and Reviser's Notes, U. S. CODE CONG. SERV. (Unbound Title 28, Appendix) 1703-1707, 1735-1736 (1948); Albert B. Maris, J., *New Federal Judicial Code: Enactment by 80th Congress a Notable Gain*, 34 A.B.A.J. 863, 963 (1948).

⁴⁷ 28 U.S.C. § 331.

⁴⁸ 28 U.S.C. § 2255. The Reviser's Notes, U. S. CODE CONG. SERV. (Unbound Title 28, Appendix) 1908 (1948), state:

“This section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis. It provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus. It has the approval of the Judicial Conference of the United States. Its principal provisions are incorporated in H.R. 4283, Seventy-ninth Congress.”

See also Longsdorf, *Habeas Corpus A Protean Writ and Remedy*, 8 F.R.D. 179, 191 (1948); Dession, *The New Federal Rules of Criminal Procedure II*, 56 YALE L. J. 97, 233-235 (1947); FEDERAL RULES OF CRIMINAL PROCEDURE, FIRST PRELIMINARY DRAFT 256-258, 260-261 (1943).

It has provided, however, that when conviction was had in the federal courts, this right must be asserted by motion before the sentencing court, and not before another court by application for habeas corpus, unless it appears that the remedy by motion is not adequate. Section 2255 provides that the motion may be made at any time, where applicant is in custody under sentence of a federal court and is claiming that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction or that the sentence was in excess of the maximum allowed by law, or "otherwise subject to collateral attacks." This motion is in the nature of an application for a writ of error coram nobis and is merely declaratory of existing law. The court before which it is made is authorized to entertain and pass upon it without requiring the production of the prisoner at the hearing.⁴⁹

The last paragraph of this section relates to habeas corpus. It provides:

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

This section thus requires that the attack upon the judgment of imprisonment be made in the court in which judgment was rendered, where the facts as to the procedure followed are known to the court officials and where the prosecutor who conducted the case will be available to see that these facts are adequately presented. Habeas corpus will be available only when a judge to whom application therefor is made finds that the remedy by motion is "inadequate or ineffective to test the legality of the detention."

As a matter of logic and completeness it would seem that most of the matters covered in the new code provision should

⁴⁹ John J. Parker, J., *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 175 (1948).

The sentencing court need not entertain a second or successive motion.

An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

properly be covered in the Criminal Rules. In my opinion Criminal Rule 33 on new trial⁵⁰ ought to cover not only all that it now covers but also the relief formerly obtained by the writ of error coram nobis and most, though possibly not all the relief formerly obtainable *after trial* by the writ of habeas corpus.⁵¹

The Supreme Court, however, deleted a provision recommended by the Advisory Committee that a motion for a new trial based "on the ground that the defendant has been deprived of a constitutional right may be made at any time before or after final judgment."⁵² The Criminal Rules should also deal with the possible availability of the writ of error coram nobis.⁵³ Rule 60 (b) of the amended Civil Rules expressly abolishes the writ and provides a substitute.⁵⁴ Title 28, section 2255 now provides a statutory substitute in criminal cases.⁵⁵ The United States Supreme Court in dicta had twice recently suggested doubt as to its availability in the federal courts.⁵⁶ Back in 1943 four members of the Advisory Committee were unsuccessful in persuading the Advisory

⁵⁰ Or Rule 33 in combination with Rules 34-36. These changes could be made by the Supreme Court immediately as they need not be referred to Congress.

⁵¹ I am not sure that there are not some cases where habeas corpus should be retained as to relief after trial, particularly because of the two year limit on motion for new trial now contained in Rule 33. If that limit were abolished then I can think of no cases where a writ of habeas corpus after trial would be essential. Criminal Rule 32 (d) seems to be ample as to pleas of guilty. I do not deny that habeas corpus will still be useful as to proceedings prior to verdict of guilty or plea of guilty.

⁵² FEDERAL RULES OF CRIMINAL PROCEDURE, REPORT OF THE ADVISORY COMMITTEE Rule 35 (1944).

⁵³ Dession, *The New Federal Rules of Criminal Procedure: II*, 56 YALE L. J. 197, 233-235 (1947).

⁵⁴ See the *Advisory Committee Report*, 5 F.R.D. 433, 477-480 (1946).

⁵⁵ See the Reviser's Notes, U. S. CODE CONG. SERV. (Unbound Title 28) 1908 (1948).

⁵⁶ "Although this court has reserved decision on whether the federal district courts are required to entertain proceedings in the nature of coram nobis . . . it is difficult to conceive of a situation in a federal criminal case today where that remedy would be necessary or appropriate." Jackson, J., in *United States v. Smith et al.*, 331 U.S. 469, 475, n. 4, 67 S.Ct. 1330, 91 L.Ed. 1610 (1947).

"It survives in varying forms in state practice but it may be that in federal practice its purpose is otherwise served." Burton, J., in *Taylor v. State of Alabama*, 335 U.S. 252, 259, 68 S.Ct. 1415, 1418 (1948).

Committee to recommend the following rule: "A motion for a new trial based solely upon the ground of newly discovered evidence, fraud, duress, or other gross impropriety may be made at any time before or after final judgment, but if an appeal is pending the trial court may grant the motion only on remand of the case."⁵⁷ It is not surprising that the new Judicial Code has attempted to fill in the gap. The present Criminal Rule 33 is not comprehensive enough as to the grounds for relief or as to the time limit on such relief.⁵⁸ Henceforth, in some cases a criminal defendant will move for a new trial under Criminal Rule 33; in others he will make a motion under 28 U.S.C. section 2255 in the sentencing court "to vacate, set aside or correct the sentence", and the court upon the requisite finding "shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." In still others, and presumably rare cases where the remedy by motion "is inadequate or ineffective to test the legality of his detention", he may apply for a writ of habeas corpus under 28 U.S.C. section 2255, the last paragraph. It may be noted in passing that 28 U.S.C. section 2255 to some extent overlaps with Criminal Rule 35 which provides in part: "The court may correct an illegal sentence at any time."

Rule 7 (b)

Questions of constitutionality and interpretation have arisen concerning Rule 7 (b) on waiver of indictment. Its

⁵⁷ See statement of Messrs. Dession, Gleck, Orfield, and Wechsler in THE FEDERAL RULES OF CRIMINAL PROCEDURE, FIRST PRELIMINARY DRAFT 256-258 (1943).

In 1947 Justice Jackson stated in a criminal case: "Of course, the federal courts have power to investigate whether a judgment was obtained by fraud and make whatever modification is necessary at any time." *United States v. Smith* et al., 331 U.S. 469, 475, n. 4, 67 S.Ct. 1330, 1335, 91 L.Ed. 1610 (1947).

⁵⁸ The rule fixes a two year limit after final judgment as to motions on the ground of newly discovered evidence. The Advisory Committee had recommended no time limit. See Orfield, *Two Years of the Federal Rules of Criminal Procedure*, 22 TEMPLE L. QUART. 46, 47-49 (1948); Dession, *The New Federal Rules of Criminal Procedure: II*, 56 YALE L. J. 197, 232-235 (1947).

constitutionality was upheld by the Fifth Circuit Court of Appeals,⁵⁹ a district judge of South Carolina,⁶⁰ and a district judge of Pennsylvania.⁶¹ No reported decision has held it unconstitutional.

The major question of interpretation arising concerning Rule 7 (b) is whether or not an information can be filed before the waiver of indictment by the defendant. Federal District Judge Albert V. Bryan of Virginia stated at the Judicial Conference of the Fourth Circuit on June 26, 1948, that the practice of a large number of United States Attorneys, and probably the view of the Department of Justice was that an information could not be filed prior to the waiver. His own view was that the information must be filed first and the waiver occur later. The United States Attorney for his district took the opposite view, and a solution was reached by doing the two simultaneously. If the information is not filed first, then the defendant is in the position of being asked whether he waives something which is not formally of record. By requiring filing of the information first, the government is irrevocably put on record of what its charge will consist. In the event defendant insists upon an indictment, no harm is done. The information will simply be filed, remain of record, and be ineffective as the defendant has not consented.

In my opinion it makes little difference which order of procedure is used. Possibly Rule 7 (b) should be amended to make it absolutely clear that the information may be filed before the waiver as well as afterwards.⁶²

⁵⁹ *Barkman v. Sanford*, 162 F. (2d) 592 (C.C.A. 5th 1947) noted 21 So. CALIF. L. REV. 193 (1948). See also my comment in 21 ROCKY MT. L. REV. 76 (1948).

⁶⁰ *United States v. Martín*, 8 F.R.D. 89 (W.D.S.C. 1948).

⁶¹ *Simones v. Humphrey*, 79 F.Supp. 5 (M.D. Pa. 1948).

⁶² Federal Circuit Judge John J. Parker suggested that either order of procedure was valid. If the information is filed first, the waiver relates back to the original finding, hence such procedure is not objectionable.

It was held that the information could be filed before the waiver in *United States v. East*, 5 F.R.D. 389, 390 (N.D.Ind. 1946). Swygert, J. stated: "The

Rule 20

No rule has attracted more discussion than Rule 20. During 1948 it was discussed by the circuit conferences in the fourth, fifth and ninth circuits.⁶³ Federal District Judge James Alger Fee of Oregon held the rule to be unconstitutional in *United States v. Bink*.⁶⁴ I have stated elsewhere my reasons for disagreeing with him.⁶⁵ The real problems in my opinion are the proper construction and possible improvement of the Rule.

Just as in the case of Rule 7 (b) question has arisen whether the information may be filed prior to the waiver of indictment when there are waivers of both indictment and venue as to pleas of guilty. Judge Bryan stated at the fourth circuit conference that he would have the information precede the waiver.⁶⁶ When the defendant is arrested in a district other than that of the commission of the crime and wishes to plead guilty, if the information has not previously been filed in the district of the crime, there will be no information to show the defendant as it is not of record. The only data he will have will be what the United States Attorney of the place of arrest orally reveals to him as to the charge. His attorney cannot advise him as to whether there is any advantage in insisting upon indictment because he is

last sentence of Rule 7 (a) reads: 'An information may be filed without leave of court', this, taken together with Rule 20, indicates it was intended that an information may be filed before the defendant waives in open court his right to be prosecuted by indictment."

⁶³ I am indebted to Mr. Chief Justice Fred Vinson for a copy of the minutes of the fourth circuit conference; and to Federal District Judge Robert L. Russell for a copy of a committee report to the fifth circuit conference. Federal District Judge Louis E. Goodman of California presented a paper to the ninth circuit conference entitled *Revolutionary Procedure in Criminal Actions*, 8 F.R.D. 338 (1948).

⁶⁴ 74 F. Supp. 603 (Ore. 1947). For reference to a similar holding in the Southern District of California see Fred E. Strine, *The New Federal Criminal Rules in Action*, 8 FED. B. J. 190, 192 (1947).

⁶⁵ Orfield, *The Constitutionality of Rule 20*, 34 CORN. L. Q. 129 (1948).

⁶⁶ This also appears to be the view of District Judge Robert L. Russell of Georgia and Ben H. Rice, Jr., of Texas in their committee report on the Federal Rules to the fifth circuit conference.

not aware what will be embraced in the information. On the other hand if the United States Attorney of the place of the crime filed his information, he could then have it immediately transferred to the place of arrest and have the defendant confronted with the information at the time he decides on his future action. If the defendant finally refuses, all that is lost is the preparation and typing of the indictment. On the other hand if he consents, then he waives what amounts to a definite charge. Furthermore a second exchange of correspondence and of transfers between the two jurisdictions is saved.

Mr. Bernard Flynn, United States Attorney in Maryland, in answer to Judge Bryan, pointed out that in Maryland, as well as in some other Districts the information is filed *after* the defendant's waiver of indictment.⁶⁷ Since the defendant is usually brought up on a complaint and a warrant before the commissioner, the complaint will reveal to him what the charges are. He may be advised by a copy of a *proposed* information. He may be advised by his counsel. He may be advised in open court by the United States Attorney. His waiver is not binding unless it is an intelligent waiver. Mr. George R. Humrickhouse, United States Attorney in Virginia, has suggested that attached to the waiver and incorporated by reference therein there could be a copy of a *proposed* information. He was opposed to consolidation of waiver of indictment and consent to transfer, as in some districts,⁶⁸ as Rule 20 specifically provides that the defendant may consent to transfer only after he has received a copy of the information.

⁶⁷ Mr. H. E. Henderson, United States Attorney in North Carolina, stated that upon inquiry to the Department of Justice he found that the United States Attorneys were about equally divided as to the proper order of procedure. It is stated that the majority view is that the waiver of indictment must precede the filing of the information in Strine, *The New Federal Criminal Rules in Action*, 8 Fed. B. J. 190, 194 (1947), although he regards the sequence as unimportant.

⁶⁸ e.g., North Carolina according to statement by United States Attorney H. E. Henderson; and Indiana, *United States v. East*, 5 F.R.D. 389 (N.D.Ind. 1946).

The committee on the Federal Rules of Criminal Procedure of the fifth circuit conference had suggestions to make only as to Rules 7 (b) and 20. The committee of two district judges were divided as to the validity of Rule 20.⁶⁹ They were also dubious as to whether waiver of indictment can occur in the district of arrest or only in the district of the crime.⁷⁰ Since Rule 20 relates to a defendant arrested in a district other than that in which the indictment is pending, the rule arguably cannot operate except where an indictment on information is pending. The expression in Rule 7 (b) as to waivers "in open court" arguably refers to waiver, only in the Court of the place of the crime. The Committee felt that if waiver of indictment at the place of arrest is to be permitted the Rule should be clarified expressly to permit it.

It was pointed out at the ninth circuit conference that the following procedure is followed in the northern district of California: ⁷¹ (1) The defendant's written statement must be filed *in open court*; ⁷² (2) prior to signing such statement, defendant must be represented by counsel unless there is an intelligent waiver of counsel; ⁷³ (3) before plea the United States Attorney must first certify to the court that he considers the consent and plea of the defendant to be in the interest of justice; ⁷⁴ (4) unless the court is satisfied, it will make its own investigation as to the defendant's reason for giving his consent before permitting the plea of guilty to be

⁶⁹ They were Robert L. Russell of Georgia and Ben H. Rice, Jr., of Texas.

⁷⁰ Permitting waiver at the place of arrest is advocated by Fred E. Strine. Strine, *The New Federal Criminal Rules in Action*, 8 FED. B. J. 190, 194 (1947). Such waiver was permitted in *United States v. East*, 5 F.R.D. 389 (N.D.Ind. 1946).

⁷¹ Louis E. Goodman, J., *Revolutionary Procedure in Criminal Actions*, 8 F.R.D. 338, 341-342 (1948).

⁷² Rule 20 is silent as to any filing in open court.

⁷³ Rule 20 is silent as to the right to counsel. The Advisory Committee provided for the right to counsel in only one of its drafts, the First Preliminary Draft. It was deleted because it was thought it would slow up the process.

⁷⁴ Rule 20 is silent as to such certification. However, a transfer requires the approval of the United States Attorney for each district.

made; ⁷⁵ (5) in case a transfer from the place of the crime to the place of arrest is sought from the California court, the clerk may not transmit the papers to such other district until so ordered by the court, and the court will require from the United States Attorney a certification that such transfer is not an interference with the administration of justice.⁷⁶ In my opinion all but the third and fourth of these requirements are in conflict with Rule 20, the third and fourth perhaps being valid under Rule 11.

Perhaps Rule 20 might be amended to make it absolutely clear that the court of the place of arrest, like the court of the place of the crime, need not accept a plea of guilty. Possibly the approval of both judges should be made a requisite.⁷⁷ A United States Attorney has suggested to the Department of Justice that when disposition has been made of a case transferred under Rule 20, the clerk in the district of arrest should be required to notify the clerk in the district where the case arose.⁷⁸ This should be done in order that the docket of the case may be completed by an official entry of the final disposition of the case.

Rule 9 (a)

Federal District Judge Bryan of Virginia has raised a problem in connection with Rule 9 (a), providing for the

⁷⁵ Rule 20 is silent as to such investigation. However, under Rule 11 the court may refuse to accept a plea of guilty.

⁷⁶ Rule 20 seems to call for transmission by the Clerk, and is silent as to any order of the court.

⁷⁷ These two suggestions have come to me from George F. Longsdorf of the United States Supreme Court Advisory Committee on Rules of Criminal Procedure. Federal District Judge Goodman thought the right of veto of the United States Attorneys of both districts not an adequate safeguard. Goodman, *Revolutionary Procedure in Criminal Actions*, 8 F.R.D. 338, 341 (1948).

⁷⁸ BULLETIN OF THE CRIMINAL DIVISION OF THE DEPARTMENT OF JUSTICE, April 5, 1948.

The Judicial Conference of the Second Circuit "voted to ask a reconsideration by the Senior Circuit Conference of its refusal to order the recording of a final judgment in the district where an indictment had been returned, when trial was had in another district, as permitted under the new Criminal Rules." 33 A.B.A.J. 873, 874 (1947).

issuance of warrants upon indictments and information. What happens if the judge is absent from the court at the time a warrant is desired? Is there any one who can then issue the warrant? Judge Bryan suggests that perhaps the commissioner could issue a warrant, but that another possible answer is that upon the return of the indictment, the court be allowed to enter a general order directing the clerks to issue a warrant upon request of the United States Attorney. He was not certain whether this would have to be entered on each occasion or whether or not a general or standing order would suffice. Mr. George R. Humrickhouse, United States Attorney in Virginia, suggested that the solution is the issuing of a summons by the clerk on the request of the prosecution. The above problems, of course, would not have arisen if the Supreme Court had adopted the suggestion of the Advisory Committee in all its drafts calling for action by the *clerk*.

Rule 15

Possibly Rule 15 on depositions does not go far enough in enabling defendants to prepare for trial.⁷⁹ The Civil Rules authorize examination of witnesses before trial as a normal routine. Criminal Rule 15 permits examination only of witnesses who "may be unable to attend or prevented from attending a trial or hearing"⁸⁰ or who have been committed for failure to give bail. In further contrast with the Civil Rules,⁸¹ depositions may be taken only in the discretion of the court.

With respect to Rule 46 (b) covering bail for witness and Rule 15 as to depositions by witnesses failing to give bail,

⁷⁹ See Dession, *The New Federal Rules of Criminal Procedure: II*, 56 *YALE L.J.* 197, 216-217 (1947); ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 327 (1947).

⁸⁰ Rule 15 (a).

⁸¹ See Civil Rules 26 (a) and 30.

possibly further protection should be given to the defendant. Federal Judge Freed states:⁸²

The rule in my personal judgment should be extended to provide for a hearing in court when the government requests that bail be fixed for a material witness. If upon a hearing it should appear to the court that an injustice may result to a witness by incarceration upon failure to furnish bail, the court may order that the witnesses' deposition be taken and the witness be discharged.

Rule 16

The Civil Rules on discovery enable the parties to prepare for trial in a most sweeping fashion. As Federal District Judge Albert A. Ridge of Missouri recently stated in an address on the amended Civil Rules:⁸³

There are two guiding principles on the subject of discovery under the rules. They are: First, every party to a litigation is entitled to secure all evidence, information and documents germane to the issues, even if they are in possession of the adverse party; Second, such evidence, information and documents should be made available before the trial. The purpose of the discovery provisions of the rules is not only to facilitate the obtaining of evidence for use at the trial, but also to reduce the element of surprise to a minimum and to shorten trials.

The First Preliminary Draft of the Federal Rules of Criminal Procedure had a provision on discovery and inspection entitling the defendant to an inspection of any relevant documents or tangible objects "not privileged."⁸⁴ The Second Preliminary Draft restricted inspection to relevant

⁸² Freed, J., *The Rules of Criminal Procedure: An Appraisal Based on a Year's Experience*, 33 A.B.A.J. 1010, 1012 (1947).

⁸³ *Amendments to the Federal Rules of Civil Procedure*, 7 Mo. B. J. 131, 151 (1948). Names "of witnesses or lists of persons having practical information which are in the possession of the adverse party may be obtained by discovery." Note, 31 MINN. L. REV. 712, 731-732 (1947). See also the view of George Wharton Pepper, *Discovery Procedure Symposium*, 5 F.R.D. 403, 405-406 (1946): "The answers, I think unanimously in the Committee, were, after considering all the reasons that can be advanced against such an affirmative course, that it is on the whole just and fair that each shall have the right by interrogating to elicit from the other the names of the witnesses and their addresses."

⁸⁴ Rule 19.

documents on tangible objects "obtained from or belonging to the defendant or constituting evidence in the proceeding."⁸⁵ The rule as adopted restricts inspection to items "obtained from or belonging to the defendant or obtained from others by seizure or by process."

Possibly Rule 16 does not go far enough in enabling the defendant to prepare for trial.⁸⁶ Federal District Judge Bryan has pointed out that inasmuch as the Federal Rules of Civil Procedure have changed the trial of a civil case from a combat of wits to a research for the truth, this purpose is equally desirable in a criminal case. If so, is not the defendant entitled to a list of the prosecution's witnesses? Is he not entitled to examine statements that have been procured?⁸⁷ Rule 16 gives the defendant a right only as to things obtained from or belonging to the defendant or obtained from others by seizure or process. But there are many things that come in neither of these categories and yet might be in the possession of the prosecution.⁸⁸

Federal Judge Freed of Ohio has stated:⁸⁹

⁸⁵ Rule 18.

⁸⁶ See the excellent discussion by George H. Dession, *The New Federal Rules of Criminal Procedure: II*, 56 YALE L. J. 179, 215-220 (1947). See also Orfield, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 328-334 (1947).

⁸⁷ "A witness' statement made voluntarily and in the possession of the prosecution is therefore not subject to inspection, but having been obtained by seizure or by process. Statements or confessions voluntarily made by co-defendants and accomplices fall in the same category. . . . There is no provision in the Rules for a disclosure by either party of the witnesses to be produced at trial." Dession, *The New Federal Rules of Criminal Procedure: II*, 56 YALE L. J. 197, 220 (1947).

⁸⁸ United States Attorney Bernard Flynn of Maryland agrees that anything the prosecutor has obtained should be turned over to a defendant for the purpose of permitting a defendant to make a legitimate honest defense, but not to build up an alibi. United States Attorney Ben Scott Whaley of South Carolina took much the same position. United States Attorney George A. Humrickhouse of Virginia was opposed.

⁸⁹ *The Rules of Criminal Procedure: An Appraisal Based on a Year's Experience*, 33 A.B.A.J. 1010, 1068 (1947). The British rule is very generous to the defendant. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 333, n. 265 (1947).

This is one of the rare situations in which the law of Soviet Russia gives more protection to the defendant. Regarding procedure in the Nuremberg trial, Mr. Justice Jackson stated: "The Soviet delegation objected to our practice on

I am inclined to the conviction that if steps should be taken to extend the discovery rules now found in civil procedure to criminal cases as well, enforcement of criminal law would not suffer. It probably is true that discovery to its fullest extent should not be allowed as a matter of right, and should be confined within the limits of the discretion of the Court. But the confines of the judicial discretion should be bounded by a showing on the part of the Government that disclosure would involve the production of a privileged file of some agency, and that either the substantial rights of the Government will be jeopardized or that the orderly course of the trial might be impeded by an order of production.

Rule 21 (b)

Rule 21 (b) provides for transfer of a proceeding as to an offense committed in two or more districts or divisions. Federal District Judge McLaughlin of Hawaii has suggested that this rule needs amendment since the benefits of the rule may be denied to a defendant "by the simple process of adding counts to a conspiracy charge which allege additionally certain overt acts as specific offenses."⁹⁰ It would appear, however, that the transfer might have been allowed by severing the joinder of offenses under Criminal Rule 14. Judge Coleman of the District Court for Maryland later so held as to severance of parties.⁹¹

the ground that it is not fair to defendants. Under the Soviet system when an indictment is filed every document and the statement of every witness which is expected to be used against the defendant must be filed with the court and made known to the defense. It was objected that under our system the accused does not know the statements of accusing witnesses nor the documents that may be used against him, that such evidence is first made known to him at the trial too late to prepare a defense, and that this tends to make the trial something of a game instead of a real quest into guilt. It must be admitted that there is a great deal of truth in this criticism. We reached a compromise by which the Nuremberg indictment was more informative than in English or American practice but less so than in Soviet and French practice." Henry Adsit Bull, *Nuremberg Trial*, 7 F.R.D. 175, 178 (1947).

See also Mr. Justice Jackson, *Some Problems in Developing an International Legal System*, 22 TEMP. L. Q. 147, 150 (1948).

⁹⁰ United States v. Hughes Tool Co., 78 F.Supp. 409, 411 (Hawaii 1948).

⁹¹ United States v. Erie Basin Metal Products Co., 79 F.Supp. 880, 882 (Md. 1948).

Rule 32 (c)

With respect to Rule 32 (c) on pre-sentence investigations, Federal District Judge Coleman of Maryland would make available to the judge the pre-sentence report *before* plea of guilty or conviction. Psychiatric information therein might be very helpful to the court. He would amend the rule so as to let the judge have the report if there has been an indication that the defendant would plead guilty. This avoids delay in sentencing. Judge Chestnut of Maryland took the same position. Mr. Henry P. Chandler, Director of the Administrative Office of the United States Courts, pointed out in reply that up to conviction the defendant has the right to be confronted with the witnesses against him and to have the question of guilt determined only by what is produced in open court.⁹² Judge Paul of Virginia suggested that the reports can be amply studied by delaying sentence eight to ten days.

Conceivably Rule 32 (c) should be amended so as expressly to confer on the defendant a right to a copy of the pre-sentence report as soon as he has pleaded guilty or has been found guilty.⁹³ Federal Judge Bryan of Virginia has stated that it is the practice in Virginia and probably many other districts⁹⁴ not to disclose the report to any one except the court. The defendant may be seriously prejudiced because the court uses the report in determining the length of the sentence.⁹⁵

⁹² Judge Barksdale of Virginia took the same position. See ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 547 (1947).

⁹³ The Supreme Court, however, rejected the following sentence proposed by the Advisory Committee. "After determination of the question of guilt the report shall be available, upon such conditions as the court may impose, to the attorneys for the parties and to such other persons or agencies having a legitimate interest therein as the court may designate."

This provision had been intended to serve two purposes: (1) The defense should have notice and an opportunity to challenge or explain misleading statements in a pre-sentence report, since the report could influence the court's determination; (2) such reports would furnish useful data for criminological research.

⁹⁴ This seems to be the practice in Maryland according to United States Attorney Bernard Flynn.

⁹⁵ ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 545-546 (1947).

Rule 38 (c)

On December 10, 1948, Federal Judge Albert B. Maris submitted to the Supreme Court an amendment to Rule 38 (c) to correct an inadvertent error in the present rule involving the use of the word "docketing" instead of "filing" in connection with the record on appeal. He pointed out that one may find a correct use of these words in Rule 39 (c).⁹⁶

Rule 46

With respect to Rule 46 on bail, Federal District Judge Bryan has raised the question of the power, if any, of the clerk to take a bail bond in the absence of a session of the court. Neither the Rules nor the statutes expressly give any authority to a clerk to take bail at such time. In Virginia it is a common practice simply to have the defendant appear before the clerk and give bond.

Forms

With respect to Form 17 entitled "Appearance Bond" Federal District Judge Bryan of Virginia has suggested that a provision be inserted that the defendant shall maintain and keep the peace. Often in determining whether a defendant shall be granted bail it is highly important to make sure of his good conduct when released on bail. He would have the bond under seal, as in Maryland and Virginia, because of the running of statute of limitations as between the surety and the principal.

With respect to Federal Rule 43 on presence of defendant, Judge Bryan has suggested that conceivably a change is needed in the form of the appearance bond. Under Rule 43 the defendant may waive his presence from trial and consent that trial and sentencing proceed in his absence. If he

⁹⁶ On December 27, 1948, the Supreme Court adopted this amendment and made it effective January 1, 1949. U.S., 69 S.Ct. IX, X (1949).

is convicted and a fine is imposed and imprisonment ordered, has his consent satisfied the bond? Or is the bond forfeitable if he does not abide the judgment? In the Virginia practice this situation is taken care of by the additional condition that is predicated on his answering the judgment of the court. Mr. D. E. Henderson, United States Attorney in North Carolina, suggested that in every bond there be a provision not to depart without leave of court first having been given.

Lester B. Orfield.