ADVISORY COMMITTEE
ON
CRIMINAL RULES

Santa Barbara, CA
April 28-29, 2003

CRIMINAL RULES COMMITTEE MEETING

April 28 and 29, 2003
Santa Barbara, California

I PRELIMINARY MATTERS

A. Chair's Remarks, Introductions, and Administrative Announcements

B. Review/Approval of Minutes of September 2002, Meeting in Cape Elizabeth, Maine

C. Status of Criminal Rules: Report of Rules Committee Support Office.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Rule Amendments Effective December 1, 2002

1. Style Changes to Rules Approved by Supreme Court in May 2002

2. Substantive Amendments to Rules Approved by Supreme Court in May 2002

   a. Rule 5. Initial Appearances. Proposed Amendment Regarding Video Teleconferencing of Initial Appearance.

   b. Rule 10. Arraignment. Proposed Amendment Regarding Video Teleconferencing of Arraignment.

   c. Rule 12.2. Notice of Insanity Defense; Mental Examination. Proposed Amendment Regarding Notice of Insanity Defense, etc.

   d. Rule 12.4. Disclosure Statement. New Rule.

   e. Rule 30. Jury Instructions. Proposed Amendment Regarding Timing of Submission of Jury Instructions.

   f. Rule 35. Correcting or Reducing a Sentence.

3. Other Substantive Amendments Effective December 1, 2002

   a. Rule 6. Amendments by USA PATRIOT ACT.

   b. Rule 41. Amendments by USA PATRIOT ACT.

B. Proposed Amendments Published for Public Comment & Pending Further Consideration by Advisory Committee

1. Rule 41. Search Warrants (Memo).

2. Rules Governing § 2254 and § 2255 Proceedings (Memo).

3. Official Forms Accompanying Rules Governing § 2254 and § 2255 Proceedings.

C. Proposed Amendment to Rule 35, Pending Approval by Standing Committee (Memo).

D. Other Proposed Amendments to Rules

1. Rule 11(b)(1)(A). Use of Defendant's Statements; Proposal to Clarify Restyled Language (Memo).

2. Rule 11. Proposal to Require Judge to Address Defendant re Collateral Consequences of Plea. (Memo)

3. Rule 12.2. Notice of Insanity Defense; Mental Examination. Proposed amendment regarding sanction for defense failure to disclose information (Memo).

4. Rules 29, 33 and 34; Proposed amendments re rulings by court and setting times for filing motions (Memo).

5. Rule 29; Proposed amendment regarding appeal for judgments of acquittal (Memo).

6. Rule 32, Sentencing; Proposed amendment re allocution rights of victims of non-violent and non-sexual abuse felonies (Memo).

7 Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendments to rule concerning defendant's

right of allocution (Memo).

8. Rule 32.1. Revoking or Modifying Probation or Supervised Release; Proposed amendment to remove requirement for production of certified copies of judgment. (Memo).

9. Rule 59; Proposed New Rule Concerning Rulings by Magistrate Judges as Counterpart to Rule of Civil Procedure 72; Status of Proposal to Permit Magistrate Judges to Take Guilty Pleas(Memo).

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

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure.

1. Rule 6. The Grand Jury.

2. Rule 46. Release from Custody; Supervising Detention.

B. Other Matters

IV. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

ADVISORY COMMITTEE ON CRIMINAL RULES

Chair:

Honorable Edward E. Carnes
United States Circuit Judge
United States Court of Appeals
United States Courthouse, Suite 500D
One Church Street
Montgomery, AL 36104

Members:

Honorable John M. Roll
United States District Judge
Evo A. DeConcini United States Courthouse
405 West Congress Street, Suite 5190
Tucson, AZ 85701-5053

Honorable Susan C. Bucklew
United States District Judge
United States District Court
109 United States Courthouse
611 North Florida Avenue
Tampa, FL 33602

Honorable Paul L. Friedman
United States District Judge
6321 E. Barrett Prettyman
United States Court House
333 Constitution Avenue, N.W.
Washington, DC 20001-2802

Honorable David G. Trager
United States District Judge
United States District Court
225 Cadman Plaza, East
Room 224
Brooklyn, NY 11201

ADVISORY COMMITTEE ON CRIMINAL RULES (CONTD.)

Honorable Harvey Bartle III
United States District Court
16614 James A. Byrne
United States Courthouse
601 Market Street
Philadelphia, PA 19106-1714

Honorable Tommy E. Miller
United States Magistrate Judge
173 Walter E. Hoffman
United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Honorable Reta M. Strubhar
Judge
Court of Criminal Appeals of Oklahoma
State Capitol Building, Room 230
2300 North Lincoln Boulevard
Oklahoma City, OK 73105

Professor Nancy J. King
Vanderbilt University Law School
131 21st Avenue South, Room 248
Nashville, TN 37203-1181

Robert B. Fiske, Jr., Esquire
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017

Donald J. Goldberg, Esquire
Ballard Spahr
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599

Lucien B. Campbell
Federal Public Defender
Western District of Texas
727 E. Durango Boulevard, B-207
San Antonio, TX 78206-1278

ADVISORY COMMITTEE ON CRIMINAL RULES (CONTD.)

Assistant Attorney General
Criminal Division (ex officio)
Honorable Michael Chertoff
Eric H. Jaso, Counselor
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 2708
Washington, DC 20530-0001

Reporter:

Professor David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, TX 78228-8602

Liaison Member:

Honorable A. Wallace Tashima
United States Circuit Judge
Richard H. Chambers Court of Appeals Building
125 South Grand Avenue
Pasadena, CA 91105-1652

Advisors and Consultants:

Professor Ira P. Robbins
American University
Washington College of Law
4801 Massachusetts Avenue, N.W.
Washington, DC 20016

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

ADVISORY COMMITTEE ON CRIMINAL RULES

SUBCOMMITTEES

Rule 41 Subcommittee
Judge Tommy E. Miller (Chair)
Judge Harvey Bartle III
Professor Nancy J. King
Lucien B. Campbell, Esquire
Eric H. Jaso, Counselor

Subcommittee on Grand Jury
Judge Susan C. Bucklew, Chair
Judge Paul L. Friedman
Robert B. Fiske, Jr., Esquire
Donald J. Goldberg, Esquire
Eric H. Jaso, Counselor

Subcommittee on Habeas Corpus
Judge David G. Trager, Chair
Judge Tommy E. Miller
Professor Nancy J. King
Lucien B. Campbell, Esquire
Eric H. Jaso, Counselor
Professor Ira P. Robbins, Consultant

April 4, 2003
Projects

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

SUBCOMMITTEES

Subcommittee on Attorney Conduct
Professor Daniel R. Coquillette (Standing)
Judge Thomas W. Thrash, Jr. (Standing)
Charles J. Cooper, Esquire (Standing)
Judge Samuel A. Alito, Jr. (Appellate)
Professor Patrick J. Schiltz (Appellate)
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Robert B. Fiske, Jr., Esquire (Criminal)
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Subcommittee on Technology
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Mark R. Kravitz, Esquire (Standing)
Sanford Svetcov, Esquire (Appellate)
Judge Thomas S. Zilly (Bankruptcy)
Professor Myles V. Lynk (Civil)
Judge Reta M. Strubhar (Criminal)
Committee Reporters, Consultants

Subcommittee on Style
Judge J. Garvan Murtha, Chair
Judge Anthony J. Scirica (*ex officio)*
Judge Thomas W. Thrash, Jr.
Dean Mary Kay Kane
Professor R. Joseph Kimble, Consultant
Joseph F. Spaniol, Jr., Esquire, Consultant

LIAISONS TO ADVISORY RULES COMMITTEES

Judge J. Garvan Murtha (Appellate)
Judge Sidney A. Fitzwater (Civil)
Judge A. Wallace Tashima (Criminal)
Judge Thomas W. Thrash, Jr. (Evidence)

April 4, 2003
Projects

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs

Honorable Anthony J. Scirica
United States Circuit Judge
22614 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, PA 19106

Honorable Samuel A. Alito, Jr.
United States Circuit Judge
357 United States Post Office
and Courthouse
50 Walnut Street
Newark, NJ 07101

Honorable A. Thomas Small
United States Bankruptcy Judge
United States Bankruptcy Court
Post Office Drawer 2747
Raleigh, NC 27602

Honorable David F. Levi
United States District Judge
United States Courthouse
501 I Street, 14th Floor
Sacramento, CA 95814

Honorable Edward E. Carnes
United States Circuit Judge
United States Court of Appeals
United States Courthouse, Suite 500D
One Church Street
Montgomery, AL 36104

Honorable Jerry E. Smith
United States Circuit Judge
United States Court of Appeals
12621 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, TX 77002-2698

Reporters

Prof. Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159

Prof. Patrick J. Schiltz
Associate Dean and
Professor of Law
University of St. Thomas
School of Law
1000 La Salle Avenue, TMH 440
Minneapolis, MN 55403-2005

Prof. Jeffrey W. Morris
University of Dayton
School of Law
300 College Park
Dayton, OH 45469-2772

Prof. Edward H. Cooper
University of Michigan
Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Prof. David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, TX 78228-8602

Prof. Daniel J. Capra
Fordham University
School of Law
140 West 62nd Street
New York, NY 10023

Item IB

MINUTES (DRAFT)
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 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 only if the defendant objects. In that case, 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 send conditions for release, other than for failure to appear in court. That issue, he explained by 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

David A. Schlueter
Professor of Law
Reporter, Criminal Rules
Committee

Item IC

CRIMINAL RULES DOCKET

ADVISORY COMMITTEE ON CRIMINAL RULES

The docket sets forth suggested changes to the Federal Rules of Criminal Procedure considered by the Advisory Committee since 1991. The suggestions are set forth in order by (1) criminal rule number, or (2) where there is no rule number, or several rules may be affected — alphabetically by subject matter.

Suggestion	Docket Number, Source, and Date	Status
	CRIMINAL RULES	
Rule 4 Clarify the ability of judges to issue warrants via facsimile transmission	01-CR-A Magistrate Judge Bernard Zimmerman 1/29/01	1/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 6 Allow grand jury witness to be accompanied by counsel (see Rule 6(d) below)	01-CR-B Robert D. Evans, Director, American Bar Association 3/2/01	3/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 7(b) Effect of tardy indictment	00-CR-B Congressional constituent 3/21/00	5/00 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 10 Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 - Committee considered **DEFERRED INDEFINITELY**
Rule 11 Advise non-U.S. citizen defendant of potential collateral consequences when accepting guilty plea	01-CR-C Richard J. Douglas, Esq., Senate Committee on Foreign Relations 4/3/01	4/01 - Referred to reporter & chair **PENDING FURTHER ACTION**
Rule 11 To expressly inquire prior to trial whether prosecution's proposed guilty plea agreement was communicated to defendant	02-CR-C Judge David D. Dowd, Jr. 5/20/02	6/02 - Referred to reporter & chair **PENDING FURTHER ACTION**
Rule 12.2(d) Sanction for defendant's failure to disclose results of mental examination	Roger Pauley 7/5/01	4/02 - Committee considered 9/02 - Committee considered **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 16(a) and (b) Disclosure of witness names and statements before trial	99-CR-D William R. Wilson, Jr., Esq. 2/92 & 5/18/99	2/92 - Committee considered 10/92 - Committee considered 4/93 - Committee deferred action until 10/93 10/93 - Committee considered 4/94 - Committee considered and approved for amendment 6/94 - Standing Committee approved for publication 9/94 - Published for public comment 4/95 - Committee considered and approved 7/95 - Standing Committee approved 9/95 - Judicial Conference declined to take action **COMPLETED** 5/99 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 23(a) Address the issue of when a jury trial is authorized	00-CR-D Jeremy A. Bell 11/00	11/00 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 29 Extension of time for filing motion	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting **PENDING FURTHER ACTION**
Rule 32 Victim allocution at sentencing	Judge Hodges Prior to 4/92 Pending legislation reactivated issue in 1997/98.	10/92 - Standing Committee approved for publication 12/92 - Published for public comment 4/93 - Committee considered 6/93 - Standing Committee approved 9/93 - Judicial Conference approved 4/94 - Supreme Court approved 12/94 - Effective **COMPLETED** 10/97 - Committee indicated that it was not opposed to addressing the legislation. Committee resolved to maintain Subcommittee to monitor/respond to the legislation. **PENDING FURTHER ACTION**
Rule 32(c)(3)(E) Provide for victim allocution in all felony cases	Professor Jayne Barnard	8/02 - Referred to chair and reporter 9/02 - Committee considered **PENDING FURTHER ACTION**
Rule 32(c)(5) Clerk required to file notice of appeal	00-CR-A Gino J. Agnello Clerk of Court, 7th Circuit 4/11/00	3/00 - Sent directly to chair 5/00 - Referred to reporter **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 32.1(a)(5)(B)(i) Eliminate requirement that the government produce *certified* copies of the judgment, warrant, and warrant application	03-CR-B Judge Wm. F. Sanderson, Jr. 2/24/03	3/03 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 32.1 Pending victims rights/allocution litigation	Pending litigation 1997/98	10/97 - Committee indicated that it did not take a position on the litigation and resolved to maintain Subcommittee to monitor litigation **PENDING FURTHER ACTION**
Rule 32.1 Right of allocution before sentencing at revocation hearing	02-CR-D U.S. v. Frazier 2/25/02	3/02 - Referred to chair and reporter 4/02 - Committee considered 9/02 - Committee considered **PENDING FURTHER ACTION**
Rule 33 Extension of time to file motion for new trial	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting **PENDING FURTHER ACTION**
Rule 34 Extension of time to file motion	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting **PENDING FURTHER ACTION**
Rule 35 Allow defendants to move for reduction of sentence	01-CR-B Robert D. Evans, American Bar Association 3/2/01	3/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 40(a) Authorize magistrate judge to set new conditions of release	03-CR-A Magistrate Judge Robert B. Collings 1/03	1/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 41(c)(2)(D) Recording of oral search warrant	Judge Dowd 2/98	4/98 - Committee deferred until study reveals need for change **DEFERRED INDEFINITELY**
Rule 57 Uniform effective date for local rules	Standing Committee Meeting 12/97	4/98 - Committee considered and deferred action **DEFERRED INDEFINITELY**
	SUBJECT MATTER	
Appeal from a magistrate judge's nondispositive, pretrial order	U.S. v. Abonce-Barerra 7/20/01	4/02 - Committee considered 9/02 - Committee approved proposed amendment **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Habeas Corpus Rule 8(c) Correct apparent mistakes in Rules Governing Section 2254 Cases and Section 2255 Proceedings	97-CR-F Judge Peter Dorsey 7/9/97	8/97 - Referred to chair and reporter 10/97 - Referred to Subcommittee 4/98 - Committee considered 10/98 - Committee considered 4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee deferred pending further study 4/02 - Committee considered and approved for publication 6/02 - Standing Committee approved for publication 8/02 - Published for public comment **PENDING FURTHER ACTION**
Model form for motions under 28 U.S.C. § 2255	00-CR-C Robert L. Byer, Esq. & David R. Fine, Esq. 8/11/00	8/00 - Referred to chair and reporter 4/02 - Committee approved 6/02 - Standing Committee approved for publication 8/02 - Published for public comment **PENDING FURTHER ACTION**
Restyle Habeas Corpus Rules		10/00 - Committee considered 1/01 - Standing Committee authorizes restyle project to proceed 4/02 - Committee approved for publication 6/02 - Standing Committee approved for publication 8/02 - Published for public comment **PENDING FURTHER ACTION**

Item II-A

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 29, 2002

Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code. The Court did not approve the addition of a new Rule 26(b) as proposed by the Judicial Conference. Justice Breyer has issued a dissenting statement, in which Justice O'Connor joins. Justice Scalia has issued a separate statement.

Sincerely,

William H. Rehnquist

APR 29 2002

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 1 through 60.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2002, and shall govern in all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

Item IIB1

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Comments on Proposed Amendments to Rule 41

DATE: March 29, 2003

In June 2002, the Standing Committee approved for publication the Committee's proposed amendments to Rule 41 that address, inter alia, tracking-device warrants. The comment period ended on February 15, 2003.

Attached are: (1) a copy of the published Rule and accompanying Committee Note and (2) a summary of the written comments sent to the Committee. Although the comments are generally supportive of the amendments, several commentators have submitted proposed substantive changes.

The Rule 41 Subcommittee is in the process of reviewing the comments and deciding whether to propose any additional changes. If so, they may prepare and circulate a separate memo.

This item is on the agenda for the April meeting.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 41. Search and Seizure**

(a) Scope and Definitions.

* * * * *

(2) ***Definitions.*** The following definitions apply under this rule:

* * * * *

(D) "Domestic terrorism" and "international terrorism" have the meanings set out in 18 U.S.C. § 2331.

(E) "Tracking device" has the meaning set out in 18 U.S.C. § 3117(b).

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* New material is underlined; matter to be omitted is lined through.

** Text of rule based on amendments that take effect on December 1, 2002, unless Congress takes action otherwise.

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district — or if none is reasonably available, a judge of a state court of record in the district — has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed; ~~and~~

(3) a magistrate judge — in an investigation of domestic terrorism or international terrorism ~~(as~~

~~defined in 18 U.S.C. § 2331)~~ — ~~having~~ with authority in any district in which activities related to the terrorism may have occurred, may issue a warrant for a person or property within or outside that district~~.~~; and

(4) a magistrate judge with authority in the district may issue a warrant to install within the district a tracking device, to use a tracking device, or both; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both.

* * * * *

(d) Obtaining a Warrant.

(1) ***~~Probable Cause~~ In General.*** After receiving an affidavit or other information, a magistrate judge — or if authorized by Rule 41(b), ~~or~~ a judge of a

state court of record — must issue the warrant if there is probable cause to search for and seize a person or property or to install or use a tracking device ~~under Rule 41(c)~~.

* * * * *

(e) Issuing the Warrant.

(1) ***In General.*** The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.

(2) ***Contents of the Warrant.***

(A) Warrant to Search for and Seize a Person or Property. Except for a tracking-device warrant, ~~T~~the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The

warrant must command the officer to:

~~(A)~~(i) execute the warrant within a specified time no longer than 10 days;

~~(B)~~(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

~~(C)~~(iii) return the warrant to the magistrate judge designated in the warrant.

(B) Warrant for a Tracking Device. A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify the length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for

good cause, grant one or more extensions of no more than 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 calendar days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and

(iii) return the warrant to the magistrate judge designated in the warrant.

(3) ***Warrant by Telephonic or Other Means.***

* * * * *

(f) Executing and Returning the Warrant.

(1) Warrant to Search for and Seize a Person or Property.

~~(1)~~(A) *Noting the Time.* The officer executing the warrant must enter on ~~its face~~ it the exact date and time it ~~is~~ was executed.

~~(2)~~(B) *Inventory.* An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.

~~(3)~~(C) *Receipt.* The officer executing the warrant must: ~~(A)~~ give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or ~~(B)~~ must leave a copy of the warrant and receipt at the place where the officer took the property.

~~(4)~~(D) *Return.* The officer executing the warrant must promptly return it — together with the copy of the inventory — to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) ***Warrant for a Tracking Device.***

(A) *Noting the Time.* The officer executing a tracking-device warrant must enter on it the date and time the device was installed and the period during which it was used.

(B) *Return.* Within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it to the magistrate judge designated in the warrant.

(C) *Service.* Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking-device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the

person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with someone of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the magistrate judge may, on one or more occasions, for good cause extend the time to serve the warrant for a reasonable period.

(3) ***Delayed Notice.*** Upon request of the government, a magistrate judge — or if authorized by Rule 41(b), a judge of a state court of record — may delay any notice required by this rule if the delay is authorized by statute.

* * * * *

COMMITTEE NOTE

The amendments to Rule 41 address two issues: first, procedures for issuing tracking-device warrants and second, a provision for delaying any notice required by the rule.

Amended Rule 41(a)(2) includes two new definitional provisions. The first, in Rule 41(a)(2)(D), addresses the definitions of "domestic terrorism" and "international terrorism," terms used in Rule 41(b)(2). The second, in Rule 41(a)(2)(E), addresses the definition of "tracking device."

Amended Rule 41(b)(4) is a new provision, designed to address the use of tracking devices. Such searches are recognized both by statute, *see* 18 U.S.C. § 3117(b) and by caselaw, *see, e.g.*, *United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983). Nonetheless, there is no procedural guidance in current Rule 41 for those judicial officers who are asked to issue tracking-device warrants. As with traditional search warrants for persons or property, tracking-device warrants may implicate law enforcement interests in multiple districts. Further, warrants may be required to monitor tracking devices when they are used to monitor persons or property in areas where there is a reasonable expectation of privacy. *See, e.g., United States v. Karo*, *supra* (although no probable cause was required to install beeper, officers' monitoring of its location in defendant's home raised Fourth Amendment concerns).

The amendment provides that a magistrate judge may issue a warrant, if he or she has the authority to do so in the district, to install or use a tracking device, as that term is defined in 18 U.S.C. § 3117(b). The magistrate judge's authority to allow installation of a tracking device includes the authority to permit maintenance and removal of the tracking device. The Committee did not intend by this

amendment to expand or contract the definition of what might constitute a tracking device. The amendment is based on the understanding that the device will assist officers only in tracking the movements of a person or property. The warrant may authorize officers to track the person or property within the district of issuance, or outside the district.

Because the authorized tracking may involve more than one district or state, the Committee believes that only federal judicial officers should be authorized to issue this type of warrant. Even where officers have no reason to believe initially that a person or property will move outside the district of issuance, issuing a warrant to authorize tracking both inside and outside the district avoids the necessity of obtaining multiple warrants if the property or person later crosses district or state lines.

The amendment reflects the view that if the officers intend to install or use the device in a constitutionally protected area, they must obtain judicial approval to do so. If, on the other hand, the officers intend to install and use the device without implicating any Fourth Amendment rights, there is no need to obtain the warrant. *See, e.g., United States v. Knotts, supra*, where the officers' actions in installing and following tracking device did not amount to a search under the Fourth Amendment.

Amended Rule 41(d) includes new language on tracking devices. The tracking-device statute, 18 U.S.C. § 3117, does not specify the standard an applicant must meet to install a tracking device. The Supreme Court has acknowledged that the standard for installation of a tracking device is unresolved, but has reserved ruling on the issue until it is squarely presented by the facts of a case. *See United States v. Karo*, 468 U.S. 705, 718 n. 5 (1984). The amendment to Rule 41 does not resolve this issue or hold that such warrants may issue only on a showing of probable cause. Instead, it simply provides that if probable cause is shown, the magistrate judge

must issue the warrant. And the warrant is only needed if the device is installed (for example, in the trunk of the defendant's car) or monitored (for example, while the car is in the defendant's garage) in an area in which the person being monitored has a reasonable expectation of privacy.

Amended Rule 41(e)(2)(B) is a new provision intended to address the contents of tracking-device warrants. To avoid open-ended monitoring of tracking devices, the revised rule requires the magistrate judge to specify in the warrant the length of time for using the device. Although the initial time stated in the warrant may not exceed 45 days, extensions of time may be granted for good cause. The rule further specifies that any installation of a tracking device authorized by the warrant must be made within ten calendar days and, unless otherwise provided, that any installation occur during daylight hours.

Current Rule 41(f) has been completely revised to accommodate new provisions dealing with tracking-device warrants. First, current Rule 41(f)(1) has been revised to address execution and delivery of warrants to search for and seize a person or property; no substantive change has been made to that provision. New Rule 41(f)(2) addresses execution and delivery of tracking-device warrants. That provision generally tracks the structure of revised Rule 41(f)(1), with appropriate adjustments for the particular requirements of tracking-device warrants. Under Rule 41(f)(2)(A) the officer must note on the warrant the time the device was installed and the period during which the device was used. And under new Rule 41(f)(2)(B), the officer must return the tracking-device warrant to the magistrate judge designated in the warrant within 10 calendar days after use of the device has ended.

Amended Rule 41(f)(2)(C) addresses the particular problems of serving a copy of a tracking-device warrant on the person who has been tracked, or whose property has been tracked. In the case of other warrants, current Rule 41 envisions that the subjects of the

search typically know that they have been searched, usually within a short period of time after the search has taken place. Tracking-device warrants, on the other hand, are by their nature covert intrusions and can be successfully used only when the person being investigated is unaware that a tracking device is being used. The amendment requires that the officer must serve a copy of the tracking-device warrant on the person within 10 calendar days after the tracking has ended. That service may be accomplished by either personally serving the person or by leaving a copy at the person's residence or usual abode and by sending a copy by mail. The Rule also provides, however, that the officer may (for good cause) obtain the court's permission to delay further the delivery of the warrant. That might be appropriate, for example, where the owner of the tracked property is undetermined, or where the officer establishes that the investigation is ongoing and that disclosure of the warrant will compromise that investigation.

Use of a tracking device is to be distinguished from other continuous monitoring or observations that are governed by statutory provisions or caselaw. *See* Title III, Omnibus Crime Control and Safe Streets Act of 1968, *as amended* by Title I of the 1968 Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2520; *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986) (use of video camera); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984) (television surveillance).

Finally, amended Rule 41(f)(3) is a new provision that permits the government to request, and the magistrate judge to grant, a delay in any notice required in Rule 41. The amendment is co-extensive with 18 U.S.C. § 3103a(b). That new provision, added as part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, authorizes a court to delay any notice required in conjunction with the issuance of any search warrants.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 41

I. SUMMARY OF COMMENTS

The Committee received seven written comments on Rule 41. The commentators generally approved of the concept of including a reference to tracking-device warrants in the rule. Several commentators, however, offered suggested language that they believed would clarify several issues, including the definition of probable cause vis a vis tracking device warrants, and language that would more closely parallel provisions in Title III of the Omnibus Crime Control Act of 1968.

II. LIST OF COMMENTATORS: RULE 41

02-CR-003 Mr. Jack E. Horsley, Esq., Matoon, Illinois, October 25, 2002.

02-CR-007 Hon. Joel M. Feldman, N.D. Ga,, Atlanta, Ga., December 2, 2002

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-014 Mr. Kent S. Hofmeister, President, Federal Bar Association, Dallas, Texas, February 14, 2003

02-CR-015 Mr. Saul Bercovitch, Staff Attorney, State Bar of California's Committee on Federal Courts, December 14, 2003

02-CR-019 Mr. Eric H. Jaso, Counselor to Asst. Attorney General, Department of Justice, Washington, D.C., February 20, 2003

02-CR-021 Mr. William Genego and Peter Goldberger, National Ass'n of Criminal Defense Lawyers, March 21, 2003

III. COMMENTS: RULE 41

Mr. Jack E. Horsley, Esq. (02-CR-003)
Matoon, Illinois
October 25, 2002.

Mr. Horsley believes that the proposed amendments concerning tracking-device warrants should be adopted

Hon. Joel M. Feldman (02-CR-007)
United States District Court, N.D. Ga,
Atlanta, Georgia
December 2, 2002

Judge Feldman suggests that the Committee consider further amendments to Rule 41 regarding warrants used to obtain electronic records from providers of electronic communications services. He attaches a written inquiry from one of colleagues pointing out a number of questions that are likely to arise in such cases.

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judge's Association generally supports the proposed amendments to Rule 41. But the Association believes that either the rule itself or the committee note should be changed to clarify whether a separate warrant is needed to enter constitutionally protected property to install the device. The Association states that the current rule and note are not clear on that point, and believe that as written, unnecessary litigation will result.

Mr. Kent S. Hofmeister (02-CR-014)
President, Federal Bar Association
Dallas, Texas
February 14, 2003

The Federal Bar Association approves of the amendments to Rule 41, noting that they fill a void.

Mr. Saul Bercovitch (02-CR-015)
Staff Attorney
State Bar of California's Committee on Federal Courts
December 14, 2003

The Committee on Federal Courts for the State Bar of California generally approves of the proposed amendments to Rule 41. But it raises two points that it believes should be addressed. First, the amendments do not clarify what the probable cause finding must be made upon, or whether a showing less than probable cause will suffice.

Second, the rule does not address the consequences of failure to comply with the delayed notice provisions in Rule 41(f)(2).

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Jaso, on behalf of the Department of Justice, offers several suggested changes to the proposed amendments to Rule 41. First, the Department is concerned that the language in Rule 41(d) might be read to require that a warrant is required anytime a tracking-device is installed; he suggests alternative language. Second, he states that some members of the Appellate Chiefs Working Group recommend deletion of the requirement that the installation occur during daylight hours. And third, he recommends a change to Rule 41(f)(2)(C), which permits delayed notification following execution of a tracking device; he believes that it would be better to delete the "good cause shown" language, and simply cross reference Rule 41(f)(3), which is the general provision dealing with delayed notice.

Mr. William Genego & Mr. Peter Goldberger (02-CR-021)
National Association of Criminal Defense Lawyers
March 21, 2003

NADCL offers a number of suggestions on Rule 41. First, it urges the Committee to use two benchmarks in amending Rule 41: tradition and jurisprudence of issuing warrants and Title III of the Omnibus Crime Control Act of 1968. Second, it notes that there is a lack of parallelism in Rule 41(b)(3) and (b)(4) from (b)(1) and (b)(2); it notes that use of the words "may issue" in (b)(4) are ambiguous. Third, NADCL also suggests that the rule contain some reference to the fact that a warrant may be issued by district judges as well as magistrate judges. Fourth, it offers suggested language that would require that the probable cause focus on the specific need for installing the tracking device and that the government first show that there is a genuine need for using a tracking device. Fifth, regarding Rule 41(e), NADCL again urges the Committee to follow Title III. And finally, with regard to Rule 41(f)(2), it states that the current language is open-ended and vague; it suggests new wording that it believes would require the magistrate judge to specify a particular period of time.

Item II B2

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Post-Publication Changes to Habeas Rules**

DATE: **March 24, 2003**

I. In General

In June 2002, the Standing Committee approved for publication the proposed style and substantive amendments to the Rules Governing § 2254 Proceedings and Rules Governing § 2255 Proceedings, and the accompanying official forms. The publication and comment period ended on February 15, 2003. The Committee received written comments from twenty-one individuals or organizations.

On Friday, February 28th and Friday, March 7, 2003, the Habeas Rules Subcommittee (Judge Trager, chair, Judge Miller, Mr. Campbell, Professor King, and Mr. Jaso) held two conference calls to review those written comments and discuss what, if any, additional changes should be made to the rules. Professor Robbins, Professor Schlueter, Mr. Wroblewski, Mr. Rabiej, and Mr. McCabe also participated in the conference calls.

During those discussions, the Subcommittee agreed to recommend the following changes (summarized here) to the rules and the Committee Notes. A copy of the revised rules (new material underlined and language to be deleted, lined through), a summary of the written comments on each rule, and the revised official forms, are attached.

II. Rules Governing § 2254 Proceedings

The Subcommittee recommends the following changes to the published § 2254 Rules:

- **Rule 2. The Petition:**

Rule 2(c)(2) should read "state the facts" rather than "briefly summarize the facts." As one commentator noted, the current language may actually mislead the petitioner and is also redundant.

Rule (2)(c)(5) should be changed to emphasize that any person, other than the petitioner, who signs the petition must be authorized to do so; the revised rule now specifically cites § 2242. The Committee Note has been amended to reflect that point.

- **Rule 3. Filing the Petition; Inmate Filing**

  The Committee Note has been changed to reflect that the clerk must file a petition, even in those instances where the necessary filing fee or in forma pauperis form is not attached. The Note also includes new language concerning the equitable tolling of the statute of limitations.

- **Rule 4. Preliminary Review; Serving the Petition and Order**

  The Rule and Committee Note have been amended to reflect the view of some commentators that it is common practice in some districts for the government to file a pre-answer motion to dismiss.

- **Rule 5. The Answer and the Reply**

  Rule 5(a) has been modified to read that the government is not required to "respond" to the petition unless the court so orders; the term "respond" has been suggested because it leaves open the possibility that the government's first response (as it is in some districts) is in the form of a pre-answer motion to dismiss the petition. The Note has been changed to reflect the fact that although the rule itself does not reflect that particular motion, it is used in some districts and refers the reader to Rule 4.

  The Note has also been changed to reflect that there has been a potential substantive change from the current rule—the published rule now requires that the answer address affirmative defenses, while the current rule does not. The Note states that the Committee believes the new language reflects current law.

  The Note also addresses the use of the term "traverse." One commentator noted that that is the term that is commonly used but that it does not appear in the rule itself.

- **Rule 6. Discovery**

  Rule 6(b) has been rewritten to require that discovery requests be supported by reasons, to assist the court in deciding what, if any, discovery should take place.

- **Rule 7. Expanding the Record**

  Rule 7(a) has been changed by removing the reference to the "merits" of the petition; one commentator noted that the court may wish to expand the record for purposes other than the merits of the case. It is has been changed to reflect that someone other than a party may authenticate the materials.

- **Rule 9. Second or Successive Petitions**

  The subcommittee has recommended that new language be added to Rule 9 that would require the court to transfer a second or successive petition to the court of appeals. That practice is currently used in several circuits, as reflected in the Note.

III. Rules Governing § 2255 Proceedings

The Subcommittee recommends the following changes to the published § 2255 Rules

- **Rule 2. The Motion**

  Rule 2(c)(2) should read, "state the facts" rather than "briefly summarize the facts." As one commentator noted, the current language may actually mislead the movant and is also redundant.

  Rule (2)(c)(5) should be changed to emphasize that any person, other than the movant, who signs the petition must be authorized to do so; there is some question, however, whether the rule should include a cite to § 2242. The Committee Note has been amended to reflect that the person signing on behalf of the movant must be authorized to do so.

- **Rule 3. Filing the Motion; Inmate Filing**

  The Committee Note has been changed to reflect that the clerk must file a motion, even in those instances where the necessary filing fee or in forma pauperis form is not attached. The Note also includes new language concerning the equitable tolling of the statute of limitations.

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- **Rule 7. Expanding the Record**

  Rule 7(a) has been changed by removing the reference to the "merits" of the motion; one commentator noted that the court may wish to expand the record for purposes other than the merits of the case. It is has been changed to reflect that someone other than a party may authenticate the materials.

- **Rule 9. Second or Successive Petitions**

  The subcommittee has recommended that new language be added to Rule 9 that would require the court to transfer a second or successive motion to the court of appeals. That practice is currently used in several circuits, as reflected in the Note.

IV. Official Forms for the § 2254 and § 2255 Rules

The Subcommittee has suggested a number of changes to the official forms. Those changes will be reviewed at the meeting.

V. Issues to be Addressed by Full Committee

In addition to deciding whether to accept the Subcommittee's recommended changes to the Rules and the Committee Notes, and the forms, the subcommittee anticipates that several matters will need to be addressed by the Committee.

- First, there is a question about whether the petitioner or movant should be required to address possible affirmative defenses.

- Second, the Committee will need to decide whether the official forms should continue to list the "most frequently cited" possible grounds for relief and whether the forms should include an additional (or expanded) list of possible grounds for relief that might be raised in a death penalty case.

- Third, the subcommittee was not able to address the question of whether the term "attorney for the government" should be used throughout the rules, and if so, whether a special definition for that term should be added to the rules.

RULES FOR PROCEEDINGS UNDER 28 U.S.C. § 2254

Present Rules	Restyled Rules
Rule 1. Scope of Rules	**Rule 1. Scope**
(a) Applicable to cases involving custody pursuant to a judgment of a state court. These rules govern the procedure in the United States district courts on applications under 28 U.S.C. § 2254:	**(a) Cases Involving a Petition under 28 U.S.C. § 2254.** These rules govern a petition for a writ of habeas corpus filed in a United States district court under 28 U.S.C. § 2254 by:
(1) by a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States; and	(1) a person in custody under a state-court judgment who seeks a determination that the custody violates the Constitution, laws, or treaties of the United States; and
(2) by a person in custody pursuant to a judgment of either a state or a federal court, who makes application for a determination that custody to which he may be subject in the future under a judgment of a state court will be in violation of the Constitution, laws, or treaties of the United States.	(2) a person in custody under a state-court or federal-court judgment who seeks a determination that future custody under a state-court judgment would violate the Constitution, laws, or treaties of the United States.
(b) Other situations. In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court.	**(b) Other Cases.** The district court may apply these rules to a habeas corpus petition not covered by Rule 1(a).

COMMITTEE NOTE

The language of Rule 1 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Rule 2. Petition	Rule 2. The Petition
(a) Applicants in present custody. If the applicant is presently in custody pursuant to the state judgment in question, the application shall be in the form of a petition for a writ of habeas corpus in which the state officer having custody of the applicant shall be named as respondent.	(a) **Current Custody; Naming the Respondent.** If the petitioner is currently in custody under a state-court judgment, the petition must name as respondent the state officer who has custody.
(b) Applicants subject to future custody. If the applicant is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future, the application shall be in the form of a petition for a writ of habeas corpus with an added prayer for appropriate relief against the judgment which he seeks to attack. In such a case the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents.	(b) **Future Custody; Naming the Respondents and Specifying the Judgment.** If the petitioner is not yet in custody — but may be subject to future custody — under the state-court judgment being contested, the petition must name as respondents both the officer who has current custody and the attorney general of the state where the judgment was entered. The petition must ask for relief against the state-court judgment being contested.
(c) Form of Petition. The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in a form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.	(c) **Form.** The petition must: (1) specify all the grounds for relief available to the petitioner; (2) state ~~briefly summarize~~ the facts supporting each ground; (3) state the relief requested; (4) be typewritten or legibly handwritten; and (5) be signed under penalty of perjury by the petitioner or a person authorized to do so under 28 U.S.C. § 2242.

(d) Petition to be directed to judgments of one court only. A petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.	(d) **Standard Form.** The petition must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule. The clerk must make blank forms available to petitioners without charge.
(e) Return of insufficient petition. If a petition received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the petitioner, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the petition.	(e) **Separate Petitions for Judgments of Separate Courts.** A petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of each court.

COMMITTEE NOTE

The language of Rule 2 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

Revised Rule 2(c)(5) has been amended by removing the requirement that the petition be signed personally by the petitioner. As reflected in 28 U.S.C. § 2242, an application for habeas corpus relief may be filed by the person who is seeking relief, or by someone acting on behalf of that person, assuming that the signer is authorized to do so. See, e.g., Whitmore v. Arkansas, 495 U.S. 149 (1990) (discussion of requisites for "next friend" standing in petition for habeas corpus).

The language in new Rule 2(d) has been changed to reflect that a petitioner must substantially follow the standard form, which is appended to the rules, or a form provided by the court. The current rule, Rule 2(c), seems to indicate a preference for the standard "national" form. Under the amended rule, there is no stated preference. The Committee understood that current practice in some courts is that if the petitioner first files a petition using the national form, that courts may ask the petitioner to supplement it with the local form.

Current Rule 2(e), which provided for returning an insufficient petition, has been deleted. The Committee believed that the approach in Federal Rule of Civil Procedure 5(e) was more

appropriate for dealing with petitions that do not conform to the form requirements of the rule. That Rule provides that the clerk may not refuse to accept a filing solely for the reason that it fails to comply with these rules or local rules. Prior to the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the petitioner suffered no penalty, other than delay, if the petition was deemed insufficient. Now that a one-year statute of limitations applies to petitions filed under § 2254, *see* 28 U.S.C. § 2244(d)(1), the court's dismissal of a petition because it is not in proper form may pose a significant penalty for a petitioner, who may not be able to file another petition within the one-year limitation period. Now, under revised Rule 3(b), the clerk is required to file a petition, even though it may otherwise fail to comply with the provisions in revised Rule 2(c). The Committee believed that the better procedure was to accept the defective petition and require the petitioner to submit a corrected petition that conforms to Rule 2(c).

Rule 3. Filing Petition	Rule 3. Filing the Petition; Inmate Filing
(a) Place of filing; copies; filing fee. A petition shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof. It shall also be accompanied by the filing fee prescribed by law unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis. If the petitioner desires to prosecute the petition in forma pauperis, he shall file the affidavit required by 28 U.S.C. § 1915. In all such cases the petition shall also be accompanied by a certificate of the warden or other appropriate officer of the institution in which the petitioner is confined as to the amount of money or securities on deposit to the petitioner's credit in any account in the institution, which certificate may be considered by the court in acting upon his application for leave to proceed in forma pauperis.	**(a) Where to File; Copies; Filing Fee.** An original and two copies of the petition must be filed with the clerk and must be accompanied by: (1) the applicable filing fee, or (2) a motion for leave to proceed in forma pauperis, the affidavit required by 28 U.S.C. § 1915, and a certificate from the warden or other appropriate officer of the place of confinement showing the amount of money or securities that the petitioner has in any account in the institution.
(b) Filing and service. Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, and having ascertained that the petition appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the petition and enter it on the docket in his office. The filing of the petition shall not require the respondent to answer the petition or otherwise move with respect to it unless so ordered by the court.	**(b) Filing.** The clerk must file the petition and enter it on the docket. **(c) Time to File.** The time for filing a petition is governed by 28 U.S.C. § 2244(d). **(d) Inmate Filing.** A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and

Rule 3. Filing Petition	Rule 3. Filing the Petition; Inmate Filing
	state that first-class postage has been prepaid.

COMMITTEE NOTE

The language of Rule 3 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended except as described below.

The last sentence of current Rule 3(b), dealing with an answer being filed by the respondent, has been moved to revised Rule 5(a).

Revised Rule 3(b) is new and is intended to parallel Federal Rule of Civil Procedure 5(e), which provides that the clerk may not refuse to accept a filing solely for the reason that it fails to comply with these rules or local rules. Prior to the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the petitioner suffered no penalty, other than delay, if the petition was deemed insufficient. That Act, however, added a one-year statute of limitations to petitions filed under § 2254, *see* 28 U.S.C. § 2244(d)(1). Thus, a court's dismissal of a defective petition may pose a significant penalty for a petitioner who may not be able to file a corrected petition within the one-year limitation period. The Committee believed that the better procedure was to accept the defective petition and require the petitioner to submit a corrected petition that conforms to Rule 2. Thus, revised 3(b) requires the clerk to file a petition, even though it may otherwise fail to comply with Rule 2. The rule, however, is not limited to those instances where the petition is defective only in form; the clerk would also be required, for example, to file the petition even though it lacked the requisite filing fee or an *in forma pauperis* form.

Revised Rule 3(c), which sets out a specific reference to 28 U.S.C. § 2244(d), is new and has been added to put petitioners on notice that a one-year statute of limitations applies to petitions filed under these Rules. Although the rule does not address the issue, every circuit that has addressed the issue has taken the position that equitable tolling of the statute of limitations is available in appropriate circumstances. *See, e.g., Smith v. McGinnis*, 208 F.3d 13, 17-18 (2d Cir. 2000); *Miller v. New Jersey State Department of Corrections*, 145 F.3d 616, 618-19 (3d Cir. 1998); *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000). The Supreme Court has not addressed the question directly. *See Duncan v. Walker*, 533 U.S. 167, 181 (2001) ("We ... have no occasion to address the question that Justice Stevens raises concerning the availability of equitable tolling.").

Rule 3(d) is new and provides guidance on determining whether a petition from an inmate is considered to have been filed in a timely fashion. The new provision parallels Federal Rule of Appellate Procedure 25(a)(2)(C).

Rule 4. Preliminary Consideration by Judge	Rule 4. Preliminary Review; Serving the Petition and Order
The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.	The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other pleading within a fixed time, or to take other action the judge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

COMMITTEE NOTE

The language of Rule 4 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

The amended rule reflects that if the court decides not to dismiss the petition, the court may order the respondent to file, inter alia, a motion, in recognition of the current practice in some districts where a pre-answer motion to dismiss is filed by the respondent.

The requirement that in every case the clerk of the court must serve a copy of the petition on the respondent by certified mail has been deleted. In addition, the current requirement that the petition be sent to the Attorney General of the state has been modified to reflect practice in some jurisdictions that the appropriate state official may be someone other than the Attorney General, for

example, the officer in charge of a local confinement facility. This comports with a similar provision in 28 U.S.C. § 2252, which addresses notice of habeas corpus proceedings to the state's attorney general or other appropriate officer of the state.

Rule 5. Answer; Contents	**Rule 5. The Answer and the Reply**
The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding.	(a) **When Required.** The respondent is not required to [answer] [respond to] the petition unless a judge so orders. (b) **Addressing the Allegations; State Remedies.** The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by any affirmative defense, including a failure to exhaust state remedies, a procedural bar, or a statute of limitations.
The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted.	(c) **Transcripts.** The answer must also indicate what transcripts (of pretrial, trial, sentencing, or post-conviction proceedings) are available, when they can be furnished, and what proceedings have been recorded but not transcribed. The respondent must attach to the answer parts of the transcript that the respondent considers relevant. The judge may order that the respondent furnish other parts of existing transcripts or that parts of untranscribed recordings be transcribed and furnished. If a transcript cannot be obtained, the respondent may submit a narrative summary of the evidence.
If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.	(d) **Briefs on Appeal and Opinions.** The respondent must also file with the answer a copy of: (1) any brief that the petitioner submitted in an appellate court contesting the conviction or

	sentence, or contesting an adverse judgment or order in a post-conviction proceeding; (2) any brief that the prosecution submitted in an appellate court relating to the conviction or sentence; and (3) the opinions and dispositive orders of the appellate court relating to the conviction or the sentence. **(e) Reply.** The petitioner may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

COMMITTEE NOTE

The language of Rule 5 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

Revised Rule 5(a), which provides that the respondent is not required to file an answer to the petition, unless a judge so orders, is taken from current Rule 3(b). The revised rule does not address the practice in some districts, where the respondent files a pre-answer motion to dismiss the petition. But revised Rule 4 contemplates that practice.

Rule 5(b) has been amended to require that the answer address any affirmative defenses, including procedural bars, and any statute of limitations. While those matters are not addressed in the current rule, the Committee intends no substantive change with the additional new language. Instead, the Committee believes that the explicit mention of those issues in the rule conforms to current case law and statutory provisions. *See, e.g.*, 28 U.S.C. § 2244(d)(1).

Revised Rule 5(d) includes new material. First, Rule 5(d)(2), requires a respondent – assuming an answer is filed – to provide the court with a copy of any brief submitted by the prosecution to the appellate court. And Rule 5(d)(3) now provides that the respondent also file copies of any opinions and dispositive orders of the appellate court concerning the conviction or sentence. These provisions are intended to insure that the court is provided with additional information that may assist it in resolving the issues raised, or not raised, in the petition.

Finally, revised Rule 5(e) reflects the practice in some jurisdictions that a petitioner has an opportunity to file a response, a "traverse," or other pleading, to the respondent's answer. Rather than using terms such as "traverse," *see* 28 U.S.C. § 2248, to identify the petitioner's response to the answer, the rule uses the more general term "reply." ~~In that case, the~~ The Rule prescribes that the court set the time for such responses and in lieu of setting specific time limits in each case, the court may decide to include such time limits in its local rules.

Rule 6. Discovery	Rule 6. Discovery
(a) Leave of court required. A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g).	(a) **Leave of Court Required.** A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure but may limit the extent of discovery. If necessary for effective discovery, the judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A.
(b) Requests for discovery. Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.	(b) **Requesting Discovery.** ~~When requesting discovery, a party must include a statement of any interrogatories or requests for admission, and a list of any requested documents~~ A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.
(c) Expenses. If the respondent is granted leave to take the deposition of the petitioner or any other person the judge may as a condition of taking it direct that the respondent pay the expenses of travel and subsistence and fees of counsel for the petitioner to attend the taking of the deposition.	(c) **Deposition Expenses.** If the respondent is granted leave to take a deposition, the judge may require the respondent to pay the travel expenses, subsistence expenses, and fees of the petitioner's attorney to attend the deposition.

COMMITTEE NOTE

The language of Rule 6 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Rule 7. Expansion of Record	Rule 7. Expanding the Record
(a) Direction for expansion. If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.	**(a) In General.** If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to ~~the merits of~~ the petition. ~~The judge may require the parties to authenticate these materials~~. The judge may require that these materials be authenticated.
(b) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.	**(b) Types of Materials.** The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.
(c) Submission to opposing party. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness. **(d) Authentication.** The court may require the authentication of any material under subdivision (b) or (c).	**(c) Review by the Opposing Party.** The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

COMMITTEE NOTE

The language of Rule 7 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

The language in current Rule 7(d), which deals with authentication of materials in the expanded record, has been moved to revised Rule 7(a).

Rule 8. Evidentiary Hearing	Rule 8. Evidentiary Hearing
(a) Determination by court. If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.	(a) **Determining Whether to Hold a Hearing.** If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.
(b) Function of the magistrate. (1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition. (2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties. (3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. (4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.	(b) **Reference to a Magistrate Judge.** A judge may, under 28 U.S.C. § 636(b), refer the petition to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within 10 days after being served, a party may file objections as provided by local court rule. The judge must determine *de novo* any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

(c) Appointment of counsel; time for hearing. If an evidentiary hearing is required the judge shall appoint counsel for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the case if the interest of justice so requires.	(c) **Appointing Counsel; Time of Hearing.** If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. These rules do not limit the appointment of counsel under § 3006A at any stage of the proceeding.

COMMITTEE NOTE

The language of Rule 8 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

The requirement in current Rule 8(b)(2) that a copy of the magistrate judge's findings must be promptly mailed to all parties has been changed in revised Rule 8(b) to require that copies of those findings be served on all parties. As used in this rule, requiring that the parties be "served" is consistent with Federal Rule of Civil Procedure 5(b), which may include mailing the copies.

Rule 9. Delayed or Successive Petitions	Rule 9. Second or Successive Petitions
(a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.	
(b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.	Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition. If the district court determines that the petition is a second or successive petition, without the requisite order, the court must promptly enter an order transferring the petition to the court of appeals.

COMMITTEE NOTE

The language of Rule 9 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as noted below.

First, current Rule 9(a) has been deleted as being unnecessary in light of the applicable one-year statute of limitations for § 2254 petitions, added as part of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214.

Second, current Rule 9(b), now Rule 9, has been changed to also reflect provisions in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, which now require a petitioner to obtain approval from the appropriate court of appeals before filing a second or successive petition. *See* 28 U.S.C. § 2244(b)(3).

Third, the amended rule provides that if the district court determines that the petition is a second or successive petition, the court must forward the case directly to the court of appeals, a

practice now used in some circuits. See, e.g., Liriano v. United States, 95 F.3d 119, 122 (2d Cir. 1996) (court established procedure requiring district courts within circuit to forward second or successive petitions that do not already include an authorization by the circuit court under 28 U.S.C. § 2244(b)(3)). *See also* In re Epps, 127 F.3d 364 (5th Cir. 1997); Pease v. Klinger, 115 F.3d 764 (10th Cir. 1997).

Finally, the title of Rule 9 has been changed to reflect the fact that the only topic now addressed in the rule is that of second or successive petitions.

Rule 10. Powers of Magistrates	Rule 10. Powers of a Magistrate Judge
The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. § 636.	If authorized to do so under 28 U.S.C. § 636, a magistrate judge may perform the duties of a district judge under these rules.

COMMITTEE NOTE

The language of Rule 10 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Rule 11. Federal Rules of Civil Procedure; Extent of Applicability	Rule 11. Applicability of the Federal Rules of Civil Procedure
The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.	The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied to a proceeding under these rules.

COMMITTEE NOTE

The language of Rule 11 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

RULES FOR PROCEEDINGS UNDER 28 U.S.C. § 2255

Present Rules	Restyled Rules
Rule 1. Scope of Rules	**Rule 1. Scope**
These rules govern the procedure in the district court on a motion under 28 U.S.C. § 2255: (1) by a person in custody pursuant to a judgment of that court for a determination that the judgment was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack; and	These rules govern a motion filed in a United States district court under 28 U.S.C. § 2255 by: **(a)** a person in custody under a judgment of that court who seeks a determination that: (1) the judgment violates the Constitution or laws of the United States; (2) the court lacked jurisdiction to enter the judgment; (3) the sentence exceeded the maximum allowed by law; or (4) the judgment or sentence is otherwise subject to collateral review; and

(2) by a person in custody pursuant to a judgment of a state or other federal court and subject to future custody under a judgment of the district court for a determination that such future custody will be in violation of the Constitution or laws of the United States, or that the district court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.	**(b)** a person in custody under a judgment of a state court or another federal court, and subject to future custody under a judgment of the district court, who seeks a determination that: (1) future custody under a judgment of the district court would violate the Constitution or laws of the United States; (2) the district court lacked jurisdiction to enter the judgment; (3) the district court's sentence exceeded the maximum allowed by law; or (4) the district court's judgment or sentence is otherwise subject to collateral review.

COMMITTEE NOTE

The language of Rule 1 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Rule 2. Motion	Rule 2. The Motion
(a) Nature of application for relief. If the person is presently in custody pursuant to the federal judgment in question, or if not presently in custody may be subject to such custody in the future pursuant to such judgment, the application for relief shall be in the form of a motion to vacate, set aside, or correct the sentence.	**(a) Applying for Relief.** The application must be in the form of a motion to vacate, set aside, or correct the sentence.
(b) Form of Motion. The motion shall be in substantially the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.	**(b) Form.** The motion must: (1) specify all the grounds for relief available to the moving party; (2) state ~~briefly summarize~~ the facts supporting each ground; (3) state the relief requested; (4) be typewritten or legibly handwritten; and (5) be signed under penalty of perjury by the movant or a person authorized to do so [under 28 U.S.C. § 2242] **(c) Standard Form.** The motion must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule. The clerk must make blank forms available to moving parties without charge.
(c) Motion to be directed to one judgment only. A motion shall be limited to the assertion of a claim for relief against one judgment only of the district court. If a movant desires to attack the validity of other judgments of that or any other district court under which he is in custody or may be	**(d) Separate Motions for Separate Judgments.** A moving party who seeks relief from more than one judgment must file a separate motion covering each judgment.

subject to future custody, as the case may be, he shall do so by separate motions.	
(d) Return of insufficient motion. If a motion received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the movant, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion.	

COMMITTEE NOTE

The language of Rule 2 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

Revised Rule 2(b)(5) has been amended by removing the requirement that the motion be signed personally by the moving party. Thus, under the amended rule the motion may be signed by movant personally or by someone acting on behalf of the movant, assuming that the person is authorized to do so, for example an attorney for the movant. The Committee envisions that the courts would apply third-party, or "next-friend," standing analysis in deciding whether the signer was actually authorized to sign the motion on behalf of the movant. See generally Whitmore v. Arkansas, 495 U.S. 149 (1990) (discussion of requisites for "next friend" standing in habeas petitions). *See also* 28 U.S.C. § 2242 (application for habeas corpus relief may be filed by the person who is seeking relief, or by someone acting on behalf of that person).

The language in new Rule 2(c) has been changed to reflect that a moving party must substantially follow the standard form, which is appended to the rules, or a form provided by the court. The current rule, Rule 2(c), seems to indicate a preference for the standard "national" form. Under the amended rule, there is no stated preference. The Committee understood that the current practice in some courts is that if the moving party first files a motion using the national form, that courts may ask the moving party to supplement it with the local form.

Current Rule 2(d), which provided for returning an insufficient motion has been deleted. The Committee believed that the approach in Federal Rule of Civil Procedure 5(e) was more appropriate for dealing with motions that do not conform to the form requirements of the rule. That Rule provides that the clerk may not refuse to accept a filing solely for the reason that it fails to comply with these rules or local rules. Prior to the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the moving party suffered no penalty, other than delay, if the motion was deemed insufficient. Now that a one-year statute of

limitations applies to motions filed under § 2255, *see* 28 U.S.C. § 2244(d)(1), the court's dismissal of a motion because it is not in proper form may pose a significant penalty for a moving party, who may not be able to file another motion within the one-year limitation period. Now, under revised Rule 3(b), the clerk is required to file a motion, even though it may otherwise fail to comply with the provisions in revised Rule 2(b). The Committee believed that the better procedure was to accept the defective motion and require the moving party to submit a corrected motion that conforms to Rule 2(b).

Rule 3. Filing Motion	Rule 3. Filing the Motion; Inmate Filing
(a) Place of filing; copies. A motion under these rules shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof.	(a) **Where to File; Copies.** An original and two copies of the motion must be filed with the clerk.
(b) Filing and service. Upon receipt of the motion and having ascertained that it appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the motion and enter it on the docket in his office in the criminal action in which was entered the judgment to which it is directed. He shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the United States Attorney of the district in which the judgment under attack was entered. The filing of the motion shall not require said United States Attorney to answer the motion or otherwise move with respect to it unless so ordered by the court.	(b) **Filing and Service.** The clerk must file the motion and enter it on the criminal docket of the case in which the challenged judgment was entered. The clerk must then deliver or serve a copy of the motion on the [United States attorney] [attorney for the government] in that district, together with a notice of its filing. (c) **Time to File.** The time for filing a motion is governed by 28 U.S.C. § 2255 ¶ 6. (d) **Inmate Filing.** A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

COMMITTEE NOTE

The language of Rule 3 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Revised Rule 3(b) is new and is intended to parallel Federal Rule of Civil Procedure 5(e), which provides that the clerk may not refuse to accept a filing solely for the reason that it fails to comply with these rules or local rules. Prior to the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the moving party suffered no penalty, other than delay, if the petition was deemed insufficient. That Act, however, added a one-year statute of limitations to motions filed under § 2255, *see* 28 U.S.C. § 2244(d)(1). Thus, a court's dismissal of a defective motion may pose a significant penalty for a moving party who may not be able to file a corrected motion within the one-year limitation period. The Committee believed that the better procedure was to accept the defective motion and require the moving party to submit a corrected motion that conforms to Rule 2. Thus, revised 3(b) requires the clerk is required to file a motion, even though it may otherwise fail to comply with Rule 2.

Revised Rule 3(c), which sets out a specific reference to 28 U.S.C. § 2255, paragraph 6, is new and has been added to put moving parties on notice that a one-year statute of limitations applies to motions filed under these Rules. Although the rule does not address the issue, every circuit that has addressed the issue has taken the position that equitable tolling of the statute of limitations is available in appropriate circumstances. *See, e.g., Dunlap v. United States*, 250 F.3d 1001, 1004-07 (6th Cir. 2001); *Moore v. United States*, 173 F.3d 1131, 1133-35 (8th Cir. 1999); *Sandvik v. United States*, 177 F.3d 1269, 1270-72 (11th Cir. 1999). The Supreme Court has not addressed the question directly. *See Duncan v. Walker*, 533 U.S. 167, 181 (2001) ("We ... have no occasion to address the question that Justice Stevens raises concerning the availability of equitable tolling.").

Rule 3(d) is new and provides guidance on determining whether a motion from an inmate is considered to have been filed in a timely fashion. The new provision parallels Federal Rule of Appellate Procedure 25(a)(2)(C).

Rule 4. Preliminary Consideration by Judge	Rule 4. Preliminary Review
(a) Reference to judge; dismissal or order to answer. The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business.	(a) **Referral to Judge.** The clerk must promptly forward the motion to the judge who conducted the trial and imposed sentence or, if the judge who imposed sentence was not the trial judge, to the judge who conducted the proceedings being challenged. If the appropriate judge is not available, the clerk must forward the motion to a judge under the court's assignment procedure.
(b) Initial consideration by judge. The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.	(b) **Initial Consideration by Judge.** The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the [government] [attorney for the government] to file an answer or other pleading within a fixed time, or to take other action the judge may order.

COMMITTEE NOTE

The language of Rule 4 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Rule 5. Answer; Contents	Rule 5. The Answer and the Reply
(a) Contents of answer. The answer shall respond to the allegations of the motion. In addition it shall state whether the movant has used any other available federal remedies including any prior post-conviction motions under these rules or those existing previous to the adoption of the present rules. The answer shall also state whether an evidentiary hearing was accorded the movant in a federal court.	**(a) When Required.** The respondent is not required to [answer] [or respond to] the motion — or move with respect to it — unless a judge so orders. **(b) Addressing the Allegations; Other Remedies.** The answer must address the allegations in the motion. In addition, it must state whether the moving party has used any other federal remedies, including any prior post-conviction motions under these rules or any previous rules, and whether the moving party received an evidentiary hearing.
(b) Supplementing the answer. The court shall examine its files and records to determine whether it has available copies of transcripts and briefs whose existence the answer has indicated. If any of these items should be absent, the government shall be ordered to supplement its answer by filing the needed records. The court shall allow the government an appropriate period of time in which to do so, without unduly delaying the consideration of the motion.	**(c) Records of Prior Proceedings.** If the answer refers to briefs or transcripts of the prior proceedings that are not available in the court's records, the judge must order the [government][attorney for the government] to furnish them within a reasonable time that will not unduly delay the proceedings. **(d) Reply.** The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

COMMITTEE NOTE

The language of Rule 5 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Revised Rule 5(a), which provides that the respondent is not required to file an answer to the motion, unless a judge so orders, is taken from current Rule 3(b). The revised rule does not address the practice in some districts, where the respondent files a pre-answer motion to dismiss the motion. But revised Rule 4 contemplates that practice and has been changed to reflect the view that if the court does not dismiss the petition, it may require (or permit) the respondent to do so.

Finally, revised Rule 5(d) reflects the practice in some jurisdictions that the moving party has an opportunity to file a response, a "traverse," or other pleading, to the respondent's answer. Rather than using terms such as "traverse," *see, e.g.*, 28 U.S.C. § 2248, to identify the movant's response to the answer, the rule uses the more general term "reply." ~~In that case, the~~ The Rule prescribes that the court set the time for such responses. In lieu of setting specific time limits in each case, the court may decide to include such time limits in its local rules.

Rule 6. Discovery	Rule 6. Discovery
(a) Leave of court required. A party may invoke the processes of discovery available under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a movant who qualifies for appointment of counsel under 18 U.S.C. § 3006A(g).	**(a) Leave of Court Required.** A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law. If necessary for effective discovery, the judge must appoint an attorney for a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A.
(b) Requests for discovery. Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.	**(b) Requesting Discovery.** ~~When requesting discovery, a party must include a statement of any interrogatories or requests for admission, and a list of any requested documents~~ A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents..
(c) Expenses. If the government is granted leave to take the deposition of the movant or any other person, the judge may as a condition of taking it direct that the government pay the expenses of travel and subsistence and fees of counsel for the movant to attend the taking of the deposition.	**(c) Deposition Expenses.** If the [government][attorney for the government] is granted leave to take a deposition, the judge may require the [government][attorney for the government] to pay the travel expenses, subsistence expenses, and fees of the moving party's attorney to attend the deposition.

COMMITTEE NOTE

The language of Rule 6 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Rule 7. Expansion of Record	Rule 7. Expanding the Record
(a) Direction for expansion. If the motion is not dismissed summarily, the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.	**(a) In General.** If the motion is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to ~~the merits of~~ the motion. ~~The judge may require the parties to authenticate these materials~~. The judge may require that these materials be authenticated.
(b) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the motion in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.	**(b) Types of Materials.** The materials that may be required include letters predating the filing of the motion, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits also may be submitted and considered as part of the record.
(c) Submission to opposing party. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness. **(d) Authentication.** The court may require the authentication of any material under subdivision (b) or (c).	**(c) Review by the Opposing Party.** The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

COMMITTEE NOTE

The language of Rule 7 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

The language in current Rule 7(d), which deals with authentication of materials in the expanded record, has been moved to revised Rule 7(a).

Rule 8. Evidentiary Hearing	Rule 8. Evidentiary Hearing
(a) Determination by court. If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.	(a) **Determining Whether to Hold a Hearing.** If the motion is not dismissed, the judge must review the answer, any transcripts and records of prior proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.
(b) Function of the magistrate. (1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the motion, and submit to a judge of the court proposed findings and recommendations for disposition. (2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties. (3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. (4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.	(b) **Reference to a Magistrate Judge.** A judge may, under 28 U.S.C. § 636(b), refer the motion to a magistrate judge to conduct hearings and to file proposed finding of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within 10 days after being served, a party may file objections as provided by local court rule. The judge must determine *de novo* any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

(c) Appointment of counsel; time for hearing. If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the proceeding if the interest of justice so requires.	(c) **Appointing Counsel; Time of Hearing.** If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. These rules do not limit the appointment of counsel under § 3006A at any stage of the proceeding.
(d) Production of statements at evidentiary hearing. **(1) In General.** Federal Rule of Criminal Procedure 26.2(a)-(d), and (f) applies at an evidentiary hearing under these rules. **(2) Sanctions for Failure to Produce Statement.** If a party elects not to comply with an order under Federal Rule of Criminal Procedure 26.2(a) to deliver a statement to the moving party, at the evidentiary hearing the court may not consider the testimony of the witness whose statement is withheld.	(d) **Producing a Statement.** Federal Rule of Criminal Procedure 26.2(a)-(d) and (f) applies at a hearing under this rule. If a party does not comply with a Rule 26.2(a) order to produce a witness's statement, the court must not consider that witness's testimony.

COMMITTEE NOTE

The language of Rule 8 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

The requirement in current Rule 8(b)(2) that a copy of the magistrate judge's findings must be promptly mailed to all parties has been changed in revised Rule 8(b) to require that copies of those findings be served on all parties. As used in this rule, requiring that the parties be "served" is consistent with Federal Rule of Civil Procedure 5(b), which may include mailing the copies.

Rule 9. Delayed or Successive Motions	Rule 9. Second or Successive Motions
(a) Delayed motions. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.	
(b) Successive motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.	Before presenting a second or successive motion, the moving party must obtain an order from the appropriate court of appeals authorizing the district court to consider the motion. If the district court determines that the motion is a second or successive motion, without the requisite order, the court must promptly enter an order transferring the motion to the court of appeals.

COMMITTEE NOTE

The language of Rule 9 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Current Rule 9(a) has been deleted as being unnecessary in light of the applicable one-year statute of limitations for § 2255 motions, added as part of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214.

The remainder of revised Rule 9 reflects provisions in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, which now require a moving party to obtain approval from the appropriate The amended rule provides that if the court determines that the petition is a second or successive petition, without the requisite approval, the court must forward the case directly to the court of appeals, a practice now used in some circuits. *See, e.g.*, Liriano v. United States, 95 F.3d 119, 122 (2d Cir. 1996) (court established procedure requiring district courts within circuit to forward second or successive § 2254 petitions that do not already include an authorization by the circuit court under 28 U.S.C. § 2244(b)(3)). *See also* In re Sims, 111 F.3d 45, 47 (6th Cir. 1997)

(applying requirement to § 2255 motions); Coleman v. United States, 106 F.3d 339, 340-41 (10th Cir. 1997); Nuñez v. United States, 96 F.3d 990, 991 (7th Cir. 1996).

Finally, the title of the rule has been changed to reflect the fact that the revised version addresses only the topic of second or successive motions.

Rule 10. Powers of Magistrates	Rule 10. Powers of a Magistrate Judge
The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. § 636.	If authorized to do so under 28 U.S.C. § 636, a magistrate judge may perform the duties of a district judge under these rules.

COMMITTEE NOTE

The language of Rule 10 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Rule 11. Time for Appeal	Rule 11. Time to Appeal
The time for appeal from an order entered on a motion for relief made pursuant to these rules is as provided in Rule 4(a) of the Federal Rules of Appellate Procedure. Nothing in these rules shall be construed as extending the time to appeal from the original judgment of conviction in the district court.	Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. These rules do not extend the time to appeal the original judgment of conviction.

COMMITTEE NOTE

The language of Rule 11 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Rule 12. Federal Rules of Criminal and Civil Procedure; Extent of Applicability	Rule 12. Applicability of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure
If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.	The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with these rules, may be applied to motions filed under these rules.

COMMITTEE NOTE

The language of Rule 12 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 1 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 1

Six commentators submitted written comments on the proposed revisions to Rule 1. Most of the comments were positive. Among the comments received were recommendations to create another set of rules to deal with habeas corpus applications filed under § 2241 and a recommendation that the term "application" be used in lieu of "petition."

II. LIST OF COMMENTATORS: RULE 1

02-CR-007 Hon. Joel M. Feldman, N.D. GA, Atlanta, GA., December 3, 2002.

02-CR-010 Mr. Patrick J. Charest, AIS No. 182262, Atmore, Alabama, December 9, 2002

02-CR-014 Mr. Kent S. Hofmeister, Federal Bar Association, Washington, D.C., February 14, 2003.

02-CR-015 Mr. Saul Bercovitch, Esq., State Bar of California, San Francisco, CA, February 14, 2003

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 1

Hon. Joel M. Feldman (02-CR-007)
United States District Judge
United States District Court of the Northern District of Georgia
Atlanta, GA.
December 3, 2002.

Judge Feldman points out that § 2254 refers to an "application" for a writ of habeas corpus. To be grammatically correct, he notes, the rules should refer to the moving papers as an "application," not a "petition."

Mr. Patrick J. Charest (02-CR-010)
Inmate, AIS No. 182262
Atmore, Alabama.
December 9, 2002

Mr. Charest states that the courts have misinterpreted and misapplied 28 U.S.C. § 2244(d)(2) (excluding periods from period of limitation) and that that has had an impact on the ability of persons to rely on § 2254. He offers no specific comment on the proposed rules.

Mr. Kent S. Hofmeister (02-CR-014)
Federal Bar Association
Washington, D.C.,
February 14, 2003.

The Federal Bar Association "supports the proposed revisions to the *habeas corpus* rules and the associated forms."

Mr. Saul Bercovitch, Esq., (02-CR-015)
State Bar of California
Committee on Federal Courts
San Francisco, California
February 14, 2003

The State Bar of California's Committee on Federal Courts supports the proposed amendments to the Rules Governing § 2254 and § 2255 Proceedings and the accompanying forms.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, urges the Committee to continue consideration of the issue of whether there should be any specific rules of procedure for § 2241 proceedings. He believes it would be helpful to adopt a third set of rules for the "triumvirate of oddball collateral attack cases.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger observes that as redrafted, Rule 1 seems to suggest an all-or-nothing approach to applying the rules to § 2241 proceedings. In his view, the Rule should allow a court to apply the rules selectively.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 2 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 2

The Committee received written comments from seven persons or organizations. A number of the commentators opposed the proposed amendment to Rule 2(c)(5) that would permit someone other than the petitioner to sign the petition. In addition, one commentator suggested that the term "briefly summarize" was redundant and potentially misleading; the petitioner should be permitted to state the facts upon which he or she is basing their petition, and not simply summarize those facts or arguments.

II. LIST OF COMMENTATORS: RULE 2

02-CR-002 Hon. William F. Sanderson, U.S. Magistrate Judge, Dallas, Texas, October 22, 2002.

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-013 Mr. Michael Rizza, Esq., Pittsburgh, PA, January 15, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-018 Mr. Sheldon N. Light, Esq., Detroit, Michigan, February 12, 2003.

02-CR-020 Mr. Kent S. Scheidegger, Criminal Justice Legal Foundation, Sacramento, CA, February 13, 2003.

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003.

III. COMMENTS: RULE 2

Hon. William F. Sanderson (02-CR-002)
United States Magistrate Judge

Dallas, Texas,
October 22, 2002.

Judge Sanderson objects to the amendment to Rule 2 that would permit someone other than the petitioner/movant personally sign the petition/motion. He believes that the current provision is not onerous and acts as a "prophylactic to a person who might assert patently false allegations; he doubts that an attorney is competent to execute a declaration subject to the penalty of perjury. He adds that if the Committee continues with the proposed change, the Committee Notes should make clear that under the rule only licensed attorneys may act on an applicant's behalf. Otherwise, he argues, someone will argue that persons other than attorneys may sign the petition or motion.

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association opposes the amendment to Rule 2(c)(5) that would permit someone other than the petitioner to sign the petition. The Association notes that the Committee Note cites § 2242 for the proposition that someone other than the petitioner may sign. But the Association points out that in the context of § 2242, the person acting on behalf of the petition has "significant meaning." Citing *Whitmore v. Arkansas*, 495 U.S. 149 (1990), the Association states that the person signing on behalf of the petitioner must be a "next friend" and that the third party is not automatically granted that status. Instead, the granting of that status depends on a showing why the third party's actions would be in the best interests of the petitioner. In short, the Association believes that this amendment to Rule 2 will result in a significant substantive change. It recommends that if the amendment is retained that the Committee Note should provide some context for the meaning of the term "someone."

Mr. Michael Rizza, Esq. (02-CR-013)
Pittsburgh, PA,
January 15, 2003.

Mr. Michael Rizza, Pro Se Staff Attorney for the Western District of Pennsylvania, suggests that proposed Rule 2(c) include some sort of requirement that a person signing on behalf of the petitioner or movant to explain whey the petitioner or movant has not, or cannot, sign the petition or motion. In the alternative, the rule could require some sort of attestation that the petitioner or movant does not object to the filing. He notes examples of cases where third persons who opposed the death penalty have signed petitions or motions even where the person facing the death penalty did not wish to have the papers filed.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, offers several suggestions on Rule 2. First, regarding Rule 2(b), he suggests that the last sentence in the rule be revised to substitute the word "from" in the place of the word "against." Thus, that sentence would read, "The petition must ask for relief from the state-court judgment being contested."

Second, he suggests that the term "briefly summarize" in Rule 2(c)(2) is redundant and also potentially bad advice. He states that the petition is often the only vehicle where the factual predicate for a claim can be set out. He cites the Supreme Court's decision in *Strickland v. Washington*, as an example of when a petitioner is required to demonstrate cause and prejudice—something that may not be briefly summarized. The petition, he argues, is the best and surest place to detail the necessary facts. A brief summary on the other hand, may lead to denied relief because it fails to adequately state a claim. He suggests the sentence should read: "The petition must (2) set forth the facts supporting each ground."

Finally, he welcomes the change in Rule 2(c)(5) that removes the requirement that the petitioner personally sign the petition. Regardless of whether it reflects good or bad policy, it is consistent with § 2242.

Mr. Sheldon N. Light, Esq. (02-CR-018)
State Bar of Michigan
Standing Committee on United States Courts
Detroit, Michigan
February 12, 2003.

Mr. Sheldon, commenting on behalf of the State Bar of Michigan's Standing Committee on United States Courts, believes that the amendment to Rule 2(c)(5) that would permit someone other than the petitioner to sign the petition, is incomplete. It would create the false impression that anyone may petition for habeas relief on behalf of another. He proposes that Rule 2(c)(5) be changed to read: "...be signed under penalty of perjury *by the petitioner or a next friend or other appropriate person appointed by the court to prosecute the action.*"

Regarding Rule 2(e), he notes that there is no current conflict between the current rule and Civil Rule 5(e) and that there is nothing the proposed rule itself reflecting the Committee's apparent belief that it is better to require the clerk to file otherwise defective

petitions. He suggests that a new Rule 3(b) be inserted, which would be more explicit about what the Committee Notes assume:

> "The court may order petitioner to correct any petition that fails to comply substantially with the requirements of these rules and may dismiss a petition without prejudice for a petitioner's unreasonable failure to comply with the requirements of such an order."

Mr. Kent S. Scheidegger (02-CR-020)
Criminal Justice Legal Foundation
Sacramento, CA
February 13, 2003.

Mr. Scheidegger, on behalf of the Criminal Justice Legal Foundation, objects to the proposed amendment that would permit someone other than the petitioner to sign the petition. He points out that the system is plagued with a "flood of worthless petitions" and that if any change is made to the rule, it should be that there is some system of verifying the interest of any third person who might sign the petition. He recommends that the rule be changed to permit "next friend" petitions as recognized in *Whitmore v. Arkansas.*

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger, on behalf of NADCL, offers several comments on Rule 2. First, regarding Rule 2(a) and (b), he suggests that the rule clarify that the petition may be filed even though petitioner may not know the exact name of the respondent.

Regarding Rule 2(c)(5), he suggests that the Committee Note should make it explicit that the five items that must be contained in the petition is an "exclusive" list and that a petition cannot be dismissed if the petitioner fails to allege any other matters, e.g., exhaustion of remedies or other affirmative defenses.

Finally, regarding Rule 2(d), he suggests that the rule be amended to add the word "either" after the words, "If filed pro se, the petition must substantially follow..." He observes that any mandatory local forms, which deviate from the national model form, should not be permitted, or at least controlled. On the other hand, he suggests that the courts should be permitted to exempt capital cases from the form. He offers substitute language:

"If the petition is filed by counsel, all information required by the form shall be included, and the petition may either follow the form or comply with the rules of the district court where filed for a complaint in a civil action."

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 3 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 3

Four persons submitted written comments on the proposed amendments to Rule 3. One of the commentators, currently a state prisoner, offered extensive comments on the problems with prison internal mail systems and may pose problems for application of the proposed rule. One commentator opposed the proposed amendment that requires the court to accept even defective petitions, while another supports that amendment.

II. LIST OF COMMENTATORS: RULE 3

02-CR-009 Ms. Theresa Torricellas, W#21722, Corona, CA, November 28, 2002.

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 3

Ms. Theresa Torricellas (02-CR-009)
Inmate, W#21722
Corona, CA
November 28, 2002.

Ms. Torricellas provides an extensive discussion pointing some of the inherent problems with referencing prison internal mailing systems in Rule 3. She notes that the prison systems do not meet the "ideal necessary to be compatible with the proposed [rule]."

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association supports the proposed amendment to Rule 3(b), which would require the clerk to file a petition, even if it was otherwise procedurally defective.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, observes that the proposed amendment to Rule 3(b) (which requires the clerk to file every petition) will create more work for the courts and goes beyond the ostensibly parallel provision in Rule of Civil Procedure 5(e). The latter rule states that the clerk shall not refuse to file a paper solely because it is not in proper form. Under Rule 3, the clerk would be required to file a petition even if the required fee or IFP affidavit was not attached. He suggests that Rule 3 should at least conform to the language in Civil Rule 5.

He "applauds" proposed Rule 3(c) and (d).

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Noting that Rule 3(c) references § 2244(d), Mr. Goldberger believes that the rules should not presume to judge the validity, or constitutionality, of a particular statute. Further, the rule should not "mislead" with regard to the existence of "extrastatutory issues, such as equitable tolling of the statute of limitations..." The rule should state in an unqualified way that timeliness "is governed" by statute.

With regard to Rule 3(d), Mr. Goldberger assumes the proposed language regarding "timely filing may be shown..." means that the § 1746 statement is sufficient but not necessary and that the court may examine other papers or information to determine if the filing is timely. If that is now permitted, he agrees with the change.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 4 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 4

The Committee received written comments from five commentators. One commentator, the Magistrate Judges Assn., approves the amendment that addresses the issue of notifying state officials of the habeas petition. Another commentator, a career law clerk, points out that the proposed amendment fails to address a significant area of practice —filing of pre-answer motions to dismiss.

II. LIST OF COMMENTATORS: RULE 4

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-012 Hon. Benson Everett Legg, D. MD, Baltimore, MD., January 22, 2003.

02-CR-016 Mr. John H, Blume, Esq., Columbia, South Carolina, February 14, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 4

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association supports the amendment to Rule 4. In particular they approve the requirement in Rule 4 that addresses the notice of the habeas proceedings to state officials.

Hon. Benson Everett Legg (02-CR-012)
United States District Judge
United States District Court for the District of Maryland
Baltimore, Maryland
January 22, 2003.

Judge Legg suggests that Rule 4 be amended to provide that the court may require the petitioner to supplement his or her petition before deciding whether to dismiss the petition. He notes that in his district it is the practice to issue a show cause order to the petitioner if it appears that the petition is time barred; based on that response, the court may dismiss the petition without requiring an answer from the government. They use the same system if it appears from the face of the petition that there may be an unexhausted claim. He suggests some additional language that would reflect that practice.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, states that proposed Rules 4 and 5 fail to address a significant issue in habeas practice. He notes that since AEDPA, there has been a significant increase in the number of filings of pre-Answer motions to dismiss, even though it is not entirely clear that a motion to dismiss is even proper in habeas practice. And there are no national rules addressing the issue of such motions; whatever guidance exists is in the form of local rules or practice. He urges the Committee to address the issue and suggests that Civil Rule 12(b) might provide a useful model for the habeas rules. However, he notes that "time" is a major issue and urges the Committee to resolve the conflict between the indefinite time limits in Rule 4(b) and the more specific time limits in § 2243.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger refers the Committee to 28 U.S.C. § 1631 (transfer to cure jurisdictional defect). He states that a federal court should not be in the position of being an advocate for the government, much less raising and ruling upon waivable defenses. The Note, he says, should emphasize the narrowness of the term, plainly appears."

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 5 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 5

Five commentators submitted written comments and suggestions on Rule 5. One of them, a state prisoner, noted that the Committee had changed the rule in such a manner to create a potential substantive change, without identifying it as such in the Committee Note. One commentator suggested that the government be required to provide certified copies of all of the prior state court proceedings, and another objected that the revised rules require the petitioner to allege possible affirmative defenses. Still another commentator is concerned that the term, "traverse" which is commonly used to label the petitioner's response to the government's answer, is not used in the rule itself. Finally, one of the commentators, a career law clerk, notes that the rules fail to address the common practice of the government filing a pre-answer motion to dismiss.

II. LIST OF COMMENTATORS: RULE 5

02-CR-009 Ms. Theresa Torricellas, W#21722, Corona, CA, November 28, 2002.

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-012 Hon. Benson Everett Legg, D. MD, Baltimore, MD., January 22, 2003.

02-CR-013 Mr. Michael Rizza, Esq., Pittsburgh, PA, January 15, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 5

Ms. Theresa Torricellas (02-CR-009)
Inmate, W#21722

Corona, CA
November 28, 2002.

Ms. Torricellas points out that the Committee Note to Rule 5 is incorrect in that it does not identify a substantive change to Rule 5(b), that the new rule now explicitly requires the government to state whether any claim in the petition is barred by one of the listed grounds. She provides an extensive discussion of the point.

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association supports the adoption of Rule 5(c) of the § 2254 Rules and Rule 5(e) of the § 2255 Rules, noting that the proposed rule is consistent with the practice in many jurisdictions.

Hon. Benson Everett Legg (02-CR-012)
United States District Judge
United States District Court for the District of Maryland
Baltimore, Maryland
January 22, 2003.

Judge Legg suggests that Rule 5(e) be amended to clarify that a reply from the petitioner is not permitted in all cases, and offers suggested language to accomplish that change.

Mr. Michael Rizza, Esq. (02-CR-013)
Pittsburgh, PA,
January 15, 2003.

Mr. Michael Rizza, Pro Se Staff Attorney for the Western District of Pennsylvania, suggests that Rule 5 be amended to require the government to append to its answer a "certified copy of the docket entries of each and every state court in which anything was filed relative to the conviction under attack as well as a docket sheet from the United States Supreme Court if a petition for certiorari was filed from of the state court judgments." He observes that this would assist the court in deciding statute of limitations issues and would provide a "snapshot/summary" of what took place in the courts and what other documents might be necessary to rule on the petition.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California

El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, states that proposed Rules 4 and 5 fail to address a significant issue in habeas practice. He notes that since AEDPA, there has been a significant increase in the number of filings of pre-Answer motions to dismiss, even though it is not entirely clear that a motion to dismiss is even proper in habeas practice. And there are no national rules addressing the issue of such motions; whatever guidance exists is in the form of local rules or practice. He urges the Committee to address the issue and suggests that Civil Rule 12(b) might provide a useful model for the habeas rules. However, he notes that "time" is a major issue and urges the Committee to resolve the conflict between the indefinite time limits in Rule 4(b) and the more specific time limits in § 2243.

Regarding Rule 5(e), he believes that the proposed addition of the "reply" should be reevaluated. The question of permitting the petitioner or movant to file a response to the government's answer is a murky area and it is unclear just what that filing should be called. He suggests that the term "traverse" should be used, citing various authorities that use that term. He adds that the Committee Note curiously fails to use the term, thus leaving litigants to wonder whether a reply and a traverse are the same thing. Finally, he offers some suggestions on what the traverse may, or may not, address.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger believes that it sounds unnecessarily burdensome to require the government to respond to every allegation in the petition/motion. He adds that that seems to also contradict Rule 4, which instructs the judge to require an answer or other pleading. A typical motion would be a motion to dismiss, and that should be permitted under the rule. He points out that the second sentence of the rule is "inappropriately phrased." The rule should not seem to require a recitation of whether any affirmative defense is applicable. Instead, the rule should state that the answer or other pleading specifically pleads any affirmative defenses. He argues that this portion of the rule should be modeled after Civil Rule 12(b) and the Note should state that the rule is not an attempt to catalog what comprises an affirmative defense — the respondent has the burden of pleading and proving an affirmative defense.

Finally, in light of § 2254(b)(3)'s express waiver requirement, the lack of exhaustion of remedies defense should be treated separately. He would prefer that the Committee use the Rules Enabling Act to supercede § 2254(b)(3).

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 6 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 6

The Committee received comments from only two commentators. The comments generally focused on a suggestion to change the rule to recognize the court's authority to approve and monitor discovery.

II. LIST OF COMMENTATORS: RULE 6

02-CR-003 Jack E. Horsley, Esq., Matoon, Illinois, October 25, 2002.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

III. COMMENTS: RULE 6

Jack E. Horsley, Esq. (02-CR-003)
Matoon, Illinois
October 25, 2002.

Mr. Horsley suggests a modification in Rule 6(b) to read "...by a statement giving grounds and details supporting the request..."

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, believes that Rule 6(b) would benefit from a minor change. He suggests that the rule be changed to read, "When requesting discovery, a party must include *with the request the proposed* interrogatories..." This change, he observes, will permit the judge to evaluate whether the requested discovery is appropriate. As currently drafted, the rule would require unnecessary work by the courts; with his proposal, the judge could in a single step evaluate both the needs and the means for the obtaining discovery.

He also suggests that Rule 6(c) be changed to address the issue of whether the petitioner bears the costs of his or her discovery.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 7 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 7

Four commentators submitted written suggestions on Rule 7. Two of the commentators suggested that the rule be revised to recognize that in an appropriate case, the court should be able to expand the record, without depending on the parties to do so. One commentator suggested that the rule be changed to better advise pro se petitioners that the Rules of Civil Procedure apply to habeas proceedings.

II. LIST OF COMMENTATORS: RULE 7

02-CR-005 Hon. Franklin S. Van Antwerpen, E.D. PA., November 27, 2002.

02-CR-013 Mr. Michael Rizza, Esq., Pittsburgh, PA, January 15, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 7

Hon. Franklin S. Van Antwerpen (02-CR-005)
United States District Judge
Criminal Business Committee
United States District Court of the Eastern District of Pennsylvania
November 27, 2002.

On behalf of the Criminal Business Committee of the U.S. District Court for the Eastern District of Pennsylvania, Judge Van Antwerpen, suggests that that additional language be added to the Committee Note that expressly states that Rule 7 is not intended to "extend or alter" existing case law, which applies the Federal Rules of Civil Procedure to the rule, and its application. That Committee believes that adding that language will

help alert pro se litigants and counsel that the Rules of Civil Procedure apply, along with the existing and applicable body of case law.

Mr. Michael Rizza, Esq. (02-CR-013)
Pittsburgh, PA,
January 15, 2003.

Mr. Michael Rizza, Pro Se Staff Attorney for the Western District of Pennsylvania, suggests that Rule 7(a) be amended by deleting the word "merits." He notes that there may other occasions where the court may want to expand the record by submitting information that is relevant to some issue other than the merits of the case, for example, where there is a question about the statute of limitations. He suggests possible substitute language.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, offers several comments on Rule 7. First, he believes that Rule 7(a) "unnecessarily cramps a judge's power to expand the record" because it contemplates that the judge will be limited to seeking additional information through the parties. The rule should be changed, he states, to read, "If the petition is not dismissed, *the judge may expand the record by obtaining additional materials, or by directing the parties to submit additional materials*, relating to the merits of the petition." Further, the rule should read, "The judge may require *these materials be authenticated.*"

Second, in Rule 7(b) the text could be simplified by inserting the word "affidavits" into the earlier list of materials in the first sentence of the rule.

Finally, he states that there is an open question whether § 2254(e)(2)'s bar on evidentiary hearings also bars other habeas discovery or whether Rules 6 and 7 are unaffected by that Act. He believes it would be helpful if the subject was addressed either in the rules or in the Committee Notes.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger suggests that the relationship between Rules 6 and 7(b) should be clarified and suggests language to accomplish that: "If discovery has been allowed under Rule 6, either party may add the fruits of discovery to the record under this Rule." He

also suggests that the last sentence should be made a separate subsection in order to clarify that a party's ability to supplement the record with affidavits is not limited to cases covered under Rule 7(a).

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 8 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 8

Three commentators offered written comments on Rule 8. One commentator observed that as a result of restyling, the court is now required to review the entire record, a task that is not currently required by any Supreme Court decision; he also notes that the 10-day provision is unrealistic. Another commentator suggests that the rule be revised to insure that courts promptly hold evidentiary hearings.

II. LIST OF COMMENTATORS: RULE 8

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-020 Mr. Kent S. Scheidegger, Criminal Justice Legal Foundation, Sacramento, CA, February 13, 2003.

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 8

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, offers suggestions on all subdivisions in Rule 8. Regarding Rule 8(a) (Determining Whether to Hold a Hearing), he states that the new provision is both underinclusive and overinclusive, and is "unwarranted." In his view, this has resulted from the restyling. He reads the new provision to require the judge to review the entire record, a task that is not required by any Supreme Court decision. To that extent it is overinclusive. And because the rule does not include in the list of documents, the petition itself and the any attached affidavits. He suggests that the rule be rewritten to

"soften the mandatory terminology," and address the issue of whether the rule encompasses the new § 2254(e)(2) prohibition on evidentiary hearings. He proposes that the rule read as follows:

> "If the petition is not dismissed, the judge *may review any part of the assembled record* to determine whether an evidentiary hearing is required *or foreclosed by a failure to develop the factual basis of the claim in State court proceedings.*"

Regarding Rule 8(b), he states that the 10-day provision in the rule is unfairly short for petitioners, especially pro se prisoner petitioners. He offers a suggested, commonplace, scenario to emphasize this point. He suggests that the time for an objection be changed to "30 days after filing." This time frame, he points out, would be consistent with the time allowed for a normal civil appeal.

Finally, regarding Rule 8(c), he states that the last sentence appears to be either superfluous and should be omitted, or instead made the subject of a new rule.

Mr. Kent S. Scheidegger (02-CR-020)
Criminal Justice Legal Foundation
Sacramento, CA
February 13, 2003.

Mr. Scheidegger, on behalf of the Criminal Justice Legal Foundation, suggests that in Rule 8(b), the word "promptly" be inserted before the words "determine de novo." He suggests that that language will admonish the district judge to expedite the process.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger believes that Rule 8(b) should entirely deleted in light of Rule 10, and the fact that it is redundant to a large extent with 28 U.S.C. § 636 and Civil Rule 72(b). The redundancy creates a question about the Committee's intent.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 9 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 9

The Committee received comments from four commentators. Two of them suggested that the rule be further amended to provide that if the court determines that the petition is a second or successive petition, that the court is required to transfer the case to the court of appeals. Another commentator recommended that the Committee use the supersession clause to eliminate the statutory procedure for second or successive petitions.

II. LIST OF COMMENTATORS: RULE 9

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-018 Mr. Sheldon N. Light, Esq., Detroit, Michigan, February 12, 2003.

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 9

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges supports the amendment to Rule 9(b). It recommends, however, that a new sentence be added after the first sentence to provide for an immediate transfer of a second or successive petition to the Court of Appeals. It suggests that the added sentence read as follows: "If it plainly appears from the petition and from a

review of the dockets of all district courts in the state that a second or successive petition has been presented, the judge shall promptly enter an order transferring the papers to the court of appeals." The Association believes that this procedure would reflect the actual practice in many districts. It adds that in some districts, however, the petition is simply dismissed.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, believes that Rule 9 is fine as is.

Mr. Sheldon N. Light, Esq. (02-CR-018)
State Bar of Michigan
Standing Committee on United States Courts
Detroit, Michigan
February 12, 2003.

Mr. Sheldon, commenting on behalf of the State Bar of Michigan's Standing Committee on United States Courts, suggests that Rule 9 clarify the procedures to be used when a petitioner or movant submits a second or successive petition or motion. In his view, express direction in the rules themselves would be helpful. He suggests that the following language be used:

> "If it plainly appears that a second or successive petition [motion] has been presented to the District Court, that court shall promptly transfer the action to the Court of Appeals."

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberg notes that any attorney who has litigated a case under the AEDPA, and judges of the Courts of Appeals, know that the statutory procedures for successive petitions or motions are cumbersome and wasteful of resources. In this view, the Act inappropriately placed that decision in the hands of the Circuit Courts. He recommends that the Committee use the Rules Enabling Act supersession clause to override the statute, and suggests language for both the Rule and the Note to accomplish that step.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 10 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 10

Only two commentators submitted written comments and both of them indicated that the proposed revisions were fine.

II. LIST OF COMMENTATORS: RULE 10

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 10

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, states that Rule 10 is fine as is.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger believes that Rule 10 is fine

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 11 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 11

Three commentators submitted written comments on the proposed amendments to Rule 11. Two of them approved of the revised rule and one suggested that the rule be further revised to state that the Rules of Civil Procedure may not be used if they conflict with the habeas statutes.

II. LIST OF COMMENTATORS: RULE 11

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-020 Mr. Kent S. Scheidegger, Criminal Justice Legal Foundation, Sacramento, CA, February 13, 2003.

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 11

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, believes that Rule 11 is fine.

Mr. Kent S. Scheidegger (02-CR-020)
Criminal Justice Legal Foundation
Sacramento, CA
February 13, 2003.

Mr. Scheidegger, on behalf of the Criminal Justice Legal Foundation, points out that Rule 11 omits reference to the fact that the Rules of Civil Procedure may not be used when they conflict with the habeas corpus statutes. He suggests inserting the words, "applicable statutes or" between the words "inconsistent with" and "these rules."

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger believes that Rule 11 is fine.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO F0RMS FOR RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: FORMS

The Committee received comments from eight persons or organizations on the proposed forms for § 2254 proceedings. The commentators generally supported the changes to the forms, but several of them suggested that the list of possible grounds for relief be either limited or omitted altogether. Another commentator objected to requiring the petitioner to list possible affirmative defenses. Finally, one commentator noted that the proposed forms do not include reference to two increasingly common grounds in habeas petitions: challenges to prison disciplinary proceedings and challenges to revocation of parole decisions.

II. LIST OF COMMENTATORS: FORMS

02-CR-003 Jack E. Horsley, Esq., Matoon, Illinois, October 25, 2002.

02-CR-005 Hon. Franklin S. Van Antwerpen, E.D. PA., November 27, 2002.

02-CR-006 Hon. Judith K. Guthrie, E.D. Texas, Tyler, Texas, November 20, 2002.

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-012 Hon. Benson Everett Legg, D. MD, Baltimore, MD., January 22, 2003.

02-CR-016 Mr. John H, Blume, Esq., Columbia, South Carolina, February 14, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: FORMS

Jack E. Horsley, Esq. (02-CR-003)
Matoon, Illinois
October 25, 2002.

Mr. Horsley supports the material concerning "Ground Two" in the official forms.

Hon. Franklin S. Van Antwerpen (02-CR-005)
United States District Judge
Criminal Business Committee
United States District Court of the Eastern District of Pennsylvania
November 27, 2002.

On behalf of his court's Criminal Business Committee, Judge Van Antwerpen suggests additional language for the § 2254 form at Paragraph 9. The proposed language would highlight the one-year statute of limitations and the filing of second or successive petitions. He notes that as a practical matter, the language will help prevent the filing of a second or successive petition without an order from the Circuit Court.

He also suggests that Question 13(a) be deleted and that the information requested in that question be asked for in each of the four grounds listed in Question 12. Thus, Question 13(b) would become Question 13. He notes that this approach is the one taken in all petitions filed in the Eastern District of Pennsylvania and resulted after extensive review of the apparent confusion caused in the format in the proposed forms.

Finally, he suggests that in Question 12(a) for each of the grounds that the word "briefly" be deleted and that the word "specific" be highlighted. He notes that using the word "briefly" my mislead petitioners into not including the necessary facts.

Hon. Judith K. Guthrie (02-CR-006)
United States District Judge
United States District Court for the Eastern District of Texas
Tyler, Texas
November 20, 2002.

Judge Guthrie observes that a growing number of habeas cases focus on challenges by a state prisoner to prison discipline proceedings and revocation of parole decisions. She cites *Edwards v. Balisok*, 520 U.S. 641 (1997), where the Court stated that challenges to disciplinary proceedings are to be filed under § 2254. She has attached a copy of the form used in the four districts in Texas to cover such proceedings.

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association supports the proposed forms, but offers specific comments on Questions 11 and 12. First the Association recommends that in Question 11 it would be beneficial to include a space for insertion of the date of filing.

Second, the Association believes that the list of possible grounds for relief in Question 12 is "terribly misleading." The Association notes that unless the motion or petition specifically invokes the Constitution, laws, or treaties the petition or motion is subject to dismissal. It points out that none of the listed grounds in Question 12 reference any of those provisions. Thus, the form should include an "admonition" that the petitioner or movant must reference those provisions. The Association also suggests that four additional grounds be added.

Hon. Benson Everett Legg (02-CR-012)
United States District Judge
United States District Court for the District of Maryland
Baltimore, Maryland
January 22, 2003.

Judge Legg indicates that in his district the local forms do not include a list of possible grounds for relief. It has been the experience in that district that using a list only encourages defendants to raise inapplicable claims.

Mr. John H, Blume, Esq. (02-CR-016)
Habeas Assistance and Training Project
Columbia, South Carolina
February 14, 2003.

Mr. Blume offers several comments on the forms accompanying the § 2254 Rules. First, he supports the change to Rule 2(c)(5), concerning the signature of either the petitioner or someone else, he observes that in the Model Form there is an indication on the last line of the form that the signature of the petitioner is required. He suggests that if someone other than the petitioner may indeed sign the petition, then the word "required" should be removed from the form.

Second, notes that there is a possible inconsistency in the § 2254 form and the § 2255 form in Question 5. In the § 2254 Form, there is a reference to an "Insanity Plea." But in the § 2255 Form, there is no reference to that plea. The inconsistency he states,

will create confusion and unnecessary litigation. His solution is to remove the reference in the § 2254 form.

Third, he raises concerns about Question 19, regarding "Timeliness of Petition." In his view the addition of the section on timeliness along with the requirement for the petitioner to "explain why..." converts the affirmative defense of the statute of limitations into an affirmative pleading requirement. That conversion, he maintains, is for Congress to make. Assuming that the question is retained, it would be beneficial to include in the form a list of sample reasons why the one-year statute of limitations is not applicable; he includes a suggested list.

Finally , regarding Question 12, he states that the second sample ground, (Conviction obtained by use of coerced confession) is already subsumed into the fifth sample ground, relating to violation of the privilege against self-incrimination. He also states that the fourth ground, concerning searches and seizures, should be removed because those grounds are not ordinarily cognizable in federal habeas corpus proceedings. He continues by suggesting that if a list is to be included in Question 12, some additional grounds should be added — *Batson* issue, denial of cross-examination, denial of conflict-free counsel, statements obtained in violation of sixth amendment right to counsel, improper jury instructions, insufficient evidence, and denial of trial by impartial jury.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, notes that while Rule 2 now permits someone other than the petitioner to sign the petition, the form still requires the petitioner's signature.

He suggests that the list of possible grounds for relief, in Question 12, be omitted. He is philosophically opposed to the courts providing what amounts to legal advice to a party. If the courts are bound to include a list, then the list should be correct; here the list is incomplete. He offers several other grounds that could be listed.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger offers a number of comments on the model § 2254 form:

Question #2 — the phrase "Date of the judgment of conviction" is technical and ambiguous. Most prisoners will know only the date on which they were sentenced; he recommends using that event as the point of reference.

Question #3 — he suggests asking the petitioner to state all of the terms of the sentence.

Question #4 — delete ambiguity by asking "Identify all crimes for which you were convicted and sentenced in the case giving rise to the custody you are challenging in this petition."

Question #6 — substitute "If your plea was not guilty, what kind of trial did you have?"

Question #7 — this question serves no purpose and should be deleted.

Question #9 — questions 9(f), (g)(6), and (h)(5) should be deleted. First, regarding (f) and (g)(6), he notes that these and any other questions relating to affirmative defenses are inconsistent with Rule 2(c) and should be eliminated. The form should not be used to ferret out nonjurisdictional grounds to dismiss the petition. Question 9(h)(5) requests information that is entirely immaterial.

Question #11 — he recommends deleting 11(a)(4), (b)(4), (c)(4), and (e). Same reasoning as above

Question #12 — he raises several points. First, he questions the usefulness of the list of frequently raised grounds. Second, it is unfair to instruct the petitioner not to argue or cite caselaw; he adamantly opposes any requirement that the petitioner anticipate and defend against an unraised, nonjurisdictional defenses, as currently required in subsections (b) through (e) under each ground for relief.

Question #13 — he recommends deleting this question, again for reasons stated previously. The form sends the message that the purpose of the proceedings is to find some reason to deny relief, which is "deeply regrettable and totally inappropriate."

Question #14 — supports the question; fits well with his suggestion in Rule 9, *supra.*

Question #17 — he has never understood the purpose of this question. If the Committee believes that it is useful, it should be moved closer to Questions 3 to 5.

Question #19 — for reasons already stated, this question is completely inappropriate, and "legally erroneous." He states that it is not true (as recognized by case law) that the petitioner must explain the timeliness of the petition, in the petition itself.

" Claim for relief" — the form violates Rule 2(c)(3) by blocking the petitioner from stating the relief requested.

"Verification" — the two verifications should be separated; the first is always required, the second is not.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 1 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 1

The Committee received three written comments on Rule 1. Two of them approved the rule and one suggested that the rules contain a common reference to the prosecutor, e.g., "attorney for the government."

II. LIST OF COMMENTATORS: RULE 1

02-CR-014 Mr. Kent S. Hofmeister, Federal Bar Assn., Washington, D.C., February 14, 2003.

02-CR-019 Mr. Eric H. Jaso, Department of Justice, Washington, D.C., February 20, 2003

III. COMMENTS: RULE 1

Mr. Kent S. Hofmeister (02-CR-014)
Federal Bar Association
Washington, D.C.,
February 14, 2003.

The Federal Bar Association "supports the proposed revisions to the *habeas corpus* rules and the associated forms."

Mr. Saul Bercovitch, Esq., (02-CR-015)
State Bar of California
Committee on Federal Courts
San Francisco, California
February 14, 2003

The State Bar of California's Committee on Federal Courts supports the proposed amendments to the Rules Governing § 2254 and § 2255 Proceedings and the accompanying forms.

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General

Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Wroblewski notes that the rules are not consistent when describing how they refer to the prosecutor. He suggests that, as with the revised Rules of Criminal Procedure, that the rules use the term "attorney for the government, and that the definition for that term be included in the rules.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 2 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 2

The Committee received seven written comments on the proposed amendments to Rule 2. Several commentators expressed concern about the possibility of unauthorized persons signing the § 2255 motion on behalf of the movant, and recommended possible changes to the rule to address that problem. One commentator suggested that the published version of the rule, which requires the motion to "briefly summarize" the facts may be misleading to the movant. Another commentator recommended that current Rule 2(e) not be deleted. Finally, one commentator stated opposition to any requirement for the movant to state possible affirmative defenses.

II. LIST OF COMMENTATORS: RULE 2

02-CR-002 Hon. William F. Sanderson, U.S. Magistrate Judge, Dallas, Texas, October 22, 2002.

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-013 Mr. Michael Rizza, Esq., Pittsburgh, PA, January 15, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-018 Mr. Sheldon N. Light, Esq., Detroit, Michigan, February 12, 2003.

02-CR-019 Mr. Eric H. Jaso, Department of Justice, Washington, D.C., February 20, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 2

Hon. William F. Sanderson (02-CR-002)
United States Magistrate Judge
Dallas, Texas,
October 22, 2002.

Judge Sanderson objects to the amendment to Rule 2 that would permit someone other than the movant personally sign the motion. He believes that the current provision is not onerous and acts as a "prophylactic to a person who might assert patently false allegations; he doubts that an attorney is competent to execute a declaration subject to the penalty of perjury. He adds that if the Committee continues with the proposed change, the Committee Notes should make clear that under the rule only licensed attorneys may act on an applicant's behalf. Otherwise, he argues, someone will argue that persons other than attorneys may sign the motion.

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association opposes the amendment to Rule 2(c)(5) that would permit someone other than the petitioner to sign the petition. The Association notes that the Committee Note cites § 2242 for the proposition that someone other than the petitioner may sign. But the Association points out that in the context of § 2242, the person acting on behalf of the petition has "significant meaning." Citing *Whitmore v. Arkansas*, 495 U.S. 149 (1990), the Association states that the person signing on behalf of the petitioner must be a "next friend" and that the third party is not automatically granted that status. Instead, the granting of that status depends on a showing why the third party's actions would be in the best interests of the petitioner. In short, the Association believes that this amendment to Rule 2 will result in a significant substantive change. It recommends that if the amendment is retained that the Committee Note should provide some context for the meaning of the term "someone."

Mr. Michael Rizza, Esq. (02-CR-013)
Pittsburgh, PA,
January 15, 2003.

Mr. Michael Rizza, Pro Se Staff Attorney for the Western District of Pennsylvania, suggests that proposed Rule 2(c) include some sort of requirement that a person signing on behalf of the petitioner or movant to explain whey the petitioner or movant has not, or cannot, sign the petition or motion. In the alternative, the rule could require some sort of attestation that the petitioner or movant does not object to the filing. He notes examples of cases where third persons who opposed the death penalty have

signed petitions or motions even where the person facing the death penalty did not wish to have the papers filed.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, suggests that the term "briefly summarize" in Rule 2(b)(2) is redundant and also potentially bad advice. He states that the petition is often the only vehicle where the factual predicate for a claim can be set out. He cites the Supreme Court's decision in *Strickland v. Washington*, as an example of when a petitioner is required to demonstrate cause and prejudice—something that may not be briefly summarized. The petition, he argues, is the best and surest place to detail the necessary facts. A brief summary on the other hand, may lead to denied relief because it fails to adequately state a claim. He suggests the sentence should read: "The petition must (2) set forth the facts supporting each ground."

Second, he welcomes the change in Rule 2(c)(5) that removes the requirement that the movants personally sign the motion. Regardless of whether it reflects good or bad policy, it is consistent with § 2242.

Mr. Sheldon N. Light, Esq. (02-CR-018)
State Bar of Michigan
Standing Committee on United States Courts
Detroit, Michigan
February 12, 2003.

Mr. Sheldon, commenting on behalf of the State Bar of Michigan's Standing Committee on United States Courts, believes that the amendment to Rule 2(c)(5) that would permit someone other than the movant to sign the motion is incomplete. It would create the false impression that anyone may move for relief on behalf of another. He proposes that Rule 2(c)(5) be changed to read: "...be signed under penalty of perjury *by the movant or a next friend or other appropriate person appointed by the court to prosecute the action.*"

Regarding Rule 2(e), he notes that there is no current conflict between the current rule and Civil Rule 5(e) and that there is nothing the proposed rule itself reflecting the Committee's apparent belief that it is better to require the clerk to file otherwise defective petitions or motions. He suggests that a new Rule 3(b) be inserted, which would be more explicit about what the Committee Notes assume:

> "The court may order petitioner to correct any [motion] that fails to comply substantially with the requirements of these rules and may dismiss a [motion] without prejudice for a [movant's] unreasonable failure to comply with the requirements of such an order."

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Wroblewski suggests that Rule 2(b) be revised to require that the habeas motion contain an express statement as to whether it is the first § 2225 motion or whether it is second or successive motion that has been authorized by the Court of Appeals. Also, the rule should require that the motion state whether the grounds asserted in the motion were raised in the district court before judgment, on direct appeal, or in any other prior § 2255 motions.

He also urges the Committee to amend Rule 2(d) to include language that would limit the amount of time that a movant could take to amend or correct a defective motion. He suggests that something like the current Rule 2(d) could address that point, expressly including a specific time requirement, e.g., 30 days.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger, on behalf of NADCL, offers several comments on Rule 2. Regarding Rule 2(b)(5), he suggests that the Committee Note should make it explicit that the five items that must be contained in the [motion] is an "exclusive" list and that a [motion] cannot be dismissed if the [movant] fails to allege any other matters, e.g., exhaustion of remedies or other affirmative defenses.

Regarding Rule 2(c), he suggests that the rule be amended to add the word "either" after the words, "If filed pro se, the [motion] must substantially follow..." He observes that any mandatory local forms, which deviate from the national model form, should not be permitted, or at least controlled. On the other hand, he suggests that the courts should be permitted to exempt capital cases from the form. He offers substitute language:

"If the [motion] is filed by counsel, all information required by the form shall be included, and the [motion] may either follow the form or comply with the rules of the district court where filed for a complaint in a civil action."

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 3 of RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 3

Of the four comments received on Rule 3, there was mixed reaction to the proposed amendment that would require the court to accept a defective motion; one commentator (a career law clerk) viewed it as an imposition on the court, while another (the Magistrate Judges' Assn), approved of the change. Another commentator suggested that the rule explicitly state that timeliness is governed by statute.

II. LIST OF COMMENTATORS: RULE 3

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-019 Mr. Eric H. Jaso, Department of Justice, Washington, D.C., February 20, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 3

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association supports the proposed amendment to Rule 3(b), which would require the clerk to file a petition, even if it was otherwise procedurally defective.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, offers two comments on Rule 3. First, he observes that the proposed amendment to Rule 3(b) (which requires the clerk to file every motion) will create more work for the courts and goes beyond the ostensibly parallel provision in Rule of Civil Procedure 5(e). The latter rule states that the clerk shall not refuse to file a paper solely because it is not in proper form. Under Rule 3, the clerk would be required to file a motion in every case, without qualification. He suggests that Rule 3 should at least conform to the language in Civil Rule 5.

Second, he "applauds" proposed Rule 3(c) and (d).

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Wroblewski suggests that the rule be amended to state that the motion must be filed with the "clerk of the United States district court in which the judgment under attack was entered."

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Noting that Rule 3(c) references § 2244(d), Mr. Goldberger believes that the rules should not presume to judge the validity, or constitutionality, of a particular statute. Further, the rule should not "mislead" with regard to the existence is sufficient of "extrastatutory issues, such as equitable tolling of the statute of limitations..." The rule should state in an unqualified way that timeliness "is governed" by statute.

With regard to Rule 3(d), Mr. Goldberger assumes the proposed language regarding "timely filing may be shown..." means that the § 1746 statement but not necessary and that the court may examine other papers or information to determine if the filing is timely. If that is now permitted, he agrees with the change.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 4 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 4

The Committee received four written comments on the proposed amendments to Rule 4. Two commentators focused their comments on the meaning of the phrase "plainly appears" in regard to whether to hold a hearing. Another commentator suggested that the rule permit the court to order the movant to expand the motion, before deciding whether to dismiss it. And another commentator pointed out that the rules fail to address a common practice in some districts, where the government files a pre-answer motion to dismiss first, rather than immediately filing an answer.

II. LIST OF COMMENTATORS: RULE 4

02-CR-012 Hon. Benson Everett Legg, D. MD, Baltimore, MD., January 22, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-019 Mr. Eric H. Jaso, Department of Justice, Washington, D.C., February 20, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 4

Hon. Benson Everett Legg (02-CR-012)
United States District Judge
United States District Court for the District of Maryland
Baltimore, Maryland
January 22, 2003.

Judge Legg suggests that Rule 4 be amended to provide that the court may require the movant to supplement his or her motion before deciding whether to dismiss it. He notes that in his district it is the practice to issue a show cause order to the movant if it

appears that the motion may be time barred; based on that response, the court may dismiss the motion without requiring an answer from the government. They use the same system if it appears from the face of the motion that there may be an unexhausted claim. He suggests some additional language that would reflect that practice.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, states that proposed Rules 4 and 5 fail to address a significant issue in habeas practice. He notes that since AEDPA, there has been a significant increase in the number of filings of pre-Answer motions to dismiss, even though it is not entirely clear that a motion to dismiss is even proper in habeas practice. And there are no national rules addressing the issue of such motions; whatever guidance exists is in the form of local rules or practice. He urges the Committee to address the issue and suggests that Civil Rule 12(b) might provide a useful model for the habeas rules. However, he notes that "time" is a major issue and urges the Committee to resolve the conflict between the indefinite time limits in Rule 4(b) and the more specific time limits in § 2243.

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Wroblewski points out that as proposed, Rule 4(b) presents several problems. First, § 2255 already provides a standard for deciding whether a hearing is required; thus, the rule's language referring to "plainly appears," diverges from the statutory standard. Second, Rule 11 incorporates Rules of Civil Procedure regarding pre-answer motions or motions for summary judgment; those motions should remain important tools for the government and should be mentioned in the rule, in order to meet any objections that § 2255 permits only a motion and answer. Third, he states that the Supreme Court in *Blackledge v. Allison*, recognized that in some cases the judge's recollection of the events in issue may suffice to permit him or her to summarily dismiss the § 2255 motion.

In order to address these concerns he suggests that the following language be substituted in 4(b):

> "If the motion, any attached exhibits, the records of prior proceedings, and the judge's recollection of the events at issue, conclusively show that the moving

party is not entitled to relief on some or all claims, or if some or all claims must be dismissed pursuant to a motion under the Federal Rules of Civil Procedure, the judge must dismiss the claims of motion..."

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

[Regarding Rule 4(b)], Mr. Goldberger refers the Committee to 28 U.S.C. § 1631 (transfer to cure jurisdictional defect). He states that a federal court should not be in the position of being an advocate for the government, much less raising and ruling upon waivable defenses. The Note, he says, should emphasize the narrowness of the term, "plainly appears."

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 5 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 5

Five commentators submitted written comments on the proposed changes to Rule 5. The Magistrate Judges' Association approved the amendment, noting that it is consistent with current practice in many districts. One commentator noted that the rules do not address a practice that occurs in a number of districts — the government often files a pre-answer motion to dismiss the § 2255 motion. Finally, one commentator believes that it is unnecessarily burdensome for the government to respond to every allegation in the motion.

II. LIST OF COMMENTATORS: RULE 5

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-012 Hon. Benson Everett Legg, D. MD, Baltimore, MD., January 22, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-019 Mr. Eric H. Jaso, Department of Justice, Washington, D.C., February 20, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 5

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association supports the adoption of Rule 5(c) of the § 2254 Rules and Rule 5(e) of the § 2255 Rules, noting that the proposed rule is consistent with the practice in many jurisdictions.

Hon. Benson Everett Legg (02-CR-012)
United States District Judge
United States District Court for the District of Maryland
Baltimore, Maryland
January 22, 2003.

Judge Legg suggests that Rule 5(e) be amended to clarify that a reply from the government is not permitted in all cases, and offers suggested language to accomplish that change.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, offers general comments on Rules 4 and 5. He states that those rules fail to address a significant issue in habeas practice. He notes that since AEDPA, there has been a significant increase in the number of filings of pre-Answer motions to dismiss, even though it is not entirely clear that a motion to dismiss is even proper in habeas practice. And there are no national rules addressing the issue of such motions; whatever guidance exists is in the form of local rules or practice. He urges the Committee to address the issue and suggests that Civil Rule 12(b) might provide a useful model for the habeas rules. However, he notes that "time" is a major issue and urges the Committee to resolve the conflict between the indefinite time limits in Rule 4(b) and the more specific time limits in § 2243.

He comments that the style of proposed Rule 5(a) is awkward and that it comes from the "curious reference" to motion practice in the current rule. If the proposed rule contemplates some sort of response by the government to a § 2255 motion, then there should be some rule governing motions practice. He cites United States v. King, 184 F.R.D. 567, 568 (E.D. Va. 1999) (noting no mention in rules regarding a reply to a motion to dismiss). The proposed rule simply hints at the possibility of a motion.

Rule 5(b), he says, "unadvisably omits" any reference to whether the statute of limitations has run. He notes that it would be helpful to the court to know the government's position on that issue.

Regarding Rule 5(e), he believes that the proposed addition of the "reply" should be reevaluated. The question of permitting the petitioner or movant to file a response to the government's answer is a murky area and it is unclear just what that filing should be called. He suggests that the term "traverse" should be used, citing various authorities that use that term. He adds that the Committee Note curiously fails to use the term, thus leaving litigants to wonder whether a reply and a traverse are the same thing. Finally, he offers some suggestions on what the traverse may, or may not, address.

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Wroblewski states that under current Rule 5(b) permits the court to grant an "appropriate period of time" to the government to file supplement its answer, etc, but that the restyled rule states that the court must grant the government a "reasonable time" to do so. He believes that the current rule seems to require the court to defer to the government's belief as to what is an appropriate period of time, while the revised rule gives the court discretion to decide what is a reasonable time. He supports retaining the "current deferential standard" in the rule.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger believes that it sounds unnecessarily burdensome to require the government to respond to every allegation in the petition/motion. He adds that that seems to also contradict Rule 4, which instructs the judge to require an answer or other pleading. A typical motion would be a motion to dismiss, and that should be permitted under the rule. He points out that the second sentence of the rule is "inappropriately phrased." The rule should not seem to require a recitation of whether any affirmative defense is applicable. Instead, the rule should state that the answer or other pleading specifically pleads any affirmative defenses. He argues that this portion of the rule should be modeled after Civil Rule 12(b) and the Note should state that the rule is not an attempt to catalog what comprises an affirmative defense — the respondent has the burden of pleading and proving an affirmative defense.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 6 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 6

The Committee received only two written comments on Rule 6. Both commentators urged the Committee to amend the rule to provide greater control by the court over the discovery process.

II. LIST OF COMMENTATORS: RULE 6

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-019 Mr. Eric H. Jaso, Department of Justice, Washington, D.C., February 20, 2003

III. COMMENTS: RULE 6

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, believes that Rule 6(b) would benefit from a minor change. He suggests that the rule be changed to read, "When requesting discovery, a party must include *with the request the proposed* interrogatories..." This change, he observes, will permit the judge to evaluate whether the requested discovery is appropriate. As currently drafted, the rule would require unnecessary work by the courts; with his proposal, the judge could in a single step evaluate both the needs and the means for the obtaining discovery.

He also suggests that Rule 6(c) be changed to address the issue of whether the petitioner bears the costs of his or her discovery.

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General

Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Wroblewski is concerned that restyled Rule 6(a) opens the door for movants to argue that they are entitled to discovery, even without the court's approval. He suggests that the rule be changed to read: "Discovery is only permitted if and to extent permitted by a judge under the standards set forth in this section." He also suggests elimination of the reference to the Federal Rules of Criminal Procedure and to "practices and principles of law"—because Rule 16 does not normally apply and the general reference to principles of law is "unbounded and unclear."

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 7 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 7

Four commentators offered written suggestions on the proposed amendments to Rule 7. Three of them offered suggestions on changing the rule to reflect that the court should be empowered to order expansion of the record, through the parties, or from other sources.

II. LIST OF COMMENTATORS: RULE 7

02-CR-005 Hon. Franklin S. Van Antwerpen, E.D. PA., November 27, 2002.

02-CR-013 Mr. Michael Rizza, Esq., Pittsburgh, PA, January 15, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 7

Hon. Franklin S. Van Antwerpen (02-CR-005)
United States District Judge
Criminal Business Committee
United States District Court of the Eastern District of Pennsylvania
November 27, 2002.

On behalf of the Criminal Business Committee of the U.S. District Court for the Eastern District of Pennsylvania, Judge Van Antwerpen, suggests that that additional language be added to the Committee Note that expressly states that Rule 7 is not intended to "extend or alter" existing case law, which applies the Federal Rules of Civil Procedure to the rule, and its application. That Committee believes that adding that language will help alert pro se litigants and counsel that the Rules of Civil Procedure apply, along with the existing and applicable body of case law.

Mr. Michael Rizza, Esq. (02-CR-013)
Pittsburgh, PA,
January 15, 2003.

Mr. Michael Rizza, Pro Se Staff Attorney for the Western District of Pennsylvania, suggests that Rule 7(a) be amended by deleting the word "merits." He notes that there may other occasions where the court may want to expand the record by submitting information that is relevant to some issue other than the merits of the case, for example, where there is a question about the statute of limitations. He suggests possible substitute language.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, offers several comments on Rule 7. First, he believes that Rule 7(a) "unnecessarily cramps a judge's power to expand the record" because it contemplates that the judge will be limited to seeking additional information through the parties. The rule should be changed, he states, to read, "If the petition is not dismissed, *the judge may expand the record by obtaining additional materials, or by directing the parties to submit additional materials*, relating to the merits of the petition." Further, the rule should read, "The judge may require *these materials be authenticated.*"

Second, in Rule 7(b) the text could be simplified by inserting the word "affidavits" into the earlier list of materials in the first sentence of the rule.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger suggests that the relationship between Rules 6 and 7(b) should be clarified and suggests language to accomplish that: "If discovery has been allowed under Rule 6, either party may add the fruits of discovery to the record under this Rule" He also suggests that the last sentence should be made a separate subsection in order to clarify that a party's ability to supplement the record with affidavits is not limited to cases covered under Rule 7(a).

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 8 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 8

The Committee received three submissions on Rule 8. One suggested that the new language requires the judge to review the entire record, a task not required by any Supreme Court decision and that the 10-day limit was unrealistic. Another commentator suggested adding language from § 2255, concerning when to hold a hearing. And a third commentator stated that Rule 8(b) should be deleted because it is redundant with 28 USC § 636.

II. LIST OF COMMENTATORS: RULE 8

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-019 Mr. Eric H. Jaso, Department of Justice, Washington, D.C., February 20, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 8

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, offers suggestions on all subdivisions in Rule 8. Regarding Rule 8(a) (Determining Whether to Hold a Hearing), he states that the new provision is both underinclusive and overinclusive, and is "unwarranted." In his view, this has resulted from the restyling. He reads the new provision to require the judge to review the entire record, a task that is not required by any Supreme Court decision. To that extent it is overinclusive. And because the rule does not include in the list of documents, the

petition itself and the any attached affidavits. He suggests that the rule be rewritten to "soften the mandatory terminology," and address the issue of whether the rule encompasses the new § 2254(e)(2) prohibition on evidentiary hearings. He proposes new language for the rule.

Regarding Rule 8(b), he states that the 10-day provision in the rule is unfairly short for movants, especially pro se prisoner movants. He offers a suggested, commonplace, scenario to emphasize this point. He suggests that the time for an objection be changed to "30 days after filing." This time frame, he points out, would be consistent with the time allowed for a normal civil appeal.

Finally, regarding Rule 8(c), he states that the last sentence appears to be either superfluous and should be omitted, or instead made the subject of a new rule.

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Wroblewski suggests adding language to Rule 8(a) that would incorporate the § 2255 standard for deciding whether a hearing should take place. He recommends that the following language be used:

> "Unless the motion, any attached exhibits, the answer, the files and records of prior proceedings, and the judge's recollection of the events at issue conclusively show that the moving party is not entitled to relief on a claim that has not been dismissed, the judge must grant a prompt hearing on that claim."

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger believes that Rule 8(b) should entirely deleted in light of Rule 10, and the fact that it is redundant to a large extent with 28 U.S.C. § 636 and Civil Rule 72(b). The redundancy creates a question about the Committee's intent.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 9 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 9

Six commentators offered their views on the proposed amendments to Rule 9. The comments were generally supportive. Three commentators, however, recommended that the rule be changed to require the court to transfer a second or successive § 2255 motion to the court of appeals. One suggested that the statutory procedures for second of successive motions is unduly cumbersome and suggests that the Committee used the supersession clause of the Rules Enabling Act to override the statutory provisions.

II. LIST OF COMMENTATORS: RULE 9

02-CR-001 Steven W. Allen, Esq., Jersey City, N.J., September 25, 2002.

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-018 Mr. Sheldon N. Light, Esq., Detroit, Michigan, February 12, 2003.

02-CR-019 Mr. Eric H. Jaso, Department of Justice, Washington, D.C., February 20, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 9

Steven W. Allen, Esq. (02-CR-001)
Jersey City, N.J.,
September 25, 2002.

Mr. Allen believes that the Committee has created an unintended gap in the rules. He points out that for state prisoners under Section 2244(b)(1), a court is required to dismiss a repetitive claim. But no such provision exists in Section 2255; thus, he says, when the language "may be dismissed" in Rule 9 is deleted, there will be no operative language in either the rules or § 2255 governing repetitive claims by federal prisoners. He concludes by noting that, in effect, "new claims and repetitive claims will be treated the same in successive petitions."

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association supports the amendment to Rule 9(b). It recommends, however, that a new sentence be added after the first sentence to provide for an immediate transfer of a second or successive motion to the Court of Appeals. It suggests that the added sentence read as follows:

> "If it plainly appears from the motion and from a review of the dockets of all district courts in the state that a second or successive motion has been presented, the judge shall promptly enter an order transferring the papers to the court of appeals."

The Association believes that this procedure would reflect the actual practice in many districts. It adds that in some districts, however, the motion is simply dismissed.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, believes that Rule 9 is fine as is.

Mr. Sheldon N. Light, Esq. (02-CR-018)
State Bar of Michigan
Standing Committee on United States Courts
Detroit, Michigan
February 12, 2003.

Mr. Sheldon, commenting on behalf of the State Bar of Michigan's Standing Committee on United States Courts, suggests that Rule 9 clarify the procedures to be used when a petitioner or movant submits a second or successive petition or motion. In

his view, express direction in the rules themselves would be helpful. He suggests that the following language be used:

> "If it plainly appears that a second or successive petition [motion] has been presented to the District Court, that court shall promptly transfer the action to the Court of Appeals."

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Wroblewski believes that either Rule 9(a) should be deleted or that the Committee Note amended to state that the deletion of Rule 9(a) is not intended to deny the government of the ability to assert defenses of laches, undue delay, or other equitable arguments when opposing a § 2255 motion. He also suggests that Rule 9 be retitled as "Second or Successive Motions;" he also suggests new language for the rule:

> "A person in custody who has already filed a motion under section 2255 challenging a judgment of a United States district court may not file in the district court a second or successive motion under section 2255 challenging that judgment unless the person has first obtained authorization by the court of appeals as provided in 28 U.S.C. Sections 2244(b) and 2255 para. 8. If such a motion is erroneously filed in the district court which imposed the challenged sentence, the district court shall transfer the petition and the record to the court of appeals. Once such authorization has been received from the court of appeals, the defendant must file the motion in the district court pursuant to these rules. After transfer, before requiring an answer, the district court shall dismiss any claims which are beyond the scope of the authorization of the court of appeals, or which are barred under 28 U.S.C. § 2244(b)(1), (2) and (4)."

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberg notes that any attorney who has litigated a case under the AEDPA, and judges of the Courts of Appeals, know that the statutory procedures for successive petitions or motions are cumbersome and wasteful of resources. In this view, the Act inappropriately placed that decision in the hands of the Circuit Courts. He recommends

that the Committee use the Rules Enabling Act supersession clause to override the statute, and suggests language for both the Rule and the Note to accomplish that step.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 10 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 10

The Committee received three written comments on Rule 10. Two commentators said that the proposed rule was fine. A third commentator suggested that the rule address the issue of certificates of appealability.

II. LIST OF COMMENTATORS: RULE 10

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-019 Mr. Eric H. Jaso, Department of Justice, Washington, D.C., February 20, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 10

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, states that Rule 10 is fine as is.

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Wroblewski notes that it is the experience of the Department of Justice that frequently courts do not rule on a certificate of appealability, which in turn requires remands and resulting delay. He suggests that Rule 11 be retitled, "Appeal," and that it read as follows:

> (a) Certificate of Appealability. At the time the district court enters a final order adverse to the movant in a proceeding under section 2255, the district judge must either issue a certificate of appealability or state why a certificate should not issue as required by 28 U.S.C. Section 2253(c). If the district court issues a certificate, the judge shall state the specific issue or issues that satisfy the criteria of 28 U.S.C. Section 2253(c)(2). The district clerk must send the certificate or statement to the court of appeals when the clerk transmits the movant's notice of appeal and the file of the district court proceedings to the court of appeals."

He believes that this change "transposes to the district court's rules the requirements placed on the district court by Federal Rules of Appellate Procedure 22(b)(1)." In the alternative, he suggests that the words "on request of a party of if the movant files notice of appeal," be inserted after "2255" in the above language.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger believes that Rule 10 is fine.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 11 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 11

Two commentators submitted comments on Rule 11. Both believed that the proposed changes to the rule were fine. One, however, suggested that the Committee give some consideration to including a provision for certificates of appealability.

II. LIST OF COMMENTATORS: RULE 11

2-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

02-CR-021 Mr. Peter Goldberger, National Ass'n of Criminal Defense Lawyers, February 21, 2003

III. COMMENTS: RULE 11

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, believes that Rule 11 is fine.

Mr. Peter Goldberger (02-CR-021)
National Ass'n of Criminal Defense Lawyers
February 21, 2003

Mr. Goldberger believes that Rule 11 is fine. He questions, however, whether it might be helpful to add something about certificates of appealability.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 12 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 12

The Committee received not written comments addressing the proposed changes to Rule 12

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO F0RMS FOR RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: FORMS

The Committee received five comments on the official forms for § 2255 motions. Several commentators addressed the issue of whether the forms should include a list of suggested grounds for relief. Other comments focused on the issue of whether someone other than the movant could sign the form and recommended that the form reflect that point.

II. LIST OF COMMENTATORS: FORMS

02-CR-005 Hon. Franklin S. Van Antwerpen, E.D. PA., November 27, 2002.

02-CR-011 Hon. Dennis G. Green, U.S. Magistrate Judges' Assn., Del Rio, Texas, January 14, 2003.

02-CR-012 Hon. Benson Everett Legg, D. MD, Baltimore, MD., January 22, 2003.

02-CR-016 Mr. John H, Blume, Esq., Columbia, South Carolina, February 14, 2003.

02-CR-017 Mr. Robert J. Newmeyer, S.D. CA, El Centro, CA, February 19, 2003

III. COMMENTS: FORMS

Hon. Franklin S. Van Antwerpen (02-CR-005)
United States District Judge
Criminal Business Committee
United States District Court of the Eastern District of Pennsylvania
November 27, 2002.

On behalf of his court's Criminal Business Committee, Judge Van Antwerpen suggests additional language for the form at Paragraph 9. The proposed language would highlight the one-year statute of limitations and the filing of second or successive

petitions. He notes that as a practical matter, the language will help prevent the filing of a second or successive petition without an order from the Circuit Court.

He suggests that in Question 12(a) for each of the grounds that the word "briefly" be deleted and that the word "specific" be highlighted. He notes that using the word "briefly" my mislead petitioners into not including the necessary facts.

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judges Association supports the proposed forms, but offers specific comments on Questions 11 and 12. First the Association recommends that in Question 11 it would be beneficial to include a space for insertion of the date of filing.

Second, the Association believes that the list of possible grounds for relief in Question 12 is "terribly misleading." The Association notes that unless the motion or petition specifically invokes the Constitution, laws, or treaties the petition or motion is subject to dismissal. It points out that none of the listed grounds in Question 12 reference any of those provisions. Thus, the form should include an "admonition" that the petitioner or movant must reference those provisions. The Association also suggests that four additional grounds be added.

Hon. Benson Everett Legg (02-CR-012)
United States District Judge
United States District Court for the District of Maryland
Baltimore, Maryland
January 22, 2003.

Judge Legg indicates that in his district the local forms do not include a list of possible grounds for relief. It has been the experience in that district that using a list only encourages defendants to raise inapplicable claims.

Mr. John H, Blume, Esq. (02-CR-016)
Habeas Assistance and Training Project
Columbia, South Carolina
February 14, 2003.

Mr. Blume offers several comments on the forms accompanying the § 2254 Rules. First, he supports the change to Rule 2(c)(5), concerning the signature of either the petitioner or someone else, he observes that in the Model Form there is an indication on

the last line of the form that the signature of the petitioner is required. He suggests that if someone other than the petitioner may indeed sign the petition, then the word "required" should be removed from the form.

Second, notes that there is a possible inconsistency in the § 2254 form and the § 2255 form in Question 5. In the § 2254 Form, there is a reference to an "Insanity Plea." But in the § 2255 Form, there is no reference to that plea. The inconsistency he states, will create confusion and unnecessary litigation. His solution is to remove the reference in the § 2254 form.

Third, he raises concerns about Question 19, regarding "Timeliness of Petition." In his view the addition of the section on timeliness along with the requirement for the petitioner to "explain why..." converts the affirmative defense of the statute of limitations into an affirmative pleading requirement. That conversion, he maintains, is for Congress to make. Assuming that the question is retained, it would be beneficial to include in the form a list of sample reasons why the one-year statute of limitations is not applicable; he includes a suggested list.

Finally, regarding Question 12, he states that the second sample ground, (Conviction obtained by use of coerced confession) is already subsumed into the fifth sample ground, relating to violation of the privilege against self-incrimination. He also states that the fourth ground, concerning searches and seizures, should be removed because those grounds are not ordinarily cognizable in federal habeas corpus proceedings. He continues by suggesting that if a list is to be included in Question 12, some additional grounds should be added — *Batson* issue, denial of cross-examination, denial of conflict-free counsel, statements obtained in violation of sixth amendment right to counsel, improper jury instructions, insufficient evidence, and denial of trial by impartial jury.

Mr. Robert J. Newmeyer (02-CR-017)
United States District Court for the Southern District of California
El Centro, California
February 19, 2003

Mr. Newmeyer, a career law clerk for United States Magistrate Judge Roger T. Benitez, notes that while Rule 2 now permits someone other than the petitioner to sign the petition, the form still requires the petitioner's signature.

He suggests that the list of possible grounds for relief, in Question 12, be omitted. He is philosophically opposed to the courts providing what amounts to legal advice to a party. If the courts are bound to include a list, then the list should be correct; here the list is incomplete. He offers several other grounds that could be listed.

Item IIB3

Petition for Relief From a Conviction or Sentence By a Person in State Custody

(Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus)

Instructions

1. To use this form, you must be a person who is currently serving a sentence under a judgment against you in a state court. You are asking for relief from the conviction or the sentence. This form is your petition for relief.

2. You may also use this form to challenge a state judgment that imposed a sentence to be served in the future, but you must fill in the name of the state where the judgment was entered. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file a motion under 28 U.S.C. § 2255 in the federal court that entered the judgment.

3. Make sure the form is typed or neatly written.

4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

5. Answer all the questions. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.

6. You must pay a fee of $5. If the fee is paid, your petition will be filed. If you cannot pay the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you. If your account exceeds $ _____, you must pay the filing fee.

7. In this petition, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different court (either in the same state or in different states), you must file a separate petition.

8. When you have completed the form, send the original and two copies to the Clerk of the United States District Court at this address:

   Clerk, United States District Court for _____
   Address
   City, State Zip Code

9. **CAUTION: You must include in this petition all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.**

10. **CAPITAL CASES: If you are under a sentence of death, you are entitled to the assistance of counsel. You should request the appointment of counsel.**

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District
Name (under which you were convicted):	Docket or Case No.:
Place of Confinement:	Prisoner No.:
Petitioner (include the name under which you were convicted)	Respondent (authorized person having custody of petitioner)
v.	
The Attorney General of the State of	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: _____

   _____

   _____

   (b) Criminal docket or case number (if you know): _____

2. (a) Date of the judgment of conviction (if you know): _____

   (b) Date of sentencing: _____

3. Length of sentence: _____

4. In this case, were you convicted on more than one count or of more than one crime? Yes ❑

   No ❑

5. Identify all crimes of which you were convicted and sentenced in this case: _____

   _____

   _____

   _____

   _____

6. (a) What was your plea? (Check one)

   (1) Not guilty ❑ (3) Nolo contendere (no contest) ❑

   (2) Guilty ❑ (4) Insanity plea ❑

   (b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge,

what did you plead guilty to and what did you plead not guilty to?_____

_____

_____

_____

_____

_____

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury ❑ Judge only ❑

7. Did you testify at either a pretrial hearing, trial or a post-trial hearing?

Yes ❑ No ❑

8. Did you appeal from the judgment of conviction?

Yes ❑ No ❑

9. If you did appeal, answer the following:

(a) Name of court: _____

(b) Docket or case number (if you know): _____

(c) Result: _____

(d) Date of result (if you know): _____

(e) Citation to the case (if you know): _____

(f) Grounds raised: _____

_____

_____

_____

_____

_____

(g) Did you seek further review by a higher state court? Yes ❑ No ❑

If yes, answer the following:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Result: _____

_____

(4) Date of result (if you know): _____

(5) Citation to the case (if you know): _____

(6) Grounds raised: _____

_____

_____

_____

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes ❑ No ❑

If yes, answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

_____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes ❑ No ❑

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

_____

_____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ❑ No ❑

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

_____

_____

_____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ❑ No ❑

(7) Result: _____

(8) Date of result (if you know): _____

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ❑ No ❑

(7) Result: _____

(8) Date of result (if you know): _____

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes ❑ No ❑

(2) Second petition: Yes ❑ No ❑

(3) Third petition: Yes ❑ No ❑

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not: _____

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief. Each one is a separate ground for possible relief. You may raise other grounds besides those listed. However, you should raise in this petition all available grounds (relating to this conviction or sentence) on which you base your claim that you are being held in custody unlawfully.

- Plea of guilty was unlawfully induced or was not made voluntarily with an understanding of the nature of the charge and the consequences of the plea.
- Use of a coerced confession.
- Violation of the privilege against self-incrimination.
- Unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- Violation of the protection against double jeopardy.
- Grand jury or petit jury was unconstitutionally selected.
- Prosecution impermissibly exercised peremptory challenges.
- Denial of the right to an impartial jury.
- Denial of the right to confront or cross-examine prosecution witnesses.
- Improper or insufficient jury instructions.
- Denial of the right to due process of law because of insufficiency of the evidence on which to base a conviction.
- Denial of the right to be free from cruel and unusual punishment.
- Denial of the right to effective assistance of counsel at trial or on appeal. (Examples of commonly raised allegations of ineffective assistance of counsel include, but are not limited to: failure to advise the defendant of the consequences of a guilty plea; failure to investigate possible defenses; failure to seek the suppression of evidence; failure to object to improper evidence or an improper argument; failure to conduct adequate cross-examination; failure to present favorable evidence; failure to advise the defendant of the right to testify; failure to request/object to jury instruction(s); conflict of interest.)
- Denial of the right to appeal.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must set out in the space provided below the facts that support your claims.

GROUND ONE: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

_____

(b) If you did not exhaust your state remedies on Ground One, explain why: _____

_____

_____

_____

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ❑ No ❑

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ❑

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

_____

_____

_____

_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: _____

_____

_____

GROUND TWO: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

_____

(b) If you did not exhaust your state remedies on Ground Two, explain why: _____

_____

_____

_____

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ❑ No ❑

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ❑

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

_____

_____

_____

_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that

you have used to exhaust your state remedies on Ground Two: _____

_____

_____

_____

GROUND THREE: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

_____

(b) If you did not exhaust your state remedies on Ground Three, explain why: _____

_____

_____

_____

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ❑ No ❑

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ❑

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

_____

_____

_____

_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: _____

_____

_____

GROUND FOUR: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

_____

(b) If you did not exhaust your state remedies on Ground Four, explain why: _____

_____

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ❑ No ❑

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion or petition?

Yes ❑ No ❑

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: _____

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes ❑ No ❑

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: _____

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: _____

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ❑ No ❑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinions or orders, if available. _____

15. Do you have any petition or appeal <u>now pending</u> (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes ❑ No ❑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

_____

_____

_____

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: _____

_____

(b) At arraignment and plea: _____

_____

(c) At trial: _____

_____

(d) At sentencing: _____

_____

(e) On appeal: _____

_____

(f) In any post-conviction proceeding: _____

_____

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

_____

_____

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ❑ No ❑

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

_____

_____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes ❑ No ❑

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as codified in 28 U.S.C. § 2244(d) does not bar your petition.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as codified in 28 U.S.C. § 2244(d) provides in part that:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: _____

_____

_____

or any other relief to which he or she may be entitled.

_____

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on _____

_____ (month, date, year).

Executed (signed) on _____ (date).

_____

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition. _____

_____

_____

IN FORMA PAUPERIS DECLARATION

[Insert from Appendix of Forms for 28 U.S.C. § 2254]

Motion to Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody

(Motion Under 28 U.S.C. § 2255)

Instructions

1. To use this form, you must be a person who is serving a sentence under a judgment against you in a federal court. You are asking for relief from the conviction or the sentence. This form is your motion for relief.

2. You must file the form in the United States district court that entered the judgment that you are challenging. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file the motion in the federal court that entered that judgment.

3. Make sure the form is typed or neatly written.

4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

5. Answer all the questions. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.

6. If you cannot pay for the costs of this motion (such as costs for an attorney or transcripts), you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you.

7. In this motion, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different judge or division (either in the same district or in a different district), you must file a separate motion.

8. When you have completed the form, send the original and two copies to the Clerk of the United States District Court at this address:

   Clerk, United States District Court for _____
   Address
   City, State Zip Code

9. **CAUTION: You must include in this motion all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this motion, you may be barred from presenting additional grounds at a later date.**

10. **CAPITAL CASES: If you are under a sentence of death, you are entitled to the assistance of counsel. You should request the appointment of counsel.**

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District
Name:	Docket or Case No.:
Place of Confinement:	Prisoner No.:
UNITED STATES OF AMERICA v.	Movant (include name under which convicted)

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: _____

   _____

   _____

   (b) Criminal docket or case number (if you know): _____

2. (a) Date of the judgment of conviction (if you know): _____

   (b) Date of sentencing: _____

3. Length of sentence: _____

4. Nature of crime (all counts): _____

   _____

   _____

   _____

   _____

   _____

5. (a) What was your plea? (Check one)

   (1) Not guilty ❑ (2) Guilty ❑ (3) Nolo contendere (no contest) ❑

   (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? _____

   _____

   _____

   _____

   _____

6. If you went to trial, what kind of trial did you have? (Check one) Jury ❑ Judge only ❑

7. Did you testify at either a pretrial hearing, trial or post-trial hearing? Yes ❑ No ❑

8. Did you appeal from the judgment of conviction? Yes ❑ No ❑

9. If you did appeal, answer the following:

(a) Name of court: _____

(b) Docket or case number (if you know): _____

(c) Result: _____

(d) Date of result (if you know): _____

(e) Citation to the case (if you know): _____

(f) Grounds raised: _____

_____

_____

_____

_____

_____

_____

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ❑ No ❑

If "Yes," answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

_____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ❑ No ❑

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, application?

Yes ❑ No ❑

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ❑ No ❑

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction the action taken on your motion, petition, or application?

(1) First petition: Yes ❑ No ❑

(2) Second petition: Yes ❑ No ❑

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

_____

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: If you fail to set forth all the grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief. Each one is a separate ground for possible relief. You may raise other grounds besides those listed. However, you should raise in this motion all available grounds (relating to this conviction or sentence) on which you base your claim that you are being held in custody unlawfully.

- Plea of guilty was unlawfully induced or was not made voluntarily with an understanding of the nature of the charge and the consequences of the plea.
- Use of a coerced confession.
- Violation of the privilege against self-incrimination.
- Unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- Violation of the protection against double jeopardy.
- Grand jury or petit jury was unconstitutionally selected.
- Prosecution impermissibly exercised peremptory challenges.
- Denial of the right to an impartial jury.
- Denial of the right to confront or cross-examine prosecution witnesses.
- Improper or insufficient jury instructions.
- Denial of the right to due process of law because of insufficiency of the evidence on which to base a conviction.
- Denial of the right to be free from cruel and unusual punishment.
- Denial of the right to effective assistance of counsel at trial or on appeal. (Examples of commonly raised allegations of ineffective assistance of counsel include, but are not limited to: failure to advise the defendant of the consequences of a guilty plea; failure to investigate possible defenses; failure to seek the suppression of evidence; failure to object to improper evidence or an improper argument; failure to conduct adequate cross-examination; failure to present favorable evidence; failure to advise the defendant of the right to testify; failure to request/object to jury instruction(s); conflict of interest.)
- Denial of the right to appeal.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must set out in the space provided below the facts that support your claims.

GROUND ONE: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

_____

_____

_____

_____

GROUND TWO: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

_____

_____

_____

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:_____

Name and location of the court where the motion or petition was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

_____

_____

_____

_____

GROUND THREE: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

_____

_____

_____

_____

_____

_____

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why: _____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:_____

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

Result (attach a copy of the court's opinion or order, if available):_____

_____

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

_____

_____

_____

_____

13. Is there any ground in this motion that has <u>not</u> been presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: _____

_____

_____

_____

_____

_____

_____

14. Do you have any motion, petition, or appeal <u>now pending</u> (filed and not decided yet) in any court for the judgment you are challenging? Yes ❑ No ❑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

_____

_____

_____

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: _____

_____

(b) At arraignment and plea: _____

_____

(c) At trial: _____

_____

(d) At sentencing: _____

_____

(e) On appeal: _____

_____

(f) In any post-conviction proceeding: _____

_____

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

_____

_____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ❑ No ❑

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ❑ No ❑

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

_____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ❑ No ❑

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as codified in 28 U.S.C. § 2255 does not bar your motion.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as codified in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

(1) the date on which the judgment of conviction became final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief: _____

_____

_____

or any other relief to which he or she may be entitled.

_____

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion Under 28 U.S.C. § 2255 was placed in the prison mailing system on _____

_____ (month, date, year).

Executed (signed) on _____ (date).

_____

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion. _____

_____

_____

IN FORMA PAUPERIS DECLARATION

[Insert from Appendix of Forms for 28 U.S.C. § 2254]

Item IIC

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Rule 35(a); Definition of "Sentencing" for Purposes of Rule 35

DATE: April 1, 2003

At the Fall 2002 meeting the Committee agreed that the better approach for dealing the problems in Rule 35 concerning the definition of sentencing, was to add a new definitional section, which explicitly notes that the term "sentencing" means oral announcement of the sentence.

I have attached a draft of the rule and Committee Note that makes those suggested changes. If the Committee agrees with the language, it can approve the changes and forward the amendments to the Standing Committee with a recommendation that they be approved without further publication, and forwarded to the Judicial Conference.

This item is on the agenda for the April meeting.

Rule 35. Correcting or Reducing a Sentence

(a) Definition. For purposes of this rule, "sentencing" means the oral announcement of the sentence.

~~(a)~~(b) Correcting Clear Error. Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

~~(b)~~(c) Reducing a Sentence for Substantial Assistance.

(1) ***In General.*** Upon the government's motion made within one year of sentencing, the court may reduce a sentence if:

(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and

(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.

(2) ***Later Motion.*** Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the

defendant.

(3) ***Evaluating Substantial Assistance.*** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(4) ***Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute

COMMITTEE NOTE

In 2000, the Committee proposed several substantive changes to Rule 35 and published those proposed amendments for public comment as part of the major restyling effort of all of the Rules of Criminal Procedure. After further review, however, the Committee determined that some attention should be given to the definition of "sentencing," the term used in the published revised rule, which went into effect on December 1, 2002. As a result of those discussions, the Committee proposed that the rule be further amended to include a definition of "sentencing" in revised Rule 35(a). As published in 2001, the rule would have defined "sentencing" as "entry of the judgment." Following the comment period, which ended on February 15, 2002, and as a result of comments on the proposed amendment, the Committee decided to retain the definitional section, Rule 35(a), but to adopt the majority view that the provisions in Rule 35 are triggered by the oral announcement of the sentence, and not the entry of judgment.

Originally, the language in Rule 35 used the term "imposition of the sentence." Although the term "imposition of sentence" was not defined in the rule, the courts that addressed the issue were split. The majority view was that the term meant the oral announcement of the sentence and the minority view was that it meant the entry of the judgment. *See United States v. Aguirre*, 214 F.3d 1122, 1124-25 (9th Cir. 2000) (discussion of current Rule 35(c) and citing cases). During the restyling of all of the Criminal Rules in 2000 and 2001, the Committee determined that the uniform term "sentencing" throughout the entire rule was the more appropriate term. Upon further reflection, and with the recognition that some ambiguity may still be present in using the term "sentencing," the Committee believes that the better approach is to make it clear in the rule itself that the term "sentencing" in Rule 35 means the oral announcement of the sentence. That is the approach recognized in the majority of the cases that have addressed the issue.

Item ID1

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rule 11(b)(1)(A)**

DATE: **March 31, 2003**

Attached is a letter from Chief Judge Brock Hornby regarding a proposed amendment to Rule 11(b)(1)(A), which addresses the possibility of the government prosecuting a defendant from making false statements during the plea colloquy. Judge Hornby believes that the revised language (resulting from the restyling efforts) seems to require that warning regardless of whether the defendant's statements during the colloquy are preceded with an oath. He adds that one might read the revised rule to mean that the judge must give that advice only when the charges to which the defendant is entering a plea of guilty involve false statement or perjury.

He suggests a revision to the current language. This item is on the agenda for the April meeting.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

D. BROCK HORNBY
CHIEF JUDGE

156 FEDERAL STREET
PORTLAND, MAINE 04101
(207) 780-3280

November 21, 2002

Peter G. McCabe, Secretary
Judicial Conference Committee on Rules
of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Amendment of Fed. R. Crim. P. 11

Dear Peter:

I believe one of the "stylistic" revisions to Criminal Rule 11, destined to take effect next month, will inadvertently create confusion.

Until now, Rule 11(c)(5) has required that if a pleading defendant is placed under oath, the court must inform the defendant that statements he/she then makes (under oath) can "later be used against the defendant in a prosecution for perjury or false statement." The meaning was obvious, and the provision worked fine.

Now, the comparable provision is in Rule 11(b)(1)(A), and by syntax appears to be a required warning during a Rule 11 colloquy, whether or not the defendant is under oath. Moreover, without an understanding of the previous history of the Rule, the plain language and syntax of the Rule would lead the reader to conclude that it requires a warning about government rights when, and only when, the current charges (to which the defendant is pleading guilty) are false statement or perjury charges. I do not believe the Committee (or the Conference or the Supreme Court) intended either inference.

If the provision remains where it is in the new version, I believe the conditional clause needs to be added ("if the defendant is placed under oath") and the modifier "later" needs to be added to "prosecution."

Very truly yours,

D. Brock Hornby

dlh
cc: Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure
Professor Daniel Coquillette, Reporter
Hon. Edward E. Carnes, Chair, Advisory Committee on Criminal Rules
Professor David A. Schlueter, Reporter
John K. Rabiej
via fax

Item IID2

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rule 11; Advice Concerning Collateral Consequences**

DATE: **April 1, 2003**

Judge Friedman, in the attached letter and memo, suggests that the Committee review a proposal originally raised by Roger Pauley concerning an amendment to Rule 11. The suggestion is that that rule be amended to require the judge to apprise a defendant of the possible collateral consequences that might result from a guilty plea, e.g., possible deportation proceedings.

The issue has been raised before. In 1992, the Committee considered and unanimously rejected a specific proposal to amend Rule 11 to require advice of possible deportation. As noted in the attached minutes of the April 1992 meeting, some members of the Committee were concerned that the amendment would lead to a requirement to advise defendants about other collateral consequences. A copy of the 1992 memo and proposed language are also attached.

This item is on the agenda for the April meeting.

United States Court of Appeals
For The Eleventh Circuit
ONE CHURCH STREET
MONTGOMERY, ALABAMA 36104

ED CARNES
CIRCUIT JUDGE

TELEPHONE (334) 954-3580
FAX (334) 954-3599

2/25/03

February 19, 2003

Mr. John K. Rabiej
Chief
Rules Committee Support Office
OJP-RCSO
Administrative Office of the US Courts
Washington, DC 20544-0001

Dear John:

Please see that the two matters Judge Friedman raises in his Feburary 13, 2003 letter are put on the agenda for our next meeting.

Sincerely,

ED CARNES
United States Circuit Judge

Enclosure

c: Judge Paul L. Friedman
Professor David A. Schlueter

United States District Court
for the District of Columbia
Washington, D.C. 20001

Chambers of
Paul L. Friedman
United States District Judge

MEMORANDUM

TO: Members, Criminal Rules Advisory Committee

FROM: Judge Paul L. Friedman

RE: Rule 11 of the Federal Rules of Criminal Procedure

DATE: April 1, 2003

In his November 20, 2001 farewell memorandum to the Committee, Roger Pauley suggested, inter alia, that the Committee reconsider the issue of whether a court in conducting a plea colloquy under Rule 11 of the Federal Rules of Criminal Procedure should be required to apprise a defendant who is an alien about possible adverse immigration consequences following a guilty plea. At least 19 states, including those with large populations of aliens, and the District of Columbia now have statutes that specifically require that aliens be advised of the potential adverse immigration consequences of a guilty plea. See INS v. St. Cyr, 533 U.S. 289, 322 n. 48 (2001). In addition, Roger noted that a recent amendment to the federal immigration laws requires the deportation of an alien convicted of an "aggravated felony." In light of these developments, Roger recommended that the Committee revisit the question of whether a defendant should be advised of this specific collateral consequence of a guilty plea at the time of his or her plea. I enclose the relevant excerpts from Roger's November 20, 2001 memorandum

for the Committee's consideration.

By way of example, the judges of the Superior Court of the District of Columbia are required by statute to give the following advice prior to accepting a plea:

> If you are not a citizen of the United States, you are advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

16 D.C. Code § 713(a). My colleagues, Judge Colleen Kollar-Kotelly and Judge Gladys Kessler use the following language:

> Where were you born?
>
> If you are not a U.S. citizen do you understand that conviction of this offense may result in your deportation, exclusion from the U.S., or denial of citizenship under our immigration laws?

My colleague, Judge Richard W. Roberts, and I both use the following language:

> Where were you born?
>
> If you are not a citizen of the United States, you are advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.[1]

A number of other judges on this Court use similar language.

I recommend that Rule 11 of the Federal Rules of Criminal Procedure be amended, substantially in the language used in the District of Columbia Code.

---

[1] With respect to other collateral consequences, I also ask:

> Do you understand that if I accept your plea, you may be deprived of certain valuable civil rights, such as the right to vote, the right to hold public office and certain jobs in both the public and private sectors, the right to serve on a jury, and the right to possess any kind of firearm?

EXCERPTS FROM ROGER PAULEY'S MEMORANDUM

IV. Rule 11.

Given recent developments, the Committee should explore whether Rule 11 should be amended to require that, as part of the plea colloquy, the judge assure that an alien defendant, at least in some instances (described below), is aware of the possible adverse immigration consequences flowing from a guilty or nolo contendere plea.

As the Committee well knows, federal law has never interpreted Rule 11 to require that persons pleading guilty be made aware of "collateral consequences" from their pleas, even important ones including loss of voting and firearms rights and loss of eligibility to hold certain jobs or elective offices. Immigration consequences have also consistently been deemed to fall into the "collateral consequences" category. However, in recent years a number of States have revised their laws to require specifically that aliens be advised of the potential adverse immigration consequences of a guilty plea. The number of such States, according to the Supreme Court opinion in INS v. St. Cyr, 121 S.Ct. 2271, 2291n.48 (2001), is 19 and includes States with large populations of aliens such as California, Florida, New York, and Texas. Also relatively recently, Congress amended the immigration laws to create a category of offenses, termed "aggravated felony," 8 U.S.C. 1101(a)(43), conviction of which renders an alien deportable and ineligible to apply for most forms of discretionary relief and therefore makes it extremely likely that such a conviction will lead ultimately to the alien's removal.

The question for the Committee is whether these recent developments merit a change in Rule 11 with respect to deportation consequences generally, or with respect to the category of violations constituting "aggravated felon[ies]." Recently a district court concluded that Rule 11 must be construed *presently* to embody a requirement that an alien be informed, in an "aggravated felony" case, of the deportation consequences, United States v. El-Nobani, 145 F. Supp.2d 906 (N.D. Ohio 2001), although it acknowledged that at least one circuit has rejected this position. See United States v. Gonzalez, 202 F.3d 20 (1st Cir. 2000). That circuit holding was, however, prior to the Supreme Court's decision in St. Cyr, supra, which quoted with approval statements in court decisions noting that aliens typically "factor the immigration consequences of conviction in deciding whether to plead or proceed to trial" and that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." 121 S.Ct., at 2291.

One need not agree with the district court above that Rule 11 now contains a deportation advice component to consider whether the above factors and the legal developments alluded to distinguish deportation sufficiently from other collateral consequences in terms of importance so as to warrant a fresh look at the issue whether, as a policy matter, Rule 11 should be amended accordingly; and (without proffering a view of the

merits) I so recommend.[8]

[8]Most circuits have caselaw interpreting "aggravated felony, either in an immigration or a sentencing context, so that district judges will not be left at sea in Rule 11 situations. Moreover, if in doubt, the judge could always give an immigration consequences warning. I contemplate that such a warning would be very general in nature, like the one involving the sentencing guidelines, e.g., "are you aware that the offense to which you are pleading is or may be one that, by law, renders you deportable from this country and ineligible for many forms of discretionary relief from deportation?"

MEMO TO: **Advisory Committee on Criminal Rules**

FROM: **Dave Schlueter, Reporter**

RE: **Amendments to Rule 11 to Provide for Magistrate Judges Hearing Guilty Pleas and to Inform Accuse of Possible Deportation**

DATE: **March 2, 1992**

1. Magistrate Judges Hearing Guilty Pleas.

At the November meeting, Judge Hodges raised the issue of whether the Supreme Court's decision in Peretz v. United States, 111 S.Ct. 2661 (1991) might support an amendment to Rule 11 to permit magistrate judges to hear guilty pleas, as a delegable "additional duty." (See attached memo dated 9/12/91). He also informed the Committee that the Administration of the Magistrates Judges Committee was going to consider the possibility of using Magistrate Judges to hear guilty pleas in felony cases at its Fall 1991 meeting. Subsequently, that Committee met and the chair, Judge Wayne Alley, sent Judge Hodges the attached letter indicating that his committee was opposed to authorizing magistrate judges to accept guilty pleas in felony cases. That committee was also opposed to authorizing magistrate judges to conduct sentencing proceedings or to preside over an entire felony trial. The question presented is whether the Advisory Committee wishes to pursue the possiblity of amending Rule 11 to permit magistrate judges to conduct any, or all, of the guilty plea inquiry.

2. Amendment to Rule 11(c) Regarding Advice of Possible Deportation.

Also attached is a letter from Mr, James Craven proposing that Rule 11(c) be amended to add a requirement that before any guilty or nolo contendre plea is accepted, the judge must advise an accused who is not a United States citizen of the possiblity of deportation, etc. Attached to his letter is a copy of a similar provision in the North Carolina statutes.

A draft of the proposed amendment as it might appear in Rule 11(c) is attached.

Rule 11. Pleas

* * * * *

(c) ADVICE TO DEFENDANT. Before accepting a plea of guilty or nolo contendre, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(6) that if the defendant is not a citizen of the United States, a plea of guilty or nolo contendre may result in deportation, exclusion from admission to the United States, or denial of naturalization.

* * * * *

MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

April 23, 24, 1992
Washington, D.C

The Advisory Committee on the Federal Rules of Criminal Procedure met in Washington, D.C. on April 23 and 24, 1992. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Keenan, acting chair, called the meeting to order at 9:00 a.m. on Thursday, April 23, 1992 at the Administrative Office of the United States Courts. The following persons were present for all or a part of the Committee's meeting:

Hon. Wm. Terrell Hodges, Chairman
Hon. James DeAnda
Hon. John F. Keenan
Hon. Sam A. Crow
Hon. D. Lowell Jensen
Hon. B. Waugh Crigler
Prof. Stephen A. Saltzburg
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Mr. Edward Marek, Esq.
Mr. Roger Pauley, Jr., designee of Mr. Robert S. Mueller III, Assistant Attorney General

Professor David A. Schlueter
Reporter

Also present at the meeting were: Judge Robert Keeton, Chairman of the Standing Committee on Rules of Practice and Procedure, Mr. Joe Spaniol, Mr. Peter McCabe, Mr. David Adair, Ms. Judith Krivit, and Mr. John Robiej of the Administrative Office of the United States Courts, and Mr. William Eldridge of the Federal Judicial Center. Judge Harvey Schlesinger was not able to attend.

I. INTRODUCTIONS AND COMMENTS

Due to the temporary absence of Judge Hodges, Judge Keenan welcomed the attendees and noted that all of the members were present with the exception of Judge Hodges, who was expected shortly and Judge Schlesinger whose docket prevented him from attending the meeting. Judge Keenan extended a welcome to the two new members, Judge Jensen and Magistrate Judge Crigler. He noted that Mr. William

Civil Rules Committee first. Mr. Pauley strenuously objected to that suggestion.

The Committee ultimately rejected the motion by 4 to 5 with one absention.

2. Rule 11. Proposal to Require Advice Concerning Consequences of Guilty Plea

Judge Hodges informed the Committee that Mr. James Craven had suggested that Rule 11 be amended. The amendment would require that any defendant who was not a United States citizen be advised that a plea of guilty might result in deportation, exclusion from admission to the United States, or denial of naturalization. The brief discussion which followed focused on the practical problems associated with giving this, and similar advice which really focuses on the potential collateral consequences of a guilty plea. Judge Keenan moved that the proposed amendment be disapproved. Judge DeAnda seconded the motion which carried unanimously.

3. Rule 16. Proposal to Consider Amendments.

Judge Hodges indicated that Mr. Wilson had suggested that Rule 16 be considered in light of growing concerns about federal criminal discovery. But in his absence, the matter would be carried over to the Fall 1992 meeting.

4. Rule 16(a)(1)(A). Disclosure of Statements by Organizational Defendants

The Reporter indicated that in response to the Committee's direction at the November 1991 meeting, he had drafted proposed amendments to Rule 16 concerning disclosure of statements by organizational defendants. In a brief discussion it was noted that the Rule and the Committee Note should differentiate between statements by agents which would be discoverable as party admissions and an agent's statements concerning acts for which the organization would be vicariously liable. Mr. Karas moved that the amendment be forwarded to the Standing Committee for public comment. Judge Crow seconded the motion. It carried unanimously.

5. Rule 29(b). Proposal to Delay Ruling on Motion for Acquittal.

The Committee continued its discussion of an amendment to Rule 29(b) which had been suggested by the Department of Justice and addressed at the November 1991 meeting. Additional drafting of the amendment made clear that the judge could only consider evidence admitted at the time of the motion in considering whether to grant a deferred

Item IID3

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Proposed Amendment to Rule 12.2(d); Missing Sanction

DATE: March 31, 2003

At the April and September 2002, meetings, the Committee considered an amendment to Rule 12.2(d) that would fill a gap created in the 2002 amendments to the rule; the amended rule contains no sanction provisions if the defendant fails to disclose any expert reports, as required under Rule 12.2(c)(3). I prepared a draft amendment for the September meeting. Following discussion, Judge Carnes asked Mr. Campbell and Mr. Jaso to consult on the issue of whether the proposed language might be overbroad, considering the impact of a failure to disclose the report.

As a result of those discussions, Mr. Campbell prepared a draft (attached) which separates the sanctions for failure to disclose the report, from the failure to give notice under Rule 12.2(b) failure to submit to an examination ordered under Rule 12.2(c). Mr. Jaso has agreed to that approach.

Using Mr. Campbell's language, I have prepared another draft of Rule 12.2(d), using the traditional marked-up formatting.

At the September 2002 meeting, there was also some discussion about whether the Committee Note should address the issue of granting a continuous to review any reports submitted under the Rule. The attached Note includes a reference to that point, in the context of imposing lesser sanctions or relief to the government if the defense fails to submit the report.

This item is on the agenda for the April meeting in Santa Barbara.

Rule 12.2. Notice of Insanity Defense; Mental Examination

.

(d) Failure to Comply.

(1) ***Failure to Give Notice or to Submit to Examination.*** The court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case if the defendant fails to:

(A) give notice under Rule 12.2(b); or

(B) submit to an examination when ordered under Rule 12.2(c).

(2) ***Failure to Disclose.*** The court may exclude any expert evidence for which the defendant has failed to comply with the disclosure requirement of Rule 12.2(c)(3).

Note: This draft responds to the proposal to amend Rule 12.2 to supply a missing sanction provision. (See September 2002 meeting book, tab II-C-1.) The substantively amended rule that took effect December 1, 2002 permits a sanction of exclusion of "any expert evidence" for failure to give notice or failure to submit to an examination, but provides no sanction for failure to disclose reports. The fix proposed at the September 2002 meeting would extend the same global sanction to defendant's failure to disclose results and reports of his own expert examinations. This broad sanction may be appropriate for the first two violations, which can substantially affect the entire hearing. But it seems overbroad to expressly authorize exclusion of "any" expert evidence, even evidence unrelated to the results and reports that were not disclosed. This draft would treat the new sanction for failure to disclose separately, tying the exclusion directly to the evidence for which the defendant failed to disclose.

Rule 12.2. Notice of Insanity Defense; Mental Examination

* * * * *

(d) Failure to Comply.

(1) ***Failure to Give Notice or to Submit to Examination.*** ~~If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the~~ The court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case~~.~~ if the defendant fails to:

(A) give notice under Rule 12.2(b); or

(B) submit to an examination when ordered under Rule 12.2(c).

(2) ***Failure to Disclose.*** The court may exclude any expert evidence for which the defendant has failed to comply with the disclosure requirement of Rule 12.2(c)(3).

COMMITTEE NOTE

The amendment to Rule 12.2(d) fills a gap created in the 2002 amendments to the rule. The substantively amended rule that took effect December 1, 2002, permits a sanction of exclusion of "any expert evidence" for failure to give notice or failure to submit to an examination, but provides no sanction for failure to disclose reports. The proposed amendment is designed to address that specific issue.

Rule 12.2(d)(1) is a slightly restructured version of current Rule 12.2(d).

Rule 12.2(d)(2) is new and permits the court to exclude any expert evidence for failure to comply with the disclosure requirement in Rule 12.2(c)(3). The sanction is intended to relate only to the evidence related to the matters address in the report, which the defense failed to disclose. Unlike the broader sanction for the two violations listed in Rule 12.2(d)(1)—which can substantially affect the entire hearing — the Committee believed that it would be overbroad to expressly authorize exclusion of "any" expert evidence, even evidence unrelated to the results and reports that were not disclosed, as required in Rule 12.2(c)(3).

The rule assumes that the sanction of exclusion will result only where there has been a complete failure to disclose the report. If the report is disclosed, albeit in an untimely fashion, other relief may be appropriate, for example, granting a continuance to the government to review the report.

Item IID

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendments to Rules 29, 33, 34, and 45 re Time for Ruling on Motions Under Those Rules**

DATE: **April 1, 2003**

For the last several meetings, the Committee has considered possible amendments to Rules 29, 33, 34, and 45. Those proposals are based upon a recommendation from Judge Friedman that the current 7-day period for setting the time for filing motions under those rules creates unjust and unanticipated results. At the April 2002 meeting, the Committee tentatively approved the proposal, subject to specific language being submitted. I prepared draft versions of the amendments and included them in the September 2002 agenda book. Because Judge Friedman could not attend the meeting, however, the matter was deferred to the April 2003 meeting.

Attached to this memo is a recent draft memo from Judge Friedman and a copy of the language I had drafted for the September 2002 meeting.

This item is on the agenda for the April meeting in Santa Barbara.

United States District Court
for the District of Columbia
Washington, D.C. 20001

Chambers of
Paul L. Friedman
United States District Judge

MEMORANDUM

TO: Members, Criminal Rules Advisory Committee

FROM: Judge Paul L. Friedman

RE: Rules 29, 33 and 34 of the Federal Rules of Criminal Procedure

DATE: April 1, 2003

As we discussed at our meeting on April 26-27, 2002 in Washington, D.C., Rules 29, 33 and 34 of the Federal Rules of Criminal Procedure, as currently written, require that any motion for an extension of time to file a motion under those Rules must not only be filed by defense counsel within a seven-day period but also must be acted upon by the trial judge within those seven days. Courts have concluded that because of the way these Rules are written the failure of the judge to act on the motion to extend within the seven-day period deprives the court of jurisdiction to consider the later-filed underlying substantive motion for judgment of acquittal, new trial, or arrest of judgment. See, e.g., United States v. Smith, 331 U.S. 469, 473-74 (1947) (rejecting argument that trial court has power to grant new trial on its own motion after expiration of time provided in Rule 33); United States v. Marquez, 291 F.3d 23, 27-28 (D.C. Cir. 2002) ("According to the clear language of Rule 33, the District Court forfeited the power to act when it failed to . . . fix a new time for filing a motion for a new trial within seven days of the

verdict"). The defendant therefore may be deprived of a valuable right through no fault of his or her own, for example, if the judge is ill or absent from the courthouse.

Following the Committee's discussion at the April 2002 meeting, I moved that Rules 29, 33 and 34 be amended to remove the requirement that the judge must rule on a request for an extension of time within the seven-day time period. Mr. Fiske seconded the motion, which carried by a vote of 10-2. See Minutes of Meeting of April 26-27, 2002, Advisory Committee on Federal Rules of Criminal Procedure, at 10-11. Judge Carnes indicated that the specific language to be used to implement this decision would be considered at a subsequent meeting By memorandum to the Committee of August 21, 2002, Professor Schlueter suggested that the simplest way to implement the decision of the Committee in April 2002 would be to delete the words "during the 7-day period" and to make a conforming amendment to Rule 45. I recommend that the Committee adopt this proposal at its April 28-29, 2003 meeting.

Enclosed for your information are my memorandum of April 18, 2002 and Professor Schlueter's suggested language changes.

MEMORANDUM

TO: **Members, Criminal Rules Advisory Committee**

FROM: **Judge Paul L. Friedman**

RE: **Rules 29, 33 and 34 of the Federal Rules of Criminal Procedure**

DATE: **April 18, 2002**

The following is the memorandum I referred to in my letter of March 22, 2002, to Judge Carnes requesting that this item be placed on the agenda for the meeting on April 25-26, 2002. See Advisory Committee on Criminal Rules, Agenda Book for Meeting on April 25-26, 2002, Tab II-D. I am sorry for the delay in submitting it.

Rule 29(c) of the Federal Rules of Criminal Procedure provides that after a jury returns a guilty verdict, "a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." Rule 33 of the Federal Rules of Criminal Procedure provides that "[a] motion for a new trial based on . . . grounds [other than newly discovered evidence] may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period." Rule 34 of the Federal Rules of Criminal Procedure

provides that a "motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty, or after plea of guilty or *nolo contendere*, or within such further time as the court may fix during the 7-day period." Rule 45(b)(2) of the Federal Rules of Criminal Procedure permits the district court to enlarge the period of time in which to file a motion after the expiration of the specific period of time upon a showing of excusable neglect, "but the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them."

Although strict enforcement of these time limits arguably serves the legitimate interest of finality of criminal convictions, many situations exist in which the 7-day time periods of Rules 29, 33 and 34 work a hardship on criminal defendants and could lead to unfair results. Under these three rules, for example, a defendant may seek an enlargement of time in which to file an appropriate motion but in doing so, defendant must file and the trial court must grant the motion within the 7 days. Thus, even the defendant who has acted promptly by seeking an extension within 7 days may lose his opportunity to move for judgment of acquittal, new trial or arrest of judgment if the trial judge is dilatory or, for example, is on vacation or is ill. In United States v. Hall, 214 F.3d 175, 176 (D.C. Cir. 2000), for example, the trial court received a timely motion for an extension of time in which to file a motion for new trial under Rule 33 but held the motion in abeyance to give the government a chance to respond. The court of appeals held that because the trial court waited over 7 days after the guilty verdict was returned, the trial court lacked jurisdiction to act on the motion, and the *nunc pro tunc* order granting the extension was a nullity. See id. Thus, a defendant who acts appropriately to

preserve his right to seek relief under these rules may forfeit his right to such relief because of the action or inaction of the trial judge.

When trial counsel for a defendant has rendered ineffective assistance at trial, strict construction of the 7-day time period also may unfairly prejudice the defendant. If, for example, a defendant wants to seek a new trial based on his trial counsel's ineffective assistance, he will be forced: (1) to rely on the trial counsel whom he felt was constitutionally deficient to file the motion for a new trial based on his or her own ineffective representation (something which trial counsel may not be able to do),[1] (2) to ask trial counsel to file a motion for an extension of time and to rely on counsel to make sure that the Court acts on the motion within 7 days of the verdict, or (3) to file a *pro se* motion for a new trial. In this context, a defendant is forced to depend on trial counsel whom he believes performed below the constitutional standard for effective counsel to preserve his right to certain types of post-trial relief.

The Advisory Committee Notes do not explain why the drafters thought it appropriate in the case of these particular Rules -- as opposed to countless others with no such requirement -- to require not only that a party file a motion within a particular time frame, but also that the trial judge must act on the motion within that same amount of time or lose jurisdiction. Nor does Professor Wright offer any explanation. See 2A CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE §§ 461-70 (3d 2000) (Rule 29); 3 CHARLES

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[1] Since the grounds on which the motion is based must be set forth with specificity within the 7-day time frame, see, e.g., United States v. Quintanilla, 193 F.3d 1139, 1148 (10th Cir. 1999), this places a particularly incongruous burden on defense counsel.

ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE §§ 551-59 (2d 1982) (Rule 33); id. §§ 571-74 (Rule 34). And judges generally resist such constraints on their discretion. I know from my own experience as chair of our Court's Civil Justice Reform Act Advisory Group, for example, how soundly we were rebuffed by the Court when we suggested a CJRA plan that would require that all pending motions in civil cases be decided within 90 days. Furthermore, while finality is a legitimate goal, the current Rules do not provide it. Under the current version of Rules 29, 33 and 34, there is nothing that prevents the trial court from granting a defendant a significant extension of time so long as this additional time is fixed within 7 days of the verdict. Thus, as the Rules are currently drafted, the merits of a substantive motion under any of these three Rules will not necessarily be dealt with shortly after the jury's verdict is returned. A judge can set a briefing schedule as extensive as he or she thinks appropriate so long as it is set within 7 days.

Rules 29, 33 and 34 could be amended to give the district court jurisdiction to grant motions for an extension of time *nunc pro tunc*. In effect, this rule change would allow defendant to stop the 7-day clock by filing a motion for extension of time in which to file an appropriate motion. This change would eliminate the unfairness to a criminal defendant created when he seeks an extension of time within 7 days, but the trial court fails to act within the allotted amount of time. Furthermore, such a change still would put a burden on defendant to act within 7 days either by filing the appropriate motion under Rules 29, 33 or 34 or by filing a motion for an extension of time. Or the Rules could be written to require that a motion for a new trial, etc. or a motion to extend time for filing such a motion "must be made within 7 days . . ." eliminating the requirement that it also be decided within that period. Alternatively,

Rule 45(b)(2) could be amended by removing the language after the semi-colon which relates to Rules 29, 33, 34 and 35. This change also would eliminate the hardship worked on criminal defendants when the court does not grant the motion for an extension of time within the 7 day period and may help to eliminate the unfairness of forcing a defendant to rely on ineffective trial counsel for post-trial relief. This rule change may be less desirable because a defendant would not necessarily have to file a motion within 7 days, and the trial court could be forced to deal with motions filed well after the jury's guilty verdict is returned.

Rule 29. Motion for a Judgment of Acquittal

* * * * *

(c) After Jury Verdict or Discharge.

(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later, or within any other time the court sets ~~during the 7-day period~~.

* * * * *

COMMITTEE NOTE

[To be drafted after Committee agrees on language for the amendment]

Rule 33. New Trial

* * * * *

(b) Time to File.

* * * * *

(2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty, or within such further time as the court sets ~~during the 7-day period~~.

COMMITTEE NOTE

[To be drafted after Committee agrees on language for the amendment]

Rule 34. Arresting Judgment

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(b) Time to File. The defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere, or within such further time as the court sets ~~during the 7-day period~~.

COMMITTEE NOTE

[To be drafted after Committee agrees on language for the amendment]

Rule 45. Computing and Extending Time

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(b) **Extending Time.**

(1) In General. When an act must or may be done within a specified time period, or the court on its own may extend the time, or for good cause may do so on a party's motion made:

(A) before the originally prescribed or previously extended time expires; or

(B) after the time expires if the party failed to act because of excusable neglect.

(2) **Exceptions**. The court may not extend the time to take any action under Rule ~~Rules 29, 33, 34 and~~ 35, except as stated in ~~those rules~~ that rule.

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COMMITTEE NOTE

[To be drafted after Committee agrees on language for the amendment]

Item IID5

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Department of Justice's Proposed Amendment to Rule 29**

DATE: **April 1, 2003**

The Department of Justice has recommended that Rule 29 be amended to preserve the government's right to appeal a court's motion for a judgment of acquittal. The memo covers the issue in great detail and includes proposed language for changing the rule.

This item is on the Committee's agenda for the April meeting in Santa Barbara.

U.S. Department of Justice

Criminal Division

Assistant Attorney General *Washington, D.C. 20530*

March 31, 2003

MEMORANDUM

TO: Hon. Edward E. Carnes
Chairman, Advisory Committee on Criminal Rules

FROM: Eric H. Jaso
Counselor to the Assistant Attorney General & Ex Officio

SUBJECT: Proposed Amendment to Criminal Rule 29

The Department of Justice requests that the Criminal Rules Advisory Committee amend Rule 29 of the Federal Rules of Criminal Procedure to preserve the government's right to appeal a trial court's decision to grant a motion for judgment of acquittal. Although the Department recognizes and supports the longstanding discretion of the district court to dismiss criminal counts as insufficiently supported by evidence introduced at trial, we do not believe that the Rules should continue to permit such discretion to be exercised without judicial review. Similarly, we recognize that most judges exercise this discretion with appropriate deference to the government's charging decisions and evidentiary burden, and to the province of the jury to weigh the sufficiency of evidence. However, we are concerned that some judges have exercised this discretion improperly, and granted dismissal motions pre-verdict expressly to avoid the possibility of appellate review. The Department urges the Committee to consider its concerns, including the examples of improper dismissals we note herein, and adopt the proposed amendment, which will preserve judicial discretion while ensuring that it is properly exercised in the vitally important area of criminal law enforcement.

The Current Version of Rule 29

Currently, Rule 29(a) permits the defendant to make a motion for judgment of acquittal "after the government closes its evidence or after the close of all the evidence," and permits the district court, in response to such a motion or on its own, to grant a judgment of acquittal if the evidence is insufficient to support a conviction. Rule 29(b) permits, but does not require, the court to reserve decision on an acquittal motion until the jury has reached a verdict. Rule 29(b) also permits a court to grant a judgment of acquittal if the jury is discharged without a verdict. Such rulings, made before the jury enters a verdict, can not be appealed under the Double Jeopardy Clause, no matter how erroneous. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977).

The Need for The Proposed Amendment to Rule 29

The proposed amendment would correct an anomaly in the Rules -- the ability of a district court to grant an unappealable judgment of acquittal. As commentators have recognized,

> [i]n all of federal jurisprudence there is only one district court ruling that is both absolutely dispositive and entirely unappealable. Federal Rule of Criminal Procedure 29 enables the trial judge upon her own initiative or motion of the defense to direct a judgment of acquittal in a criminal trial at any time prior to the submission of the case to the jury. Once the judgment of acquittal is entered, the government's right of appeal is effectively blocked by the Double Jeopardy Clause of the U.S. Constitution, as the only remedy available to the Court of Appeals would be to order a retrial. No matter how irrational or capricious, the district judge's ruling terminating the prosecution cannot be appealed.

Richard Sauber & Michael Waldman, *Unlimited Power: Rule 29(a) and the Unreviewability of Directed Judgments of Acquittal*, 44 Am. U. L. Rev. 433, 433-34 (1994) (footnotes omitted). These commentators noted that "[t]hough there is only one such rule in federal jurisprudence, it is one too many." *Id.*

This is not merely an academic issue. The Department has observed repeated instances in which district court judges have granted Rule 29 motions and dismissed criminal counts – and even entire cases -- after jeopardy has attached but before a jury verdict has issued, thus preventing the government from seeking appellate review. Nor is this a phenomenon involving a handful of extraordinary cases. District courts grant hundreds of judgments of acquittal each year, many of which are granted before the jury reaches a verdict. To an extent rarely equaled in our history, citizens look to the federal criminal justice system to play a leading role in ensuring the national security, policing financial markets and corporate suites, and ensuring the consistent enforcement of a host of important laws. Particularly in these times, the societal costs suffered when even a small number of meritorious criminal cases are irretrievably abrogated far outweigh the burdens placed on the court, the parties and the jurors to await the deliberation of the defendant's peers – whose verdict may moot the issue in any event – before allowing the court to render judgment. The Rules should ensure a just result for all parties to a criminal case. The proposed amendment would not restrict diminish judicial discretion; rather only permit the appellate courts to provide the same checks and balances against judicial *indiscretion* they do in virtually every other context.

Examples of Problems Encountered By the Current Version of Rule 29

The reasons given by judges granting pre-verdict judgments of acquittal are in many cases erroneous or insupportable. The examples we have gathered confirm that the authority to dismiss a case in a manner precluding appellate review has been employed unfairly to terminate prosecutions under circumstances in which the court has an unreasonable view of the sufficiency of the evidence.

Recently, the Department conducted a survey of all United States Attorney's Offices asking for empirical data regarding their experiences with either pre-verdict or post-verdict dismissals over the past three years. We received responses from 74 districts. A total of 240 cases were reported. Of that number, 159 cases were completely or partially dismissed before verdict.[1] Sixty-eight cases were dismissed after a verdict was entered. In a number of these post-verdict dismissals, the government appealed and was successful in reinstating the verdict. What follows are some particularly egregious examples of pre-verdict dismissals being granted.

In one district, a judge dismissed three counts of money laundering against two defendants pursuant to Rule 29 based upon an erroneous understanding of the law. The allegation was that the one defendant took proceeds from a mail fraud scheme and transferred it to a dummy corporation set up overseas. The other defendant helped him set up the overseas corporation and bank accounts. The court opined that where the money takes a "circuitous route" and never goes to a third party, the court did not believe it constituted money laundering. As a result, the court dismissed these money laundering counts pursuant to Rule 29.

In a case in another district, a judge granted a judgment of acquittal for the sole reason that he was scheduled to attend a conference. During the trial, when it appeared that the case would continue longer than the judge expected, he invited defense counsel to move for dismissal at the close of the government's case. The defense attorney told the judge he thought it was unethical to make the motion because he did not believe it was well founded. The judge dismissed the case and attended the conference.

This power also has been used to terminate cases a judge simply does not like, for reasons unrelated to the sufficiency of the evidence. A third district, which has experienced an exceptionally high number of pre-verdict dismissals, reported that in a prosecution for failure to pay child support the judge dismissed the case based upon his finding that there was insufficient evidence that the defendant lived in a different state than the child, despite sufficient prima facie (indeed, overwhelming) evidence (sworn statements, utility records, etc.) that the defendant had established residence elsewhere. The United States Attorney from that district is of the view that the judge in question viewed the case as a dispute better resolved in state court.

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[1] A number of the cases involved the pre-verdict dismissal of a defendant in a multi-defendant case or the dismissal of counts. Nevertheless, it appears approximately 100 cases were dismissed pre-verdict in their entirety.

A fourth district reported that one judge has exhibited great hostility towards firearms prosecutions. This judge apparently has commented that these cases are a waste of time and resources. In one case the judge dismissed the case pre-verdict based upon the government's failure to establish that the firearm traveled in interstate commerce. However, there are no gun manufacturers in that state and the precedent in that circuit holds that when a gun is stamped with the name of an out-of-state manufacturer, such evidence is sufficient to establish the interstate nexus without the need for the testimony of an ATF agent.

Two additional districts reported that following successful government appeals of post-verdict dismissals, the respective judges announced that in the future they would dismiss such cases *before* submission to the jury.

Summary of the Proposed Amendment to Rule 29

The proposed amendment is straightforward, and does not alter the basic purpose of the Rule. As amended, the Rule would require the district court to reserve decision on whether to grant a judgment of acquittal (unless the court simply denies the motion) until after the jury returns a verdict. It thus would preclude the entry of a judgment of acquittal before the jury returns a verdict, or if the jury is discharged without having returned a verdict. Accordingly, the proposed rule preserves the government's appellate rights and ensures that erroneous rulings will be corrected by the Courts of Appeals. Meritless or erroneous dismissals can be reversed and verdicts of guilt reinstated without offending the Double Jeopardy Clause. *See United States v. Scott*, 437 U.S. 82 (1978). Attached is a red-lined copy of the proposed rule change (Attachment "A") and a "clean" version of the amended rule (Attachment "B").

Conclusion

The Department of Justice has considered this issue at great length and does not lightly urge substantive amendments to the Criminal Rules, as this Committee is well aware. Nonetheless we believe that Rule 29 as currently constituted represents an anomaly within the Rules and indeed within the judicial system. Throughout the legal system – even in federal administrative proceedings far removed in jurisdiction and importance from the Article III courts – nearly every ruling made by the judge or decisionmaker can at some point be substantively appealed. For the Rules to preserve an unreviewable discretion to dismiss in its entirety a criminal case, perhaps the most fundamental and grave proceeding in any system of laws, is wrong as a matter of policy and of justice. Certainly the invocation of tradition alone should not suffice to preserve what is demonstrably improper. The proposed amendment to Rule 29 would help "provide for the just determination of every criminal proceeding," Fed. R. Crim. P. 2, and allow the Department of Justice to do a better job vindicating the interests of both the United States and the victims of crime. We know the Committee will seriously consider our views, and we urge the Committee to adopt the proposed amendment.

cc: Prof. David Schlueter, Secretary

ATTACHMENT "A"

PROPOSED AMENDMENTS TO 2002 VERSION OF RULE 29

Rule 29. Motion for a Judgment of Acquittal

(a) Before Submission to the Jury.

After the government closes its evidence or after the close of all the evidence, the ~~court on the~~ defendant ~~'s motion must enter~~may move for a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may ~~on its own consider whether the evidence is insufficient to sustain a conviction~~deny the motion, or reserve decision on the motion, but the court may not grant the motion prior to the jury's return of a verdict of guilty. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision.

~~The~~If the court ~~may~~ reserves decision on the motion, the court must proceed with the trial ~~(where the motion is made before the close of all the evidence)~~, submit the case to the jury, and decide the motion ~~either before~~after the jury returns a verdict ~~or after it returns a verdict~~ of guilty ~~or is discharged without having returned a verdict~~. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) After Jury Verdict ~~or Discharge~~.

(1) *Time for a Motion.* ~~A~~Within 7 days after a guilty verdict, or within any other time the court sets during the 7-day period, a defendant may move for a judgment of acquittal, or renew such a motion, ~~within 7 days after a guilty verdict or after~~ the court ~~discharges the jury, whichever is later, or within any other time the court sets during the 7-day period.~~ may on its own consider whether the evidence is insufficient to sustain a conviction.

(2) *Ruling on the Motion.* ~~If~~After the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. ~~If the jury has failed to return a verdict, the court may enter a judgment of acquittal.~~

(3)*No Prior Motion Required.* A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury ~~discharge~~verdict.

(d)Conditional Ruling on a Motion for a New Trial.

(1)*Motion for a New Trial.* If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or
reversed. The court must specify the reasons for that determination.

(2)*Finality.* The court 's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3)*Appeal.*
(A)*Grant of a Motion for a New Trial.* If the court conditionally grants a motion for a new trial and an appellate court later
reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.
(B)*Denial of a Motion for a New Trial.* If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

ATTACHMENT "B"

PROPOSED AMENDMENT TO 2002 VERSION OF RULE 29

Rule 29. Motion for a Judgment of Acquittal

(a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the defendant may move for a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may deny the motion or reserve decision on the motion, but the court may not grant the motion prior to the jury's return of a verdict of guilty. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision. If the court reserves decision on the motion, the court must proceed with the trial, submit the case to the jury, and decide the motion after the jury returns a verdict of guilty. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) After Jury Verdict.

(1) *Time for a Motion.* Within 7 days after a guilty verdict, or within any other time the court sets during the 7-day period, a defendant may move for a judgment of acquittal, or renew such a motion, or the court may on its own consider whether the evidence is insufficient to sustain a conviction.

(2) *Ruling on the Motion.* After the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal.

(3) *No Prior Motion Required.* A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury verdict.

(d) Conditional Ruling on a Motion for a New Trial.

(1) *Motion for a New Trial.* If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or
reversed. The court must specify the reasons for that

determination.

(2)*Finality*. The court 's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3)*Appeal*.
(A)*Grant of a Motion for a New Trial*. If the court conditionally grants a motion for a new trial and an appellate court later
reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.
(B)*Denial of a Motion for a New Trial*. If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

Item IID6

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Allocution for All Victims in Felony Cases: Proposed Amendment

DATE: April 1, 2003

At its September 2002, meeting the Committee approved in principle an amendment to Rule 32 that would extend the right of allocution to all victims in non-violent, non-sexual abuse felony cases. I was asked to draft appropriate language. Attached is suggested language for an amendment.

In considering specific language for this amendment, I encountered several issues that the Committee may wish to consider.

First, the current rule is the result of some work by the Committee and Congress; Congress originally added the language concerning victims of sexual abuse and a special definitional section. The Committee added the language about victim allocution for victims of violent crimes. To the best of my memory, the Committee did not distinguish between felony and misdemeanor offenses; although I think the assumption was that the rule would involve felony violence and sexual abuse offenses. Because the proposed expansion of allocution only addresses felony offenses, I thought it best —at least for now —to create a separate allocution provision for non-violent, non-sexual abuse felonies.

Second, the current rule permits someone other than the actual victim to address the court, under conditions specified in Rule 32(i)(4). The Committee may wish to consider whether those same considerations should be extended to victims of non-violent, non-sexual abuse felonies.

Third, in the law review article, which prompted the Committee's discussion in September, the author suggested inclusion of a provision that would state that the judge's decision regarding victim allocution was not reviewable. Although I have serious questions about the viability of that type of language, I have included nonetheless, at least for purposes of discussion.

Finally, Rule 32(a) includes definitions for "victim" and "Crime of violence or sexual abuse." At this point, I do not think any change needs to be made to those provisions.

Rule 32. Sentencing and Judgment

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(i). Sentencing.

* * * * *

(4) Opportunity to Speak

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(B) *By a Victim of a Crime of Violence or Sexual Abuse*. Before imposing sentence, the court must address any victim of any crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:

(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or

(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.

(C) *By a Victim of a Felony Offense*. Before imposing sentence, the court must address any victim of a felony offense, not involving violence or sexual abuse, who is present at the proceeding and must permit the victim to speak or submit any information about the sentence. Where the felony offense involves multiple victims, the court may limit the number of victims who will address the court.

* * * * *

~~(C)~~ (D) *In Camera Proceedings.* Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

[(E). *Nonreviewability.* The court's decision as to whether a person or organization is a victim, or whether a victim should be permitted to address the court, is not reviewable.]

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COMMITTEE NOTE

[To be drafted]

Item II D 7

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rule 32.1; Rights of Allocution**

DATE: **April 2, 2003**

At the September 2002 meeting in Maine, the Committee considered a proposed amendment to Rule 32.1 that would expressly include a right of allocution for a person during a revocation proceeding. At the time, I suggested that perhaps similar provision should be made for persons who face a modification or their sentence under Rule 32.1(c). The Committee agreed and asked that I consider additional language to accomplish that change as well.

The attached draft creates a parallel provision in Rule 32.1(c) for the provision in proposed new Rule 32.1(b)(2)(E). Blending Rule 32.1(b) and (c) together did not seem feasible, and simply cross-referencing (b)(2)(E) did not seem sufficient.

This item is on the agenda for the April meeting.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

* * * * *

(b) Revocation.

* * * * *

(2) Revocation Hearing. Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear; ~~and~~

(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel ~~.~~ ; and

(E) an opportunity to make a statement and present any information in mitigation.

(c) Modification.

(1). In General. Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right

to counsel - and an opportunity to make a statement and present any information in mitigation.

* * * * *

COMMITTEE NOTE

The amendments to Rule 32.1(b) and (c) are intended to address a gap in the rule. As noted by the court in United States v. Frazier, 283 F.3d 1242 (11th Cir. 2002) (per curiam), there is no explicit provision in current Rule 32.1 for allocution rights for a person upon resentencing. In that case the court noted that several circuits had concluded that the right to allocution in Rule 32 extended to supervised release revocation hearings. *See United States v. Patterson*, 128 F.3d 1259, 1261 (8th Cir. 1997) (Rule 32 right to allocution applies); *United States v. Rodriguez*, 23 F.3d 919, 921 (5th Cir. 1997) (right of allocution, in Rule 32, applies at revocation proceeding). But the court agreed with the Sixth Circuit that the allocution right in Rule 32 was not incorporated into Rule 32.1. *See United States v. Waters*, 158 F.3d 933 (6th Cir. 1998) (allocution right in Rule 32 does not apply to revocation proceedings). The *Frazier* court observed that the problem with the incorporation approach would require application of other provisions specifically applicable to sentencing proceedings under Rule 32, but not expressly addressed in Rule 32.1. 283 F.3d at 1245. The court, however, believed that it would be "better practice" is for courts to provide for allocution at revocation proceedings and stated that "[t]he right of allocution seems both important and firmly embedded in our jurisprudence." *Id.*

The amended rule recognizes the importance of allocution and now explicitly recognizes that right at revocation hearings, Rule 32.1(b)(2) and extends it as well to modification hearings where the court may decide to modify the terms or conditions of the defendant's probation, Rule 32.1(c)(1). In each instance the court is required to give the defendant the opportunity to make a statement and present any mitigating information.

Item II D 8

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rule 32.1 Regarding Presentation of Certified Copies of Judgment**

DATE: **April 1, 2003**

Attached is a letter from United States Magistrate Judge William Sanderson, Jr., in which he proposes that Rule 32.1 be amended to remove the requirement that the government produce certified copies of the judgment.

This item is on the agenda for the April meeting.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
UNITED STATES COURTHOUSE
1100 COMMERCE STREET, ROOM 1376
DALLAS, TEXAS 75242

WM. F. SANDERSON JR.
U.S. MAGISTRATE JUDGE

PHONE: (214) 753-2385
FAX: (214) 753-2390

03-CR-B

February 24, 2003

Peter G. McCabe
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
OJP AD/4-180
One Columbus Circle, NE
Washington, D.C. 20544

Dear Mr. McCabe:

I am writing to request that the Advisory Committee on Criminal Rules consider amending Federal Rule of Criminal Procedure 32.1(a)(5)(B)(i) which requires that the government produce certified copies of the judgment, warrant and warrant application relating to a probation or supervised release arrestee charged in another district.

The provisions of Rule 32.1 apply to such an individual by virtue of the provisions of amended Rule 5(a)(2)(B).

In the case of a person arrested on an out-of-district criminal complaint, facsimiles of the underlying charging documents are permitted. See Rule 5(c)(3)(D)(i). It is indeed anomalous that the authentication of documents with reference to a person who has already been convicted of a federal crime must satisfy a higher standard than those supporting a pending charge against an arrestee.

I can perceive of no rational reason for such a higher standard and apprehend that it is based on a mere oversight based upon the vast amount of material the Committee had to review in drafting the amendments which became effective December 1, 2002.

On a purely pragmatic level I would make the following observations:

1. More often than not an out-of-district probation (supervised release) violator is an absconder from jurisdiction of the distant district and is apprehended as a result of an NCIC "hit" following a local arrest. Therefore it is unlikely in the extreme that the clerk or the United States Marshal in the district of arrest has certified copies at the time of arrest.

2. Since the arresting district court has no jurisdiction over such an offender the delay in obtaining certified copies simply impedes the ultimate return of the offender to the issuing court, which benefits no one including the arrestee. Although Rule 32.1(a)(6) permits release on bond, it is highly unlikely that an absconder can discharge the burden imposed.

3. The standard in Rule 5(c)(3)(D)(i) is sufficient to protect the interests of an out-of-district probation (supervised release) violator - assuming no issue regarding identity. In nearly 24 years I have never confronted a situation in which facsimile copies of documents differed one iota from the original or certified copies.

Thank you for your consideration and that of the Advisory Committee.

Very truly yours,

Wm. F. Sanderson, Jr.

Item II D9

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Proposed New Rule 59; Matters Before a Magistrate Judge

DATE: April 1, 2003

At the Spring 2002 meeting in Maine, the Committee agreed to proceed with adoption of a new rule, or an amendment to an existing rule, which would serve as a counterpart to Rule of Civil Procedure 72. Judge Carnes appointed a subcommittee to address the issue; the subcommittee (Judge Miller, chair, and Judge Roll) submitted a draft amendment to Rule 12 to the Committee at its Fall 2002 meeting in Maine. Following additional discussion the subcommittee amended the draft, with a view to including a provision for magistrate judges taking guilty pleas.

The attached materials from Judge Miller include a variety of materials and a draft amendment for a new Rule 59, instead of an amendment to Rule 12. The materials, which are self-explanatory, include correspondence between Judge Carnes and the Magistrate Judges' Committee.

This item will be on the agenda for the April meeting in Santa Barbara. As noted in Judge Miller's cover letter, the subcommittee recommends that the new Rule 59 be approved and submitted to the Standing Committee with a recommendation that it be published for public comment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
SUITE 173
WALTER E. HOFFMAN UNITED STATES COURTHOUSE
600 GRANBY STREET
NORFOLK, VIRGINIA 23510-1915
(757) 222-7007

CHAMBERS OF
TOMMY E. MILLER
UNITED STATES MAGISTRATE JUDGE

FACSIMILE NO.
(757) 222-7027

March 3, 2003

The Honorable Edward E. Carnes
United States Circuit Judge
United States Court of Appeals
United States Courthouse, Suite 500D
One Church Street
Montgomery, AL 36104

Re: Criminal Rule Counterpart to Civil Rule 72
Felony Guilty Plea Proceedings before Magistrate Judges

Dear Judge Carnes:

At our meeting in October, you requested Judge Roll and me to continue to examine the proposal to add a criminal rule counterpart to Federal Rule of Civil Procedure 72 and to add a rule for felony guilty pleas before magistrate judges. I attended the meeting of the Committee on the Administration of the Magistrate Judges System in Savannah, Georgia on December 5, 2002 to discuss these issues with that committee.

Attached are the following documents:

1. Judge Carnes' letter to Judge Schlesinger dated October 21, 2002.

2. Judge Schlesinger's letter to Judge Carnes dated December 13, 2002.

3. Redline version of proposed Rule 12(i) -- now proposed Rule 59.

4. Proposed Rule 59 with draft comments.

5. Proposed Rule 11(i) with draft comments.

Your letter and Judge Schlesinger's letter clearly present the issues involved in these proposals and we will not repeat those discussions. We will comment on several new matters.

Prior to my trip to Savannah, a conference call was held with you, Judge Roll, Peter McCabe, John Rabiej, and me. We reviewed a staff memorandum from the Magistrate Judges Division and agreed with their suggestions. I reported the agreement to Judge Schlesinger and he incorporated the suggestions in pages 1 and 2 of his letter. These changes are noncontroversial and are highlighted in the redline version of proposed Rule 59 (Attachment 3).

On December 31, 2002, the Court of Appeals for the Ninth Circuit granted *en banc* review in United States v. Reyna-Tapia, 294 F.3d 1192 (9th Cir.), *vacated by* 315 F.3d 1107 (9th Cir. 2002). Thus, the major impetus for establishing a felony guilty plea rule for magistrate judges has been withdrawn.

After considering the comments at the meeting of the Committee on the Administration of the Magistrate Judges System and drafting problems created by including the felony guilty plea procedure in proposed Rule 59, I drafted a new Rule 11(i) to set out a felony guilty plea rule for magistrate judges. Proposed Rule 11(i) has the advantage of being contained within the general plea rule. Rule 11(i) cross references proposed Rule 59 as needed. Rule 11(i) also includes all the provisions that our committee felt needed to be included in such a rule. See page 3 of Attachment 1. Despite this drafting effort,we believe that the time is not ripe for proceeding with this rule. We believe that the committee should await the *en banc* decision from the Court of Appeals for the Ninth Circuit in Reyna-Tapia, supra.

Conclusions

We recommend that the proposed Rule 59 be submitted for public comment.

We recommend that the magistrate judge felony guilty plea rule be withdrawn from consideration at this time.

Respectfully submitted on behalf of
Judge Roll and myself,

Tommy E. Miller

Tommy E. Miller
United States Magistrate Judge

TEM:plc
Enclosures

cc: The Honorable John M. Roll, United States District Judge
Professor David A. Schleuter, Reporter
John K. Rabiej, Chief, Rules Committee Support Office

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

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EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

October 21, 2002

The Honorable Harvey E. Schlesinger
Chair, Committee on the Administration of the
Magistrate Judges System
United States District Court
Post Office Box 1740
Jacksonville, FL 32201-1740

Dear Judge Schlesinger:

The Advisory Committee on Criminal Rules needs advice from the Committee on the Administration of the Magistrate Judges System about several issues related to the duties of magistrate judges. Judge Miller of the Criminal Rules committee is available to attend your December 5-6, 2002 meeting as a representative of our committee if you wish to discuss these issues.

Attached is a draft of a proposed criminal rule tentatively numbered new Rule 12(i). This proposed rule covers several matters related to review of determinations or recommendations by magistrate judges in criminal cases:

1. Should there be a Rule of Criminal Procedure counterpart to Civil Rule 72?

In *United States v. Abonce-Barrera*, 257 F.3d 959 (9th Cir. 2001), the Ninth Circuit held that a defendant's failure to appeal a magistrate judge's discovery rulings to a district judge does not waive his right to appeal those rulings to the court of appeals. The Court concluded that the Criminal Rules, unlike the Civil Rules, do not require appeals from nondispositive decisions of magistrate judges to district judges as a prerequisite to review in the court of appeals, and it said that, "[i]f a rule like Civil Rule 72(a) should be adopted in criminal discovery, we believe the normal rule-making process should be employed," *id.* at 968. The Court did note that its decision conflicts with decisions of the First and Seventh Circuits, *id.* at 969.

A subcommittee of our committee worked on this issue over the summer and has proposed a criminal rule that sets out the procedures for appeal of a magistrate judge's determination in nondispositive matters, as well as review *de novo* of recommendations in dispositive matters. The proposed rule would have the effect of requiring that nondispositive rulings of magistrate judges be appealed to district judges before they could be appealed to the court of appeals.

2. Should a specific provision be included within the Criminal Rules setting forth a procedure for review of a magistrate judge's recommendation to accept a felony guilty plea? Should a general waiver of appeal be included within the rule?

In *United States v. Reyna-Tapia*, 294 F.3d 1192, 1201 (9th Cir. 2002), the Court held that, "when a defendant explicitly consents, a magistrate judge may administer the Rule 11 plea colloquy in a felony case, so long as the district court reviews the proceedings *de novo*."

The circuits that have addressed the issue of magistrate judges conducting felony Rule 11 proceedings are split three ways:

1. The Ninth Circuit now requires *de novo* review by a district judge in every case. *United States v. Reina-Tapia, supra.*

2. The Second, Fifth, and Eighth Circuits permit a magistrate judge to conduct the Rule 11 guilty plea colloquy and enter a report and recommendation that it be accepted, if a defendant consents, but unlike the Ninth Circuit they have not held that a district judge must conduct a *de novo* review of the proceeding even if there is no objection to the magistrate judge's report and recommendation that the guilty plea be accepted. *United States v. Torres*, 258 F.3d 791, 795-96 (8th Cir. 2001); *United States v. Dees*, 125 F.3d 261, 265 (5th Cir. 1997); *United States v. Williams*, 23 F.3d 629, 633 (2d Cir. 1994).

3. The Tenth Circuit has held that a magistrate judge may actually accept a guilty plea, as distinguished from issuing a report and recommendation that it be accepted, but if there is an objection or a motion to withdraw the plea, the district judge must review *de novo* the decision to accept the plea. *United States v. Ciapponi*, 77 F.3d 1247, 1251-52 (10th Cir. 1996).

The impact of the Ninth Circuit decision will be substantial. According to a memorandum from the Magistrate Judges Division, guilty plea proceedings are conducted by magistrate judges in significant volume in 46 districts. Of necessity, the practice is prevalent in the southwestern border districts where the courts are inundated with illegal entry and similar cases. For example, one of our committee members, Judge John Roll of Arizona, alone had 625 felony sentencings in 2001, the vast majority of which resulted from guilty pleas. Virtually all of those guilty pleas were taken in proceedings conducted by magistrate judges. Requiring preparation of a transcript and *de novo* review in every case in which the guilty plea is taken by a magistrate judge is time consuming, expensive, and unnecessary. The stark reality is that the district judges of the Ninth Circuit simply do not have time to read through a transcript of every guilty plea taken by a magistrate judge looking for some defect or error that neither party is concerned about.

Our committee believes that there should be three requirements for a magistrate judge to conduct a felony guilty plea proceeding:

1. The Defendant Must Consent to the Magistrate Judge Conducting the Guilty Plea Proceedings.

All of the circuit courts that have addressed the propriety of a magistrate judge conducting a guilty plea have agreed that the defendant must consent to the magistrate judge conducting the Rule 11 guilty plea. The Supreme Court has indicated that consent is required before a magistrate judge can carry out certain duties normally performed by a district judge in felony cases. *See Peretz v. United States*, 501 U.S. 923, 111 S. Ct. 2661 (1991); *Gomez v. United States*, 490 U.S. 858, 109 S. Ct. 2237 (1989).

2. The Magistrate Judge's Decision Should be in the Form of a Report and Recommendation.

The Tenth Circuit, in *United States v. Ciapponi*, 77 F.3d 1247, 1251-52 (10th Cir. 1996), held that a magistrate judge could actually accept a defendant's guilty plea in a felony case where the defendant had consented to the proceedings being before a magistrate judge. But every other circuit to address the issue has required that the magistrate judge submit a report and recommendation to the district judge that the guilty plea be accepted. We believe that the more conservative approach utilizing a report and recommendation procedure is preferable.

3. Upon Objection, There Must be Review of the Guilty Plea Decision by District Judge.

Only the Ninth Circuit has held that a district judge must review guilty plea proceedings and the magistrate judge's decision concerning acceptance of a guilty plea even if there is no objection or a motion to withdraw the plea.

In *United States v. Reyna-Tapia*, 294 F.3d 1192, 1201 (9th Cir. 2002), the Court states, "[W]e hold that, when a defendant explicitly consents, a magistrate judge may administer the Rule 11 plea colloquy in a felony case, so long as the district judge reviews the proceedings *de novo*." The Court then said, "We agree with the Fifth and Eighth Circuits that *de novo* review by the district court is a crucial factor for finding the duty to be delegable." *Id.* at 1201 n.7. That misstates the holdings of the Fifth and Eighth Circuits. Those circuits have held that the availability of *de novo* review by the district judge is crucial, but they have not held that *de novo* review is crucial or necessary when there is no objection. And, importantly, although the case concerned a different aspect of criminal proceedings, in *Peretz* the Supreme Court held that *de novo* review by a district judge is not required to satisfy Article III concerns unless it is requested in a timely fashion. 501 U.S. at 939, 111 S. Ct. at 2670-71.

In *Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475 (1985), the Supreme Court held:

> Courts of appeal may adopt a rule conditioning appeal, when taken from a district court judgment that adopts a magistrate's recommendation, upon the filing of objections with the district court identifying those issues on which further review is desired. Such a rule, at least when it incorporates clear notice to the litigants and an opportunity to seek an extension of time for filing objections, is a valid exercise of the supervisory power that does not violate either the Federal Magistrates Act or the Constitution.

As you can see from the enclosed, our committee is considering a rule of criminal procedure which would provide that the failure to object to a magistrate judge's report and recommendation waives the right to have an issue covered in that report and recommendation considered by either the district judge or the court of appeals. The waiver provision is set forth in the last sentence of proposed Rule 12(i)(2)(B).

We are also considering a provision that would permit a defendant to consent to a magistrate judge conducting a felony guilty plea and would require a *de novo* review by a district judge prior to sentencing only if the defendant timely objects; otherwise, it is waived. The waiver provision would cover all failures to object to a magistrate judge's report and recommendation, not just those related to felony guilty pleas.

For the same reasons that we are considering the waiver provision applicable to matters covered in reports and recommendations, which is presented in Rule 12(i)(2)(B), we are also considering a general waiver provision for nondispositive matters. It is contained in the last sentence of Rule 12(i)(1).

The Criminal Rules Advisory Committee solicits and would appreciate the comments and recommendations of the Committee on the Administration of the Magistrate Judges System about these matters. Please let Judge Miller know if you would like him to attend your meeting as a representative of the Criminal Rules Committee.

Sincerely yours,

Ed Carnes

Ed Carnes
United States Circuit Judge

cc: Judge John M. Roll
Judge Tommy E. Miller
Professor Dave A. Schlueter
John K. Rabiej

COMMITTEE ON THE ADMINISTRATION
OF THE MAGISTRATE JUDGES SYSTEM
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
Post Office Box 1740
Jacksonville, FL 32201-1740

HONORABLE LARRY M. BOYLE
HONORABLE ELAINE E. BUCKLO
HONORABLE TENA CAMPBELL
HONORABLE DENNIS M. CAVANAUGH
HONORABLE NINA GERSHON
HONORABLE IRMA E. GONZALEZ
HONORABLE RAYMOND A. JACKSON
HONORABLE R. E. LONGSTAFF
HONORABLE MILDRED E. METHVIN
HONORABLE DAN A. POLSTER
HONORABLE MICHAEL A. PONSOR
HONORABLE WALTER S. SMITH, JR.
HONORABLE MARY S. STANLEY

HONORABLE HARVEY E. SCHLESINGER
CHAIR

(904) 549-1990
(904) 549-1997 FAX

December 13, 2002

VIA FACSIMILE

Honorable Edward E. Carnes
Chair, Advisory Committee on Criminal Rules
United States Court of Appeals
500-D Frank M. Johnson, Jr. Federal
Courthouse Annex
One Church Street
Montgomery, AL 36104

Dear Judge Carnes:

I am writing to advise you of the actions taken by the Magistrate Judges Committee at its meeting last week concerning your Committee's proposal to add a criminal rule counterpart to Fed. R. Civ. P. 72. The Magistrate Judges Committee discussed the proposed rule and related issues at length and makes several recommendations.

The Committee endorses promulgation of a new federal rule of criminal procedure that will be a counterpart to Fed. R. Civ. P. 72, thereby establishing procedures for both non-case-dispositive and case-dispositive matters referred to magistrate judges. The Committee recommends, however, some changes to the draft rule submitted with your October 21, 2002, letter.

The draft rule as worded would apply only to pretrial matters, and does not address other non-case-dispositive and case-dispositive matters in felony cases that are referred to magistrate

judges during or after trial, such as voir dire proceedings, supervised release revocation proceedings, and probation revocation proceedings. The Committee believes that it would be more appropriate to promulgate a stand-alone criminal rule of procedure counterpart to Fed. R. Civ. P. 72 that would cover additional felony duties that are not specifically pretrial matters.

In addition, the draft rule in subsection (1) states that for non-case-dispositive matters, "[a] district judge may refer to a magistrate judge for a hearing and determination..." (emphasis added). Similarly, in subsection (2), the first sentence reads, "[a] district judge may refer to a magistrate judge for a hearing and recommendation..." (emphasis added). The use of the term "for a hearing" in the first sentences of both subsections could suggest that a magistrate judge must conduct a hearing whenever referred either a non-case-dispositive or case-dispositive matter. It is well established that magistrate judges are not required to hold hearings when referred matters under § 636(b). Accordingly, the Committee recommends that the words "a hearing and" be removed from the first sentence of subsection (1), and that the words "hearing and" be removed from the first sentence of subsection (2).

The Committee also endorses inclusion of a waiver provision in any new federal rule of criminal procedure promulgated as a counterpart to Fed. R. Civ. P. 72. The Committee believes, however, that the proposed waiver language contained in the draft rule goes too far in limiting review if a party fails to raise timely objections. The waiver provision applicable to case-dispositive matters referred to a magistrate judge states that, "[f]ailure to object in accordance with this rule precludes any review." Identical language (except that the proposed rule uses "to" instead of "with") would apply to non-case-dispositive matters referred to magistrate judges under the proposed rule. To the extent that the language precludes a district judge, if no objections are filed, from exercising discretionary authority to conduct *de novo* or any review of a magistrate judge's ruling or report and recommendation *sua sponte* or at the request of a party, it would be contrary to the Federal Magistrates Act and articulated Supreme Court decisions. Accordingly, the Committee recommends that the proposed waiver provisions make clear that the district judge retains the discretionary authority to review the magistrate judge's ruling *sua sponte* or at the request of a party, regardless of whether objections have been filed. It therefore recommends that the waiver provisions in the draft rule be changed to state as follows: "Failure to object in accordance with this rule waives a party's right to review." I understand, based on remarks made by Judge Tommy Miller at our meeting that Judge Roll, Judge Miller, and you all agree with this and the other changes suggested above.

Regarding felony guilty plea proceedings, the Committee recommends that any new federal rule of criminal procedure promulgated as a counterpart to Fed. R. Civ. P. 72 not specify felony guilty plea proceedings as case-dispositive matters or otherwise mention felony guilty plea proceedings conducted by magistrate judges. This view arises out of the Committee's concerns that the magistrate judges system must remain flexible to the varied needs of the district courts and that specific duties referred to magistrate judges should not be unnecessarily enumerated in either the statute or the rules of procedure.

From its inception, the Federal Magistrates Act was intended to encourage district courts to be flexible and to experiment in referring matters to magistrate judges. It has long been the view of Congress and the Judicial Conference that courts should be free to experiment in using magistrate judges in different ways. This view is expressed in the legislative history of 28 U.S.C. § 636(b)(3), the "additional duties" provision of the Federal Magistrates Act, where Congress stated:

> "[P]lacing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates....Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters." S. Rep. No. 625, 94th Cong., 2d Sess. 10; H.R. Rep. No. 1609, 94th Cong., 2d Sess. 12 (1976).

In recent years, the Magistrate Judges Committee has declined to endorse several proposals to amend the Act to make the statute more explicit about magistrate judge authority to conduct specific proceedings, including proceedings in felony cases. The Committee has considered such amendments unnecessary where case law has already established that magistrate judges have the authority in question. It has also consistently taken the position that the statute should not contain a list of enumerated duties, and has declined to endorse several attempts to include references to specific duties in the statute, primarily because inclusion of some duties could be read to implicitly exclude others. Including references to specific duties in the proposed rule would arguably present the same issues and concerns.

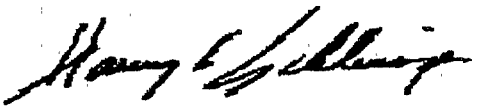
Accordingly, the Committee recommends that the proposed new rule not specify felony guilty plea proceedings as case-dispositive or non-case-dispositive. At the Committee's meeting, Judge Miller suggested that perhaps specific procedures relating to magistrate judges conducting felony guilty plea proceedings could be added to Fed. R. Crim. P. 11. For the same reasons outlined above, the Committee recommends that Fed. R. Crim. P. 11 not be amended to specifically discuss procedures for having magistrate judges conduct felony guilty plea proceedings. The Committee believes that it is more appropriate to leave district courts with the flexibility and discretion to use magistrate judges to accept felony guilty pleas in different ways.

By not specifying felony guilty plea proceedings as case-dispositive matters in the proposed new rule, courts would remain free to refer them to magistrate judges under subsection (1), which contains language that provides that review of a magistrate judge's order in a non-dispositive matter is waived if a party fails to file timely objections, or under subsection (2), treating guilty plea proceedings as case-dispositive matters, which would subject them to an explicit waiver provision governing *de novo* review. Such an approach would provide courts with the flexibility either to refer felony guilty plea proceedings to magistrate judges on a report and recommendation basis or to follow the practice upheld by the Tenth Circuit of having magistrate

judges accept felony guilty pleas with the defendant's consent, subject only to the defendant's right to withdraw the plea under Fed. R. Crim. P. 32. *See United States v. Ciapponi*, 77 F.3d 1247 (10th Cir. 1996). The Advisory Committee note to the proposed new rule could acknowledge the different approaches the circuits have taken regarding the extent of magistrate judges' authority in this area.

Thank you very much for soliciting our Committee's views on these issues. If you would like to discuss these issues with me, please do not hesitate to call.

Sincerely,



Harvey E. Schlesinger

cc: Members, Magistrate Judges Committee
Honorable Tommy E. Miller
Ms. Karen K. Siegel
Mr. Peter G. McCabe
Mr. Thomas C. Hnatowski
Mr. John K. Rabiej

~~Rule 12. Pleadings and Pretrial Motions~~

~~* * * * *~~

~~(i)~~ Rule 59 Matters Before a Magistrate Judge.

~~(1a)~~ *Nondispositive Matters*. A district judge may refer to a magistrate judge for ~~a hearing and~~ determination a ~~pretrial~~ matter that does not dispose of the case. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record a written order stating the determination. A party may serve and file any objections to the order within 10 days after being served with a copy or at some other time the court sets. The district judge must consider any timely objections and modify or set aside any portion of the order that is clearly erroneous or contrary to law. Failure to object in accordance ~~to~~ with this rule ~~precludes~~ ~~any~~ waives a party's right to review.

~~(2b)~~ *Dispositive Matters.*

~~(A~~1) A district judge may refer to a magistrate judge for ~~a hearing and~~ recommendation any ~~pretrial~~ matter that may dispose of the case including a defendant's motion to dismiss or quash an indictment or information, or a motion to suppress evidence in a criminal case~~, or a felony guilty plea under Rule 11~~. The magistrate judge must promptly conduct the required proceedings. A record must be made of any evidentiary proceeding before the magistrate judge and of any other proceeding, if the magistrate judge considers it necessary. The magistrate judge must enter on the record a

recommendation for disposing of the matter, including any proposed findings of fact. The clerk must immediately mail copies to all parties.

~~(B)~~2) Within 10 days after being served with a copy of the recommended disposition, or such other period as fixed by the court, a party may serve and file any specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the party objecting to the recommendation must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule ~~precludes~~ any waives a party's right to review.

~~(C)~~3) The district judge must consider de novo any objection to the magistrate judge's recommendation. The district judge may accept, reject, or modify the recommendation, receive further evidence, or may resubmit the matter to the magistrate judge with instructions.

Rule 59. Matters Before a Magistrate Judge

(a) *Nondispositive Matters*. A district judge may refer to a magistrate judge for determination a matter that does not dispose of the case. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record a written order stating the determination. A party may serve and file any objections to the order within 10 days after being served with a copy or at some other time the court sets. The district judge must consider any timely objections and modify or set aside any portion of the order that is clearly erroneous or contrary to law. Failure to object in accordance with this rule waives a party's right to review.

(b) *Dispositive Matters*.

(1) A district judge may refer to a magistrate judge for recommendation any matter that may dispose of the case including a defendant's motion to dismiss or quash an indictment or information, or a motion to suppress evidence in a criminal case. The magistrate judge must promptly conduct the required proceedings. A record must be made of any evidentiary proceeding before the magistrate judge and of any other proceeding, if the magistrate judge considers it necessary. The magistrate judge must enter on the record a recommendation for disposing of the matter, including any proposed findings of fact. The clerk must immediately mail copies to all parties.

(2) Within 10 days after being served with a copy of the recommended disposition, or such other period as fixed by the court, a party may serve and file any specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the party objecting to the recommendation must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

(3) The district judge must consider de novo any objection to the magistrate judge's recommendation. The district judge may accept, reject, or modify the recommendation, receive further evidence, or may resubmit the matter to the magistrate judge with instructions.

RULE 59

COMMITTEE NOTE

Rule 59 is a new rule that creates a procedure for the review by district judges of dispositive and nondispositive decisions by magistrate judges. This rule is derived in part from Federal Rule of Criminal Procedure 72.

The Committee's attention was directed to this issue by the decision in United States v. Abonce-Barrera, 257 F.3d 959 (9th Cir. 2001). The court held that the Criminal Rules do not require appeals from nondispositive decisions by magistrate judges to district judges as a requirement for review in a court of appeals. The court suggested that the rule-making process be employed if a criminal rule similar to Fed. R. Crim. P. 72(a) should be adopted. The Committee concluded a rule providing for review by district judges of magistrate judges' dispositive as well as nondispositive rulings should be proposed.

Rule 59(a) sets forth the procedure in nondispositive matters. After a magistrate judge decides a matter, the magistrate judge must issue an order. A party must object to the order within the time limit set by rule or by the judge. If an objection is made, the district judge must timely consider the objection under the clearly erroneous or contrary to law standard as set out in the rule and in 28 U.S.C. § 636(b)(1)(A).

Rule 59(b) provides for the assignment and review of recommendations made by magistrate judges in dispositive matters. It directs the magistrate judge to promptly consider the motion and enter on the record a recommendation for disposition. The parties are served with the recommendation and have ten (10) days to file an objection. If there is an objection, the district judge must conduct a de novo review of that portion of the magistrate judge's recommendation. The

district judge is free to accept, reject, or modify the recommendation or resubmit the matter to the magistrate judge for further proceedings.

Both Rule 59(a) and (b) contain a waiver provision that provides that "Failure to object in accordance with this rule waives a party's right to review." This waiver provision clarifies conflicting courts of appeals decisions discussing the requirements for objection in the district court to magistrate judge orders and recommendations in order to preserve appellate review. The Supreme Court upheld the adoption of waiver rules on matters determined or recommended by magistrate judges in Thomas v. Arn, 474 U.S. 140, 155 (1985). This waiver provision will enhance the ability of the district judge to review the magistrate judge's decisions or recommendations by requiring the party to promptly file an objection to that portion of the decision or recommendation at issue. The Supreme Court has held that a de novo review to a recommendation is only required to satisfy Article III concerns when there is an objection. Peretz v. United States, 501 U.S. 923 (1991).

Despite the waiver provision, the district judge still has the discretionary authority to review any decision or recommendation by a magistrate judge whether or not objections were timely filed. This discretionary review is in accord with the Supreme Court's ruling in Thomas v. Arn, 474 U.S. 140, 154 (1985). See also Matthews v. Weber, 423 U.S. 261, 270-271 (1976).

Rule 11. Pleas

* * * * *

(i) Felony Guilty Pleas Before a Magistrate Judge

(1) A district judge may refer felony guilty pleas to a magistrate judge to conduct proceedings under this rule.

(2) The defendant must consent to the magistrate judge conducting the proceeding.

(3) The magistrate judge must submit a recommendation to the district judge in compliance with Rule 59(b)(1) and (2).

(4) Upon timely objection, the district judge's review of the recommendation is governed by Rule 59(b)(3).

RULE 11(i)

COMMITTEE NOTE

United States Magistrate Judges conducted 15,725 felony guilty pleas in the year ending September 30, 2002. Every court of appeals that has addressed the issue has agreed that magistrate judges may conduct such proceedings The Second, Fifth, and Eighth Circuits permit the magistrate judge to preside over the felony guilty plea and to file a report and recommendation which the district judge reviews de novo if there is an objection. United States v. Torres, 258 F.3d 791, 795-96 (8th Cir. 2001); United States v. Deeds, 125 F.3d 261, 265 (5th Cir. 1997); United States v. Williams, 23 F.3d 629, 633 (2d Cir. 1994).

The Tenth Circuit permits the magistrate judge to accept a felony guilty plea and requires review by a district judge only if there is a motion to withdraw the plea. United States v. Ciapponi, 77 F.3d 1247, 1251-52 (10th Cir. 1996).

The Committee determined that there should be three requirements for a magistrate judge to conduct a felony plea proceeding. First, the defendant must consent to the magistrate judge conducting the proceeding. Second, the magistrate judge should submit a report and recommendation to the district judge. Finally, if there is an objection, there must be a de novo review of the guilty plea procedure by the district judge.

The Committee recognized the procedure adopted by the Tenth Circuit, which permits a magistrate judge to accept a felony guilty plea. However, every other circuit which has addressed the issue requires a report and recommendation. The Committee believes that the more conservative constitutional approach is to use the report and recommendation procedure.

The procedure in Rule 11(i) cross references Rule 59(b) so that the procedures to follow are

clear. By cross referencing Rule 59(b), the requirement of an objection by a party to preserve the matter for appeal set out in Rule 59(b)(2) applies to the Rule 11(i) procedure.

Item III A 1

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

December 5, 2002
Via Fax

MEMORANDUM TO JUDGE ED CARNES

SUBJECT: *Criminal Rule 6*

The Homeland Security Act of 2002 amended Criminal Rule 6 based on the rule's former language, which was amended on December 1, 2002. The Homeland Security Act takes effect 60 days from enactment on November 25, 2002. (Pub. L. No. 107-296.) A copy of the Act's relevant portions is attached.

Legislation is required to correct the drafting problem. I prepared a draft rule incorporating the Homeland Security amendments to Rule 6 and sent it to Professor Kimble for his review. I later sent Professor Kimble's edited version to Professor Schlueter. The attached draft represents Professor Schlueter's edits. I have also attached Professor Kimble's edits so that you can compare some of the changes made by Professor Schlueter. Most of the revisions are straightforward. But some are more complicated and are highlighted below.

We need to send a draft to the Department of Justice for their input. The Department is working on their own corrective language, so it makes sense if we can agree on a coordinated response to Congress. Once I receive your edits, I will send a revised version to Judge Scirica for his review. We can then send it to the Justice Department and await their input before proceeding.

Highlighted Revisions

Line 10 — Schlueter declined to accept Kimble's suggestion to insert "foreign or" after "any." Schlueter noted that the parenthetical following "government personnel" does not apply to both foreign and domestic personnel.

Lines 33-45 — Schlueter prefers to use the Congressional language, whereas Kimble moved the last clause earlier in the sentence.

Lines 53-54 — The Congressional language uses "shall." Kimble changed it to "must." Schlueter prefers "may only" to be consistent with the preceding sentence, which was enacted by Congress at an earlier time. Schlueter added the words "in a manner" before "consistent" in line 54.

John K. Rabiej

Attachments

cc: Honorable Anthony J. Scirica (with attach.)
Professor David A. Schlueter (with attach.)
Professor Daniel R. Coquillette (with attach.)
Peter G. McCabe, Secretary (with attach.)

(A) to access information shared with such personnel; and

(B) to share, with others who have access to such information sharing systems, the homeland security information of their own jurisdictions, which shall be marked appropriately as pertaining to potential terrorist activity.

(7) Under procedures prescribed jointly by the Director of Central Intelligence and the Attorney General, each appropriate Federal agency, as determined by the President, shall review and assess the information shared under paragraph (6) and integrate such information with existing intelligence.

(c) SHARING OF CLASSIFIED INFORMATION AND SENSITIVE BUT UNCLASSIFIED INFORMATION WITH STATE AND LOCAL PERSONNEL.—

(1) The President shall prescribe procedures under which Federal agencies may, to the extent the President considers necessary, share with appropriate State and local personnel homeland security information that remains classified or otherwise protected after the determinations prescribed under the procedures set forth in subsection (a).

(2) It is the sense of Congress that such procedures may include 1 or more of the following means:

(A) Carrying out security clearance investigations with respect to appropriate State and local personnel.

(B) With respect to information that is sensitive but unclassified, entering into nondisclosure agreements with appropriate State and local personnel.

(C) Increased use of information-sharing partnerships that include appropriate State and local personnel, such as the Joint Terrorism Task Forces of the Federal Bureau of Investigation, the Anti-Terrorism Task Forces of the Department of Justice, and regional Terrorism Early Warning Groups.

(d) RESPONSIBLE OFFICIALS.—For each affected Federal agency, the head of such agency shall designate an official to administer this Act with respect to such agency.

(e) FEDERAL CONTROL OF INFORMATION.—Under procedures prescribed under this section, information obtained by a State or local government from a Federal agency under this section shall remain under the control of the Federal agency, and a State or local law authorizing or requiring such a government to disclose information shall not apply to such information.

(f) DEFINITIONS.—As used in this section:

(1) The term "homeland security information" means any information possessed by a Federal, State, or local agency that—

(A) relates to the threat of terrorist activity;

(B) relates to the ability to prevent, interdict, or disrupt terrorist activity;

(C) would improve the identification or investigation of a suspected terrorist or terrorist organization; or

(D) would improve the response to a terrorist act.

(2) The term "intelligence community" has the meaning given such term in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

(3) The term "State and local personnel" means any of the following persons involved in prevention, preparation, or response for terrorist attack:

(A) State Governors, mayors, and other locally elected officials.

(B) State and local law enforcement personnel and firefighters.

(C) Public health and medical professionals.

(D) Regional, State, and local emergency management agency personnel, including State adjutant generals.

(E) Other appropriate emergency response agency personnel.

(F) Employees of private-sector entities that affect critical infrastructure, cyber, economic, or public health security, as designated by the Federal government in procedures developed pursuant to this section.

(4) The term "State" includes the District of Columbia and any commonwealth, territory, or possession of the United States.

(g) CONSTRUCTION.—Nothing in this Act shall be construed as authorizing any department, bureau, agency, officer, or employee of the Federal Government to request, receive, or transmit to any other Government entity or personnel, or transmit to any State or local entity or personnel otherwise authorized by this Act to receive homeland security information, any information collected by the Federal Government solely for statistical purposes in violation of any other provision of law relating to the confidentiality of such information.

SEC. 893. REPORT.

(a) REPORT REQUIRED.—Not later than 12 months after the date of the enactment of this Act, the President shall submit to the congressional committees specified in subsection (b) a report on the implementation of section 892. The report shall include any recommendations for additional measures or appropriation requests, beyond the requirements of section 892, to increase the effectiveness of sharing of information between and among Federal, State, and local entities.

(b) SPECIFIED CONGRESSIONAL COMMITTEES.—The congressional committees referred to in subsection (a) are the following committees:

(1) The Permanent Select Committee on Intelligence and the Committee on the Judiciary of the House of Representatives.

(2) The Select Committee on Intelligence and the Committee on the Judiciary of the Senate.

SEC. 894. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as may be necessary to carry out section 892.

SEC. 895. AUTHORITY TO SHARE GRAND JURY INFORMATION.

Rule 6(e) of the Federal Rules of Criminal Procedure is amended—

(1) in paragraph (2), by inserting ", or of guidelines jointly issued by the Attorney General and Director of Central Intelligence pursuant to Rule 6," after "Rule 6"; and

(2) in paragraph (3)—

(A) in subparagraph (A)(ii), by inserting "or of a foreign government" after "(including personnel of a state or subdivision of a state";

(B) in subparagraph (C)(i)—

(i) in subclause (I), by inserting before the semicolon the following: "or, upon a request by an attorney for the government, when sought by a foreign court or prosecutor for use in an official criminal investigation";

(ii) in subclause (IV)—

(I) by inserting "or foreign" after "may disclose a violation of State";

(II) by inserting "or of a foreign government" after "to an appropriate official of a State or subdivision of a State"; and

(III) by striking "or" at the end;

(iii) by striking the period at the end of subclause (V) and inserting "; or"; and

(iv) by adding at the end the following:

"(VI) when matters involve a threat of actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power, domestic or international sabotage, domestic or international terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by an agent of a foreign power, within the United States or elsewhere, to any appropriate federal, state, local, or foreign government official for the purpose of preventing or responding to such a threat."; and

(C) in subparagraph (C)(iii)—

(i) by striking "Federal";

(ii) by inserting "or clause (i)(VI)" after "clause (i)(V)"; and

(iii) by adding at the end the following: "Any state, local, or foreign official who receives information pursuant to clause (i)(VI) shall use that information only consistent with such guidelines as the Attorney General and Director of Central Intelligence shall jointly issue.".

SEC. 896. AUTHORITY TO SHARE ELECTRONIC, WIRE, AND ORAL INTERCEPTION INFORMATION.

Section 2517 of title 18, United States Code, is amended by adding at the end the following:

"(7) Any investigative or law enforcement officer, or other Federal official in carrying out official duties as such Federal official, who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents or derivative evidence to a foreign investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure, and foreign investigative or law enforcement officers may use or disclose such contents or derivative evidence to the extent such use or disclosure is appropriate to the proper performance of their official duties.

"(8) Any investigative or law enforcement officer, or other Federal official in carrying out official duties as such Federal official, who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents or derivative evidence to any appropriate Federal, State, local, or foreign government official to the extent that such contents or derivative evidence reveals a threat of actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power, domestic or international sabotage, domestic or international terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by an agent of a foreign power, within the United States or elsewhere, for the purpose of preventing or responding to such a threat. Any official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information, and any State, local, or foreign official who receives information pursuant to this provision may use that information only consistent with such guidelines as the Attorney General and Director of Central Intelligence shall jointly issue.".

SEC. 897. FOREIGN INTELLIGENCE INFORMATION.

(a) DISSEMINATION AUTHORIZED.—Section 203(d)(1) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 (Public Law 107–56; 50 U.S.C. 403–5d) is amended by adding at the end the following: "Consistent with the responsibility of the Director of Central Intelligence to protect intelligence sources and methods, and the responsibility of the Attorney General to protect sensitive law enforcement information, it shall be lawful for information revealing a threat of actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power, domestic or international sabotage, domestic or international terrorism, or clandestine intelligence gathering

SEC. 2. DEFINITIONS.

In this Act, the following definitions apply:

(1) Each of the terms "American homeland" and "homeland" means the United States.

(2) The term "appropriate congressional committee" means any committee of the House of Representatives or the Senate having legislative or oversight jurisdiction under the Rules of the House of Representatives or the Senate, respectively, over the matter concerned.

(3) The term "assets" includes contracts, facilities, property, records, unobligated or unexpended balances of appropriations, and other funds or resources (other than personnel).

(4) The term "critical infrastructure" has the meaning given that term in section 1016(e) of Public Law 107-56 (42 U.S.C. 5195c(e)).

(5) The term "Department" means the Department of Homeland Security.

(6) The term "emergency response providers" includes Federal, State, and local emergency public safety, law enforcement, emergency response, emergency medical (including hospital emergency facilities), and related personnel, agencies, and authorities.

(7) The term "executive agency" means an executive agency and a military department, as defined, respectively, in sections 105 and 102 of title 5, United States Code.

(8) The term "functions" includes authorities, powers, rights, privileges, immunities, programs, projects, activities, duties, and responsibilities.

(9) The term "key resources" means publicly or privately controlled resources essential to the minimal operations of the economy and government.

(10) The term "local government" means—

(A) a county, municipality, city, town, township, local public authority, school district, special district, intrastate district, council of governments (regardless of whether the council of governments is incorporated as a nonprofit corporation under State law), regional or interstate government entity, or agency or instrumentality of a local government;

(B) an Indian tribe or authorized tribal organization, or Alaska Native village or organization; and

(C) a rural community, unincorporated town or village, or other public entity.

(11) The term "major disaster" has the meaning given in section 102(2) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122).

(12) The term "personnel" means officers and employees.

(13) The term "Secretary" means the Secretary of Homeland Security.

(14) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any possession of the United States.

(15) The term "terrorism" means any activity that—

(A) involves an act that—

(i) is dangerous to human life or potentially destructive of critical infrastructure or key resources; and

(ii) is a violation of the criminal laws of the United States or of any State or other subdivision of the United States; and

(B) appears to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.

(16)(A) The term "United States", when used in a geographic sense, means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, any possession of the United States, and any waters within the jurisdiction of the United States.

(B) Nothing in this paragraph or any other provision of this Act shall be construed to modify the definition of "United States" for the purposes of the Immigration and Nationality Act or any other immigration or nationality law.

SEC. 3. CONSTRUCTION; SEVERABILITY.

Any provision of this Act held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable from this Act and shall not affect the remainder thereof, or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

SEC. 4. EFFECTIVE DATE.

This Act shall take effect 60 days after the date of enactment.

TITLE I—DEPARTMENT OF HOMELAND SECURITY

SEC. 101. EXECUTIVE DEPARTMENT; MISSION.

(a) ESTABLISHMENT.—There is established a Department of Homeland Security, as an executive department of the United States within the meaning of title 5, United States Code.

(b) MISSION.—

(1) IN GENERAL.—The primary mission of the Department is to—

(A) prevent terrorist attacks within the United States;

(B) reduce the vulnerability of the United States to terrorism;

(C) minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States;

(D) carry out all functions of entities transferred to the Department, including by acting as a focal point regarding natural and manmade crises and emergency planning;

(E) ensure that the functions of the agencies and subdivisions within the Department that are not related directly to securing the homeland are not diminished or neglected except by a specific explicit Act of Congress;

(F) ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland; and

(G) monitor connections between illegal drug trafficking and terrorism, coordinate efforts to sever such connections, and otherwise contribute to efforts to interdict illegal drug trafficking.

(2) RESPONSIBILITY FOR INVESTIGATING AND PROSECUTING TERRORISM.—Except as specifically provided by law with respect to entities transferred to the Department under this Act, primary responsibility for investigating and prosecuting acts of terrorism shall be vested not in the Department, but rather in Federal, State, and local law enforcement agencies with jurisdiction over the acts in question.

SEC. 102. SECRETARY; FUNCTIONS.

(a) SECRETARY.—

(1) IN GENERAL.—There is a Secretary of Homeland Security, appointed by the President, by and with the advice and consent of the Senate.

(2) HEAD OF DEPARTMENT.—The Secretary is the head of the Department and shall have direction, authority, and control over it.

(3) FUNCTIONS VESTED IN SECRETARY.—All functions of all officers, employees, and organizational units of the Department are vested in the Secretary.

(b) FUNCTIONS.—The Secretary—

(1) except as otherwise provided by this Act, may delegate any of the Secretary's functions to any officer, employee, or organizational unit of the Department;

(2) shall have the authority to make contracts, grants, and cooperative agreements, and to enter into agreements with other executive agencies, as may be necessary and proper to carry out the Secretary's responsibilities under this Act or otherwise provided by law; and

(3) shall take reasonable steps to ensure that information systems and databases of the Department are compatible with each other and with appropriate databases of other Departments.

(c) COORDINATION WITH NON-FEDERAL ENTITIES.—With respect to homeland security, the Secretary shall coordinate through the Office of State and Local Coordination (established under section 801) (including the provision of training and equipment) with State and local government personnel, agencies, and authorities, with the private sector, and with other entities, including by—

(1) coordinating with State and local government personnel, agencies, and authorities, and with the private sector, to ensure adequate planning, equipment, training, and exercise activities;

(2) coordinating and, as appropriate, consolidating, the Federal Government's communications and systems of communications relating to homeland security with State and local government personnel, agencies and authorities, the private sector, other entities, and the public; and

(3) distributing or, as appropriate, coordinating the distribution of, warnings and information to State and local government

John Rabiej

12/09/2002 02:31 PM

To: eric.jaso@usdoj.gov, Jonathan.Wroblewski@usdoj.gov
cc: Peter McCabe/DCA/AO/USCOURTS
cc:
Subject: Draft Rule 6 Amendments

Dear Eric and Jonathan:

I have attached draft amendments to Rule 6 that account for the changes made to the rule by the Homeland Security Act of 2002. We have made a commitment to Congressman Sensenbrenner to provide him with proposed amendments to Rule 6 that correct the problem created by the Homeland Security amendments, after consultation and coordination with the Department of Justice.

The attached draft has been reviewed and edited by Professor Kimble (our style consultant0, Professor Schlueter, Judges Carnes and Scirica. We did not accept several of the proposed edits suggested by our style consultant, preferring to retain the Congressional language, even though it may be less elegant.

I am hoping that we may arrive at some consensus on the proposal so that it could be sent to Congressman Sensenbrenner with both our blessings. What are your thoughts?

John

Criminal Rule 6.wp

TITLE III. THE GRAND JURY, THE INDICTMENT, AND THE INFORMATION

Rule 6. The Grand Jury

* * * * *

(e) Recording and Disclosing the Proceedings.

* * * * *

(3) ***Exceptions.***

(A) Disclosure of a grand-jury matter — other than the grand jury's deliberations or any grand juror's vote — may be made to:

(i) an attorney for the government for use in performing that attorney's duty;

(ii) any domestic government personnel — (including those of a state or state subdivision or of an Indian tribe) — ,or foreign government personnel, if ~~that~~ an attorney for the government considers disclosure necessary to assist in performing that attorney's duty to

enforce federal criminal law; or

(iii) a person authorized by 18 U.S.C. § 3322.

* * * * *

(D) Grand-jury matters involving foreign intelligence, terrorism, sabotage, or similar matters may be disclosed as follows:

(i) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties.

(ii) An attorney for the government may disclose

any grand-jury matter involving a threat of actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power, domestic or international sabotage, domestic or international terrorism, or clandestine intelligence-gathering activities by an intelligence service or network of a foreign power or by an agent of a foreign power, within the United States or elsewhere, to any appropriate federal, state, local, or foreign government official for the purpose of preventing or responding to such a threat.

~~(i)~~(iii) Any ~~federal~~ official who receives information under Rule 6(e)(3)(D)(i) or (ii) may use the information only as necessary in the conduct of that person's official duties and subject to any limitations on the unauthorized disclosure of such information. Any state, local, or

foreign official who receives information in accordance with Rule 6(e)(3)(D)(ii) may use that information only in a manner consistent with any guidelines jointly issued by the Attorney General and Director of Central Intelligence.

~~(ii)~~(iv) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D)(i) or (ii), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

~~(iii)~~(v) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that

relates to the ability of the United States to protect against —

- actual or potential attack or other grave hostile acts of a foreign power or its agent;
- sabotage or international terrorism by a foreign power or its agent; or
- clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to —

- the national defense or the security of the United States;

or

- the conduct of the foreign affairs of the United States.

(E) The court may authorize disclosure — at a time, in a manner, and subject to any other conditions that it directs — of a grand-jury matter:

(i) preliminarily to or in connection with a judicial proceeding;

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

(iii) at the request of the government if it shows that the matter may disclose a violation of state, ~~or~~ Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, ~~or~~ Indian tribal, or foreign government official for the purpose of

enforcing that law; ~~or~~

(iv) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law; ; or

(v) at the request of an attorney for the government, when sought by a foreign court or prosecutor for use in an official criminal investigation.

* * * * *

(7) ***Contempt.*** A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and Director of Central Intelligence in accordance with this rule, may be punished as a contempt of court.

* * * * *

Item IIIA2

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Legislation Which Would Amend Rule 46(e) Regarding Authority of Court to Revoke Bond**

DATE: **April 2, 2003**

Attached are materials relating to pending legislative attempts to amend Rule 46. This is an information item for the April meeting in Santa Barbara.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

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CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

March 17, 2003

Honorable Howard Coble
Chairman, Subcommittee on Crime
Terrorism and Homeland Security
Committee on the Judiciary
United States House of Representatives
207 Cannon House Office Building
Washington, D.C. 20515-6223

Dear Chairman Coble:

I am pleased to provide you with some additional bail bond statistics of the type requested during my testimony on H.R. 2929, the "Bail Bond Fairness Act of 2001," before the Subcommittee on Crime, Terrorism, and Homeland Security on October 8, 2002. The bill would amend Federal Rule of Criminal Procedure 46(e) in order to remove a judge's power to forfeit a bail bond as a result of a defendant's violation of any release condition other than failing to appear.

Proponents of the bill contend that the bail bond industry is effectively prevented from doing business in federal courts because of the added risks associated with guaranteeing that a defendant abides by release conditions other than failing to appear. The statistics show conclusively, however, that corporate surety bonds are used in federal courts and that very few of them are forfeited as a result of a defendant violating any condition of release other than failing to appear. The statistics also show that the number of corporate surety bonds posted in federal court has increased consistently since 1995.

The data in the enclosed Table One is drawn from records maintained by the Administrative Office of the United States Courts. That table shows the total number of criminal defendants released on bond by a federal court during each of the ten fiscal years from 1993 through 2002, and it breaks those numbers down by type of bond, including recognizance, unsecured, cash, collateral, and corporate surety bonds. Mr. Richard Verrochi, representing the Professional Bail Agents of the United States, testified at the October 8 hearing that "since the *Vaccarro*[1] opinion, bail agents and corporate surety bail bond issuers have essentially been

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[1] *United States v. Vacarro*, 51 F.3d 189 (9th Cir. 1995) (upholding a judge's authority to forfeit a bail bond as a result of a defendant's violation of a release condition that does not involve failing to appear).

eliminated from the federal pretrial system, for obvious excessive risk reasons." His assertion is contradicted by the facts. Not only has the use of corporate surety bonds not decreased, as he indicated, but the number of corporate surety bonds posted in the federal courts has actually gone up significantly since the *Vacarro* decision was released in 1995. As Table One shows, the number of corporate surety bonds posted in federal courts has climbed from 812 in fiscal year 1995 to 2,275 in fiscal year 2002, an increase of 180 percent. That compares with an increase of only 33 percent in the total number of defendants released on bond over the same period. So, not only has the number of corporate surety bonds used in federal court not decreased since the year the *Vacarro* decision was issued, it has increased substantially and the rate at which the use of corporate surely bonds has increased has outstripped the growth in the total number of defendants released on bond.

The Administrative Office does not maintain statistics on the number of corporate surety bonds forfeited as a result of a violation of a condition of release other than for failure to appear. At my request, however, the Administrative Office asked district court personnel to manually compile the numbers from the docket records in ten district courts that handle a substantial number of criminal cases, representing about a quarter of defendants released on bond nationally. The resulting statistics from those ten district courts, presented in Tables Two, Three, and Four, show that there were few occasions on which a corporate surety bond was even subject to forfeiture because a defendant violated a condition of release other than for failing to appear. The number of occasions on which a surety bond *was actually forfeited* as a result of a defendant violating a condition of release other than failing to appear was fewer still. For example, Table Two shows that during fiscal year 2002, in those ten districts a total of 1,128 defendants were released on corporate surety bonds, 269 were found to have violated conditions of release other than appearance, and only 19 corporate surety bonds were forfeited for violations of release conditions other than appearance. In other words, the percentage of corporate surety bonds forfeited in those ten districts during fiscal year 2002 because of violation of a condition of release other than appearance is only about 2 percent of the total number of corporate surety bonds issued during that year in those districts.

The minuscule number of corporate bonds forfeited as a result of a defendant violating a condition of release other than for failing to appear belies the contention that corporate surety bonds posted in federal courts are subject to substantially enhanced risks of forfeiture because of conditions other than failure to appear. On the contrary, the statistics show that it is relatively rare for a federal court to forfeit a corporate surety bond as a result of violation of a condition of release other than for failing to appear. Moreover, the posting of corporate surety bonds in federal courts, though relatively modest, is trending upward. I believe that these statistics support the comments I made during your subcommittee's hearing and the position of the Judicial Conference that federal courts should retain their authority to forfeit a bail bond as a result of a defendant's violation of a condition of release other than failing to appear.

We continue to encourage you and the subcommittee to oppose legislation amending Rule 46(e) and to support the conclusions and recommendations expressed in my statement on behalf of the Judicial Conference. Rule 46(e) should not be amended.

Sincerely yours,

Ed Carnes
United States Circuit Judge

Enclosures

cc: Committee on the Judiciary

TABLE 1
Types of Bonds Set for Defendants Released
For the Twelve Month Period Ending September 30th

Fiscal Year	Cases Closed*	Defendants Released**	Total Def. Released on Bond	Def. Released on Personal Recognizance Bond	Def. Released on Unsecured Bond	Defendants Released on Cash Bond	Defendants Released on Collateral Bond	Defendants Released on Corporate Surety Bond	Defendants Released with No Bond Set***
1993	50,284	29,694	19,584	6,964	6,509	2,895	2,478	1,149	10,110
1994	52,357	30,835	27,472	8,322	13,639	3,102	2,281	956	3,363
1995	52,108	29,522	27,403	8,793	13,894	2,893	2,172	812	2,119
1996	57,184	31,008	29,549	9,658	15,201	2,926	2,013	1,030	1,459
1997	63,599	33,909	32,197	9,947	16,817	3,161	2,098	1,391	1,712
1998	69,693	35,698	33,353	11,007	16,832	3,141	2,064	1,538	2,345
1999	75,348	37,850	34,999	11,254	18,148	3,311	2,053	1,715	2,851
2000	77,675	38,096	34,948	11,034	17,846	3,396	1,933	1,929	3,148
2001	79,129	38,588	34,879	10,879	17,708	3,195	1,989	1,985	3,709
2002	83,553	40,060	36,419	11,375	18,354	3,325	1,997	2,275	3,641

* Includes cases dismissed

** Includes defendants released at any time before a case is closed, including cases that have been dismissed. A defendant may have more than one type of release before disposition.

*** Includes defendants who may have had a bond set at a prior hearing, but were not released until a subsequent hearing; includes cases dismissed.

TABLE 2
Number of Corporate Surety Bonds Forfeited as a Result of a Violation of Condition of Release in Criminal Cases
(Other than Failure to Appear)
Fiscal Year 2002

District	Pretrial Services Cases Closed in Fiscal Year 2002*	Criminal Defendants Released in a Case Closed In Fiscal Year 2002**	Defendants Released on Bond	Defendants Released on Corporate Surety Bond***	Defendants Found to Have Violated Conditions on Corporate Surety Bond Other than Appearance	Corporate Surety Bonds Forfeited for Violation of Conditions Other than Appearance
California Southern	5,475	1,821	771	72	30	1
Florida Southern	2,297	974	932	210	44	2
Geogia Northern	984	476	472	178	34	0
Massachusetts	737	366	365	5	2	0
Missouri Eastern	849	438	419	34	11	0
New Mexico	2,738	851	849	121	47	7
New York Eastern	2,095	1,039	1,039	221	13	0
South Carolina	1,306	804	782	130	35	0
Texas Northern	1,661	741	575	41	12	0
Texas Western	5,092	2,278	2,172	116	41	9
Total	23,234	9,788	8,376	1,128	269	19

* Includes cases dismissed.

** Includes defendants released at any time before the case is closed, including cases that have been dismissed.

*** Available data does not reflect whether these bonds included only an appearance release condition or whether they also included release conditions other than appearance.

TABLE 3
Number of Corporate Surety Bonds Forfeited as a Result of a Violation of Condition of Release (Other than Failure to Appear)
Fiscal Year 2001

District	Pretrial Services Cases Closed in Fiscal Year 2001*	Criminal Defendants Released in a Case Closed in Fiscal Year 2001**	Defendants Released on Bond	Defendants Released on Corporate Surety Bond***	Defendants Found to Have Violated Conditions on Corporate Surety Bond Other than Appearance	Corporate Surety Bonds Forfeited for Violation of Conditions Other than Appearance
California Southern	6,001	2,109	840	63	13	0
Florida Southern	2,179	1,030	990	183	41	0
Geogia Northern	1,014	495	488	162	31	0
Massachusetts	628	345	342	3	0	0
Missouri Eastern	647	323	314	20	5	0
New Mexico	2,111	725	723	107	32	10
New York Eastern	1,797	955	952	174	21	0
South Carolina	1,106	734	724	98	25	0
Texas Northern	1,704	802	650	66	21	1
Texas Western	5,105	2,234	2,173	79	33	3
Total	22,292	9,752	8,196	955	222	14

* Includes cases dismissed.

** Includes defendants released at any time before the case is closed, including cases that have been dismissed.

*** Available data does not reflect whether these bonds included only an appearance release condition or whether they also included release conditions other than appearance.

TABLE 4
Number of Corporate Surety Bonds Forfeited as a Result of a Violation of Condition of Release (Other than Failure to Appear)
Fiscal Year 2000

District	Pretrial Services Cases Closed in Fiscal Year 2000*	Criminal Defendants Released in a Case Closed in Fiscal Year 2000**	Defendants Released on Bond	Defendants Released on Corporate Surety Bond***	Defendants Found to Have Violated Conditions on Corporate Surety Bond Other than Appearance	Corporate Surety Bonds Forfeited for Violation of Conditions Other than Appearance
California Southern	4,787	1,591	772	58	11	0
Florida Southern	2,435	1,032	988	202	56	3
Geogia Northern	944	435	430	136	33	0
Massachusetts	722	398	398	7	0	0
Missouri Eastern	845	450	439	25	15	0
New Mexico	2,369	845	844	89	30	7
New York Eastern	1,951	1,031	1,025	161	20	0
South Carolina	1,129	739	718	134	30	0
Texas Northern	1,572	764	611	55	7	0
Texas Western	4,848	2,162	2,058	104	40	13
Total	21,602	9,447	8,283	971	242	23

* Includes cases dismissed.

** Includes defendants released at any time before the case is closed, including cases that have been dismissed.

*** Available data does not reflect whether these bonds included only an appearance release condition or whether they also included release conditions other than appearance.

STATEMENT ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Good afternoon Mr. Chairman. I appreciate the invitation to testify today on behalf of the Judicial Conference of the United States, regarding H.R. 2929, the "Bail Bond Fairness Act of 2001." My name is Ed Carnes. I am a circuit judge on the United States Court of Appeals for the Eleventh Circuit with my chambers in Montgomery, Alabama, and I am here in my capacity as Chair of the Conference's Advisory Committee on Criminal Rules ("advisory committee").

The Judicial Conference of the United States opposes H.R. 2929, because this legislation would impair the authority of federal courts to enforce conditions of release prior to trial, including conditions that may be essential to public safety. We also oppose H.R. 2929 because it directly amends the Federal Rules of Criminal Procedure, thereby overturning the results of the rulemaking process, a process that was established by Congress in the Rules Enabling Act, 28 U.S.C. §§2071-77. Finally, we want to set the record straight about some factual issues addressed in the "Findings and Purposes" in Section 2 of the bill.

Bail Reform Acts of 1966 and 1984

The Bail Reform Acts of 1966 and 1984, codified at 18 U.S.C. § 3142 et seq., set out the Congressional policy governing the pretrial release of an accused. Both Acts disfavor pecuniary bail and the existing law instead favors other safeguards that *both* ensure the public safety and the defendant's appearance at court proceedings when required. Both Acts provide wide discretion to courts in setting pretrial conditions of release. Consistent with the expressed policy of these Acts, commercial bail bondsmen have been used in only a small fraction of cases.

Section 2 of the Bail Reform Act of 1966 revised bail practices to assure that all persons, regardless of their financial condition, would not needlessly be detained pending their appearance in court, when detention served neither the ends of justice nor the public interest. "Danger to the community and the protection of society were not to be considered as release factors" under the 1966 Act. S. Rep. No. 225, 98th Cong., 2d Sess. 3, reprinted in 1984 U.S. Code Cong., & Adm. News 3182, 3187.

The 1984 legislation amended the Bail Reform Act to expand the discretion of a court in setting release conditions. The Senate Judiciary Committee reported that: "Many of the changes in the Bail Reform Act incorporated in this bill reflect the Committee's determination that Federal bail laws must address the alarming problem of crimes committed by persons on release and *must give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.* The adoption of these changes marks a significant departure from the basic philosophy of the Bail Reform Act, which is that the sole purpose of bail laws must be to assure the appearance of the defendant at judicial proceedings." S. Rep. No. 225, 98th Cong., 2d Sess. 3, reprinted in 1984 U.S. Code Cong., & Adm. News 3182, 3185-3186. (emphasis added)

The Bail Reform Act, as amended in 1984, requires a court to determine whether there is any condition or combination of conditions that will reasonably assure that the defendant will appear in court as required, and at the same time assure the safety of others in the community while the defendant is free pending trial. It contains a Congressionally mandated preference for imposing the least restrictive bail condition on a person charged with a non-capital offense who must be released "on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court ... unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. § 3142(b).

The Bail Reform Act sets out thirteen specific conditions of release, which can be imposed by a court separately, in combination, or as hybrid versions, but only if the court finds that release on personal recognizance or on an unsecured appearance bond is inadequate. In fact, the majority of the 38,000 defendants released in fiscal year 2001 were released on the two least restrictive conditions, either personal recognizance or an unsecured appearance bond.

Accordingly, unless a court imposes other conditions, an accused is released on personal recognizance by promising only to make all further court appearances as required and not to commit crimes while on bond. There are no financial conditions. If not released on personal recognizance, an accused may be released on an unsecured personal bond. This is not a commercial bond. Rather, an unsecured personal bond is a promise by the accused to pay into court a specified sum of money if the accused fails to appear as required. A court's determination to release an accused on an appearance bond of this type means that the accused will be released without deposit of cash bail or collateral in most cases. Release on personal recognizance or on an unsecured appearance bond were available prior to 1966, but the 1966 legislation created a strong policy in favor of their use.

In practice, the requirement of obtaining a co-signer for an unsecured bond often serves as an upgraded form of release preferable to one of the other alternatives listed in the Act. A co-signer may be a family member or a friend, preferably employed or owning sufficient assets to make the financial undertaking of the bond a meaningful undertaking. It is particularly in these cases in which the forfeiture of a bond for breach of a condition of release, other than for failing to appear, becomes an important additional tool for the judge to protect the public safety.

Commercial bail bond is listed in the Act as the twelfth condition of release. A court has noted that the structure of the statute makes the conventional bonds of professional bondsmen the least desired condition. *United States v. Gillin*, 345 F. Supp. 1145, 1147 (S.D. Tex. 1972). Others have advocated the abolishment of this alternative condition altogether, which was seriously considered during Congressional debate of the 1984 legislation. (*ABA Standards for Criminal Justice*, 2ed. 1980, § 10-5.5 says: "Compensated sureties should be abolished. Pending abolishment, they should be licensed and carefully regulated.") If used, the "obligation of commercial sureties to assure the appearance of their clients, and, if necessary, *actively to*

maintain contact with them during the pretrial period, is emphasized." S. Rep. No. 225, 98th Cong., 2d Sess. 3, reprinted in 1984 U.S. Code Cong., & Adm. News 3182, 3185-3198.

The Present System and What H.R. 2929 Would Do to It

Section 3142 of Title 18 authorizes the conditional pretrial release of defendants in the federal criminal system. Where a federal judicial officer determines that release of the defendant on personal recognizance or on an unsecured appearance bond will not reasonably assure that defendant's appearance or will endanger the safety of anyone in the community, section 3142(c) expressly provides for conditions on release, and it lists as examples thirteen types of conditions that may be imposed. One available condition is that the defendant, or others acting on the defendant's behalf, execute a property or secured bail bond. Among the other conditions that may be imposed are that the defendant not possess a firearm, avoid all contact with the victim and witnesses to the crime, refrain from the use of alcohol and illegal drugs, stay away from certain places and people, and observe a curfew. The statute also provides that the judge may order the defendant to "satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person in the community." Rule 46(e) of the Federal Rules of Criminal Procedure sets out the procedure relating to forfeiture of surety bonds and to setting aside or remitting of any forfeiture.

Section 3 of H.R. 2929 would eliminate the power of a federal judge to forfeit bail, including a bail bond, for failure to satisfy a condition of release, other than failure to appear before the court. It would rule out the use of forfeiture or the threat of forfeiture to enforce conditions of release that are necessary to assure the safety of innocent people and the community as a whole. While the impetus for this legislation comes from professional bail bond interests, its provisions are not limited to cases in which they put up the surety bond, or even to cases in which there is a surety bond.

Last month, the Judicial Conference formally resolved to oppose legislation that would amend Rule 46 to restrict a judge's power to forfeit a bail bond to instances where the defendant fails to appear before the court. This Conference position followed a careful examination by the advisory committee of Rule 46(e) and of the consequences of removing the authority of judges to forfeit bonds for reasons other than failure to appear, as H.R. 2929 would do.

Shortly after the previous chair of the advisory committee, Judge W. Eugene Davis, testified before this Subcommittee on March 12, 1998 regarding an earlier version of this bill,[1] the advisory committee undertook a study of the proposal. As part of that study, we conducted a survey of magistrate judges, the front-line judicial officers who preside over virtually all of the proceedings governing the pretrial release of defendants in the federal system. The study revealed that Rule 46(e) is working well in its current form.[2]

In a large majority of the ninety-four federal districts bonds are forfeited only if the defendant fails to appear at a scheduled proceeding. In some districts, however, courts do incorporate conditions of release as part of the bail bond and may forfeit bonds for violations of those release conditions. In those districts, the magistrate judges believe that subjecting the posted assets of the defendant, or of a friend or relative of the defendant, to risk if the defendant violates a non-appearance condition of release significantly increases the probability that the

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[1] H.R. 2134, 105th Cong., 1st Sess. (1997).

[2] As a result of the study, at its April 1998 meeting the advisory committee declined to recommend amending Rule 46(e). On May 7, 1998, Judge Davis wrote to the Honorable Bill McCollum, then Chairman of the Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representatives, with copies to the Subcommittee members, advising him of the study and actions taken. In response to a letter, dated May 22, 2002, from the Honorable F. James Sensenbrenner, Jr., Honorable John Conyers, Jr., Honorable Lamar S. Smith, and Honorable Robert C. Scott, Members of the Committee on the Judiciary, U.S. House of Representatives, to Chief Justice William H. Rehnquist, requesting the views of the Conference on H.R. 2929, the advisory committee again considered this issue and reaffirmed its opposition to the legislation at its meeting in April 2002. The Conference subsequently adopted the advisory committee's recommendation in September 2002.

defendant will comply with all the release conditions. Absent this added assurance, these magistrate judges would be more reluctant to release a particular defendant. They report that they might well decide to retain a defendant in custody instead of exposing the court and innocent members of the community to the greater risk that the defendant will violate a significant release condition, such as refraining from drug use. In fact, some defendants themselves have suggested that their bond be subject to forfeiture if they fail to abide by the release conditions as a means of persuading a judge to release them. Amending Rule 46(e), as H.R. 2929 proposes, could have the unintended consequence of causing some defendants who would otherwise have been released to be detained instead.

Magistrate judges report that they routinely impose a condition of release that prohibits the defendant from contacting specific individuals. This release condition is often essential to protect the safety of witnesses in large drug cases, ex-spouses and domestic partners of defendants with prior histories of drug abuse, spouses and family of defendants charged with felony sexual abuse, child abuse, or domestic violence. The current Rule 46(e) provides judges with the valuable flexibility to impose added safeguards in appropriate cases ensuring a defendant's compliance with these and other conditions of release by subjecting a bail bond to forfeiture on a breach of these conditions of release. Judges have found that the added supervision provided by the friend, family member, or bondsman whose posted bond becomes subject to forfeiture if the defendant breaches a condition of release is an effective insurance deterring the defendant's misbehavior.

Some defendants gain their release by posting their own cash or property as bail. Others have relatives or close friends post their property or act as sureties for the defendant. As the Bail Reform Act intended, significantly more federal defendants secure their release by putting at risk their own money or property or persuading a relative or friend to do so, than use corporate sureties or bail bonds firms. When defendants themselves or their families or friends put up the

collateral, and it is at risk of forfeiture for failure to comply with non-appearance conditions, the defendant has a powerful incentive to comply with those incentives. The defendant has a powerful incentive to observe a curfew or travel restriction, to stay away from a victim, or to stay away from alcohol, drugs, or convicted felons, and to obey whatever other conditions a judge has imposed for the safety of the community. H.R. 2929 would remove that powerful incentive by amending Rule 46(e)(1), which now provides for forfeiture of the bail if there is a breach of any condition of the bond, so that bail could be forfeited only if the defendant fails to appear. And that would be true no matter what the bail is or who put it up.

Consider, for example, a defendant who puts up his own cash or property as bail, and among the conditions imposed are that he not possess a firearm and that he stay away from the victim of the charged crime or any witnesses. Would we not want the defendant's own posted cash or property to be at risk if he threatened with a firearm the victim or a witness? Under the existing rule, a judge could order that the cash or property the defendant posted be forfeited if the defendant committed that kind of serious breach. If H.R. 2929 is enacted, the judge will be powerless to forfeit any bail bond regardless of who put it up and regardless of how serious the defendant's breach of a non-appearance condition is.

The effects of the proposed legislation extend to third-party custodian sureties, such as family members. If their property is at risk when the defendant violates curfew or starts using drugs or begins carrying a firearm, they will exert pressure on the defendant to straighten up, or they may surrender a misbehaving defendant into custody to avoid jeopardizing their property. By insulating their property from any risk for the defendant's failure to adhere to non-appearance conditions, H.R. 2929 would remove a major incentive for third-party custodian sureties to exert influence over a released defendant's behavior.

Even with corporate sureties, who obviously lack a custodial or family relationship with the defendant, the threat of forfeiture of the bond can provide an incentive to keep tabs on the

defendant to insure that he does not leave the territory to which he is confined, obeys a curfew, and so forth. To the extent that corporate sureties cannot effectively police a defendant's compliance with non-appearance conditions, their inability to do so can be taken fully into account by the judge in deciding whether to set aside or remit some or all of any forfeiture. Rule 46(e)(2) & (4) provide for the setting aside or remission in whole or part of any forfeiture "if it appears that justice does not require the forfeiture."

In summary, Rule 46(e) as it now exists provides federal judges with the important flexibility to impose added safeguards to ensure a defendant's compliance with conditions of release. Removing that flexibility, which is what H.R. 2929 would do, may jeopardize public safety and the proper functioning of the federal criminal justice system. Federal courts should retain their full authority to enforce all conditions of pretrial release.

The Rules Enabling Act

Because H.R. 2929 would directly amend one of the Federal Rules of Practice and Procedure, its enactment would contravene the rulemaking process established by Congress under the Rules Enabling Act, 28 U.S.C. §§2071-77. Under that important Act, proposed amendments to federal court rules are subjected to extensive scrutiny by the public, bar, and bench through the advisory committee process, are carefully considered by the Judicial Conference, and then are presented after approval by the Supreme Court to Congress. It is an exacting and deliberate process designed to ensure that careful thought and consideration is given to any proposed amendment of the rules so that lurking ambiguities can be unearthed, inconsistencies removed, problems identified, and improvements made. Direct amendment of the federal rules through legislation, even when the process is complete, circumvents the careful safeguards that Congress itself has established.