Agenda E-18
Rules
September 2003

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. (a) Approve the proposed amendments to Bankruptcy Rules 1011, 2002, and 9014 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 4-6

   (b) Approve the new Official Form 21 to take effect on December 1, 2003 . . . . . pp. 5-6

2. Approve the proposed amendments to Criminal Rule 35 and the Rules Governing § 2254 Cases and § 2255 Proceedings and accompanying forms and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 11-16

3. Approve the proposed amendment to Evidence Rule 804(b)(3) and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 17-18

The remainder of the report is submitted for the record, and includes the following items for the information of the Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure met on June 9-10, 2003. All the members attended.

Representing the advisory rules committees were: Judge Samuel A. Alito, chair, and Professor Patrick J. Schiltz, reporter, of the Advisory Committee on Appellate Rules; Judge A. Thomas Small, chair, and Professor Jeffrey W. Morris, reporter, of the Advisory Committee on Bankruptcy Rules; Judge David F. Levi, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge Edward E. Carnes, chair, Judge David G. Trager, member, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Jerry E. Smith, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief of the Rules Committee Support Office, Jeffrey A. Hennemuth, Deputy Assistant Director for Judges Programs, James Ishida and Katherine Marrone, attorney advisors, all in the Administrative Office; Joseph Cecil of the Federal Judicial Center;

Professor Mary P. Squiers, Director of the Local Rules Project; and Joseph F. Spaniol, consultant to the Committee. Peter G. McCabe, the Committee's Secretary, was unable to attend the meeting.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules proposed amendments to Rules 4, 26, 28, 32, 34, 35, and 45, and new Rules 27(d)(1)(E), 28.1, and 32.1 with a recommendation that they be published for comment.

The amendments to Rule 4(a)(6) would clarify the conditions specified in the rule to reopen the time to appeal. Under the proposed amendments, a party may move to reopen the time to appeal only if the party had not received notice in accordance with Federal Rules of Civil Procedure 77(d) and 5(d) of the entry of judgment or order within 21 days after its entry. The amendments eliminate an unintended ambiguity that had arisen from the comprehensive restructuring of the Appellate Rules in 1998 concerning the specific type of notice that precludes later moving to reopen the time to appeal under this rule. The amendments also make it clear that the seven-day period to move to reopen the time to appeal is triggered only by written notice of the entry of judgment or order.

Amended Rule 26 and Rule 45 would substitute "Washington's Birthday" for "Presidents' Day" as one of the legal holidays for purposes of computing time and determining when court is open under the rules. New Rule 27(d)(1)(E) would provide that a motion, a response to a motion, and a reply to a response to a motion must comply with Rule 32 typeface and type-style requirements.

Under the proposed amendments to Rule 28, the provisions dealing with cross-appeals are transferred to a proposed new Rule 28.1. The new Rule 28.1 would collect in one place all the provisions dealing with briefing of cross-appeals now dispersed throughout the rules and would also fill in the present gaps in the rules regarding cross-appeals. The provisions in the new rule largely have been patterned after the requirements imposed by Rules 28, 31, and 32 on briefs in cases that do not involve cross-appeals.

The proposed amendments to Rule 32 and Rule 34 contain cross-references to new Rule 28.1 governing cross-appeals.

New Rule 32.1 would require courts to permit the citation of opinions, orders, or other judicial dispositions that have been designated as "not for publication," "non-precedential," or the like. It also would require a party to file a copy of the unpublished opinion, order, judgment, or other written disposition if it is not readily available in a publicly accessible electronic database. The proposed rule is narrowly drawn and only addresses the citation of unpublished opinions. The proposed rule takes no position on whether designating opinions as non-precedential is constitutional. Nor does it have any impact on the effect a court must give to an unpublished opinion.

The proposed amendments to Rule 35(a) resolve an inter-circuit conflict regarding the make-up of the vote for a hearing or a rehearing en banc. Under the proposed amendments, disqualified judges would not be counted in the "base" in determining whether a "majority" of the circuit judges voted in favor of an en banc hearing. The proposed amendments resolve the circuit conflict over the interpretation of 28 U.S.C. § 46(c), which provides that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service."

In 1973 the Judicial Conference supported legislation to amend § 46(c) to permit an en banc hearing on the vote of a majority of judges who were not disqualified to vote, instead of only on the vote of an absolute majority of the judges of the court, which was presumed to be required by the statute (JCUS-SEP 73, p. 47). In 1984, the Judicial Conference rescinded its earlier position, when it concluded that the statutory provision did not mandate the "absolute majority" rule (JCUS-SEP 84, pp. 55-56). Instead, the Conference recommended that each court of appeals adopt a local rule specifying the appropriate vote-counting procedure. The advisory committee concluded that national uniformity in vote-counting procedures is necessary as a matter of fairness and because no justifiable reason for different treatment has been shown.

Like the Judicial Conference in 1984, the advisory committee concluded that both the "absolute majority" and "case majority" vote-counting procedure represent reasonable interpretations of § 46(c). This conclusion is supported by the fact that, although a majority of the circuits now use the "absolute majority" approach, a substantial minority use the "case majority" approach, and even more circuits have used the "case majority" approach in the past. In the advisory committee's view, the proposed amendment to Rule 35(a) does not represent the use of a rule to supersede an inconsistent statute as much as it represents the use of a rule to embrace one of two reasonable interpretations of an ambiguous statute.

The Committee approved the recommendations of the advisory committee to circulate the proposed rule amendments to the bench and bar for comment.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 1011, 2002, and 9014 and new Official Form 21 with a recommendation that they be

approved and transmitted to the Judicial Conference. The amendment to Rule 9014 was circulated to the bench and bar for comment in August 2002. The scheduled public hearing on the proposed rule amendment was canceled because no one asked to testify. The amendments to Rules 1011 and 2002 and new Official Form 21 are technical or conforming and were not published for public comment.

The proposed amendment to Rule 9014 exempts "contested matters" from the mandatory disclosure provisions of Rule 26 of the Federal Rules of Civil Procedure, which apply to bankruptcy proceedings in accordance with Rule 7026. Contested matters often involve time-sensitive matters. They typically are resolved well before the time when disclosure is required under Rule 26, rendering the mandatory disclosure provisions ineffective and counterproductive. The mandatory disclosure requirements, however, continue to apply to adversary proceedings and may apply in individual contested matters if directed by the court or the judge.

The proposed amendment to Rule 1011 changes the reference to Rule 1004 to conform with a recent amendment of that rule. Rule 2002 would be amended to specify that copies of notices to creditors in a chapter 11 case must be sent to the address for the Internal Revenue Service set out in the Rule 5003(e) mailing-address register.

The proposed new Official Form 21 implements the recent amendment to Rule 1007(f), which requires a debtor to submit a verified statement setting out the debtor's social security number. The form containing the full social security number would not be available to the public, consistent with the Judicial Conference privacy policy limiting disclosure of personal identification numbers on court documents. But the form would provide information to the clerk to include the social security number on the notice of the creditors' meeting, as required under Rule 2002(a)(1). A copy of the notice in the public court files, however, would show only the last four digits of the number.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference:

a. approve the proposed amendments to Bankruptcy Rules 1011, 2002, and 9014 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. approve the new Official Form 21 to take effect on December 1, 2003.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and the new Official Form are in Appendix A with an excerpt from the advisory committee report.

Approved for Publication and Comment

The advisory committee proposed amendments to Rules 1007, 3004, 3005, 4008, 7004, and 9006 with a recommendation that they be published for public comment.

The proposed amendment to Rule 1007 requires the debtor in a voluntary case to submit with the petition a list of the names and addresses of each person and entity entitled — under specified schedules prescribed by the Official Forms — to receive a notice of the bankruptcy filing. The "mailing-matrix" information is required by virtually all courts under local rules. The information ensures that all entities entitled to receive notice will be mailed notices, including codebtors, and nondebtor parties to executory contracts and unexpired leases.

Under the proposed amendments to Rule 3004, which conform to § 501(c) of the Bankruptcy Code, the debtor and trustee must wait and may not file a proof of claim until the creditor's opportunity to file a proof of claim has expired.

The proposed amendments to Rule 3005(a) delete, because it is unnecessary, the language in the existing rule that permits a creditor to file a proof of claim that supersedes a claim filed on behalf of the creditor by a codebtor. The existing provision was intended to protect a creditor from being bound by a proof of claim filed by a codebtor on behalf of the creditor. But § 501 of

the Code and the proposed amendments to Rule 3004 obviate the need for the existing language, because a codebtor may no longer file a proof of claim until after the creditor's time to file has expired.

The proposed amendments to Rule 4008 set the deadlines for filing a reaffirmation agreement. The Committee approved publishing the amendments for comment at its last meeting.

The proposed amendments to Rule 7004 explicitly authorize a clerk to issue a summons by electronic means. The amendments address only the issuance of the summons and not the service of the summons, which must be accomplished in the traditional manner.

Rule 9006 would be amended to clarify the method of counting the additional three days provided to respond if service is by mail or by one of the methods prescribed in Civil Rule 5(b)(2)(C) or (D). The counting of the three days commences after the prescribed period to respond expires. Similar amendments are being proposed to Civil Rule 6.

The Committee approved the recommendations of the advisory committee to publish the proposed amendments to Rules 1007, 3004, 3005, 7004, and 9006 to the bench and bar for comment along with the earlier-approved amendments to Rule 4008.

Informational Item

A panel consisting of a judge, an academic, and several practitioners well experienced in complex litigation briefed the advisory committee on current developments in mass-tort litigation handled in bankruptcy. The number of large-scale bankruptcies involving mass tort litigation has significantly risen. The advisory committee will continue to monitor the litigation and evaluate the need for any appropriate rule changes.

Rules Approved for Publication and Comment

The Advisory Committee on Civil Rules proposed amendments to Rules 6, 27, and 45, and a new Rule 5.1 with a recommendation that they be published for public comment. The advisory committee also proposed a style revision of Rules 1-15 with a recommendation that they be published for public comment but at a later date. At its last meeting, the Committee approved publishing for comment proposed amendments to Admiralty Rules B and C.

Proposed new Rule 5.1 requires a party to notify the appropriate federal or state government official if a filed pleading, motion, or other paper draws into question the constitutionality of a federal or state statute. The notice requirement supplements the court's duty under 28 U.S.C. § 2403 to notify the appropriate government official of a constitutional challenge to a statute. The new rule replaces the final three sentences of Rule 24(c), which sets out the court's notification duty and urges a challenging party to call the court's attention to the court's duty.

The proposed amendment to Rule 6 clarifies the method of counting the additional three days provided to respond if service is by mail or by one of the methods prescribed in Rule 5(b)(2)(C) or (D). The counting of the three days commences after the prescribed period to respond expires.

The proposed amendment to Rule 27 corrects an outdated cross-reference to former Rule 4(d). The amendment makes clear that all methods of service that are authorized under Rule 4 can be used to serve a petition to perpetuate testimony.

Rule 45(a)(2) would be amended to require that the subpoena served on a deponent state the method for recording testimony. Although Rule 30(b)(2) directs that notice of a deposition state the manner by which the testimony will be recorded, the notice is served on the parties and

not necessarily on a non-party deponent. Under rare circumstances, a deponent may have good reasons to seek a protective order with regard to the manner of recording. The advance notice required by the amendment would eliminate delay caused by a deponent seeking a protective order restricting the manner of recording.

The Committee approved the advisory committee's recommendations to publish the proposed rules amendments to the bench and bar for comment, along with the Admiralty Rules amendments described in the Committee's March 2003 report to the Judicial Conference.

Informational Items

The advisory committee has embarked on a multi-year, comprehensive "style" revision aimed at clarifying and simplifying the existing language of the Civil Rules. The project follows the successful completion of the style revisions of the Federal Rules of Appellate Procedure and the Federal Rules of Criminal Procedure.

The advisory committee approved the "style" revision of Rules 1 through 15. The rules had undergone demanding scrutiny, first by noted academic scholars, then by a leading legal writing expert, and later by the Committee's Subcommittee on Style, composed of federal judges and an academic assisted by consultants, before the revisions were forwarded to the advisory committee.

The advisory committee divided itself into two subcommittees, each with primary responsibility over half the group of rules. The subcommittees met in person to discuss each group of rules, and revised drafts were submitted to the advisory committee for its consideration in a plenary session.

The advisory committee addressed the appropriate scope of the project as a threshold issue. It decided not to propose substantive changes as part of this comprehensive style revision for two principal reasons: (1) a multitude of small substantive changes would be difficult for the

bench and bar to digest, comment upon, and incorporate into practice; and (2) the advisory committee and the style project easily could become swamped were the committee forced to consider the merits of many substantive changes. Potentially desirable substantive changes that emerge from style deliberations are directed to the regular agenda for separate consideration as opportunities arise.

After approving the recommended style revision of Rules 1-15, the advisory committee agreed that it was best to defer publishing them for public comment until a later time when work on the next group of rules can be completed and a greater number of rules can be aggregated and published at a single time.

The Committee approved the proposed amendments to Rules 1-15 to be published at a later date to the bench and bar for comment.

The advisory committee's subcommittees met or held conference calls during the past six months to study issues arising from discovery of computer-based documents, sealing of filed settlement orders, outstanding issues remaining from the committee's work on class-action reform, and a new civil forfeiture rule.

The Discovery Subcommittee identified several discrete electronic-discovery topics that it will present to the advisory committee next fall by way of draft rule amendments.

The Forfeiture Subcommittee conducted several lengthy conference calls as the first step in working on a draft Admiralty Rule "G" proposed by the Department of Justice to consolidate and expand the procedures for civil forfeiture now scattered throughout the Admiralty Rules.

The Federal Judicial Center is conducting research at the advisory committee's request on sealing orders and selection of class-action forums. The Center presented the advisory committee with preliminary findings on the number of settlements filed under seal. It also

reported its progress on a national survey of lawyers' predispositions to file class-actions either in federal courts or state courts.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to to Rules 35, 41, and the Rules Governing § 2254 Cases and § 2255 Proceedings and accompanying forms with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments to Rule 35 were published for public comment in August 2001, and the amendments to Rule 41 and the § 2254 and § 2255 Rules and accompanying forms were published for public comment in August 2002. Neither public hearing scheduled for the proposed amendments was held because no one requested to testify.

The proposed amendments to Rule 35 define "sentencing" as used in the rule to mean the "oral announcement of the sentence" for purposes of correcting a sentence. The clarification eliminates the potential ambiguity in the meaning of "sentencing," which triggers the seven-day period for making corrections in a sentence. The advisory committee originally proposed to define "sentencing" to be the "entry of judgment," which triggers many other time periods in the appellate rules. But the advisory committee agreed with the weight of the public comments that "oral announcement of sentencing" is preferable.

Defining "sentencing" to mean the "oral announcement of the sentence" represents the majority view of the courts of appeals addressing the issue. The advisory committee determined that there likely would be less confusion generated if the majority view were adopted. More practitioners are accustomed to computing their time to file a Rule 35 motion from the "oral announcement of the sentence" than from the "entry of judgment." Furthermore, the entry of judgment may be delayed for substantial periods of time for any number of reasons. Defining

"sentencing" to mean oral announcement of sentence would not expand the time during which a court could change the sentence, as it might be if the time period were to be triggered by the entry of judgment. The advisory committee concluded that the interests of finality would be better served by setting the triggering event as the "oral announcement of the sentence."

Proposed amendments to Rule 41 set out procedures governing the issuance of a tracking-device warrant and the comprehensive revision of the Rules Governing § 2254 Cases and § 2255 Proceedings conform to recent legislation and reflect the best practices of the courts.

The Committee approved the proposed amendments to Rule 41 for transmission to the Judicial Conference. The amendments would provide guidance, now found only in the case law, to judges issuing tracking-device warrants. Following the meeting, the Deputy Attorney General, who abstained from the vote, requested the Committee to defer transmitting them. In light of the Deputy's concerns and because the Department of Justice itself originally proposed the rule changes, the Committee decided to defer transmitting the proposed amendments. The deferral would allow the Department of Justice to present its concerns for the Committee's consideration.

The Rules Governing § 2254 Cases and § 2255 Proceedings are amended not only to conform to the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. Law No. 104-132) (AEDPA) and best practices of the courts but also to improve their clarity, consistent with the recent comprehensive style revision of the Federal Rules of Criminal Procedure. Many of the § 2254 Rules are similar or identical to the § 2255 Rules. Although the advisory committee initially pursued a proposal to consolidate both sets of rules, it ultimately declined to do so because consolidation raised too many problems.

The proposed amendments to Rules 1, 10, and 11 of the § 2254 Rules and Rules 1, 10, 11, and 12 of the § 2255 Rules are stylistic only. The proposed amendments to the remaining rules include more substantive changes noted below.

The proposed amendments to Rules 2 of the § 2254 and § 2255 Rules remove the existing requirement in the rules that the petition or motion be signed by the petitioner. The amendments would allow others authorized by law to sign the petition or motion on behalf of the petitioner or movant, e.g., "next friend," to do so. The proposed amendments also eliminate the authority of a clerk of court to return an insufficient petition or motion. Related amendments to Rules 3 of the § 2254 and § 2255 Rules would explicitly require the clerk to accept the filings.

Under the proposed amendments to Rules 3 of the § 2254 and § 2255 Rules, the clerk must file the petition or motion, consistent with Rule 5(e) of the Federal Rules of Civil Procedure, regardless of whether it fails to comply with these rules or local rules. Only a judge should refuse to accept a petition for filing, because the consequences of a late filing have become more serious in light of AEDPA's one-year statute of limitations. The proposed amendments also add a provision referring to the statutory one-year limitations that applies to a petition or motion filed under these rules. The Committee Note observes that the rule does not refer to the equitable tolling of a statute of limitation, but recognizes that every circuit addressing the issue has ruled that equitable tolling is available in appropriate circumstances.

Rule 4 of the § 2254 Rules would be amended to eliminate the requirement that the clerk of court serve a copy of the petition only by certified mail. The other methods of service authorized by Civil Rule 5 may be used. The amendments would also allow service on appropriate state officers instead of limiting service to the state attorney general alone. Under the proposed amendments to Rules 4 of the § 2254 and § 2255 Rules, a respondent may respond to a § 2254 petition or § 2255 motion not only by an answer or other pleading, but also by motion, including a motion to dismiss.

Rule 5 of the § 2254 Rules would be amended to require that the respondent state whether any claim of the petitioner is barred by a failure to exhaust state remedies, a procedural bar, non-

retroactivity, or a statute of limitations. It is also amended to require the respondent to provide the court with copies of any brief filed by the prosecution in the appellate court and the appellate court's opinions and dispositive orders relating to the conviction or sentence. The proposed amendments to Rules 5 of § 2254 Rules and § 2255 Rules adopt the practices of jurisdictions that explicitly provide an opportunity for the petitioner or movant to file a "reply" to the respondent's answer within a time fixed by the judge. The rules use the general term "reply" to refer to a petitioner's or movant's response to the answer, instead of the term "traverse."

The proposed amendments to Rules 6 of the § 2254 and § 2255 Rules add the requirement that the parties must provide reasons for requested discovery. Any proposed interrogatory and request for admission must accompany the discovery request, which must also specify any requested documents. These proposed changes reflect common practice in the courts.

Rules 7 of the § 2254 and § 2255 Rules clarify the authority of a judge to direct parties to submit to the court materials to assist it in its deliberations. The existing rules may be read narrowly to limit the court's authority to request only certain information in the record.

Under the proposed amendments to Rules 8 of the § 2254 and § 2255 Rules, a copy of the magistrate judge's findings may be delivered to all parties not only by mail, as required under the present rules, but also by any of the Civil Rule 5(b) service methods.

Rules 9 of the § 2254 and § 2255 Rules delete the provisions governing the dismissal of delayed § 2254 petitions or § 2255 motions. The AEDPA's one-year statute of limitations renders the provision unnecessary and potentially confusing. The amendments also reflect the requirement in the AEDPA that the petitioner or movant obtain approval from the appropriate court of appeals authorizing the district court to consider a second or successive petition or motion.

The proposed comprehensive revision of the model forms for filing a § 2254 petition or a § 2255 motion simplify the language and reflect the amendments proposed to the § 2254 and § 2255 Rules, including provisions conforming to the AEDPA. The revisions specifically refer to the one-year statute of limitations and require that all grounds of relief be stated in the forms. Space is provided for reasons explaining an untimely filing.

The revised forms omit the illustrative lists of the most frequently cited grounds for relief in § 2254 cases and § 2255 proceedings. Some members of the advisory committee believed that the lists were useful, because they might narrow the issues presented to the court by focusing the petitioner's or movant's attention on discrete, articulable issues. But a majority of the advisory committee concluded that the lists were not particularly helpful and encouraged unsupported allegations. Moreover, no list could be comprehensive.

The advisory committee believed that requesting in the forms information regarding an earlier motion, petition, or other application concerning the judgment of conviction is essential to the efficient handling of petitions and motions under the § 2254 and § 2255 Rules. Many petitions or motions filed under the § 2254 and § 2255 Rules are quickly disposed of because they do not comply with AEDPA's requirements. Absent the requested information, the respondent and the court could waste time and energy exploring the merits of the claims that would ultimately be barred by AEDPA. The advisory committee did not agree that providing this information would shift the burden to demonstrate an affirmative defense from the respondent to the petitioner or movant.

The revised forms may be signed by a person other than the petitioner or movant when authorized by law. The "in forma pauperis" declaration relieving the petitioner or movant of paying the $5 filing fee is left intact. The advisory committee determined that expanding the

form to require more information than the proposed forms do would be counterproductive and unreasonable.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rule 35 and the Rules Governing § 2254 Cases and § 2255 Proceedings and accompanying forms and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Criminal Procedure are in Appendix B with an excerpt from the advisory committee report.

Approved for Publication and Comment

The advisory committee proposed amendments to Rules 12.2, 29, 32, 32.1, 33, 34, 45, and new Rule 59 with a recommendation that they be published for public comment.

The proposed amendments to Rule 12.2 authorize a court to exclude certain expert evidence that had not been timely disclosed in accordance with the rule's disclosure requirements.

The amendments to Rules 29, 33, and 34 would permit a court to extend the time of filing of the designated motion even if the court rules on the matter after the expiration of the specified seven days, so long as the motion to extend was timely filed within the seven-day period. Rule 45, which deals generally with extensions of time, would be amended to be consistent with the proposed amendments to Rules 29, 33, and 34.

The proposed amendments to Rule 32 extend allocution at sentencing to victims of a felony offense not involving violence or sexual abuse. Under the existing rule, only a victim of a crime of violence or sexual abuse is entitled to address the court at sentencing. The amendments provide the court with discretion to limit the number of victims who may address the court at sentencing in cases involving multiple victims.

Rule 32.1 would be amended to specifically provide a person with an opportunity to make a statement in mitigation upon resentencing in a proceeding revoking probation or supervised release or modifying the conditions of probation or supervised release.

New Rule 59 creates a procedure for a district judge to review nondispositive and dispositive decisions by a magistrate judge. Under the amendments, a party waives its right to review of a magistrate judge's decision unless the party timely files objections with the district judge. The district judge retains the authority, however, to review a magistrate judge's decision even if an objection had not been timely filed. The procedures are based on 28 U.S.C. § 636 and are derived in part from Federal Rule of Civil Procedure 72.

The Committee approved the recommendations of the advisory committee to publish the proposed amendments to Rules 12.2, 29, 32, 32.1, 33, 34, 45, and new Rule 59 to the bench and bar for comment.

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted a proposed amendment to Rule 804(b)(3) with a recommendation that it be approved and transmitted to the Judicial Conference. The amendment to Rule 804(b)(3) was published for public comment in August 2002. A public hearing was held at which several witnesses testified.

The proposed amendment to Rule 804(b)(3) requires "particularized guarantees of trustworthiness" indicating the reliability of an unavailable witness's statement against penal interest *incriminating* an accused. The requirement mirrors the test applied by the Supreme Court in *Lilly v. Virginia,* 527 U.S. 116, 134-135 (1999). The amendment would maintain the longstanding "corroborating circumstances" requirement for a statement against penal interest of an unavailable witness *exculpating* an accused.

In *Lilly,* the Supreme Court held that statements against penal interest by unavailable witnesses incriminating an accused must bear "particularized guarantees of trustworthiness" because of the Confrontation Clause. But statements exculpating an accused do not implicate the Confrontation Clause. The advisory committee concluded that the "corroborating circumstances" standard, which has been significantly developed by case law over 30 years, should continue to apply to statements exculpating an accused. The Committee Note explains the distinction between the two standards.

The advisory committee recognized that the difference between the two standards is not sharply defined. Although there is substantial case law explaining what is meant by "corroborating circumstances" supporting a hearsay statement exculpating an accused, the precise extent of "particularized guarantees of trustworthiness" required to support a hearsay statement incriminating an accused is subject to developing case law. The Committee Note is intended to provide as much guidance as is possible to the bench and bar to understand the differences between the two standards. The Note points out the factors to be considered under each standard.

The advisory committee withdrew its proposed amendments to extend the "corroborating circumstances" standard to statements against penal interest in civil cases. It determined that the change was not necessary and would be counterproductive.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendment to Evidence Rule 804(b)(3) and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to the Federal Rules of Evidence is in Appendix C with an excerpt from the advisory committee report.

RULES GOVERNING ATTORNEY CONDUCT

The Committee's Subcommittee on Rules Governing Attorney Conduct has monitored legislative developments and discussions on the attorney conduct rules among the Department of Justice, state court representatives, and the American Bar Association.

LOCAL RULES PROJECT

The report on the local rules project prepared by Professor Mary P. Squiers identifies individual rules that are potentially inconsistent or duplicative of national rules or federal law. The advisory committee reporters reviewed the report's findings and recommendations. The advisory committee reporters, Committee reporter, and advisory committee chairs are working with Professor Squiers to develop a consensus report. Individual letters to each district court will be drafted identifying specific problematic local rules.

LONG-RANGE PLANNING

The Committee was provided a report of the March 17, 2003, meeting of the Judicial Conference's committee chairs involved in long-range planning. The Committee made no changes to its long-range goals.

REPORT TO THE CHIEF JUSTICE

In accordance with the standing request of the Chief Justice, a summary of issues concerning select proposed amendments generating controversy is set forth in Appendix D.

Respectfully Submitted,

Anthony J. Scirica

David M. Bernick
Charles J. Cooper
Sidney A. Fitzwater
Mary Kay Kane
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Appendix A — Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix B — Proposed Amendments to the Federal Rules of Criminal Procedure
Appendix C — Proposed Amendments to the Federal Rules of Evidence
Appendix D — Report to the Chief Justice on Proposed Amendments Generating Controversy

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

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

FROM: **Honorable A. Thomas Small, Chair**
Advisory Committee on Bankruptcy Rules

DATE: **May 27, 2003**

RE: **Report of the Advisory Committee on Bankruptcy Rules**

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 3-4, 2003, in Longboat Key, Florida. The Advisory Committee considered public comments regarding a proposed amendment to Bankruptcy Rule 9014 that was published in August 2002. The Advisory Committee received only four comments on the proposed amendment to the Rule. Since no person who submitted a written comment requested to appear at the public hearing scheduled for January 24, 2003, the hearing was canceled. The Advisory

Committee also considered technical amendments to Bankruptcy Rules 1011 and 2002(g) as well as a new Official Form for the submission of a debtor's social security number as required by amendments to Bankruptcy Rules 1007 and 2002 that will become effective on December 1, 2003.

* * * * *

The Advisory Committee considered the written comments on the proposed amendment to Bankruptcy Rule 9014, and approved the proposal and will present it to the Standing Committee at its June 2003 meeting for final approval and transmission to the Judicial Conference. The amendment to Bankruptcy Rule 9014 is set out in Part II A of this Report.

The amendments to Bankruptcy Rules 1011 and 2002(g) are technical and are submitted to the Standing Committee without prior publication and comment. The amendment to Rule 1011 simply conforms a cross reference in that rule to reflect a recent amendment to another Bankruptcy Rule. The amendment to Rule 2002(g) changes the address for mailing notices to the Internal Revenue Service because of a change in the structure of the Service. A new Official Form 21 is proposed to implement the restrictions on the publication of a debtor's social security number. The amendments to Bankruptcy Rules 1011 and 2002(g) and Official Form 21 are set out in Part II B of this Report.

* * * * *

II Action Items

A. Proposed Amendments to Bankruptcy Rule 9014 Submitted for Final Approval by the Standing Committee and Submission to the Judicial Conference.

1. *Public Comment.*

The preliminary draft of the proposed amendment to Bankruptcy Rule 9014 was published for comment in August 2002. A public hearing on the preliminary draft was scheduled for January 24, 2003. There were no requests to appear at the hearing. There were four comments on the proposal, and they are summarized below. The Advisory Committee reviewed these comments and approved the amendment to the rule as published.

2. *Synopsis of Proposed Amendment*

Rule 9014 is amended to limit the applicability of the mandatory disclosure provisions of Rule 26 of the Federal Rules of Civil Procedure made applicable in contested matters in bankruptcy cases by Bankruptcy Rule 7026. Contested matters typically are resolved more quickly than the time that would elapse under the normal application of the mandatory disclosure provisions of Fed. R. Civ. P. 26. Those disclosure requirements continue to apply in adversary proceedings, and the court can order that they apply in a particular contested matter.

B. *Rules and Official Form Amendments Proposed Without Public Comment.*

The Advisory Committee considered technical amendments to Bankruptcy Rules 1011 and 2002(g). The Advisory Committee approved the amendments to the rules and submits that the nature of these amendments is such that there is no need for publication and comment on the proposed amendments. The Advisory Committee recommends that the Standing Committee approve the amendments for submission to the Judicial Conference.

The Advisory Committee also considered a new Official Form 21. This form implements the amendment to Rule 1007(f) that becomes effective on December 1, 2003, in the absence of Congressional action. The form provides the mechanism for the debtor to submit a social security number to the court so that creditors and other parties in interest can identify the debtor while maintaining the debtor's privacy. The Advisory Committee recommends that the Standing Committee approve the Official Form for submission to the Judicial Conference with an effective date of December 1, 2003.

1. *Synopsis of Proposed Rules Amendments and New Official Form:*

(a) Rule 1011 is amended to delete a cross reference to Rule 1004(b). The cross reference should be to Rule 1004 because that rule was amended recently such that the rule no longer includes any subdivisions.

(b) Rule 2002(g) is amended to reflect the restructuring of the Internal Revenue Service. The Service no longer includes a District Director, so the rule is amended to provide that notices should be mailed to the address set out by the Service in the register maintained by the clerk of the Bankruptcy Court.

(c) Official Form 21 is a new form that a debtor must submit to the court setting out the debtor's social security number. The Form implements the recently approved amendments to Bankruptcy Rule 1007 adopted to further the Judicial Conference's privacy protection policy.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1011. Responsive Pleading or Motion in Involuntary and Ancillary Cases

(a) WHO MAY CONTEST PETITION. The debtor named in an involuntary petition or a party in interest to a petition commencing a case ancillary to a foreign proceeding may contest the petition. In the case of a petition against a partnership under Rule 1004 ~~(b)~~, a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition.

* * * * *

COMMITTEE NOTE

The amendment to Rule 1004 that became effective on December 1, 2002, deleted former subdivision (a) of that rule leaving only the provisions relating to involuntary petitions against partnerships. The rule no longer includes subdivisions. Therefore, this technical amendment changes the reference to Rule 1004(b) to Rule 1004.

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

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

* * * * *

(j) NOTICES TO THE UNITED STATES. Copies of notices required to be mailed to all creditors under this rule shall be mailed (1) in a chapter 11 reorganization case, to the Securities and Exchange Commission at any place the Commission designates, if the Commission has filed either a notice of appearance in the case or a written request to receive notices; (2) in a commodity broker case, to the Commodity Futures Trading Commission at Washington, D.C.; (3) in a chapter 11 case, to the ~~District Director of~~ Internal Revenue Service at its address set out in the register maintained under Rule 5003(e) for the district in which the case is pending; (4) if the papers in the case disclose a debt to the United States other than for taxes, to the United States attorney for the district in which the case is pending and to the department,

agency, or instrumentality of the United States through which the debtor became indebted; or (5) if the filed papers disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C.

* * * * *

COMMITTEE NOTE

The rule is amended to reflect that the structure of the Internal Revenue Service no longer includes a District Director. Thus, rather than sending notice to the District Director, the rule now requires that the notices be sent to the location designated by the Service and set out in the register of addresses maintained by the clerk under Rule 5003(e). The other change is stylistic.

Rule 9014. Contested Matters

* * * * *

(c) APPLICATION OF PART VII RULES. Except as otherwise provided in this rule, and unless ~~Unless~~ the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071. The following subdivisions of Fed. R.

Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

* * * * *

COMMITTEE NOTE

The rule is amended to provide that the mandatory disclosure requirements of Fed. R. Civ. P. 26, as incorporated by Rule 7026, do not apply in contested matters. The typically short time between the commencement and resolution of most contested matters makes the mandatory disclosure provisions of Rule 26 ineffective. Nevertheless, the court may by local rule or by order in a particular case provide that these provisions of the rule apply in a contested matter.

Public Comment on Proposed Amendments to Rule 9014:

1. Gary L. Kepplinger, Deputy General Counsel, United States General Accounting Office, submitted a letter indicating that his office had no comments on the proposal.

2. Thomas J. Yerbich, Court Rules Attorney for the District of Alaska, supports the proposed amendment to Rule 9014 and also suggested that the rule include a specific reference to the court's authority to issue a local rule governing mandatory discovery matters.

3. Professor Anthony Michael Sabino, Associate Professor at St. John's University School of Business, supports the proposed amendment to Rule 9014 and suggested an addition to the Committee Note to reiterate that the court has the power to require the application of all or some of Civil Rule 26 in appropriate circumstances.

4. Kent F. Hofmeister, Esq., President, Federal Bar Association, stated that the Federal Bar Association supports the amendment to Rule 9014.

Changes Made After Publication. No changes since publication.

Form B 21 Official Form 21
(12/03)

FORM 21. STATEMENT OF SOCIAL SECURITY NUMBER

[*Caption as in Form 16A.*]

STATEMENT OF SOCIAL SECURITY NUMBER(S)

1.Name of Debtor (enter Last, First, Middle):_____
(Check the appropriate box and, if applicable, provide the required information.)

/ /Debtor has a Social Security Number and it is: _ _ _-_ _-_ _ _ _
(*If more than one, state all.*)
/ /Debtor does not have a Social Security Number.

2.Name of Joint Debtor (enter Last, First, Middle):_____
(Check the appropriate box and, if applicable, provide the required information.)

/ /Joint Debtor has a Social Security Number and it is: _ _ _-_ _-_ _ _ _
(*If more than one, state all.*)
/ /Joint Debtor does not have a Social Security Number.

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

X _____
Signature of Debtor Date

X _____
Signature of Joint Debtor Date

**Joint debtors must provide information for both spouses.*
Penalty for making a false statement: Fine of up to $250,000 or up to 5 years imprisonment or both. 18 U.S.C. §§ 152 and 3571.

COMMITTEE NOTE

The form implements Rule 1007(f), which requires a debtor to submit a statement under penalty of perjury setting out the debtor's Social Security number. The form is necessary because Rule 1005 provides that the caption of the petition includes only the final four digits of the debtor's Social Security number. The statement provides the information necessary for the clerk to include the debtor's full Social Security number on the notice of the meeting of creditors, as required under Rule 2002(a)(1). Creditors in a case, along with the trustee and United States trustee or bankruptcy administrator, will receive the full Social Security number on their copy of the notice of the meeting of creditors. The copy of that notice which goes into the court file will show only the last four digits of the number.

* * * * *

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

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CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

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

FROM: **Ed Carnes, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

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

DATE: **May 15, 2003**

* * * * *

II. Action Items—Summary and Recommendations.

The Advisory Committee on the Criminal Rules met on April 28 and 29, 2003, and acted on a number of proposed

amendments. This report addresses matters discussed by the Committee at that meeting. First, the Committee considered public comments on proposed amendments to the following Rules:

- Rule 35. Correcting or Reducing a Sentence; Addition of Definition for Sentencing.

* * * * *

- Rules Governing § 2254 and § 2255 Proceedings and Accompanying Forms.

As noted in the following discussion, the Advisory Committee proposes that those amendments be approved by the Committee and forwarded to the Judicial Conference.

* * * * *

III. Action Items–Recommendations to Forward Amendments to the Judicial Conference

A. Summary and Recommendations.

At its June 2001 meeting, the Standing Committee approved the publication of proposed amendments to Rule 35 for public comment and in June 2002, the committee approved proposed amendments to . . . the Rules Governing § 2254 and § 2255 Proceedings. The comment period for the proposed amendment to Rule 35 was closed on February 15, 2002, and the comment period for the proposed amendments to the other rules closed on February 15, 2003. In response, the Advisory Committee received written comments from a number of persons and organizations commenting on all or some of the Committee's

proposed amendments to the rules. The Committee has made several changes to rules and recommends that all of the proposed amendments be forwarded to the Judicial Conference for approval and transmittal to the Supreme Court. The following discussion briefly summarizes the proposed amendments.

B. ACTION ITEM—Rule 35. Correcting or Reducing a Sentence.

Several years ago, after the restyled rules were published for comment, the Committee considered an issue raised by members of the Appellate Rules Committee regarding possible conflict over what was meant by the term "imposition of sentence" in original Rule 35(c) (now restyled Rule 35(a)), which serves as the triggering event for the 7-day period for making corrections to the sentence. Initially, the Committee decided to use the term "oral announcement of sentence," but then later determined that the rule should be more consistent with Appellate Rule 4 and any other rules that might specify when the right to appeal is triggered. Thus, it proposed an amendment that would include in the rule a new definitional section that stated that for purposes of Rule 35, sentencing meant "entry of the judgment." That amendment was published for comment and the comment period expired in February 2002.

At the April 2002 meeting, the Committee considered the seven written comments on the proposed amendment. The comments were mixed. While the Department of Justice, the Federal Bar Association, the Committee on the U.S. Courts of the State Bar of Michigan, and the NACDL opposed the amendment, the State Bar of California Committee on Federal Courts, the Federal Magistrate Judges Assn., and Judge David Lawson endorsed the amendment.

The public comments opposing the amendment cited concerns about interjecting more uncertainty into the area, expanding the time during which the court could change the sentence, and adopting the minority view of the circuit courts that have addressed the issue. On the other hand, those endorsing the amendment believed that it would clarify an ambiguity in the rule and make it more consistent with Appellate Rule 4.

Following additional discussion the Committee voted to use the term "oral announcement" throughout Rule 35 and to forward the amendment to the Standing Committee for action. However, shortly after the Criminal Rules Committee's meeting, it became apparent that approach would result in unwieldy language. Thus, the rule was not forwarded to the Standing Committee in June 2002. Instead, at its September 2002 meeting, the Committee reverted to the original concept of including a special definition of sentencing and instructed the Reporter to prepare the draft. That draft was considered and approved at the Committee's April 2003 meeting.

The Committee does not believe that the proposed amendment needs to be republished. A copy of the rule, Committee Note, summary of the written comments, and a GAP report are at Appendix A.

Recommendation—The Committee recommends that the amendments to Rule 35 be approved and forwarded to the Judicial Conference.

* * * * *

D. ACTION ITEM—Rules Governing § 2254 and § 2255 Rules and Accompanying Forms

Following successful restyling of the Criminal Rules, the Committee obtained approval from the Standing Committee to proceed with a review of the Rules Governing § 2254 and § 2255 Proceedings (the "Habeas Rules"). Under the chairmanship of Judge David Trager, and with the assistance of the style subcommittee, the Committee recommended a number of style and substantive changes to the rules themselves and also to the accompanying official forms. The rules and forms were published for comment in 2002 and the comment period ended on February 15, 2003. The Committee received a large number of comments from individuals and organizations.

At its April 2003 meeting, the Committee considered those comments and made a number of changes to the rules as published. A copy of the rules, Committee Notes, forms, summary of written comments, and GAP reports are at Appendix C.

Recommendation—The Committee recommends that the amendments to the Rules Governing § 2254 Proceedings and the Rules Governing § 2255 Proceedings, and the forms accompanying those rules be approved and forwarded to the Judicial Conference.

* * * * *

Attachments:

Appendix A. Rule 35. Correction or Reduction of Sentence.

* * * * *

Appendix C. Rules Governing § 2254 and § 2255 Proceedings

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 35. Correcting or Reducing a Sentence

* * * * *

(c) **"Sentencing" Defined.** As used in this rule, "sentencing" means the oral announcement of the sentence.

COMMITTEE NOTE

Rule 35(c) is a new provision, which defines sentencing for purposes of Rule 35 as the oral announcement of the sentence.

Originally, the language in Rule 35 had used the term "imposition of sentence." The term "imposition of sentence" was not defined in the rule and the courts addressing the meaning of the term 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 original 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. After further reflection, and with the recognition that some ambiguity may still be present in using the term "sentencing," the Committee believes that the better approach is to make clear in the rule itself that the term "sentencing" in Rule 35 means the oral announcement of the sentence. That is the

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

meaning recognized in the majority of the cases addressing the issue.

SUMMARY OF COMMENTS ON RULE 35.

The Committee received only seven written comments on the proposed amendment to Rule 35.

The comments were mixed. While the Department of Justice, the Federal Bar Association, the Committee on the U.S. Courts of the State Bar of Michigan, and the NACDL opposed the amendment, the State Bar of California Committee on Federal Courts, the Federal Magistrate Judges Assn., and Judge David Lawson endorsed the amendment.

The public comments opposing the amendment cited concerns about interjecting more uncertainty into the area, expanding the time during which the court could change the sentence, and adopting the minority view of the circuit courts that have addressed the issue. On the other hand, those endorsing the amendment believed that it would clarify an ambiguity in the rule and make it more consistent with Appellate Rule 4.

Changes Made After Publication and Comment. The Committee changed the definition of the triggering event for the timing requirements in Rule 35 to conform to the majority view in the circuit courts and adopted a special definitional section, Rule 35(c), to define sentencing as the "oral announcement of the sentence."

PROPOSED AMENDMENTS TO THE RULES FOR PROCEEDINGS UNDER 28 U.S.C. § 2254

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

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

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

Current Rule 2(e), which provided for returning an insufficient petition, has been deleted. The Committee believed that the approach in Federal Rule of Civil Procedure 5(e) was more appropriate for dealing with petitions that do not conform to the form requirements of the rule. That Rule provides that the clerk may not refuse to accept a filing solely for the reason that it fails to comply with these rules or local rules. Before the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the petitioner suffered no penalty, other than delay, if the petition was deemed insufficient. Now that a one-year statute of limitations applies to petitions filed under § 2254, *see* 28 U.S.C. § 2244(d)(1), the court's dismissal of a petition because it is not in proper form may pose a significant penalty for a petitioner, who may not be able to file another petition within the one-year limitations period. Now, under revised Rule 3(b), the clerk is required to file a petition, even though it may otherwise fail to comply with the provisions in revised Rule 2(c). The Committee believed that the better procedure was to accept the defective petition and require the petitioner to submit a corrected petition that conforms to Rule 2(c).

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

COMMITTEE NOTE

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

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

Revised Rule 3(b) is new and is intended to parallel Federal Rule of Civil Procedure 5(e), which provides that the clerk may not refuse to accept a filing solely for the reason that it fails to comply with these rules or local rules. Before the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the petitioner suffered no penalty, other than delay, if the petition was deemed insufficient. That Act, however, added a one-year statute of limitations to petitions filed under § 2254, *see* 28 U.S.C. § 2244(d)(1). Thus, a court's dismissal of a defective petition may pose a significant penalty for a petitioner who may not be able to file a corrected petition within the one-year limitations period. The Committee believed that the better procedure was to

accept the defective petition and require the petitioner to submit a corrected petition that conforms to Rule 2. Thus, revised Rule 3(b) requires the clerk to file a petition, even though it may otherwise fail to comply with Rule 2. The rule, however, is not limited to those instances where the petition is defective only in form; the clerk would also be required, for example, to file the petition even though it lacked the requisite filing fee or an *in forma pauperis* form.

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

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

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

COMMITTEE NOTE

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

The amended rule reflects that the response to a habeas petition may be a motion.

The requirement that in every case the clerk must serve a copy of the petition on the respondent by certified mail has been deleted. In addition, the current requirement that the petition be sent to the Attorney General of the state has been modified to reflect practice in some jurisdictions that the appropriate state official may be someone other than the Attorney General, for example, the officer in charge of a local confinement facility. This comports with a similar provision in 28 U.S.C. § 2252, which addresses notice of habeas corpus proceedings to the state's attorney general or other appropriate officer of the state.

Rule 5. Answer; Contents	Rule 5. The Answer and the Reply
The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding.	(a) **When Required.** The respondent is not required to answer the petition unless a judge so orders. (b) **Contents: Addressing the Allegations; Stating a Bar.** The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations.
The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted.	(c) **Contents: 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) **Contents: Briefs on Appeal and Opinions.** The respondent must also file with the answer a copy of: (1) any brief that the petitioner submitted in an appellate court contesting the conviction or sentence, or contesting an adverse judgment or order in a post-conviction proceeding; (2) any brief that the prosecution submitted in an appellate court relating to the conviction or sentence; and (3) the opinions and dispositive orders of the appellate court relating to the conviction or the sentence. (e) **Reply.** The petitioner may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

COMMITTEE NOTE

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

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

Rule 5(b) has been amended to require that the answer address not only failure to exhaust state remedies, but also procedural bars, non-retroactivity, and any statute of limitations. Although the latter three matters are not addressed in the current rule, the Committee intends no substantive change with the additional new language. *See, e.g.*, 28 U.S.C. § 2254(b)(3). Instead, the Committee believes that the explicit mention of those issues in the rule conforms to current case law and statutory provisions. *See, e.g.*, 28 U.S.C. § 2244(d)(1).

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

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

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

COMMITTEE NOTE

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

Although current Rule 6(b) contains no requirement that the parties provide reasons for the requested discovery, the revised rule does so and also includes a requirement that the request be accompanied by any proposed interrogatories and requests for admission, and must specify any requested documents. The Committee believes that the revised rule makes explicit what has been implicit in current practice.

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 petition. The judge may require that these materials be authenticated.
(b) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.	(b) **Types of Materials.** The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.
(c) Submission to opposing party. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness. **(d) Authentication.** The court may require the authentication of any material under subdivision (b) or (c).	(c) **Review by the Opposing Party.** The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

COMMITTEE NOTE

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

Revised Rule 7(a) is not intended to restrict the court's authority to expand the record through means other than requiring the parties themselves to provide the information. Further, the rule has been changed to remove the reference to the "merits" of the petition in the recognition that a court may wish to expand the record in order to assist it in deciding an issue other than the merits of the petition.

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

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

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

COMMITTEE NOTE

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

Rule 8(a) is not intended to supersede the restrictions on evidentiary hearings contained in 28 U.S.C. § 2254(e)(2).

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

Rule 9. Delayed or Successive Petitions	Rule 9. Second or Successive Petitions
(a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.	
(b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.	Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2244(b)(3) and (4).

COMMITTEE NOTE

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

First, current Rule 9(a) has been deleted as unnecessary in light of the applicable one-year statute of limitations for § 2254 petitions, added as part of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(d).

Second, current Rule 9(b), now Rule 9, has been changed to also reflect provisions in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(b)(3) and (4), which now require a petitioner to obtain approval from the appropriate court of appeals before filing a second or successive petition.

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

PROPOSED AMENDMENTS TO THE RULES FOR PROCEEDINGS UNDER 28 U.S.C. § 2255

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

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

COMMITTEE NOTE

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

Rule 2. Motion	Rule 2. The Motion
(a) Nature of application for relief. If the person is presently in custody pursuant to the federal judgment in question, or if not presently in custody may be subject to such custody in the future pursuant to such judgment, the application for relief shall be in the form of a motion to vacate, set aside, or correct the sentence.	**(a) Applying for Relief.** The application must be in the form of a motion to vacate, set aside, or correct the sentence.
(b) Form of Motion. The motion shall be in substantially the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.	**(b) Form.** The motion must: (1) specify all the grounds for relief available to the moving party; (2) state the facts supporting each ground; (3) state the relief requested; (4) be printed, typewritten, or legibly handwritten; and (5) be signed under penalty of perjury by the movant or by a person authorized to sign it for the movant. **(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 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.	

COMMITTEE NOTE

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

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

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

Current Rule 2(d), which provided for returning an insufficient motion has been deleted. The Committee believed that the approach in Federal Rule of Civil Procedure 5(e) was more appropriate for dealing with motions that do not conform to the form requirements of the rule. That Rule provides that the clerk may not refuse to accept a filing solely for the reason that it fails to comply with these rules or local rules. Before the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the moving party suffered no penalty, other than delay, if the motion was deemed insufficient. Now that a one-year statute of limitations applies to motions filed under § 2255, *see* 28 U.S.C. § 2244(d)(1), the court's dismissal of a motion because it is not in proper form may pose a significant penalty for a moving party, who may not be able to file another motion within the one-year limitations period. Now, under revised Rule 3(b), the clerk is required to file a motion, even though it may otherwise fail to comply with the provisions in revised Rule 2(b). The Committee believed that the better procedure was to accept the defective motion and require the moving party to submit a corrected motion that conforms to Rule 2(b).

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

COMMITTEE NOTE

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

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

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

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

Rule 4. Preliminary Consideration by Judge	Rule 4. Preliminary Review
(a) Reference to judge; dismissal or order to answer. The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business.	(a) **Referral to a 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 the 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 United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

COMMITTEE NOTE

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

The amended rule reflects that the response to a Section 2255 motion may be a motion to dismiss or some other response.

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 unless a judge so orders. **(b) Contents.** 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.

COMMITTEE NOTE

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

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

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

Rule 6. Discovery	Rule 6. Discovery
(a) Leave of court required. A party 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.** A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.
(c) Expenses. If the government is granted leave to take the deposition of the movant or any other person, the judge may as a condition of taking it direct that the government pay the expenses of travel and subsistence and fees of counsel for the movant to attend the taking of the deposition.	(c) **Deposition Expenses.** If the government 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.

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 indicated below.

Although current Rule 6(b) contains no requirement that the parties provide reasons for the requested discovery, the revised rule does so and also includes a requirement that the request be accompanied by any proposed interrogatories and requests for admission, and must specify any requested documents. The Committee believes that the revised rule makes explicit what has been implicit in current practice.

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 motion. The judge may require that these materials be authenticated.
(b) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the motion in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.	**(b) Types of Materials.** The materials that may be required include letters predating the filing of the motion, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits also may be submitted and considered as part of the record.
(c) Submission to opposing party. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness. **(d) Authentication.** The court may require the authentication of any material under subdivision (b) or (c).	**(c) Review by the Opposing Party.** The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

COMMITTEE NOTE

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

Revised Rule 7(a) is not intended to restrict the court's authority to expand the record through means other than requiring the parties themselves to provide the information.

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

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

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

COMMITTEE NOTE

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

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

Rule 9. Delayed or Successive Motions	Rule 9. Second or Successive Motions
(a) Delayed motions. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.	
(b) Successive motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.	Before presenting a second or successive motion, the moving party must obtain an order from the appropriate court of appeals authorizing the district court to consider the motion, as required by 28 U.S.C. § 2255, para. 8.

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 indicated below.

First, current Rule 9(a) has been deleted as unnecessary in light of the applicable one-year statute of limitations for § 2255 motions, added as part of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2255, para. 6.

Second, the remainder of revised Rule 9 reflects provisions in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2255, para. 8, which now require a moving party to obtain approval from the appropriate court of appeals before filing a second or successive motion.

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

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

Instructions

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

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

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

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

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

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

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

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

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

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

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

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

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

PETITION

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

   _____

   _____

   (b) Criminal docket or case number (if you know): _____
2. (a) Date of the judgment of conviction (if you know): _____

   (b) Date of sentencing: _____
3. Length of sentence: _____
4. In this case, were you convicted on more than one count or of more than one crime? Yes ❑ No ❑
5. Identify all crimes of which you were convicted and sentenced in this case: _____

   _____

   _____

   _____

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

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

   (2) Guilty ❑ (4) Insanity plea ❑

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?_____

_____

_____

_____

_____

_____

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

Jury ❑ Judge only ❑

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

Yes ❑ No ❑

8. Did you appeal from the judgment of conviction?

Yes ❑ No ❑

9. If you did appeal, answer the following:

(a) Name of court: _____

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

(c) Result: _____

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

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

(f) Grounds raised: _____

_____

_____

_____

_____

_____

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

If yes, answer the following:

(1) Name of court: _____

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

(3) Result: _____

_____

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

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

(6) Grounds raised: _____

_____

_____

_____

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

If yes, answer the following:

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

(2) Result: _____

_____

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

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

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

Yes ❑ No ❑

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

(a) (1) Name of court: _____

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

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

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

_____

_____

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

Yes ❑ No ❑

(7) Result: _____

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

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

(1) Name of court: _____

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

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

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

_____

_____

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

Yes ❑ No ❑

(7) Result: _____

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

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

(1) Name of court: _____

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

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

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

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

Yes ❑ No ❑

(7) Result: _____

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

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

(1) First petition: Yes ❑ No ❑

(2) Second petition: Yes ❑ No ❑

(3) Third petition: Yes ❑ No ❑

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

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

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

GROUND ONE: _____

_____

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

_____

_____

_____

_____

_____

_____

_____

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

_____

_____

_____

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

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

Yes ❑ No ❑

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

_____

_____

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

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

Yes ❑ No ❑

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

Type of motion or petition: _____

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

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

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

_____

_____

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

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

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

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

_____

_____

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

_____

_____

_____

_____

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

_____

_____

GROUND TWO: _____

_____

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

_____

_____

_____

_____

_____

_____

_____

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

_____

_____

_____

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

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

Yes ❑ No ❑

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

_____

_____

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

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

Yes ❑ No ❑

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

Type of motion or petition: _____

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

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

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

_____

_____

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

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

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

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

_____

_____

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

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

GROUND THREE:

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

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

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

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

Yes ❑ No ❑

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

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

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

Yes ❑ No ❑

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

Type of motion or petition:

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

Docket or case number (if you know): _____

Date of the court's decision: _____

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

_____

_____

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

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

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

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

_____

_____

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

_____

_____

_____

_____

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

_____

_____

GROUND FOUR: _____

_____

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

_____

_____

_____

_____

_____

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

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

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

Yes ❑ No ❑

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

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

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

Yes ❑ No ❑

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

Type of motion or petition: _____

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

Docket or case number (if you know): _____

Date of the court's decision: _____

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

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

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

Docket or case number (if you know): _____

Date of the court's decision: _____

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

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

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

13. Please answer these additional questions about the petition you are filing:

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

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

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ❑ No ❑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes ❑ No ❑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

_____

_____

_____

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: _____

_____

(b) At arraignment and plea: _____

_____

(c) At trial: _____

_____

(d) At sentencing: _____

_____

(e) On appeal: _____

_____

(f) In any post-conviction proceeding: _____

_____

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

_____

_____

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ❑ No ❑

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

_____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes ❑ No ❑

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: _____

_____

_____

or any other relief to which petitioner may be entitled.

_____

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on _____

_____ (month, date, year).

Executed (signed) on _____ (date).

_____

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition. _____

_____

_____

* * * * *

Motion to Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody

(Motion Under 28 U.S.C. § 2255)

Instructions

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

2. You must file the form in the United States district court that entered the judgment that you are challenging. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file the motion in the federal court that entered that judgment.

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

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

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

6. If you cannot pay for the costs of this motion (such as costs for an attorney or transcripts), you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you.

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

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

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

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

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

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

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

MOTION

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

   _____

   _____

   (b) Criminal docket or case number (if you know): _____
2. (a) Date of the judgment of conviction (if you know): _____

   (b) Date of sentencing: _____
3. Length of sentence: _____
4. Nature of crime (all counts): _____

   _____

   _____

   _____

   _____

   _____
5. (a) What was your plea? (Check one)

   (1) Not guilty ❑ (2) Guilty ❑ (3) Nolo contendere (no contest) ❑

   (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? _____

   _____

   _____

   _____

   _____
6. If you went to trial, what kind of trial did you have? (Check one) Jury ❑ Judge only ❑
7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ❑ No ❑

8. Did you appeal from the judgment of conviction? Yes ❑ No ❑

9. If you did appeal, answer the following:

(a) Name of court: _____

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

(c) Result: _____

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

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

(f) Grounds raised: _____

_____

_____

_____

_____

_____

_____

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

If "Yes," answer the following:

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

(2) Result: _____

_____

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

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

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

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

Yes ❑ No ❑

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

(a) (1) Name of court: _____

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

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

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

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

Yes ❑ No ❑

(7) Result: _____

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

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

(1) Name of court: _____

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

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

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

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

Yes ❑ No ❑

(7) Result: _____

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

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ❑ No ❑

(2) Second petition: Yes ❑ No ❑

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

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

GROUND ONE: _____

_____

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

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

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

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

Yes ❑ No ❑

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

_____

_____

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

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

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

Type of motion or petition: _____

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

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

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

_____

_____

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

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

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

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

_____

_____

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

_____

_____

_____

_____

GROUND TWO: _____

_____

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

_____

_____

_____

_____

_____

_____

_____

_____

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

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

Yes ❑ No ❑

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

_____

_____

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

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

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

Type of motion or petition:_____

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

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

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

_____

_____

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

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

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

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

_____

_____

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

_____

_____

_____

_____

GROUND THREE: _____

_____

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

_____

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

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

Yes ❑ No ❑

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

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

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

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

Type of motion or petition: _____

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

Docket or case number (if you know): _____

Date of the court's decision: _____

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

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

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

Docket or case number (if you know): _____

Date of the court's decision: _____

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

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

GROUND FOUR: _____

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

(b) **Direct Appeal of Ground Four:**

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

Yes ❑ No ❑

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

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

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

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

Type of motion or petition:_____

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

Docket or case number (if you know):_____

Date of the court's decision:_____

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

_____

_____

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

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

_____

Docket or case number (if you know):_____

Date of the court's decision:_____

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

_____

_____

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

_____

_____

_____

_____

13. Is there any ground in this motion that you have <u>not</u> previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: _____

_____

_____

_____

_____

_____

_____

14. Do you have any motion, petition, or appeal <u>now pending</u> (filed and not decided yet) in any court for the judgment you are challenging? Yes ❑ No ❑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

_____

_____

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: _____

(b) At arraignment and plea: _____

(c) At trial: _____

(d) At sentencing: _____

(e) On appeal: _____

(f) In any post-conviction proceeding: _____

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ❑ No ❑

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ❑ No ❑

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ❑ No ❑

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

(1) the date on which the judgment of conviction became final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief: _____

_____

_____

or any other relief to which movant may be entitled.

_____

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion Under 28 U.S.C. § 2255 was placed in the prison mailing system on _____

_____ (month, date, year).

Executed (signed) on _____ (date).

_____

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion. _____

_____

_____

* * * * *

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

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CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

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

FROM: **Honorable Jerry E. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **May 5, 2003**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 25, 2003, in Washington, D.C. At the meeting the Committee approved a proposed amendment to Evidence Rule 804(b)(3), with the unanimous recommendation that the Standing Committee approve the proposed amendment and forward it to the Judicial Conference. Part II of this Report summarizes the discussion of this proposed amendment. An attachment to this Report includes the text, Committee Note, statement of changes made after public comment, and summary of public comment for the proposed amendment to Rule 804(b)(3).

* * * * *

II. Action Item

Recommendation To Forward the Proposed Amendment to Evidence Rule 804(b)(3) to the Judicial Conference

The Evidence Rules Committee has voted unanimously to propose an amendment to Rule 804(b)(3) in order to correct the potential unconstitutionality of that Rule in cases where declarations against penal interest are offered against a criminal defendant. The amendment is made necessary by Supreme Court decisions analyzing the relationship between the Confrontation Clause and hearsay admitted against an accused under a hearsay exception. Specifically, in *Lilly v. Virginia*, 527 U.S. 116 (1999), the Supreme Court declared that the hearsay exception for declarations against penal interest is not "firmly rooted" and therefore the Confrontation Clause is not satisfied simply because a hearsay statement fits within that exception. Furthermore, under *Lilly* and *Idaho v. Wright*, 497 U.S. 805 (1990), a statement offered under a hearsay exception that is not firmly-rooted will satisfy the Confrontation Clause only when it bears "particularized guarantees of trustworthiness." And the *Lilly* Court held that this standard of "particularized guarantees" would not be satisfied simply because the statement was disserving to the declarant's penal interest. To satisfy the Confrontation Clause, the government must show particularized guarantees of trustworthiness beyond the fact that the statement is disserving. Yet Rule 804(b)(3) as written requires only that the prosecution show that the statement is disserving to the declarant's penal interest. It does not impose any additional evidentiary requirement.

Thus, after *Lilly*, Rule 804(b)(3) as written is not consistent with constitutional standards. To the Committee's knowledge, no other categorical hearsay exception has the potential of being applied to admit evidence that would violate the accused's right to confrontation. Other categorical hearsay exceptions, such as those for dying declarations, excited utterances and business records, have been found firmly-rooted.

The Evidence Rules Committee has determined that codifying constitutional doctrine provides a protection for defendants against an inadvertent waiver of the reliability requirements imposed by the Confrontation Clause. A defense counsel might be under the impression that the hearsay exceptions as written comport with the Constitution. Indeed, this is a justifiable assumption for all the other categorical hearsay exceptions in the Federal Rules of Evidence, which have been found "firmly rooted"–the exception being Rule 804(b)(3). A minimally competent defense lawyer might object to a hearsay statement as inadmissible under Rule 804(b)(3), thinking that an additional, more specific objection on constitutional grounds would be unnecessary. If the hearsay exception and the Confrontation Clause are congruent, then the risk of inadvertent waiver of the constitutional reliability requirements would be eliminated. See, e.g., *United States v. Shukri,* 207 F.3d 412 (7th Cir. 2000) (court considers only admissibility under Rule 804(b)(3) because defense counsel never objected to the hearsay on constitutional grounds).

The language added to the amendment concerning "particularized guarantees of trustworthiness" is carefully chosen to track the language used by the Supreme Court in its Confrontation Clause jurisprudence. The addition of this language would guarantee that the Rule would comport with the Constitution in criminal cases,

without imposing on the government any evidentiary requirement that it is not already required to bear.

The Evidence Rules Committee carefully considered the public comment on the proposed amendment and held a public hearing on the amendment as part of its Spring 2003 meeting. While the comments received generally were favorable, the Committee agreed with two important suggestions for improvement to the proposed amendment:

1. The proposal released for public comment would have extended the corroborating circumstances requirement to declarations against penal interest offered in civil cases. The Committee has deleted this language in response to public comment indicating that it would make it unreasonably difficult to present some important evidence in certain civil cases, and reasoning that the extension was not supported by the original intent of Rule 804(b)(3).

2. The proposal released for public comment did not attempt to provide guidance on the difference between the two evidentiary standards set forth in the Rule, i.e., "corroborating circumstances" (applicable to statements against penal interest offered by the accused) and "particularized guarantees of trustworthiness" (applicable to statements against penal interest offered by the prosecution). The Committee has added a paragraph to the Committee Note that distinguishes the two standards, in response to public comment suggesting the need for more guidance to courts and litigants.

The proposed amendment to Rule 804(b)(3) is set forth as an attachment to this Report.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 804(b)(3), as modified following publication, be approved and forwarded to the Judicial Conference.

* * * * *

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * * * *

(b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * * *

(3) Statement against interest. – A statement ~~which~~ that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. But in a criminal case a ~~A~~ statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is ~~not~~

---

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

admissible ~~unless~~ under this subdivision in the following circumstances only:

(A) if offered to exculpate an accused, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness, or ~~of the statement~~

(B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness.

* * * * *

COMMITTEE NOTE

The Rule has been amended to confirm the requirement that the prosecution must provide a showing of "particularized guarantees of trustworthiness" when a declaration against penal interest is offered against an accused in a criminal case. This standard is intended to assure that the exception meets constitutional requirements, and to guard against the inadvertent waiver of constitutional protections. *See Lilly v. Virginia,* 527 U.S. 116, 134-138 (1999) (holding that the hearsay exception for declarations against penal interest is not "firmly-rooted"and requiring a finding that hearsay admitted under a non-firmly-rooted exception must bear "particularized guarantees of trustworthiness" to be admissible under the Confrontation Clause).

The amendment distinguishes "corroborating circumstances that clearly indicate" trustworthiness (the standard applicable to statements offered by the accused) from "particularized guarantees of

trustworthiness" (the standard applicable to statements offered by the government). The reason for this differentiation lies in the guarantees of the Confrontation Clause that are applicable to statements against penal interest offered against the accused. The "particularized guarantees" requirement cannot be met by a showing that independent corroborating evidence indicates that the declarant's statement might be true. This is because under current Supreme Court Confrontation Clause jurisprudence, the hearsay exception for declarations against penal interest is not considered a "firmly rooted" exception (*see Lilly v. Virginia, supra*) and a hearsay statement admitted under an exception that is not "firmly rooted" must "possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Idaho v. Wright,* 497 U.S. 805, 822 (1990). In contrast, "corroborating circumstances" can be found, at least in part, by a reference to independent corroborating evidence that indicates the statement is true.

The "particularized guarantees" requirement assumes that the court has already found that the hearsay statement is genuinely disserving of the declarant's penal interest. *See Williamson v. United States*, 512 U.S. 594, 603 (1994) (statement must be "squarely self-inculpatory" to be admissible under Rule 804(b)(3)). "Particularized guarantees" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a particularized guarantee. *See Lilly v. Virginia, supra,* 527 U.S. at 138 (the fact that the hearsay statement may have been disserving to the declarant's interest does not establish particularized guarantees of trustworthiness because it "merely restates the fact that portions of his statements were technically against penal interest").

The amendment does not affect the existing requirement that the accused provide corroborating circumstances for exculpatory

statements. The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Hall,* 165 F.3d 1095 (7th Cir. 1999)):

(1) the timing and circumstances under which the statement was made;

(2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;

(3) whether the declarant repeated the statement and did so consistently, even under different circumstances;

(4) the party or parties to whom the statement was made;

(5) the relationship between the declarant and the opponent of the evidence; and

(6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.

Changes Made After Publication and Comments. The proposed amendment as issued for public comment would have extended the corroborating circumstances requirement to statements against penal interest offered in civil cases. The Committee withdrew this language in response to public comment, thus retaining the existing rule that corroborating circumstances are not required for declarations against interest offered in civil cases.

A paragraph was added to the Committee Note to clarify the distinction between "corroborating circumstances" (the standard applicable to statements against penal interest offered by the accused) and "particularized guarantees of trustworthiness" (the standard applicable to statements against penal interest offered against the accused).

SUMMARY OF PUBLIC COMMENTS

Robert E. Leake, Jr., Esq. (02-EV-001) would apply the "particularized guarantees of trustworthiness" requirement to "exculpatory as well as incriminating matter."

G. Daniel Carney, Esq. (02-EV-002) approves of the proposed amendment.

Jack E. Horsley, Esq. (02-EV-003) endorses the proposed change to Rule 804(b)(3).

The General Accounting Office (02-EV-004) has no comments to offer with respect to the proposed amendment.

The Commercial and Federal Litigation Section of the New York State Bar Association (02-EV-005) supports the proposed changes to Rule 804(b)(3) and advocates further analysis of other possible changes to the Rule. The Section notes that the text of the Rule is "misleading" in two respects. First, "in civil cases recent federal cases have held that an out-of-court statement against penal interest must be supported by corroborating circumstances to be admissible" – even though that requirement is not imposed by the text of the Rule. Second, where such statements are offered in a criminal case to inculpate the accused, the Confrontation Clause requires a showing of "particularized guarantees of trustworthiness" – a requirement that does not exist in the current text of the Rule. The Section notes that the proposed amendment would incorporate these two "judicial glosses" into the text of the Rule. The section supports the proposed amendment "as a useful codification of current law." But it urges the Advisory Committee to address two further questions: 1) whether the standard of "particularized guarantees of trustworthiness" should be applied to statements against penal interest offered in civil cases; and 2) whether the "particularized guarantees of trustworthiness" requirement should be applied to declarations against penal interest offered by an accused.

Professor Richard Friedman (02-EV-006), appreciates and applauds "at least much of the impetus" behind the proposed amendment. But he fears that the proposed amendment may cause confusion and that it "foregoes the opportunity to make more significant improvements in the operation of Rule 804(b)(3)." He advocates the elimination of the corroborating circumstances requirement as applied to hearsay statements offered by an accused. Professor Friedman also opposes an extension of the corroborating circumstances requirement to statement against penal interest offered in civil cases. He concludes that the Rule should provide that a statement made to law enforcement personnel "shall not be admissible against the accused." He also suggests that the proposed amendment should be changed to add language that would reject the Supreme Court's analysis in *Williamson v. United States,* 512 U.S. 594 (1994), by providing that a non-adverse statement that is part of a broader inculpatory statement would be admissible if "it appears likely that the declarant would make the statement in question only if believing it to be true." Finally, Professor Friedman suggests that the

text of the Rule include language (currently in the proposed Committee Note) providing that the credibility of the in-court witness is irrelevant to the reliability of the hearsay statement.

David Romine, Esq. (02-EV-007), opposes the extension of the corroborating circumstances requirement to civil cases. He contends that the extra evidentiary requirement will have a deleterious effect on the prosecution of civil antitrust cases. He states that the "relatively easy ways in which the corroborating circumstance requirement is satisfied by defendants in criminal cases will usually not be available to antitrust plaintiffs." Mr. Romine concludes that the "Committee should not endorse a revision that will have the perverse effect of making it harder to introduce such evidence in a private antitrust case than to exculpate the accused in a criminal case."

The Federal Magistrate Judges Association (02-EV-008) supports the proposed amendment to Rule 804(b)(3), as an appropriate revision in light of the Supreme Court's decision in *Lilly v. Virginia,* 527 U.S. 116 (1999).

Professor Roger Kirst (02-EV-009) opposes the amendment on the ground that it is "not possible to anticipate the evolving contours of confrontation doctrine for the hearsay exception in this Rule." He recommends that if the Rule is to be amended on other topics, "a caution about the right to confrontation should be included only in an Advisory Committee Note without attempting to define what the Sixth Amendment requires."

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (02-EV-010) agrees with the proposed amendment "insofar as it articulates the constitutional requirement that a declaration against penal interest, offered to inculpate a defendant in a criminal case, be supported by particularized guarantees of trustworthiness." The Committee states that "[i]ncorporating the 'particularized guarantees' language into the rule does not change the law; it simply carries on the mission of the Rules of Evidence of codifying court-made evidentiary law and making it more accessible." However, the Committee disagrees with the proposal "insofar as it would import into the law of civil evidence

the 'corroborating circumstances' requirement that traditionally has been thought to apply only to declarations against penal interest offered in criminal cases." Extension of the corroborating circumstances requirement to civil cases would, in the Committee's view, "move a difficult aspect of the criminal procedural law into the civil procedural law, without any compelling reason to do so."

Professor Clifford Fishman (02-EV-011), complains that "the proposal's language provides no explanation as to why different standards are imposed in the first place and offers no guidance as to what the different standards mean." Professor Fishman suggests that the text of the Rule be expanded to clarify that "corroborating circumstances" requires the court to consider the nature or strength of independent evidence that tends to corroborate the hearsay statement, while "particularized guarantees of trustworthiness" prohibits consideration of corroborating evidence.

The Federal Bar Association (02-EV-012), "supports the substance of the proposed amendment" but "recommends a change in format to provide additional clarity." The Association's proposal would place statements against penal interest offered by the prosecution into a separate subdivision. The Association "also agrees with the Committee's recommendation that the specific factors to be considered in assessing whether a proffered statement meets the applicable requirement be left to the Committee Note and to case law rather than being specified in the text of the Rule."

The Committee on Federal Courts of the California State Bar (02-EV-013), supports the proposed amendment to Rule 804(b)(3).

The National Association of Criminal Defense Lawyers (02-EV-014), opposes the amendment and argues that "'corroborating circumstances' should be required, and not merely 'particularized guarantees of trustworthiness', before the prosecution is allowed to obtain admission of hearsay statements on the basis of their having been made against the declarant's penal interest."

III. Illustrative Forms Following Rules Governing § 2254 Cases and § 2255 Proceedings

A. Brief Description

The proposed revisions to the illustrative forms accompanying the § 2254 and § 2255 rules conform to the proposed amendments to the rules. They received general support and generated little controversy. But two revisions in the illustrative forms were considered at length during the advisory committee's deliberations. The first eliminated a list of "frequently cited grounds for relief." The second retained questions requiring the petitioner or movant to set out all the grounds raised concerning the judgment of conviction in any previous motion, petition, or other application.

B. Arguments in Favor of Eliminating List of "Frequently Cited Grounds for Relief"

- The list of "frequently cited grounds for relief" set out in the illustrative forms is not complete and may create confusion. Persons filing pro se may be misled into believing that they are limited to asserting only claims that are included in the list.

- The list may lead to abuse by providing the petitioner or movant irrelevant information that might be used to assert unmeritorious claims, needlessly burdening the respondent and the court.

C. Objections to Eliminating List of "Frequently Cited Grounds for Relief"

- The list of "frequently cited grounds for relief" in the illustrative forms provides helpful information to pro se filers.

- The list helps to focus the attention of pro se filers on specific issues, facilitating the narrowing of claims that are being presented to the court by the petitioner or movant.

D. Arguments in Favor of Retaining Questions on Grounds Raised in an Earlier Motion, Petition, or Other Application

- Information on grounds raised in an earlier motion, petition, or other application concerning the judgment of conviction is useful to the court in determining whether that opportunity to challenge the conviction bars the petitioner or movant under AEDPA from raising the ground of relief for the first or a second time in a § 2254 case or a § 2255 motion.

E. Objections to Retaining Questions on Grounds Raised in an Earlier Motion, Petition, or Other Application

- Asking the petitioner or movant to specify the grounds of relief raised in an earlier motion, petition, or other application may unfairly shift the burden of raising an affirmative defense from the respondent to the petitioner or movant. Under AEDPA, the one-year statute of limitations and failure to set forth all the grounds of relief in a single petition or motion may bar a later filing. Compelling the petitioner or movant to disclose information relating to these defenses relieves the respondent of much of its burden to plead "affirmative defenses."

F. Rules Committees' Consideration

The committees concluded that the lists of "frequently cited grounds for relief" in the illustrative forms following the § 2254 and § 2255 rules were counterproductive. In some cases, the lists do help to narrow the potential claims raised by a petitioner or movant, especially those who submit filings pro se. Furthermore, the lists offer an articulable set of issues that may in some cases simplify the court's deliberations. But the committees concluded that the lists are more likely to increase the probability that the petitioner or movant: (1) will take a "shotgun" approach and select inappropriate grounds of relief, burdening the respondent and court with unnecessary work, or (2) will be misled into believing that the claims were limited to those found in the list. The committees were also concerned that the lists might create the misperception that the court is counseling the petitioner or movant and is assuming an adversarial position.

The questions on the illustrative forms pertaining to information regarding an earlier motion, petition, or other application concerning the judgment of conviction are on the existing forms. The committees believed that retaining the information is essential in the efficient handling of petitions and motions under the § 2254 and § 2255 rules. Many petitions or motions filed under the § 2254 and § 2255 rules are quickly disposed of because they do not comply with AEDPA's requirements. Absent this information, the respondent and the court would waste much time and energy on the disposition of the merits of the claims that would ultimately be barred by AEDPA. The committees concluded that this information is necessary to properly review the petition or motion. The committees did not agree that providing this information would shift the burden to demonstrate an "affirmative defense" from the respondent to the petitioner or movant.

Federal Rules of Evidence

I. Evidence Rule 804(b)(3)

A. Brief Description

The proposed amendment to Rule 804(b)(3) requires "particularized guarantees of trustworthiness" indicating the reliability of an unavailable witness's statement against penal interest *incriminating* the accused. The amendment conforms the rule to the Supreme Court holding in *Lilly v. Virginia*, 527 U.S. 116 (1999). Under the existing rule, the prosecution is only required to show that the statement is disserving to the declarant's penal interest.

The longstanding admissibility requirement that the reliability of a hearsay statement against penal interest of an unavailable witness *inculpating* an accused must be supported by "corroborating circumstances" is retained in the rule. The proposed amendments initially published for comment would have extended the "corroborating circumstances" requirement to civil cases. But the advisory committee agreed with the public comment objections and rejected extending the standard to civil cases.

B. Arguments in Favor

- The existing rule concerning hearsay statements incriminating an accused is not consistent with constitutional standards as determined in *Lilly*.

- The proposed amendment eliminates a potential trap for counsel who may object to a hearsay statement incriminating an accused as inadmissible solely because it does not comply with the rule and not on constitutional grounds, incorrectly assuming that the rule comports with the Constitution's Confrontation Clause.

C. Objections

- The proposed amendment sets up two different standards that may create confusion concerning the admission of hearsay statements incriminating or exculpating an accused.

- The amendments do not explain the difference, if any, between the two standards.

D. Rules Committees' Consideration

The rules committees concluded that the rules must comport with constitutional doctrine. The committees believed that it was important to eliminate the risk that a practitioner might, in the mistaken reliance on the rule's requirements, inadvertently waive an objection to the admission of the hearsay statement incriminating an accused by failing to raise Confrontation Clause constitutional grounds.

The committees recognized that the difference between the two standards is not sharply defined. Although there is substantial case law explaining what is meant by "corroborating circumstances" supporting a hearsay statement exculpating an accused, the precise extent of "particularized guarantees of trustworthiness" required to support a hearsay statement incriminating an accused is subject to developing case law. The Committee Note is intended to provide as much guidance as is possible to the bench and bar to understand the differences between the two standards. The Note points out the factors to be considered under each standard.

The Supreme Court has granted certiorari in a case involving the admissibility of a custodial confession offered against an accomplice as a declaration against penal interest under the evidence code of the State of Washington. That case might give the Court an opportunity to revise Confrontation Clause jurisprudence. This should not have an effect on the proposed amendment to Rule 804(b)(3), however, because the statement admitted in the Washington case would not be admissible under the current or amended Federal Rule 804(b)(3). Moreover, even if the Supreme Court revises Confrontation Clause jurisprudence, the requirement that the prosecution must provide particularized guarantees of trustworthiness for a declaration against interest offered by an accused serves an important function in assuring that the accused is convicted only by reliable evidence.