ADVISORY COMMITTEE
ON
CRIMINAL RULES

Washington, D.C.
April 25-26, 2002

CRIMINAL RULES COMMITTEE MEETING

April 25 and 26, 2002
Washington, D.C.

I PRELIMINARY MATTERS

A. Remarks, Introductions, and Administrative Announcements by the Chair.

B. Review/Approval of Minutes of April 2001, Meeting in Washington, D.C.

C. Criminal Rules Agenda Docketing.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Rules Pending Before the Supreme Court

1. Style Changes to Rules Approved by Judicial Conference in Fall 2001.

2. Substantive Amendments to Rules Approved by Judicial Conference in Fall 2001

   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. Proposed New Rule.

   e. Rule 26. Taking Testimony. Proposed Amendment

Regarding Taking of Testimony by Remote Transmission.

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

g. Rule 32. Sentence and Judgment. Proposed Amendment Regarding Requirement that Court Rule on Unresolved Objections to Material Matters.

h. Rule 35. Correcting or Reducing a Sentence. Proposed Amendments to Rule 35(b) Regarding Motions to Reduce Sentence for Substantial Assistance.

3. Substantive Amendments Pending Before Judicial Conference

a. Rule 6. Amendments by USA PATRIOT ACT.

b. Rule 41. Amendments by USA PATRIOT ACT.

B. Rule Published for Public Comment.

1. Rule 35. Correcting or Reducing a Sentence (Memo).

C. Pending Proposed Amendments to Rules.

1. Rule 41. Search Warrants. Report of Subcommittee on Proposed Amendments (Memo).

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

D. Other Proposed Amendments to Rules

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

2. Rule 16. Discovery and Inspection. Proposed amendment regarding defense discovery of government experts. (Memo).

3. Rules 29, 33 and 34; Proposed Amendments re Rulings by Court (Memo).

4. Rule 32. Sentencing. Proposed amendment to clarify time for appeal of sentence involving restitution. (Memo)

5. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Suggested amendment to rule concerning defendant's right of allocution (Memo)

6. Package of Proposed Amendments from Mr. Pauley. (Memo)

7. Proposed New Rule Concerning Rulings by Magistrate Judges as Counterpart to Rule of Civil Procedure 72 (Memo).

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

A. Review of Rules Governing Electronic Filings in Criminal Cases

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

IV. DESIGNATION OF TIME AND PLACE FOR FUTURE MEETINGS

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March 29, 2002
Projects

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MINUTES [DRAFT]
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 25-26, 2001
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at Washington, D.C. on April 25 and 26, 2001. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Wednesday, April 25, 2001. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. Edward E. Carnes
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. Tommy E. Miller
Hon. Reta M. Strubhar
Prof. Kate Stith
Mr. Robert B. Fiske, Esq.
Mr. Donald J. Goldberg, Esq.
Mr. Lucien B. Campbell
Mr. Roger A. Pauley, 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. Anthony J. Scirica, Chair of the Standing Committee, Hon. A. Wallace Tashima, member of the Standing Committee and liaison to the Criminal Rules Committee; Mr. Peter McCabe 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; Professor Joseph Kimble and Mr. Joseph Spaniol, consultants to the Standing Committee; Ms. Laurel Hooper, of the Federal Judicial Center; and Mr. Christopher Jennings, briefing attorney for Judge Scirica.

Judge Davis, the Chair, welcomed the attendees and noted the presence of new members of the Committee, Judges Trager and Strubhar, and Mr. Fiske.

II. HEARING ON PROPOSED AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The Committee held a public hearing on the proposed amendments to the Federal Rules of Criminal Procedures and heard the testimony of five witnesses:

- Honorable Paul D. Borman
  United States District Court, Detroit Michigan

- Professor Richard D. Friedman
  University of Michigan School of Law

- Mr. Peter Goldberger & Mr. Gregory Smith
  (On behalf of National Association of Criminal Defense Lawyers)

- Professor Elizabeth Phillips Marsh
  Quinnipiac University School of Law
  (On behalf of Criminal Justice Section, American Bar Association)

- Ms. Shelley Stark
  Federal Public Defender, W.D., Pa
  (On behalf of Federal Public and Community Defenders)

III. APPROVAL OF MINUTES

Judge Miller moved that the minutes of the Committee's meeting in San Diego, California in October 2000 be approved. The motion was seconded by Mr. Goldberg and following a minor correction, carried by a unanimous vote.

IV. RECENT AMENDMENTS TO CRIMINAL RULES

Professor Schlueter informed the Committee that amendments to Rules 6, 7, 11, 24(c), 32.2, and 54 (approved by the Supreme Court on April 17, 2000) had been become effective on December 1, 2000.

V. CRIMINAL RULES UNDER CONSIDERATION

A. Introductory Comments by Judge Davis, Chair

Judge Davis pointed out that the two subcommittees had met in March to discuss possible changes to the proposed rules, based in part on the public comments received on the amendments. He proposed that the Committee take each rule, in order and discuss both the style and substantive changes, in order. He also noted that the Style Subcommittee had submitted additional suggested style changes, following the subcommittee's meetings.

B. Rule by Rule Consideration of Proposed Changes.

1. Rule 1. Scope; Definitions:

The Reporter noted that the Committee had agreed to restore a reference in (F) to 28 U.S.C. § 1784.

2. Rule 2. Interpretation

Judge Carnes informed the Committee that Subcommittee A had no additional changes to Rule 2.

3. Rule 3. The Complaint

Judge Bucklew noted that no changes had been made to Rule 3

4. Rule 4. Arrest Warrant or Summons on a Complaint

Judge Bucklew reported that Subcommittee A had recommended that Rule 4(c)(2) be amended to reflect the recently enacted Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 114 Stat. 2488). That act now recognizes that arrest warrants may be executed outside the United States. The Committee agreed to that change

5. Rule 5. Initial Appearance

a. Substantive Amendment: Video Teleconferencing.

Judge Miller reported that Subcommittee A had considered a number of style changes to the rule. Judge Davis suggested that the Committee consider the major substantive amendments to Rule 5, regarding the use of video teleconferencing for initial appearances. Judge Carnes observed that given the public comments on the proposed changes that the Committee was probably obligated to send the amendment forward.

Judge Miller moved that the Committee forward the version of Rule 5 that would permit the court to use teleconferencing without the consent of the defendant. Judge Roll seconded the motion. The Committee engaged in an extensive discussion of the motion. The Reporter provided a brief overview of the history of similar amendments that had been considered by the Committee in 1994 that led to a pilot program..

One member questioned whether there might be a way to accommodate those districts that would really use the technology, because of security concerns or extremely heavy dockets, without adopting a national rule. Mr. Campbell reminded the Committee that if video teleconferencing was used, that the costs saved by the court and marshals in not having to transport defendants to the courthouse would be shifted to the offices of the public defenders that might have to travel to the defendant's location. Several members also noted concerns expressed by members of the public that video teleconferencing is being used in state courts and that the quality of those proceedings may fall short.

Mr. Pauley spoke in favor of the motion, noting that a rule requiring consent would not really add anything because some federal courts are already using video teleconferencing procedures with the consent of the defendant; he reiterated that virtually every rule can be waived by the defendant. Judge Trager questioned whether it might be advisable to amend the rule to impose a mileage limit before a court could use video teleconferencing. Judge Roll observed that whatever system was used the court should take steps to maintain the dignity of the proceedings. And Professor Stith indicated that a court should take steps to put the defendant and the defense counsel in the same location.

Following additional discussion, the Committee rejected the motion by a vote of 5 to 6.

Judge Carnes moved that Rule 5 be amended to permit video teleconferencing with the consent of the defendant. Judge Roll seconded the motion. Following additional discussion, the Committee voted 7 to 4 to forward the amendment to the Standing Committee. (The Committee also voted at this point, by a vote of 8 to 3, to permit the court to use video teleconferencing for arraignments, with the consent of the accused).

b. Proposed Style Changes

Turning to proposed style changes to Rule 5, the Reporter indicated that Subcommittee A had recommended that Rule 5(a)(1)(B) be amended to reflect the recently enacted Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 114 Stat. 2488).

Judge Miller also pointed out that the rule was inconsistent in its use of the terms "where the offense was allegedly committed" and "where the prosecution is pending." Following brief discussion, the Committee decided to use the former reference, for clarity and consistency.

Judge Miller also noted that there was a potential gap relating to preliminary hearings vis a vis proceedings before a magistrate. Following brief discussion, Mr. Campbell, Mr. Pauley, and Judge Miller proposed language to address the issue.

6. Rule 5.1. Preliminary Hearing in a Felony Case

The Committee briefly discussed Subcommittee A's minor style changes to Rule 5.1, and approved them. The Committee also discussed briefly the proposed substantive change to Rule 5.1 that would permit magistrate judges to grant a continuance, over the objection of the defendant. Judge Miller moved that the Committee approve and forward the proposed substantive amendment. Judge Carnes seconded the motion, which carried by a unanimous vote.

7. Rule 6. The Grand Jury

Professor Stith lead the discussion on the proposed style changes to Rule 6 and that Subcommittee A had recommended that a new subdivision (iii) be added that would provide an exception for disclosures authorized under 18 U.S.C. § 3322 (authorizing disclosures for civil forfeiture and civil banking laws, etc. The Committee approved the change.

8. Rule 7. The Indictment and the Information

Professor Stith also reported that Subcommittee A had recommended a change to Rule 7 (inserting a parenthetical) that would clarify that the rule does not apply in criminal contempt proceedings. The Committee agreed to the change.

9. Rule 8. Joinder of Offenses or Defendants

Judge Friedman reported that Subcommittee A had recommended only minor style changes to Rule 8, which were accepted by the Committee.

10. Rule 9. Warrant or Summons Upon Indictment or Information

Judge Friedman also reported that Subcommittee A recommended minor style changes; the Committee agreed to those changes.

11. Rule 10. Arraignment

The Committee discussed the proposed substantive amendment to Rule 10, which would permit the defendant to waive his or her appearance at the arraignment. Following a brief discussion, Judge Miller moved that the amendment be approved and forwarded to the Standing Committee. Judge Roll seconded the motion, which carried by a unanimous vote. (The Committee had previously discussed and voted to go forward with the

proposed substantive amendment that would permit use of video teleconferencing for arraignments).

12. Rule 11. Pleas

Mr. Campbell pointed out that Subcommittee B had recommended some style changes to Rule 11, including a change to Rule 11(b)(1)(A) to clarify the government's use of statements made by a defendant. He also noted that in Rule 11(e), Subcommittee B recommended that the reference to 28 U.S.C. § 2255 be changed to "collateral attack" to recognize that a plea may be set aside during some other form of collateral attack and not just under § 2255, as noted in *United States v. Jeffers*, 234 F3d 277 (5th Cir. 2000). Mr. Campbell also pointed out that the Subcommittee recommended that Rule 11(f) be revised to simply state that "The admissibility or inadmissibility of a plea, plea discussion, and any related statement is governed by Federal Rule of Evidence 410." That will avoid the possible drafting problems of restyling that provision, which was originally intended to mirror Rule of Evidence 410.

Mr. Pauley questioned whether Rule 11(b)(1) could be clarified to more accurately distinguish between the judge's advice to the defendant concerning maximum and mandatory minimum sentences. In particular, he noted that the current restyled version included the punishment of forfeiture in the section dealing with maximum sentences when in fact, he believed, that punishment should be listed in the subsection dealing with mandatory minimum sentences. Following some additional discussion, Mr. Campbell offered a possible amendment that was accepted by the Committee.

13. Rule 12. Pleadings and Motions Before Trial; Defenses and Objections

Judge Roll informed the Committee that Subcommittee B had proposed additional, minor, style changes to Rule 12. The Committee accepted those changes.

14. Rule 12.1. Notice of Alibi Defense

Judge Roll also stated that Subcommittee B had proposed some style changes to Rule 12.1. The Committee also discussed the question of whether the rules should use the word "intention" or "intent" in Rules 12.1, 12.2, etc. It ultimately agreed to accept the recommendations of the Subcommittees, which had recommended using the term "intent."

15. Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.

The Committee discussed the style changes proposed by Subcommittee B and the proposed sustentative amendment. Mr. Pauley moved, and Judge Roll seconded, a

motion to approve and forward that substantive amendment. The motion carried by a unanimous vote.

16. Rule 12.3.Notice of Public Authority Defense

In discussing Rule 12.3, Judge Roll pointed out that Subcommittee B had recommended some additional minor style changes. The Committee accepted those changes.

17. Rule 12.4. Disclosure Statement (New Rule)

Turning to new Rule 12.4, in the substantive package of amendments, Judge Roll informed the Committee that Subcommittee B had recommended several changes. offer several recommended changes. First, regarding Rule 12.4(a)(2), the subcommittee recommended adding the words, "to the extent it can be obtained through due diligence" at the end of that section. Second, he pointed out that the language in Rule 12.4(b)(1) was intended to track similar language in the Civil Rules counterpart to this rule but creates problems in applying the requirements to a criminal proceeding. Thus, the subcommittee recommended modifying Rule 12.4(b)(1) to indicate that the disclosure requirements are triggered with the defendant's initial appearance. The Committee accepted those proposed changes.

Second, Judge Scirica pointed out that in discussing the issue with the other Advisory Committees, there was a consensus that the reference to the Judicial Conference in Rule 12.4, should probably be deleted and conformed to the other rules. The Committee agreed, with the understanding that the Standing Committee would probably offer conforming changes to Rule 12.4.

18. Rule 13. Joint Trial of Separate Cases

Judge Roll reported that Subcommittee B had no additional changes to Rule 13, which was approved by the Committee.

19. Rule 14. Relief from Prejudicial Joinder

The Committee made only a minor style correction to Rule 14.

20 Rule 15. Depositions

Mr. Campbell noted that Subcommittee B had recommended a number of minor stylist changes to Rule 15, following brief discussion, the proposed changes were accepted by the Committee.

21. Rule 16. Discovery and Inspection

Mr. Campbell also reported that Subcommittee B recommended additional style changes to Rule 16. The changes were adopted by the Committee, following discussion.

22. Rule 17. Subpoena

In discussing proposed style changes to Rule 17, Mr. Pauley noted that Subcommittee B had recommended a change to Rule 17(g) concerning the ability of magistrate judges to find a person in contempt. The Committee accepted the proposed changes.

23. Rule 17.1. Pretrial Conference

Mr. Pauley reported that Subcommittee B recommended only a minor style change to Rule 17, which was accepted by the Committee.

24. Rule 18. Place of Prosecution and Trial

Mr. Pauley also informed the Committee that Subcommittee B had recommended only a minor style change to Rule 18, which was accepted by the Committee.

25. Rule 19. Rescinded or Reserved.

The Reporter informed the Committee that Rule 19, which had been listed as a "rescinded" rule would carry the designation as "reserved." He noted that the rule was rescinded years ago and appears in the published versions of the rules as "rescinded." He noted, however, that using the word "rescinded" might give the reader the incorrect impression that it was rescinded by the style project amendments. The Committee accepted the change.

26. Rule 20. Transfer for Plea and Sentence

Mr. Pauley stated that Subcommittee B had recommended several style changes to Rule 20, which were accepted by the Committee.

27. Rule 21. Transfer for Trial

Mr. Pauley next informed the Committee that Subcommittee B had offered several minor corrections to Rule 21. Those changes were accepted by the Committee.

28. Rule 22. Time to File Motion to Transfer [Transferred]

Finally, Mr. Pauley noted that Subcommittee B recommended that because the substance of this rule was transferred to Rule 21, the rule should carry the designation of "transferred" and explained in the Committee Note.

29. Rule 23. Jury or Nonjury Trial

Judge Carnes informed the Committee that Subcommittee A had no additional changes or corrections to Rule 23.

30 Rule 24. Trial Jurors

Regarding Rule 24, Judge Miller reported that Subcommittee A had proposed only several minor changes to the Rule.

31. Rule 25. Judge's Disability

Judge Friedman indicated that Subcommittee A had offered only several minor changes to Rule 25. Those changes were accepted by the Committee.

32. Rule 26. Taking Testimony

a. Substantive Amendments: Remote Transmission of Live Testimony

The Reporter noted that the style version of Rule 26 includes the word "orally," which is technically a substantive change and that change is reflected in the substantive package version of Rule 26. Subcommittee A had recommended that the term "orally" be deleted from the restyled version as well and that the Committee Note be amended to reflect the purpose of that amendment. He also noted that Subcommittee A had recommended that the term "two-way" be inserted in line 13 of Rule 26 and that he had drafted additional language for Committee Note to address some of the concerns raised in the public comments, e.g., insuring the integrity of testimony and the quality of the transmission. The Committee accepted those changes.

Judge Carnes raised several questions about the possible Confrontation Clause issues presented in the proposed substantive amendments to Rule 26, i.e., permitting remote transmission of testimony. He recommended that the term "compelling circumstances" be changed to "exceptional circumstances" to more closely following the standard for taking depositions under Rule 15. The Reporter concurred, noting that the term "exceptional circumstances" had been used in at least one Supreme Court decision and that originally, the term "compelling circumstances" had been used to parallel a similar rule in the Rules of Civil Procedure. The Committee also discussed whether to

retain the reference to Federal Rule of Evidence 804, and after some discussion on the matter, decided to retain the reference in lieu of drafting new language that might, or might not, capture the essence of that rule.

Judge Carnes moved that the substantive change to Rule 26 be approved and forwarded to the Standing Committee. Judge Miller seconded the motion, which carried by a unanimous vote. The Committee also discussed suggested language for the Committee Note.

b. Style Changes.

The Committee also discussed and approved several style changes to Rule 26.

33. Rule 26.1. Foreign Law Determination

Judge Friedman reported that Subcommittee A had made no changes to Rule 26.1

34. Rule 26.2. Producing a Witness's Statement

Turning to Rule 26.2, Judge Friedman indicated that Subcommittee A had recommended several style changes to Rule 26.2, which were accepted by the Committee.

35. Rule 26.3. Mistrial

The Committee made no changes to Rule 26.3

36. Rule 27. Proof of Official Record

Judge Friedman indicated that Subcommittee A recommended only one minor style change to Rule 27. The Committee accepted the change.

37. Rule 28. Interpreters.

Judge Friedman also reported that Subcommittee A had recommended a minor style change to Rule 28, which was accepted by the Committee.

38. Rule 29. Motions for Judgment of Acquittal

Judge Bucklew stated that Subcommittee A recommended a number of style changes to Rule 29. Following brief discussion, the Committee accepted the changes.

39. Rule 29.1. Closing Argument

The Committee made no changes were made to Rule 29.1.

40. Rule 30. Jury Instructions

Regarding proposed amendments to Rule 30, Professor Stith indicated that Subcommittee A had unanimously voted to recommend that the Committee defer any further action of the substantive amendment to Rule 30 that would permit the court to request the parties to submit their requested jury instructions before trial. The Subcommittee had expressed concern, as pointed out in some of the public comments, that requiring the defense to reveal the theory of its case before trial might pose problems. Judge Miller moved that the substantive amendment be deferred. The motion, which was seconded by Mr. Campbell, was defeated by a vote of 6 to 7 (the chair cast the tie-breaking vote).

In addressing the proposed amendment, several members of the Committee expressed the view that one of the problems with the plain language of the rule was that it did not appear to accommodate those situations where counsel may wish to supplement their requested instructions during the trial. On that point, the Committee considered the draft of a proposed amendment to Rule of Civil Procedure 51. Following additional discussion, the Committee agreed that the sense of that draft should be included in the Committee Note to Rule 30, and not in the Rule itself.

Judge Roll moved that the Committee approve and forward both the style and substantive amendments to Rule 30. The motion was seconded by Mr. Fiske and carried by a vote of 9 to 2, with one abstention.

41. Rule 31. Jury Verdict

Mr. Pauley informed the Committee that Subcommittee A had recommended style changes to Rule 31. He also noted that the Subcommittee had considered whether to add the word "federal" before the word "judge," to avoid the possibility that the rule might be read to permit a state judge to accept the verdict. Following discussion, the Committee decided not add the term.

42. Rule 32. Sentencing and Judgment

a. Substantive Amendment: Ruling on Material Matter

Professor Stith commented that Subcommittee had considered the major substantive amendment to Rule 32 that would require the sentencing judge to rule on any unresolved objections to material matters in the PSR, even if those matters would not otherwise affect the sentence. She noted that the Subcommittee had spoken to representatives from the Bureau of Prisons regarding the role that the PSR may or may not play in decisions regarding the defendant's incarceration. She noted that the Bureau indicated that potentially everything in the PSR could be considered "material." The Committee discussion focused on the fact that even assuming there is a problem with

objected-to, and possibly incorrect, information might remain in the PSR, the problem should not be addressed in the rule itself, but instead in the Committee Note.

Following additional discussion, Judge Miller moved that the substantive change in Rule 32(h)(3)(B) be withdrawn. The motion was seconded by Mr. Pauley and carried by a vote of 11 to 1.

Judge Miller moved that the issue of resolving objections to matters that might be considered important for purposes of the BOP not be included in the Committee Note. The motion was seconded by Judge Roll but failed by a vote of 5 to 6. Subsequently, the Committee considered proposed revisions to the Committee Note, pointing out the problem of important, unresolved, information remaining in the PSR that might impact on post-sentencing decisions by the Bureau of Prisons. The Committee ultimately voted 7 to 3 to include the language in the Note.

b. Style Changes.

The Reporter pointed out that Subcommittee B had recommended a number of style changes to Rule 32. First, the Subcommittee recommended a revised version of Rule 32(d), concerning the contents of the presentence report. Second, the subcommittee had recommended a revised version of Rule 32(h) and had designated it as subdivision (h) and redesignated the remaining provisions (Subdivision (h) is now what had been Rule 32(h)(5) in the restyled version published for comment). Third, Rule 32(i) (formerly 32(h) also includes a change in (i)(B) to reflect a recommendation by Mr. Pauley that Rule 32(h)(1)(B) be amended to include a requirement that the judge provide the excluded information to the government as well as to the defendant. Fourth, Subcommittee B recommended that Rule 32(i)(4)(C) (currently (h)(4)(C) in the published version) include a "good cause" requirement as recommended by Mr. Pauley.

43. Rule 32.1. Revoking or Modifying Probation or Supervised Release.

Professor Stith noted that Subcommittee B recommended style changes to Rule 32.1. Those style changes were accepted.

Mr. Pauley urged the Committee to delete Rule 32.1(a)(3)(D) that would require the judge to apprise a person of their right to remain silent. He argued that the Constitution does not require the warnings, and that even assuming some judges are currently giving some rights warnings did not necessarily rise to the level of requiring such warnings. He also noted that the change would result in a major change in practice and that the change probably should have been published in the substantive package of amendments. By not doing so, he pointed out, the public may have not had adequate notice of the proposed change. Several Committee members noted that the rule simply captures the procedure already used in Rule 5 initial appearances and that although a person standing before the judge is not necessarily in a coercive environment, it would be

better for the judge to appear to be neutral in considering whatever evidence is presented. Ultimately, Mr. Pauley moved that the rights warnings provision be deleted from the rule. The motion was seconded by Judge Trager and carried on a vote of 8 to 4.

Judge Friedman questioned whether all of the material in Rule 32.1(a), regarding initial appearances for revocation proceedings, should be withdrawn. He pointed out that some districts do not hold initial appearances for those proceedings and that in those districts the judge moves immediately into the revocation hearing itself. Judge Miller responded that early in the style project the Committee had decided to include provision in Rule 32.1 for initial appearances, reflecting the practice in a number of districts. The Reporter added that this amendment reflected the sorts of decisions the Committee had dealt with throughout the Style Project—whether to adopt the current practice in a number of districts as a national rule. He noted that withdrawing Rule 32.1.(a) would not require major redrafting of the rule, and perhaps other rules, such as Rule 40. Other members noted that a point could be made in the Committee Note that a court could collapse both the initial appearance and the revocation hearing into one proceeding. That view was ultimately adopted as a consensus of the Committee.

44. Rule 32.2. Criminal Forfeiture

The Reporter indicated that Subcommittee B recommended minor style changes to Rule 32.2, which were accepted by the Committee.

45. Rule 33. New Trial

Mr. Pauley noted that Subcommittee B recommended several style changes to Rule 33. The Committee adopted those changes.

46. Rule 34. Arresting Judgment

Turning to Rule 34, Mr. Pauley reported that Subcommittee B had recommended several style changes. After a brief discussion, the Committee accepted the proposed changes.

47. Rule 35. Correcting or Reducing Sentence.

a. Substantive Amendment: Reduction of Sentence

Mr. Pauley reported that Subcommittee B had recommended new language to the substantive amendments to Rule 35(b), to cover the issue raised in *United States v. Orozco* and the situation where a defendant does not learn of the helpful information until more than one year has elapsed. Mr. Pauley moved that the change be made. Judge Miller seconded the motion, which carried by a unanimous vote. Judge Friedman questioned why the Committee had decided to change the word "sentencing" in Rule 35(a) to "oral announcement of the sentence." The Reporter explained that the Appellate

Rules Committee had pointed out the ambiguity in the term "sentencing" and had recommended last year that the Committee address the issue. At the Committee's October 2000, meeting, the Committee voted to change the term to "oral announcement" to reflect the majority view of the circuits that had addressed the meaning of "sentencing" for purposes of triggering the time for correcting clear errors. Some members of the Committee pointed out that the better term might be to refer to the entry of the judgment, which serves as a triggering event for appeals, etc. Following additional discussion, the Committee voted to change Rule 35. Rule 35(a) will be a new definitional provision indicating that sentencing refers to entry of the written judgment. Rule 35(a) will become (b) and Rule 35(b), will become (c).

48. Rule 36. Clerical Mistakes.

Judge Miller reported that Subcommittee B had no additional changes to Rule 36.

49. Rule 37. [Reserved]

The Reporter indicated that because Rule 37 was abrogated in 1968, it should be labeled as "reserved." The Committee agreed with that recommendation.

50. Rule 38. Staying a Sentence or a Disability

Judge Miller indicated that Subcommittee B had recommended minor style changes to Rule 38. The Committee agreed with those changes.

51. 39. [Reserved]

As with Rule 37, the Reporter indicated that because Rule 39 was abrogated in 1968, it should be labeled as "reserved." The Committee agreed with that recommendation.

52. Rule 40. Arrest for Failing to Appear in Another District

Judge Miller informed the Committee that Subcommittee B had recommended several minor style changes to Rule 40. Those changes were accepted by the Committee.

53. Rule 41. Search and Seizure

a. Substantive Amendment: Covert Searches

Judge Bucklew pointed out that Subcommittee A discussed questions raised by the public comments on the proposed substantive change to Rule 41 that would govern warrants for covert searches. The subcommittee recommended that the proposed amendment be deferred, and considered further in conjunction with pending proposals governing warrants for tracking devices. She ultimately moved to defer further action on

the covert searches provisions in Rule 41. Judge Miller seconded the motion, which carried by a unanimous vote.

b. Style Changes

Finally, Judge Bucklew reported that Subcommittee B had recommended additional style changes, which were accepted by the Committee.

54. Rule 42. Criminal Contempt

Judge Bucklew reported that Subcommittee A recommended style changes to Rule 42 and an amendment to Rule 42(b) to reflect the authority of magistrate judges to hold contempt proceedings—per the recent Federal Courts Improvement Act. The Committee accepted the proposed changes.

55. Rule 43. Defendant's Presence

Regarding Rule 43, Judge Bucklew reported that Subcommittee A had recommended several minor style changes. Those changes were accepted by the Committee.

56. Rule 44. Right to and Appointment of Counsel

Judge Friedman indicated that there were no suggested changes to Rule 44.

57. Rule 45. Computing and Extending Time

Judge Friedman also indicated that Subcommittee A had recommended style changes to Rule 45, and that the term "President's Day" has been changed to "Washington's Birthday" in accordance with the discussion at the October 2000, Committee meeting. The Committee accepted those changes.

58. Rule 46. Release from Custody; Supervising Detention

Judge Carnes reported to the Committee that Subcommittee A had not recommended any additional style changes to Rule 46

59. Rule 47. Motions and Supporting Affidavits

The Committee made a minor style change to Rule 47.

60. Rule 48. Dismissal

Judge Carnes indicated that Subcommittee A had suggested several minor style changes to Rule 48. The Committee accepted those changes.

61. Rule 49. Serving and Filing Papers

Judge Carnes also reported that Subcommittee A recommended minor style changes to Rule 49; the Committee adopted those proposed changes.

62. Rule 50. Prompt Disposition.

No changes were made to Rule 50

63. Rule 51. Preserving Claimed Error.

Mr. Pauley reported that there were no recommended changes to Rule 50.

64. Rule 52. Harmless and Plain Error

Mr. Pauley reported that Subcommittee A had not recommended any style changes. He urged the Committee, however, to clarify an ambiguity in the wording "A plain error or defect..." in Rule 52(b). He pointed out that the Supreme Court has concluded that that wording should be read more simply as meaning "error." As he noted, the Court has indicated that the use of the disjunctive is misleading. He recommended that the words "or defect" be deleted from the rule. Following discussion, the Committee voted 11 to 1 to delete the words, "or defect."

65. Rule 53. Courtroom Photographing and Broadcasting Prohibited

No changes were made to Rule 53.

66. Rule 54. [Transferred]

The Reporter informed the Committee that Subcommittee A recommended that because this rule was transferred to Rule 1 it should carry the designation of transferred" rather than "reserved." He also indicated that a Committee Note would be prepared for the rule.

67. Rule 55. Records

Judge Friedman indicated that no additional changes had been proposed for Rule 55.

68. Rule 56. When Court is Open

Turning to Rule 56, Judge Friedman reported that Subcommittee A had recommended style changes to Rule 56, to conform it to Rule 45, *supra*.

69. Rule 57. District Court Rules

Judge Friedman pointed out that Subcommittee A had proposed several minor style changes to Rule 57. The Committee accepted the changes.

70. Rule 58. Petty Offenses and Other Misdemeanors

Judge Miller reported that Subcommittee A had suggested a number of proposed changes—several of them to represent recent statutory changes. In addition, the Committee modified Rule 58(b)(2) (rights warnings) to parallel a similar provision in Rule 5(d).

71. Rule 59. [Deleted]

The Reporter stated that because Rule 59 is being deleted as being unnecessary, the reference should be "deleted." The Committee agreed.

72. Rule 60. Title

Judge Miller suggested that the Committee consider restoring Rule 60, which had been deleted in the early stages of the drafting process. He pointed out that without the rule, there may be a real question as to the "official" designation of the rules. Following brief discussion, the Committee adopted that recommendation.

C. Rules Governing § 2254 and § 2255 Proceedings

Judge Carnes reported that the Subcommittees had recommended deferring any further action on Rules Governing § 2254 and § 2255 Proceedings, pending further research on the substantive questions and consideration of a "restyled" version of the rules. The Committee agreed with that proposal.

Judge Davis reported that Professor Robbins was being retained as a special consultant on the habeas rules, and that the Style Subcommittee had prepared an initial restyled draft of the rules. He indicated that the matter would probably be on the agenda for the Fall 2001 meeting.

VI. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee tentatively agreed to hold its next meeting in October 2001, either at Santa Fe, New Mexico or at San Francisco, California, depending on availability of accommodations.

Respectfully submitted

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

AGENDA DOCKETING

ADVISORY COMMITTEE ON CRIMINAL RULES

Proposal	Source, Date, and Doc #	Status
[CR 4] — Require arresting officer to notify pretrial services officer, U.S. Marshal, and U.S. Attorney of arrest	Local Rules Project	10/95 — Subc appointed 4/96 — Rejected by subc **COMPLETED**
[CR 4] — Clarify the ability of judges to issue warrants via facsimile transmission	Magistrate Judge Bernard Zimmerman 1/29/01 (01-CR-A)	1/01 — Referred to chair and reporter for consideration **PENDING FURTHER ACTION**
[CR 5] — Video Teleconferencing of Initial Appearances and Arraignments	Judge Fred Biery 5/98; Judge Durwood Edwards 6/98	5/98 — Referred to chair and reporter for consideration 10/98 — Referred to subcmte 10/99 — Approved for publication by advisory cmte 1/00 — Considered by cmte as part of style package 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Forwarded to ST Cmte; version requires defendant's consent and court approval 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 5(a)] — Time limit for hearings involving unlawful flight to avoid prosecution arrests	DOJ 8/91; 8/92	10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication 9/93 — Published for public comment 4/94 — Revised and forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 5.1(d)] — Eliminate consent requirement for magistrate judge consideration	Judge Swearingen 10/28/96 (96-CR-E)	1/97 — Sent to reporter 4/97 — Recommends legislation to ST Cmte 6/97 — Recommitted by ST Cmte 10/97—Adv. Cmte declines to amend provision. 3/98 — Jud Conf instructs rules cmtes to propose amendment 4/98 — Approves amendment, but defers until style project completed 6/98 — ST Cmte concurs with deferral 6/99 — Considered 10/99 — Approved for publication by advisory cmte 1/00 — Considered by cmte 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 5.1] — Extend production of witness statements in CR26.2 to 5.1.	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96— Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 6] — Statistical reporting of indictments	David L. Cook AO 3/93	10/93 — Cmte declined to act on the issue **COMPLETED**
[CR 6] — Allow grand jury witness to be accompanied by counsel (see CR 6(d) below)	Robert D. Evans, ABA, 3/2/01 (01-CR-B)	3/01 — Referred to chair and reporter for consideration **PENDING FURTHER ACTION**
[CR 6] — Allow sharing of grand jury information pertaining to foreign intelligence	USA Patriot Act of 2001 (P.L. 107-56) 10/26/01	11/01 — Adv Cmte considered proposed amendments **PENDING FURTHER ACTION**
[CR 6(a)] — Reduce number of grand jurors	H.R. 1536 introduced by Cong Goodlatte	5/97 — Introduced by Congressman Goodlatte, referred to CACM with input from Rules Cmte 10/97—Adv Cmte unanimously voted to oppose any reduction in grand jury size. 1/98—ST Cmte voted to recommend that the Judicial Conference oppose the legislation. 3/98 — Jud Conf concurs **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 6(d)] — Allow witness to be accompanied into grand jury by counsel	Omnibus Approp. Act (P.L.105-277)	10/98 — Considered; Subcomm. Appointed 1/99 — ST Cmte approved subcomm rec. not to allow representation 3/99 — Jud Conf approves report for submission to Congress **COMPLETED**
[CR 6(d)] — Interpreters allowed during grand jury	DOJ 1/22/97 (97-CR-B)	1/97 — Sent directly to chair 4/97 — Draft presented and approved for request to publish 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to ST Cmte 6/98 — Approved by ST Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/01— Effective **COMPLETED**
[CR 6(e)] — Intra-Department of Justice use of Grand Jury materials	DOJ	4/92 — Rejected motion to send to ST Cmte for public comment 10/94 — Discussed and no action taken **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State Officials	DOJ	4/96 — Cmte decided that current practice should be reaffirmed 10/99 — Approved for publication by advisory cmte **COMPLETED**
[CR 6(e)(3)(C)(iv)] — Disclosure of Grand Jury materials to State attorney discipline agencies	Barry A. Miller, Esq. 12/93	10/94 — Considered, no action taken **COMPLETED**
[CR6(f)] — Return by foreperson rather than entire grand jury	DOJ 1/22/97 (97-CR-A)	1/97 — Sent directly to chair 4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Approved by ST Cmte 9/98 — Approved by Judicial Conference 4/99 — Approved by Sup. Ct. 12/01— Effective **COMPLETED**
[CR7(b)] — Effect of tardy indictment	Congressional constituent 3/21/00 (00-CR-B)	5/00— Referred to chair and reporter **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR7(c)(2)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of R. 32.2 rejection by ST Cmte 10/98 — revised and resubmitted to ST Cmte for transmission to conference — 1/99— Approved by ST Cmte 3/99— Approved by Jud Conf 4/00— Approved by Supreme Court 12/00 — Effective **COMPLETED**
[CR 10] — Arraignment of detainees through video teleconferencing; Defendant's presence not required	DOJ 4/92	4/92 — Deferred for further action 10/92 — Subc appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Action deferred, pending outcome of FJC pilot programs 10/94 — Considered 4/98 —Draft amendments considered, but subcmte appointed to further study 10/98 — Considered by cmte; reporter to redraft and submit at next meeting 4/99 — Considered 10/99— Approved for publication by advisory cmte 1/00 — Considered by cmte as part of style package 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01— Approved and forwarded to ST Cmte 6/01— Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 10] — Guilty plea at an arraignment	Judge B. Waugh Crigler 10/94	10/94 — Suggested and briefly considered **DEFERRED INDEFINITELY**
[CR 11] — Magistrate judges authorized to hear guilty pleas, and inform accused of possible deportation	James Craven, Esq. 1991	4/92 — Disapproved **COMPLETED**
[CR 11] — Advise defendant of impact of negotiated factual stipulation	David Adair & Toby Slawsky, AO 4/92	10/92 — Motion to amend withdrawn **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 11] — Advise non-U.S. citizen defendant of potential collateral consequences when accepting guilty plea	Richard J. Douglas, Atty., Senate Committee on Foreign Relations 4/3/01 (01-CR-C)	4/01 — Referred to reporter & chair **PENDING FURTHER ACTION**
[CR 11(c)] — Advise defendant of any appeal waiver provision which may be contained in plea agreement	Judge Maryanne Trump Barry 7/19/96 (96-CR-A)	10/96 — Considered, draft presented 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to ST Cmte 6/98 — Approved by ST Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99— Effective **COMPLETED**
[CR 11(b)(2)] — Examine defendant's prior discussions with a government attorney	Judge Sidney Fitzwater 11/94 & 3/99	4/95 — Discussed and no motion to amend **COMPLETED** 3/99 — Sent to chair and reporter 4/00 — Considered; request to publish 6/00 — ST Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 11(e)] — Judge, other than the judge assigned to hear case, may take part in plea discussions	Judge Jensen 4/95	10/95 — Considered 4/96 —Tabled as moot, but continued study by subcmte on other Rule 11 issues **DEFERRED INDEFINITELY**
[CR 11(e)(4) — Binding Plea Agreement (Hyde decision)	Judge George P. Kazen 2/96	4/96 — Considered 10/96 — Considered 4/97 — Deferred until Sup Ct decision **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 11(e)(1) (A)(B) and (C)] — Sentencing Guidelines effect on particular plea agreements	CR Rules Committee 4/96	4/96 — To be studied by reporter 10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 — Approved by ST Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99 — Effective **COMPLETED**
[CR 11]—Pending legislation regarding victim allocution	Pending legislation 97-98	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation. **COMPLETED**
[CR 11(e)(6) — Court required to inquire whether the defendant is entitled to an adjustment for acceptance of responsibility	Judge John W. Sedwick 10/98 (98-CR-C)	**PENDING FURTHER ACTION**
[CR 12] — Inconsistent with Constitution	Paul Sauers 8/95	10/95 — Considered and no action taken **COMPLETED**
[CR 12(b)] — Entrapment defense raised as pretrial motion	Judge Manuel L. Real 12/92 & Local Rules Project	4/93 — Denied 10/95 — Subcmte appointed 4/96 — No action taken **COMPLETED**
[CR 12(i)] — Production of statements		7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 12.2(c)] — Authority of trial judge to order mental examination.	Presented by Mr. Pauley on behalf of DOJ at 10/97 meeting	10/97—Adv Cmte voted to consider draft amendment at next meeting. 4/98 — Deferred for further study of constitutional issues 10/98 — Considered draft amendments, continued for further study 4/99 — Considered 10/99 — Considered by cmte 1/00 — Considered by cmte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 12.4] — Financial disclosure	Stg Comte, 1/00	4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved with post-publication changes and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 16] — Disclosure to defense of information relevant to sentencing	John Rabiej 8/93	10/93 — Cmte took no action **COMPLETED**
[CR 16] — Prado Report and allocation of discovery costs	'94 Report of Jud Conf	4/94 — Voted that no amendment be made to the CR rules **COMPLETED**
[CR 16] — Prosecution to inform defense of intent to introduce extrinsic act evidence	CR Rules Committee '94	10/94 — Discussed and declined **COMPLETED**
[CR 16(a)(1)] — Disclosure of experts		7/91 — Approved by for publication by St Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 16(a)(1)(A)] — Disclosure of statements made by organizational defendants	ABA	11/91 — Considered 4/92 — Considered 6/92 — Approved by ST Cmte for publication, but deferred 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 16(a)(1)(C)] — Government disclosure of materials implicating defendant	Prof. Charles W. Ehrhardt 6/92 & Judge O'Brien	10/92 — Rejected 4/93 — Considered 4/94 — Discussed and no motion to amend **COMPLETED**
[CR 16(a)(1)(E)] — Require defense to disclose information concerning defense expert testimony	Jo Ann Harris, Asst. Atty. Gen., CR Div., DOJ 2/94; clarification of the word "complies" Judge Propst (97-CR-C)	4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf 1/96 — Discussed at ST meeting 4/96 — Reconsidered and voted to resubmit to ST Cmte 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED** 3/97 — Referred to reporter and chair 10/98 — Incorporated in proposed amendments to Rule 12.2 1/00 — Considered by cmte as part of style package 4/00— Comte decided not to take action **COMPLETED**
[CR 16(a) — Permit the same discovery of experts as is permitted under the civil rules	Carl E. Person, Esq. 6/01 (01-CR-D)	6/01— Referred to reporter and chair **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 16(a) and (b)] — Disclosure of witness names and statements before trial	William R. Wilson, Jr., Esq. 2/92 5/18/99 (99-CR-D)	2/92 — No action 10/92 — Considered and decided to draft amendment 4/93 — Deferred until 10/93 10/93 — Considered 4/94 — Considered 6/94 — Approved for publication by ST Cmte 9/94 — Published for public comment 4/95 — Considered and approved 7/95 — Approved by ST Cmte 9/95 — Rejected by Jud Conf **COMPLETED** 5/99— Sent to chair and reporter **PENDING FURTHER ACTION**
[CR 16(d)] — Require parties to confer on discovery matters before filing a motion	Local Rules Project & Mag Judge Robert Collings 3/94	10/94 — Deferred 10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR 23(a)] — Address the issue of when a jury trial is authorized	Jeremy A. Bell 11/00 (00-CR-D)	11/00 — Sent to chair and reporter **PENDING FURTHER ACTION**
[CR23(b)] — Permits six-person juries in felony cases	S. 3 introduced by Sen Hatch 1/97	1/97 — Introduced as § 502 of the Omnibus Crime Prevention Act of 1997 10/97—Adv. Cmte voted to oppose the legislation 1/98— ST Cmte expressed grave concern about any such legislation **COMPLETED**
[CR 24(a)] — Attorney conducted voir dire of prospective jurors	Judge William R Wilson, Jr. 5/94	10/94 — Considered 4/95 — Considered 6/95 — Approved for publication by ST Cmte 9/95 — Published for public comment 4/96 — Rejected by advisory cmte, but should be subject to continued study and education; FJC to pursue educational programs **COMPLETED**
[CR 24(b)] — Reduce or equalize peremptory challenges in an effort to reduce court costs	Renewed suggestions from judiciary; Judge Acker (97-CR-E); pending legislation S-3.	2/91 — ST Cmte, after publication and comment, rejected CR Cmte 1990 proposal 4/93 — No motion to amend 1/97 — Omnibus Crime Control Act of 1997 (S.3) introduced [Section 501] 6/97 — Stotler letter to Chairman Hatch **COMPLETED** 10/97—Adv. Cmte decided to take no action on proposal to randomly select petit and venire juries and abolish peremptory challenges. 10/97—Adv. Cmte directed reporter to prepare draft amendment equalizing peremptory challenges at 10 per side. 4/98 — Approved by 6 to 5 vote and will be included in style package 10/99 — Rejected inclusion in style package **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 24(c)] — Alternate jurors to be retained in deliberations	Judge Bruce M. Selya 8/96 (96-CR-C)	10/96 — Considered and agreed to in concept; reporter to draft appropriate implementing language 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to ST Cmte 6/98 — Approved by ST Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99 — Effective **COMPLETED**
[CR 26] — Questioning by jurors	Prof. Stephen Saltzburg	4/93 — Considered and tabled until 4/94 4/94 — Discussed and no action taken **COMPLETED**
[CR 26] — Expanding oral testimony, including video transmission	Judge Stotler 10/96	10/96 — Discussed 4/97 — Subcmte will be appointed 10/97—Subcmte recommended amendment. Adv Cmte voted to consider a draft amendment at next meeting. 4/98 — Deferred for further study 10/98 — Cmte approved, but deferred request to publish until spring meeting or included in style package 4/99 — Considered 10/99 — Approved for publication by advisory cmte 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 26] — Court advise defendant of right to testify	Robert Potter	4/95 — Discussed and no motion to amend **COMPLETED**
[CR 26.2] — Production of statements for proceedings under CR 32(e), 32.1(c), 46(i), and Rule 8 of § 2255		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 26.2] — Production of a witness' statement regarding preliminary examinations conducted under CR 5 1	Michael R. Levine, Asst. Fed. Defender 3/95	10/95 — Considered by cmte 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97— Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Jud Conf approves 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR26.2(f)] — Definition of Statement	CR Rules Cmte 4/95	4/95 — Considered 10/95 — Considered and no action to be taken **COMPLETED**
[CR 26.3] — Proceedings for a mistrial		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 29(b)] — Defer ruling on motion for judgment of acquittal until after verdict	DOJ 6/91	11/91 — Considered 4/92 — Forwarded to ST Cmte for public comment 6/92 — Approved for publication, but delayed pending move of RCSO 12/92 — Published for public comment on expedited basis 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 30] — Permit or require parties to submit proposed jury instructions before trial	Local Rules Project	10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 30] — discretion in timing submission of jury instructions	Judge Stotler 1/15/97 (97-CR-A)	1/97 — Sent directly to chair and reporter 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Deferred for further study 10/98 — Considered by cmte, but deferred pending Civil Rules Cmte action on CV 51 1/00 — Considered by cmte as part of style package 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 31] — Provide for a 5/6 vote on a verdict	Sen. Thurmond, S.1426, 11/95	4/96 — Discussed, rulemaking process should handle it **COMPLETED**
[CR 31(d)] — Individual polling of jurors	Judge Brooks Smith	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[31(e)] — Reflect proposed new Rule 32.2 governing criminal forfeitures		4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00 — Approved by Supreme Court 12/00 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 32] — Amendments to entire rule; victims' allocution during sentencing	Judge Hodges, before 4/92; pending legislation reactivated issue in 1997/98.	10/92 — Forwarded to ST Cmte for public comment 12/92 — Published 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED** 10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32]—findings on controverted matters in presentence report		3/00 — considered by subcomte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Advisory Cmte withdrew recommendation **COMPLETED**
[CR 32]—release of presentence and related reports	Request of Criminal Law Committee	10/98 — Reviewed recommendation of subcomm and agreed that no rules necessary **COMPLETED**
[CR 32(c)(5)] — clerk required to file notice of appeal	Clerk, 7th Circuit 4/11/00 (00-CR-A)	3/00 — Sent directly to chair 5/00 — referred to reporter **PENDING FURTHER ACTION**
[CR 32(d)(2) — Forfeiture proceedings and procedures reflect proposed new Rule 32.2 governing criminal forfeitures	Roger Pauley, DOJ, 10/93	4/94 — Considered 6/94 — Approved by ST Cmte for public comment 9/94 — Published for public comment 4/95 — Revised and approved 6/95 — Approved by ST Cmte 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED** 4/97— Draft presented and approved for publication 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32.2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00 — Approved by Supreme Ct 12/00 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 32(e)] — Delete provision addressing probation and production of statements (later renumbered to CR32(c)(2))	DOJ	7/91 — Approved by ST Cmte for publication 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Judicial Conference 4/93 — Approved by Supreme Court 12/93 — Effective **COMPLETED**
[CR 32.1] — Production of statements		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 32.1]— Technical correction of "magistrate" to "magistrate judge."	Rabiej (2/6/98)	2/98—Letter sent advising chair & reporter 4/98 — Approved, but deferred until style project completed 1/00 — considered by comte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved by Advisory Cmte as part of style package and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 32.1]—pending victims rights/allocution litigation	Pending litigation 1997/98.	10/97—Adv Cmte expressed view that it was not opposed to addressing the legislation and decided to keep the subcmte in place to monitor/respond to the legislation. **PENDING FURTHER ACTION**
[CR 32.1]— Right of allocution before sentencing at revocation hearing	U S. v. Frazier 2/25/02	3/02—Referred to chair and reporter **PENDING FURTHER ACTION**
[CR 32.2] — Create forfeiture procedures	John C. Keeney, DOJ, 3/96 (96-CR-D)	10/96 — Draft presented and considered 4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Rejected by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99 — Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00 — Approved by Supreme Ct 12/00 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 33] — Time for filing motion for new trial on ground of newly discovered evidence	John C. Keeney, DOJ 9/95	10/95 — Considered 4/96 — Draft presented and approved 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 35] — Allow defendants to move for reduction of sentence	Robert D. Evans, ABA, 3/2/01 (01-CR-B)	3/01 — Referred to chair and reporter for consideration **PENDING FURTHER ACTION**
[CR 35(b)] — Recognize combined pre-sentencing and post-sentencing assistance	Judge T. S. Ellis, III 7/95	10/95 — Draft presented and considered 4/96 — Forwarded to ST Cmte 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 35(b)] To permit sentence reduction when defendant assists government before or within 1 year after sentence	Judge Ed Carnes 3/99 (99-CR-A); Asst. Attorney Gen./ Crim. Div. 4/99 (99-CR-C)	3/99— Referred to chair and reporter 1/00 — Considered by comte as part of style package 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved with post-publication changes and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 35(b)] — Recognize assistance in any offense	S.3, Sen Hatch 1/97	1/97 — Introduced as § 602 and 821 of the Omnibus Crime Prevention Act of 1997 6/97 — Stotler letter to Chairman Hatch **COMPLETED**
[CR 35(c)] — Correction of sentence, timing	Jensen, 1994 9th Cir. decision	10/94 — Considered 4/95 — No action pending restylization of CR Rules 4/99 — Considered 4/00— Considered and included in request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 38(e)] — Conforming amendment to CR 32.2		4/97— Draft presented and approved for publication 6/97 — Approved by ST Cmte for publication 8/97— Published for public comment 4/98— Approved and forwarded to St Cmte 6/98 — Withdrawn in light of rejection of R. 32 2 by Stg Cmte 10/98 — revised and resubmitted to stg cmte for transmission to conference 1/99— Approved by Stg Cmte 3/99 — Approved by Jud Conf 4/00— Approved by Supreme Ct 12/00 — Effective **COMPLETED**
[CR 40] — Commitment to another district (warrant may be produced by facsimile)		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 40] —Treat FAX copies of documents as certified	Mag Judge Wade Hampton 2/93	10/93 — Rejected **COMPLETED**
[CR 40(a)] — Technical amendment conforming with change to CR5	Criminal Rules Cmte 4/94	4/94 — Considered, conforming change no publication necessary 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CR 40(a)] —Proximity of nearest judge for removal proceedings	Mag Judge Robert B. Collings 3/94	10/94 — Considered and deferred further discussion until 4/95 10/96 — Considered and rejected **COMPLETED**
[CR 40(d)] — Conditional release of probationer; magistrate judge sets terms of release of probationer or supervised release	Magistrate Judge Robert B. Collings 11/92	10/92 — Forwarded to ST Cmte for publication 4/93 — Discussed 6/93 — Approved by ST Cmte 9/93 — Approved by Jud Conf 4/94 — Approved by Sup Ct 12/94 — Effective **COMPLETED**
[CR 41] — Search and seizure warrant issued on information sent by facsimile		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 41] — Warrant issued by authority within the district	J.C. Whitaker 3/93	10/93 — Failed for lack of a motion **COMPLETED**
[CR 41] — Allow magistrate judge to issue nationwide search warrant	USA Patriot Act of 2001 (P.L. 107-56) 10/26/01	11/01 — Adv Cmte considered proposed amendments **PENDING FURTHER ACTION**
[CR 41(c)(2)(D)] — recording of oral search warrant	J. Dowd 2/98	4/98 — Tabled until study reveals need for change **DEFERRED INDEFINITELY**
[CR 41(c)(1) and (d) — enlarge time period	Judge B. Waugh Crigler 11/98 (98-CR-D)	6/00 — Stg Comte approves request to publish 8/00 — Published (rejects expansion of time period) **PENDING FURTHER ACTION**
[CR 41(c)(1) — to just provide that the warrant designate the court to which shall be returned	Judge D. Brock Hornby 11/28/01 (02-CR-A)	2/02— Referred to reporter, chair, and Rule 41 Subcommittee **PENDING FURTHER ACTION**
[CR 41(d)] — covert entry for purposes of observation only	DOJ 9/2/99	10/99 — Considered 1/00 — Considered by comte as part of style package 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Advisory Cmte decided to defer further action **PENDING FURTHER ACTION**
[CR42(b)] — magistrate judge contempt power clarification	Magistrate Judge Tommy Miller 12/00 (00-CR-E)	4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 43(b)] —Sentence absent defendant	DOJ 4/92	10/92 — Subcmte appointed 4/93 — Considered 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Deleted video teleconferencing provision & forwarded to ST Cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR 43(b)] — Arraignment of detainees by video teleconferencing		10/98 — Subcmte appointed 4/99 — Considered 1/00 — Considered by comte as part of style package 4/00— Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 43(c)(4)] — Defendant need not be present to reduce or change a sentence	John Keeney, DOJ 1/96	4/96 — Considered 6/96 — Approved for publication by ST Cmte 8/96 — Published for public comment 4/97 — Forwarded to ST Cmte 6/97 — Approved by ST Cmte 9/97—Approved by Jud Conf 4/98 — Approved by Supreme Court 12/98 — Effective **COMPLETED**
[CR 43(a) — Defendant may waive arraignment on subsequent, superseding indictments and enter plea of not guilty in writing	Judge Joseph G. Scoville, 10/16/97 (97-CR-I) and Mario Cano 97---	10/97 — Referred to reporter and chair 4/98 —Draft amendments considered, subcmte appointed 10/98 — Cmte considered; reporter to submit draft at next meeting 4/00— Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved & forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 46] — Production of statements in release from custody proceedings		6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[CR 46(d)] — Release of persons after arrest for violation of probation or supervised release	Magistrate Judge Robert Collings 3/94	10/94 — Defer consideration of amendment until rule might be amended or restylized 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved & forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CR 46] — Requirements in AP 9(a) that court state reasons for releasing or detaining defendant in a CR case	11/95 Stotler letter	4/96 — Discussed and no action taken **COMPLETED**
[CR 46 (e)] — Forfeiture of bond	H.R. 2134	4/98 — Opposed amendment **COMPLETED**
[CR 46(i)] — Typographical error in rule in cross-citation	Jensen	7/91 — Approved for publication by ST Cmte 4/94 — Considered 9/94 — No action taken by Jud Conf because Congress corrected error **COMPLETED**
[CR 47] — Require parties to confer or attempt to confer before any motion is filed	Local Rules Project	10/95 — Subcmte appointed 4/96 — Rejected by subcmte **COMPLETED**
[CR 49] — Double-sided paper	Environmenta l Defense Fund 12/91	4/92 — Chair informed EDF that matter was being considered by other cmtes in Jud Conf **COMPLETED**
[CR 49(c)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CR-G)	9/97 — Mailed to reporter and chair 4/98 — Referred to Technology Subcmte 4/99 — Considered 4/00— Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR49(c)] — Facsimile service of notice to counsel	William S. Brownell, 10/20/97 (CR-J)	11/97 — Referred to reporter and chair, pending Technology Subcmte study 4/99 — Considered 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Approved and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 49(e)] —Delete provision re filing notice of dangerous offender status — conforming amendment	Prof. David Schlueter 4/94	4/94 — Considered 6/94 — ST Cmte approved without publication 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CR53] — Cameras in the courtroom		7/93 — Approved by ST Cmte 10/93 — Published 4/94 — Considered and approved 6/94 — Approved by ST Cmte 9/94 — Rejected by Jud Conf 10/94 — Guidelines discussed by cmte **COMPLETED**
[CR54] — Delete Canal Zone	Roger Pauley, minutes 4/97 mtg	4/97 — Draft presented and approved for request to publish 6/97 — Approved for publication by ST Cmte 8/97— Published for public comment 4/98 — Approved and forwarded to Stg Cmte 6/98 —Approved by Stg Cmte 9/98 — Approved by Jud Conf 4/99 — Approved by Sup. Ct. 12/99— Effective **COMPLETED**
[CR 57] — Local rules technical and conforming amendments & local rule renumbering	ST meeting 1/92	4/92 — Forwarded to ST Cmte for public comment 6/93 — Approved for publication by ST Cmte 9/93 — Published for public comment 4/94 — Forwarded to ST Cmte 12/95 — Effective **COMPLETED**
[CR 57] — Uniform effective date for local rules	Stg Cmte meeting 12/97	4/98 — Considered an deferred for further study **PENDING FURTHER ACTION**
[CR 58] — Clarify whether forfeiture of collateral amounts to a conviction	Magistrate Judge David G. Lowe 1/95	4/95 — No action **COMPLETED**
[CR 58] — magistrate judge petty offenses jurisdiction	Magistrate Judge Tommy E. Miller 12/00 (00-CR-E)	12/00 — Sent to chair & reporter 4/01 — Approved & forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CR 58 (b)(2)] — Consent in magistrate judge trials	Judge Philip Pro 10/24/96 (96- CR-B)	1/97 — Reported out by CR Rules Cmte and approved by ST Cmte for transmission to Jud Conf without publication; consistent with Federal Courts Improvement Act 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED**
[CR 59] — Authorize Judicial Conference to correct technical errors with no need for Supreme Court & Congressional action	Report from ST Subcommittee on Style	4/92 — Considered and sent to ST Cmte 6/93 — Approved for publication by ST Cmte 10/93 — Published for public comment 4/94 — Approved as published and forwarded to ST Cmte 6/94 — Rejected by ST Cmte **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Megatrials] — Address issue	ABA	11/91 — Agenda 1/92 — ST Cmte, no action taken **COMPLETED**
[Rule 8. Rules Governing §2255] — Production of statements at evidentiary hearing		7/91 — Approved for publication by ST Cmte 4/92 — Considered 6/92 — Approved by ST Cmte 9/92 — Approved by Jud Conf 4/93 — Approved by Sup Ct 12/93 — Effective **COMPLETED**
[Rules Governing Habeas Corpus Proceedings]— miscellaneous changes to Rule 8 & Rule 4 for §2255 & §2254 proceedings	CV Cmte	10/97 — Subcmte appointed 4/98 — Considered; further study 10/98 — Cmte approved some proposals and deferred others for further consideration 4/00 — Considered; request to publish 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Advisory Cmte deferred further action **PENDING FURTHER ACTION**
[Hab Corp R8(c)] — Apparent mistakes in Federal Rules Governing § 2255 and § 2254	Judge Peter Dorsey 7/9/97 (97-CR-F)	8/97 — Referred to reporter 10/97 — Referred to subcmte 4/98 — Cmte considered 10/98 — Cmte considered 4/00 — Considered; request to publish 6/00 — ST Cmte approves request to publish 8/00 — Published 4/01 — Advisory Cmte deferred further action **PENDING FURTHER ACTION**
[Modify the model form for motions under 28 U.S.C. § 2255]	Robert L. Byer, Esq. & David R. Fine, Esq. 8/11/00 (00-CR-C)	8/00 — Referred to reporter & chair **PENDING FURTHER ACTION**
[U.S. Attorneys admitted to practice in Federal courts]	DOJ 11/92	4/93 — Considered **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Restyling CR Rules]		10/95 — Considered 4/96 — On hold pending consideration of restyled AP Rules published for public comment 4/98 — Advised that Style Subc intends to complete first draft by the end of the year 12/98 — Style subcmte completes its draft 4/99 — Considered Rules 1-9 6/99 — Considered Rules 1-22 4/00— Rules 32-60 approved by comte; request to publish Rules 1-60 6/00 — Stg Comte approves request to publish 8/00 — Published 4/01 — Approved with amendments and forwarded to ST Cmte 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[Restyling Hab. Corp. Rules]		10/00 — Considered 1/01 — ST Cmte authorizes restyling to proceed **PENDING FURTHER ACTION**

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

DATE: October 15, 2001

TO: Members, Criminal Rules Committee

FROM: W. Eugene Davis

SUBJECT: Meeting of Judicial Conference

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Dear Friends,

I am happy to report to you that the Judicial Conference of the United States has approved all of our proposed style and substantive rule changes. They will now be submitted to the Supreme Court.

The only rule changes that drew opposition were the proposed changes to Rules 5, 10 and 43 that permit courts to conduct initial appearances and arraignments by video conference. The conference adopted the remaining rules by consent.

As you may know, the September 11th meeting of the Judicial Conference was rudely interrupted by the terrorist activity. The Chief Justice terminated the meeting before the conference had an opportunity to discuss our proposed changes to Rules 5, 10 and 43. However, a mail ballot was circulated to the conference members the following week and they voted to approve our proposed changes to these rules.

I take this opportunity to express my sincere thanks to all of you and to our reporter, David Schlueter, for your dedication and hard work on the committee the last four years, particularly for your work on the restyling project. By copy of this memo to Peter McCabe, Joe Spaniol and Joe Kimble, I extend my thanks and appreciation for all of their invaluable help. The project could not have been completed without them.

I would like to single out John Rabiej for special thanks. John helped in so many ways. He made invaluable, substantive suggestions; he and his staff kept the revised drafts moving so we could see what we had accomplished from meeting to meeting - and he kept us organized and moving forward.

My work with you on this committee has been the most rewarding assignment anyone could have. I hope to work with you again on some future assignment.

Sincerely yours,

W. Eugene Davis

WED:drm

cc: John K. Rabiej
David A. Schlueter
Peter G. McCabe
Joseph F. Spaniol, Jr., Esq.
Prof. R. Joseph Kimble

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

November 19, 2001

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed amendments to Rules 1 through 60 of the Federal Rules of Criminal Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

Two sections of the recently enacted USA PATRIOT Act (Pub. L. No. 107-56) add new provisions to Criminal Rules 6 and 41. The statutory amendments were made after the Judicial Conference had approved the attached comprehensive revision of the Criminal Rules. The advisory rules committee is now preparing conforming amendments to Rules 6 and 41 to avoid confusion and possible supersession problems. It expects to submit proposed conforming amendments to Rules 6 and 41 to the Judicial Conference in March 2002, with a recommendation that they be transmitted for approval to the Court as an addendum to the attached package of rule amendments.

For your assistance in considering these proposed amendments, I am transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Criminal Procedure.

Leonidas Ralph Mecham
Secretary

Attachments

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

CHAIRS OF ADVISORY COMMITTEES

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

November 13, 2001

To: The Chief Justice of the United States
Associate Justices of the United States

From: Judge Anthony J. Scirica

Re: Summary of the Proposed Amendments to the Federal Rules

The amendments to the Federal Rules of Practice and Procedure being transmitted from the Judicial Conference are intended to have the consequences summarized below.

CRIMINAL RULES

Criminal Rules 1-60 have been comprehensively revised using uniform drafting guidelines. In addition, substantive amendments to several rules are proposed that had been under consideration outside the "style" project.

Comprehensive "Style" Revisions

The restyling of the criminal rules is the second in a series of comprehensive revisions to simplify, clarify, and make more uniform certain federal procedural rules. (The restyling of the Rules of Appellate Procedure took effect December 1998.) In its style revision, the advisory committee focused on three elements. First, it attempted to eliminate confusion regarding key terms and phrases by simplifying and standardizing them. Second, the committee deleted provisions that are no longer applicable or necessary. Finally, the committee reorganized several inconsistent, convoluted rules to make them easier to apply.

The proposed changes are intended to be primarily stylistic only. But the advisory committee's extensive style review revealed ambiguities and inconsistencies in the rules that required correction. The committee identified any revision that may cause a change in practice and explained them in the Committee Notes.

Rule 4 is amended to conform to recent legislation that authorizes arrest warrants to be executed outside the United States on military personnel and Department of Defense civilian personnel.

Many of the removal provisions presently contained in Rule 40 dealing with initial appearance procedures are transferred to amended Rule 5.

Rule 5.1 substitutes the term "preliminary hearing" for "preliminary examination," which predominates present usage and more accurately describes the proceeding.

The proposed amendment to Rule 6 may require disclosure of a grand-jury matter if it may reveal a violation of military-criminal law.

Rule 7 would be amended to exempt a criminal contempt charge from the general requirement that prosecutions must be initiated by indictment.

Rule 9 would give a court the discretion not to issue an arrest warrant if a defendant fails to respond to a summons.

The proposed amendments to Rule 12 vest the authority in the judge to set deadlines for filing pretrial motions.

Rule 16 would be amended to require a defendant to disclose reports of examinations and tests that the defendant intends to "use" instead of intends "to introduce" at trial.

The amendments to Rule 17 conform with recent legislation affecting the contempt authority of a magistrate judge.

Rule 24 clarifies an ambiguity by explicitly authorizing a defendant to conduct voir dire only if the defendant is acting pro se.

Rule 26 would be amended to permit the taking of non-oral testimony, e.g., a witness needing a sign-language interpreter.

Rule 31 would authorize a jury to return partial verdicts, either as to multiple defendants or multiple counts, or both.

The proposed amendments to Rule 32 require notice be given to parties of possible departure from sentencing guidelines on a ground not identified in the presentence report.

Rule 32.1 would require the defendant be afforded an initial appearance in a probation or supervised release revocation or modification proceeding.

Much of present Rule 40 would be transferred to Rules 5, 5.1, and 32.1.

Rule 42 would be amended to provide explicit procedures for appointment of counsel to prosecute a contempt.

Rule 46 would delete an existing government reporting requirement as unnecessary in light of the Speedy Trial Act.

Rule 49 would be amended to permit a court to issue a notice of an order on any post-arraignment motion by electronic means.

Rule 52 would be clarified by deleting the words "or defect" in the phrase "plain error or defect," which was found misleading.

Rule 54 would be transferred to Rule 1.

Rule 59 dealing with the effective date of the original rules would be abrogated as no longer necessary.

"Substantive" Amendments

The "substantive-rules" package includes amendments to ten rules which provide for changes in practice. These amendments were under consideration before the style project was undertaken. The "substantive-rules" package includes not only the language that would effect the changes in practice but also the restyled version of the rule. The proposed "substantive" amendments were published separately from the restyled rules to ensure that each set was separately considered.

The proposed amendments to Rules 5, 10, and 43 would give the court discretionary authority, upon the defendant's consent, to conduct initial appearance and arraignment proceedings by video teleconferencing (in lieu of the defendant's physical appearance in court).

Rule 5.1 would be amended to authorize a magistrate judge to continue a preliminary hearing over the defendant's objection. This proposed amendment, however, is inconsistent with 18 U.S.C. § 3060(c), which authorizes only a district court judge to continue the hearing if the defendant objects to a magistrate judge doing so. If the amendment is approved, we will notify the appropriate congressional offices alerting them of the inconsistency between the rule and statute so that conforming legislation can be enacted.

Rule 12.2 would be amended to clarify the procedures governing the ordering, consideration, and disclosure of expert testimony on the defendant's mental condition.

The new proposed Rule 12.4 closely tracks the party financial disclosure provisions proposed in similar amendments to the appellate and civil rules and would require a nongovernmental corporate party to disclose any parent corporation. In addition, however, the rule also would require the government to disclose, to the extent it can be obtained through due diligence, the identity of any organizational victim that could affect a judge's recusal decision if restitution is ordered.

The proposed amendment to Rule 26 authorizes a court to use contemporaneous video transmission of testimony under "exceptional circumstances" when a witness is otherwise unavailable within the meaning of Evidence Rule 804(a)(4) - (5). The amendment is substantially similar to an analogous amendment to Civil Rule 43, but is more restrictive because of Confrontation Clause considerations.

Consistent with the prevailing practice in many districts, the proposed amendment to Rule 30 allows a court to ask that a party submit its requested jury instructions before trial.

Rule 32 would require the court to notify the parties of possible departure from sentencing guidelines on a ground not identified in the presentence report.

The proposed amendment of Rule 35 clarifies circumstances when a sentence can be reduced to account for the defendant's substantial assistance in providing information helpful to the government in prosecuting another person when that information was known but not fully appreciated nor acted on within the prescribed time.

A more complete explanation and background of these proposed rules amendments are set out in the excerpts of the committee's report to the Judicial Conference, including the appendices, which contain Committee Notes to the rules. The Advisory Committee chairs and I would be pleased to answer any questions about the proposed changes.

Anthony J. Scirica
Chair, Committee on Rules of Practice
and Procedure

cc: Honorable Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules
Honorable A. Thomas Small, Chair, Advisory Committee on Bankruptcy Rules
Honorable David F. Levi, Chair, Advisory Committee on Civil Rules
Honorable Edward E. Carnes, Chair, Advisory Committee on Criminal Rules
Honorable Milton I. Shadur, Chair, Advisory Committee on Evidence Rules

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

I have the honor to transmit herewith for consideration of the Court proposed amendments to Rules 6 and 41 of the Federal Rules of Criminal Procedure. These proposed amendments add to and replace provisions in revised Rules 6 and 41 that were sent to the Court by the Conference on November 19, 2001, as part of a comprehensive revision of the rules.

The proposed amendments take into account two sections of the recently enacted USA PATRIOT Act (Pub. L. No. 107-56), which added new provisions to Criminal Rules 6 and 41. These statutory amendments were made after the Judicial Conference had approved a comprehensive revision of the Criminal Rules. To avoid confusion and supersession problems, conforming amendments to Rules 6 and 41 have been proposed, which make no substantive changes to the statutory provisions.

The Judicial Conference has placed the proposed amendments on its final consent calendar, and the Conference is expected to approve them by acclamation at its March 13, 2002, meeting. The amendments are now being transmitted to the Court to facilitate early review with a recommendation that they be integrated into the comprehensive Criminal Rules revision and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference, the Report of the Advisory Committee on Criminal Rules, and a single, comprehensive set of rules that integrates all the proposed amendments.

Leonidas Ralph Mecham
Secretary

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 6. The Grand Jury

* * * * *

(e) Recording and Disclosing the Proceedings.

* * * * *

(3) Exceptions.

* * * * *

(D) 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

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* New material is underlined; matter to be omitted is lined through. Text of rules based on amendments approved by Judicial Conference in September 2001.

receiving the information in the performance of that official's duties.

(i) Any federal official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), 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) 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.

~~(D)~~(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) preliminary to or in connection with a judicial proceeding;

* * * * *

~~(E)~~(F) A petition to disclose a grand-jury matter under Rule ~~6(e)(3)(D)(i)~~ 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte — as it may be when the government is the petitioner — the petitioner must serve the petition on, and the

court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

(iii) any other person whom the court may designate.

~~(F)~~(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons

identified in Rule ~~6(e)(3)(E)~~ 6(e)(3)(F) a reasonable opportunity to appear and be heard.

* * * * *

COMMITTEE NOTE**

Rule 6(e)(3)(D) is new and reflects changes made to Rule 6 in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001. The new provision permits an attorney for the government to disclose grand-jury matters involving foreign intelligence or counterintelligence to other Federal officials, in order to assist those officials in performing their duties. Under Rule 6(e)(3)(D)(i), the federal official receiving the information may only

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** The Committee Note explains proposed new amendments to the rule that conform to the USA PATRIOT ACT, which added provisions to Rule 6. The statutory amendment was made after the Judicial Conference had approved a comprehensive revision of the rules in October 2001. If approved by the Court, the text of the proposed conforming amendments and Committee Note will be integrated into the comprehensive revision of the rules, which was transmitted to the Court in November 2001. The conforming amendments to Rule 6 added a new subparagraph (D) to Rule 6(e)(3), which required the renumbering of later subparagraphs (D)-(F). The references to these subparagraphs in the Committee Note now before the Court have been changed consistent with the renumbered subparagraphs in the text of the rule. The amended cross-references in the Committee Note will be integrated into the comprehensive revision of the rules and include the following: Rule 6(e)(3)(D)(iii) changed to Rule 6(e)(3)(**E**)(iii); Rule 6(e)(3)(D)(iv) changed to Rule 6(e)(3)(**E**)(iv); Rule 6(e)(3)(E)(ii) changed to Rule 6(e)(3)(**F**)(ii); and Rule 6(e)(3)(D)(i) changed to Rule 6(e)(3)(**E**)(i).

use the information as necessary and may be otherwise limited in making further disclosures. Any disclosures made under this provision must be reported under seal, within a reasonable time, to the court. The term "foreign intelligence information" is defined in Rule 6(e)(3)(D)(iii).

Rule 41. Search and Seizure

* * * * *

(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; ~~and~~

(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 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.

* * * * *

COMMITTEE NOTE***

Rule 41(b)(3) is a new provision that incorporates a congressional amendment to Rule 41 as a part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001. The provision explicitly addresses the authority of a magistrate

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*** The Committee Note explains proposed new amendments to the rule that conform to the USA PATRIOT ACT, which added provisions to Rule 41. The statutory amendment was made after the Judicial Conference had approved a comprehensive revision of the rules in October 2001. If approved by the Court, the text of the proposed conforming amendment and Committee Note will be integrated into the comprehensive revision of the rules, which was transmitted to the Court in November 2001.

judge to issue a search warrant in an investigation of domestic or international terrorism. As long as the magistrate judge has authority in a district where activities related to terrorism may have occurred, the magistrate judge may issue a warrant for persons or property not only within the district, but outside the district as well.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Rule 35; Public Comments on Proposed Amendment

DATE: March 25, 2002

In June 2001, the Standing Committee approved publication of a proposed amendment to Rule 35. Although the resyled Rule 35 was in the process of being approved, the Advisory Committee believed it important to move forward with another amendment to Rule 35 that would hopefully clarify a potential ambiguity in the restyled Rule 35(a) rule concerning the starting point for the 7-day period for correcting a clear error in the sentence. Thus, proposed new Rule 35(a) includes a definition of "sentencing"--only for purposes of Rule 35. Under that rule, sentencing means "entry of the judgment." The Comment period for that proposed amendment ended on February 15th.

A copy of the proposed amendment to Rule 35 and the accompanying Committee Note are attached.

The Committee has received seven written comment. Those comments, which are attached for your convenience, are 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 oppose the amendment. On the other hand, the State Bar of California Committee on Federal Courts, the Federal Magistrate Judges Assn., and Judge David Lawson endorse the amendment.

The public comments opposing the amendment cite, inter alia, concerns about interjecting more uncertainty into the area, leaving open the possibility of the court changing the sentence, and adopting the minority, rather than majority view of the circuit courts that have addressed the issue. At least one commentator noted that the rule as proposed creates a special definition for "sentencing" that normally does not apply to other rules, such as Rule 32 itself. Those endorsing the amendment believe that it will clarify an ambiguity in the rule and make it more consistent with Appellate Rule 4.

As noted in the comments 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. *See United States v. Aguirre*, 214 F.3d 1122, 1125-26 (9th Cir. 2000) (citing cases). The Committee 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 Committee has several options at this point:

- First, approve the amendment as published and forward it to the Standing Committee for transmittal to the Judicial Conference;

- Second, defer the amendment and study the issue further; or

- Third, assuming the Committee decides to retain the "entry of judgment" as the operative triggering event, change the rule to state that clearly. For example, the proposed new subdivision (a) could be deleted and in the remainder of the rule substitute the term "entry of judgment" for "sentencing." That should accomplish the intent of the Committee without creating any conflict over the meaning of "sentencing" in the other rules.

This item is on the agenda for the April meeting.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

TO: **Hon. Anthony J. Scirica, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **W. Eugene Davis, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: **Report of the Advisory Committee on Criminal Rules**

DATE: **May 10, 2001**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on April 25-26 in Washington, D.C. and acted on the proposed restyling of the Rules of Criminal Procedure and on proposed substantive amendments to some of those rules. The Minutes of that meeting are included at Appendix E.

* * * * *

IV. ACTION ITEM—Approval and Forwarding to Judicial Conference of Amendments to Rules 5, 5.1, 10, 12.2, 12.4, 26, 30, 35, and 43 in the Substantive Package (Appendix B)

A. The Substantive Package of Amendments—An Overview

In June 2000, the Standing Committee approved publication of a separate package of amendments, known as the "substantive" package. That package originally consisted of Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43, which all provide for significant changes in practice. This version of the package includes not only the restyled version of the rule but also the language that would effect the change in practice. The Committee Notes reflect those changes and a "Reporter's Note" explained to the public that another version of each of these rules (which includes only style changes) was being published simultaneously in a separate package.

The Advisory Committee received approximately 80 written comments, and heard the testimony of five witnesses, on the proposed substantive amendments. Most of the comments focused on the proposed amendments to Rules 5, 10, and 26, which would provide for video teleconferencing of initial appearances and arraignments and for video transmission of trial testimony. Those comments and testimony are summarized by rule at Appendix C.

* * * * *

C. Rule-by-Rule Summary of Post-Publication Changes to the "Substantive" Package

* * * * *

8. Rule 35. Correcting or Reducing Sentence

Rule 35 contains several changes. First, as noted, *supra*, the published version of Rule 35 used the term "sentencing" to describe the triggering element for the two "time" requirements in the rule. While the rule was out for public comment, and at the suggestion of the Standing Committee, the Advisory Committee discussed the issue of further defining or clarifying the term "sentencing." The Committee's initial decision was to use the term "oral announcement of the sentence." That is the view of the majority of the courts that have addressed the issue. Upon further reflection, however, the Committee decided to add a new provision (now Rule 35(a)) and define sentencing as the entry of the judgment. Even though that may result in the change in practice in some circuits, it is more consistent with describing the triggering event, for example, of an approval of a sentence.*

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* At the request of the Advisory Committee on Criminal Rules, the Committee on Rules of Practice and Procedure agreed at its June 7-8, 2001, meeting to withdraw the proposal defining "sentencing" as the entry of the judgment. The Committee also agreed with the advisory committee's recommendation to publish the withdrawn proposal for public comment.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 35. Correcting or Reducing a Sentence**

(a) **Definition.** For purposes of this rule, "sentencing" means the entry of the judgment.

~~(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.**

* * * * *

(4) ***Below Statutory Minimum.*** When acting under ~~Rule 35(b)~~ Rule 35(c), the court may

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* New matter is underlined and matter to be omitted is lined through.

** The rule includes proposed amendments approved by the Judicial Conference's Committee on Rules of Practice and Procedure in June 2001 and forwarded to the Judicial Conference for its consideration. The amended rule takes effect on December 1, 2002, if approved by the Conference and Supreme Court, and Congress takes no action otherwise on it.

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 changes for public comment. After further review, the Committee determined that some attention should be given to the definition of "sentencing," the term used in the published revised rule. As a result of those discussions, the Committee has proposed that the rule be further amended to include a definition of "sentencing" in revised Rule 35(a).

In particular, the current version of Rule 35(c) permits the sentencing court to correct errors in the sentence if the correction is made within seven days of the "imposition of the sentence." Current Rule 35(b) also permits the court to reduce a sentence for the defendant's substantial assistance within one year after "the sentence is imposed." 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 after the rule was published for comment, the Committee decided that it should resolve the conflict in the circuits by

defining "sentencing" — for purposes of Rule 35 — as the point when judgment is entered. The Committee reached that decision for two reasons. First, the triggering event for appeal under Federal Rule of Appellate Procedure 4(b)(1)(A) is the entry of the judgment and a different triggering event for purposes of Rule 35 is confusing and a trap for the practitioner. Second, in many cases, more than seven days elapse after oral announcement of the sentence before the court enters the written judgment. In those cases, if the judge misspeaks or makes a technical error in announcing the sentence, no party can call the error to the attention of the judge and thus, the judge cannot correct that error because more than seven days has elapsed. This results in a significant number of appeals where conflicts exist between the oral announcement of the sentence and the sentence reflected in the written judgment but the sentencing court has no opportunity to declare which version of the sentence it intended to impose.

PUBLIC COMMENTS
ON
PROPOSED AMENDMENTS TO RULE 35

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2001 FED App. 0386P (6th Cir.)
File Name: 01a0386p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN DOE,*
Defendant-Appellant.

No. 99-6729

Appeal from the United States District Court
for the Eastern District of Tennessee at Chattanooga.
No. 96-00019—Curtis L. Collier, District Judge.

Argued: March 22, 2001,

Decided and Filed: November 1, 2001

Before: RYAN and BATCHELDER, Circuit Judges;
LAWSON, District Judge.**

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*At the district court's suggestion, in which we concur, the identities of "John Doe" and "Richard Roe" are not revealed.

**The Honorable David M. Lawson, United States District Judge for the Eastern District of Michigan, sitting by designation.

COUNSEL

ARGUED: Elizabeth H. Foss, SPEARS, MOORE, REBMAN & WILLIAMS, Chattanooga, Tennessee, for Appellant. Michael E. Winck, ASSISTANT UNITED STATES ATTORNEY, Knoxville, Tennessee, for Appellee. **ON BRIEF:** Howell G. Clements, SPEARS, MOORE, REBMAN & WILLIAMS, Chattanooga, Tennessee, for Appellant. Michael E. Winck, ASSISTANT UNITED STATES ATTORNEY, Knoxville, Tennessee, for Appellee.

RYAN, J., delivered the opinion of the court, in which BATCHELDER, J., joined. LAWSON, D. J. (pp. 5-6), delivered a separate concurring opinion.

OPINION

RYAN, Circuit Judge. The defendant, John Doe, substantially assisted the government by providing information concerning illegal drug activities, but the government delayed in filing a motion pursuant to Federal Rule of Criminal Procedure 35(b) until over two and a half years after Doe's sentencing. The district court concluded that it lacked jurisdiction to decide the government's motion because the government had failed to comply with the time limitations set forth in Rule 35(b). We will affirm.

I.

Because Doe substantially assisted the government by providing information concerning the drug activities of Richard Roe, the court departed downward from the applicable guideline range and sentenced Doe to 120 months for his conviction of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1). Doe also claims entitlement to an additional reduction pursuant to Rule

35(b); however, the government did not file a Rule 35(b) motion until June 28, 1999, over two and a half years after Doe's sentencing. The government delayed filing its motion because Roe had appealed his conviction, and had Roe been successful, the government thought it might need Doe as a witness during Roe's new trial.

Federal Rule of Criminal Procedure 35(b) states:

> **(b) Reduction of Sentence for Substantial Assistance.** *If the Government so moves within one year after the sentence is imposed,* the *court may reduce a sentence to reflect a defendant's subsequent substantial assistance* in investigating or prosecuting another person, in accordance with the guidelines and policy statements issued by the Sentencing Commission under 28 U.S.C. § 994. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum sentence.

Fed. R. Crim. P. 35(b) (emphasis added).

The district court held a hearing on the government's Rule 35(b) motion on September 24, 1999. In its opinion, the district court concluded that it lacked jurisdiction to decide the motion because the government had not complied with Rule 35(b)'s statute of limitation requiring that the government file the motion within one year after the sentence is imposed, when the information is known to the defendant during that time. Doe then timely filed an appeal.

II.

The Honorable Curtis L. Collier, United States District Judge, prepared a well-reasoned opinion that thoroughly discussed and analyzed the Rule 35(b) issue presented in this case. Because we agree with Judge Collier's reasoning and conclusion, and because we cannot improve upon his excellent opinion, we adopt Judge Collier's opinion as our own.

Accordingly, we **AFFIRM** the judgment of the district court.

CONCURRENCE

LAWSON, District Judge (concurring). I concur in the judgment of the Court and I join in the majority's adoption of Judge Collier's well-reasoned opinion. The plain language of Rule 35 precludes district courts from considering motions to reduce sentences which are not filed "within one year after the sentence is imposed," unless the exception stated in the Rule applies. Since only the government may file such a motion under Rule 35 after the 1987 amendments took effect, allowing the government to "waive" the time limit would improperly cede to it the authority to determine when court-rule-imposed deadlines would be enforced. *See United States v. McDowell,* 117 F.3d 974, 979-80 (7th Cir. 1997).

I write separately, however, to emphasize that a rule such as this which does not contain a "safety valve" that allows trial judges the measured flexibility to deal with circumstances unforeseen by the drafters will yield unjust results which can undermine the policies the rule is intended to promote. Among Rule 35's policy goals identified by the Fourth Circuit, for example, are finality in sentencing by discouraging manipulation of the process, and motivating criminal defendants to be prompt and complete in their cooperation. *United States v. Carey,* 120 F.3d 509, 511-12 (4th Cir. 1997), *cert. denied*, 522 U.S. 1120 (1998). Both of those goals were fulfilled in this case, yet the defendant did not receive the benefit of his efforts because of the government's failure to promptly perform. Allowing that default to remain uncured will undermine confidence in the government and possibly jeopardize future cooperation when the result of this case filters back to those from whom cooperation is sought.

The one exception presently included in Rule 35 – that of permitting adjudication of a motion to reduce sentence when the cooperating defendant does not learn of the helpful information until after the one-year deadline has expired –

does not address all of the exigencies that can arise. It likewise does not allow courts to address the manifest unfairness that was caused by the government's failure to abide by Rule 35's filing requirements for reasons solely within the control of the government, as occurred here. Nor does the Rule provide a mechanism for dealing with defendants who cooperate more than one year after sentencing when the information is known to them beforehand, *see United States v. Carey, supra,* or when the government belatedly realizes the usefulness of timely-disgorged information. *See United States v. Orozco,* 160 F.3d 1309 (11th Cir. 1998).

In my view, this Court should join with other courts in urging an amendment to Rule 35(b) which will permit district courts to administer substantial justice. *See, e.g., Orozco,* 160 F.3d at 1316 n.13, in which the Court noted: "[W]e agree with the district judge that this case demonstrates a factual situation that Congress should consider when it next contemplates revision of this rule. That is, we hope that Congress will address the apparent unforeseen situation presented in this case . . . ." *See also id.* at 1317 (Hill, J., concurring) ("The facts of this case illustrate the near impossibility of codifying that which ought to be left to judicial discretion. . . . [A]ll that we can do is suggest that Congress, in its own good time, attempt by further codification to see that it does not happen to someone else. We ought to do better than this.") and *Id.* at 1317-18 (Kravitch, J., concurring)("That the language of the rule itself fails to carry out . . . obvious and important polic[ies] manifests an urgent need for Congress to reconsider Rule 35.").

When the government makes a promise, it ought to keep it. The rules of criminal procedure should facilitate, not inhibit, good faith and fair dealing within the federal criminal justice system.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
1000 WASHINGTON AVENUE – ROOM 214
BAY CITY, MICHIGAN 48708

(989) 894-8810
Fax (989) 894-8814

CHAMBERS OF
DAVID M. LAWSON
UNITED STATES DISTRICT JUDGE

November 8, 2001

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Comments to Amendment on Fed. R. Crim. P. 35

Dear Mr. McCabe:

I have reviewed the proposed amendment to Fed. R. Crim. P. 35 and I believe that the amendment provides needed clarification. However, since the Committee and Congress may be considering an amendment to this rule, additional amendments which address anomalies and application problems identified in the appellate decisions ought to be addressed as well.

Rather than setting forth those problems in the text of this letter, I have enclosed a copy of a recent decision by the United States Court of Appeals for the Sixth Circuit which, I believe, describes a problem with the rule in detail and provides references. Please submit this comment to the Committee together with my request that it consider an amendment which will provide a remedy to the identified problems.

Thank you for your consideration.

Sincerely,

David M. Lawson

DML/jrs
Enclosure

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

January 16, 2002

Honorable David M. Lawson
United States District Court
for the Eastern District of Michigan
1000 Washington Avenue, Room 214
Bay City, Michigan 48708

Re: *Proposed Amendments to Rule 35 of the Federal Rules of Criminal Procedure*

Dear Judge Lawson:

Thank you for letter of November 8, 2001, commenting on the proposed amendments to Criminal Rule 35. Your letter arrived in my office in January 2002, and I apologize for the late response. A copy of your letter has been sent to the members of the Advisory Committee on Criminal Rules for their consideration. The committee will consider all comments on the proposed amendments at its spring 2002 meeting. The committee's actions on the proposed amendments will be posted on the Administrative Office's web site <www.uscourts.gov/rules>.

We very much welcome your comments and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe

cc: Honorable Anthony J. Scirica
Advisory Committee on Criminal Rules
Professor Daniel R. Coquillette

FEDERAL MAGISTRATE JUDGES ASSOCIATION

40th Annual Convention - Minneapolis, Minnesota
June 12-June 14, 2002

January 28, 2002

Mr. Peter McCabe, Secretary
Committee on Rules of Practice & Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

RE: Comments on Proposed Amendments to the Federal Rules of Civil and Criminal Procedure

Dear Mr. McCabe:

The Federal Magistrate Judges Association (FMJA) submits the following comments to the Rules Advisory Committee. The comments were first considered by the Standing Rules Committee of the FMJA chaired by the Honorable Anthony Battaglia. The committee members are:

Honorables S. Allan Alexander, Northern District of Mississippi
Honorable Anthony Battaglia, Southern District of California
Honorable J Daniel Breen, Western District of Tennessee
Honorable Hugh W. Brenneman, Jr., Western District of Michigan
Honorable Joe B. Brown, Middle District of Tennessee
Honorable B. Waugh Crigler, Western District of Virginia
Honorable Morton Denlow, Northern District of Illinois
Honorable Patricia Hemann, Northern District of Ohio
Honorable Paul Komives, Eastern District of Michigan
Honorable Michael R. Merz, Southern District of Ohio
Honorable Thomas W. Phillips, Eastern District of Tennessee; and
Honorable Mary Pat Thynge, District of Delaware
Honorable Andrew Wistrich, Central District of California

The committee members come from several kinds of districts and have varying types of duties.. Many of them consulted with their colleagues in the course of preparing these comments. The comments were then reviewed and approved by the Officers and Directors of the FMJA.

The comments reflect the considered position of magistrate judges as a whole. The FMJA has also encouraged individual magistrate judges to forward individual comments to you.

We are pleased to have this opportunity to present written comments representing the view of the FMJA, and we welcome the opportunity to testify.

Sincerely,

Elizabeth A. Jenkins
United States Magistrate Judge
President, Federal Magistrate Judges Association

cc: Hon. Anthony Battaglia

COMMENTS OF FEDERAL MAGISTRATE JUDGES ASSOCIATION RULES COMMITTEE ON PROPOSED CHANGES TO THE FEDERAL RULES OF CIVIL PROCEDURE, CRIMINAL PROCEDURE AND EVIDENCE

I. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE.

(A) PROPOSED AMENDMENT TO FEDERAL RULE 23 - CLASS ACTIONS.

COMMENT: The FMJA Rules Committee supports the proposed amendments to Rule 23. The proposed amendments have a stated goal of revising the current rule to protect against improvident certifications in class action cases on the one hand, and to protect the interest of the class members once a class action is filed on the other. These goals are adequately addressed by the proposed amendments.

With regard to the alternatives proposed for Rule 23(e)(3) concerning exclusion after notice of the proposed settlement for Rule 23(b)(3) class actions, the Committee supports the adoption of Alternative 1. Alternative 1 mandates that the notice concerning settlement "must" state the terms under which a member may elect the exclusion and provides that the court may "for good cause" refuse to allow an opportunity to elect exclusion if class members had an earlier opportunity to elect exclusion. This is preferable to Alternative 2 which is more permissive by its terms and fails to provide the court with the discrete guidelines furnished by Alternative 1.

DISCUSSION: The proposed amendments focus on four areas in all, including the timing of the certification decision and notice (Rule 23c), judicial oversight of settlements (Rule 23e), appointment of attorneys as class counsel (Rule 23g), and attorney compensation (Rule 23h). Principally, the amendments by subparagraph are as follows:

9. Rule 53(i). Appointment of Magistrate Judge.

A magistrate judge is subject to the special master rule only when it is expressly stated in the Order of Reference. Unless authorized by 28 U.S.C. § 636(b)(2) or some other statute, a magistrate judge may be appointed only:

a. for duties that cannot be performed as a magistrate judge; and,

b. only in exceptional circumstances.

The Advisory Committee expresses concern about the "sensitivity" of this provision including magistrate judges and poses three options concerning this amendment:

a. delete the sentence of the rule that relates to the inclusion of magistrate judges as special masters;

b. leave the current rule as it now exists; or,

c. revise the second sentence to provide that the magistrate judge may be appointed as a special master only when specifically authorized by a statute other than 636(b)(2). An example in this regard is 42 U.S.C. § 2000(e-5)(f)(5).

As stated previously, the FMJA Rules Committee supports the complete deletion of magistrate judges from the Special Master Rule as currently proposed.

II. PROPOSED AMENDMENT TO FEDERAL RULES OF CRIMINAL PROCEDURE.

(A) PROPOSED AMENDMENTS TO FEDERAL RULE 35 - CORRECTING OR REDUCING A SENTENCE.

COMMENT: The Committee supports the proposed amendment to Rule 35.

DISCUSSION: The amendment to Rule 35 would add as a new subparagraph (a) a definition for "sentencing." Specifically, sentencing is defined as the "entry of the judgment." This amendment is designed to add specific meaning to the event which triggers timing requirements found in the rule. This amendment is actually an amendment to the current substantive change recommended by the Advisory Committee as part of the year 2000 changes. This clarification will address a split of the courts that view the term "sentencing" to mean either the "oral pronouncement of the sentence" or the "entry of the judgment." Resolution of the issue in favor of the "entry of the judgment" is consistent with Federal Rule of Appellate Procedure 4(b)(1)(A). The new amendment would eliminate confusion between the provisions of the appellate rule and Rule 35 and is in the best interest of all concerned.

III. PROPOSED AMENDMENT TO FEDERAL RULES OF EVIDENCE.

(A) PROPOSED AMENDMENT TO FEDERAL RULE 608(b) - EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS.

COMMENT: The Committee supports the proposed amendment to Rule 608(b) which would narrow the limitation on admitting extrinsic evidence to cases in which the proponent's sole purpose is to impeach the witness's character with regard to "veracity."

DISCUSSION: The existing rule prohibits extrinsic evidence to impeach a witness's credibility. The amendment would prohibit extrinsic evidence only when the sole reason for proffering the evidence is to attack or support the witness's character with regard to truthfulness. This was the original intent of the drafters of this rule. The existing rule, however, is phrased and refers to credibility. This can be read to prohibit extrinsic evidence when offered for non-character forms of impeachment, such as to prove bias, contradiction or prior inconsistent statements. The Supreme Court has ruled that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering the evidence is to attack or support the witnesses character for truthfulness. See United States v. Abel, 469 U.S. 45 (1984). As such, this rule change is consistent with the drafter's

Office of the Deputy Attorney General
Washington, D.C. 20530

2/15/02

01-CR- 003

February 14, 2002

Honorable Edward E. Carnes
Chairman, Advisory Committee
On Criminal Rules
U.S. Court of Appeals for the
Eleventh Circuit
Frank M. Johnson, Jr. Federal Building
and U.S. Courthouse
15 Lee Street
Montgomery, Alabama 36104

Dear Judge Carnes:

On behalf of the Department of Justice, we submit the following comments regarding the proposed amendment to Rule 35 of the Federal Rules of Criminal Procedure published for comment in August 2001. We very much appreciate the Advisory Committee's consideration of our views, and we look forward to working with the members of the Committee on this and other important matters.

The Department of Justice Strongly Opposes The Proposed Amendment To Rule 35 Of The Federal Rules Of Criminal Procedure

By a narrow margin, the Advisory Committee voted to recommend publication of a proposed amendment to Rule 35 of the Federal Rules of Criminal Procedure that would define "sentencing" as the entry of judgment rather than the oral pronouncement of sentence. The Department continues to oppose this proposed amendment.

We object to this amendment primarily because it would undermine the goal of finality in sentencing. It would allow a trial judge to delay the entry of judgment long after the oral pronouncement of sentencing and thus delay the point beyond which the sentence would become final. Currently, the courts of appeals are divided 6-1 on this issue, with the majority favoring the "oral pronouncement" interpretation of the rule. See, e.g., United States v. Aguirre, 214 F.3d 1122, 1125-26 (9th Cir. 2000) (collecting cases). As the Aguirre opinion observes, interpreting the rule so that the limitations period runs from the entry of judgment is in tension with the goal of bringing finality to criminal proceedings – a goal that underlies the Sentencing Reform Act of 1984 and other acts of Congress. A judge, under the definition of "sentencing" contained in the amendment, would be permitted to revisit indefinitely an orally imposed sentence without triggering the time limits of Rule 35. Aguirre itself serves to illustrate how this rule could undermine societal interests in finality: There, over a year elapsed between the oral pronouncement of sentence and the final entry of judgment. Such

uncertainty is contrary to the system envisioned by the Act and is not, we believe, good public policy. We believe that all those involved in the criminal justice system – victims, law enforcement officials, witnesses, and defendants themselves – benefit from finality, which begins the necessary process of punishment and rehabilitation.

We also believe the proposed definition of "sentencing" is inconsistent with the use of that term in other parts of the restyled Criminal Rules. Both restyled Rules 32 and 43 use the term "sentencing" to mean the oral pronouncement of sentencing. For example, restyled Rule 43 reads:

> (a) When Required. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:
>
> (1) the initial appearance, the initial arraignment, and the plea;
>
> (2) every trial stage, including jury impanelment and the return of the verdict; and
> (3) sentencing.

Clearly, this rule does not anticipate that the defendant must be present during the administrative act of entering judgment. Similarly, Rule 32's timetable for the disclosure of presentence reports (Rule 35(c)(3), (g)), its requirement that the defendant has read and discussed the PSR (Rule 35(i)), and its provision allowing the receipt of evidence (Rule 35(i)(2)) all clearly contemplate the oral pronouncement of sentence rather than the formal entry of the judgment.

Conclusion

We appreciate the opportunity to provide our views, comments, and suggestions and look forward to working further with the other members of the Advisory Committee.

Sincerely,

Larry D. Thompson
Deputy Attorney General

cc: Honorable Anthony J. Scirica
Mr. Peter G. McCabe

Federal Bar Association
Western Michigan Chapter

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161 Monroe Avenue NW, Suite 203-B, Grand Rapids, MI 49503

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedures - Comments Due February 15, 2002

Dear Mr. McCabe:

On behalf of the Standing Committee on Rules of Practice for the United States District Court for the Western District of Michigan, we submit the following comments on proposed amendments to the Federal Rules of Bankruptcy Procedure (Rule 107, 1007, 2003, 2016, 7007.1 et al), the Federal Rules of Civil Procedure (Rule 23, 51, 53 and 54), the Federal Rules of Criminal Procedure (Rule 35(c)) and the Federal Rules of Evidence (Rule 608(b) and 804(b)(3). We treat each of the series of proposed amendments *seriatim*.

PROPOSED AMENDMENTS TO THE BANKRUPTCY RULES

The Committee supports the proposed amendments.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

RULE 23. Our Committee views the proposed changes to Rule 23 as both extensive, and in large part, controversial. While the objectives identified by the Committee as underpinning the proposed amendments were to "protect against improvident certification" and to "protect the interests of class members once class action is filed" some of the proposed amendments may, in fact, undermine these objectives and otherwise further exacerbate the concerns held about the class action mechanism generally. Indeed, we see the philosophy that emerges from the proposed amendments as protracting class action litigation by providing additional opportunities for defendants to challenge the status of the case as a class action, including new opportunities to challenge the class definition, selection of counsel and the propriety of

In addition to the above, the formulation of this new rule concerning appointment of counsel will require the development of an entirely new body of case law that will need to address such questions as:

1. What is the appropriate bounds of the judge's exercise of discretion in choosing counsel?

2. What weight should be given to the various criteria that the judge is to focus on, and specifically how much weight is to be given to the economic proposal versus the experience of the petitioning class counsel?

3. What if any deference is to be given to the preference of the class representative who initiated the action and chose counsel?

4. In this market based approach, what weight should be given to objections of defense counsel based on the economics of class counsel's proposal?

This list is just a start. Indeed, the list of issues that will have to be litigated under the proposed amendment will be as long as the litigator's imagination is boundless.

In short, the amendments in this area do not advance the interests of the class members, the practicing bar, or the efficient administration of justice.

Rule FRCP 23(h). The amendments in this area are simply unnecessary. Details about the nature of the attorney fees being sought can be incorporated in the notices sent to class members under the other provisions of Rule 23. Introducing an entirely separate procedure for approving attorneys' fees creates delay and redundancy that is both expensive and inefficient.

RULE 35. Our Committee adopts the position of the State Bar of Michigan's Committee on U.S. Courts. In short, we consider the proposed amendments unnecessary and ill advised.

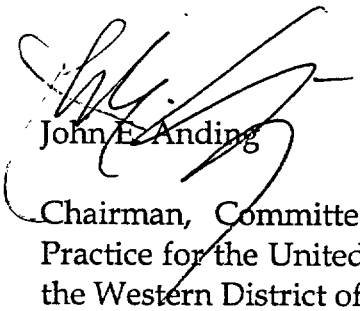
The balance of the proposed changes to both the Federal Rules of Civil Procedure and Federal Rules of Evidence are, in the view of our Committee, uncontroversial and we therefore offer our support.

In closing, a few words are appropriate as a follow-up to our observations concerning the proposed amendments to Rule 23. We view the objectives behind the amendment, as articulated by your Committee, as worthy goals and objectives. There is little question that the amendments are proposed in response to the hue and cry heard from individuals both within and outside of our profession about abuses that exist in

class action litigation. However, we see the proposed amendments as "eliminating the pesky mosquito with a sledge hammer." Such an approach not only eliminates sound elements of the existing Rule 23, but in the process creates collateral damage that practitioners and the bench may spend years recovering from as a body of case law is developed to sort out the new, and in our view, more pernicious problems created by the proposed amendments.

We encourage the committee to exercise restraint and withhold from its submission the more problematic amendments we have identified above.

Very truly yours,



John E. Anding

Chairman, Committee on Rules of Federal Practice for the United States District Court for the Western District of Michigan.

cc: Member Hon. Joseph G. Scoville
Member Stephen C. Bransdorfer
Member Michael Cavanaugh
Member Donald A. Davis
Member David J. Gass
Member Bradley K. Glazier
Member Christopher G. Hastings
Member Paul L. Mitchell
Member Harold E. Nelson
Member John D. Pirich
The Honorable Robert Holmes Bell, Chief Judge

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MEMORANDUM

TO: Committee on Rules of Practice and Procedure of the Judicial Conference of the United States

FROM: State Bar of California's Committee on Federal Courts

DATE: February 15, 2002

SUBJECT: Proposed Amendments to the Federal Rules of Bankruptcy Procedure, Civil Procedure, Criminal Procedure, and Evidence

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The State Bar of California's Committee on Federal Courts ("Committee") has reviewed and analyzed the proposed amendments to the Federal Rules of Bankruptcy Procedure, Civil Procedure, Criminal Procedure, and Evidence, and appreciates the opportunity to submit its comments. By way of background, the Committee is comprised of attorneys throughout the State of California who specialize in federal court practice and volunteer their time and expertise to analyze and comment upon matters that have an impact on federal court practice in California. The Committee consists of a broad range of federal practitioners, including members with civil, criminal, bankruptcy, and appellate experience. The Committee has reviewed and analyzed all the proposed amendments, but has limited its comments to those proposed amendments discussed below. As to the other proposed amendments, the Committee offers no position.

I. PROPOSED AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

A. Rule 23

The Committee supports the proposed amendment to Rule 23(c)(1)(A), which addresses the timing of class certification. The proposed amendment would change language requiring the court to make the class certification decision "as soon as practicable" to language requiring that decision to be made "at an early practicable time." This change represents an attempt to give courts greater flexibility in deciding when the decision on certification is ripe. The current language of "as soon as practicable" led some courts to believe that they were overly constrained in the period before certification. In contrast, the proposed amendment gives courts some flexibility in allowing discovery on issues that may further illuminate issues bearing on certification, e.g., commonality of evidence as to the members of the proposed class and whether there are conflicts problems within classes, before the certification decision.

Notably, the draft Committee Note relating to amended Rule 23(c)(1)(A) states that the proposed amendment is not intended to encourage undue delay or to permit extensive discovery unrelated to certification. We believe the proposed amendment will allow courts to decide certification promptly, but after obtaining the information necessary to make the important certification decision on an informed basis.

II. PROPOSED AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The Committee supports the proposed amendment to Rule 35, defining sentencing as the "entry of judgment." Typically, oral pronouncement of the sentence and entry of judgment do not occur on the same day, so this clarification will help avoid any confusion as to the date from which the seven-day term for correcting a technical sentencing error, or the one year-term for filing a motion for substantial assistance, begin to run. The proposed amendment will provide clear notice to both defendants and prosecution as to when they must make their motions following sentencing.

III. PROPOSED AMENDMENTS TO FEDERAL RULES OF EVIDENCE

A. Rule 608(b)

The Committee supports the proposed modification to Rule 608(b), which substitutes the term "character for truthfulness" for the overly broad term "credibility."

B. Rule 804(b)(3)

The Committee supports the proposed changes to Rule 804(b)(3). Rule 804(b)(3) as presently constituted lacks an equally balanced corroborating circumstance requirement element of proof. The proposed change provides for the balance that is currently lacking, and simply equals the requirements for admitting a statement against penal interest.

The following responses are submitted to the Advisory Committee's specific inquiries:

1. In terms of trustworthiness, there is *not* a difference between statements against penal interest when offered to exculpate an accused and such statements when offered to inculpate an accused. The circumstances under which exculpatory statements are made are not, as a bright line rule, different from those surrounding the making of inculpatory statements. In fact, as a result of the government's use of "snitches" or "informants", an inculpatory statement made by a certain government witnesses ("snitches" or "informants") may have a greater degree of trustworthiness when required to have corroboration.

2. The Committee was unable at this time to find other examples of evidentiary rules that were asymmetrical in the government's favor, and believe this highlights the need for the proposed reform, which would create symmetry in the evidentiary rules.

3. The Committee was unable to conceive of examples in which trustworthy government-proffered statements that have satisfied or would satisfy the against-penal-interest requirement of Rule 804(b)(3) would not satisfy a corroborating circumstances requirement.

2/15/02

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01-CR-006
01-EV-016

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February 15, 2002

Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

FAX TRANSMISSION
(202) 502-1755

Re: Proposed Amendments for Rule 35 of the Federal Rules of Criminal Procedure

Dear Secretary:

I submit these comments to certain of the substantive amendments proposed to the Federal Rules of Criminal Procedure on behalf of the Committee on the United States Courts of the State Bar of Michigan. The committee is composed of judges and practitioners from both the Eastern and Western Districts of Michigan. Under the bylaws of the State Bar of Michigan, this standing committee concerns itself "with the administration, organization and operation of the United States courts for the purpose of securing the effective administration of justice." The committee adopted the comments at a meeting on December 11, 2001 by majority votes after written notice to the committee. The comments are the opinions of the committee and do not necessarily represent the policy of the State Bar of Michigan.

Our subcommittee reviewed the proposed changes to Federal Rules of Criminal Procedure and the Evidence Rules, published by the Committee on Rules of Practice and Procedure in August of 2001. We have concluded that the amendments to Evidence Rules 608 and 804 are not controversial and do not require comment. We do suggest that the Committee oppose the suggested change to Rule 35.[1]

Rule 35 addresses three distinct matters. Subsection (a) governs correction of a sentence imposed in violation of law. Subsection (b) allows the court to reduce a sentence for substantial assistance on motion of the government. Subsection (c), adopted in 1991, now provides as follows:

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[1] The numbering of the proposed rule can be confusing, because the proposed rule is offered as an amendment not to the present Criminal Rules, but to the reorganized Criminal Rules published in September of 2000 and slated for adoption in December of 2002. To prevent confusion, this memo uses the numbering of the current rules and not the reorganized rules.

> The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.

The Advisory Committee Note published in 1991 says that the authority to correct a sentence under this subdivision "is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a)." The courts have held that the seven-day period under Rule 35(c) is jurisdictional. *See United States v. Austin*, 217 F.3d 595, 597 (8th Cir. 2000); *United States v. Lopez*, 26 F.3d 512, 518-19 (5th Cir. 1994). There is a split among circuit courts "over the timing of the 'imposition' of the judgment and sentence under Fed. R. Crim. P. 35(c)." *United States v. McGahee*, 257 F.3d 520, 533 (6th Cir. 2001) (noting the split, but finding it unnecessary to resolve the issue in deciding the case before the court). The majority of courts holds that the seven-day period begins to run on the date of the oral pronouncement of the sentence. *See, e.g., United States v. Aguirre*, 214 F.3d 1122, 1124 (9th Cir.), *cert. denied*, 531 U.S 970 (2000); *United States v. Morrison*, 204 F.3d 1091, 1093-94 (11th Cir. 2000) (collecting cases). A minority holds that the seven days begins upon the entry of judgment. *See, e.g., United States v. Clay*, 37 F.3d 338, 340 (7th Cir. 1994). The proposed amendment would add a new subsection defining "sentencing" as the entry of judgment. The Committee thus proposes to codify the minority rule.

The subcommittee believes that the proposal would introduce confusion and ambiguity into a situation that is presently clear and well-defined. It is the oral sentence that controls. *United States v. Werber*, 51 F.3d 342, 347 (2d Cir. 1995). As interpreted by the majority of courts, Rule 35(c) grants the sentencing court seven days to correct technical errors in the oral sentence. There is no need to wait for the entry of judgment. The oral pronouncement of sentence is a discrete act of which everyone, including the criminal defendant, is immediately aware. There can be no dispute concerning the triggering of the seven-day period for correcting clerical errors. The proposal would eliminate this clarity by having the seven-day period begin upon the entry of judgment, an act done in the Clerk's Office and only later communicated to the parties. By the time the parties receive notice of the entry of judgment, the seven-day period may be partially or completely expired. Furthermore, measuring the seven-day period from the entry of judgment will create the same problems as the appellate courts have experienced when a party fails to receive notice of the entry of judgment. The rule makers have been required to establish an elaborate procedure in Fed. R. App. P. 4(a)(6) governing motions to reopen the time to file an appeal when the moving party fails to receive notice of the entry of judgment. The proposed amendment to Rule 35 does not contain any such mechanism. The inevitable result will be further litigation and disagreement by the courts concerning their power to grant relief to a party who has not received notice of the judgment and, inevitably, further rule amendments to create a mechanism to grant such relief in appropriate cases. Finally, the amendment is unnecessary. As the Second Circuit has pointed out, clerical errors in the written judgment can already be amended by virtue of Rule 36, at any time. *United States v. Abreu-Cabrera*,

64 F.3d 67, 73 (2d Cir. 1995).

We do not believe that the proposal is an improvement over the majority rule. Rule 35, as interpreted by a majority of the courts of appeals, is clear and workable and should not be amended.

Very truly yours,

Charles E. Chamberlain, Jr.

CEC.tle

cc: Mr. Bruce W. Neckers
Mr. John T. Berry

February 28, 2002
VIA FedEx Overnight

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Bldg.
One Columbus Circle, N.E., suite 4-170
Washington, DC 20002

Re: Proposed Changes in Federal Rules of Criminal Procedure and of Evidence: Request for Comments Issued August 2001

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit the following comments with respect to the proposed changes in the Federal Rules of Criminal Procedure and Federal Rules of Evidence, on behalf of the over 10,000 members of our association, and its 80 affiliates in all 50 states, with an additional membership of some 28,000.

COMMENTS ON FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 35. Correcting or Reducing Sentence.

Summary of Comment

The National Association of Criminal Defense Lawyers agrees that Rule 35 should be amended to render unnecessary "the significant number of appeals" that could be avoided if the time for correcting an error in the sentence continued until the time for taking an appeal, rather than ending seven days after the oral announcement of the sentence. This objective can be best achieved, we believe, in a different manner from that proposed for comment; that is, by amending the Rule instead to provide that an error in the sentence may be corrected any time prior to expiration of the time for taking an appeal, together with a corresponding amendment of Fed.R.App.P. 4(b)(3)(A) designating a motion to correct an error in the sentence under Rule 35 as a motion which extends the time for filing a

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notice of appeal until ten days after the entry of the order disposing of the motion.

We do not believe there is a need or reason to amend the provisions of present Rule 35(b) (to be recodified as Rule 35(c)) governing calculation of the time periods applicable to substantial assistance sentence reduction motions, as would result from the Advisory Committee's proposal.

Discussion

The Committee has published for comment an amendment to the restyled and amended version of Rule 35, scheduled to become effective December 1, 2002 (absent contrary action by the Supreme Court). The amendment would add a new subparagraph (a), which would define "sentencing" to mean "entry of judgment," for purposes of Rule 35. The problem the Committee would address by this proposal is real, but there is a better solution.

Establishing a unique definition of the term "sentencing" in Rule 35, applicable only to that rule, would not only be confusing to courts and practitioners, but it would also affect other date calculations not intended to be addressed by the Committee. The event of "sentencing" is used in the restyled and amended version of Rule 35 to demarcate three time periods, all of which would be changed by the proposed amendment. The term "sentencing" is used in Rule 35 as the date:

- after which the district court has seven days to correct an error in the sentence, present Rule 35(c)/new 35(b);
- after which the government has one year to file a motion for reduction of the defendant's sentence for substantial assistance, present Rule 35(b)/new 35(c); and
- to be used in determining whether the conditions required for a court to grant a substantial assistance sentence reduction motion filed more than one year after the sentencing are satisfied, present Rule 35(b)/new 35(c).

The effect of the amendment would be that the date to be used for all of the above purposes would be the date of the entry of judgment, rather than the date of the oral announcement of the sentence. The proposed amendment would not only introduce a new confusion into the vocabulary of federal criminal procedure, but would also have unjustified and perhaps unintended consequences in relation to a different subsection of the Rule.

The Committee Note accompanying the amendment explains that the justification for choosing the "entry of judgment" date over the date of the "oral announcement of the sentence" is that it is the later of the two dates, and for that reason it will help prevent the "significant number of appeals" that are now made necessary because the seven-day period within which a district court may correct an error in the sentence has expired before

the error can be corrected, even though time remains to correct the error before an appeal must be taken. We agree that Rule 35 should be amended in a manner that achieves this objective of preventing as many such unnecessary appeals as possible.

Amending the Rule to provide that the seven-day period does not begin to run until the entry of judgment, however, will not fully achieve that objective. (In this regard, it should be noted that the "seven days" under present Rule 35(c), being fewer than eleven, are seven working days, by virtue of Rule 45(a). The time allowed for the court to act is actually nine calendar days in most cases.) Where a court is not able to rule on a motion to correct an error in the sentence within seven days of the entry of judgment, an appeal will still be made necessary that might have been avoided if the court had time to rule on the motion, even though the Appellate Rules, as expected to be amended effective December 2001 will allow ten working days from entry of judgment to file the notice of appeal, a change from the present ten calendar days.

We believe the intended objective can be best achieved by amending the Rule to provide that an error in the sentence may be corrected at any time prior to expiration of the time for taking an appeal, together with a corresponding amendment of Fed.R.App.P. 4(b)(3)(A) designating a motion to correct an error in the sentence under Rule 35(c) as a motion which extends the time for filing a notice of appeal until ten days after the entry of the order disposing of the motion. Technical correction motions would thus be treated the same way the Rules treat other motions to amend a judgment -- as terminating the appeal time, with a new appeal period commencing upon entry of the order on the motion. This action would insure that an otherwise avoidable appeal will never be made necessary by the district court's inability or failure to rule on a motion before the time for taking an appeal has expired, by eliminating the need to retain the unwieldy provision of Rule 35(c) requiring the district judge to act within seven days.

Even if it were decided to amend the Rule to make the seven day period for correcting an error to run from the entry of judgment, we do not believe such a change should be accomplished by redefining "sentencing," for purposes of Rule 35 only, to mean "entry of judgment." Rather, the change should be effected by replacing the term "sentencing" in the first clause of Rule 35(a) with the words "entry of judgment." This would accomplish what the amendment is intended to achieve, without affecting other provisions of the Rule or introducing a new confusion into an area which is already replete with burgeoning technicalities. In contrast, a rule-wide redefinition of "sentencing" would have the effect of also altering the calculation of the time periods governing substantial assistance reduction motions under present Rule 35(b) (proposed to be redesignated as Rule 35(c)). We do

not know of any reason why the Rule 35 substantial assistance time periods should be calculated from the entry of judgment, rather than the date of the oral announcement of the sentence. Nor does the Committee Note offer any reason for such a change. Moreover, the oral announcement of the sentence is the more appropriate event to use for purposes of calculating the one-year time period under (current) Rule 35(b), because easy ascertainment of the controlling date is more important than extending the one-year period by what will be, at most, a matter of days.

Alternatively, and at the least, Appellate Rule 4 should provide that if a timely motion to correct a sentence is filed under redesignated Rule 35(b), the time to appeal does not commence until the later of (i) the date the motion is ruled upon, or seven days after imposition of sentence (when the court's power to act would expire), whichever comes first, or (ii) the entry of judgment. A defendant contemplating a sentencing appeal on a technical or arithmetic sentencing issue may choose not to appeal if the question can be resolved by motion, and should not have to make that decision until the final contours of the sentence are settled. This would also avoid the necessity, in some cases, of filing two notices of appeal in the same case from what is really the same judgment, as required by the Committee's approach (as recognized in the final paragraph of the advisory committee's 2000 note).

Surely the Committee was right last year to delete the present Rule 35(a), which served no real purpose; it goes without saying that a district court may (indeed, it must) correct a sentence as directed on remand following a sentencing appeal. However, rather than introduce a unique and unnecessary definition of "sentencing" as a new Criminal Rule 35(a), the Committee should take this opportunity to restore part of a provision dropped from Rule 35(a) in 1987 by the Sentencing Reform Act, but made necessary again by the introduction of a statute of limitations for motions under 28 U.S.C. § 2255 in 1996. The Rule formerly provided that "the court may correct an illegal sentence at any time." The Committee should create a new Rule 35(a) at this time to provide that a court may, at any time, correct a sentence it determines to be in excess of the applicable statutory maximum. Such gross illegalities and miscarriages of justice must be subject to correction, regardless of any limitation on the scope or availability of § 2255 or other traditional means of collateral attack.

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 41 Subcommittee Report and Recommendation**

DATE: **March 27, 2002**

Attached is the report from the Rule 41 Subcommittee. As noted in that report, the Subcommittee met on February 15th to discuss proposed amendments to Rule 41. In addition the Subcommittee held a conference call and exchanged additional suggestions by fax and e-mail.

Please note that there are seven (7) attachments to the report. The proposed amendments to Rule 41 are at attachment 1 and the proposed Committee Note is at Attachment 2. Attachments 3 and 4 are suggestions from Judge D. Brock Hornby and Mr. Lucien Campbell, respectively.

Attachments 5, 6, and 7 are not referenced in the report itself. Attachment 5 is a list of additional style suggestions from Professor Kimble and Attachment 6 is an e-mail from Mr. Ellwood suggesting noting some issues for discussion. Finally, Attachment 7 is a very recent memo from Mr. Ellwood suggesting other changes to Rule 41.

The proposed changes to Rule 41 are on the agenda for the Committee's meeting in Washington D.C. in April.

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CHAMBERS OF
TOMMY E. MILLER
UNITED STATES MAGISTRATE JUDGE

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MEMORANDUM

TO: THE HONORABLE EDWARD E. CARNES
CHAIR, CRIMINAL RULES ADVISORY COMMITTEE

FROM: RULE 41 SUBCOMMITTEE
TOMMY E. MILLER, CHAIR
THE HONORABLE HARVEY BARTLE III
PROFESSOR NANCY J. KING
LUCIEN B. CAMPBELL, FEDERAL PUBLIC DEFENDER
JOHN P. ELWOOD, ESQ., DEPARTMENT OF JUSTICE

RE: PROPOSED AMENDMENTS TO
FEDERAL RULE OF CRIMINAL PROCEDURE 41

DATE: MARCH 26, 2002

You assigned this subcommittee the task of considering any amendments to Federal Rule of Criminal Procedure 41 that would establish procedures for tracking device search warrants and covert or delayed notification search warrants. In addition, you requested that the committee consider the provisions of the USA PATRIOT ACT (P.L. 106-56) to determine whether any changes to the rule need to be made because of the Act.

Attached to this memorandum is proposed language for Rule 41 that establishes procedures for the issuance of tracking device and delayed notification search warrants. (Attachment 1). Also attached is a proposed Committee Note which details the changes (Attachment 2).

I will not repeat the language of the proposed rule or the note in this memo, but I wish to

describe several decisions the subcommittee made in presenting its proposal.

I. In General

A. The subcommittee elected to amend Rule 41, instead of attempting to create a new rule. We felt that with relatively modest changes Rule 41 could be amended to accommodate delayed notification and tracking device search warrants.

B. We added three definitions to Rule 41(a)(2). In Rule 41(a)(2)(D) the terms "Domestic Terrorism," and "international terrorism," are defined by the meaning in 18 U.S.C. § 2331. "Tracking device" was similarly defined in Rule 41(a)(2)(E) as having the meaning set forth in 18 U.S.C. § 3117(b). By cross-referencing these statutes, we eliminated the need to create new definitions and run the risk of changing Congressional meaning.

II. Delayed Notification Warrants

A. The subcommittee determined that Section 213 of the USA PATRIOT ACT set out the substantive authority for delayed notification search warrants and we should not attempt to expand on that authority. Instead we endeavored to create the procedures within Rule 41 to implement Section 213.

B. The delayed notification (covert search warrant) procedure was reduced to one simple sentence and set forth in Rule 41(f)(6). The note identifies the statute which authorizes this procedure (18 U.S.C. § 3103a(b)).

C. One issue regarding delayed notification search warrants presented by Lucien Campbell may have slipped by the committee. In a memo dated February 26, 2002, (Attachment 3), Lucian questioned whether the rule should limit to federal judicial officers the authority to provide for delayed notification search warrants. It does not appear from my

notes that the subcommittee definitively decided this issue. Because of the deadline for the agenda book I am including Lucien's memo as an issue for the full committee but I hope to have a recommendation from the subcommittee to present orally at the committee meeting.

III. Tracking Device Warrants

A. We decided to authorize in Rule 41(b)(4) that only federal judicial officers have the power to issue tracking device warrants. Since the devices may travel across state lines, we thought it inappropriate to extend this power to state court of record judges.

B. The contents of the tracking device warrant are set out in Rule 41(e)(2)(B). We bracketed the suggested time period of 45 days as the time period for which the warrant may be used. The Department of Justice may present a separate memorandum to the full committee recommending a longer period. Similarly, the subcommittee bracketed for further discussion the seven-day notification provision in Rule 41(f)(5). The Department of Justice may issue a separate memorandum recommending a longer time.

C. The subcommittee also decided not to include a procedure to require third parties to assist in the execution of the warrant. The subcommittee saw no need for such language in the rule.

D. After soliciting advice through the Magistrate Judge list server, we decided not to include any provisions for removal of the tracking device in the warrant. There seemed to be too many variables related to the removal that may not be known at the time of the issuance of the warrant to install and use the tracking device.

IV. Other USA PATRIOT ACT Issues

A. The committee also considered several other sections of the USA PATRIOT ACT.

B. Section 209 permits the government to obtain unopened voicemail messages by warrant. We do not recommend any changes to Rule 41 because we feel that the current rule and the statute, 18 U.S.C. § 2703, provide sufficient procedure guidance.

In addition, Section 209 has a sunset provision of December 31, 2005. Therefore, even if a rule amendment were useful, it would not be effective until December 1, 2004.

C. Section 216 authorizes that an order may be used to capture certain addressing information from electronic facilities, such as the internet. We determined that such an order was not a search warrant covered by Rule 41 and therefore no changes need be made to Rule 41.

D. Section 220 provides for nationwide service of search warrants for electronic evidence. The subcommittee concluded that no amendments are needed for this provision. This section also has a sunset provision of December 31, 2005.

V. Judge D. Brock Hornby's suggestion

Attached is a letter from Judge Hornby suggesting that Rule 41 be amended to permit the return of a search warrant to the clerk.(Attachment 4) This issue was considered at some point during the restyling project and the committee agreed then to continue requiring returns to be made before a magistrate judge. The current Rule 41 subcommittee concurs that the return should be made before a magistrate judge.

cc: Professor David Schlueter
John Rabiej, Esq.

ATTACHMENT 1

(Subcommittee's March 26, 2002 Draft of Rule 41)

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).

(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 — ~~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; 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) *Tracking-Device Warrant.* 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 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.

* * * * *

(5) ***Delivering a Tracking-Device Warrant.*** In the case of a tracking-device warrant, the officer must within [7] days after the use of the device has ended 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 an individual of suitable age and discretion residing at that location and by mailing a copy to the person's last known address. Upon request of the government, the court may, on one or more occasions, for good cause extend the time to deliver the warrant for a reasonable period.

(6) ***Delayed Notice.*** Upon request of the government, a magistrate judge may delay any notice required by this rule if the delay is authorized by statute.

* * * * *

COMMITTEE NOTE

* * * * *

March 26, 2002

ATTACHMENT 2

(Proposed Committee Note to Rule 41)

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.

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 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 does 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 believed 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.

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 that 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 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 in an area where that person has a reasonable expectation of privacy.

Rule 41(e)(2)(B) is a new provision intended to address the contencts of tracking device warrants. To avoid open-ended monitoring of tracking devices, the 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 the warrant must require installation of the device within ten days and, unless otherwise provided, that the installation occur during daylight hours.

Rule 41(f)(5), another new provision, addresses the particular problems of delivering a copy of a tracking device warrant to the person who has been tracked, or whose property has been tracked. In the case of other warrants, 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 magistrate has issued the warrant. 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 7 days after the tracking has ended. That service may be accomplished by either personally serving the person, by leaving a copy at the person's residence or usual abode, or 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 would be 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, Rule 41(f)(6) 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 in response to the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001. That Act added a new provision, 18 U.S.C. § 3103a(b), which now authorizes a court to delay any notice required in conjunction with the issuance of any search warrants. [The amendment was designed to address those situations where officers obtain a warrant to make a covert entry—ordinarily not for the purpose of seizing property—and do not wish to reveal the intrusion until later in the investigation. Those observations may assist officers in confirming information already in the possession of law enforcement officials and in turn may assist in deciding whether, and by what means, to pursue further investigation. For example, agents may seek a warrant to enter the office of suspected conspirators to determine the layout of the office for purposes of seeking additional warrants to establish surveillance points or to determine the number and identity of the participants. *See, e.g., United States v. Villegas*, 899 F.2d 1334, 1336 (2d Cir. 1990), *citing Dalia v. United States*, 441 U.S. 238 (1979) and *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986), *citing United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977) (Rule 41 is not limited to tangible items). *See also United States v. Freitas*, 856 F.2d 1425 (9th Cir. 1988) (on remand, court held that good faith exception to exclusionary rule applied; officers had reasonably relied on search warrant, based on probable cause, to surreptitiously search for information; failure to provide notice under Rule 41(d) was technical error). *See also United States v. Villegas, supra*, 899 F.2d at 1334-35 (2d Cir. 1990) (approving search warrant for "sneak and peek" entry of defendant's buildings).]

Although the Committee considered an amendment to Rule 41 that would have expressly provided guidance on such covert searches, these amendments do not address that issue. Instead, the addition of Rule 41(f)(6) simply recognizes that 18 U.S.C. § 3103a(b), *supra*, now authorizes delayed notice. But that statute does not, on its face, extend only to covert searches. It could, for example, be read to extend to the use of tracking device warrants, where but for the amendment in Rule 41(f)(5), would have to be disclosed promptly as required by other provisions in Rule 41.

ATTACHMENT 3

(Mr. Campbell's Memo on Subcommittee's February 15th Draft)

MEMORANDUM

FOR: The Chair and Members of the Rule 41 Subcommittee
Honorable Tommy E. Miller
Honorable Harvey Bartle III
Professor Nancy J. King
John P. Elwood, Esq.

FROM: Lucien B. Campbell

DATE: February 26, 2002

SUBJ: **Subcommittee Draft Amended Rule 41**

After spending a little time with the Rule 41 draft amendments that came out of our subcommittee meeting of February 21 in Washington, I have some suggestions, in order of importance.

1. In Rule 41(f)(6), the delayed notice provision that reflects USA PATRIOT Act § 213, I am concerned that our amendment could be read as attempting to both restrict and enlarge the authority conferred by statute, contrary to our intention. First, at line 214 we begin with "A magistrate judge may . . . ." By the provisions of restyled Rule 1(b)(5) and (c), this means that only a United States magistrate judge or other federal judge may delay notice. But the delay authority of PATRIOT § 213 seems coextensive with the warrant authority; for purposes of Rule 41, it seems to include judges of state courts of record. If I am reading § 213 correctly, this could be fixed by changing "magistrate judge" to "judge issuing a warrant under this rule." (Under restyled Rule 1(b)(4), "judge" is defined as "a federal judge or a state or local judicial officer"; and PATRIOT § 213 is tied to "the issuance of any warrant.") Alternatively, the longer formulation used in Rule 41(d)(1) could be used ("magistrate judge—or, if authorized by this rule, a judge of a state court of record—").

On the enlargement side, the remainder of (f)(6) ("may delay any notice required by this rule, if delay is authorized by statute") could be read as authorizing unrestricted delay, conditioned only upon some delay being

authorized by statute. This could be corrected by linking the delay granted back to the statutory authorization, as intended. I suggest below a way it could be done (redlining in also the alternate suggestions on who may grant a delay and retaining the draft's bracketed material pertaining to request of the government):

> (6) ***Delayed Notice.*** A ~~magistrate judge~~ [judge issuing a warrant under this rule] [magistrate judge—or, if authorized by this rule, a judge of a state court of record—] may[, upon request of the government,] delay any notice required by this rule, if the delay is authorized by statute.

2. In Rule 41(e)(2)(B), line 139, we bracketed the form of negation to be double checked later:

> The warrant must specify the time period that the device may be used, which [may] [must] not exceed [45] days from issuance of the warrant.

According to our official stylesheet, the preferred way to say "is required not to" is "must not." Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules* para. 4.2, at 29.

3. In Rule 41(d)(2), Additional Requirement for a Tracking-Device Warrant, I think we can lose the second instance of "tracking" because we're only talking about one device. Redlined:

> (2) ***Additional Requirement for a Tracking-Device Warrant.*** In addition to complying with Rule 41(d)(1), a request for a warrant to use a tracking device must state the length of time that the ~~tracking~~ device will be used.

cc: David A. Schlueter
John K. Rabiej

By facsimile only

ATTACHMENT 4

(Judge Hornby's Proposed Amendment to Rule 41)

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

D. BROCK HORNBY
CHIEF JUDGE

156 FEDERAL STREET
PORTLAND, MAINE 04101
(207) 780-3280

02-CR-A

November 28, 2001

Hon. Edward E. Carnes
United States Circuit Judge
Frank M. Johnson, Jr. Federal Building
and United States Courthouse
15 Lee Street
Montgomery, AL 36104

Re: Judicial Conference Advisory Committee on Criminal Rules;
Fed. R. Crim. P. 41

Dear Judge Carnes:

When one of our Magistrate Judges was out sick recently, I had occasion to issue some warrants and take returns of warrants. The process reminded me of a question I had when I was a Magistrate Judge.

What is gained by requiring the officer to make his/her return and inventory before the judge/magistrate judge? Of course, a judge/magistrate judge must issue the warrant, but why not permit the return and inventory to be made before any deputy clerk who is authorized to administer oaths (as deputy clerks do in the courtroom for witnesses)? Taking the return and inventory is solely a ministerial task, an unnecessary interruption for the judicial officer, and an unnecessary delay for the law enforcement officer who has to arrange an appointment with the judge/judicial officer in advance. The problem is Rule 41(c)(1), which requires that the warrant "designate a federal magistrate judge to whom it shall be returned." Why not just provide that the warrant "designate the court to which it shall be returned"? (That is what our equivalent state rule does here in Maine.) Moreover, subsection (g) requires the magistrate judge to attach a copy of the

return, the inventory, and any other papers to the warrant and to file them with the clerk of the district court. This latter requirement seems archaic. I believe that in many districts the administrative part of the warranting process and return activity occurs in the clerk's office (where the deputy assigned to the magistrate judge is often located). It seems strange in 2001 to impose filing requirements directly upon the magistrate judge.

I suggest that it is time to re-examine these requirements.

Very truly yours,

D. Brock Hornby

dlh
cc: John K. Rabiej, Chief–Rules Committee Support Office
Peter G. McCabe, Secretary to the Rules Committee
Professor David A. Schlueter, Reporter to Criminal Rules Committee
Thomas C. Hnatowski, Chief–Magistrate Judges Division

ATTACHMENT 5

(Suggested Style Changes from Professor Kimble)

Note: This attachment is not referenced in Judge Miller's report

Faxed to Fabiej — March 14 —

1

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" or "international terrorism" has the meaning set out in 18 U.S.C. § 2331.

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

(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; ~~and~~

(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.;

(TOO CAVE?)

(3) a magistrate judge — in an investigation of domestic terrorism or international terrorism ∀ 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; 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.

(AGAIN, IS THIS INTENTIONALLY DIFFERENT FROM (b)(1)?)

(1) ***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.

AND? (WON'T THE WARRANT AUTHORIZE BOTH?)

* * * * *

(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) *Tracking-Device Warrant.* 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

(IF STILL SEEMS ODD, AFTER THE HEADING, TO INTRODUCE THE WARRANT INDIRECTLY, COULD YOU START WITH "A SEARCH-AND-SEIZURE WARRANT MUST IDENTIFY, ETC."? WHAT ARE THEY CALLED? NOTE THAT 41(a) CALLS IT A "SEARCH WARRANT.")

longer than 10 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.**

* * * * * *

(5) ***Delivering a Tracking-Device Warrant.*** In the case of a tracking-device warrant, the officer must within [7] days after the use of the device has ended deliver a copy of the warrant to the person who was tracked or whose property was tracked. Upon request [of the government], the court may, on one or more occasions, for good cause extend the time to deliver the warrant for a reasonable period.

(6) ***Delayed Notice.*** Upon request [of the government,] a magistrate judge may delay any notice required by this rule if the delay is authorized by statute.

* * * * *

COMMITTEE NOTE

Rule 41(f)?

(I think there's a problem with the whole structure of 41(f). Most of it is directed to search warrants, yet it only says "the warrant." How much of 41(f) applies to tracking-device warrants? Just (f)(1)? It might be better to limit 41(f) to search warrants and create a new 41(g) for tracking-device warrants.)

ATTACHMENT 6

(Mr. Elwood's Suggested Changes to Rule)

Note: This attachment is not referenced in Judge Miller's report

E-MAIL MESSAGE AVAILABLE ON REQUEST
FROM
RULES COMMITTEE SUPPORT OFFICE

ATTACHMENT 7

(Mr. Ellwood's Suggestions in March 27th Memo)

Note: This attachment is not referenced in Judge Miller's report

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

March 27, 2002

MEMORANDUM

TO: The Advisory Committee on Criminal Rules

FROM: John P. Elwood, Counselor to the Assistant Attorney General

SUBJECT: Authorization of Delayed-Notice Warrants by Judges of State Courts of Record; Returns for Warrants Executed Outside District of Issuance; Duration of Monitoring; Duration of Delay of Notification of Monitoring

The Department of Justice is proposing the following changes to the draft revision of Rule 41 that was approved by the Subcommittee.

1. Authorization of Delayed-Notice Warrants by Judges of State Courts of Record. As set forth in Section II.C. of Judge Miller's Memorandum, there is some question about whether the Rule 41 amendment regarding authority to issue delayed-notice search warrants should be limited to federal judicial offers only, or whether it should also extend to judges of state courts of record authorized by Rule 41(b). We believe that both should have that authority. To begin with, the USA PATRIOT Act, which the amendment seeks to implement, contains no such limitation. Section 213 of the act amended 18 U.S.C. § 3103a to provide in relevant part that:

> With respect to the issuance of any warrant or court order under this section, or any other rule of law, to search for and seize any property or material that constitutes evidence of a criminal offense in violation of the laws of the United States, any notice required, or that may be required, to be given may be delayed if–
>
> (a) the court finds reasonable cause to believe that providing immediate notification would have an adverse result (as defined in section 2705) . . . .

Nothing in USA PATRIOT limited the scope of the provision to federal judicial officers. The remainder of the relevant Code chapter suggests precisely the opposite. It refers explicitly to Rule 41 (which authorizes state courts of record to issue warrants), and indeed the chapter makes clear that "Federal, State or Territorial Judges, or U.S. Magistrates [are] authorized to issue search warrants." 18 U.S.C. § 3102. Because the Act contemplates obtaining the order for delay at the same time as the warrant, it is reasonable that the judge issuing the warrant–whether it be a federal magistrate judge or a judge of a state court of record–be authorized to order that notice of the warrant be delayed.

The traditional rationale for limiting warrant authority to federal judicial officers is the possibility that the warrant will be executed outside the district. Compare Rule 41(a)(1) (federal magistrate judge or a state court of record within the district may issue warrant for property within the district), with Rule 41(a)(2) (federal magistrate judge alone may issue warrant for a search of property or for a person if currently within the district but which "might move outside the district before the warrant is executed"); see also Rule 41(a)(3) (federal magistrate judge alone may issue out-of-district search warrants in terrorism cases). With those exceptions, judges of state courts of record are otherwise appropriately treated as judges of a coordinate government. Because geographic concerns are not necessarily implicated here, I propose that restyled Rule 41(f)(6) be revised to read as follows:

> **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.

2. Returns. Section 220 of the USA PATRIOT Act amended 18 U.S.C. § 2703 to allow investigators to use section 2703(a) search warrants to compel production of electronic communications outside of the district in which the court is located, just as they use federal grand jury subpoenas and orders under section 2703(d). (The provision will sunset on December 31, 2005.) Section 219 of USA PATRIOT amended Rule 41 to permit the execution of search warrants outside the district of issuance in terrorism cases. Because of these changes, the Committee may wish to consider the handling of returns for warrants executed outside the district of issuance.

While neither current Rule 41 nor restyled Rule 41 explicitly requires warrant returns to be done in person, warrant forms typically require certification in person by the executing officer. Unlike current Rule 41 (which is phrased in the passive voice and does not say who must perform a return), restyled Rule 41 also explicitly requires that "[t]he officer executing the warrant must promptly return it - together with a copy of the inventory - to the magistrate judge designated on the warrant." Because the warrant form and restyled Rule 41 together require an in-person return by the officer executing the warrant, we must consider the mechanics of performing returns on warrants executed outside the district of issuance.

The obvious alternative options for performing the return are (1) for the executing officer to return the warrant in the district of execution; (2) for the executing officer to return the warrant to the issuing district in person; and (3) allowing an officer other than the executing officer to return the warrant to the issuing district. We believe the best course would be (3), to permit another officer to return the warrant to the issuing district.

The first choice–return in the district of execution–could be achieved under restyled Rule 41 (which permits return "to the magistrate judge designated on the warrant"), but would eliminate one of the principal advantages of out-of-district execution under Sections 219 and 220:

having the judges most familiar with a particular case oversee the use of warrants in it. Instead, magistrate judges with no other involvement in a case, and who did not read the affidavits or issue the search warrant, would oversee its return. If the warrant was issued under seal, it might require an unsealing order to perform the return before another court; if the return was done under seal, any transfer of materials back to the issuing court might require another unsealing order. The second choice–return by the executing agent in person to the district of issuance–could require time-consuming travel by agents during the middle of an ongoing investigation simply to perform the in-person certification.

Our preferred course would be to have returns done in the district of issuance, but without requiring in-person certification by the executing officer. Restyled Rule 41(f)(4) could be revised to read "[t]he officer executing the warrant must promptly ~~return it~~ cause a copy of the warrant to be returned - together with a copy of the inventory - to the magistrate judge designated on the warrant." Corresponding changes could be made to the warrant return form, so that the returning officer would certify in person either (i) that he or she is the officer who executed the warrant and that the inventory of items seized is true and accurate; or (ii) that he or she received the form from the officer who executed the warrant by a specified and reliable means[1] and that he or she was advised by the executing officer that the inventory of items seized is true and accurate; in addition, the executing officer who transmitted the return would have certified that he or she had executed the warrant and that the inventory of items seized is true and accurate. (The certification by all agents responsible for transmitting the return to the magistrate judge handling the return would be akin to a chain of custody for evidence.) I understand this is how some magistrate judges have handled returns under Section 220 of USA PATRIOT.

The possibility of out-of-district execution of warrants gives rise to two other concerns that the Committee may wish to consider. First, both current and restyled Rule 41(g) state that motions for return of property must be filed in the district where the property was seized. However, because the court of issuance likely will be more familiar with the case than the court where the warrant was executed, the Committee may wish to consider whether to include the district where the warrant was issued as an alternative venue or as the default venue. ("The motion must be filed in the district where the property was seized, or the district that issued the warrant.")

Second, Rule 41(i) currently provides that "The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, of the inventory, and of all other related papers and must deliver them to the clerk in the district where the property was seized." Because the clerk in that district may have no other involvement in the case, it may be prudent to require the magistrate judge to deliver the papers "to the clerk of the district court that issued the warrant."

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[1]Reliable means may include any number of options approved by the Committee, including, for example, United States Mail, private overnight delivery services, facsimile, or e-mail in imaged format.

3. Duration of Monitoring. The Subcommittee has bracketed 45 days as the proposed upper limit for the duration of a tracking-device warrant. Although this is adequate time, the Committee may wish to consider adopting a counting rule comparable to that used for Title III wiretaps so as to rationalize counting periods for various types of surveillance and minimize the number of distinct counting rules that exist in criminal procedural law. Title III provides for 30-day monitoring periods, and states that the 30-day period begins to run on the earlier of the day interception begins or 10 days after the order is entered. 18 U.S.C. §2518(5). Along those lines, restyled Rule 41(e)(2)(B) could be revised to provide, in relevant part: "The time must not exceed 30 days from the day on which the federal law enforcement officer begins monitoring under the warrant or ten days after the warrant was issued, whichever is earlier." (A similar "whichever is later" counting period is used in restyled Rule 29(c)(1).)

The underlying purpose of the restyling project is to rationalize the Rules. One of the stated reasons for the now-pending proposal to amend Rule 35's definition of "sentencing" to mean the entry of final judgment (rather than oral pronouncement of sentence) was to make Rule 35 more consistent with the rule triggering the time to appeal a judgment under Federal Rule of Appellate Procedure 4(b)(1)(A). Adopting the Title III period and counting rule would have the additional benefit of eliminating the need for restyled Rule 41(e)(2)(A)(i), which requires the government to execute any warrant to install a monitoring device within 10 days. Using the formulation proposed by the Department would give the government the incentive to install the tracking device promptly and penalize it for not installing the device within the first 10 days, but would not require the government to return to the magistrate judge for another warrant if agents were unable to execute the warrant during the 10-day period.

4. Notification of Monitoring-Duration of Delay. There is concern in the Department that the requirement that notice be given within 7 days of the end of monitoring (restyled Rule 41(f)(5)) provides too little time, given the realities of mobile tracking-device monitoring. These devices sometimes require monitoring across several districts, a process which requires coordination between numerous investigative field offices and agents. The reality is that the district where the warrant was issued and the device was installed might not be the one where agents are controlling the daily tracking and/or investigation at the moment that the use of the tracking device has ended. Accordingly, it is reasonable to expect that a few days may lapse before the responsible government agent or attorney learns that the moment has arrived to either deliver notice to the affected individual, or request an extension from the court. A few more days will elapse while the agents determine how to achieve service.

Ordinarily, the Federal Rules do not employ such a brief time period outside of the litigation context, where both notice and the identity of the party responsible for acting are significantly clearer. See, e.g., Rule 12.3(a)(4)(B) (within 7 days of receiving government's request to disclose witnesses, defendant must serve response); Rule 29(c)(1) (defendant may move for judgment of acquittal within 7 days after guilty verdict or after court discharges duty; period may be extended); Rule 33(b)(2) (any motion for new trial not based on newly discovered

evidence must be filed within 7 days after verdict or finding of guilty); Rule 34(b) (motion to arrest judgment must be made within 7 days after court accepts a verdict or finding of guilty).

To avoid problems of insufficient time, it may be worthwhile either to extend this period or simply specify–in accord with Title III, 18 U.S.C. § 3103a, and other provisions–that notice be given within a "reasonable period."

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Habeas Corpus Rules; Report of Subcommittee**

DATE: **March 28, 2002**

Attached are materials on the proposed "style" amendments to the Rules Governing § 2254 and § 2255 Proceedings. In January 2001, the Standing Committee approved the Committee's recommendation to proceed with restyling the "habeas" rules. The Style Subcommittee of the Standing Committee prepared an initial draft of suggested style changes, which were then placed in a side-by-side format.

The Habeas Corpus Rules Subcommittee, chaired by Judge Trager, has reviewed those proposals and at a meeting in Washington, D.C. discussed possible changes. Since then, additional correspondence and communications have resulted in additional suggested changes or issues to be discussed.

Judge Trager's report to the Committee is attached. Additional materials follow his report:

- A copy of the Subcommittee's proposed changes to the Rules and accompany proposed Committee Notes (which will need to be changed or expanded, depending on the Committee's actions);

- A memo from Judge Carnes, dated March 26, 2002, concerning a possible issue to be included in the rules and a copy of *Castro v. United States.*

- A memo from Judge Trager, dated March 25, 2002, and an accompanying copy of suggested changes to the national and local forms;

- A memo, dated March 27, 2002, from Professor Ira Robbins (special consultant to the Subcommittee) on the proposed changes to the forms;

- A copy of public comments to proposed amendments to the habeas rules that were published for comment in 2000.

This item is on the agenda for the April 2002 meeting in Washington, D.C. If the Committee agrees with the proposed amendments, the package can be forwarded to the Standing Committee with a recommendation that the rules be published for public comment in August 2002.

M E M O R A N D U M

To: Criminal Rules Committee Members

From: Judge David G. Trager

Date: March 27, 2002

Subject: March 15, 2002 meeting of Habeas Corpus Subcommittee

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At the subcommittee's March 15 meeting, we reviewed the proposed stylized habeas corpus rules. We were able to complete a run-through of the entirety of both sets of rules (§2254 and §2255). However, we determined that in light of the proposed changes to the rules, the passage of time and the changes in substantive law, a review and redraft of the model forms for these rules was required. Accordingly, we set up a subcommittee of Judge Tommy Miller, Professor Ira Robbins and myself, and we have drafted proposed changes in the model forms, but not for the form involving a Rule 9 issue. I thought it best to wait until the full committee resolves the substantive issue whether Rule 9(a), relating to delayed petitions or motions, should be deleted before redrafting that form. The proposed revised forms for §2254 petitions and §2255 motions are included in your agenda book.

The proposed changes in the rules and forms are, for the most part, stylistic. But there are some substantive issues which the full committee needs to discuss. There are also a number of issues that I am not sure whether they should be characterized as substantive or stylistic. Finally, there a number of open issues, both substantive and stylistic.

At the outset, I note for the record that the subcommittee decided not to make any reference to §2241 petitions in the proposed restylized rules. Section 2241 is being employed in many immigration and other matters, and the proposed rules speak to criminal matters. Also, some consideration was given to the proposed merger of §2254 and §2255 rules. We concluded that there was no compelling need for merger, that we might unintentionally be opening a Pandora's box, and therefore we should leave the format as it is now.

Substantive issues:

1. We agreed to drop present **Rule 2(e)(Return of Insufficient Petition)** of the §2254 rules and the similar provision in **Rule 2(d)** of the §2255 rules, and to follow instead the last sentence of Rule 5(e) of the Federal Rules of Civil Procedure which provides that:

> The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

The principal reason for this proposed change for most of us lies with the addition of the one year statute of limitation to both §2254 and §2255. Prior to AEDPA, there was no penalty, other than delay, if the petition were returned for insufficiency. Now, the consequences - depending on how case law develops - could be quite severe for a petitioner.

2. Assuming that the proposal in #1 above is accepted, then the bracketed language in proposed **Rule 3(b)** for both §2254 and §2255 can be employed. If the proposal to delete Rule 2(e) and Rule 2(d) is not accepted, then the proposed language in Rule 3(b) would have to be changed to be more in accord with the first sentence of the existing Rule 3(b). Otherwise, there would be an inconsistency between Rule 2(e)/Rule 2(d) and Rule 3(b).

A related issue is that some subcommittee members believe that there should be a specific reference in Rule 3(b) to Rule 5(e) of the Federal Rules of Civil Procedure, both to make the intent of the change clear and to save much unnecessary verbiage.

3. Another substantive issue is whether to drop **Rule 9(a)(Delayed Petition)** of the §2254 rules and **Rule 9(a)(Delayed Motion)** of the §2255 rules. Some members of the subcommittee believe the rules are unnecessary in light of the AEDPA's one year statute of limitations. Other members believe the rules may still be viable. As noted above, depending on the outcome of this discussion, the model form can then reviewed for any necessary updating.

4. In **Rule 5(d)** of the §2254 rules and **Rule 5(e)** of the §2255 rules, we have provided that the petitioner or the moving party may file a reply within a time fixed by the judge. Although I do not view this as a substantive change since I believe most judges presently afford that opportunity to a petitioner or moving party, some may feel otherwise.

5. Judge Carnes has brought to our attention to the recent 11th Circuit decision in Castro v. United States, 277 F.3d 1300, and related decisions in other circuits concerning a district court's recharacterization of a filing as a §2254 petition or §2255 motion. Again, prior to AEDPA, this would have been of little significance, but in light of the successive petition rule the consequences to a petitioner can be severe. Judge Carnes has suggested in his memorandum of March 26 that we might wish to provide in the rules certain procedural protections for a petitioner or movant. I believe that a provision to this effect could easily be incorporated as a separate subdivision of Rule 9. I have not had the opportunity to draft language for the committee's consideration, but I will try to do so next week.

6. Professor Robbins believes that the changes in the revised model forms, insofar as they seek to obtain certain information relating to exhaustion and statute of limitations issues, are unwarranted. He is drafting a memorandum setting forth his position which will be included in the agenda book. He is also seeking to update the list of grounds for relief offered as a guide to petitioners or movants in item #12 of the forms.

Stylistic changes:

1. We left the meeting with a number of stylistic changes that would be reviewed before the full committee meeting. They include such items as the diverse use of "furnish", "submit", "send", etc. Also, there was the question of the use of "certified mail" in **Rule 4** of the §2254 rules. It was thought that the rules should conform to changes in other rules that take into account new technology.

2. After the meeting, in reviewing the materials, it occurred to me that the language of **Rule 11**

(Applicability of the Federal Rules of Civil Procedure) of the §2254 rules, and **Rule 12 (Applicability of the Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure)** of the §2255 rules are somewhat inconsistent. In my view, Rule 12 of the §2255 rules could be simplified to the following effect:

> The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are consistent with these rules, may be applied to motions filed under these rules.

I am open to other suggestions.

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

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 possible 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).

Rules Governing § 2254 Proceedings
Committee Notes
March 23, 2002

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, including those known to the petitioner and those the petitioner should know about by exercising reasonable diligence; (2) briefly summarize the facts supporting each ground; (3) state the relief requested; (4) be typewritten or legibly handwritten; and (5) be signed by the petitioner under penalty of perjury. **(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 free of charge.

(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.	**(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.
(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.	

Rules Governing § 2254 Proceedings
Committee Notes
March 23, 2002

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.

[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 understands that current practice in some courts is that if the petitioner first files the 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 language in Rule of Civil Procedure 5(e) was more appropriate. The new provision 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 the [AEDPA] the petitioner suffered no penalty, other than delay, if the petition was deemed insufficient. Now that a one-year statute of limitations applies [cite], a person's failure to file a petition in its proper form might pose a significant penalty for a petitioner.]

Rule 3. Filing Petition	Rule 3. Filing the Petition
(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 [To be inserted]** [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).

Rules Governing § 2254 Proceedings
Committee Notes
March 23, 2002

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 language of Rule 3(b) has been amended to reflect the change to Rule 2(d). The amended rule requires the clerk to file the petition and enter the petition on the docket, even if the petition is defective or fails otherwise to comply with Rule 3(a).]

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 or other pleading within a fixed time, or to take other action the judge may order. In every case, the clerk must [, by certified mail,] serve a copy of the petition and the order on the respondent and on the attorney general of the state involved.

Rules Governing § 2254 Proceedings
Committee Notes
March 23, 2002

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.]

Rule 5. Answer; Contents	Rule 5. The Answer
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 the petition — or move with respect to it — 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 the petitioner has exhausted state remedies, including: (1) any right to appeal the conviction or sentence; (2) any available post-conviction remedies; and (3) any right to appeal an adverse judgment or order in a post-conviction proceeding.
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 is not available or procurable, 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 an adverse judgment or order in a post-conviction proceeding; (b) any brief that the prosecution submitted in an appellate court in relation to the conviction or sentence, and (3) any opinion of the appellate court. **(e) Reply.** The petitioner may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

Rules Governing § 2254 Proceedings
Committee Notes
March 23, 2002

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.]

[Possible substantive change in Rule 5(d) regarding time for filing]

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. § 3006(A).
(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.
(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.

Rules Governing § 2254 Proceedings
Committee Notes
March 23, 2002

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, [except as described below.]

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.
(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.

Rules Governing § 2254 Proceedings
Committee Notes
March 23, 2002

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, [except as described below.]

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 [mail] copies of the proposed findings and recommendations to 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.

Rules Governing § 2254 Proceedings
Committee Notes
March 23, 2002

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.]

Rule 9. Delayed or Successive Petitions	Rule 9. Delayed 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.	**(a) Delayed Petition.** A judge may dismiss a petition for delay in filing that prejudiced the state in its ability to respond, unless the petition is based on a ground that the petitioner could not have known about through the exercise of reasonable diligence before the state was prejudiced.
(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.	**(b) Successive Petitions**. 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.

Rules Governing § 2254 Proceedings
Committee Notes
March 23, 2002

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 described below.]

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.

Rules Governing § 2254 Proceedings
Committee Notes
March 23, 2002

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, [except as described below.]

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 consistent with these rules, may be applied to a proceeding under these rules.

Rules Governing § 2254 Proceedings
Committee Notes
March 23, 2002

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, [except as described below.]

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

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 who seeks a determination that: (1) possible 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 sentence exceeded the maximum allowed by law; or (4) the judgment or sentence is otherwise subject to collateral review.

Rules Governing § 2255 Proceedings
Committee Notes
March 23, 2002

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	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, including those known to the moving party and those the moving party should know about by exercising reasonable diligence; (2) briefly summarize the facts supporting each ground; (3) state the relief requested; (4) be typewritten or legibly handwritten; and (5) be signed by the moving party under penalty of perjury. **(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 free of 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 subject to future custody, as the case may be, he shall do so by separate motions.	**(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.
(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.	

Rules Governing § 2255 Proceedings
Committee Notes
March 23, 2002

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.

The language in Rule 2(c) 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 seems to indicate a preference for the standard "national" form. Under the amended rule, there is no stated preference. The Committee understands that current practice in some courts is that if the petitioner first files the a petition using the national form, that courts may ask the petitioner to supplement it with the local form.

[Current Rule 2(d) has been deleted. The Committee believed that language in Rule of Civil Procedure 5(e) was more appropriate. The new provision, 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 the [AEDPA] the petitioner suffered no penalty, other than delay, if the petition was deemed insufficient. Now that a one-year statute of limitations applies [cite], a person's failure to file a petition in its proper form might pose a significant penalty for a petitioner.]

Rule 3. Filing Motion	Rule 3. Filing the Motion
(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 **[(see Bk. R. 9034) transmit, deliver to or]** serve a copy of the motion on the [United States attorney] 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.

Rules Governing § 2255 Proceedings
Committee Notes
March 23, 2002

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 language of Rule 3(b) has been amended to reflect the change to Rule 2(d). The amended rule requires the clerk to file the petition and enter the petition on the docket, even if the petition is defective or fails otherwise to comply with Rule 3(a).]

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 to file an answer or other pleading within a fixed time, or to take other action the judge may order.

Rules Governing § 2255 Proceedings
Committee Notes
March 23, 2002

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.]

Rule 5. Answer; Contents	Rule 5. Answer and 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 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 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.

Rules Governing § 2255 Proceedings
Committee Notes
March 23, 2002

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.]

[Possible substantive change in Rule 5(d) regarding time for filing]

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. § 3006(A).
(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.
(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 is granted leave to take a deposition, the judge may require the government to pay the travel expenses, subsistence expenses, and fees of the moving party's attorney to attend the deposition.

Rules Governing § 2255 Proceedings
Committee Notes
March 23, 2002

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, [except as described below.]

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.
(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.

Rules Governing § 2255 Proceedings
Committee Notes
March 23, 2002

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, [except as described below.]

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 [mail] copies of the proposed findings and recommendations to 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 cannot consider that witness's testimony.

Rules Governing § 2255 Proceedings
Committee Notes
March 23, 2002

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.]

Rule 9. Delayed or Successive Motions	Rule 9. Delayed or Successive Motion
(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.	(a) **Delayed Motion.** A judge may dismiss a motion for delay in filing that prejudiced the government in its ability to respond, unless the motion is based on a ground that the moving party could not have known about through the exercise of reasonable diligence before the government was prejudiced. (Alternatively — Delete.)
(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.	(b) **Successive Motions.** 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.

Rules Governing § 2255 Proceedings
Committee Notes
March 23, 2002

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 described below.]

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.

Rules Governing § 2255 Proceedings
Committee Notes
March 23, 2002

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, [except as described below.]

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 must not be construed to extend the time to appeal the original judgment of conviction.

Rules Governing § 2255 Proceedings
Committee Notes
March 23, 2002

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, [except as described below.]

Rule 12. Federal Rules of Criminal and Civil Procedure; Extent of Applicability	**Rule 12. Applicability of the Federal Rules of Civil Procedure and 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.	If no procedure is specifically prescribed by these rules, the judge may proceed in any [lawful] manner consistent with these rules and any applicable statute, and may apply the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure to motions filed under these rules.

Rules Governing § 2255 Proceedings
Committee Notes
March 23, 2002

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, [except as described below.]

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

JOHN K. RABIEJ
Chief
Rules Committee Support Office

WASHINGTON, D.C. 20544

March 19, 2002
Via Fax

MEMORANDUM TO HABEAS CORPUS SUBCOMMITTEE

SUBJECT: Revised Habeas Corpus Rules

For your review, I have attached the revised set of habeas corpus rules, which incorporates the changes approved at the March 15 subcommittee meeting. Please advise me if you find any errors.

Please note that in Rule 4 of the 2254 rules, the following additional bracketed insert was included: "in the manner provided in Federal Rule of Civil Procedure 5(b)." The insert would allow the clerk to electronically send a petition to the respondent and attorney general. Under Rule 5, the parties must consent to such delivery means and the option makes a lot of sense. Alternatively, the provision could be limited to delivery under Rule 5(b)(2)(A) and (D), which would eliminate delivery by regular mail authorized by (B) and (C).

A similar provision was not added to Rule 8(b) of the 2254 and 2255 rules. That provision requires "mailing" of a magistrate judge's proposed findings and recommendations to all parties. But the underlying statute requires "mailing," and although we could probably exercise the supersession authority to trump it, it may not be warranted.

Finally, it was suggested at the subcommittee meeting that the time of filing by an inmate should be made precise. Peter McCabe noted that the Federal Rules of Appellate Procedure address the matter in Rule 25(a)(2)(C). That rule says: "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." This provision could be added in Rule 3 of the 2254 and 2255 rules as a new subdivision (d).

John K. Rabiej

Attachment

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 or other pleading within a fixed time, or to take other action the judge may order. In every case, the clerk must [, by certified mail,] serve [in the manner provided for in Federal Rule of Civil Procedure 5(b)] a copy of the petition and the order on the respondent and on the attorney general of the state involved.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
15 Lee Street, Room 408
Montgomery, Alabama 36104

ED CARNES
CIRCUIT JUDGE

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TO: Habeas Corpus Subcommittee

COPY TO: Professor Dave Schlueter
John Rabiej

FROM: Judge Ed Carnes

DATE: March 26, 2002

As I requested, Professor Schlueter has sent you a copy of the Castro decision. I wanted to write in order to clarify my purpose in having it sent to you.

The issue of whether a filing that is recharacterized as a § 2254 or § 2255 petition should be counted as a first habeas petition for purposes of the restrictions on second petitions is not the principal reason I wanted to bring the decision to your attention. That issue, it seems to me, is a substantive one more properly left to court decision.

The more procedural question mentioned in the Castro opinion deals with whether district courts should re-characterize filings as § 2254 or § 2255 petitions without notice to the inmate and without providing an opportunity for him to amend

or withdraw the filing. As you can see from the Castro opinion, a number of circuits have already addressed that procedural issue. For example, the Third Circuit has decreed as follows:

> upon receipt of pro se pleadings challenging an inmate's conviction or incarceration – whether styled as a § 2255 petition or not – a district court should issue a notice to the petitioner regarding the effect of his pleadings. The notice should advise the petitioner that he can (1) have his motion ruled upon as filed; (2) if his motion is not styled as a § 2255 motion have his motion recharacterized as a § 2255 motion and heard as such, but lose his ability to file successive petitions absent certification by the court of appeals; or (3) withdraw the motion, and file one all-inclusive § 2255 petition within the one-year statutory period.

United States v. Miller, 197 F.3d 644, 652 (3d Cir. 1999). I express no opinion on that edict, but I thought the subcommittee might want to consider whether something like that procedural approach should be incorporated in the formal procedural rules governing §§ 2254 and 2255 proceedings.

United States Court of Appeals,
Eleventh Circuit.

Hernan O'Ryan CASTRO, Petitioner-Appellant,
v.
UNITED STATES of America, Respondent-Appellee.

No. 01-12181.

Jan. 2, 2002.

Federal prisoner petitioned to vacate, set aside or correct sentence. The United States District Court for the Southern District of Georgia, No. 97- 00097-CV-4, Anthony A. Alaimo, J., dismissed petition as "second or successive," and prisoner appealed. The Court of Appeals, Wilson, Circuit Judge, held that prisoner's earlier post-conviction motion, which district court had recharacterized as § 2255 petition, did not count as "first" habeas petition where court had not warned prisoner of potential consequences of such recharacterization.

Vacated and remanded.

West Headnotes

[1] Habeas Corpus ⚿842
197k842

District court's denial of habeas corpus relief is reviewed de novo.

[2] Habeas Corpus ⚿846
197k846

District court's factual findings in habeas corpus proceeding are reviewed for clear error.

[3] Criminal Law ⚿1668(3)
110k1668(3)

Where district court had recharacterized federal prisoner's post-conviction motion as § 2255 petition to vacate, set aside or correct sentence, without notifying him that such recharacterization might bar him from filing subsequent § 2255 petition, prisoner's subsequent attempt to file § 2255 petition could not be characterized as "second or successive petition" within purview of Antiterrorism and Effective Death Penalty Act (AEDPA) amendments. 28 U.S.C.A. § 2255.

[4] Criminal Law ⚿1668(3)
110k1668(3)

District court's recharacterization of petitioner's initial post-conviction motion as § 2255 petition will not be considered "first" habeas petition for Antiterrorism and Effective Death Penalty Act (AEDPA) purposes unless petitioner is given notice of consequences of such recharacterization, i.e., that subsequent § 2255 petition might be barred. 28 U.S.C.A. § 2255.

***1301** Michael G. Frick, Norman Daniel Lovein, Hall, Booth, Smith & Slover, PC, Brunswick, GA, for Petitioner-Appellant.

Amy Lee Copeland, Savannah, GA, for Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Georgia.

Before WILSON, RONEY and FAY, Circuit Judges.

WILSON, Circuit Judge:

Hernan O'Ryan Castro appeals the district court's dismissal of his habeas corpus petition, which was filed pursuant to 28 U.S.C § 2255. The district court concluded that the petition was successive under § 2255, as amended by the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), and thus not entitled to consideration. The dismissal of O'Ryan Castro's petition raises an issue of first impression in this Circuit: when a district court recharacterizes a federal prisoner's postconviction motion as a petition under § 2255, does that render the prisoner's subsequent attempt to file a § 2255 petition a "second or successive petition" within the purview of AEDPA amendments? Finding some of the opinions of our sister circuits who have considered this issue to be persuasive, we hold that O'Ryan Castro's subsequent § 2255 petition cannot be deemed successive.

I. BACKGROUND

In 1992, O'Ryan Castro was convicted and sentenced

to twenty years of imprisonment for conspiracy to possess with the intent to distribute cocaine in violation of 21 U.S C. § 846, possession with the intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) , and conspiracy to import cocaine in violation of 21 U.S.C. § 963. We affirmed the convictions and sentence on March 24, 1994. On July 11, 1994, O'Ryan Castro filed a pro se Motion For New Trial pursuant to Federal Rule of Criminal Procedure 33 based upon newly discovered evidence. The evidence consisted of proof that a witness, who testified against him at trial, had entered into an immunity agreement with the government. The government submitted a response in ***1302** which it stated that it did not object to the motion as demanding relief under both Rule 33 and § 2255. O'Ryan Castro then filed a pro se reply in which he explained that he had filed his motion properly under Rule 33. The district court treated O'Ryan Castro's motion as requesting relief pursuant to both Rule 33 and § 2255 and denied it on October 28, 1994. We affirmed the district court's ruling.

On April 22, 1997, O'Ryan Castro filed his first self-styled § 2255 habeas petition, alleging, among other things, that he failed to receive effective assistance of counsel in violation of the Sixth Amendment. The district court denied this petition and O'Ryan Castro appealed. After granting a certificate of appealability on the ineffective assistance claim, we vacated the order denying his petition and remanded the matter for further evidentiary determinations. We also instructed the district court to examine the record to determine whether O'Ryan Castro's petition was successive. The district court concluded that the petition was successive and dismissed it due to his failure to meet the particular requirements imposed by the amendments to § 2255 regarding successive petitions.

II. STANDARD OF REVIEW

[1][2] "We review de novo a district court's denial of habeas corpus relief." *Dorsey v. Chapman,* 262 F.3d 1181, 1185 (11th Cir.2001). "A district court's factual findings in a habeas corpus proceeding are reviewed for clear error." *Id.*

III. DISCUSSION

[3] Due to the frequency with which pro se litigants draft incognizable motions, "[f]ederal courts have long recognized that they have an obligation to look behind the label of a motion filed by a *pro se* inmate and determine whether the motion is, in effect, cognizable under a different remedial statutory framework." *United States v. Jordan,* 915 F.2d 622, 624-25 (11th Cir.1990). This accommodation was the result of the time-honored practice of construing pro se plaintiffs' pleadings liberally. *See Haines v. Kerner,* 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed 2d 652 (1972) (per curiam). In accordance with this practice, "district courts routinely convert postconviction motions of prisoners who unsuccessfully seek relief under some other provision of law into motions made under ... § 2255 and proceeded to determine whether the prisoner was entitled to relief under that statute." *Adams v. United States,* 155 F.3d 582, 583 (2d Cir.1998) (per curiam). These conversions were justified because they were harmless and they also assisted prisoner-movants in dealing with legal technicalities that might otherwise preclude prompt adjudication of their claims. *Id.* "Several courts of appeals ... have endorsed this approach as fair and efficient." *United States v. Miller,* 197 F.3d 644, 648 (3d Cir.1999).

On April 24, 1996, however, the AEDPA took effect and significantly altered the innocuousness of liberally recharacterizing a petitioner's postconviction motion. The AEDPA, which amended § 2255, bars federal prisoners from attacking their convictions through successive habeas corpus petitions except in very limited circumstances. [FN1] Specifically, successive applications may be heard only after an appellate court certifies the petition, because it contains "(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to ***1303** establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255. "If a district court receiving a motion under some other provision of law elects to treat it as a motion under § 2255 and then denies it, that may cause the movant's subsequent filing of a motion under § 2255 to be barred as" successive. *Adams,* 155 F.3d at 583. Consequently, a "court's act of conversion which we approved under pre-AEDPA law because it was useful and harmless might, under AEDPA's new law, become extraordinarily harmful to a prisoner's rights." *Id.* at 583-84.

FN1. "A 'successive petition' raises grounds identical to those raised and rejected on the merits on a prior petition." *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n 6, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986). A petitioner abuses the writ when he "files a petition raising grounds that were available but not relied upon in a prior petition." *Id.*

O'Ryan Castro filed his initial Rule 33 motion [FN2] prior to the enactment of the AEDPA and his subsequent § 2255 petition after the AEDPA became effective. Despite the fact that O'Ryan Castro filed his Rule 33 motion before the AEDPA's effective date, it nonetheless has the capacity to trigger the procedural strictures that the AEDPA attaches to successive habeas petitions. *See Raineri v. United States*, 233 F.3d 96, 99 (1st Cir.2000). This raises the question of whether the district court properly considered O'Ryan Castro's Rule 33 motion as his first § 2255 petition, making his subsequent § 2255 petition successive.

FN2. The district court converted this motion into a § 2255 petition.

Several circuits have prescribed specific guidelines for construing a claimant's self-styled § 2255 petition when a district court has recharacterized a claimant's prior postconviction motion as a § 2255 petition. The First Circuit, in particular, decided a case that is strikingly similar to the present case. The petitioner in *Raineri*, like O'Ryan Castro, brought a "Motion for Correction of Sentence and/or New Trial" pursuant to Federal Rule of Criminal Procedure 35 and/or Rule 33 prior to the AEDPA's effective date. *Id.* at 98. The district court, acting sua sponte, found Rules 33 and 35 inapplicable and recharacterized the motion as an application for relief under § 2255. *Id.* The petitioner submitted a subsequent motion styled as a § 2255 petition that the district court deemed successive and thus dismissed for his failure to obtain the requisite authorization to proceed with a successive petition. *Id.* at 99. In reversing this dismissal, the First Circuit concluded that "because the court acted sua sponte and without any advance notice to the petitioner, [it could not] treat the earlier pleading as a 'first' habeas petition for AEDPA purposes." *Id.* at 100-01. In reaching this decision, the First Circuit, persuaded by holdings of the Second and Third Circuits in prior cases, gave due consideration to the importance of protecting a claimant's right to habeas review. *Id.* at 99-101.

Two years before the First Circuit decided *Raineri*, the Second Circuit held,

> At least until it is decided whether such a conversion or recharacterization can affect the movant's right to bring a future habeas petition, district courts should not recharacterize a motion purportedly made under some other rule as a motion made under § 2255 unless (a) the movant, with knowledge of the potential adverse consequences of such recharacterization, agrees to have the motion so recharacterized, or (b) the court finds that, notwithstanding its designation, the motion should be considered as made under § 2255 because of the nature of the relief sought, and offers the movant the opportunity to withdraw the motion rather than have it so recharacterized.

***1304** *Adams*, 155 F.3d at 584. Similarly, the Third Circuit, "conclude [d] that district courts should discontinue their practice of automatically treating pro se, postconviction motions as § 2255 petitions." *United States v. Miller*, 197 F.3d 644, 652 (3d Cir.1999). The Third Circuit, however, went a step further than the procedure announced by the Second Circuit, stating that

> upon receipt of pro se pleadings challenging an inmate's conviction or incarceration--whether styled as a § 2255 motion or not--a district court should issue a notice to the petitioner regarding the effect of his pleadings. This notice should advise the petitioner that he can (1) have his motion ruled upon as filed; (2) if his motion is not styled as a § 2255 motion have his motion recharacterized as a § 2255 motion and heard as such, but lose his ability to file successive petitions absent certification by the court of appeals; or (3) withdraw the motion, and file one all-inclusive § 2255 petition within the one-year statutory period.

Id. It also held that this rule was narrow and would apply prospectively--meaning that "a pro se petitioner who filed a pre-AEDPA pleading, which was recast as a § 2255 motion, is bound by the existing provisions of AEDPA regarding successive second or successive petitions." *Id.* [FN3]

FN3. We should note that the petitioners in both *Adams* and *Miller* filed their initial postconviction motions after the effective date of the AEDPA. *Adams*, 155 F.3d at 582-83; *Miller*, 197 F.3d at 652-53.

In addition to the First Circuit, the Seventh, Ninth, and Tenth Circuits have adopted the views expressed by the Second and Third Circuits. *See Henderson v. United States,* 264 F.3d 709, 711 (7th Cir.2001) (holding that a court should not deem a Rule 33 or other mislabeled motion a § 2255 motion "unless the movant has been warned about the consequences of his mistake"); *United States v. Kelly,* 235 F.3d 1238, 1242 (10th Cir.2000) ("[w]e hold that district courts should use the procedure adopted in *Adams* for dealing with pro se postconviction motions not expressly made under § 2255...."); *United States v. Seesing,* 234 F.3d 456, 464 (9th Cir.2000) (adopting the procedure set forth in *Adams* to address circumstances where a court is presented with a pro se motion that could be recharacterized as a § 2255 motion)

Only one circuit has taken an opposite approach on this issue. In *In re Tolliver,* 97 F.3d 89, 90 (5th Cir.1996) (per curiam), which was the first case to address this issue, the Fifth Circuit upheld the district court's unilateral recharacterization of the petitioner's previous pro se motion as a § 2255 motion and held that, because the petitioner had filed such a motion, any subsequent § 2255 motion he filed required certification by a court of appeals. The court also determined that despite the petitioner's objection to the district court's conversion of his initial postconviction motion, the motion was incapable of being construed as anything other than a § 2255 motion. *Id.* In discussing *Tolliver,* the Third Circuit noted that the case "was decided two years before *Adams* and almost immediately after AEDPA's enactment." *Miller,* 197 F.3d at 651. It opined that the Fifth Circuit may have decided the case differently if it had the benefit of the Second Circuit's discussion. *Id.* We find this assertion remarkably plausible, because we certainly are persuaded by the courts that have discussed this issue since *Tolliver.*

Unlike the petitioner in *Tolliver,* O'Ryan Castro's Rule 33 motion for a new trial asserted a cognizable ground for relief. The motion was based upon alleged new ***1305** evidence, which Rule 33 explicitly provides as a basis for bringing such a motion. *See United States v. Kersey,* 130 F.3d 1463, 1465 n. 2 (11th Cir.1997). In response to the government's motion, the district court considered the motion as requesting relief under both Rule 33 and § 2255. Thus, also unlike *Adams, Miller,* and *Raineri,* the district court acted on the government's motion, and not sua sponte. This, however, is a distinction without a difference. The more critical factor is whether O'Ryan Castro knew the consequences of the district court's actions; and much the same as the litigants in *Adams, Miller, Henderson,* and *Raineri,* there was no protocol in place to ensure that O'Ryan Castro had such knowledge. Because O'Ryan Castro filed his initial postconviction motion pre-AEDPA, it is inconceivable that he, or any pro se litigant during that time, could have foreseen the ultimate consequences of a district court's recharacterization (sua sponte or upon the government's motion) of his postconviction motion. When the district court recharacterized his Rule 33 motion, O'Ryan Castro made the effort to reply in a manner that reaffirmed his intent to move for a new trial under that rule rather than seek habeas relief. It is therefore probable, not just possible, to conclude that he would have mounted a much stronger campaign to defeat the district court's recasting of his Rule 33 motion if he was aware that his subsequent § 2255 petition would face nearly insurmountable scrutiny.

[4] In sum, we join the majority of circuits that have addressed this issue. Whether a petitioner's initial postconviction motion was filed before or after the AEDPA's effective date or whether the district court's recharacterization of that motion was sua sponte or upon the government's motion, a district court's recharacterization of a petitioner's initial postconviction motion will not be considered a "first" habeas petition for AEDPA purposes unless the petitioner is given notice of the consequences of such recharacterization. Requiring a district court to ensure that a petitioner realizes the ramifications of a court's decision to convert his postconviction motion is an appropriate means of apprizing all defendants of the circumstances that may impair or preserve their right to habeas review. We do not endeavor to burden the district courts with onerous disclosure requirements. As long as a petitioner is not blindsided by having to meet the new criteria in § 2255 for successive petitions, the district court's obligation is satisfied.

IV. CONCLUSION

The district court's dismissal of O'Ryan Castro's § 2255 petition is hereby VACATED. We find that O'Ryan Castro's § 2255 petition is not successive and REMAND this case to the district court to consider the merits of his petition.

FORMS

Facsimile Transmission

To: Judge Tommy E. Miller - Fax: (757) 222-7027
Professor Ira Robbins - Fax: (202) 274-4130
Professor David A. Schlueter - Fax: (210) 436-3717
John K. Rabiej, Esq. - Fax: (202) 502-1755

From: Judge David G. Trager

Date: March 25, 2002

Subject: Revised forms for §2254 petitions and §2255 motions

Pages (including cover page): 26 (sent in two parts)

Attached are my drafts of revised forms for §2254 petitions and §2255 motions. Tommy Miller and I reviewed my first endeavor and this is the result of our mutual efforts. Ira Robbins has agreed to review this work tomorrow (Tuesday) and to get back to me by the end of the day. In light of David Schlueter's need to get out the agenda book by the end of the week, I thought he should have the attached.

The suggested revisions are adapted from forms presently used by district courts in Connecticut, the Southern District of New York, Oklahoma and Texas. If anyone cares to see the originals, please give me a call.

REVISED FORMS FOR § 2254 PETITIONS AND § 2255 MOTIONS

PREPARED BY THE HABEAS CORPUS SUBCOMMITTEE

☆☆☆☆☆

(The "clean versions" of the forms, which incorporate the subcommittee's proposed amendments, precede the working copies of the forms containing Judge Trager's handwritten changes.)

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court that entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Instructions — Read Carefully

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the facts that you rely upon to support your grounds for relief. No citation of authorities need be furnished. Briefs or arguments may be submitted, but they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed in forma pauperis, in which event you must execute the attached declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $_____, you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is _____

_____

(8) Petitions that do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION UNDER 28 USC § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District	
Name	Prisoner number	Case No.
Place of Confinement		
Name of Petitioner (include name under which convicted)	Name of 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 under attack _____

_____

_____

1(b). Criminal Docket Number (if known)_____

2. Date of judgment of conviction _____

3. Length of sentence _____

4. Nature of offense involved (all counts) _____

_____

_____

_____

5. What was your plea? (Check one)

(a) Not guilty ❑

(b) Guilty ❑

(c) Nolo contendere or no contest ❑

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:_____

_____

_____

6. Kind of trial: (Check one)

(a) Jury ❑

(b) Judge only ❑

7. Did you testify at the trial?

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 Number (if known) _____

(c) Result _____

(d) Date of result and citation (if known) _____

(e) Grounds raised _____

_____

(f) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court _____

(2) Docket Number (if known) _____

(3) Result _____

_____

(4) Date of result and citation (if known) _____

(5) Grounds raised _____

_____

(g) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court _____

(2) Docket Number (if known) _____

(3) Result _____

_____

(4) Date of result and citation (if known) _____

(5) Grounds raised _____

_____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any state court?

Yes ❑ No ❑

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

(a) (1) Name of court _____

(2) Docket Number (if known) _____

(3) Nature of proceeding _____

_____

(4) Grounds raised _____

_____

_____

(5) Did you receive an evidentiary hearing on your petition, application, or motion?

Yes ❑ No ❑

(6) Result _____

(7) Date of result _____

(b) As to any second petition, application, or motion give the same information:

(1) Name of court _____

(2) Docket Number (if known) _____

(3) Nature of proceeding _____

(4) Grounds raised _____

(5) Did you receive an evidentiary hearing on your petition, application, or motion?

Yes [ ] No [ ]

(6) Result _____

(7) Date of result _____

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

(1) First petition, etc. Yes ❑ No ❑

(2) Second petition, etc. Yes ❑ No ❑

(3) Third petition, etc. Yes ❑ No ❑

(e) If you did *not* appeal from the adverse action on any petition, application, or motion, explain briefly why you did not: _____

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, law, or treaties of the United States. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same. If you have filed more than two petitions, applications, or motions, please attach additional sheet(s) of paper and give the same information about each petition, application, or motion.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all 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 in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. (1) GROUND ONE: _____

_____

(2) Supporting facts — without citing legal authority or argument briefly state the facts that support your claim:

_____

_____

_____

_____

_____

(3) If you did not exhaust state remedies as to Ground One, briefly explain why:

_____

_____

_____

Direct Appeal

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

Yes ❑ No ❑

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

_____

_____

Post-Conviction Proceedings

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

Yes ❑ No ❑

(7) If your answer to Question (6) is "Yes," state the type of motion or petition, the name and location of the court where the motion or petition was filed, the case number (if known), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available.

_____

_____

_____

(8) Did you receive an evidentiary hearing on your motion or petition?

Yes ❑ No ❑

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

Yes ❑ No ❑

(10) If your answer to Question (9) is "Yes," was this issue raised in the appeal? Yes ❑ No ❑

State the name and location of the court where the appeal was filed, the case number (if known), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available.

_____

_____

_____

_____

(11) If your answer to Questions (8), (9), or (10) is "No," briefly explain:

_____

_____

_____

_____

Other Remedies

(12) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to this issue:

_____

_____

_____

_____

B. (1) GROUND TWO: _____

_____

(2) Supporting facts-without citing legal authority or argument briefly state the facts that support your claim:

_____

_____

_____

_____

(3) If you did not exhaust state remedies as to Ground Two, briefly explain why:

_____

_____

Direct Appeal

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

Yes ❑ No ❑

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

_____

_____

_____

Post-Conviction Proceedings

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

Yes ❑ No ❑

(7) If your answer to Question (6) is "Yes," state the type of motion or petition, the name and location of the court where the motion or petition was filed, the case number, the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available.

_____

_____

_____

_____

(8) Did you receive an evidentiary hearing on your motion or petition?

Yes ❑ No ❑

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

Yes ❑ No ❑

(10) If your answer to Question (9) is "Yes," was this issue raised in the appeal? Yes ❑ No ❑

State the name and location of the court where the appeal was filed, the case number, the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available.

_____

(11) If your answer to Question (8), (9), or (10) is "No," briefly explain:

Other Remedies

(12) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to this issue:

C. (1) GROUND THREE:

(2) Supporting facts-without citing legal authority or argument briefly state the facts that support your claim:

(3) If you did not exhaust state remedies as to Ground Three, briefly explain why:

Direct Appeal

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

Yes ❑ No ❑

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

Post-Conviction Proceedings

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

Yes ❑ No ❑

(7) If your answer to Question (6) is "Yes," state the type of motion or petition, the name and location of the

court where the motion or petition was filed, the case number, the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available.

(8) Did you receive an evidentiary hearing on your motion or petition?

Yes ❑ No ❑

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

Yes ❑ No ❑

(10) If your answer to Question (9) is "Yes," was this issue raised in the appeal? Yes ❑ No ❑

State the name and location of the court where the appeal was filed, the case number, the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available.

(11) If your answer to Questions (8), (9), or (10) is "No," briefly explain:

Other Remedies

(12) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to this issue:

(13) (a) Have all grounds for relief raised in this petition been presented to the highest state court having jurisdiction? Yes ❑ No ❑

(b) If your answer is "No," state which grounds have not been so presented and briefly give your reason(s) for not presenting them:

(14) If any of the grounds listed in this petition were not previously presented in any other state or federal court, briefly state which grounds were not presented, and your reasons for not presenting them:

_____

_____

_____

(15) Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction under attack in this petition? Yes ❑ No ❑ If "Yes," state the name and location of the court, the case number, the type of proceeding, 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.

_____

_____

_____

16. Do you have any petition or appeal <u>now pending</u> in any court, either state or federal, as to the judgment under attack? Yes ❑ No ❑

17. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(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 adverse ruling in a post-conviction proceeding _____

_____

_____

_____

18. 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 ❑

19. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes [ ] No [ ]

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

_____

_____

(b) And give date and length of sentence to be served in the future: _____

_____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment that imposed the sentence to be served in the future?

Yes ❑ No ❑

20. TIMELINESS OF PETITION: If your judgment of conviction was made final over one year ago, you must set forth below 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.

Wherefore, petitioner prays that the Court grant the relief to which he or she may be entitled in this proceeding.

_____

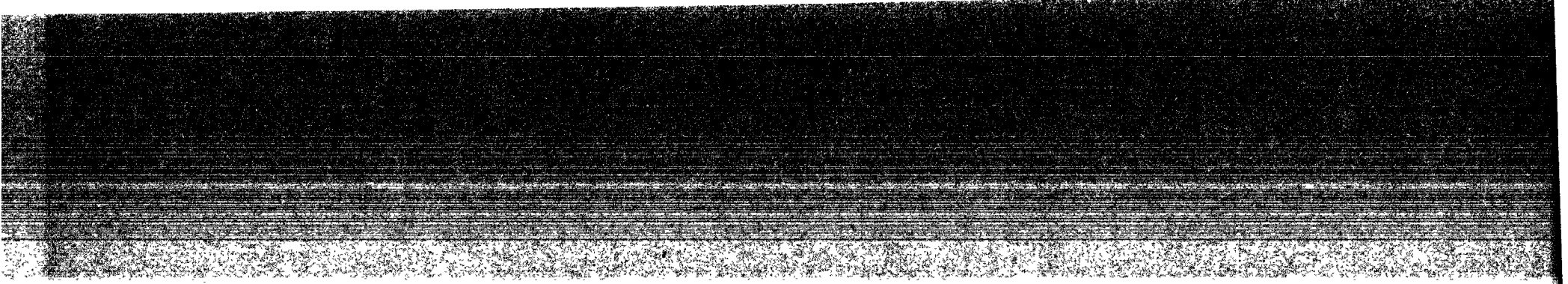
Signature of Attorney (if any)

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 on _____ (date).

_____

Signature of Petitioner (<u>required</u>)



PETITION UNDER 28 USC § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 USC § 2255, in the federal court ~~which~~ that entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Instructions–Read Carefully

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the facts ~~which~~ that you rely upon to support your grounds for relief. No citation of authorities need be furnished. ~~If~~ If briefs or arguments ~~are~~ may be submitted, but they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5 your petition will be filed if it is in proper order.

(4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed *in forma pauperis,* in which event you must execute the attached form AO 240 or any other form required by the court, setting forth information establishing your inability to pay the costs. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your person account exceeds $ _____ , you must pay the filing fee as required by the rules of the district court.

(5) Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the original and ~~at least~~ two copies must be mailed to the Clerk of the United States District Court whose address is

(8) Petitions ~~which~~ that do not conform to these instructions will be returned with a notation as to the deficiency.

AO 241 (Rev. 5/85)

PETITION UNDER 28 USC § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

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

PETITION

1(a) Name and location of court ~~which~~ that entered the judgment of conviction under attack _____

_____

(b) Criminal Docket Number (if known) _____

2. Date of judgment of conviction _____

3. Length of sentence _____

4. Nature of offense involved (all counts) _____

_____

_____

_____

5. What was your plea? (Check one)
   (a) Not guilty ☐
   (b) Guilty ☐
   (c) Nolo contendere or no contest ☐

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

_____

_____

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☐
   (b) Judge only ☐

7. Did you testify at the trial?
   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 Number (if known) _____

(c) Result _____

(d) Date of result and citation (if known) _____

(e) Grounds raised _____

_____

(f) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court _____

(2) Docket Number (if known) _____

(3) Result _____

_____

(4) Date of result and citation (if known) _____

(5) Grounds raised _____

_____

(g) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court _____

(2) Docket Number (if known) _____

(3) Result _____

_____

(4) Date of result and citation (if known) _____

(5) Grounds raised _____

_____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
state

Yes ☐ No ☐

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

(a) (1) Name of court _____

(2) Docket Number (if known) _____

(3) Nature of proceeding _____

_____

(4) Grounds raised _____

_____

(5) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(6) Result _____

(7) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Docket Number (if known) _____

(3) Name of proceeding _____

(4) Grounds raised _____

(5) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(6) Result _____

(7) Date of result _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes ☐ No ☐
(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held ~~unlawfully~~ in violation of the constitution, law, or treaties of the United States. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

If you have filed more than (4) two petitions, applications, or motions, please attach additional sheet(s) of paper and give the same information about each petition, application, or motion.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel
(j) Denial of right of appeal. [see attachment "A"]

A. ~~Ground one:~~

Supporting FACTS (state *briefly* without citing cases or law):

B. Ground two:

Supporting FACTS (state *briefly* without citing cases or law):

C. ~~Ground three:~~

Supporting FACTS (state *briefly* without citing cases or law):

D. Ground four:

Supporting FACTS (state *briefly* without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

16. ~~14.~~ Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☐

17. ~~15.~~ Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(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 adverse ruling in a post-conviction proceeding _____

_____

18. ~~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 ☐

19. ~~17.~~ Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☐

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

_____

(b) Give date and length of the above sentence: _____

_____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment ~~which~~ that imposed the sentence to be served in the future?

Yes ☐ No ☐

20. [see attachment "B"] Wherefore, petitioner prays that the Court grant ~~petitioner~~ the relief to which he or she may be entitled in this proceeding.

_____

Signature of Attorney (if any)

[see attachment "C"]

~~I declare under penalty of perjury that the foregoing is true and correct. Executed on~~

_____

Date

_____

Signature of Petitioner

ATTACHMENT A

A. (1) GROUND ONE: _____

_____

(2) Supporting facts-without citing legal authority or argument briefly state the facts that support your claim: _____

_____

_____

_____

_____

(3) If you did not exhaust state remedies as to Ground One, briefly explain why:

_____

_____

_____

Direct Appeal

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

Yes ❑ No ❑

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

_____

_____

Post-Conviction Proceedings

(6) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ❑ No ❑

(7) If your answer to Question (6) is "Yes," state the type of motion or petition, the name and location of the court where the motion or petition was filed, the case number (if known), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available.

_____

_____

_____

(8) Did you receive an evidentiary hearing on your motion or petition?

Yes ❑ No ❑

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

Yes ❑ No ❑

(10) If your answer to Question (9) is "Yes," was this issue raised in the appeal?

Yes ❑ No ❑ State the name and location of the court where the appeal was filed, the case number (if known), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available. _____

_____

_____

_____

(11) If your answer to Questions (8), (9), or (10) is "No," briefly explain:

_____

_____

_____

_____

Other Remedies

(12) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to this issue: _____

_____

_____

_____

B. (1) GROUND TWO: _____

_____

(2) Supporting facts-without citing legal authority or argument briefly state the facts that support your claim: _____

_____

_____

_____

(3) If you did not exhaust state remedies as to Ground Two, briefly explain why: _____

_____

Direct Appeal

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

Yes ❑ No ❑

(5) If you did not raise this issue in your direct appeal, briefly explain why

_____

_____

_____

Post-Conviction Proceedings

(6) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ❑ No ❑

(7) If your answer to Question (6) is "Yes," state the type of motion or petition, the name and location of the court where the motion or petition was filed, the case number, the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available. _____

_____

_____

_____

(8) Did you receive an evidentiary hearing on your motion or petition?

Yes ❑ No ❑

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

Yes ❑ No ❑

(10) If your answer to Question (9) is "Yes," was this issue raised in the appeal?

Yes ❑ No ❑ State the name and location of the court where the appeal was filed, the case number, the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available.

_____

_____

_____

(11) If your answer to Question (8), (9), or (10) is "No," briefly explain:

Other Remedies

(12) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to this issue.

C. (1) **GROUND THREE:**

(2) Supporting facts-without citing legal authority or argument briefly state the facts that support your claim:

(3) If you did not exhaust state remedies as to Ground Three, briefly explain why:

Direct Appeal

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

Yes ❑ No ❑

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

Post-Conviction Proceedings

(6) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ❑ No ❑

(7) If your answer to Question (6) is "Yes," state the type of motion or petition, the name and location of the court where the motion or petition was filed, the case number, the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available. _____

_____

_____

_____

(8) Did you receive an evidentiary hearing on your motion or petition?

Yes ❑ No ❑

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

Yes ❑ No ❑

(10) If your answer to Question (9) is "Yes," was this issue raised in the appeal?

Yes ❑ No ❑ State the name and location of the court where the appeal was filed, the case number, the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available.

_____

_____

_____

_____

(11) If your answer to Questions (8), (9), or (10) is "No," briefly explain:

_____

_____

_____

_____

Other Remedies

(12) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to this issue: _____

_____

_____

_____

(13) (a) Have all grounds for relief raised in this petition been presented to the highest state court having jurisdiction? Yes ❑ No ❑

(b) If your answer is "No," state which grounds have not been so presented and briefly give your reason(s) for not presenting them:

_____

_____

_____

_____

_____

(14) If any of the grounds listed in this petition were not previously presented in any other state or federal court, briefly state which grounds were not presented, and your reasons for not presenting them: _____

_____

_____

(15) Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction under attack in this petition?

Yes ❑ No ❑ If "Yes," state the name and location of the court, the case number, the type of proceeding, 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.

_____

_____

_____

ATTACHMENT B

20. TIMELINESS OF PETITION: If your judgment of conviction was made final over one year ago, you must set forth below 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.

ATTACHMENT C

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 on _____ (date).

_____

Signature of Petitioner (required)

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

(If movant has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion in the federal court that entered the judgment.)

MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

Explanation and Instructions — Read Carefully

(1) This motion must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the facts that you rely upon to support your grounds for relief. No citation of authorities need be furnished. Briefs or arguments may be submitted, but they should be submitted in the form of a separate memorandum.

(3) Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.

(4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed in forma pauperis, in which event you must execute the attached declaration on the last page, setting forth information establishing your inability to pay the costs. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each such judgment.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.

(7) When the motion is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is _____

_____

(8) Motions that do not conform to these instructions will be returned with a notation as to the deficiency.

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District	
Name of Movant	Prisoner No.	Case No.
Place of Confinement		
UNITED STATES OF AMERICA v.		(name under which convicted)

MOTION

1(a). Name and location of court that entered the judgment of conviction under attack _____

_____

1(b). Criminal Docket Number (if known)_____

2. Date of judgment of conviction _____

3. Length of sentence _____

4. Nature of offense involved (all counts) _____

_____

_____

_____

5. What was your plea? (Check one)
   (a) Not guilty ❑
   (b) Guilty ❑
   (c) Nolo contendere or no contest ❑
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

_____

_____

6. Kind of trial: (Check one)
   (a) Jury ❑
   (b) Judge only ❑

7. Did you testify at the trial?
   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 Number (if known) _____
   (c) Result _____
   (d) Date of result and citation (if known) _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
    Yes ❑ No ❑

11. If your answer to 10 was "yes," give the following information:
    (a) (1) Name of court _____
    (2) Docket Number (if known) _____
    (3) Nature of proceeding _____

_____

(4) Grounds raised _____

_____

(5) Did you receive an evidentiary hearing on your petition, application, or motion?
Yes ❑ No ❑
(6) Result
(7) Date of result

(b) As to any second petition, application, or motion give the same information:
(1) Name of court
(2) Docket Number (if known)
(3) Nature of proceeding
(4) Grounds raised
(5) Did you receive an evidentiary hearing on your petition, application, or motion?
Yes ❑ No ❑
(6) Result
(7) Date of result

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application, or motion?
(1) First petition, etc. Yes ❑ No ❑
(2) Second petition, etc. Yes ❑ No ❑
(3) Third petition, etc. Yes ❑ No ❑

(d) If you did not appeal from the adverse action on any petition, application, or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws, or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same. If you have filed more than two petitions, applications, or motions, please attach additional sheet(s) of paper and give the same information about each petition, application, or motion.
CAUTION: If you fail to set forth all 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 in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: _____

Supporting FACTS (state *briefly* without citing cases or law):

B. Ground two: _____

Supporting FACTS (state *briefly* without citing cases or law):

C. Ground three: _____

Supporting FACTS (state *briefly* without citing cases or law):

D. Ground four: _____

Supporting FACTS (tell your story briefly without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes ❑ No ❑

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(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 adverse ruling 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 approximately the same time?

Yes ❑ No ❑

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ❑ No ❑

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) And give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment that imposed the sentence to be served in the future?

Yes ❑ No ❑

18. TIMELINESS OF PETITION: If your judgment of conviction was made final over one year ago, you must set forth below why the one-year statute of limitations as codified in 28 U.S.C. § 2255, ¶ 6 does not bar your petition.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as codified in 28 U.S.C. § 2255, ¶ 6 provides in part that:

> 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 —
>
> (1) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (2) 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;
>
> (3) the date on which the constitutional 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 factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Wherefore, movant prays that the Court grant the relief to which he or she may be entitled in this proceeding.

_____

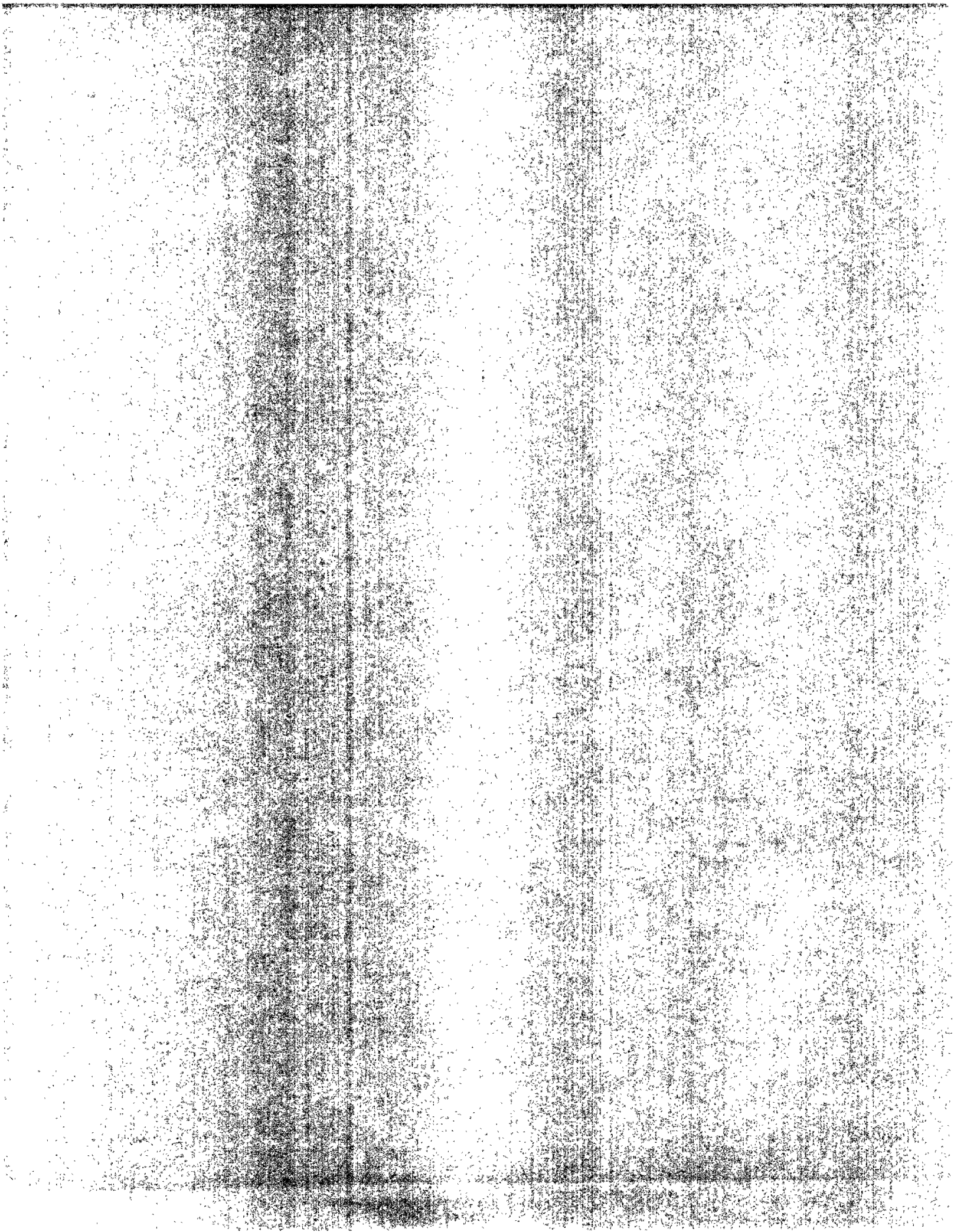
Signature of Attorney (if any)

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 on _____ (date).

_____

Signature of Petitioner (required)



AO 243 (Rev. 2/95)

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

(If movant has a sentence to be served in the future under a federal judgment which he or she wishes to attack, the movant should file a motion in the federal court ~~which~~ that entered the judgment.)

MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

Explanation and Instructions–Read Carefully

(1) This motion must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the facts ~~which~~ that you rely upon to support your grounds for relief. No citation of authorities need be furnished. ~~If~~ briefs or arguments ~~are~~ may be submitted, but they should be submitted in the form of a separate memorandum.

(3) Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.

(4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed *in forma pauperis,* in which event you must execute the attached form AO 240 or any other form required by the court, setting forth information establishing your inability to pay the costs. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each such judgment.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.

(7) When the motion is fully completed, the original and ~~at least~~ two copies must be mailed to the Clerk of the United States District Court whose address is

(8) Motions ~~which~~ that do not conform to these instructions will be returned with a notation as to the deficiency.

AO 243 (Rev. 2/95)

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District	
Name of Movant	Prisoner No.	Case No.
Place of Confinement		
UNITED STATES OF AMERICA V. (name under which convicted)		

MOTION

1(a) Name and location of court ~~which~~ that entered the judgment of conviction under attack _____

(b) Criminal Docket Number (if known) _____

2. Date of judgment of conviction _____

3. Length of sentence _____

4. Nature of offense involved (all counts) _____

5. What was your plea? (Check one)
   (a) Not guilty ☐
   (b) Guilty ☐
   (c) Nolo contendere or ~~no contest~~ ☐

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☐
   (b) Judge only ☐

7. Did you testify at the trial?
   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 Number (if known) _____

(c) Result _____

(d) Date of result and citation (if known) _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any federal court?

Yes ☐ No ☐

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

(a) (1) Name of court _____

(2) Docket Number (if known) _____

(3) Nature of proceeding _____

_____

(4) Grounds raised _____

_____

_____

_____

_____

(5) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(6) Result _____

(7) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Docket Number (if known) _____

(3) Name of proceeding _____

_____

(4) Grounds raised _____

_____

_____

_____

_____

5
(f) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

6
(g) Result _____

7
(h) Date of result _____

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes ☐ No ☐
(2) Second petition, etc. Yes ☐ No ☐

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

12 State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same. If you have filed more than two petitions, applications, or motions, please attach additional sheet(s) of paper and give the same information about each petition, application, or motion.

CAUTION: If you fail to set forth all 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 in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: _____

_____

Supporting FACTS (state *briefly* without citing cases or law): _____

_____

_____

_____

_____

_____

B. Ground two: _____

_____

Supporting FACTS (state *briefly* without citing cases or law): _____

_____

_____

_____

_____

_____

C. Ground three: _____

_____

Supporting FACTS (state *briefly* without citing cases or law): _____

_____

_____

_____

_____

D. Ground four: _____

Supporting FACTS (state *briefly* without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes ☐ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(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 adverse ruling 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 approximately the same time?
Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☐

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

_____

_____

(b) Give date and length of the above sentence: _____

_____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment ~~which~~ that imposed the sentence to be served in the future?
Yes ☐ No ☐

18. [see attachment "A"]
Wherefore, movant prays that the Court grant ~~him all~~ the relief to which he or she may be entitled in this proceeding.

_____
Signature of Attorney (if any)

[see attachment "B"]

~~I declare under penalty of perjury that the foregoing is true and correct. Executed on~~

_____
Date

_____
Signature of Movant

ATTACHMENT A

18. TIMELINESS OF PETITION: If your judgment of conviction was made final over one year ago, you must set forth below why the one-year statute of limitations as codified in 28 U.S.C. § 2255, ¶ 6 does not bar your petition.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as codified in 28 U.S.C. § 2255, ¶ 6 provides in part that:

> 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 —
>
> (1) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (2) 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;
>
> (3) the date on which the constitutional 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 factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

ATTACHMENT B

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 on _____ (date).

_____
Signature of Petitioner (required)

AMERICAN UNIVERSITY
WASHINGTON, DC

Direct Dial: 202-274-4235 Professor Ira P. Robbins Email: robbins@wcl.american.edu

MEMORANDUM

TO: Judge David G. Trager
Fax: 718-260-2518, 718-722-2824

FROM: Ira P. Robbins

DATE: March 27, 2002

RE: **Habeas Corpus and Section 2255 Forms and Rules: Follow-up to March 26 Telephone Conversation**

As you requested, I am writing to memorialize some of my comments from yesterday's phone conversation, for the consideration of the members of the Habeas Corpus Subcommittee, Professor Schlueter, and others.

Forms

Apart from the suggested changes to the forms that you made before and during our conversation, I recommended the following matters for the Subcommittee's consideration:

(1) Question 12 on both the Section 2254 and Section 2255 forms provides a list "of the most frequently raised grounds for relief in habeas corpus proceedings." (The Section 2255 form says "these proceedings.") The problem is that the list of ten grounds for relief has not been updated in a quarter-century. Most importantly, the list does not contain grounds that are typically raised in death-penalty proceedings — particularly claims addressed to the guilt phase. My suggestion is that, unless members of the Subcommittee think it is not a good idea, Professor Schlueter or I contact death-penalty litigators for the purpose of compiling such a list to be added to the existing list in the forms.

(2) While the Subcommittee may not wish to list in the rules the affirmative defenses that the respondent must plead (I believe the Subcommittee so decided on March 15), there are several places in both the Section 2254 and the Section 2255 forms that seek to obligate the petitioner/movant to

go forward with a showing on the potential issue of a procedural default. Yet the Supreme Court has recognized that procedural default is an affirmative defense that the respondent must plead and that the respondent may waive by failing to do so. *See Trest v. Cain*, 522 U.S. 87 (1997). Another affirmative defense about which the forms obligate the petitioner/movant go forward is the one-year limitations period.

Thus, the Subcommittee might wish to consider whether to delete from the forms certain questions that appear to put the burden on the petitioner/movant to go forward with a showing on these affirmative defenses. The relevant questions include:

Section 2254 Form (as revised):

On procedural default: Question 11(d); from Attachment A: Questions A(3), A(5), A(11), B(3), B(5), B(11), C(3), C(5), C(11), 13(b)

On statute of limitations: Attachment B (whole page)

Section 2255 Form (as revised):

On procedural default: Questions 11(d), 13
On statute of limitations: Attachment A (whole page)

Rules

(1) Although both sets of forms specifically state that the petitioner/movant may submit briefs or arguments in a separate memorandum (*see* item (2) on both instruction sheets), the relevant rules — Section 2254 Rule 2(c), (d) and Section 2255 Rules 3(b), (c) — do not make the point explicitly. One way to handle this matter would be track the language of the forms and add the following, probably as a new sentence at the end of 2254 Rule 2(c) and 2255 Rule 2(b): "Briefs or arguments may be submitted, but they should be submitted in the form of a separate memorandum."

If the Subcommittee decides against adding this language to the rules, another way to handle the matter would be for Professor Schlueter to include in the Advisory Committee Notes for these rules the above sentence, followed by an explanation of the purpose of submitting a brief or memorandum at the initial filing stage — *i.e.*, to explain why the petition/motion on its face is sufficient to withstand dismissal under Section 2254 Rule 4 or Section 2255 Rule 4(b). If the Subcommittee believes that the suggested sentence does belong in the rules, I think it would still be a good idea to include the explanation in the Advisory Committee Notes.

(2) You should also be aware that I spoke with John Rabiej earlier this week to point out two errors in the restyled forms. First, the last word in Section 2254 Rule 1(a)(1) and Section 2255 Rule 1(a)(4) should be "and" instead of "or." Second, Rule 9 in both sets of rules should contain the several options that the Subcommittee discussed after John Rabiej and Professor Schlueter left the meeting on March 15.

Thank you for your attention. Please let me know if you have questions about any items contained in this memorandum.

Preliminary Draft of

Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure

Request For Comment

ALL WRITTEN COMMENTS DUE BY FEBRUARY 15, 2001

COMMENTS ARE SOUGHT ON AMENDMENTS TO:

Appellate Rules	1, 4, 5, 15, 21, 24, 25, 26, 26.1, 27, 28, 31, 32, 36, 41, 44, and 45, and new Form 6
Bankruptcy Rules	1004, 2004, 2014, 2015, 4004, 9014, and 9027, and new Rule 1004.1, and Official Form 1
Civil Rules	54, 58, 81, and new Rule 7.1
Criminal Rules	5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43, and new Rule 12.4

Note: Preliminary Draft of Proposed "Style Revision" of Rules 1-60 Published in Separate Pamphlet

§ 2254 Rules	2, 3, 6, 8, 9, and 10
§ 2255 Rules	2, 3, 6, 8, 9, and 10

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL
CONFERENCE OF THE UNITED STATES

August 2000

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Another version of Rule 43,
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RULES GOVERNING PROCEEDINGS IN THE UNITED STATES DISTRICT COURT UNDER § 2254 OF TITLE 28, UNITED STATES CODE

Rule 2. Petition

* * * * *

(e) Return of insufficient petition. If a petition ~~received by~~ filed with 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.

COMMITTEE NOTE

Rule 2(e) has been amended to conform it to language in Federal Rule of Civil Procedure 5(e). No change in practice is intended by the amendment.

Rule 3. Filing Petition

* * * * *

(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~~ The clerk of the district court shall file the petition and enter it on the docket in ~~his~~ the clerk's 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.

COMMITTEE NOTE

The first portion of Rule 3(b) has been deleted because it conflicts with the requirement in Federal Rule of Civil Procedure 5(e) that the clerk file the papers. The amendment also conforms to current practice; the clerk files the petition and refers it to the court for its consideration of any defects in the petition.

Rule 6.

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§ 3006A.

Rule 8.

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)~~ § 3006A.

* * * * *

COMMITTEE NOTE

The amendment to Rule 6(a) reflects amendments to 18 U.S.C. § 3006A.

Rule 8. Evidentiary Hearing

* * * * *

(b) Function of the magistrate judge.

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate judge 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 judge 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

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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 judge.

(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)~~ § 3006A 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.

COMMITTEE NOTE

The amendments to Rule 8 address two issues. First the term "magistrate" has been changed to "magistrate judge" to reflect the change in name of magistrates to United States magistrate judges. Second, the amendment to Rule 8(c) reflects amendments to 18 U.S.C. § 3006A.

Rule 9. Delayed or Successive Petitions

* * * * *

(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 a second or successive petition is presented to the district court, the applicant shall obtain an order from the appropriate court

of appeals authorizing the district court to consider the petition.

COMMITTEE NOTE

Rule 9(b) has been amended to reflect the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 which amended 28 U.S.C. § 2244. That new provision places limitations on the ability of a petitioner to file successive applications for habeas corpus relief. Section 2244(b) explicitly states that a second or successive petition must be first presented to the appropriate court of appeals for an order that authorizes the district court to consider the application dismissed if it was presented in an earlier petition. The amendment to Rule 9(b) is intended to reflect that statutory provision.

Rule 10. Powers of ~~Magistrates~~ Magistrate Judges

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate judge pursuant to 28 U.S.C. § 636.

COMMITTEE NOTE

Rule 10 has been amended to reflect the change in the title of United States magistrates to United States magistrate judges.

RULES GOVERNING PROCEEDINGS IN THE UNITED STATES DISTRICT COURT UNDER § 2255 OF TITLE 28, UNITED STATES CODE

Rule 2. Motion

* * * * *

(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 the movant 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

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motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the ~~petitioner~~ movant.

* * * * *

(d) Return of insufficient motion. If a motion ~~received by~~ filed with 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 amendment to Rule 2(b) — changing the word "petitioner" to "movant" — is intended to make the terminology internally consistent throughout the rule.

Rule 2(d) has been amended to conform it to language in Federal Rule of Civil Procedure 5(e). No change in practice is intended by the amendment.

Rule 3. Filing Motion

* * * * *

(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~~ The clerk of the district court shall file the motion and enter it on the docket in ~~his~~ the clerk's office in the criminal action in which was entered the judgment to which it is directed. ~~He~~ The clerk 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.

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Rule 6.

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COMMITTEE NOTE

The first portion of Rule 3(b) has been deleted because it conflicts with the requirement in Federal Rule of Civil Procedure 5(e) that the clerk file the papers. The amendment also conforms to current practice; the clerk files the petition and refers it to the court for its consideration of any defects in the petition.

Rule 6. Discovery

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).~~ § 3006A.

* * * * *

COMMITTEE NOTE

The amendment to Rule 6(a) reflects amendments to 18 U.S.C. § 3006A.

Rule 8. Evidentiary Hearing

* * * * *

(b) Function of the magistrate judge.

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate judge 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 judge 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

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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 judge.

(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)~~ § 3006A 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.

* * * * *

COMMITTEE NOTE

The amendments to Rule 8 address two issues. First the term "magistrate" has been changed to "magistrate judge" to reflect the change in name of magistrates to United States magistrate judges. Second, the amendment to Rule 8(c) reflects amendments to 18 U.S.C. § 3006A.

Rule 9. Delayed or Successive Motions

* * * * *

(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~~

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~~abuse of the procedure governed by these rules.~~ Before a second or successive motion is presented to the district court, the applicant shall obtain an order from the appropriate court of appeals authorizing the district court to consider the motion.

* * * * *

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COMMITTEE NOTE

Rule 9(b) has been amended to reflect the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 which amended 28 U.S.C. 2244. That new provision places limitations on the ability of a petitioner or movant to file successive applications for habeas corpus relief. Section 2244(b) explicitly states that a second or successive petition must be first presented to the appropriate court of appeals for an order that authorizes the district court to consider the application dismissed if it was presented in an earlier petition. The amendment to Rule 9(b) is intended to reflect that statutory provision.

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Rule 10. Powers of ~~Magistrates~~ Magistrate Judges

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate judge pursuant to 28 U.S.C. § 636.

COMMITTEE NOTE

Rule 10 has been amended to reflect the change in the title of United States magistrates to United States magistrate judges.

PUBLIC COMMENTS ON PROPOSED AMENDMENTS PUBLISHED FOR COMMENT IN AUGUST 2000

00-CR-059
Late Comment

Judy Krivit
01/30/2002 07:04 PM

To: SAllen3098@aol.com
cc:
Subject: Re: Habeas Rule 9(b)

Mr. Allen,

The proposed amendments to the habeas rules were deferred pending further study. A copy of your message is being sent to the chair of the subcommittee and the reporter for their consideration. The proposed amendments to the Habeas Corpus Rules should be published in August 2002 for comment.

Peter Mc Cabe

SAllen3098@aol.com

SAllen3098@aol.com
01/24/2002 12:30 PM

To: Rules_Comments@ao.uscourts.gov
cc:
Subject: Habeas Rule 9(b)

Mr. McCabe,

I'm not sure if its too late to comment, but I think I discovered a problem with the proposed amendment to sec.2255 Rule 9(b).

As they now stand, both sec. 2254 Rule 9(b) and sec. 2255 Rule 9(b) provide that claims that were in a previous petition or motion "may be dismissed." The proposed amendments delete this language.

With respect to state prisoners, section 2244(b)(1) provides that repetitive claims "shall be dismissed," so the amendment to sec. 2254 Rule 9(b) has no substantive effect. However, there is no corresponding provision in section 2255. Section 2255 does cross-reference to the certification procedures of section 2244 but not to the substantive provisions, so the proposed amendment appears to leave a gap for repetitive claims by federal prisoners.

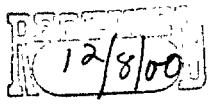
I'm going to be responsible for updating a major treatise covering this issue if the proposed amendments go through, so I'd appreciate any guidance you could give me.

Sincerely,

Steven W. Allen
36 Birch Street
Jersey City, NJ 07305
(201) 432-7127

PS. I tried to submit this on the comment form on the website, but got an error message that my computer couldn't support the necessary cgi-bin script. I've used the form before using the same computer, so I'm not sure if the problem is with AOL or at your end.

Author: "Netscape SuiteSpot" <nsuser@host3.uscourts.gov> at ~Internet
Date: 12/7/00 5:04 PM
Normal
TO: Rules Comments at AO-OJPPO
Subject: Submission from http://www.uscourts.gov/rules/comment2001/we
---------- Message Contents



Via InterneT

00-CR-010
Substantive

Salutation: Mr.
First: Gregory
MI: C
Last: Krog, Jr.
Org:

Pro Se Staff Attorney, U.S. District Court, W.D. Tenn.

MailingAddress1: Ste. 368 Federal Building, 167 N. Main
MailingAddress2:
City: Memphis
State: Tennessee
ZIP: 38103
EmailAddress:
Phone: 901-495-1261
Fax: 901-495-1205
Miscellaneous: Yes
Comments:

This is a comment regarding the proposed amendments to the Rules Governing § 2254 Cases in the U.S. Dist. Cts.

The proposed rule changes are merely cosmetic. The AEDPA reforms have created new procedural problems for the federal courts. In particular, Rule 9 needs to be revised to clarify the district court's procedure for handling the innumerable frivolous successive petitions being directed to the wrong courts. A uniform approach to this issue is needed for all the federal courts. Now the various appellate courts are adopting a patchwork of ad hoc responses to these petitions. A related problem is the inconsistent manner in which such petitions are treated after being filed. Are they civil cases, (i.e., does the clerk get to add a statistic to the civil caseload), or miscellaneous cases? This is not just a technical point significant only for historical and statistical purposes. More importantly, Rule 9 should be amended to flat out prohibit the filing of such petitions absent an order from the appellate court, thus conforming to Congress' intent in enacting the AEDPA and eliminating the wasted time now devoted to such petitions.

The Rules also need to be amended to reflect the realities of habeas motion practice. It would help to specify more clearly the applicability of the FRCvP. E.g., should a Habeas Rule 5 answer conform to Rules 8, 12, 56, a combination thereof, or be independently defined (the preferable result)? Similarly, § 2254 Rule 6 governing discovery and Rule 8 governing evidentiary hearings need to be amended entirely to conform to the limitations on factual inquiry and evidentiary hearings

created by amended § 2254.

The Model Forms also require substantial revision in light of the AEDPA.

In short, mere cosmetic alterations to the Habeas Rules will result in habeas procedural reform continuing to lag behind reforms in general federal procedure, interfering with the court's goal of processing habeas cases efficiently and economically, particularly as to successive petitions.

submit: Submit Comment

HTTP Referer: http://www.uscourts.gov/rules/comment2001/webform.htm
HTTP User Agent: Mozilla/4.72 [en] (Win98; I)
Remote Host: 207.41.14.11
Remote Address: 207.41.14.11

Author: "Netscape SuiteSpot" <nsuser@host3.uscourts.gov> at ~Internet
Date: 12/7/00 5:21 PM
Normal
TO: Rules Comments at AO-OJPPO
Subject: Submission from http://www.uscourts.gov/rules/comment2001/we
---------- Message Contents

Salutation: Mr.
First: Gregory
MI: C.
Last: Krog, Jr.
Org: Pro Se Staff Attorney, U.S. District Ct. WD TN
MailingAddress1: Ste. 368 Federal Building, 167 N. Main
MailingAddress2:
City: Memphis
State: Tennessee
ZIP: 38103
EmailAddress:
Phone: 901-495-1261
Fax: 901-495-1205
Miscellaneous: Yes
Comments:

This is a comment regarding the proposed amendments to the Rules Governing § 2255 Proceedings in the U.S. Dist. Cts.

These cosmetic changes to do not address serious defects in these Rules that impede the federal courts in reviewing and ruling on § 2255 motions. In particular, Rule 9 governing successive motions should be revised to clarify that the successive motions should not even be filed without an order from the appellate court. Now, prisoners are disguising innumerable motions as "habeas petitions" or in other irregular and inapplicable forms, such as writs of error coram nobis or audita querela, when all that is sought is relief from the underlying conviction. These attempts have multiplied and created a large increase in the amount of judicial resources wasted on frivolous matters despite the opposite intention of the AEDPA. Reform of Rule 9 in accordance with common-sense and a practical application of the AEDPA could virtually eliminate this needless waste.

The commentary to the Rule 3 amendments that they conform to existing practice are interesting. In fact, the federal courts have long ignored, on a practical level, the requirement of Rule 3 that § 2255 motions be filed in the criminal case. Instead, many districts routinely open them as separate civil cases, merely making some type of pro forma entry on the criminal docket. Other districts attempt to maintain the fiction that § 2255 is a "motion." So there is no "uniform" practice to which the Rule can be conformed. Whether § 2255 motions should be docketed (and credited statistically) as civil cases is another issue. Regardless, Rule 3(b) needs to be amended to establish a uniform practice, or at least to reflect that courts have a choice if uniformity is not desireable.

Author: "Netscape SuiteSpot" <nsuser@host3.uscourts.gov> at ~Internet
Date: 2/7/01 3:55 PM
Normal
TO: Rules Comments at AO-OJPPO
Subject: Submission from http://www.uscourts.gov/rules/comment2001/we
---------- Message Contents

00-CR-021
Substantive

Salutation: Mr.
First: Gell
MI: R.
Last: Kingery
Org:

Pro Se Staff Attorney - Western District of Texas,
Waco Division

MailingAddress1:
MailingAddress2:
City:
State: default
ZIP:
EmailAddress: Gell_Kingery@txwd.uscourts.gov
Phone: (254) 750-1505
Fax: (254) 750-1516
CriminalRules: Yes
Comments:

I would suggest that in the "Committee Note" to
Rule 3(b) of the Rules Governing Section 2255
Proceedings (page 279), the word "petition" (used in 2 places)
be changed to the word "motion" for consistency.

submit: Submit Comment

HTTP Referer: http://www.uscourts.gov/rules/comment2001/webform.htm
HTTP User Agent: Mozilla/4.0 (compatible; MSIE 5.5; Windows 95)
Remote Host: 207.41.16.3
Remote Address: 207.41.16.3

Author: Lana_Hanson@ksd.uscourts.gov at ~Internet
Date: 2/13/01 4:53 PM
Normal
Receipt Requested
TO: Rules Comments at AO-OJPPO
CC: Judge_Walter@ksd-tweb.ksd.uscourts.gov at ~Internet
Subject: Rule 6
---------- Message Contents

2/14/01
Via Internet
00-CR-032
Substantive

From: Catherine A. Walter, U.S. Magistrate Judge
U.S. District Court,
444 SE Quincy
Topeka, Kansas 66683
email: Judge_Walter@ksd.uscourts.gov
phone: 785-295-2619
fax: 785-295-2634

Committee on Rules of Practice and Procedure:

I would propose minor changes to Rule 6 of the rules governing proceedings under both sec. 2254 and 2255 to make these rules gender neutral. Both rules include the phrase "the judge in the exercise of his discretion." I would propose adding "or her."

Thank you for your time and hard work,
Catherine Walter.

THE STATE BAR OF CALIFORNIA

180 HOWARD STREET
SAN FRANCISCO, CALIFORNIA 94105-1639
TELEPHONE (415) 538-2000

June 14, 2001

00-CV-015

00-CR-058
Substantive

Secretary of the Committee on Rules of Practice
and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Comments of the State Bar of California Committee on Federal Courts to Proposed Amendments to Rules 54 and 58 of the Federal Rules of Civil Procedure and Proposed Amendments to Rules Following 28 U.S.C., Sections 2254 and 2255

Dear Sir/Madam:

Enclosed are the comments of the State Bar of California Committee on Federal Courts on proposed amendments to rules 54 and 58 of the Federal Rules of Civil Procedure and proposed amendments to rules following 28 U.S.C. sections 2254 and 2255. These comments are only those of the State Bar of California's Committee on Federal Courts. They have not been adopted by the State Bar's Board of Governors or overall membership and are not to be construed as representing the position of the State Bar of California. Committee activities relating to these comments are funded from voluntary sources.

If you have any questions about the comments of the Committee on Federal Courts, please contact me at 415/583-2306 or Henry Kevane, Chair of the State Bar Committee on Federal Courts at (415) 263-7000.

Sincerely,

David C. Long
Special Assistant for Administration of Justice

DCL:ec
Enclosure

cc: Marie Moffat
Starr Babcock
Henry Kevane (w/o enclosure)
Martin Fineman (w/o enclosure)

THE COMMITTEE ON FEDERAL COURTS
THE STATE BAR OF CALIFORNIA

180 HOWARD STREFT
SAN FRANCISCO, CA 94105-1639
(415) 538-2000

MEMORANDUM

TO: Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee)

FROM: The Committee on Federal Courts of the State Bar of California

DATE: June 14, 2001

RE: Proposed Amendments to Rules Following 28 U.S.C. § 2254 and 2255

The Federal Court Committee of the State Bar of California proposes three changes to the proposed amendments to the Rules following 28 U.S.C. §§ 2254 and 2255. The proposed changes are as follows:

First, the Committee Note to Rule 9 following 28 U.S.C. § 2254 should be amended to eliminate a redundancy and confusing language. Specifically, the second to the last sentence of the Committee Note should be amended. That sentence currently provides: "Section 2244(b) explicitly states that a second or successive petition must be first presented to the appropriate court of appeals for an order that authorizes the district court to consider the application dismissed if it was presented in an earlier petition." The last nine words of the sentence should be deleted because some are redundant, some are misleading and none are necessary. First, a "second or successive" means a petition which was presented previously. Thus, reference to an earlier petition is redundant. Second, in addition to this redundancy, the word "dismissed" will cause confusion. Section 2244(b) creates a "gatekeeping" function for federal courts of appeals. Before a second or successive petition can be filed in a district court, the petitioner must obtain permission from the appropriate court of appeals. The Committee Note should state this fact, not confuse the issue. Accordingly, the second to the last sentence in the Committee Note should simply read: "Section 2244(b) explicitly states that a second or successive petition must be first presented to the appropriate court of appeals for an order that authorizes the district court to consider the application."

Second, the Committee Note to Rule 9 following 28 U.S.C. § 2255 suffers from the identical infirmity discussed above regarding Rule 9 following 28 U.S.C. § 2254.

Third, Rule 6 following 28 U.S.C. § 2255 should be amended. Specifically, on line six the words "his discretion" should be replaced with the words "the judge's discretion" or alternate gender neutral language consistent with the gender neutral changes reflected on lines five and seven in the proposed amendments to Rule 3 following 28 U.S.C. § 2255 (from "his" to "the clerk's" and from "He" to "The clerk").

Thank you for considering our comments.

00-CR-059

Judy Krivit
01/30/2002 07:04 PM

To: SAllen3098@aol.com
cc:
Subject: Re: Habeas Rule 9(b)

Mr. Allen,

The proposed amendments to the habeas rules were deferred pending further study. A copy of your message is being sent to the chair of the subcommittee and the reporter for their consideration. The proposed amendments to the Habeas Corpus Rules should be published in August 2002 for comment.

Peter Mc Cabe

SAllen3098@aol.com

SAllen3098@aol.com
01/24/2002 12:30 PM

To: Rules_Comments@ao.uscourts.gov
cc:
Subject: Habeas Rule 9(b)

Mr. McCabe,

I'm not sure if its too late to comment, but I think I discovered a problem with the proposed amendment to sec.2255 Rule 9(b).

As they now stand, both sec. 2254 Rule 9(b) and sec. 2255 Rule 9(b) provide that claims that were in a previous petition or motion "may be dismissed." The proposed amendments delete this language.

With respect to state prisoners, section 2244(b)(1) provides that repetitive claims "shall be dismissed," so the amendment to sec. 2254 Rule 9(b) has no substantive effect. However, there is no corresponding provision in section 2255. Section 2255 does cross-reference to the certification procedures of section 2244 but not to the substantive provisions, so the proposed amendment appears to leave a gap for repetitive claims by federal prisoners.

I'm going to be responsible for updating a major treatise covering this issue if the proposed amendments go through, so I'd appreciate any guidance you could give me.

Sincerely,

Steven W. Allen
36 Birch Street
Jersey City, NJ 07305
(201) 432-7127

PS. I tried to submit this on the comment form on the website, but got an error message that my computer couldn't support the necessary cgi-bin script. I've used the form before using the same computer, so I'm not sure if the problem is with AOL or at your end.

AMENDMENT TO CIVIL RULE 81
TAKING EFFECT ON DECEMBER 1, 2002, ASSUMING SUPREME COURT APPROVES IT AND CONGRESS TAKES NO ACTION OTHERWISE

II C: Rule 81(a): Rules Governing Habeas Corpus

Rule 81. Applicability in General

(a) To What Proceedings Applicable.

* * * * *

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such

proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions. ~~The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days.~~

* * * * *

Committee Note

This amendment brings Rule 81(a)(2) into accord with the Rules governing § 2254 and § 2255 proceedings; those rules govern as well habeas corpus proceedings under § 2241. In its present form, Rule 81(a)(2) includes return-time provisions that are inconsistent with the provisions in the Rules Governing §§ 2254 and 2255. The inconsistency should be eliminated, and it is better that the time provisions continue to be set out in the other rules without duplication

in Rule 81. Rule 81 also directs that the writ be directed to the person having custody of the person detained. Similar directions exist in the § 2254 and § 2255 rules, providing additional detail for applicants subject to future custody. There is no need for partial duplication in Rule 81.

The provision that the Civil Rules apply to the extent that practice is not set forth in the § 2254 and § 2255 rules dovetails with the provisions in Rule 11 of the § 2254 Rules and Rule 12 of the § 2255 Rules.

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rule 12.2; Missing Sanction Provision**

DATE: **March 23, 2002**

In the attached memo, Mr. Roger Pauley, a former member of the Committee, notes that the version of Rule 12.2 forwarded to the Supreme Court does not include a provision for sanctions where the defense fails to disclose the results of a mental examination conducted by the defense's expert (s).

He believes the omission of a sanction provision was inadvertent and recommends that the Committee consider fixing the problem.

This item is on the agenda for the April meeting in Washington, D.C.

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

July 5, 2001

MEMORANDUM

To: Honorable W. Eugene Davis, Honorable Edward E. Carnes, Professor David A. Schlueter, and John Rabiej

From: Roger A. Pauley RAP

Re: Possible Error in Rule 12.2(d)

An AUSA's request for a copy of our pending substantive amendments to Rule 12.2 caused me to look anew at that rule, and in doing so I think I may have found an error, in the nature of a failure to conform, in Rule 12.2(d). I hasten to make clear that the error is of minor dimension and is not such as to merit delaying the progress of the amendments to the current rule (copies of which have already been requested by AUSAs handling capital cases and which I believe will be of immediate assistance), but may warrant fixing at a future time.

Rule 12.2(d) deals with the remedy for a "failure to comply" with the rule. As drafted, the pending version follows the existing rule in saying that the remedy of exclusion of the defendant's expert evidence on the issue of mental condition can be imposed in two instances: (1) if the defendant fails to give notice under Rule 12.2(b); and (2) if the defendant fails to "submit to an examination when ordered" under Rule 12.2(c). The pending version, however, omits to account for the fact that the (new) rule creates a further obligation of the defendant under Rule 12.2(c)(3), namely to disclose to the government the results of its expert's mental examination once the government, at the penalty phase in a capital case, has disclosed to the defendant the results of its expert's mental examination of the defendant. A court faced with a defendant who obstinately refused to make the required disclosure would assuredly have the remedy of contempt available, but whether or not, in the light of the specific conditions specified in Rule 12.2(d) for excluding the defendant's proffered expert testimony, the court would be able to employ the exclusion sanction is unclear.

I believe the Committee intended to apply Rule 12.2(d) in this circumstance and that the failure to do so was inadvertent. (I can recall no discussion of limiting the exclusion sanction so that it would not apply to a failure to disclose and cannot fathom a reason for such a limitation). Compare Rule 26.2(e)(sanction for defendant (or government) failing to comply with disclosure requirements includes striking of testimony). Accordingly, the Committee should consider rectifying this apparent error in the rule.

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 16; Proposed Amendment Regarding Discovery of Experts in Criminal Cases**

DATE: **March 22, 2002**

Attached is a letter from Mr. Carl Person, an attorney practicing in New York City. He recommends that Rule 16 be amended to require automatic disclosure of the identity of any government expert—in the same manner as currently exists in the civil rules. He notes that the requirement of automatic disclosure would assist counsel who prepares a § 2255 motion in determining whether the original counsel was derelict.

This matter is on the agenda for the April meeting.

Carl E. Person
Attorney at Law
325 W. 45th St. - Suite 201
New York NY 10036-3803
(212) 307-4444
Fax (212) 307-0247

June 16, 2001

Professor David Schlueter, Reporter
Criminal Rules Advisory Committee
St. Mary's University School of Law
One Camino Santa Maria
San Antonio, Texas 78228-8602
(210) 431-2212

Re: Matter for Criminal Rules Advisory Committee
Dear Prof. Schlueter:

I met Kenneth J. Withers, Research Associate (Federal Judicial Center) on a BNA panel (relating to discovery costs of data processing discovery) and raised with him the problem which I see (as an antitrust litigator, and as someone trying to go through a 28 USC 2255 proceeding for an obviously wrongfully-convicted defendant).

I spend much of my time in civil litigation dealing with experts, and obtaining discovery relating to defendants' experts, including documents upon which their opinions were based, other cases in which they were involved, and pre-trial depositions of the opponents' experts to try to establish matters for use at trial to impeach or disqualify the expert for various reasons.

The problem I see is that this level of discovery **guided by adversarial requests (in document requests, interrogatories, requests to admit, and depositions)** is not available to persons whose lives or years are on the line as criminal defendants, but is available for civil litigants trying to ward off a $10,000 liability.

I do not understand why the civil rules and practice relating to pre-trial discovery of experts is not granted to defendants.

I believe Rule 16(a)(1)(E) and 16(a)(2) of the criminal rules should be changed to permit the same discovery of experts (see FRE 702, 703, 706) (including government experts) as is permitted under the civil rules and decisions thereunder, and not just limit the defendant as the limitations are set forth in Rule 16(a)(1)(E) / 16(a)(2).

Also, the defendant today should be getting the expert disclosure automatically, without requesting it, to enable the attorney and defendant to see the evidence and evaluate it. I'm sure many cases would have come out differently if full disclosure of this evidence was mandated. The requirement of automatic disclosure would assist counsel who subsequently prepare 2255 motions, to show where the original counsel was derelict. When the original counsel fails to request this expert information, it probably is not obtainable subsequently to help in making a 2255 motion.

Also, there should be no exemption for government-employee experts - see 16(a)(2).

Anyway, I thought I would present this to you, for the purpose of trying to offset the huge

and growing advantage that the criminal prosecution has, which undoutedly results in the high rate of pleas, and convictions when cases go to trial, and the incarceration and related disenfranchisement of the poor and middle class.

The injustice being permitted by the present criminal rule 16(1)(a)(E) -- from the viewpoint of someone who has litigated under the civil rules for 30 years -- is unconscionable and should be reviewed by your group.

Many thanks for listening to me.

Carl E. Person
Member of the New York Bar

cc: <kwithers@fjc.gov <mailto:kwithers@fjc.gov>>
>

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rules 29, 33 & 34; Proposed Amendments re Rulings on Motions**

DATE: **March 28, 2002**

Attached is a letter from Judge Friedman asking that his proposal to consider amendments to Rules 29, 33, and 34 be placed on the agenda. His proposal was originally placed on the agenda for the Fall 2000 meeting in San Diego, but due to Judge Friedman's absence the matter was deferred until a later meeting.

As he notes in his letter, he will be preparing a more detailed memo about his concerns with the current language.

This item will be on the agenda for the April meeting in Washington, D.C.

United States District Court
for the District of Columbia
Washington, D.C. 20001

Chambers of
Paul L. Friedman
United States District Judge

March 22, 2002

The Honorable Edward E. Carnes
Chair, Advisory Committee on Criminal Rules
United States Circuit Judge
Frank M. Johnson, Jr. Federal Building
and Courthouse
15 Lee Street
Montgomery, AL 36104

Dear Ed:

A couple of years ago, I suggested as an agenda item for one of our meetings a consideration of Rules 29, 33 and 34 of the Federal Rules of Criminal Procedure relating to motions for judgment of acquittal, new trial and arrest of judgment. All of these rules require not only that a defendant move for an extension of time to file such motions within seven days after verdict but also that the trial judge must grant the motion for the extension of time within that seven-day period. It seemed to me then and still does that these rules work an injustice on defendants when judges themselves may be dilatory or, for example, are on vacation or ill. The matter was ultimately not discussed at the meeting for which it was scheduled because of my absence.

The purpose of this letter is to request that a discussion of those rules be put on the agenda for our April meeting if time permits and, if not, for a meeting as soon thereafter as possible. I will try to do a short memorandum of my concerns and suggestions as soon as possible.

Hope all is well with you. I look forward to seeing you in April.

Sincerely,

Paul L. Friedman

cc: John K. Rabiej
Professor David A. Schlueter

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposal to Amend Rule 32 to Clarify Time for Appeal Where Sentence Includes Restitution but Defers Determination of Amount to be Paid**

DATE: **March 22, 2002**

Attached is a letter from Judge D. Brock Hornby in which he proposes an amendment to Rule 32. He notes that the current rule does not address the finality issue for purposes of appeal in the situation where the sentence includes a provision for restitution but the amount is not specified until sometime after sentencing.

He recommends the addition of a provision that would specifically address that problem.

This matter is on the agenda for the April 2002 meeting.

United States Court of Appeals
For The Eleventh Circuit
15 LEE STREET
MONTGOMERY, ALABAMA 36104

ED CARNES
CIRCUIT JUDGE

TELEPHONE (334) 223-7132
FAX (334) 223-7676

March 19, 2002

Mr. John K. Rabiej
Chief, Rules Committee Support Office
Thurgood Marshall Fed. Judiciary Bldg.
One Columbus Circle, N.E.
Washington, DC 20544

Dear John:

Enclosed is a copy of a letter I received from Chief Judge Hornby of Maine. I know that you will eventually get a copy from Peter McCabe, but I wanted to get it to you now so that we can be sure to have it on the agenda for the next meeting.

Sincerely,

ED CARNES
United States Circuit Judge

EC:bb

Enclosure

c: Professor Dave Schlueter

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

D. BROCK HORNBY
CHIEF JUDGE

156 FEDERAL STREET
PORTLAND, MAINE 04101
(207) 780-3280

March 11, 2002

Hon. Edward E. Carnes
Chair, Advisory Committee on Criminal Rules
United States Court of Appeals for the Eleventh Circuit
Johnson Federal Building & Courthouse
15 Lee Street
Montgomery, AL 36104

Re: Federal Rule of Criminal Procedure 32

Dear Judge Carnes:

I am writing to suggest a revision to Federal Rule of Criminal Procedure 32. The rule should be amended to clarify the time at which a sentence imposing an order of restitution but reserving determination of the amount to be paid is final for purposes of filing an appeal.

When imposing sentence, the judge must inform the defendant of his or her right to appeal. Fed. R. Crim. P. 32(c)(5). The Federal Rules of Appellate Procedure allow the defendant ten days to appeal the court's judgment. Fed. R. App. P. 4(b)(1)(A)(i). Generally, if the defendant's sentence includes an order of restitution, the judge will order payment and determine the amount to be paid at the sentencing. This restitution order is final and appealable, even though it is subject to later correction. 18 U.S.C. § 3664(o). Sometimes, however, the victim's losses are not ascertainable by the time of sentencing. In that case, the court may order restitution as part of the sentence, but delay determination of the amount as much as ninety days. 18 U.S.C. § 3664(d)(5). Neither Rule 32 nor § 3664(o) answer the question: Is the sentence final when the sentence (with order of restitution) is imposed or when the amount of restitution is later determined?

I suggest that the following sentence be added to the text of Fed. R. Crim. P. 32(d)(1): "A sentence that includes an order of restitution is not a final judgment

until the amount of restitution has been determined." (The only alternative seems to be to make both events final orders.) Substantively, the revision would provide procedural certainty both to judges and, more importantly, to defendants affected by § 3664(d)(5) delays. Textually, specific mention of restitution in Rule 32(d)(1) is appropriate because restitution is already specifically mentioned in other provisions of the rule. Fed. R. Crim. P. 32(b)(1), 32(b)(4)(F). And, the Rules pronounce grounds for the finality of orders in other contexts. Fed. R. Crim. P. 32.2(b)(3).

Very truly yours,

D. Brock Hornby

dlh
cc: Peter G. McCabe, Secretary,
Committee on Rules of
Practice and Procedure

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Proposed Amendment to Rule 32.1

DATE: March 22, 2001

Judge Carnes has requested that the Committee consider the possible impact of the 11th Circuit's recommendation in *United States v. Frazier* (attached) that Rule 32.1 be amended to include the defendant's right to allocution. In that case the court concluded that current Rule 32.1 includes no such right and that it does not incorporate the right to allocution found in Rule 32.

This item is on the agenda for the April 2002 meeting in Washington, D.C.

United States Court of Appeals
For The Eleventh Circuit
15 LEE STREET
MONTGOMERY, ALABAMA 36104

ED CARNES
CIRCUIT JUDGE

TELEPHONE (334) 223-7132
FAX (334) 223-7676

March 15, 2002

Mr. John K. Rabiej
Chief, Rules Committee Support Office
Thurgood Marshall Fed. Judiciary Bldg.
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Amendment to Rule 32.1

Dear John:

Enclosed is a copy of an opinion from my court in United States v. Frazier, ___ F.3d ____ (11th Cir. Feb. 25, 2002). As you can see, the opinion suggests an amendment to Rule 32.1 with respect to allocution by the defendant at a proceeding to revoke supervised release. Please put this proposal on the agenda for consideration at our April meeting.

Sincerely,

ED CARNES
United States Circuit Judge

EC:bb

Enclosure

c: Dave Schlueter
Judge Wilson
Judge Hill
Judge Fay

UNITED STATES of America, Plaintiff–Appellee,

v.

Sidney Carl FRAZIER, a.k.a. Sydney Oliver, Defendant–Appellant.

No. 01–12880.

United States Court of Appeals, Eleventh Circuit.

Feb. 25, 2002.

Defendant appealed from a judgment of the United States District Court for the Northern District of Florida, No. 00-00024-CR-SPM-1, Stephan P. Mickle, J., revoking his term of supervised release and sentencing him to additional incarceration. The Court of Appeals held that defendant did not have the right to allocute upon resentencing for violating the terms of his supervised release.

Affirmed.

1. Criminal Law ⇐1042, 1181.5(8)

Where the defendant fails to make a timely objection, Court of Appeals reviews a district court's failure to address a defendant personally at sentencing for plain error; furthermore, court will remand only if manifest injustice results from the omission. Fed. Rules Cr.Proc.Rule 32, 18 U.S.C.A.

2. Sentencing and Punishment ⇐2308

Defendant did not have the right to allocute upon resentencing for violating the terms of his supervised release; however, given the importance of allocution, the better practice is for district courts to provide defendants with an opportunity to allocute prior to the imposition of a sentence based upon a violation of supervised release. Fed.Rules Cr.Proc.Rules 32(c)(3)(C), 32.1, 18 U.S.C.A.

Appeal from the United States District Court for the Northern District of Florida.

Before WILSON, HILL and FAY, Circuit Judges.

PER CURIAM:

Appellant Sidney Carl Frazier ("Frazier") appeals from the judgment of the district court revoking his term of supervised release and sentencing him to additional incarceration. Frazier argues that the district court erred by sentencing him for violating the terms of his supervised release without allowing him to allocute before imposing the sentence. Specifically, Frazier argues that the district court improperly denied him his right of allocution pursuant to Rule 32 of the Federal Rules of Criminal Procedure. We reject this argument and affirm.

Frazier was originally convicted of possessing counterfeit notes with the intent to defraud, in violation of 18 U.S.C. § 472. On February 18, 1998, the district court sentenced him to 15 months imprisonment followed by a three year term of supervised release. Under the conditions of the supervised release, Frazier was not to commit any federal, state or local crime.

Frazier began his term of supervised release on December 1, 1998. On April 14, 2000, the jurisdiction of his supervised release was transferred to the Northern District of Florida. On April 6, 2001, the probation officer, alleging a violation of a condition of his supervision, filed a Petition for Warrant for Offender Under Supervision. Specifically, the petition alleged that Frazier had

committed aggravated assault and battery.[1] On May 16, 2001, the district court, after conducting a hearing, found that Frazier had violated the terms of his supervised release and committed him to an additional 24 months incarceration. The record is clear that prior to sentencing the district court did not provide Frazier with an opportunity to personally address the court. Frazier made no objection at the time.

[1] Where the defendant fails to make a timely objection, we review a district court's failure to address a defendant personally at sentencing for plain error. *United States v. Gerrow,* 232 F.3d 831, 833 (11th Cir.2000), *rev'd on other grounds, United States v. Sanchez,* 269 F.3d 1250 (11th Cir.2001) (*en banc*). Further, this Court will remand only if "manifest injustice" results from the omission. *Gerrow,* 232 F.3d at 834 (quoting *United States v. Tamayo,* 80 F.3d 1514, 1521 (11th Cir.1996)). After reviewing the record, the parties briefs and the argument of counsel, we find no plain error.

[2] This Court has not yet addressed the question of whether a defendant has the right to allocute upon resentencing for violating the terms of his or her supervised release. Rule 32 of the Federal Rules of Criminal Procedure specifies the process by which a sentence and judgment are imposed upon a defendant following conviction. Rule 32(c)(3)(C) provides a party with the right to allocute, requiring a district court to, "address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence," before the court imposes a sentence. Fed.R.Crim.P. 32(c)(3)(C). Effective December 1, 1980, Rule 32.1 was added to the Federal Rules of Criminal Procedure. It is entitled "Revocation or Modification of Probation or Supervised Release," and provides, in part, that at a revocation hearing, a person shall be afforded:

> (A) written notice of the alleged violation;
>
> (B) disclosure of the evidence against the person;
>
> (C) an opportunity to appear and to present evidence in the person's own behalf;
>
> (D) the opportunity to question adverse witnesses; and
>
> (E) notice of the person's right to be represented by counsel.

Fed.R.Crim.P. 32.1(a)(2).

Appellant urges us to find that Rule 32.1 incorporates the provision of Rule 32 concerning the right of allocution. He bases his argument on the rationale used by several of our sister circuits which have held that the right of allocution in Rule 32 applies at supervised release revocation hearings. *See United States v. Patterson,* 128 F.3d 1259, 1261 (8th Cir.1997) (holding that Rule 32 provides a defendant with the right to allocute at supervised released revocation hearings); *United States v. Rodriguez,* 23 F.3d 919, 921 (5th Cir.1994) (same); *United States v. Carper,* 24 F.3d 1157, 1162 (9th Cir.1994) (same). Although we find these decisions reasonable, we find the conclusion of the Sixth Circuit in *United States v. Waters,* 158 F.3d 933 (6th Cir.1998), more persuasive.

The focus of the discussion before us is whether Rule 32.1 also incorporates the additional provisions of Rule 32 including, but not limited to, the right of allocution. We think

1. On February 24, 2001, Beverly Slappy filed charges against Frazier for assault and battery. Allegedly, Frazier punched Ms. Slappy in the head and threw her on the ground, punching and kicking her several times. Further, he threatened her with a tire iron and stole her money.

not. The appellant in *Waters* argued that the lower court erred by failing to provide him with an opportunity to allocute prior to sentencing for violating his supervised release. *See id.* at 942. In deciding that Rule 32.1 does not incorporate the provisions of Rule 32, the court noted that, "[Rule 32.1] is silent with respect to whether a defendant has a right to allocute before sentence is imposed at a revocation hearing." *Id.* at 943. The court concluded that the right of allocution specified in Rule 32 does not apply at supervised release revocation hearings. *See id.* at 944. Were we to hold that Rule 32.1 incorporates all of the provisions of Rule 32, the sentencing court would not only have to give the defendant a right to allocution, it would have to require presentence investigation reports along with all of the other demands of the rule. *See id.* In our opinion, this would render Rule 32.1 superfluous. However, given the importance of allocution, we agree that the better practice is for district courts to provide defendants with an opportunity to allocute prior to the imposition of a sentence based upon a violation of supervised release.

In suggesting this procedure we are mindful of what we did in *United States v. Eads*, 480 F.2d 131, 133 (5th Cir.1973).[2] In *Eads*, we *sua sponte* noted that the defendant was not given the right to allocute prior to sentencing at a revocation hearing which terminated his term of probation. *See id.* The Court, stressing the importance of the right to allocute and the fundamental nature of such in the process of imposing any sentence of incarceration, granted the appellant the right to allocute.

Although the right to allocution was granted to *Eads*, we recognize that a revocation of probation is different from the revocation of supervised release. *See Waters*, 158 F.3d at 943 (distinguishing sentencing for a violation of supervised release from a probation violation). We also note that Rule 32.1 was not in existence until 1980. Because Rule 32.1 is silent with respect to the right to allocute at a revocation hearing, and since *Eads* does not control our situation, there exists no legal requirement to grant a defendant the right to allocution at a revocation hearing for supervised release. Consequently, Frazier's rights were not violated; and thus, there is no error, plain or otherwise.

It does appear to us, however, that this question is one that should be addressed by the Advisory Committee on the Federal Rules of Criminal Procedure. The right of allocution seems both important and firmly embedded in our jurisprudence. We suspect that its omission from Rule 32.1 could be the result of a simple oversight.

In conclusion, the district court did not commit plain error in denying Frazier an opportunity to allocute prior to imposing the sentence because there presently exists no such requirement. Further, there was no manifest injustice that resulted from the omission. The judgment of the district court is affirmed.

AFFIRMED.

2. This Court adopted as binding precedent all decisions of the Fifth Circuit handed down prior to October 1, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*).

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendments to Rules of Criminal Procedure**

DATE: **March 23, 2002**

Attached is a memo from Hon. Roger Pauley setting out a number of areas and rules, which he believes deserve additional, or new, consideration by the Committee. As he notes in his memo, he is offering his personal views, and not those of the Department of Justice.

His proposals fall into several categories: First, he identifies several rules that may need to be amended to address international criminal activity—Rules 4, 5, 6, and 41. He notes that the Committee may wish to review all of the rules with the possibility of international application in mind.

Second, he observes that the development of DNA evidence may support another global review of the rules. For example, he raises a number of questions about whether the current rules would permit an indictment of a yet unknown defendant who can be identified only by DNA evidence, in order to toll the statute of limitations. Another example is the possible relationship between Rule 33 (New Trial) and the Innocence Protection Act.

Third, he identifies lingering issues that the Committee may wish to consider, i.e., the issue of intra-Departmental access to grand jury information for purposes of civil enforcement in Rule 6 and addressing the issue of equalizing the number of peremptory challenges in Rule 24.

Fourth, he suggests that the Committee reconsider the issue of whether the court in conducting a plea colloquy under Rule 11 should be required to apprise the defendant, who is an alien, about possible adverse immigration consequences following a guilty or nolo contendere plea.

Fifth, he offers additional views in support of adopting language (or a new rule) on the subject of covert searches and suggests that the Committee may wish to visit the issue of authorizing judges to issue warrants for persons or property "within or outside" the district.

Finally, he offers a list of miscellaneous matters that may deserve attention; whether to adopt a new general rule regarding waiver vis a vis consent; clarifying language in Rule 1 concerning the ability of a "judge" to act; and in Rule 16, extending the due

diligence requirement to the subsection dealing with disclosure of documents and tangible evidence.

These various proposals are on the agenda for the April meeting, for discussion.

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

November 20, 2001

MEMORANDUM TO: Honorable Edward E. Carnes and Professor David A. Schlueter

FROM: Roger A. Pauley

SUBJECT: Criminal Rules Agenda Suggestions

Attached please find a memorandum setting forth a number of ideas for possible amendments of the Federal Rules of Criminal Procedure. John Elwood, who will be assuming my former role of representing the Department on the Committee, had advised me before I sent it to John Rabiej some weeks ago that he had no objection to it provided it is clear (as stated in the first paragraph of the memo) that the views therein are strictly my own.

I hope that you will find some or all of the ideas worth pursuing, and I wish you a happy Thanksgiving and look forward to seeing you in the future.

November 1, 2001

TO: CRIMINAL RULES COMMITTEE

FROM: ROGER A. PAULEY

SUBJECT: SOME AGENDA SUGGESTIONS FOR THE FUTURE

As I end, at least for now, a more than quarter century of continuous association with the Committee on behalf of the Department of Justice, I wanted - in addition to expressing my profound gratitude for the unique opportunity afforded me to know and to work with you and your predecessors - to leave with you some parting thoughts about possible areas for future amendments of the rules. I remain interested in the rules, and in particular the operations of this Committee, and hope that one day I may again play a formal role.[1] The following represent purely personal observations and suggestions, not necessarily endorsed by the Department of Justice, and should be treated no differently from those any interested "outsider" might make.

I. Issues relating to crimes committed abroad.

Given the increasing internationalization of crime and the substantial presence of United States nationals living or traveling outside the United States at any one time, it makes sense to take a systematic look at the Criminal Rules to see whether adjustments are needed to address the fact that more and more violations of federal criminal laws are likely to occur outside the country. During the restylization process, the Committee did take a small step in this direction, by eliminating the limitation, found in Rule 4, that an arrest warrant be executable only within the United States. But other issues remain. For example, assuming probable cause, how would a prosecutor go about obtaining a search warrant, if deemed necessary or desirable, for a United States citizen's office or computer in a United States embassy in a foreign country or on a United States vessel on the high seas,[2] e.g., if the citizen was

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[1] As my new responsibilities as a judge on the Board of Immigration Appeals permit, I plan to attend the Committee's meetings as an observer, so may see you in the future.

[2] It is not clear that a warrant is ever required for a search outside the United States. The cases hold generally that only the Fourth Amendment's reasonableness requirement, not the Warrant Clause, applies to a search of a U.S. citizen conducted

believed to be engaged in espionage or drug trafficking? Rule 41 contemplates issuance of a search warrant only by a judge "within the district" where the property is located. Thus, no procedure exists for obtaining a search warrant abroad or outside the boundaries of a "district." More than a decade ago, the Committee developed an amendment to deal with warrants for foreign searches; it was approved by the Judicial Conference but the Supreme Court declined to send it forward to Congress.[3] While that particular proposal may have been problematic, the procedural lacuna it sought to address is an issue that merits reexamination, at the very least to vest authority in judges in a particular venue (e.g. in the District of Columbia or in the district where the investigation is pending) to issue a warrant when requested.

Another international issue concerns the sharing of grand jury information. Should Rule 6(e) be amended to allow a court to authorize, on some showing, the disclosure of grand jury information to authorities of a foreign country when that information is believed to include evidence of a violation of the foreign country's laws? The issue is a difficult and sensitive one, with many pros and cons. Our ability to work cooperatively with foreign nations may depend, in part, on our ability to share information, and some international agreements may indeed obligate the United States to do so. Notwithstanding the additional risk of improper disclosure or use of grand jury material associated with its disclosure to foreign government personnel who cannot easily be controlled by a federal court, it may be that circumstances exist when, balancing the respective interests,[4] such disclosure is appropriate. This issue too would

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by or on behalf of United States authorities. E.g., United States v. Juda, 46 F.3d 961, 968 (9th Cir. 1995)(search generally reasonable if it conforms to requirements of foreign law). But the term "United States" is nowhere defined in the Federal Rules of Criminal Procedure, compare 18 U.S.C. 5. Notably, Congress recently resolved a conflict in circuits by providing that a United States embassy is within the "special maritime and territorial jurisdiction of the United States." See section 804 of the USA Patriot Act of 2001, P.L. 107-56, effective October 26, 2001. Hence, an embassy, like certain other places within the special maritime and territorial jurisdiction, may be within the "United States" within the meaning of the rules, albeit not within any district.

[3]The proposal may be found at 124 F.R.D. 442-45 (1989).

[4]Those interests also include the countervailing consideration that an ability of a court to authorize such disclosure may bolster the claims of some foreign witnesses who

seem worthy of exploration.

Finally, the question arises whether to amend Rule 5 with respect to persons arrested abroad for extraterritorial jurisdiction crimes, in light of the recent enactment of the Military Extraterritorial Jurisdiction Act of 2000 (MEJA), 18 U.S.C. 3261 et seq. In that statute, Congress provided arrestees (usually civilians accompanying members of the armed forces) with a limited right to remain abroad and to have their initial appearance conducted by telephonic communication, unless a magistrate judge specifically orders the person returned to the United States. See 18 U.S.C. 3264 and 3265.[5] Congress evidently believed that, for persons who would not be subject to pretrial detention, it was an unnecessary hardship in many cases to compel the arrested person, who might be living abroad with his or her family, to return to the United States for the purposes of a brief initial appearance proceeding. But the statute has created a disparity, since there exist many other federal offenses with extraterritorial jurisdiction to which the special right created by Congress in MEJA does not apply and where the alleged perpetrator, who may be living abroad, must be brought forthwith to the United States under Rule 5 for the initial appearance. The Committee should therefore consider whether the procedural benefits accorded to MEJA arrestees should be extended to other Americans arrested outside the United States for offenses committed overseas.

These are but three potential areas for rules amendments relating to international matters. The Committee might want to review all the Criminal Rules with international application issues in mind.

II. DNA and related issues.

The recent development of DNA evidence suggests another area for Criminal Rules review, although some issues predate DNA. To illustrate, suppose a thoroughly disguised, black hooded bank robber leaves only a fingerprint at the scene by way of future identification, or scrapes his hand while exiting the bank to leave a DNA sample as the sole potential source of future identification. On the day before the expiration of the statute of limitations, a grand jury returns an indictment that references the fingerprint or DNA as the principal means of identification of the unnamed, indicted individual. A year later

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invoke the Fifth Amendment privilege on the ground of a fear of foreign prosecution.

[5]Congress enacted this aspect of MEJA over the opposition of the Departments of Defense and Justice.

a person is arrested on unrelated charges and found to have a matching fingerprint or DNA. Should the indictment be found to be valid? Would it be so found today?

Interestingly, Rule 4(c)(1) authorizes an arrest warrant that identifies the defendant, if the defendant's name is unknown, by "any name **or description** by which the defendant can be identified with reasonable certainty." (emphasis supplied). Although my research has revealed no cases involving fingerprint or DNA evidence utilized as a means of identification under Rule 4(c)(1),[6] the general principles set forth in the cases indicate that, given the existence of appropriate technology, a valid arrest warrant could issue that used fingerprint or DNA evidence as the means of identification in the scenarios described above. See, collecting most of the cases, United States v. Doe, 703 F.2d 745, 747-50 (3d Cir. 1983).

Rule 7, dealing with indictments, contains no comparable subdivision to Rule 4(c)(1), specifying the standard for identifying a person charged by indictment or information. In order to avoid litigation over whether a DNA-type method of identification is sufficient for purposes of Rule 7, and to clearly authorize such a method where the person's name is unknown, the Committee, if it approved the concept, could amend that rule to import language like that found in Rule 4(c)(1). A number of States have recently enacted provisions that allow indictments based on DNA identification, and others are considering such changes.

Another rule that is a candidate for amendment in light of DNA evidence is of course Rule 33 relating to motions for a new trial based on newly discovered evidence. The Committee fairly recently amended this rule to provide a straight three-year period from the date of plea or verdict for the making of such motions. But legislation is pending, the so-called Innocence Protection Act, that would in effect provide an open-ended exception to Rule 33's time limitation based on claims of innocence arising from newly discovered DNA evidence. The Committee should decide whether or not any exception to Rule 33 is warranted for DNA evidence,[7] and, at least from a prudential

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[6]This is not surprising since, absent a means of quickly matching a fingerprint or DNA sample to an existing database, an arresting officer will not be able to effect an arrest using this form of identification. But technology may advance to permit such instant checks so the question is not moot.

[7]Is DNA really different? Suppose, more than three years after verdict, all the identification witnesses against the

standpoint, whether to develop its own proposal as regards Rule 33 issues rather than abandon the field to Congress.

III. Old (and heretofore intractable) chestnuts.

Some issues that the Committee has attempted unsuccessfully to resolve in the past may deserve another try. One is the question of intra-Departmental access to grand jury information for purposes of civil enforcement. In the Sells Engineering case (463 U.S. 418), the Supreme Court ruled 5-4 that, under Rule 6(e), prosecutors could not disclose grand jury matters to their attorney colleagues in the Department for civil enforcement purposes without a court order. But, subsequently, the Court held in John Doe, Inc. I, 487 U.S. 102 (1987) that there was no prohibition under the rule for a prosecutor to **use** information he had derived from a grand jury investigation to pursue civil remedies (the rule bars disclosure, the Court said, not use). From one perspective, the upshot of these two rulings is that Rule 6(e) effectively penalizes the Attorney General and United States Attorneys with larger offices for organizing in a normally more efficient manner that separates attorneys handling criminal cases from those with civil enforcement responsibilities. Moreover, Sells Engineering frequently hinders the enforcement of complex civil investigations, by compelling Justice Department attorneys assigned solely to enforce statutes having civil penalties to replicate a lengthy grand jury investigation, e.g., into defense contractor fraud or environmental misconduct; sometimes this cannot be done consistent with civil limitations periods. The Department has estimated that tens of millions of dollars have been lost as a result of Sells Engineering. In addition, Congress has expressed its disagreement with Sells Engineering, as applicable in certain areas, by enacting 18 U.S.C. 3322, which overturns the result in Sells Engineering in two situations: the statute provides that no court order is needed for a prosecutor to share grand jury information with another Department of Justice attorney to enforce civil penalties under the banking or civil forfeiture laws.

The net effect of the Court's decisions and the enactment of

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defendant recant and, more, are convicted of perjury for their false testimony identifying him as the perpetrator. The defendant in that case would not be afforded a right under the pending legislation to file a Rule 33 motion. Rather, in the interests of finality, he would be relegated, as are all other similarly situated defendants, to seeking a pardon (or to a section 2255 motion if the Court ultimately determines that actual innocence is a constitutional basis for seeking the writ).

section 3322 is to create an inconsistent regime. While the Committee, in prior years, has twice rejected amendments of Rule 6(e) that would on a wholesale basis reverse the result in Sells Engineering, another look at the issue seems warranted in light of Congress's intervening action. In addition to again reviewing whether an amendment to overturn Sells Engineering altogether is appropriate, the Committee could opt to follow a more targeted approach that focuses on Congress's actions in enacting exceptions under 18 U.S.C. 3322. There is nothing to suggest that civil forfeiture and civil banking laws, albeit important, are any more significant, or require investigations typically any more complex, than several other civil statutes, such as the False Claims Act, which is used to enforce health care, defense contractor, and other fraud-against-the-government schemes. The Committee could determine to amend Rule 6(e) to create additional exceptions to Sells Engineering where the underlying civil statute is similar in nature to the banking fraud and forfeiture laws, while leaving the general rule of Sells Engineering in place. In short, the Committee should reconsider this area and attempt to arrive at a more defensible overall regime regarding the ability of the Department's attorneys to disclose grand jury information among themselves for legitimate civil enforcement purposes.

Another area where the current rule makes little sense but the Committee has been unable to make amendments is Rule 24 relating to peremptory challenges. The present system, in which each side in a misdemeanor or a capital case has an equal number of challenges (3 for misdemeanors; 20 for capital crimes), but in a non-capital felony case the defendant has 10 challenges while the prosecution has 6, defies rational explanation. The Committee has sought in the past to correct the imbalance in non-capital felony cases, once by increasing the government's challenges, and once by (inter alia) lowering the defendant's. Neither effort was successful, with the latter approach being further complicated by the insistence of the defense bar that, if the number of its peremptory challenges is to be reduced, the parties should be given a greater role in the conduct of voir dire examinations. Despite the previous failures, the Committee should try again to reach an accommodation that cures the rule's present irrationality.

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]

V. Unfinished (and new) business involving Rule 41.

The Committee labored long and hard to develop a proposed amendment to Rule 41 to establish procedures for obtaining warrants for covert observation-type searches, commonly referred to as sneak and peek searches. The amendments were published for comment but, after critical comment was received, the Committee decided at its last meeting against immediately pressing forward with the amendments and instead to reexamine them, both in light of the comments and to see whether, instead of the approach followed of attempting to incorporate procedures for covert searches into Rule 41, it made sense to develop a separate rule that would deal with other kinds of covert searches as well, specifically those involving the use of tracking devices. The Committee should carry on this effort, since success would significantly improve the rules and aid judges, prosecutors, and law enforcement officers in clarifying the procedures applicable to clandestine searches.

The criticisms of the published amendments generally fell into two categories. The first argued that the proposed rule's provisions for post-search notice, which generally followed the caselaw in providing for initial notice within 7 days after the search, unless the period was extended for good cause, were insufficient. The second criticism was that the amendments failed adequately to describe the particular species of covert observation search in question. The first criticism seems ill-taken, while the second may have validity.

Contrary to the comments, the rule's notice provisions were and are extremely generous. A brief background discussion is in order. The Supreme Court has never held or even so much as opined that post-search notice of a search in which property is **not** taken is required, nor has Rule 41 ever so required. Post-search notice seems never to have been regarded, by either the Founding Fathers or subsequent generations of jurists, as a core

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[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?"

element (if element at all) of the Fourth Amendment's privacy protections.[9] Indeed, the rule's present notice provisions, which are embodied in the requirement to leave a copy of the search warrant and an inventory, are really better described as mandating **"notice of seizure"** rather than "notice of search;" they apply only in the event property is seized during a search. Nothing in the rule has ever required that officers, who search pursuant to warrant but seize no property, must give notice of the fact that they and not some burglar, for example, were responsible for entering the premises and disturbing the contents in the course of a search.[10] Nor does the caselaw suggest that officers must, even if they could conduct a search with equal efficiency when the owner of the premises is present, do so at that time rather than wait to execute the warrant when no owner is present. The Court in West Covina v. Perkins, 525 U.S. 234 (1999) did say that due process requires that post-search notice be provided by law enforcement, but only where property is seized, so "the owner can pursue available remedies for its return." Id. At 240.[11]

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[9]The Fourth Amendment's important privacy interests have always been deemed protected by core requirements that must be met **before** a warrant is obtained and **during** its execution (but not by after-execution notice). For example, the requirements that the warrant be supported by probable cause, determined by a neutral magistrate, that the warrant describe the things to be searched for or seized with particularity, and that the search be conducted reasonably and pursuant to the warrant, all undergird the Constitutional guarantee against unreasonable searches. But no Supreme Court case, nor any historical treatise on the Fourth Amendment, has ever opined that post-search notice of a search in which no property is taken is an attribute of the interests protected by the Constitution.

[10]I believe it is the practice of federal law enforcement agencies to leave a copy of the warrant in these circumstances, so as to ease the owner's mind as to who entered the premises and for what purpose, but it is telling that the law has never compelled such post-search notice.

[11]Moreover Congress, in section 213 of the USA Patriot Act, P.L. 107-56, effective October 26, 2001, amended 18 U.S.C. 3103a to provide that any post-seizure notice required to be given following a search for evidence pursuant to warrant may be delayed for a reasonable period, on a showing of reasonable cause to believe that immediate notice would have an adverse consequence as defined in 18 U.S.C. 2705, and that the court may grant further such delays in notice "for good cause shown."

Moreover, the only statute, of all those that authorize searches, to require that notice of a search, as opposed to a seizure pursuant to a search, be given is the wiretap statute, 18 U.S.C. 2518(8)(d). That statute, which authorizes searches far more intrusive, and of far greater duration, than the "sneak and peek" searches at issue in the proposed amendment, requires the government to give post-search notice that a court-authorized wiretap was conducted, whether or not communications were intercepted. But unlike the 7-day post-search period that the proposed "sneak and peek" amendment would have mandated, the statute allows for up to **90** days after the wiretap prior to notice, and that period may be extended indefinitely by the court "in the interest of justice." In sum, the published rule's proposed 7-day post-search notice period was and is highly deferential to privacy interests, which have never regarded post-search notice as an essential attribute (if attribute at all) of the Fourth Amendment. In adopting the 7-day notice requirement created by two circuits out of whole cloth, the proposed rule indeed went far beyond what the Supreme Court is likely to require, if and when it considers the issue of such covert observation searches.

The criticism that the proposal failed adequately to define a "sneak and peek" search may, however, well be valid. The proposed rule's use of the phrase "on a noncontinuous basis" to describe a brief "sneak and peek" entry on premises for observation of the sort meant to be covered by the rule, may well be insufficient to distinguish other more invasive searches involving, e.g., the use of hidden cameras that are triggered by movement in a room. The Committee should reconstitute a subcommittee to see whether the published rule can be improved in this regard, and also to examine the intriguing suggestion that a separate rule be developed to deal more comprehensively with warrant procedures for covert searches whose object is not to seize property, including certain tracking device searches.

Lastly, the Committee may want to examine whether the amendment recently fashioned by Congress to Rule 41, permitting a magistrate judge in a domestic or international terrorism case "in any district in which activities related to the terrorism may have occurred" to issue a search warrant for a person or property "within or outside the district,"[12] should be extended

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[12]Section 219 of the USA Patriot Act, P.L. 107-56, effective October 26, 2001. Note that this amendment does not, however, permit issuance of a warrant where no activities have yet occurred "in a district" (e.g. a conspiracy abroad to commit a terrorism offense in the United States). See Part I of this memorandum.

to other categories of offenses.

VI. Miscellaneous minor matters.

Not surprisingly, certain relatively minor inconsistencies continue to exist in the rules, despite the yeoman efforts (which largely were successful) to address them during the restylization process. One area, which I have noted in the past and which threatens to generate needless litigation, concerns the joint issues of whether to include waiver language in a rule, and, if waiver-type language is inserted, whether to use the term "waiver" or another term such as "consent." The Criminal Rules are, as previous memos have pointed out, inconsistent in both these respects. The Committee should consider anew whether, e.g., to eliminate specific "waiver" provisions in favor of a general rule that all the rules are presumptively waivable unless expressly stated to the contrary, or, if the present system of selectively including waivers is followed, of adopting a more consistent practice as to when to include a waiver provision; and employing consistent terminology. Likewise, if the Committee means something different when it uses the word "consent" as opposed to "waiver," (e.g. that "consent" is less formal and, inter alia, need not be in writing or under oath and does not require that the person giving consent have been advised of his or her rights), thought should be given to including a definition of these terms that makes the distinction clear.

Another area where further attention may be warranted is Rule 1. The provision the Committee adopted to clarify that, when a rule authorizes a magistrate judge to act, "any" other judge may also act is literally inaccurate, although courts will probably have no trouble applying it correctly. The Committee does not really mean that "any" other judge may act (e.g. it does not mean that, if a magistrate judge in Iowa may act, a judge in Idaho may also do so); rather, it means that any other judge **with jurisdiction** over the area within which the magistrate judge could lawfully act, may also act. But to say that any other judge "with jurisdiction" may also act is to express a tautology. So perhaps another formulation, such as "any other *level* of judge" may act, would be an improvement.

Lastly in this minor/miscellaneous category, a seeming inconsistency exists in Rule 16. All the branches of 16(a)(1) that specify the types of information subject to disclosure, except one, contain a due diligence requirement applicable to the attorney for the government. That is, they require the government to disclose information in the government's possession not only that the prosecutor knows about but of whose existence he could become aware through the exercise of due

diligence. The sole exception is the subdivision dealing with documents and tangible objects. The reason, if any, for this disparity is unknown to me, but the lack of a due diligence provision in this branch of Rule 16 has been noted by the courts, and may sometimes require denial of a disclosure request notwithstanding, in effect, the prosecutor's negligence in failing to be aware of a document's existence. See generally, e.g., United States v. Gatto, 763 F.2d 1040, 1046-9 (9th Cir. 1985). Superficially at least, no justification for the absence of a due diligence requirement in this context is apparent, and the Committee may wish to explore whether to add one.

Best wishes to all.

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposal to Add Rule of Criminal Procedure Counterpart to Civil Rule 72**

DATE: **March 23, 2002**

Judge A. Wallace Tashima has recommended that the Committee give some thought to an issue discussed in *United States v. Abonce-Barerra*, 257 F.3d 959 (9th Cir. 2001) (attached).

In that case a magistrate judge had denied several defense requests for pretrial discovery. At trial, the district court agreed with that ruling and declined to change or reject the magistrate judge's ruling. On appeal, in response to the defense argument that the magistrate judge had erred in not requiring the requested discovery, the government argued that the defense had waived the issue by not formally filing an appeal of the magistrate judge's ruling with the district court. In rejecting the waiver argument, the court noted that the Criminal Rules are silent on that specific point and declined the government's invitation to use its supervisory powers to craft a new, specific rule concerning appeals of magistrate judges' decisions. Instead, it said, that matter is for the "rule-making process." *Id.* at 968.

The court noted, however, that both the 1st and 7th Circuits have concluded that a party is required to challenge the magistrate judge's decision on nondispositive matters before the district court in order to preserve a claim of error on appeal. *Id.* at 969.

This matter is on the agenda for the April meeting.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
125 SOUTH GRAND AVENUE
PO BOX 91510
PASADENA, CALIFORNIA 91109-1510

CHAMBERS OF
A. WALLACE TASHIMA
UNITED STATES CIRCUIT JUDGE

TEL: (626) 229-7373
FAX (626) 229-7457

August 31, 2001

Hon. Edward E. Carnes
United States Circuit Judge
Frank M. Johnson Courthouse
15 Lee Street
Montgomery, Alabama 36104

Re: Magistrate Judges in Criminal Cases

Dear Judge Carnes:

I pass along an item you may wish to consider adding to the list of things for the Criminal Rules Advisory Committee to look at.

Our circuit recently decided a case which expressly created an inter-circuit conflict on a matter within your Committee's jurisdiction. *See United States v. Abonce-Barerra*, 257 F.3d 959, 969, 2001 WL 817304, at **8 (9th Cir. Jul. 20, 2001) (recognizing that two other circuits have held to the contrary). The rule adopted by the Ninth Circuit is that, in criminal cases, as opposed to civil cases, parties are not required to appeal a magistrate's nondispositive, pretrial order to the district court in order to preserve the issue for appeal. The primary reason for this ruling is that, unlike Fed. R. Civ. P. 72(a), the Criminal Rules do not include a rule setting forth the procedure to be followed in criminal cases in raising objections to a magistrate's rulings on nondispositive matters.

Your Committee may wish to consider whether a counterpart to Civil Rule 72 should be adopted in the Criminal Rules. Finally, I note that, as you recall, Civil Rule 72 is now in the process of undergoing revision.

Sincerely,

A. Wallace Tashima

cc: Judge Scirica
Prof. Schlieter
Mr. Rabiej

Note: Sorry to be missing your next meeting.

257 F.3d 959
56 Fed. R. Evid Serv. 1179, 00 Cal. Daily Op. Serv. 6095, 2001 Daily Journal D.A.R. 7495
(Cite as: 257 F.3d 959)

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Jose ABONCE-BARRERA, Defendant-Appellant.

No. 99-10282.

Argued and Submitted Nov. 13, 2000
Filed July 20, 2001

Defendant was convicted by jury in the United States District Court for the Northern District of California, Ronald M. Whyte, J., of conspiracy to distribute methamphetamine, distribution of methamphetamine, and possession with intent to distribute methamphetamine. Defendant appealed. The Court of Appeals, Wallace, Circuit Judge, held that: (1) admission of transcriptions and English translations for recorded Spanish-language conversations was not abuse of discretion; (2) qualifying undercover agent who participated in recorded conversations as expert to testify about transcription and translation of tapes was not abuse of discretion or plain error; (3) defendant did not waive his ability to challenge magistrate judge's decision on scope of pretrial disclosure by failing to file appeal of magistrate judge's order to district court; (4) decision to withhold informant's identity prior to trial was not abuse of discretion; (5) defendant was not entitled to disclosure of federal agent's affidavit regarding informant or government's debriefing report on informant; and (6) government did not commit *Brady* disclosure violation when it failed to disclose informant's conviction for drunk driving.

Affirmed.

West Headnotes

[1] Criminal Law ⚿438.1
110k438.1

Admission of transcriptions and English translations for recorded Spanish- language conversations was not abuse of discretion where defendant had notice that transcriptions and translations would play key role and he would have opportunity to present competing versions at trial, court held pretrial hearings regarding qualifications of government's expert and accuracy of its transcriptions and translations, defendant was allowed to cross-examine government's expert, jurors were allowed to listen to tapes to detect problems with audibility and compare tapes to transcriptions, defendant presented expert to testify about government's transcription process, and defendant's two objections to translations that were not incorporated by government were brought to jury's attention.

[2] Criminal Law ⚿1153(1)
110k1153(1)

Where there is no dispute as to accuracy, Court of Appeals reviews for abuse of discretion the district court's decision to admit transcriptions of recorded conversations and their English translation and to allow the jury to take such exhibits into the jury room.

[3] Criminal Law ⚿1153(1)
110k1153(1)

Abuse of discretion was appropriate standard of review for challenge to admission of transcriptions and translations of recorded Spanish-language conversations when defendant made no effort on appeal to allege specific inaccuracies in transcriptions and their translation, leaving Court of Appeals with largely conclusory allegations of possible inaccuracy.

[4] Criminal Law ⚿1153(1)
110k1153(1)

Court of Appeals reviews district court's decision to allow the use of transcripts as an aid in listening to tape recordings for abuse of discretion.

[5] Criminal Law ⚿438.1
110k438.1

Recorded conversation is generally admissible unless the unintelligible portions are so substantial that the recording as a whole is untrustworthy.

[6] Criminal Law ⚿1134(3)
110k1134(3)

In reviewing challenge to admissibility of transcriptions

of tape-recorded conversations in the case of foreign language tapes, Court of Appeals reviews whether the following steps were taken to ensure the accuracy of the transcriptions and their translation: (1) whether the district court reviewed the transcriptions and translations for accuracy, (2) whether the defense counsel had the opportunity to highlight alleged inaccuracies and to introduce alternative versions, and (3) whether the jury was allowed to compare the transcript to the tape and hear counsel's arguments as to the meaning of the conversations; in this review, no single question is dispositive.

[7] Criminal Law ⚿481
110k481

[7] Criminal Law ⚿1036.6
110k1036.6

Qualifying undercover agent who participated in recorded Spanish-language conversations as expert to testify about transcription and translation of tapes was not abuse of discretion or plain error, even though agent had never before been qualified as expert and allegedly was biased due to his active participation in investigation of case, given agent's credentials with respect to his proficiency in Spanish language and experience with English-Spanish translations, opportunity which defendant was given to cross-examine agent as to any biases, and impeachment of agent's credibility as expert by defendant's expert, who testified as to inadvisability of having participant in conversation transcribe and translate that conversation. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[8] Criminal Law ⚿481
110k481

The determination of whether an expert witness has sufficient qualifications to testify is a matter within the district court's discretion. Fed.Rules Evid.Rule 702, 28 U.S.C A.

[9] Criminal Law ⚿472
110k472

When court considers the admissibility of testimony based on some "other specialized knowledge," rule governing admission of expert testimony generally is construed liberally. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[10] Criminal Law ⚿1036.6
110k1036.6

Defendant waived argument that government's proffered expert on transcription and translation of recorded Spanish-language conversations, as active participant in investigation of case, was incapable of providing unbiased opinion when defendant did not seek to disqualify expert from testifying due to alleged bias.

[11] Criminal Law ⚿1036.6
110k1036.6

Trial court's decision to qualify agent who was active participant in investigation of case to testify as expert on transcription and translation of recorded Spanish-language conversations could be reviewed for plain error.

[12] Criminal Law ⚿742(1)
110k742(1)

[12] Witnesses ⚿80
410k80

[12] Witnesses ⚿378
410k378

Generally, evidence of bias goes toward the credibility of a witness, not his competency to testify, and credibility is an issue for the jury.

[13] United States Magistrates ⚿31
394k31

Defendant did not waive his ability to challenge magistrate judge's decision on scope of pretrial disclosure by failing to file appeal of magistrate judge's order to the district court. 28 U.S.C.A. § 636(b)(1).

[14] Federal Courts ⚿523
170Bk523

Although Court of Appeals has supervisory power to formulate procedural rules, it may act only when there exists a clear basis in fact and law for doing so.

[15] Federal Courts ⚿1.1
170Bk1.1

Federal judiciary's supervisory power is a power it enjoys only concurrently with Congress, and over which Congress has the final say.

[16] Criminal Law ⚿1139
110k1139

Court of Appeals reviews alleged *Brady* violations de novo

[17] Criminal Law ⚿1148
110k1148

Court of Appeals reviews pretrial decision to withhold the identity of informant for an abuse of discretion.

[18] United States Magistrates ⚿21
394k21

Decision to withhold informant's identity prior to trial was not abuse of discretion where magistrate judge balanced extent to which pretrial disclosure would be helpful to defendant against government's interest in protecting informant, and assured himself that government would fulfill promise to provide defense with pretrial interview with informant and would disclose informant's identity at trial

[19] Criminal Law ⚿700(3)
110k700(3)

Defendant's statement that list of all cases on which informant had worked might have been useful was insufficient to establish that list was material and thus subject to disclosure pursuant to government's *Brady* disclosure obligations.

[20] Criminal Law ⚿627.6(5)
110k627.6(5)

[20] Criminal Law ⚿627.7(1)
110k627.7(1)

Defendant was not entitled to disclosure of federal agent's affidavit regarding informant or government's debriefing report on informant. Fed.Rules Cr.Proc.Rule 16(a)(2), 18 U.S.C.A.

[21] Criminal Law ⚿627.10(2.1)
110k627.10(2.1)

Finding that, on first day of trial and several days prior to day on which informant was to testify, government retained legitimate safety concerns over disclosure of identifying information other than informant's name, and thus was not required to provide defendant with unredacted materials about informant, was not abuse of discretion.

[22] Criminal Law ⚿700(4)
110k700(4)

Government did not commit *Brady* disclosure violation when it failed to disclose informant's conviction for drunk driving, inasmuch as defendant was aware of conviction and able to cross-examine informant about it at trial, government stipulated that it did not have record of drunk driving conviction, and informant's credibility was further damaged by conviction because jury was able to infer that informant lied to government regarding his criminal history.

***961** Laurie Kloster Gray, Esq., United States Attorney's Office, San Francisco, California, for the plaintiff-appellee.

Daniel G. Herns, Esq., Law Offices of Daniel G. Herns, San Jose, California, for the defendant-appellant.

Appeal from the United States District Court for the Northern District of California; Ronald M. Whyte, District Judge, Presiding. D.C. No. CR-98-20025-RMW.

Before: WALLACE, FISHER, and RAWLINSON, Circuit Judges.

WALLACE, Circuit Judge:

Jose Abonce-Barrera appeals from his convictions for conspiracy to distribute methamphetamine, in violation of 21 U.S.C. § 846; distribution of methamphetamine, in violation of 21 U.S.C. § 841(a)(1); and possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1) The district court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

***962** I

In January 1998, a Drug Enforcement Administration (DEA) informant contacted Martin Tapia, a known drug trafficker, to arrange for the purchase of thirty pounds of methamphetamine. Later, Tapia introduced the informant to Jose Padilla, who was to deliver the methamphetamine. DEA agents requested that the informant arrange for Padilla to provide a sample. The informant, undercover DEA agent Florentino Rosales, and Padilla met at a restaurant in San Jose, California (the first meeting). The DEA agent was wearing a body recording device, and the conversation took place in Spanish. At this meeting, Padilla explained that he did not have the sample with him. He made a call on his cellular telephone and then explained that the person who was supposed to bring the sample could not arrive for several hours. Another meeting was arranged for a later date.

The next meeting took place two days later (the second meeting). Padilla provided the informant with a sample, which he immediately gave to Rosales. Subsequently, the informant was told by DEA agents to finalize the details of the purchase of thirty pounds of methamphetamine. A week later, the informant, again wearing a body recording device, met Padilla at a gas station to complete the transaction (the third meeting) Padilla, however, did not have the methamphetamine. Approximately forty-five minutes later, Abonce-Barrera arrived. Abonce-Barrera gave the informant a sample; however, he stated that he had brought only five pounds of methamphetamine rather than the promised thirty pounds. Abonce-Barrera told the informant that he could deliver another ten pounds, but that he could not deliver the entire thirty pounds because he had other commitments. The meeting was broken off at this news.

Later that day, the informant was told to contact Padilla for the purpose of obtaining the five pounds of methamphetamine. The informant, Padilla, and Abonce-Barrera met again at the gas station (the fourth meeting). The informant, who was still wearing the recording device, and Abonce-Barrera got into the informant's truck. A short time later, the informant alerted the agents that the methamphetamine was present. Agents moved in, and Abonce- Barrera was arrested. The agents found four pounds of methamphetamine and a cellular telephone. The cellular telephone records revealed that Padilla had repeatedly called a pager number registered to Abonce-Barrera during the first meeting. The records also revealed that Padilla called this number repeatedly while waiting for the third party to bring the methamphetamine to the gas station.

During the trial, recordings from the first, third and fourth meetings provided key evidence of Abonce-Barrera's involvement. DEA agent Rosales, who was present at the first meeting, was qualified as an expert to testify at trial as to the transcription of the recordings and their translation into English. Each member of the jury was given a copy of both the verbatim Spanish transcriptions and the English translations of those transcriptions. In addition, the Spanish-language tapes were played for the jury, and the English translations were read to the jury.

II

[1] Abonce-Barrera makes several related arguments with respect to the transcription and translation of the Spanish language tapes. He contends that the district court failed to formulate "a just and practical method for the use of the body wire tapes." He asserts that he was not afforded sufficient time to review the government's ***963** transcriptions and translations and that the tapes were of such poor quality and the process of transcription so problematic that the district court should have ordered "the wholesale exclusion of the tapes or a continuance of the trial to attempt to fashion a better approach."

[2][3][4][5] Where there is no dispute as to accuracy, we review for abuse of discretion the district court's decision to admit the transcriptions and their English translation and to allow the jury to take such exhibits into the jury room. *United States v. Rrapi,* 175 F.3d 742, 746 (9th Cir.1999); *United States v. Fuentes-Montijo,* 68 F.3d 352, 354 (9th Cir.1995). Abonce-Barrera has made no effort on appeal to allege specific inaccuracies in the transcriptions and their translation. Because we are left "with largely conclusory allegations of possible inaccuracy," abuse of discretion is the proper standard. *United States v. Pena-Espinoza,* 47 F.3d 356, 359 (9th Cir.1995). We also review the district court's decision to allow the use of transcripts as an aid in listening to tape recordings for abuse of discretion. *Rrapi,* 175 F.3d at 746. " 'A recorded conversation is generally admissible unless the

unintelligible portions are so substantial that the recording as a whole is untrustworthy.' " *Id.,quoting United States v. Tisor,* 96 F.3d 370, 376 (9th Cir.1996).

[6] In the case of foreign language tapes, we review whether the following steps were taken to ensure the accuracy of the transcriptions and their translation: (1) whether the district court reviewed the transcriptions and translations for accuracy, (2) whether the defense counsel had the opportunity "to highlight alleged inaccuracies and to introduce alternative versions," and (3) whether "the jury was allowed to compare the transcript to the tape and hear counsel's arguments as to the meaning of the conversations." *Id.* No single question is dispositive. *See United States v. Armijo,* 5 F.3d 1229, 1234-35 (9th Cir.1993) (No abuse even where "the trial judge did not review the tape for accuracy because he was not fluent in Spanish and there was no agent involved in the conversation who could testify to its accuracy").

Six months before his trial, Abonce-Barrera entered into a stipulation with the government in which it was agreed that the government would provide Abonce-Barrera with successive drafts of its transcription and translation efforts on the condition that the draft versions could "not be used by either side as evidence in the case or to impeach the person or persons who helped prepare the transcription and translation or to impeach the accuracy of the final transcripts." The government provided drafts to the defense in July 1998, on December 21, 1998, on January 11, 1999, and on January 15, 1999. The start of trial was continued to January 26, 1999, to afford Abonce-Barrera the opportunity to review the final draft.

The stipulation also set forth procedures for ensuring that the translation at trial would be accurate, including a provision stating that "the defendants and defense counsel will provide to the United States copies of the transcriptions and translations prepared by the defense of those tape-recorded conversations that the defendants and defense counsel intend to use at trial." Thus, Abonce-Barrera was clearly on notice six months before trial that the transcriptions and translations of the tapes were going to play a key role in the prosecution and that he would have the opportunity to present competing transcriptions and translations at trial of the Spanish-language tapes.

The district court held hearings before trial regarding the qualifications of the government's expert and the accuracy of the government's transcripts and translations. At trial, Abonce-Barrera was given ***964** the opportunity, within the confines of the stipulation, to cross-examine the government's witness regarding the translations. The jurors were allowed to listen to the tapes to detect any problems with audibility and to compare the tapes to the transcriptions. Abonce-Barrera presented his own expert to testify about the transcription process employed by the government. Abonce-Barrera's argument that he had insufficient time to review the government's transcriptions and translations is further belied by the fact that Abonce-Barrera's counsel did bring to the government's attention several objections to the translations. All but two of the objections were incorporated by the government, and these two objections were brought to the attention of the jury at trial.

In light of the steps taken by the parties and the district court, we hold that the district court did not abuse its discretion in admitting the transcriptions and translations. The case before us is remarkably like *United States v. Franco,* 136 F.3d 622, 626 (9th Cir.1998), where

> [t]he district court gave the defendants abundant time to review the English- language transcripts and the tapes. It informed the defendants that, to the extent that they did not succeed in securing the government's consent to suggested corrections, they should submit competing translations of disputed passages. Although the defendants did succeed in making numerous agreed corrections, they submitted no competing translations. The district court accordingly was quite correct in concluding that the defendants had not placed the accuracy of the transcripts in issue.

III

[7][8][9] Abonce-Barrera also contends that DEA agent Rosales should not have been qualified by the district court as an expert in the translation and transcription of the Spanish-language tapes. Federal Rule of Evidence 702 provides that if "specialized knowledge will assist the trier of fact to understand the evidence ... a witness qualified as an expert by knowledge, skill, experience, training, or education,

may testify thereto in the form of an opinion or otherwise." "The determination whether an expert witness has sufficient qualifications to testify is a matter within the district court's discretion." *United States v. Garcia,* 7 F.3d 885, 889 (9th Cir.1993) (internal quotation omitted). Further, "in considering the admissibility of testimony based on some 'other specialized knowledge,' Rule 702 generally is construed liberally." *United States v. Hankey,* 203 F.3d 1160, 1168 (9th Cir.2000).

The district court conducted a pre-trial hearing at which Agent Rosales's qualifications were examined. Agent Rosales's native language is Spanish; he was born in Mexico and lived there until the age of fifteen. He had lived in the United States for twenty years and attended high school and college here. At college, Rosales took between twenty-four and thirty courses in Spanish and Latin American Studies. After being graduated from college, Rosales worked for a Chicago-based, nonprofit organization dedicated to counseling troubled Latino youth. His ability to translate and understand Spanish was an essential part of his job responsibilities. Rosales next worked as a certified social worker for the Illinois Department of Children and Family Services. This job required Rosales to utilize his abilities to translate between Spanish and English frequently. Spanish language proficiency was also a necessity for his job with the DEA: Rosales has been required to interview non-English speaking defendants, translate undercover work for other agents, monitor transmissions from undercover buys, and act as a translator in debriefing defendants. In addition, prior to joining the DEA, Rosales took a language proficiency test with the ***965** FBI and received one of the highest scores.

Abonce-Barrera asserts that these credentials are not sufficient to qualify Rosales as an expert in the transcription and translation of Spanish-language tapes. He points out that Rosales had never before been qualified as an expert. However, there is nothing in Rule 702 that requires an expert to have been previously qualified as an expert; such an approach would lead to absurd results.

[10][11][12] He also contends that Rosales, as an active participant in the investigation of this case, was incapable of providing an unbiased opinion. But Abonce-Barrera did not seek to disqualify Rosales from testifying in the district court because of his alleged bias, so that argument is waived. *See United States v. Cook,* 53 F.3d 1029, 1031 (9th Cir.1995). We may, however, review the trial court's decision for plain error. *United States v. Wilson,* 690 F.2d 1267, 1273-74 (9th Cir.1982). Generally, evidence of bias goes toward the credibility of a witness, not his competency to testify, and credibility is an issue for the jury. *See Gilbrook v. City of Westminster,* 177 F.3d 839, 856 (9th Cir.1999). Further, Abonce-Barrera had the opportunity to cross-examine Rosales fully about any biases, and Rosales's credibility as an expert was impeached by defendant's expert, who testified that it was inadvisable to have a participant to a conversation transcribe and translate that conversation. Although the government's use of a neutral expert would have obviated this problem,--and would probably have avoided much of the litigation dispute both in the district court and in this appeal--the trial court did not abuse its discretion or commit plain error in qualifying Rosales to testify about the transcription and translation of the Spanish- language tapes.

IV.

Abonce-Barrera's final contention is that his Sixth Amendment right to confront witnesses was violated because the government refused to provide complete information about the undercover informant.

A.

Prior to trial, Abonce-Barrera's co-defendant, Padilla, argued to the district court that he had not received all discoverable material about the informant. This nondispositive motion was referred to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A). In his memorandum in support of the motion, Padilla requested "disclosure of the informant," including the informant's identity and whereabouts, the informant's criminal record, any government notes and records of interviews with the informant, and "all forms of promises, inducements and/or deals between the government and its informant." Padilla urged that this information was necessary because the informant was "the sole percipient witness," Padilla could reasonably assert an entrapment defense, and Padilla would need impeachment material at trial. The government responded to Padilla's motion by stating "the Government has disclosed the informant's

compensation in this case, prior cooperation agreements with the Government but not related to this case, information regarding the informant's immigration status, and a redacted copy of the informant's criminal history report." The government refused to provide the informant's identity out of safety concerns and had provided only redacted materials. The government did, however, concede that the informant was a percipient witness and agreed to make the informant available for a pre-trial interview.

At the motion hearing held on January 15, 1999, Abonce Barrera asked to join in ***966** Padilla's motion, and this request was granted by the magistrate judge. The defense first argued that it was entitled to receive an affidavit prepared by Agent Rosales regarding the informant. The magistrate judge reviewed the affidavit and ordered it to be filed under seal. The defendants next asserted that, although the government had provided them with the informant's payment history, they were entitled to "a list of cases in which the informant has testified as a witness and that would correlate to the disclosure of the payments to the informant" in order to impeach the informant properly. The magistrate judge did not specifically address this argument. The defendants also requested a complete criminal history and an account of any pending litigation. The magistrate judge stated that they were entitled to such material and questioned the government's attorney, who replied that he was aware of only one conviction (for marijuana possession) and that there were no pending criminal charges. To this, defense counsel responded, "If the government's representing that that's the entirety of his criminal history, I have it."

In addition, the defense stated that it required additional supporting immigration documents, although it had received a "series of letters from an Assistant United States Attorney ... to representatives of the Immigration Service intervening in the informant's immigration proceedings." The court responded, "All you have to know is that he was subject to deportation and that he was not deported and that he's here." The defense then asked about its request for a debriefing report on the informant, any notes about the informant, and statements by the informant. The magistrate judge responded that the defense would be entitled to receive at trial any statements, as defined by the Jencks Act, made by the witness but that the government attorney's personal notes constituted privileged work product. Finally, the defense, after having withdrawn its request for the informant's address, argued that the government was required to provide the name of the informant. The magistrate judge ruled that the government had met its burden on the safety issue. In response, the defense asked, and received, leave to renew its motion on the identity issue at a later date. At the conclusion of the hearing, the magistrate judge said to the defense, "You're getting everything you asked for. You will get disclosure of the informant's identity at trial. That is customary ... I deny your motion because the government has voluntarily provided you with everything you're entitled to under the law. So for the record your motion is denied."

On the first day of trial, January 26, 1999, after the name of the informant had been disclosed, the defense renewed its request that "the court order the unredacted copies of what was provided in *Giglio* materials" because the government could no longer have any concern for the informant's safety. The government responded that the defense had agreed it was not entitled to the informant's address and that the defense had not specifically requested any other identifying information in the hearing before the magistrate judge. In addition, the government expressed continued concerns about the informant's safety. The district court judge agreed with the government and stated, "[T]he matter was heard by [the magistrate judge], who made a decision. It strikes me that the government has complied with that decision, and I don't think anything more should be ordered at this point. You have the name. I'm going to leave it as it is."

B.

On appeal, Abonce-Barrera first argues that the magistrate judge erred in refusing ***967** to order pre-trial disclosure of (1) the informant's identity, (2) a list of the cases on which the informant worked, (3) the affidavit prepared by Agent Rosales regarding the informant, and (4) the report on the debriefing of the informant. Abonce-Barrera asserts that, because of the lack of these materials, he was unable to impeach the informant properly at trial and he was "unduly restricted in his ability to investigate and/or develop an entrapment defense." The government responds that Abonce-Barrera has waived his ability to challenge the magistrate judge's decision on the scope of pre-trial disclosure because he failed to file an appeal of the magistrate judge's order to the district court.

1.

[13] With respect to nondispositive matters heard by a magistrate judge, the Magistrates Act provides:

> [A] judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

28 U.S.C. § 636(b)(1)(A). The Magistrates Act contains "[n]o specific procedures or timetables for raising objections to the magistrate's rulings on nondispositive matters." Fed.R.Civ.P. 72(a) advisory committee's note. In the civil context, Federal Rule of Civil Procedure 72(a) (Civil Rule 72(a)) was enacted to "avoid uncertainty and provide uniformity." *Id.* This rule provides, "Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made." No counterpart to Civil Rule 72(a) exists in the Federal Rules of Criminal Procedure.

In *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174-76 & n. 1 (9th Cir.1996), we held that failure to appeal to the district court a magistrate judge's order on a nondispositive matter in accordance with Civil Rule 72(a) resulted in forfeiture of appellate review of the order. To reach this result, we relied on Civil Rule 72(a) and on *Thomas v. Arn*, 474 U.S. 140, 146, 106 S Ct. 466, 88 L.Ed.2d 435 (1985), in which the Supreme Court approved the Sixth Circuit's use of its supervisory powers to create a rule whereby a party waived appellate review of a magistrate judge's *dispositive* orders under 28 U.S.C. § 636(b)(1)(B) by failing to appeal those orders to the district court. *See Simpson*, 77 F.3d at 1174-76.

[14][15] The government urges us to extend our holding in *Simpson* to the criminal context and require criminal defendants to comply with Civil Rule 72(a) in order to preserve appellate review of a magistrate judge's ruling on a nondispositive motion. We have emphasized, however, that our supervisory authority is limited. *See United States v. Tucker*, 8 F.3d 673, 674 (9th Cir.1993) (en banc) ("[T]he circumstances under which we may exercise [supervisory] power are substantially limited."); *United States v. Gatto*, 763 F.2d 1040, 1045 (9th Cir.1985). Although we have supervisory power to formulate procedural rules, we may act only when there exists "a clear basis in fact and law for doing so." *Gatto*, 763 F.2d at 1046 (internal quotations omitted). Further, ***968** "the federal judiciary's supervisory power is a power it enjoys only concurrently with Congress, and over which Congress has the final say." *Id.*; *see also Carlisle v. United States*, 517 U.S. 416, 426, 116 S.Ct. 1460, 134 L.Ed.2d 613 (1996) (supervisory power "does not include the power to develop rules that circumvent or conflict with" the Constitution, federal statutes, or federal rules of procedure). In the present case, several considerations lead us to hold that the requisite "clear basis in fact and law" for adopting, with our supervisory authority, the government's proposed rule is absent.

First, we must deal with whether we are controlled by *Simpson* 's language. In holding that objections to a magistrate judge's ruling on a nondispositive issue must be filed with the district court to preserve appellate review, *Simpson* heavily relied on the fact that Civil Rule 72(a) was amended in 1991 to prohibit "an aggrieved party who fails to object within the ten-day period from later 'assigning as error a defect in the magistrate judge's order.' " 77 F.3d 1170, 1173-74 (9th Cir.1996) (internal citation omitted). *Simpson* was a civil case and its holding only extends to the civil context. As already mentioned, the Federal Rules of Criminal Procedure contain no counterpart to Civil Rule 72(a). In addition, although prior to *Simpson* our case law was inconsistent, there was no inconsistency among *criminal* cases, and the *criminal* case closest in time to *Simpson* held that defendants were not required to file objections in the district court to preserve appellate review of a magistrate judge's ruling on a nondispositive matter. *United States v. Bogard*, 846 F.2d 563, 567 n. 2 (9th Cir 1988). Because *Simpson* dealt only with civil discovery, any effort to change *criminal* case law would necessarily be nonbinding dicta. Indeed, *Simpson* entirely failed to explain how a

rule of *civil* procedure could accomplish such a task. *See Simpson,* 77 F.3d at 1174. If a rule like Civil Rule 72(a) should be adopted in criminal discovery, we believe the normal rule-making process should be employed.

Second, the absence of a criminal counterpart to Civil Rule 72(a) is of further significance because of the way the Magistrates Act distinguishes between nondispositive matters under 28 U.S.C. § 636(b)(1)(A) and dispositive matters heard pursuant to 28 U.S.C. § 636(b)(1)(B). With respect to dispositive motions, the Magistrates Act provides, "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. 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.*" *Id.* § 636(b)(1)(C) (emphasis added). Thus, as to *dispositive* matters in both the civil and criminal context, there is in place a formal procedure, akin to Civil Rule 72(a), to which parties must adhere in order to have their objections heard by the district court. As to nondispositive matters, the Magistrates Act provides only that the district court "may reconsider any pretrial matter ... where it has been shown that the magistrate's order is *clearly erroneous* or *contrary to law.*" *Id.* § 636(b)(1)(A) (emphasis added). There is no formal procedure specified for review of a nondispositive order by the district court. The Magistrates Act thus treats them differently. Further, the Magistrates Act's specification that nondispositive matters are to be reviewed by the district court under a far more deferential standard-"clearly erroneous" and "contrary to law"-than dispositive matters indicates that decisions by the magistrate judge on nondispositive matters are essentially "final decisions of the district court which may be appealed in due course with ***969** other issues." *United States v. Brown,* 79 F.3d 1499, 1504 (7th Cir.1996) (stating but then rejecting this proposition without further discussion); *see also Arn,* 474 U.S. at 151 n. 10, 106 S.Ct. 466 (indicating that Congress "clearly intended [a magistrate judge's ruling on a nondispositive motion] to be final unless a judge of the court exercises his ultimate authority to reconsider the magistrate's determination." (internal quotations omitted)).

Finally, the Federal Rules of Criminal Procedure do contain a provision specifying how requests for discovery are to proceed before the district court. Federal Rule of Criminal Procedure 12(b)(4) states that "[r]equests for discovery under Rule 16" "must be raised prior to trial." Abonce- Barrera timely made his pre-trial request for the discovery of materials regarding the informant, and at trial he renewed that request as to identifying information. In hearing the motion on this nondispositive discovery matter, the magistrate judge acted as the agent of, and not merely an assistant to, the district judge. As discussed above, the text of the Magistrates Act suggests that the magistrate judge's decision in such nondispositive matters is entitled to great deference by the district court. We will not exercise our supervisory authority to break apart this unity of identity between the district court and the magistrate judge absent clear indication from Congress to the contrary. We recognize that two of our sister circuits, the Seventh and the First, have held that a party in a criminal case is required to challenge a magistrate judge's decision on nondispositive matters before the district court in order to seek appellate review of the magistrate judge's order. *See Brown,* 79 F.3d at 1503-04 (7th Cir.); *United States v. Akinola,* 985 F.2d 1105, 1108-09 (1st Cir.1993). In both cases, however, our sister circuits failed to confront the implications of the text of the Magistrates Act and the absence of a counterpart to Civil Rule 72(a) in the Federal Rules of Criminal Procedure.

We now turn to the merits of the magistrate judge's discovery orders.

2.

[16][17] We review alleged *Brady* violations de novo. *United States v. Manning,* 56 F.3d 1188, 1197-98 (9th Cir.1995). We review the pre- trial decision to withhold the identity of the informant for an abuse of discretion. *United States v. Spires,* 3 F.3d 1234, 1238 (9th Cir.1993).

[18] We are satisfied that the magistrate judge did not abuse his discretion in withholding the identity of the informant before trial. The magistrate judge balanced the extent to which pre-trial disclosure would be helpful to the defendant and the government's interest in protecting the informant. *See id.* In addition, the magistrate judge assured himself that the government

would fulfill its promise to provide the defense with a pre-trial interview with the informant and that the government would disclose the informant's identity at trial.

[19] Abonce-Barrera also asserts that the magistrate judge erred in failing to require the production of a list of all the cases on which the informant worked. Abonce-Barrera has failed, however, to show how such a list would be material under *Brady*. *See Kyles v. Whitley*, 514 U.S. 419, 434-38, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *Manning*, 56 F.3d at 1198 ("Evidence is material for *Brady* purposes only if there is a reasonable probability that, had it been disclosed to the defense, the result of the proceeding would have been different."). In *United States v. Flores*, 540 F.2d 432 (9th Cir.1976), we held that a request "to disclose the names and numbers of the prior cases in which the informant [ ] had testified on behalf of ***970** the government" was not material based only on "a hunch" that the informant may have tampered with evidence in other cases. *Id.* at 437-38. Similarly, Abonce-Barrera has offered nothing to support his proposed fishing expedition beyond stating that it might have been useful. *See also United States v. Cutler*, 806 F.2d 933, 935 (9th Cir.1986) (holding that additional detailed information about a previous unrelated investigation involving an informant could be withheld after balancing the government's interest in insuring the informant's safety)

[20] Abonce-Barrera's insistence that he should have been provided with both the affidavit regarding the informant prepared by Agent Rosales and the debriefing report on the informant is also ill-founded. Federal Rule of Criminal Procedure 16(a)(2) provides that, apart from certain exceptions not applicable here, "discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case" is not authorized. *See Flores*, 540 F.2d at 438 ("*Brady* does not create any pre- trial discovery privileges not contained in the Federal Rules of Criminal Procedure."). Abonce-Barrera has not asserted on appeal that there was any violation of the Jencks Act, 18 U.S.C. § 3500 (governing the discovery or inspection of statements made by government witnesses or prospective government witnesses).

C.

[21] Abonce-Barrera also raises two alleged *Brady* errors with respect to the informant which took place at trial. First, he asserts that even if pre-trial withholding of the informant's identity was appropriate, he should have received unredacted materials from the government once the informant's name was disclosed at trial. However, this renewed request for unredacted materials came on the first day of trial, several days before the informant was actually to testify. The district court did not abuse its discretion in finding that the government still retained legitimate safety concerns over the disclosure of other identifying information. *Spires*, 3 F.3d at 1238. Further, the defense expressly withdrew its request for a present address during the hearing before the magistrate judge.

[22] The final error Abonce-Barrera alleges is that a "conviction for drunk driving was intentionally or inadvertently withheld from the defense." *See id.* The trial transcript shows, however, that the defense was aware of this conviction and was able to cross-examine the informant about it at trial. *See United States v. Aichele*, 941 F.2d 761, 764 (9th Cir.1991) ("When a defendant has the opportunity to present impeaching evidence to the jury ... there is no prejudice in the preparation of his defense."). In addition, the government stipulated that it did not have a record of the drunk driving conviction. Thus, the informant's credibility was further damaged because the jury was able to infer that the informant had lied to the government about his criminal history. *See United States v. Bernal-Obeso*, 989 F.2d 331, 336 (9th Cir.1993) (holding that a lie by defendant to government regarding his past criminal history was exculpatory material under *Brady*). There is no indication, unlike in *Bernal-Obeso*, that this drunk-driving conviction was the "tip of an iceberg of other evidence that should have been revealed." *Id.* at 333 (internal quotation omitted).

AFFIRMED.

END OF DOCUMENT

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Committee Review of Proposed Model Local Rule for Electronic Filing**

DATE: **March 23, 2002**

As noted in Mr. Rabiej's attached memo, last year, a subcommittee of the Committee on Court Administration and Management (CACM) developed a model local rule for accepting electronic filings in civil cases. The Judicial Conference ultimately approved that rule.

Now it appears that some courts will be able to accept electronic filings in criminal cases in the very near future. The chair of CACM, Judge John Koeltl (S.D.N.Y) has offered suggested changes to the existing model local rule to accommodate criminal cases. The revised rule was forwarded to Judge Fitzwater, chair of the Technology Subcommittee of the Committee on Rules of Practice and Procedure who in turn has asked the members of that subcommittee to review the attached draft and offer any comments or suggestions to Judge Koeltl.

In the anticipation that a model local rule will be submitted, eventually, to the Judicial Conference, the Committee should review the enclosed draft and be prepared to offer its views, suggestions, or comments on the proposed rule.

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

CHAIRS OF ADVISORY COMMITTEES

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BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

March 29, 2002

MEMORANDUM TO JUDGE EDWARD CARNES

SUBJECT: *Electronic Filing of Criminal Cases*

The Standing Committee's Subcommittee on Technology has been asked to review and comment on revisions that Judge John Koeltl (S.D.N.Y.) has made to the draft Model Local District Court Rules for Electronic Case Filing to address electronic filing in criminal cases. We have also been asked to send our comments to the Criminal Rules Advisory Committee. Judge Koeltl has led the work on the model local electronic filing rules for the Committee on Court Administration and Case Management. We hope you will find these comments helpful in reaching your own conclusions about any suggestions that should be sent from your committee to Judge Koeltl.

Judge Koeltl is recommending that the model local rules, as revised, be restyled as preliminary guidelines and made available to those courts that are preparing to accept electronic filing of criminal cases. It is contemplated that a formal set of model local rules will be prepared and submitted to the Judicial Conference for its approval after sufficient experience with criminal case electronic filings has been acquired. We suggest, at a general level of review, that courts now planning to prescribe local rules governing electronic filing in criminal cases be advised that such rules be adopted as a separate set of rules rather than be combined with civil rules. This will facilitate the "uniform numbering" that is required by national rule, and it will also make it easier to tailor the rules to address issues that are particular to criminal cases.

Judge Koeltl's draft uses the civil model rules as a starting point. Although the model rules appear well-suited for most civil cases, we think your committee may wish to consider other rule issues that are more pertinent to criminal cases but that are not necessarily made apparent when the civil rules are used as a foundational structure. One issue we have identified relates to treatment of signatures on electronic documents. The model local rules were developed for use in civil cases; they provide that electronically filed documents signed by someone other than the attorney filing the document (*e.g.*, an affidavit) should use a notation (such as "/s/") to indicate that the original was signed, and a signed paper copy is to be kept by the filing attorney for some designated period of time (Model Rules 7, 8). Because the role of the attorney in a criminal case is somewhat different in that the attorney cannot in some instances bind the client

based on the attorney's signature alone, there are likely to be more documents signed by non-attorneys (*e.g.*, defendants) filed in criminal proceedings. There may be greater concerns about retention of documents by counsel in criminal cases. And, there may be a greater likelihood that the signature could become an issue in collateral proceedings. We feel the issue of how signatures of non-attorneys on electronically filed documents in criminal cases should be handled warrants additional consideration.

There may be other issues that will require modifications to the proposed electronic filing rules for criminal cases, and the expertise and input of your committee will provide valuable assistance in that process.

If you have any questions concerning these comments, please do not hesitate to contact me.

Sidney A. Fitzwater

cc: Honorable Anthony J. Scirica
Professor Daniel J. Capra
Peter G. McCabe, Secretary

March 6, 2002

MEMORANDUM TO JUDGE SIDNEY A. FITZWATER

SUBJECT: *Guidance to Courts on Electronic Filing of Criminal Cases*

Last year, a set of model local rules for electronic filing of civil cases was approved by the Judicial Conference. They were developed by a subcommittee of the Committee on Court Administration and Case Management (CACM) chaired by Judge John Koeltl (S.D.N.Y.), which included Gene Lafitte and Professor Capra as liaisons from the rules committees.

The model local rules were largely derived from local rules and procedures used by courts with experience accepting electronic filing of civil cases. Electronic filing of criminal cases will begin to be made available in some courts in the next several months. Judge Koeltl believes that these courts should be given timely guidance. He has reviewed the model local rules governing electronic filing of civil cases, and he has tentatively concluded that they seem, with some revision, to apply equally as well to criminal cases. He believes that these revised rules will serve as useful preliminary guidance to the courts implementing Case Management/Electronic Case Filing (CM/ECF) in criminal cases.

I have attached a copy of the model local rules governing electronic filing of civil cases as revised by Judge Koeltl to handle electronic filing of criminal cases. The changes are modest, although they do include changes to reflect the Judicial Conference's recently adopted policy on privacy and public access to electronic files. These revised model local rules represent a work-in-progress and are subject to change. They will be made available as preliminary guidance to the small number of courts that are beginning to accept electronic filing of criminal cases. It is expected that the rules will be refined as we acquire experience with electronic filing of criminal cases, at which time a formal set of model local rules will be finalized and recommended to the Judicial Conference for approval.

A copy of the revised rules will be circulated to the Advisory Committee on Criminal rules for comment as part of their agenda at their April 25-26 meeting. It may make sense for your subcommittee to review Judge Koeltl's edited rules and provide comment on them to the advisory committee before it meets to facilitate their deliberations. In particular, at this time we need to: (1) review the specific edits made by Judge Koeltl, and (2) determine whether there are

other issues either not addressed by the existing model local rules or that should be handled differently in the criminal-case context, e.g., treatment of electronic signatures of defendants and third parties and document retention. If you agree, I can send out Judge Koeltl's revised rules to the entire Technology Subcommittee asking them to review it by Monday, March 25. That would give us time to include the subcommittee's recommendations in the mailing of the advisory committee's agenda materials.

In the coming months I will update you with information on the experiences of courts accepting electronic filing of criminal cases. In addition, an AO working group is considering the issues arising from electronic filing of criminal cases, and their report may also shed more light on these issues. It is likely that later this year, we will be invited to comment on a revised set of model local rules governing electronic filing of criminal cases for formal submission to the Judicial Conference.

Please call me or Nancy Miller, Co-Project CM/ECF manager, if you want to discuss any of this material further.

John K. Rabiej

cc: Honorable Anthony J. Scirica (with attach.)
Honorable Ed Carnes (with attach.)
Honorable John Koeltl (with attach.)
Professor David A. Schlueter (with attach.)
Professor Daniel R. Capra (with attach.)
Peter G. McCabe, Secretary (with attach.)
Abel Mattos (with attach.)
Nancy Miller (with attach.)

Model Local District Court Rules for Electronic Case Filing

Proposed revisions to address filing in criminal cases

Approved by the Judicial Conference of the United States

~~**September 2001**~~
March 2002

Introduction

Because most existing court rules and procedures have been designed with paper court documents in mind, some modifications are needed to address issues arising when court documents are filed in electronic form. This set of model local rules has been developed for federal district and bankruptcy courts implementing the electronic case filing capabilities of the federal judiciary's Case Management/Electronic Case Files (CM/ECF) Project, and can be adapted by courts that offer some other method of electronic filing of court documents.

The model was compiled by a subcommittee of the Court Administration and Case Management Committee that included as members representatives from the Committee on Automation and Technology and the Committee on Rules of Practice and Procedure. The subcommittee reviewed the rules and procedures for electronic filing developed in the CM/ECF prototype district and bankruptcy courts. It also undertook an informal survey of those courts to find out how well those procedures operated. The information indicated general satisfaction with courts' existing procedures. There was also general agreement that it was essential to include the bar in the process of developing and modifying the local procedures governing electronic filing.

This set of model local rules for electronic case filing is based to a significant extent on the procedures used in courts that served as prototype courts for the federal judiciary's CM/ECF Project. There are separate sets of model local rules for district courts and bankruptcy courts. They use the same terminology and are identical to the extent possible and appropriate. Courts are free to adapt the provisions of these model local rules as they choose.

The Federal Rules of Procedure (Civil Rule 5(e), Bankruptcy Rules 5005, 7005 and 8008) provide that a court may "by local rule" permit filing, signing and verification of documents by electronic means. The Federal Rules of Criminal Procedure provide that service upon the attorney or upon a party shall be made in the manner provided in civil actions. (Criminal Rule 49(b)), and that papers shall be filed in the manner provided in civil actions (Criminal Rule 49 (d)). The Federal Rules of Criminal Procedure also authorize each district court to make and amend rules governing its practice. (Criminal Rule 57(a)(1)) Thus, each court that intends to allow electronic filing should have at least a general authorizing provision in its local rules.[1] The model rules developed here may be used either as a set of local rules, or as the contents for a general order or other administrative procedures. The use of local rules promotes the requirements of the Rules Enabling Act, provides better public notice of applicable procedures, and allows for input from the bar. On the other hand, use of general orders gives courts more

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[1] An example of a local rule authorizing electronic filing is as follows:

The court will accept for filing documents submitted, signed or verified by electronic means that comply with procedures established by the court.

flexibility to modify requirements and rules in response to changing circumstances. If local rules are used, it should be noted that Fed.R.Civ.P. 83, Fed. R.Crim.P. 57(a)(1), Fed.R.Bankr.P. 9029 and related Judicial Conference policy require that rule numbering conform to the numbering system of the Federal Rules. The model rules could be added as a group to local rules corresponding to Fed.R.Civ.P. 5 or 83.

Note: These model procedures use the term "Electronic Filing System" to refer to the court's system that receives documents filed in electronic form. The term "Filing User" is used to refer to those who have a court-issued log-in and password to file documents electronically.

Rule 1– Scope of Electronic Filing

The court will designate which cases will be assigned to the Electronic Filing System. Except as expressly provided and in exceptional circumstances preventing a Filing User from filing electronically, all petitions, motions, memoranda of law, or other pleadings and documents required to be filed with the court in connection with a case assigned to the Electronic Filing System must be electronically filed.

The filing of the initial papers, including the complaint and the issuance and service of the summons in a civil case, and the indictment or information in a criminal case, will be accomplished in the traditional manner on paper rather than electronically. In a case assigned to the Electronic Filing System after it has been opened, parties must promptly provide the clerk with electronic copies of all documents previously provided in paper form. All subsequent documents must be filed electronically except as provided in these rules or as ordered by the court.

Notwithstanding the foregoing, attorneys and others who are not Filing Users in the Electronic Filing System are not required to electronically file pleadings and other papers in a case assigned to the System. Once registered, a Filing User may withdraw from participation in the Electronic Filing System by providing the clerk's office with written notice of the withdrawal.

Derivation

The first and third paragraphs of the Model Rule are derived from the Southern District of California Bankruptcy procedures, with the exception of the last sentence of the third paragraph, which is derived from the Eastern District of Virginia Bankruptcy procedures. The second paragraph is adapted from the Northern District of Ohio procedures.

Commentary

1. The Model Rule provides that the court will designate which cases will be assigned to the electronic filing system. It also establishes a presumption that all documents filed in cases assigned to the electronic filing system should be electronically filed. Some courts have designated certain types of cases for electronic filing, while some have determined that all cases are appropriate for electronic filing. However, the Rule does not make electronic filing mandatory. Mandatory electronic filing appears to be inconsistent with Fed.R.Civ.P. 5 (and thus Fed.R.Crim.P 49), which states that a court "may permit" papers to be filed electronically, and provides that the clerk "shall not refuse to accept for filing any paper presented . . . solely because it is not presented in proper form." However, the Federal Rules clearly permit a court to

strongly encourage lawyers to participate in electronic case filing, and the Model Rule is written to provide such encouragement.

2. For cases assigned to the electronic filing system after documents have already been filed conventionally, the Model Rule states that the parties must provide electronic copies of all previously filed documents. This will include the summons and complaint and the indictment or information in a criminal case. In cases removed to the federal court, parties in cases assigned to the electronic filing system are required to provide electronic copies of all previous filings in the state court. Where documents filed in paper form were previously scanned by the court, electronic filing would not be necessary.

3. Some courts offering electronic filing require fees to be paid in the traditional manner, while others permit or require electronic payment of fees. Nothing in the rule would constrain the court in providing for a desired method of payment of fees.

4. Electronic case filing raises privacy concerns. Electronic case files can be more easily accessible than traditional paper case files, so there is a greater risk of public dissemination of sensitive information found in case files. ~~See Model Rule 12. The Judicial Conference is investigating and evaluating the privacy concerns attendant to electronic case files, and is working to develop a policy.~~ The Judicial Conference has adopted a policy recommending that certain personal identifying information be excluded from all documents filed with the courts. In addition, until further notice, documents in criminal cases should be available only to parties and litigants in those cases and should not be available to the general public through remote public access. See Model Rule 12.

Rule 2– Eligibility, Registration, Passwords

Attorneys admitted to the bar of this court, including those admitted pro hac vice, may register as Filing Users of the court's Electronic Filing System. Registration is in a form prescribed by the clerk and requires the Filing User's name, address, telephone number, Internet e-mail address, and a declaration that the attorney is admitted to the bar of this court.

If the court permits, a party to a pending civil action who is not represented by an attorney may register as a Filing User in the Electronic Filing System solely for purposes of the action. Registration is in a form prescribed by the clerk and requires identification of the action as well as the name, address, telephone number and Internet e-mail address of the party. If, during the course of the action, the party retains an attorney who appears on the party's behalf, the attorney must advise the clerk to terminate the party's registration as a Filing User upon the attorney's appearance.

Provided that a Filing User has an Internet e-mail address, registration as a Filing User constitutes consent to electronic service of all documents as provided in these rules in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

Once registration is completed, the Filing User will receive notification of the user log-in and password. Filing Users agree to protect the security of their passwords and immediately notify the clerk if they learn that their password has been compromised. Users may be subject to sanctions for failure to comply with this provision.

Derivation

The first three paragraphs of Model Rule 2 are derived from the Eastern District of New York procedures. The last paragraph is derived from the Northern District of Ohio procedures.

Commentary

1. The Model Rule specifically provides that attorneys admitted pro hac vice can be filing users in electronic filing systems. The Model Rule also recognizes that a court may wish under certain circumstances to permit pro se filers to take part in electronic case filing. Such participation is left to the discretion of the court.

2. The Model Rule provides that a person who registers with the System (a Filing User) thereby consents to electronic service of documents subject to the electronic filing system. ~~Pending~~ Amendments to the Federal Rules of Civil Procedure (and applicable to criminal proceedings) permit electronic service on a person who consents "in writing." The Committee Notes indicate that the consent may be provided by electronic means. A court may "establish a registry or other facility that allows advance consent to service by specified means for future action." Thus, a court might use CM/ECF registration as a means to have parties consent to receive service electronically.

3. Several districts currently have provisions addressing the possibility of compromised passwords. Such a provision may be useful in a User Manual for the electronic filing system. The provision might read as follows:

> Attorneys may find it desirable to change their court assigned passwords periodically. In the event that an attorney believes that the security of an existing password has been compromised and that a threat to the System exists, the attorney must give immediate notice by telephone to the clerk, chief deputy clerk or systems department manager and confirm by facsimile in order to prevent access to the System by use of that

password.

Rule 3–Consequences of Electronic Filing

Electronic transmission of a document to the Electronic Filing System consistent with these rules, together with the transmission of a Notice of Electronic Filing from the court, constitutes filing of the document for all purposes of the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the local rules of this court, and constitutes entry of the document on the docket kept by the clerk under Fed.R.Civ.P. 58 and 79 and Fed.R.Crim.P 49 and 55.

When a document has been filed electronically, the official record is the electronic recording of the document as stored by the court, and the filing party is bound by the document as filed. Except in the case of documents first filed in paper form and subsequently submitted electronically under Rule 1, a document filed electronically is deemed filed at the date and time stated on the Notice of Electronic Filing from the court.

Filing a document electronically does not alter the filing deadline for that document. Filing must be completed before midnight local time where the court is located in order to be considered timely filed that day.

Derivation

The first two paragraphs of Model Rule 3 are adapted from the Eastern District of New York procedures. The third paragraph is adapted from the Northern District of Ohio procedures.

Commentary

1. The Model Rule provides a "time of filing" rule that is analogous to the traditional system of file stamping by the Clerk's office. A filing is deemed made when it is acknowledged by the Clerk's office through the CM/ECF system's automatically generated Notice of Electronic Filing.

2. The Model Rule makes clear that the electronically filed documents are considered to be entries on the official docket.

Rule 4– Entry of Court Orders

All orders, decrees, judgments, and proceedings of the court will be filed in accordance with these rules which will constitute entry on the docket kept by the clerk under Fed.R.Civ.P. 58 and 79 and Fed.R.Crim.P.49 and 55. All signed orders will be filed electronically by the court or court personnel. Any order filed electronically without the original signature of a judge has the same force and effect as if the judge had affixed the judge's signature to a paper copy of the order and it had been entered on the docket in a conventional manner.

A Filing User submitting a document electronically that requires a judge's signature must promptly deliver the document in such form as the court requires.

Derivation

The first two sentences of the first paragraph of the Model Rule are adapted from the Eastern District of New York procedures. The last sentence is derived from the Northern District of Georgia Bankruptcy Court. The second paragraph is adapted from Eastern District of New York procedures.

Commentary

1. Not all courts have a provision in their electronic filing procedures addressing the electronic entry of court orders. In at least one court without such a provision, a question arose about the validity of electronically filed court orders. The Model Rule specifically states that an electronically filed court order has the same force and effect as an order conventionally filed.

2. The Model Rule contemplates that a judge can authorize personnel, such as a law clerk or judicial assistant, to electronically enter an order on the judge's behalf.

3. The Model Rule leaves the method for submitting proposed orders to the discretion of the court.

Rule 5– Attachments and Exhibits

Filing Users must submit in electronic form all documents referenced as exhibits or attachments, unless the court permits conventional filing. A Filing User must submit as exhibits or attachments only those excerpts of the referenced documents that are directly germane to the matter under consideration by the court. Excerpted material must be clearly and prominently identified as such. Filing Users who file excerpts of documents as exhibits or attachments under this rule do so without prejudice to their right to timely file additional excerpts or the complete document. Responding parties may timely file additional excerpts or the complete document that they believe are directly germane.

Derivation

The Model Rule is adapted from the Southern District of New York Bankruptcy procedures.

Commentary

1. One issue that has arisen in most courts using electronic filing relates to attachments or exhibits not originally available to the filer in electronic form, and that must be scanned (or imaged) into Portable Document Format before filing. Examples include leases, contracts, proxy statements, charts and graphs. A scanned document creates a much larger electronic file than one prepared directly on the computer (*e.g.*, through word processing). The large documents can take considerable time to file and retrieve. The Model Rule provides that if the case is assigned to the electronic filing system, the party must file this type of material electronically, unless the court specifically permits conventional filing.

2. It is often the case that only a small portion of a much larger document is relevant to the matter before the court. In such cases, scanning the entire document imposes an inappropriate burden on both the litigants and the courts. To alleviate some of this inconvenience, the Model Rule provides that a Filing User must submit as the exhibit only the relevant excerpts of a larger document. The opposing party then has a right to submit other excerpts of the same document under the principle of completeness.

3. This rule is not intended to alter traditional rules with respect to materials that are before the court for decision. Thus, any material on which the court is asked to rely must be specifically provided to the court.

Rule 6–Sealed Documents

Documents ordered to be placed under seal must be filed conventionally and not electronically unless specifically authorized by the court. A motion to file documents under seal may be filed electronically unless prohibited by law. The order of the court authorizing the filing of documents under seal may be filed electronically unless prohibited by law. A paper copy of the order must be attached to the documents under seal and be delivered to the clerk.

Derivation

The Model Rule is adapted from the Western District of Missouri procedures.

Commentary

1. The Model Rule recognizes that other laws may affect whether a motion to file documents under seal, or an order authorizing the filing of such documents, can or should be electronically filed. It is possible that electronic access to the motion or order may raise the same privacy concerns that gave rise to the need to file a document conventionally in the first place. For similar reasons, the actual documents to be filed under seal should ordinarily be filed conventionally.

2. See Model Rule 12 for another provision addressing privacy concerns arising from electronic filing.

Rule 7– Retention Requirements

Documents that are electronically filed and require original signatures other than that of the Filing User must be maintained in paper form by the Filing User until [number] years after all time periods for appeals expire. On request of the court, the Filing User must provide original documents for review.

Derivation

Model Rule 7 is adapted from the Eastern District of Virginia Bankruptcy procedures.

Commentary

1. Because electronically filed documents do not include original, handwritten signatures, it is necessary to provide for retention of certain signed documents in paper form in case they are needed as evidence in the future. The Model Rule requires retention only of those documents containing original signatures of persons other than the person who files the document electronically. The filer's use of a log-in and password to file the document is itself a signature under the terms of Model Rule 8.

2. The Model Rule places the retention requirement on the person who files the document. Another possible solution is to require the filer to submit the signed original to the court, so that the court can retain it. Some government officials have expressed a preference to have such documents retained by the court, in order to make it easier to retrieve the documents for purposes such as a subsequent prosecution for fraud.

3. Courts have varied considerably on the required retention period. Some have limited it to the end of the litigation (plus the time for appeals). Others have required longer retention periods (four or five years). Assuming that the purpose of document retention is to preserve relevant evidence for a subsequent proceeding, the appropriate retention period might relate to relevant statutes of limitations.

4. Some districts require the filer to retain a paper copy of *all* electronically filed documents. Such a requirement seems unnecessary, and it tends to defeat one of the purposes of using electronic filing. Other courts have required retention of "verified documents," i.e., documents in which a person verifies, certifies, affirms, or swears under oath or penalty of perjury. See, *e.g.*, 28 U.S.C. § 1746 (unsworn declarations under penalty of perjury).

Rule 8– Signatures

The user log-in and password required to submit documents to the Electronic Filing System serve as the Filing User's signature on all electronic documents filed with the court. They also serve as a signature for purposes of Fed.R.Civ.P. 11, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the local rules of this court, and any other purpose for which a signature is required in connection with proceedings before the court. Each document filed electronically must, if possible, indicate that it has been electronically filed. Electronically filed documents must include a signature block [in compliance with local rule number [ ] if applicable] and must set forth the name, address, telephone number and the attorney's [name of state] bar registration number, if applicable. In addition, the name of the Filing User under whose log-in and password the document is submitted must be preceded by an "s/" and typed in the space where the signature would otherwise appear.

No Filing User or other person may knowingly permit or cause to permit a Filing User's password to be used by anyone other than an authorized agent of the Filing User.

Documents requiring signatures of more than one party must be electronically filed either by: (1) submitting a scanned document containing all necessary signatures; (2) representing the consent of the other parties on the document; (3) identifying on the document the parties whose signatures are required and by the submission of a notice of endorsement by the other parties no later than three business days after filing; or (4) in any other manner approved by the court.

Derivation

The first and third paragraphs of the Model Rule are adapted from the Northern District of Ohio procedures. The second paragraph is derived from the Southern District of New York Bankruptcy procedures.

Commentary

1. Signature issues are a subject of considerable interest and concern. The CM/ECF system is designed to require a log-in and password to file a document. The Model Rule provides that use of the log-in and password constitutes a signature, and assures that such a signature has the same force and effect as a written signature for purposes of the Federal Rules of Civil Procedure, including Fed.R.Civ.P. 11, the Federal Rules of Criminal Procedure, and any other purpose for which a signature is required on a document in connection with proceedings before the court.

2. At the present time, other forms of digital or other electronic signature have received only limited acceptance. It is possible that over time and with further technological development a system of digital signatures may replace the current password system.

3. Some users of electronic filing systems have questioned whether an s-slash requirement is worth retaining. The better view is that an s-slash is necessary; otherwise there is no indication that documents printed out from the website were ever signed. The s-slash provides some indication when the filed document is viewed or printed that the original was in fact signed.

4. The second paragraph of the Model Rule does not require an attorney or other Filing User to personally file his or her own documents. The task of electronic filing can be delegated to an authorized agent, who may use the log-in and password to make the filing. However, use of the log-in and password to make the filing constitutes a signature by the Filing User under the Rule, even though the Filing User does not do the physical act of filing.

5. Issues arise when documents being electronically filed have been signed by persons other than the filer, *e.g.*, stipulations and affidavits. The Model Rule provides for a substantial amount of flexibility in the filing of these documents. Courts may wish to modify or narrow the options if, for example, they believe that administering the three-day period for endorsements would be burdensome.

6. Courts may wish to underscore the fact that a Filing User's log-in and password constitutes the Filing User's signature, by including a statement to that effect on the registration form.

Rule 9– Service of Documents by Electronic Means

Each person electronically filing a pleading or other document must serve a "Notice of Electronic Filing" to parties entitled to service under the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and the local rules. The "Notice of Electronic Filing" must be served by e-mail, hand, facsimile, or by first-class mail postage prepaid. Electronic service of the "Notice of Electronic Filing" constitutes service of the filed document. Parties not deemed to have consented to electronic service are entitled to receive a paper copy of any electronically filed pleading or other document. Service of such paper copy must be made according to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and the local rules.

Derivation

Model Rule 9 is derived from the Western District of Missouri procedures.

Commentary

1. The ~~pending~~ amendments to the Federal Rules (Fed.R.Civ.P. 5(b)) authorizing service of documents by electronic means (which are incorporated into Fed.R.Crim.P 49(b)) do not permit electronic service of process for purposes of obtaining personal jurisdiction (i.e., Rule 4 service). The Model Rule covers only service of documents after the initial service of the summons and complaint.

2. The CM/ECF system automatically generates a Notice of Electronic Filing at the time a document is filed with the system. The Notice indicates the time of filing, the name of the party and attorney filing the document, the type of document, and the text of the docket entry. It also contains an electronic link (hyperlink) to the filed document, allowing anyone receiving the Notice by e-mail to retrieve the document automatically. The CM/ECF system automatically

sends this Notice to all case participants registered to use the electronic filing system. If the court is willing to have this Notice itself constitute service, it may, under pending amendments to the Federal Rules, do so through a local rule. The pending amendments require a local rule if a court wants to authorize parties to use its transmission facilities to make electronic service. The Model Rule does not include such a provision, but could be easily modified to provide that the court's automatically generated notice of electronic filing constitutes service.

3. An ~~pending~~ amendment to Fed.R.Civ.P. 6(e) provides that the three additional days to respond to service by mail will apply to electronic service as well. The Committee Note states:

> Electronic transmission is not always instantaneous, and may fail for any number of reasons. It may take three days to arrange for transmission in readable form. Providing added time to respond will not discourage people from asking for consent to electronic transmission, and may encourage people to give consent. The more who consent, the quicker will come the improvements that make electronic service ever more attractive.

~~The Model Rule does not specifically provide for the added three days, but such a provision would not be necessary if the proposed amendment to Fed.R.Civ.P. 6(e) takes effect.~~

4. The CM/ECF system is designed so that a person may request electronic notice of all filings in a matter even though that person has not obtained a password and registered as a Filing User. Such electronic notice would not constitute service under the Model Rule, because the effectiveness of electronic service is dependent on registration with the system. The court should be aware of this possibility and should encourage all those who request electronic notice to register for a system password.

Rule 10– Notice of Court Orders and Judgments

> Immediately upon the entry of an order or judgment in an action assigned to the Electronic Filing System, the clerk will transmit to Filing Users in the case, in electronic form, a Notice of Electronic Filing. Electronic transmission of the Notice of Electronic Filing constitutes the notice required by Fed.R.Civ.P. 77(d). The clerk must give notice to a person who has not consented to electronic service in paper form in accordance with the Federal Rules of Civil Procedure.

Derivation

The Model Rule is adapted from the Eastern District of New York procedures

Commentary

1. Pending amendments to Fed.R.Civ.P 77(d) authorize electronic notice of court orders where the parties consent. The Model Rule provides that for all Filing Users in the electronic filing system, electronic notice of the entry of an order or judgment has the same force and effect as traditional notice. The CM/ECF system automatically generates and sends a Notice of Electronic Filing upon entry of the order or judgment. The Notice contains a hyperlink to the document.

Rule 11– Technical Failures

A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.

Derivation

The Model Rule is adapted from the Eastern District of New York procedures.

Commentary

1. CM/ECF is designed so that filers access the court through its Internet website. The Model Rule addresses the possibility that a party may not meet a filing deadline because the court's website is not accessible for some reason. Cf. Fed.R.Civ.P. 6, Fed.R.Crim.P. 45(a) (permitting extension of time when "weather or other conditions have made the office of the clerk of the district court inaccessible"). The Model Rule also addresses the possibility that the filer's own unanticipated system failure might make the filer unable to meet a filing deadline.

2. The Model Rule does not require the court to excuse the filing deadline allegedly caused by a system failure. The court has discretion to grant or deny relief in light of the circumstances.

RULE 12 – PUBLIC ACCESS

The non-redlined text reflects an amended version of Rule 12 submitted to the Judicial Conference for its March 2002 session.

A person may review at the clerk's office filings that have not been sealed by the court. A person also may access the Electronic Filing System at the court's Internet site [Internet address] by obtaining a PACER log-in and password. A person who has PACER access may retrieve docket sheets in civil and criminal cases and documents in a civil case, but only litigants and their attorneys may retrieve documents in a criminal case. Only a Filing User under Rule 2 of these rules may file documents.

Commentary:

1. The first paragraph of this rule is intended to make it clear that anyone can access al unsealed court files and documents at the courthouse, whether such file is electronic or in hard copy. It also explains that a person or entity that has a PACER login and password may access these same court files and documents over the Internet in a civil case but access to such documents over the Internet is limited in a criminal case to the Filing Users in that case.

2. The original second paragraph explaining that a person may apply for an order limiting access to or prohibiting the electronic filing or certain identifying information has been omitted. This portion of the rule is not necessary given that the policy for civil cases requires the redaction of any personal identifier (social security number, financial account number, date of birth, names of minor children) if it must be included in a filed document. There was also concern that any suggestion of the filing of a specific motion in the rules might encourage such a motion to be filed when it is not necessary. In a criminal case, remote public access to electronically filed documents is not currently permitted, except by litigants and attorneys to documents in their cases. The Judicial Conference has undertaken to continue to study the availability of remote public access and documents in criminal cases.

3. The original third paragraph was deleted out of concern that it may not be constitutional or and enforceable. There are identity theft statutes that could be enforced if any such activity were tied to the access of electronic case files.

4. The court may also wish to consider an exception to the general prohibition on remote public access to criminal case file documents to allow such access in cases that impose extraordinary demands on a court's resources upon consent of all parties and a finding by the trial judge that such access is warranted under the circumstances. This exception would allow public access to documents in cases where the public interest in court filings places unusual demands on the court. [The Judicial Conference has approved this exception to the general prohibition on remote public access to criminal case files.]

Rule 12– Public Access

Any person or organization, other than one registered as a Filing User under Rule 2 of these rules, may access the Electronic Filing System at the court's Internet site [Internet address] by obtaining a PACER log-in and password. Those who have PACER access but who are not Filing Users may retrieve docket sheets and documents, but they may not file documents.

In connection with the filing of any material in an action assigned to the Electronic Filing System, any person may apply by motion for an order limiting electronic access to or prohibiting the electronic filing of certain specifically-identified materials on the grounds that such material is subject to privacy interests and that electronic access or electronic filing in the action is likely to prejudice those privacy interests.

Information posted on the System must not be downloaded for uses inconsistent with the privacy concerns of any person.

Derivation

The first paragraph of the Model Rule is adapted from the District of Arizona Bankruptcy procedures. The second paragraph is adapted from the Eastern District of New York procedures. The third paragraph is adapted from the Southern District of New York Bankruptcy procedures.

Commentary

1. A subcommittee of the Judicial Conference Committee on Court Administration and Case Management is currently assessing the privacy concerns arising from electronic case filing. The Judicial Conference may at some point develop policies to address these concerns. The rule can be adapted to reflect any future specific policies or suggestions adopted by the Judicial Conference.

2. The Model Rule is consistent with Judicial Conference policy to limit remote public access to electronic case files to those who have obtained a PACER password.

3. The second paragraph of the Model Rule is not intended to create substantive rights. It simply highlights the fact that a person may apply for a protective order when Internet access to a case file or document is likely to result in the loss of that person's legitimate interest in privacy.

105TH CONGRESS
1ST SESSION

H.R. 2134

To amend the Federal Rules of Criminal Procedure with respect to bail bond forfeitures.

IN THE HOUSE OF REPRESENTATIVES

JULY 10, 1997

Mr. MCCOLLUM introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the Federal Rules of Criminal Procedure with respect to bail bond forfeitures.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Bail Bond Fairness Act of 1997".

SEC. 2. FAIRNESS IN BAIL BOND FORFEITURE.

Rule 46(e)(1) of the Federal Rules of Criminal Procedure is amended by striking "there is a breach of condition

of" and inserting "the defendant fails to appear as required by".

○

STATEMENT
OF
W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE
COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON

"BAIL BOND FAIRNESS ACT OF 1997"
H.R. 2134

BEFORE THE SUBCOMMITTEE
ON CRIME

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

March 12, 1998

STATEMENT

Good morning Chairman McCollum. On behalf of the Judicial Conference of the United States I wish to thank you for inviting me to appear before the Subcommittee today to discuss H.R. 2134, the "Bail Bond Fairness Act of 1997." My name is W. Eugene Davis. I am a circuit judge in the Court of Appeals for the Fifth Circuit. I chair the Judicial Conference's Advisory Committee on Criminal Rules ("advisory committee").

Under Rule 46(e)(1) of the Federal Rules of Criminal Procedure a district court shall forfeit the bail of a person who breaches a condition of bond while on release prior to trial. Rule 46(e)(2) then authorizes the district court to set aside any forfeiture. Section 2 of H.R. 2134 would amend Rule 46 and authorize a court to forfeit bail only when the "defendant fails to appear as required" by the bond. I urge you and the other members of the subcommittee to defer action on this bill and allow the rulemaking process established under the Rules Enabling Act to proceed.

Inconsistent with the Rules Enabling Act

H.R. 2134 directly amends one of the Federal Rules of Practice and Procedure. Its passage would thwart the rulemaking process established by Congress under the Rules Enabling Act, 28 U.S.C. §§2071-77. Under the Act,

proposed amendments to the federal rules are presented by the Supreme Court to Congress for approval only after being subjected to extensive scrutiny by the public, bar, and bench. As envisioned by Congress, the Rules Enabling Act rulemaking process offers a systematic review of rule proposals that is designed to identify potential problems, suggest improvements, unearth lurking ambiguities, and eliminate possible inconsistencies. The rulemaking process is laborious and time-consuming, but the painstaking process reduces the potential for future satellite litigation over unforeseen consequences or unclear provisions. It also ensures that all persons, including the public, who may be affected by a rule change have had an opportunity to express their views on it. Direct amendment of the federal rules circumvents this careful process established by Congress.

Advisory Committee Work

Rule 46(e) has not been carefully examined by the advisory committee since the rule's promulgation in 1944. The advisory committee has received no complaints or comments from the bar, bench, or public on the rule, and the committee is not otherwise aware of any problems associated with it. The advisory committee will next meet on April 27-28, 1998, in Washington, D.C. In light of Congress' interest in this matter, I will place the proposed amendment of Rule 46(e) in H.R. 2134 on the agenda of the advisory committee's meeting.

A defendant is frequently granted bail and released from detention subject to a number of conditions as authorized by 18 U.S.C. §3142. The release conditions are many and varied, and it is important that a court retain the authority —as it presently does—to ensure that a defendant complies with them. It has been my experience that when a defendant breaches a condition of release, the judge "revokes" the bail and remands the defendant to custody without "forfeiting" the bond (requiring payment by the surety). It has also been my experience that a release bond is "forfeited" only when a defendant fails to make a required appearance. Indeed, the standard appearance bond form issued by the Administrative Office of the U.S. Courts, which I believe is used uniformly by the federal courts, only obligates the surety to pay the proceeds of the bond if the defendant fails to appear. So, unless the defendant fails to appear as ordered the surety has no exposure under the standard appearance bond. A separate standard form is used that contains the various conditions of pretrial release and the governing sanctions for defendant's violations. But the surety does not sign and is not bound by those conditions, which apply solely to the defendant. Copies of each form are attached.

Rule 46(e) may need further study. But we must be careful not to unintentionally disturb the court's authority to "revoke" bail and enforce all the

conditions of release. If given an opportunity to do so, the advisory committee will focus on: (1) whether a change or clarification in Rule 46(e) is justified; and (2) if so, whether we should expand the specific language proposed in H.R. 2134 to Rule 46(e) to make it clear that the court has the authority to "revoke" bail for failure to comply with any release condition as well as the authority to forfeit the bond for the defendant's failure to appear.

Conclusion

Under the rulemaking process, proposed changes are vetted and thoroughly studied and debated. Hidden problems are often discovered and brought to the attention of the advisory committee. By deferring immediate action and permitting the rulemaking process to proceed on this proposed amendment, this subcommittee and Congress will have assured itself of a well-documented record on which to make a decision once the rule change has completed its course in accordance with the Rules Enabling Act.

I look forward to continuing this dialogue with you and the other members of the subcommittee. I would be happy to answer any questions that you may have. Thank you.

MINUTES

of

THE ADVISORY COMMITTEE

on

FEDERAL RULES OF CRIMINAL PROCEDURE

April 27-28, 1998

Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. on April 27th and 28th 1998. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, April 27, 1998. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair

Hon. Edward E. Carnes

Hon. George M. Marovich

Hon. David D. Dowd, Jr.

Hon. John M. Roll

Hon. Tommy E. Miller

Hon. Daniel E. Wathen

Prof. Kate Stith

J. Rule 46. Release From Custody. Proposed Legislation

Regarding Forfeiture of Bond for Reasons Other Than Failure

to Appear.

Judge Davis informed the Committee that Representative Bill McCullum (Fla.) had introduced H.R. 2134, "Bail Bond Fairness Act," which would amend Rule 46(e) to limit the authority to revoke bonds to those situations where a defendant has failed to appear. Under current practice a magistrate or judge may impose conditions which are not limited to failures to appear, e.g., to remain in particular location or to refrain from violating the law, etc. Judge Davis indicated that he had testified at hearings held by Representative McCullum on the issue and that Mr. McCullum had subsequently agreed to delay any further action on his proposal until the Advisory Committee had an opportunity to review the matter under the Rules Enabling Act and decide whether to propose and forward to the Standing Committee an amendment of its own.

Judge Miller stated that in response to a request from Judge Davis he had conducted a poll of magistrate judges to determine the extent to which this might be an issue. The results of that poll indicated that many do not use corporate sureties but instead release a defendant on personal recognizance or when a friend or family member posts personal property or signs an unsecured bond. Some do revoke bond for reasons other than nonappearance. He indicated that in those districts the magistrates believe strongly that holding a relative's or friend's assets insure compliance with release conditions.

Professor Stith expressed the view that the statute does not authorize such use of bonds but Judge Roll responded that his circuit has approved of the practice. Mr. Josefsberg indicated that forfeiting bonds on conditions other than nonappearance penalizes the accused and whomever has posted the bond, in some cases family members. Judge Miller opined that removing the option of forfeiting bonds for nonappearance would get a negative reaction from magistrate judges and the defense bar. He note that such procedures seem to be used in selected situations where the family of the accused is willing to take a risk and bear the burden on noncompliance with the conditions set by the magistrate.

Mr. Martin questioned whether a magistrate would realistically order forfeiture of a family home if an accused failed to meet the conditions of release. He recognized that the system tended to punish those friends and family members who have lost control over an accused. Judge Miller added that the practice had apparently been approved in some case law. Mr. Pauley indicated that if a forfeiture is later determined to be inappropriate there is a procedure for seeking remission. He added that the Department

of Justice opposes the legislation and that permitting forfeiture for nonappearance can provide some protection for victims, from defendants who do not fear going to jail. Mr. Josefsberg expressed concern that there is a real risk that family members or friends who have posted bond will be harmed. He worried that some defense counsel might simply tell a surety to sign the bond without fully informing them of the problems that might follow if the defendant violates conditions of the bond.

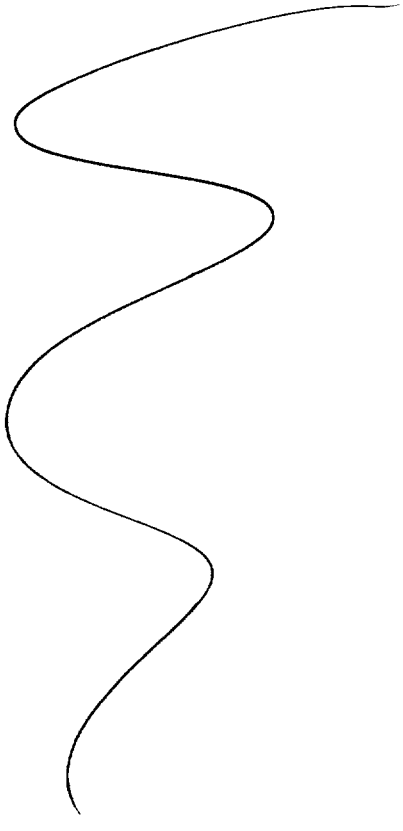
Ms. Harkenrider expressed the view that threatening to forfeit a bond for having unauthorized contact with victims is beneficial; Judge Roll responded that he did not see witness intimidation as the real problem in these situations. Following additional brief discussion, Judge Marovich moved that the Committee adopt the language suggested by Congress--which would limit forfeiture of bonds to nonappearance only. Judge Roll seconded the motion. That motion failed by a vote of 5 to 6. In additional discussion, it was agreed that the vote expressed the Committee's opposition (by a narrow margin) to attempts to limit the magistrate's ability to order forfeiture of bond for conditions other than nonappearance.

Supplemental

Agenda

Book

Materials



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

MEMORANDUM

TO: THE HONORABLE EDWARD E. CARNES
CHAIR, CRIMINAL RULES ADVISORY COMMITTEE

FROM: RULE 41 SUBCOMMITTEE
TOMMY E. MILLER, CHAIR
THE HONORABLE HARVEY BARTLE III
ASSOCIATE DEAN NANCY J. KING
LUCIEN B. CAMPBELL, FEDERAL PUBLIC DEFENDER
JOHN P. ELWOOD, ESQ., DEPARTMENT OF JUSTICE

RE: SUPPLEMENTAL REPORT TO THE
PROPOSED AMENDMENTS TO
FEDERAL RULE OF CRIMINAL PROCEDURE 41

DATE: APRIL 19, 2002

A number of issued remained undecided after this subcommittee submitted its March 26, 2002 report, which is included in the agenda book. The subcommittee met again by conference call and reached consensus on most of the remaining issues.

I will present the issues with a cross reference to the appropriate attachment in the agenda book behind Tab II-C-1.

1. Should the authority to permit delayed notification of the execution of a search warrant

be extended to a judge of a state court of record [Attachment 3, Part 1; Attachment 7, Part 1]? [Lines 104 and 105 of April 19, 2002 Rule 41 Draft][Exhibit 1 to this memorandum.]

The subcommittee unanimously agreed that if a state judge of a court of record issues a search warrant, then that judge would also have the authority to provide for delayed notification. As pointed out in both Mr. Campbell's and Mr. Elwood's memoranda, Section 213 of the USA PATRIOT ACT did not limit to federal judicial officers the authority to delay notification of a search warrant.

2. Comments Received from Professor Joe Kimble [Attachment 5]

a) Rule 41(b)(3) [Lines 24 and 25]

The subcommittee agreed that Professor Kimble's style suggestion to move the phrase "in an investigation of domestic terrorism or international terrorism" to the beginning of the sentence is a slight style improvement. However, the subcommittee recommends leaving the rule as it is. This subsection is before the Supreme Court now and is not part of the changes proposed by the subcommittee for this meeting. In addition, all other subparts of Rule 41(b) begin with the phrase "a magistrate judge," and we determined to recommend the same language for Rule 41(b)(3).

b) Rule 41(b)(4) [Lines 34 and 35]

Professor Kimble questioned whether the phrase "within the district, outside the district or both" is intentionally different from the authority in Rule 41(b)(1). The subcommittee intentionally chose the language in Rule 41(b)(4) because tracking devices are frequently expected to move outside the district. The subcommittee recommends no change.

c) Rule 41(d)(1) [Line 43]

Professor Kimble suggested that we change the "or" to "and" since a tracking device warrant would authorize both installation and use of a tracking device.

The subcommittee disagrees. In many instances a warrant is obtained only to go upon private property to install the tracking device. The actual use of the device does not implicate privacy interests protected by the Fourth Amendment. Therefore the disjunctive "or" should be used.

d) Rule 41(e)(2)(A) [Lines 52 and 53]

Professor Kimble suggests that the phrasing at the beginning of Rule 41(e)(2)(A) is awkward and does not appropriately identify the warrant in question.

The subcommittee discussed this issue at some length and decided to recommend leaving the language as it is. Throughout this rule the search warrant is only referred to as a "warrant" after the introductory section 41(a)(1). This language was deliberately chosen during the restyling effort to avoid redundancy. Throughout the restyled rule, the warrant referred to is a search and seizure warrant. We are now creating an exception called a "tracking-device warrant" and identifying such a warrant as such when mentioned in the rule.

Therefore the subcommittee believes the language is clear and recommends no change.

e) Rule 41(f) [Lines 87-107]

Professor Kimble, in a note at the bottom of page 4 of Attachment 5, suggests that the structure of Rule 41(f) may be confusing.

The subcommittee agreed with Professor Kimble.

Professor Schleuter drafted a proposed change to Rule 41(f) that attempts to address the concerns raised by Professor Kimble, as well as the concerns of the subcommittee members [Exhibit 2].

The subcommittee has not yet taken a position on this new language, but I hope to have an oral report for you at the committee meeting.

The subcommittee did recommend that we try to restructure Rule 41(f) rather than renumber the remaining subsections of Rule 41. Professor Schleuter's effort complies with this direction.

f) Rule 41(f)(5) [Lines 90 and 92]

The subcommittee concurs with Professor Kimble's insertion of two commas.

g) Rule 41(f)(6) [Line 106]

Professor Kimble suggested changing the phrase "this rule" to the specific rule in question--Rule 41(f).

At this writing the subcommittee recommends no change. However, we are reviewing the entire Rule 41 carefully to see if Professor Kimble's request for citing a specific subsection is appropriate.

3. John Elwood's Memo of March 27, 2002 [Attachment 7]

a) This issue is the same as Item 1 above.

b) Return of Search Warrants.

Mr. Elwood raises a number of issues related to the return of search warrants, particularly search warrants issued for out-of-district searches.

After reviewing the restyled rule, the subcommittee tentatively concluded that the Department of Justice concerns could be addressed by amending the search warrant form (AO Form 93) [Exhibit 3], rather than amending the rule. Our initial belief is that the rule is flexible enough to address the Department of Justice concerns if the form is modified to address the rule and current practices.

A draft that could be used on the reverse of the search warrant form that attempts to address the Department of Justice concerns is contained at page 3 of Exhibit 3.

c) Rule 41(g)

Mr. Elwood requested the subcommittee to consider whether a motion to return seized property should be authorized in the district that issued the warrant.

The subcommittee declined to endorse this suggestion. The subcommittee felt that we should let the practice develop under this current rule before making any suggestions for change.

See also Professor King's e-mail that she composed after the subcommittee that also supports no change at this time [Exhibit 4].

d) Rule 41(i)

Mr. Elwood also suggested that the subcommittee amending Rule 41(i) to require the magistrate judge to whom the search warrant is return to deliver the

papers in the district which issued the search warrant.

Again, the subcommittee recommended no action at this time in order to see how the practice develops. The magistrate judge can send copies of the returned warrant to the issuing district under the current rule.

e) Rule 41(e)(2)(B)

Mr. Elwood suggests that the proposed upper limit for the monitoring of a tracking-device warrant be changed.

This issue was considered by the subcommittee in February and rejected in favor of a fixed time period. The subcommittee understood that the Department of Justice would seek to revisit this issue before the full committee and Part 3 of Mr. Elwood's memorandum addresses the issue.

f) Rule 41(f)(5)

Mr. Elwood suggests that instead of requiring notice of a tracking-device warrant be given within seven days that the notice provision merely state that it must be given within a "reasonable period."

The subcommittee bracketed the period of seven days in the proposed rule to discuss the issue further with the entire committee. Mr. Elwood advised us that he would present a request for a longer time period before the full committee. Part 4 of his memorandum contains that argument.

Exhibits to April 19, 2002 Memorandum

Exhibit 1 - April 19, 2002 draft of proposed changes to Rule 41

Exhibit 2 - Professor Schleuter's suggested changes to Rule 41(f)

Exhibit 3 - AO Form 93 and suggested language

Exhibit 4 - Professor King's April 17 e-mail

Exhibit 1 to April 19, 2002 Memo

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).

(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 — ~~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; 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)*Tracking-Device Warrant.* 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 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.

* * * * *

(5)Delivering a Tracking-Device Warrant. In the case of a tracking-device warrant, the officer must, within [7] days after the use of the device has ended, 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 an individual of suitable age

and discretion residing at that location and by mailing a copy to the person's last known address. Upon request of the government, the court may, on one or more occasions, for good cause extend the time to deliver the warrant for a reasonable period.

(6) ***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

* * * * *

April 19, 2002

Exhibit 2 to April 19, 2002 MEMO

Judge Miller—

Attached is a redraft of Rule 41(f) along the lines we discussed yesterday. The current Rule 41(f)(1) to (4) is now Rule 41(f)(1)(A) to (D). Those provisions cover the regular search warrant.

I added a new subdivision for executing and deliverying tracking device warrants---new Rule 41(f)(2)(A) to (B). Please note that I added a new timing requirement for returning the warrant to the magistrate—7 days, the same as we now have for delivering the warrant to the owner of the premises, etc.

Also please note that I added some langauge in Rule 41(f)(2)(A) (which is intended to parallel 41(f)(1)(A) concerning notations of times that the device was installed and used. This is something that I do not believe we even discussed.

Dave

DRAFT

4-18-2002

* * * * *

(f) Executing and Returning the Warrant.

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

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

(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.

(C) *Receipt.* The officer executing the warrant must 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 leave a copy of the warrant and receipt at the place where the officer took the property.

(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) ***Tracking-Device Warrant.***

(A) *Noting the Time.* The officer executing a tracking device warrant must enter on its face the dates and times the device was installed and the dates and times it was used.

(B) *Return of a Tracking-Device Warrant.* The officer executing a tracking device warrant must return it, within [7] days after the use of the device has ended, to the magistrate judge designated in the warrant.

(C) *Delivering a Tracking-Device Warrant.* The officer executing a tracking device must within [7] days after the use of the device has ended 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 an individual of suitable age and discretion residing at that location and by mailing a copy to the person's last known address. Upon request of the government, the court may, on one or more occasions, for good cause extend the time to deliver 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.

* * * * *

OAO 93 (Rev. 8/98) Search Warrant

United States District Court

District of _____

In the Matter of the Search of
(Name, address or brief description of person or property to be searched)

SEARCH WARRANT

Case Number:

TO : _____ and any Authorized Officer of the United States

Affidavit(s) having been made before me by _____ who has reason to believe
Affiant

that ☐ on the person of, or ☐ on the premises known as (name, description and/or location)

in the _____ District of _____ there is now concealed a certain person or property, namely (describe the person or property)

I am satisfied that the affidavit(s) and any record testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before _____
Date

(not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search ☐ in the daytime – 6:00 AM to 10:00 P.M. ☐ at anytime in the day or night as I find reasonable cause has been established established and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to as required by law.

_____
U.S. Judge or Magistrate

_____ at _____
Date and Time Issued City and State

_____ _____
Name and Title of Judicial Officer Signature of Judicial Officer

AO 93 (Rev. 8/98) Search Warrant (Reverse)

RETURN	Case Number:	
DATE WARRANT RECEIVED	DATE AND TIME WARRANT EXECUTED	COPY OF WARRANT AND RECEIPT FOR ITEMS LEFT WITH
INVENTORY MADE IN THE PRESENCE OF		
INVENTORY OF PERSON OR PROPERTY TAKEN PURSUANT TO THE WARRANT		
CERTIFICATION		
I swear that this inventory is a true and detailed account of the person or property taken by me on the warrant.		
Subscribed, sworn to, and returned before me this date.		
U.S. Judge or Magistrate		Date

Officer's Verification

I verify under penalty of perjury that this inventory is a true and detailed inventory of the person or property taken by me on the warrant.

_____ _____

DATE Officer's Signature

Return

This warrant and verified inventory was returned to me this date by_____
(Name of agent and means of return)

DATE

Magistrate Judge

We could also set out the text of Rule 41(i) which sets forth that the warrant is to be returned to the district where the property was seized.

Exhibit 4 to April 19, 2002 Memo
Professor Kings email

All:
I was intrigued by the 41(g) "send-the-papers-to-the-district-where-seized" issue, [item 3 (c) on the phone agenda] and did a bit more digging. Perhpas this will simply shore-up our decision to do nothing. 41(g) was in the rule BEFORE 41(a)(2) was added, authorizing out of district warrants. The intent of 41(g) was apparently to ensure that interested persons (the searchee and the public) could access the papers. See e.g., 175 F. Supp 2d 194; 489 F. Supp. 207; 100 F.3d 514 (7C 96). The language "district in which the property was seized" was apparently not intended to distinguish the district where the warrant was issued, but simply to describe the very same district in which the magistrate sat.
The question is, after (a)(2) was added in 1990, did ANYONE interpret 41(g) to require magistrates to ship off the documents to the *other* district where the property was seized. I don't know the answer to this question, does anyone else? I searched for any cases that cited both 41(g) and 41(a)(2) and came up with nothing. If the function of the rule was to make sure the public and the searchee could easily find out about the search, then maybe it should be interpreted, following the 1990 amendment adding (a)(2) and the terrorism amendment we are proposing, to require filing the documents in the district of the search as well as the district of issuance. Still, I expect this requires no action by the Rules Committee, but practice may need to be changed.
Nancy

Prof Kimble's comments

DRAFT

4-18-2002

* * * * *

(f) Executing and Returning the Warrant.

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

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

(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.

(C) *Receipt.* The officer executing the warrant must 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 leave a copy of the warrant and receipt at the place where the officer took the property. Must

(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) *Tracking-Device Warrant.*

(A) *Noting the Time.* The officer executing a tracking device warrant must enter on its face the dates and times the device was installed and the dates and times it was used. (Within 7 days after the use of the tracking device has ended,)

(B) *Return of a Tracking-Device Warrant.* The officer executing a ~~tracking device~~ (The) warrant must return it, ~~within [7] days after the use of the device has ended,~~ to the magistrate judge designated in the warrant.

(C) *Delivering a Tracking-Device Warrant.* The officer executing a tracking device must ~~within [7] days after the use of the device has ended~~ 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 ~~an individual~~ someone of suitable age and discretion residing (who resides) at that location and by mailing a copy to the person's last known address. Upon request of the government, the court may, on one or more occasions, for good cause extend the time to deliver the warrant for a reasonable period. (SAME AS IN (B).)

(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.

* * * * *

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 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.

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

April 11, 2002

MEMORANDUM TO CRIMINAL RULES COMMITTEE

SUBJECT: *Professor Kimble's Changes to the Revised §§ 2254 and 2255 Forms*

Attached are Professor Kimble's proposed changes to the §§ 2254 and 2255 forms that were recently revised by the Habeas Corpus Subcommittee. Professor Kimble's comments should be placed in your agenda book behind the "Forms" tab.

John K. Rabiej for

Attachment

cc: Honorable Anthony J. Scirica
Honorable A. Wallace Tashima

THE THOMAS M. COOLEY LAW SCHOOL
In corde hominum est anima legis.
1972

April 8, 2002

Honorable J. Garvan Murtha
Fax: 802-254-0267

Professor David Schlueter
Fax: 210-436-3717

John Rabiej or James Ishida
Fax: 202-502-1755

Dear Judge Murtha, Dave, and John (or Jim):

Attached are my proposed edits to the habeas corpus forms. Please note that I rewrote the two cover pages — the instructions pages.

The agenda book for the meeting on April 25-26 has already been prepared. I have talked with Dave and James Ishida, and we have to decide whether the edits are readable or whether the forms need to be retyped. I hope they are readable, but you'll see that there are a lot of them.

Incidentally, we did not get the forms assignment until after the March 15 meeting, and I had to wait a week or so for a clean copy from John.

I don't know whether the Habeas Corpus Subcommittee will want to look at these before the meeting. In any event, the experts will want to make sure that I didn't make any unintended changes.

Sincerely,

Joe

JK/clh

PS. I only did the § 2254 form because the § 2255 form seems almost identical. But, as I said, I did revise both the cover sheets.

300 SOUTH CAPITOL AVENUE • POST OFFICE BOX 13038 • LANSING, MICHIGAN 48901 517-371-5140

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

3. 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.

4. Answer all the questions briefly. You don't need to cite law. You may submit additional pages only if a question allows you to do that. If you want to submit briefs or arguments, you must use a separate memorandum.

5. You must pay a fee of $5. If the fee is paid and this form is filled out properly, it will be filed. If you cannot pay for 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 or securities that the institution is holding for you. If your account exceeds $ _____, you must pay the filing fee.

6. In this one 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 different states), you must file a separate petition.

7. 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.

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:

   _____

   _____

   _____

9. This petition will be returned if you do not fill out the form properly.

Motion to Vacate, Set Aside, or Correct a Sentence [Judgment?] 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 had 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.

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 briefly. You don't need to cite law. You may submit additional pages only if a question allows you to do that. If you want to submit briefs or arguments, you must use a separate memorandum.

6. If you cannot pay for the costs of this motion (such as costs for an attorney or for 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 or securities that the institution is holding for you.

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

8. 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.

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

   _____

   _____

   _____

10. This motion will be returned if you do not fill out the form properly.

(Type should be at least 10 point.)

PETITION UNDER 28 USC § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	← District	
Name (of WHAT?)	Prisoner number	Case No.
Place of Confinement (MORE SPACE)		
→ Your NAME (include the NAME you WERE CONVICTED UNDER)		
~~Name of Petitioner~~ (include name under which convicted) ← Name of Respondent (authorized person having custody of petitioner)		
V.		
The Attorney General of the State of		

(Rule 2254 speaks of "judgment." you ARE CHALLENGING:

PETITION

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

1(b). Criminal Docket Number (if ~~known~~) you KNOW:

2. Date of judgment ~~of conviction~~:

3. Length of sentence:

4. Nature of ~~offense involved~~ CRIME (all counts): (MORE lines?)

5. What was your plea? (Check one)

(a) Not guilty ☐

(b) Guilty ☐

(c) Nolo contendere ~~of~~ (no contest) ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: not-guilty

(hanging indents) → What did you plead guilty to AND what did you plead not-guilty to? (MORE lines)

6. Kind of trial: (Check one)

(a) Jury ☐

(b) Judge only ☐

7. Did you testify at the trial?

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 Number (if ~~known~~) YOU KNOW

(c) Result _____

(d) Date of result ~~and citation~~ (if ~~known~~) YOU KNOW

(e) CITATION TO THE CASE (if you KNOW)

(f) Grounds ~~raised~~ FOR YOUR APPEAL

(f) If you sought ~~further review of the decision on~~ a SECOND appeal by a higher state court, ~~please~~ answer the following:

(1) Name of court _____

(2) Docket Number (if ~~known~~) YOU KNOW

(3) Result _____

(4) Date of result ~~and citation~~ (if ~~known~~) YOU KNOW

(5) CITATION TO THE CASE (if you KNOW)

(5) Grounds ~~raised~~ FOR YOUR SECOND APPEAL

(CASE? SEE 12(a)(7).)

(g) If you filed a petition for certiorari in the United States Supreme Court, ~~please~~ answer the following with respect to each direct appeal: (HOW DO YOU ANSWER IF THERE'S MORE THAN ONE?)

(1) Name of court _____

(2) Docket Number (if ~~known~~) YOU KNOW

(3) Result _____

(4) Date of result ~~and citation~~ (if ~~known~~) YOU KNOW

(5) CITATION TO THE CASE (if you KNOW)

(5) Grounds ~~raised~~ FOR YOUR PETITION TO THE UNITED STATES SUPREME COURT

BESIDES THE APPEALS YOU LISTED ABOVE

10. ~~Other than a direct appeal from the judgment of conviction and sentence,~~ have you ~~previously~~ filed any OTHER petitions, applications, or motions ~~with respect to~~ this judgment in any state court?

Yes ☐ No ☐ CONCERNING

11. If your answer to 10 was "yes," ~~give~~ ANSWER the following ~~information~~: (THERE ARE FIVE PARTS TO THIS QUESTION — a THROUGH e)

(a) (1) Name of court _____

(2) Docket Number (if ~~known~~) YOU KNOW

(3) Nature of proceeding THE LEGAL _____

(4) Grounds raised (BASIS FOR YOUR CLAIM) _____

(5) Did you receive an ~~evidentiary~~ hearing on your petition, application, or motion? (WHERE EVIDENCE WAS GIVEN)

Yes ☐ No ☐

(6) Result

(7) Date of result (IF YOU KNOW)

If you filed a

(b) ~~As to any~~ second petition, application, or motion give the same information:

(1) Name of court

(2) Docket Number (if ~~known~~) YOU KNOW

(3) Nature of proceeding THE legal

(4) Grounds raised (BASIS FOR YOUR CLAIM)

(5) Did you receive an ~~evidentiary~~ hearing on your petition, application, or motion? (WHERE EVIDENCE WAS GIVEN)

Yes [ ] No [ ]

(6) Result

(7) Date of result (IF YOU KNOW)

(d) Did you appeal to the highest state court ~~having jurisdiction~~ the result ~~of action taken on any~~ petition, application, or motion? (OF YOUR)

(1) First petition, ~~etc.~~ Yes ☐ No ☐

(2) Second petition, ~~etc.~~ Yes ☐ No ☐

(3) Third petition, ~~etc.~~ Yes ☐ No ☐

(e) If you did *not* appeal ~~from the adverse action on any petition, application, or motion,~~ explain briefly why you did not: THE RESULT;

BRIEFLY

FOR THIS CURRENT MOTION

12. State ~~concisely~~ every ground on which you claim that you are being held in violation of the constitution, law, or treaties of the United States. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same. If you have filed more than two petitions, applications, or motions, please attach additional sheet(s) of paper and give the same information about each petition, application, or motion.

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

ON

PREVENTED

TRYING TO PRESENT

ALSO, THE

For your information, the following is a list of the most frequently raised grounds for relief ~~in habeas corpus~~ proceedings. Each ~~statement preceded by a letter constitutes~~ a separate ground for possible relief. You may raise any grounds ~~which you may have other than~~ those listed if you have exhausted your state court remedies ~~with respect to them~~. However, *you should raise in this petition all available grounds* (relating to this ~~conviction~~) on which you base your ~~allegations~~ that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must ~~allege~~ facts. The petition will be returned to you if you ~~merely~~ check ~~(a) through (j) or any one of these grounds~~.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. (1) GROUND ONE: _____

(2) Supporting facts ~~without citing legal authority or argument briefly state the facts that support your claim:~~

_____

_____

_____

_____

_____

(3) If you did not exhaust state remedies ~~as to~~ Ground One, briefly explain why:

_____

_____

_____

Direct Appeal

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

Yes ☐ No ☐

- your guilty plea WAS UNLAWfully INDUCED (you WERE led to plead guilty by some UNLAWful MEANS).

- your didn't MAKE your guilty plea VOLUNTARILY; KNOWING the CHARGES AGAINST you AND the CONSEQUENCES of pleading guilty.

- you WERE CONVICTED because your confession WAS COERCED.

- you WERE CONVICTED because of EVIDENCE THAT WAS OBTAINED FROM AN UNCONSTITUTIONAL SEARCH AND SEIZURE.

- you WERE CONVICTED because of EVIDENCE THAT WAS OBTAINED FROM AN UNLAWFUL ARREST

- you WERE CONVICTED because the PROSECUTOR FAILED to TELL you ABOUT INFORMATION THAT would have helped you.

- your CONVICTION VIOLATED the protection AGAINST double jeopardy (your right NOT to be TRIED TWICE for the SAME CRIME).

- you WERE CONVICTED because of ACTION by a GRAND JURY or PETIT JURY THAT WAS UNCONSTITUTIONALLY SELECTED.

- your WERE denied your right to AN EFFECTIVE LAWYER.

- you WERE denied your RIGHT to APPEAL.

(DO WE NEED "you WERE CONVICTED BECAUSE" EACH TIME?)

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

Post-Conviction Proceedings (ITALICS - NOT UNDERLINED)

(6) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? ← AFTER YOUR CONVICTION;

Yes ☐ No ☐

(7) If your answer to Question (6) is "Yes," ~~state the type of motion or petition, the name and location of the court where the motion or petition was filed, the case number (if known), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available.~~ ANSWER THE FOLLOWING:

- NAME AND LOCATION OF THE COURT WHERE you filed
- THE CASE NUMBER (if you KNOW)
- THE DATE OF THE COURT'S DECISION
- THE RESULT

ATTACH A COPY OF THE COURT'S OPINION OR ORDER, if IT IS AVAILABLE

(8) Did you receive ~~an evidentiary~~ hearing on your motion or petition? (WHERE EVIDENCE WAS GIVEN)

Yes ☐ No ☐

(9) Did you appeal ~~from the denial of~~ your motion or petition? (AFTER I WAS DENIED)

Yes ☐ No ☐

(10) If your answer to Question (9) is "Yes," ~~was~~ this issue ~~raised~~ in the appeal? (I did you RAISE) Yes ☐ No ☐

STATE THE following:
~~State the name and location of the court where the appeal was filed, the case number (if known), the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available.~~

- THE NAME AND LOCATION of THE COURT WHERE you filed THE APPEAL
- THE CASE NUMBER (if you KNOW)
- THE DATE of THE COURT'S DECISION
- THE RESULT

ATTACH A COPY OF THE COURT'S OPINION OR ORDER, if IT IS AVAILABLE

(11) If your answer to Questions (8), (9), or (10) is "No," briefly explain:

Other Remedies (ITALICS, NOT UNDERLINING)

(12) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies ~~as to~~ ON this issue:

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 possible 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).

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.

↓ (SAME AS GROUND ONE)

B. (1) GROUND TWO: _____

_____

(2) Supporting facts-without citing legal authority or argument briefly state the facts that support your claim:

_____

_____

_____

_____

(3) If you did not exhaust state remedies as to Ground Two, briefly explain why:

_____

_____

Direct Appeal

(4) If you appealed from the judgment of conviction. did you raise this issue?

Yes ☐ No ☐

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

_____

_____

_____

Post-Conviction Proceedings

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

Yes ☐ No ☐

(7) If your answer to Question (6) is "Yes," state the type of motion or petition, the name and location of the court where the motion or petition was filed, the case number, the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available.

_____

_____

_____

_____

(8) Did you receive an evidentiary hearing on your motion or petition?

Yes ☐ No ☐

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

Yes ☐ No ☐

(10) If your answer to Question (9) is "Yes," was this issue raised in the appeal? Yes ☐ No ☐

State the name and location of the court where the appeal was filed, the case number, the date of the court's decision, and the result. Attach a copy of the court's opinion or order, if available.

_____

(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) 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. **(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.

(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.	(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.
(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.	

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 state that first-class postage has been prepaid.

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 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 the attorney general or other appropriate officer of the state involved.

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 the petition unless a judge 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 exhaustion of state remedies, procedural bar, or 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.

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.
(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.

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.
(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.

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.

Rule 9. Delayed or Successive Petitions	Rule 9. 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.
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.
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.

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.

Rule 2. Motion	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) 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. **(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 subject to future custody, as the case may be, he shall do so by separate motions.	**(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.
(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.	

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 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.
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 to file an answer or other pleading within a fixed time, or to take other action the judge may order.

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 the motion — or move with respect to it — unless a judge so orders. **(b) Addressing the Allegations; Other Remedies.** An 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 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.

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.
(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 is granted leave to take a deposition, the judge may require the government to pay the travel expenses, subsistence expenses, and fees of the moving party's attorney to attend the deposition.

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.
(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.

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.

Rule 9. Delayed or Successive Motions	Rule 9. 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.
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.
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.

Rule 12. Federal Rules of Criminal and Civil Procedure; Extent of Applicability	**Rule 12. Applicability of the Federal Rules of Civil Procedure and 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.