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

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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**

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on April 26-27, 2003 in Santa Barbara, California and took action on proposed amendments to the Rules of Criminal Procedure. The Minutes of that meeting are included at Appendix E.

This Report addresses eight action items: approval of published Rules 35, 41, and the restyled Rules Governing § 2254 and § 2255 Proceedings, for transmission to the Judicial Conference and approval for publication and comment on proposed amendments to Rules 12.2, 29, 32, 32.1, 33, 34, 45, and new Rule 59. In addition, the report includes two information items.

II. Action Items—Summary and Recommendations.

The Advisory Committee on the Criminal Rules met on April 27 and 28, 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.

- Rule 41. Search and Seizure; Tracking-Device Warrants
- 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.

Second, the Committee has considered and recommended amendments to the following Rules:

- Rule 12.2. Notice of Insanity Defense; Mental Examination; Sanction for Failing to Disclose.
- Rules 29, 33, 34 & 45. Regarding Ruling by Judge on Motions to Extend Time for Filing Motions Under Those Rules.
- Rule 32. Sentencing; Regarding Victim Allocution.
- Rule 32.1. Revoking or Modifying Probation or Supervised Release; Regarding Allocution by Defendant.
- New Rule 59. Review of Rulings by Magistrate Judges

The Committee recommends that those rules be published for public comment.

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 Rule 41 and 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.

C. ACTION ITEM--Rule 41. Search and Seizure; Tracking Device Warrants.

In June 2002, the Standing Committee approved for publication amendments to Rule 41 that would address tracking-device warrants, and conforming amendments to 18

U.S.C. § 3103, concerning delays in notification required under Rule 41. The Committee considered the seven written comments and made several minor clarifying changes to the published rule. A copy of the rule, Committee Note, summary of written comments, and GAP report are at Appendix B.

Recommendation —The Committee recommends that the amendments to Rule 41 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.

IV. Action Items—Recommendation to Publish Amendments to Rules

A. ACTION ITEM — Rule 12.2. Notice of Insanity Defense; Mental Examination and Sanctions for Failure to Disclose.

For the last year the Committee has considered a proposal to amend Rule 12.2 to fill a perceived gap. Although the rule contains a sanctions provision for failing to comply with the requirements of the rule, there is no provision stating possible sanctions if the defendant does not comply with Rule 12.2(c)(3), which requires the defendant to disclose to the government the results and reports of the defendant's expert examination.

The Committee has unanimously proposed an amendment to Rule 12.2(d) to address that issue and requests that the rule be published for public comment.

The Rule and the accompanying Committee Note are at Appendix D.

B. ACTION ITEM —Rules 29, 33, 34, and 45; Proposed Amendments re Rulings by Court and Setting Times for Filing Motions.

In Rules 29, 33, and 34 the court is required to rule on any motion for an extension of time, within the seven-day period specified for filing the underlying motion. Failure to do so deprives the court of the jurisdiction to consider an underlying motion, filed after the seven-day period. *See United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict"). Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the judge must rule on that motion or request within the same seven-day period. If for some reason the court does not act on the request within the seven days, the court lacks jurisdiction to act on the underlying substantive motion.

Parallel amendments have been proposed for Rules 29, 33, and 34 and a conforming change has been proposed for Rule 45. The defendant would still be required to file motions under those rules within the specified seven-day period unless the time is extended. And the defendant would still be required to file within that seven-day period any request for extension. The change is that the court would not be required to act on that motion within the same seven-day period on the request for the extension.

The Rule and Committee Note, which was approved by an 8 to 2 vote of the Committee is attached at Appendix D.

C. ACTION ITEM —Rule 32, Sentencing; Proposed Amendment re Allocution Rights of Victims of Non-violent and Non-sexual Abuse Felonies.

Currently, Rule 32(i)(4) provides for allocution at sentencing by victims of violent crimes and sexual abuse. Although there is no provision in the current rule for victim allocution for other felonies, the Committee understands that many courts nonetheless consider statements from victims of felonies that do not involve violence or sexual abuse.

At its September 2002, meeting the Committee decided to amend Rule 32 to provide for allocution for victims of non-violent and non-sexual abuse felonies. At its April 2003 meeting, the Committee continued its discussion of the proposed amendment

and voted by a margin of 7 to 2, with one abstention, to recommend that the proposed amendment be published for comment.

The Committee considered but rejected a provision that would provide that a court's decision regarding allocution in this type of case would not be reviewable. In rejecting that provision, the Committee considered the fact that there is already some authority for the view that victims do not have standing to appeal a court's decision denying them the ability to address the court.

The proposed amendment does not make any specific provision for hearing from representatives of victims of non-violent or non-sexual abuse felonies, because the Committee believes that the policy reasons for permitting statements by third persons are not as compelling, in cases involving "economic" crimes. In any event, the rule does not prohibit the court from considering statements from third persons, speaking on behalf of victims.

A copy of the proposed rule and Committee Note are at Appendix D.

D. ACTION ITEM —Rule 32.1. Revoking Or Modifying Probation Or Supervised Release. Proposed Amendments To Rule Concerning Defendant's Right Of Allocution.

In *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002), the court observed that there is no explicit provision in Rule 32.1 giving the defendant a right to allocution; it suggested that the Advisory Committee might wish to address that matter. At the Committee's April 2002 meeting, it voted to amend Rule 32.1 to address allocution rights at revocation hearings; at its September 2002 meeting, the Committee decided to consider a further amendment to the rule that would include a similar allocution provision in proceedings to modify a sentence.

The Committee unanimously approved the proposed amendment to Rule 32.1 and recommends that the Standing Committee approve the amendments for publication. A copy of the rule and Committee Note are at Appendix D.

E. ACTION ITEM—Rule 59; Proposed New Rule Concerning Rulings by Magistrate

In response to a decision by the Ninth Circuit in *United States v. Abonce-Barerra*, 257 F.3d 959, 969 (9th Cir. 2001), the Committee has considered an amendment to the Rules of Criminal Procedure that would parallel Federal Rule of Civil Procedure 72, which addresses procedures for appealing decisions by magistrate judges.

At its April 2002 meeting, the Committee voted to consider the issue further and at its September 2002 meeting the Committee adopted a draft rule that would have included not only procedures for appealing a magistrate judge's decision but would also have addressed the ability of a magistrate judge to take a guilty plea. That provision was dropped, however, due to two developments. First, the Magistrate Judges' Committee was opposed to any reference in the rule to taking guilty pleas. And second, the Ninth Circuit had granted *en banc* review in *United States v. Reyna-Tapia*, 294 F.3d 1192 (9th Cir.), *vacated by* 315 F.3d 1107 (9th Cir. 2002), the case that had provided the impetus for including reference to guilty pleas in the proposed rule. [Following the meeting, the Committee learned the court had decided that a magistrate judge could hear Rule 11 plea colloquies, for findings and recommendations and that the district court was not required to conduct a de novo review unless one of the parties objected.]

The current draft, approved by a vote of 8 to 1 would be new Rule 59 and it would address only the issue of appealing a magistrate judge's orders, both for dispositive and nondispositive matters.

A copy of Rule 59 and the accompanying Committee Note are at Appendix D.

V. Information Items

A. Congressional Amendments to Rule 6

As the restyled Criminal Rules were going into effect in December 2002, Congress further amended Rule 6 to permit the government to share grand jury information with foreign governments in terrorism cases. But the amendment was based on the former version of the rule, and therefore the legislation could not be executed. Mr. Rabiej, Professor Schlueter, Professor Kimble, Judge Carnes, and the Department of Justice prepared conforming language to remedy the problem, but to date Congress had not acted. Thus, there is a potential conflict between the rule that went into effect on December 1, 2002, and the subsequent legislative amendment. The Department of Justice considers the legislation a nullity and will not rely on it. The Criminal Rules Committee does not anticipate taking any additional action at this point.

B. Congressional Consideration of Amendments to Rule 46.

For the past several years Congress had considered an amendment to Rule 46. Bail bondsmen have urged Congress to amend that rule to prevent judges from revoking surety bonds for violation of any condition other than for failure to appear in court. They are concerned that the current version of Rule 46 might serve as the basis for similar treatment in state practice. The chair of the Criminal Rules Committee, Judge Carnes, has testified on the matter and presented additional statistical data supporting the current version of the rule. To date, no additional action has apparently been taken by Congress.

Attachments:

Appendix A. Rule 35. Correction or Reduction of Sentence.
Appendix B. Rule 41. Search Warrants.
Appendix C. Rules Governing § 2254 and § 2255 Proceedings
Appendix D. Proposed Amendments to Rules 12.2, 29, 33, 34, 45, 32, 32.1, 45, and 59 (new rule).
Appendix E. Minutes of April 2003 Meeting.

APPENDIX A

RULE 35. CORRECTING OR REDUCING A SENTENCE

- **Copy of Rule**
- **Committee Note**
- **Summary of Written Public Comments**
- **GAP Report**

Rule 35. Correcting or Reducing a Sentence

(a) Correcting Clear Error. Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(b) Reducing a Sentence for Substantial Assistance.

(1) ***In General.*** Upon the government's motion made within one year of sentencing, the court may reduce a sentence if:

(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and

(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.

(2) ***Later Motion.*** Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(3) ***Evaluating Substantial Assistance.*** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(4) ***Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute

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

SUMMARY OF COMMENTS ON RULE 32.

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.

GAP REPORT--RULE 35.

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 added a special definitional section, Rule 35(c) to define sentencing as the "oral announcement of the sentence."

APPENDIX B

RULE 41. SEARCH AND SEIZURE

- **Copy of Rule**
- **Committee Note**
- **Summary of Written Public Comments**
- **GAP Report**

Rule 41. Search and Seizure

(a) Scope and Definitions.

* * * * *

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

* * * * *

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

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

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

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

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is

issued but might move or be moved outside the district before the warrant is executed; ~~and~~

(3) a magistrate judge—in an investigation of domestic terrorism or international terrorism ~~(as defined in 18 U.S.C. § 2331) having~~ with authority in any district in which activities related to the terrorism may have occurred, ~~may~~ has authority to issue a warrant for a person or property within or outside that district~~.~~; and

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

* * * * *

(d) Obtaining a Warrant.

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

there is probable cause to search for and seize a person or property or to install and use a tracking device ~~under Rule 41(c)~~.

* * * * *

(e) Issuing the Warrant.

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

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

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

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

~~(B)~~(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution

at another time; and

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

(B) *Warrant for a Tracking Device.* A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

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

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause

expressly authorizes installation at another time; and

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

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

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(f) Executing and Returning the Warrant.

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

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

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

the presence of at least one other credible person.

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

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

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

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

installed and the period during which it was used.

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

(C) *Service.* Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the magistrate

judge may delay notice as provided in 41(f)(3).

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

* * * * *

COMMITTEE NOTE

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

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

Amended Rule 41(b)(4) is a new provision, designed to address the use of tracking devices. Such searches are recognized both by statute, *see* 18 U.S.C. § 3117(b) and by caselaw, *see, e.g., United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983). Warrants may be required to monitor tracking devices when they are used to monitor persons or property in areas where there is a reasonable expectation of privacy. *See, e.g., United States v. Karo, supra* (although no probable cause was required to install beeper, officers' monitoring of its location in defendant's

home raised Fourth Amendment concerns). Nonetheless, there is no procedural guidance in current Rule 41 for those judicial officers who are asked to issue tracking device warrants. As with traditional search warrants for persons or property, tracking device warrants may implicate law enforcement interests in multiple districts.

The amendment provides that a magistrate judge may issue a warrant, if he or she has the authority to do so in the district, to install and use a tracking device, as that term is defined in 18 U.S.C. § 3117(b). The magistrate judge's authority under this rule includes the authority to permit entry into a area where there is a reasonable expectation of privacy, installation of the tracking device, and maintenance and removal of the device. The Committee did not intend by this amendment to expand or contract the definition of what might constitute a tracking device. The amendment is based on the understanding that the device will assist officers only in tracking the movements of a person or property. The warrant may authorize officers to track the person or property within the district of issuance, or outside the district.

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

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

Amended Rule 41(d) includes new language on tracking devices. The tracking device statute, 18 U.S.C. § 3117, does not specify the standard an applicant must meet to install a tracking device. The Supreme Court has acknowledged that the standard for installation of a tracking device is unresolved, but has reserved ruling on the issue until it is squarely presented by the facts of a case. *See United States v. Karo*, 468 U.S. 705, 718 n. 5 (1984). The amendment to Rule 41 does not resolve this issue or hold that such warrants may issue only on a showing of probable cause. Instead, it simply provides that if probable cause is shown, the magistrate must issue the warrant. And the warrant is only needed if the device is installed (for example in the trunk of the defendant's car) or monitored (for example, while the car is in the defendant's garage) in an area in which the person being monitored has a reasonable expectation of privacy.

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

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

the device has ended.

Amended Rule 41(f)(2)(C) addresses the particular problems of serving a copy of a tracking device warrant on the person who has been tracked, or whose property has been tracked. In the case of other warrants, current Rule 41 envisions that the subjects of the search typically know that they have been searched, usually within a short period of time after the search has taken place. Tracking device warrants, on the other hand, are by their nature covert intrusions and can be successfully used only when the person being investigated is unaware that a tracking device is being used. The amendment requires that the officer must serve a copy of the tracking device warrant on the person within 10 calendar days after the tracking has ended. That service may be accomplished by either personally serving the person or by leaving a copy at the person's residence or usual abode and by sending a copy by mail. The Rule also provides, however, that the officer may (for good cause) obtain the court's permission to delay further the delivery of the warrant. That might be appropriate, for example, where the owner of the tracked property is undetermined, or where the officer establishes that the investigation is ongoing and that disclosure of the warrant will compromise that investigation.

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

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

delay any notice required in conjunction with the issuance of any search warrants.

SUMMARY OF PUBLIC COMMENTS ON RULE 41.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NADCL offers a number of suggestions on Rule 41. First, it urges the Committee to use two benchmarks in amending Rule 41: tradition and jurisprudence of issuing warrants and Title III of the Omnibus Crime Control Act of 1968. Second, it notes that there is a lack of parallelism in Rule 41(b)(3) and (b)(4) from (b)(1) and (b)(2); it notes that use of the words "may issue" in (b)(4) are ambiguous. Third, NADCL also suggests

that the rule contain some reference to the fact that a warrant may be issued by district judges as well as magistrate judges. Fourth, it offers suggested language that would require that the probable cause focus on the specific need for installing the tracking device and that the government first show that there is a genuine need for using a tracking device. Fifth, regarding Rule 41(e), NADCL again urges the Committee to follow Title III. And finally, with regard to Rule 41(f)(2), it states that the current language is open-ended and vague; it suggests new wording that it believes would require the magistrate judge to specify a particular period of time.

GAP REPORT--RULE 41

The Committee agreed with the NADCL proposal that the words "has authority" should be inserted in Rule 41(c)(3), and (4) to parallel similar language in Rule 41(c)(1) and (2). The Committee also considered, but rejected, a proposal from NADCL to completely redraft Rule 41(d) , regarding the finding of probable cause. The Committee also made minor clarifying changes in the Committee Note

APPENDIX C

RULES GOVERNING § 2254 AND § 2255 PROCEEDINGS

- **Copy of Rules**
- **Committee Notes**
- **Forms Accompanying Rules**
- **Summary of Written Public Comments on Rules and Forms**
- **GAP Reports**

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

Present Rules	Restyled Rules
Rule 1. Scope of Rules	**Rule 1. Scope**
(a) Applicable to cases involving custody pursuant to a judgment of a state court. These rules govern the procedure in the United States district courts on applications under 28 U.S.C. § 2254:	**(a) Cases Involving a Petition under 28 U.S.C. § 2254.** These rules govern a petition for a writ of habeas corpus filed in a United States district court under 28 U.S.C. § 2254 by:
(1) by a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States; and	(1) a person in custody under a state-court judgment who seeks a determination that the custody violates the Constitution, laws, or treaties of the United States; and
(2) by a person in custody pursuant to a judgment of either a state or a federal court, who makes application for a determination that custody to which he may be subject in the future under a judgment of a state court will be in violation of the Constitution, laws, or treaties of the United States.	(2) a person in custody under a state-court or federal-court judgment who seeks a determination that future custody under a state-court judgment would violate the Constitution, laws, or treaties of the United States.
(b) Other situations. In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court.	**(b) Other Cases.** The district court may apply 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 a person authorized to do so under 28 U.S.C. § 2242.

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

COMMITTEE NOTE

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

Revised Rule 2(c)(5) has been amended by removing the requirement that the petition be signed personally by the petitioner. As reflected in 28 U.S.C. § 2242, an application for habeas corpus relief may be filed by the person who is seeking relief, or by someone acting on behalf of that person. *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. Prior to the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the petitioner suffered no penalty, other than delay, if the petition was deemed insufficient. Now that a one-year statute of limitations applies to petitions filed under § 2254, *see* 28 U.S.C. § 2244(d)(1), the court's dismissal of a petition because it is not in proper form may pose a significant penalty for a petitioner, who may not be able to file another petition within the one-year limitation period. Now, under revised Rule 3(b), the clerk is required to file a petition, even though it may otherwise fail to comply with the provisions in revised Rule 2(c). The Committee believed that the better procedure was to accept the defective petition and require the petitioner to submit a corrected petition that conforms to Rule 2(c).

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

COMMITTEE NOTE

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

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

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

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

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

Rule 4. Preliminary Consideration by Judge	Rule 4. Preliminary Review; Serving the Petition and Order
The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.	The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other 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 of the court must serve a copy of the petition on the respondent by certified mail has been deleted. In addition, the current requirement that the petition be sent to the Attorney General of the state has been modified to reflect practice in some jurisdictions that the appropriate state official may be someone other than the Attorney General, for example, the officer in charge of a local confinement facility. This comports with a similar provision in 28 U.S.C. § 2252, which addresses notice of habeas corpus proceedings to the state's attorney general or other appropriate officer of the state.

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

	relating to the conviction or sentence; and (3) the opinions and dispositive orders of the appellate court relating to the conviction or the sentence. **(e) Reply.** The petitioner may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

COMMITTEE NOTE

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

Revised Rule 5(a), which provides that the respondent is not required to file an answer to the petition, unless a judge so orders, is taken from current Rule 3(b). The revised rule does not address the practice in some districts, where the respondent files a pre-answer motion to dismiss the petition. But revised Rule 4 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 and any statute of limitations. While the latter two 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 insure that the court is provided with additional information that may assist it in resolving the issues raised, or not raised, in the petition.

Finally, revised Rule 5(e) 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, 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 authority of the court 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 supercede 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, requiring that the parties be "served" is consistent with Federal Rule of Civil Procedure 5(b), which may include mailing the copies.

Rule 9. Delayed or Successive Petitions	Rule 9. Second or Successive Petitions
(a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.	
(b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.	Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition 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 being unnecessary in light of the applicable one-year statute of limitations for § 2254 petitions, added as part of the Antiterrorism and Effective Death Penalty Act of 1996, 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 rule is that of second or successive petitions.

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

COMMITTEE NOTE

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

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

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

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

COMMITTEE NOTE

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

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

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

COMMITTEE NOTE

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

Revised Rule 2(b)(5) has been amended by removing the requirement that the motion be signed personally by the moving party. Thus, under the amended rule the motion may be signed by movant personally or by someone acting on behalf of the movant, assuming that the person is authorized to do so, for example an attorney for the movant. The Committee envisions that the courts would apply third-party, or "next-friend," standing analysis in deciding whether the signer was actually authorized to sign the motion on behalf of the movant. *See generally Whitmore v. Arkansas*, 495 U.S. 149 (1990) (discussion of requisites for "next friend" standing in habeas petitions). *See also* 28 U.S.C. § 2242 (application for 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. Prior to the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the moving party suffered no penalty, other than delay, if the motion was deemed insufficient. Now that a one-year statute of limitations applies to motions filed under § 2255, *see* 28 U.S.C. § 2244(d)(1), the court's dismissal

of a motion because it is not in proper form may pose a significant penalty for a moving party, who may not be able to file another motion within the one-year limitation period. Now, under revised Rule 3(b), the clerk is required to file a motion, even though it may otherwise fail to comply with the provisions in revised Rule 2(b). The Committee believed that the better procedure was to accept the defective motion and require the moving party to submit a corrected motion that conforms to Rule 2(b).

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

COMMITTEE NOTE

The language of Rule 3 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, 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. Prior to the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the moving party suffered no penalty, other than delay, if the petition was deemed insufficient. That Act, however, added a one-year statute of limitations to motions filed under § 2255, *see* 28 U.S.C. § 2244(d)(1). Thus, a court's dismissal of a defective motion may pose a significant penalty for a moving party who may not be able to file a corrected motion within the one-year limitation period. The Committee believed that the better procedure was to accept the defective motion and require the moving party to submit a corrected motion that conforms to Rule 2. Thus, revised 3(b) requires the clerk is required to file a motion, even though it may otherwise fail to comply with Rule 2.

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

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

Rule 4. Preliminary Consideration by Judge	Rule 4. Preliminary Review
(a) Reference to judge; dismissal or order to answer. The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business.	**(a) Referral to Judge.** The clerk must promptly forward the motion to the judge who conducted the trial and imposed sentence or, if the judge who imposed sentence was not the trial judge, to the judge who conducted the proceedings being challenged. If the appropriate judge is not available, the clerk must forward the motion to a judge under the court's assignment procedure.
(b) Initial consideration by judge. The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.	**(b) Initial Consideration by Judge.** The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States attorney to file an answer 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) Addressing the Allegations; Other Remedies.** The answer must address the allegations in the motion. In addition, it must state whether the moving party has used any other federal remedies, including any prior post-conviction motions under these rules or any previous rules, and whether the moving party received an evidentiary hearing.
(b) Supplementing the answer. The court shall examine its files and records to determine whether it has available copies of transcripts and briefs whose existence the answer has indicated. If any of these items should be absent, the government shall be ordered to supplement its answer by filing the needed records. The court shall allow the government an appropriate period of time in which to do so, without unduly delaying the consideration of the motion.	**(c) Records of Prior Proceedings.** If the answer refers to briefs or transcripts of the prior proceedings that are not available in the court's records, the judge must order the government to furnish them within a reasonable time that will not unduly delay the proceedings. **(d) Reply.** The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

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(e) 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][attorney for the government] to pay the travel expenses, subsistence expenses, and fees of the moving party's attorney to attend the deposition.

COMMITTEE NOTE

The language of Rule 6 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, 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, 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 authority of the court 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, requiring that the parties be "served" is consistent with Federal Rule of Civil Procedure 5(b), which may include mailing the copies.

Rule 9. Delayed or Successive Motions	Rule 9. Second or Successive Motions
(a) Delayed motions. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.	
(b) Successive motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.	Before presenting a second or successive motion, the moving party must obtain an order from the appropriate court of appeals authorizing the district court to consider the motion, 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 being unnecessary in light of the applicable one-year statute of limitations for § 2255 motions, added as part of the Antiterrorism and Effective Death Penalty Act of 1996, 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.

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

COMMITTEE NOTE

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

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

COMMITTEE NOTE

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

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

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

Instructions

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

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

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

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

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

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

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

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

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

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

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

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

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

PETITION

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

_____

_____

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

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

(b) Date of sentencing: _____

3. Length of sentence: _____

4. In this case, were you convicted on more than one count or of more than one crime? Yes ❑ No ❑

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

_____

_____

_____

_____

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

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

(2) Guilty ❑ (4) Insanity plea ❑

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

_____

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

Jury ❑ Judge only ❑

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

Yes ❑ No ❑

8. Did you appeal from the judgment of conviction?

Yes ❑ No ❑

9. If you did appeal, answer the following:

(a) Name of court: _____

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

(c) Result: _____

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

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

(f) Grounds raised: _____

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

If yes, answer the following:

(1) Name of court: _____

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

(3) Result: _____

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

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

(6) Grounds raised: _____

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

If yes, answer the following:

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

(2) Result: _____

_____

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

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

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

Yes ❑ No ❑

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

(a) (1) Name of court: _____

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

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

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

_____

_____

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

Yes ❑ No ❑

(7) Result: _____

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

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

(1) Name of court: _____

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

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

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

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

Yes ❑ No ❑

(7) Result: _____

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

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

(1) Name of court: _____

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

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

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

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

Yes ❑ No ❑

(7) Result: _____

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

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

(1) First petition: Yes ❑ No ❑

(2) Second petition: Yes ❑ No ❑

(3) Third petition: Yes ❑ No ❑

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

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

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

GROUND ONE: _____

_____

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

_____

_____

_____

_____

_____

_____

_____

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

_____

_____

_____

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

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

Yes ❑ No ❑

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

_____

_____

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

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

Yes ❑ No ❑

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

Type of motion or petition: _____

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

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

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

_____

_____

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

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

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

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

_____

_____

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

_____

_____

_____

_____

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

_____

_____

GROUND TWO: _____

_____

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

_____

_____

_____

_____

_____

_____

_____

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

_____

_____

_____

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

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

Yes ❑ No ❑

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

_____

_____

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

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

Yes ❑ No ❑

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

Type of motion or petition: _____

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

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

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

_____

_____

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

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

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

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

_____

_____

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

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

GROUND THREE:

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

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

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

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

Yes ❑ No ❑

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

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

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

Yes ❑ No ❑

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

Type of motion or petition:

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

Docket or case number (if you know): _____

Date of the court's decision: _____

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

_____

_____

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

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

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

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

_____

_____

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

_____

_____

_____

_____

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

_____

_____

GROUND FOUR: _____

_____

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

_____

_____

_____

_____

_____

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

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

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

Yes ❑ No ❑

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

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

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

Yes ❑ No ❑

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

Type of motion or petition: _____

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

Docket or case number (if you know): _____

Date of the court's decision: _____

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

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

Yes ❑ No ❑

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

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

Docket or case number (if you know): _____

Date of the court's decision: _____

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

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

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

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

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

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

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

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

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

15. Do you have any petition or appeal 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 codified in 28 U.S.C. § 2244(d) does not bar your petition.*

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

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

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

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

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

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

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

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

_____

_____

or any other relief to which he or she may be entitled.

_____

Signature of Attorney (if any)

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

_____ (month, date, year).

Executed (signed) on _____ (date).

_____

Signature of Petitioner

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

_____

_____

IN FORMA PAUPERIS DECLARATION

[Insert from Appendix of Forms for 28 U.S.C. § 2254]

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

(Motion Under 28 U.S.C. § 2255)

Instructions

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

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

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

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

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

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

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

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

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

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

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

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

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

MOTION

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

   _____

   _____

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

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

   (b) Date of sentencing: _____

3. Length of sentence: _____

4. Nature of crime (all counts): _____

   _____

   _____

   _____

   _____

   _____

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

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

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

   _____

   _____

   _____

   _____

6. If you went to trial, what kind of trial did you have? (Check one) Jury ❑ Judge only ❑

7. Did you testify at either a pretrial hearing, trial or post-trial hearing? Yes ❑ No ❑

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

9. If you did appeal, answer the following:

(a) Name of court: _____

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

(c) Result: _____

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

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

(f) Grounds raised: _____

_____

_____

_____

_____

_____

_____

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

If "Yes," answer the following:

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

(2) Result: _____

_____

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

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

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

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

Yes ❑ No ❑

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

(a) (1) Name of court: _____

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

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

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

_____

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

Yes ❑ No ❑

(7) Result: _____

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

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

(1) Name of court: _____

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

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

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

_____

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

Yes ❑ No ❑

(7) Result: _____

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

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

(1) First petition: Yes ❑ No ❑

(2) Second petition: Yes ❑ No ❑

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

_____

_____

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

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 ❑

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

_____

_____

or any other relief to which he or she may be entitled.

_____

Signature of Attorney (if any)

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

_____ (month, date, year).

Executed (signed) on _____ (date).

_____

Signature of Movant

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

_____

_____

IN FORMA PAUPERIS DECLARATION

[Insert from Appendix of Forms for 28 U.S.C. § 2254]

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 1 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 1

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

II. LIST OF COMMENTATORS: RULE 1

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

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

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

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

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

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

III. COMMENTS: RULE 1

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

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

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

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

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

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

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

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

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

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

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 2 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 2

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

II. LIST OF COMMENTATORS: RULE 2

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

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

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

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

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

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

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

III. COMMENTS: RULE 2

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

Dallas, Texas,
October 22, 2002.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 3 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 3

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

II. LIST OF COMMENTATORS: RULE 3

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

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

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

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

III. COMMENTS: RULE 3

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

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

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

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

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

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

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

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

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 4 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 4

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

II. LIST OF COMMENTATORS: RULE 4

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

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

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

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

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

III. COMMENTS: RULE 4

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

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

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

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

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

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

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 5 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 5

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

II. LIST OF COMMENTATORS: RULE 5

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

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

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

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

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

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

III. COMMENTS: RULE 5

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

Corona, CA
November 28, 2002.

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

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

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

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

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

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

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

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

El Centro, California
February 19, 2003

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

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

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

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 6 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 6

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

II. LIST OF COMMENTATORS: RULE 6

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

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

III. COMMENTS: RULE 6

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

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

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

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 7 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 7

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

II. LIST OF COMMENTATORS: RULE 7

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

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

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

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

III. COMMENTS: RULE 7

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

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

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

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

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

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

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

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

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

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

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 8 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 8

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

II. LIST OF COMMENTATORS: RULE 8

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

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

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

III. COMMENTS: RULE 8

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

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

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

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

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

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

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

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

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 9 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 9

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

II. LIST OF COMMENTATORS: RULE 9

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

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

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

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

III. COMMENTS: RULE 9

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

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

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

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

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

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

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

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

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 10 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 10

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

II. LIST OF COMMENTATORS: RULE 10

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

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

III. COMMENTS: RULE 10

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

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

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

Mr. Goldberger believes that Rule 10 is fine

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 11 — RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 11

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

II. LIST OF COMMENTATORS: RULE 11

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

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

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

III. COMMENTS: RULE 11

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

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

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

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

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

Mr. Goldberger believes that Rule 11 is fine.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO F0RMS FOR RULES GOVERNING § 2254 PROCEEDINGS

I. SUMMARY OF COMMENTS: FORMS

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

II. LIST OF COMMENTATORS: FORMS

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

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

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

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

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

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

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

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

III. COMMENTS: FORMS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 1 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 1

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

II. LIST OF COMMENTATORS: RULE 1

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

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

III. COMMENTS: RULE 1

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

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

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

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

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

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 2 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 2

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

II. LIST OF COMMENTATORS: RULE 2

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

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

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

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

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

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

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

III. COMMENTS: RULE 2

Hon. William F. Sanderson (02-CR-002)

United States Magistrate Judge
Dallas, Texas,
October 22, 2002.

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

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

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

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

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

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

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

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

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

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

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

> "The court may order petitioner to correct any [motion] that fails to comply substantially with the requirements of these rules and may dismiss a [motion]

without prejudice for a [movant's] unreasonable failure to comply with the requirements of such an order."

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

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

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

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

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

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 3 of RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 3

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

II. LIST OF COMMENTATORS: RULE 3

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

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

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

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

III. COMMENTS: RULE 3

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

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

Mr. Robert J. Newmeyer (02-CR-017)

United States District Court for the Southern District of California
El Centro, California
February 19, 2003

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

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

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

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

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

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 4 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 4

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

II. LIST OF COMMENTATORS: RULE 4

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

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

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

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

III. COMMENTS: RULE 4

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

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

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

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

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

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

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

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

> "If the motion, any attached exhibits, the records of prior proceedings, and the judge's recollection of the events at issue, conclusively show that the moving party is not entitled to relief on some or all claims, or if some or all claims must

be dismissed pursuant to a motion under the Federal Rules of Civil Procedure, the judge must dismiss the claims of motion..."

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 5 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 5

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

II. LIST OF COMMENTATORS: RULE 5

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

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

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

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

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

III. COMMENTS: RULE 5

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

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

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

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

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

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

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

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

Regarding Rule 5(e), he believes that the proposed addition of the "reply" should be reevaluated. The question of permitting the petitioner or movant to file a response to

the government's answer is a murky area and it is unclear just what that filing should be called. He suggests that the term "traverse" should be used, citing various authorities that use that term. He adds that the Committee Note curiously fails to use the term, thus leaving litigants to wonder whether a reply and a traverse are the same thing. Finally, he offers some suggestions on what the traverse may, or may not, address.

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

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

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 6 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 6

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

II. LIST OF COMMENTATORS: RULE 6

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

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

III. COMMENTS: RULE 6

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

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

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

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

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 7 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 7

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

II. LIST OF COMMENTATORS: RULE 7

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

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

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

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

III. COMMENTS: RULE 7

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

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

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

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

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

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

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

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 8 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 8

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

II. LIST OF COMMENTATORS: RULE 8

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

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

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

III. COMMENTS: RULE 8

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

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

"soften the mandatory terminology," and address the issue of whether the rule encompasses the new § 2254(e)(2) prohibition on evidentiary hearings. He proposes new language for the rule.

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

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

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

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

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

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 9 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 9

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

II. LIST OF COMMENTATORS: RULE 9

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

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

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

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

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

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

III. COMMENTS: RULE 9

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

Mr. Allen believes that the Committee has created an unintended gap in the rules. He points out that for state prisoners under Section 2244(b)(1), a court is required to

dismiss a repetitive claim. But no such provision exists in Section 2255; thus, he says, when the language "may be dismissed" in Rule 9 is deleted, there will be no operative language in either the rules or § 2255 governing repetitive claims by federal prisoners. He concludes by noting that, in effect, "new claims and repetitive claims will be treated the same in successive petitions."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 10 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 10

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

II. LIST OF COMMENTATORS: RULE 10

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

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

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

III. COMMENTS: RULE 10

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

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

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

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

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

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

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

Mr. Goldberger believes that Rule 10 is fine.

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 11 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 11

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

II. LIST OF COMMENTATORS: RULE 11

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

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

III. COMMENTS: RULE 11

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

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

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

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO RULE 12 — RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: RULE 12

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

ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE

PROPOSED AMENDMENTS TO FORMS FOR RULES GOVERNING § 2255 PROCEEDINGS

I. SUMMARY OF COMMENTS: FORMS

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

II. LIST OF COMMENTATORS: FORMS

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

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

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

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

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

III. COMMENTS: FORMS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GAP REPORT—RULES GOVERNING § 2254 PROCEEDINGS

Rule 1. Scope of Rules

In response to at least one commentator on the published rules, the Committee modified Rule 1(b) to reflect the point that if the court was considering a habeas petition not covered by s2254, the court could apply some or all of the rules.

Rule 2. The Petition

The Committee changed Rule 2(c)(2) to read "state the facts" rather than "briefly summarize the facts." As one commentator noted, the current language may actually mislead the petitioner and is also redundant. The Committee modified Rule (2)(c)(5) to emphasize that any person, other than the petitioner, who signs the petition must be authorized to do so; the revised rule now specifically cites § 2242. The Note was changed to reflect that point.

Rule 2(c)(4) was modified to account for those cases where the petitioner prints the petition on a computer word-processing program.

Rule 3. Filing the Petition; Inmate Filing

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

Rule 4. Preliminary Review; Serving the Petition and Order

The Rule was modified slightly to reflect the view of some commentators that it is common practice in some districts for the government to file a pre-answer motion to dismiss. The Committee agreed with that recommendation and changed the word "pleading" in the rule to "response." It also made several minor changes to the Committee Note.

Rule 5. The Answer and the Reply

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

reflect that particular motion, it is used in some districts and refers the reader to Rule 4.

The Committee also deleted the reference to "affirmative defenses," because the Committee believed that that term was a misnomer in the context of habeas petitions. The Note was also changed to reflect that there has been a potential substantive change from the current rule, to the extent that the published rule now requires that the answer address procedural bars and any statute of limitations. The Note states that the Committee believes the new language reflects current law.

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

Rule 6. Discovery

Rule 6(b) was modified to require that discovery requests be supported by reasons, to assist the court in deciding what, if any, discovery should take place. The Committee believed that the change made explicit what has been implicit in current practice.

Rule 7. Expanding the Record

The Committee modified Rule 7(a) by removing the reference to the "merits" of the petition. One commentator had commented that the court might wish to expand the record for purposes other than the merits of the case. The Committee agreed to the change and also changed the rule to reflect that someone other than a party may authenticate the materials.

Rule 8. Evidentiary Hearing

The Committee changed the Committee Note to reflect the view that the amendments to Rule 8 were not intended to supercede the restrictions on evidentiary hearings contained in § 2254(e)(2).

Rule 9. Second or Successive Petitions

The Committee made no changes to Rule 9.

Rule 10. Powers of a Magistrate Judge

The Committee restyled the proposed rule.

Rule 11. Applicability of Federal Rules of Civil Procedure

The Committee made no changes to Rule 11

GAP REPORT—RULES GOVERNING § 2255 PROCEEDINGS

Rule 1. Scope

The Committee made no changes to Rule 1.

Rule 2. The Motion

The Committee changed Rule 2(b)(2) to read "state the facts" rather than "briefly summarize the facts; " One commentator had written that the current language may actually mislead the petitioner and is also redundant.

Rule 2(b)(4) was also modified to reflect that some motions may be printed using a word processing program

Finally Rule (2)(b)(5) was changed to emphasize that any person, other than the petitioner, who signs the petition must be authorized to do so.

Rule 3. Filing the Motion; Inmate Filing

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

Rule 4. Preliminary Review

The Committee modified Rule 4 to reflect the view of some commentators that it is common practice in some districts for the government to file a pre-answer motion to dismiss the § 2255 motion. The Committee agreed with that recommendation and changed the word "pleading" in the rule to "response." It also made several minor changes to the Committee Note.

Rule 5. The Answer and the Reply

Rule 5(a) was modified to read that the government is not required to "respond" to the motion unless the court so orders; the term "respond" was used because it leaves open the possibility that the government's first response (as it is in some districts) is in the form of a pre-answer motion to dismiss the motion. The Note has been changed to reflect the fact that

although the rule itself does not reflect that particular motion, it is used in some districts and refers the reader to Rule 4.

Finally, the Committee changed the Note to addresses the use of the term "traverse," a point raised by one of the commentators on the proposed rule.

Rule 6. Discovery

The Committee modified Rule 6(b), to require that discovery requests be supported by reasons, to assist the court in deciding what, if any, discovery should take place. The Committee amended the Note to reflect the view that it believed that the change made explicit what has been implicit in current practice.

Rule 7. Expanding the Record

Rule 7(a) was changed by removing the reference to the "merits" of the petition. One commentator had stated that the court may wish to expand the record for purposes other than the merits of the case. The Committee agreed and also changed the rule to reflect that someone other than a party may authenticate the materials.

Rule 8. Evidentiary Hearing

The Committee made no changes to Rule 8, as published for public comment.

Rule 9. Second or Successive Petitions

The Committee made no changes to Rule 9, as published.

Rule 10. Powers of a Magistrate Judge

The Committee restyled the proposed rule

Rule 11. Time to Appeal

The Committee made no changes to Rule 11, as published..

Rule 12. Applicability of Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure

The Committee made no changes to Rule 12.

GAP REPORT—FORMS ACCOMPANYING RULES GOVERNING § 2254 AND § 2255 PROCEEDINGS

Responding to a number of comments from the public, the Committee deleted from both sets of official forms the list of possible grounds of relief. The Committee made additional minor style corrections to the forms.

APPENDIX D

PROPOSED AMENDMENTS TO RULES — FOR PUBLICATION

Proposed Amendment to Rule 12.2 & Committee Note

Proposed Amendment to Rules 29, 33, 34, and 45 & Committee Notes

Proposed Amendment to Rule 32 & Committee Note

Proposed Amendment to Rule 32.1 & Committee Note

Proposed New Rule 59 & Committee Note

Rule 12.2. Notice of Insanity Defense; Mental Examination

* * * * *

(d) Failure to Comply.

(1) ***Failure to Give Notice or to Submit to Examination.*** ~~If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the~~ The court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case~~.~~ if the defendant fails to:

(A) give notice under Rule 12.2(b); or

(B) submit to an examination when ordered under Rule 12.2(c).

(2) ***Failure to Disclose.*** The court may exclude any expert evidence for which the defendant has failed to comply with the disclosure requirement of Rule 12.2(c)(3).

* * * * *

COMMITTEE NOTE

The amendment to Rule 12.2(d) fills a gap created in the 2002 amendments to the rule. The substantively amended rule that took effect December 1, 2002, permits a sanction of exclusion of "any expert evidence" for failure to give notice or failure to submit to an examination, but provides no sanction for failure to disclose reports. The proposed amendment is designed to address that specific issue.

Rule 12.2(d)(1) is a slightly restructured version of current Rule 12.2(d). Rule 12.2(d)(2) is new and permits the court to exclude any expert evidence for failure to comply with the disclosure requirement in Rule 12.2(c)(3). The sanction is intended to apply only to the evidence related to the matters addressed in the report that the defense failed to disclose. Unlike the broader sanction for the two violations listed in Rule 12.2(d)(1)—which can substantially affect the entire hearing—the Committee believed that it would be overbroad to expressly authorize exclusion of "any" expert evidence, even evidence unrelated to the results and reports that were not disclosed as required in Rule 12.2(c)(3).

As with sanctions for violating other parts of the rule, the amendment entrusts to the court the discretion to fashion an appropriate sanction proportional to the failure to disclose the results and reports of the defendant's expert examination. *See Taylor v. Illinois*, 484 U.S. 400, 414 n. 19 (1988) (court should consider "the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the extent of prosecutorial surprise or prejudice, and whether the violation was willful"), citing *Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1983).

Rule 29. Motion for a Judgment of Acquittal

* * * * *

(c) After Jury Verdict or Discharge.

(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later ~~, or within any other time the court sets during the 7-day period~~.

* * * * *

COMMITTEE NOTE

Rule 29(c) has been amended to remove the requirement that the court must act within seven days after a guilty verdict or after the court discharges the jury, if it sets another time for filing a motion for a judgment of acquittal. This amendment parallels similar changes to Rules 33 and 34. Further, a conforming amendment has been made to Rule 45(b)(2).

Currently, Rule 29(c) requires the defendant to move for a judgment of acquittal within seven days of the guilty verdict, or after the court discharges the jury, whichever occurs later, or some other time set by the court in an order issued within that same seven-day period. Similar provisions exist in Rules 33 and 34. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, it loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting a very significant delay to the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the

Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to act on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion for a judgment of acquittal under Rule 29 within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 33. New Trial

* * * * *

(b) Time to File.

* * * * *

(2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty. ~~, or within such further time as the court sets during the 7-day period~~.

COMMITTEE NOTE

Rule 33(b)(2) has been amended to remove the requirement that the court must act within seven days after a verdict or finding of guilty if it sets another time for filing a motion for a new trial. This amendment parallels similar changes to Rules 29 and 34. Further, a conforming amendment has been made to Rule 45(b)(2).

Currently, Rule 33(b)(2) requires the defendant to move for a new trial within seven days after the verdict or the finding of guilty verdict, or within some other time set by the court in an order issued during that same seven-day period. Similar provisions exist in Rules 29 and 34. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, it loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting a very significant delay to the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other

timing requirements in the rules, which do not force the court to act on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion for a new trial under Rule 33(b)(2) within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion for new trial within the specified time, the court may nonetheless consider that untimely underlying motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 34. Arresting Judgment

* * * * *

(b) Time to File. The defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere. ~~, or within such further time as the court sets during the 7-day period~~.

COMMITTEE NOTE

Rule 34(b) has been amended to remove the requirement that the court must act within seven days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere if it sets another time for filing a motion to arrest a judgment. The amendment parallels similar amendments to Rules 29 and 33. Further, a conforming amendment has been made to Rule 45(b).

Currently, Rule 34(b) requires the defendant to move to arrest judgment acquittal within seven days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere, or within some other time set by the court in an order issued by the court within that same seven-day period. Similar provisions exist in Rules 29 and 33. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal within the seven-day period, the judge must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, the court loses jurisdiction to act on the underlying substantive motion, if it is not filed within the seven days. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting a very significant delay to the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion to arrest judgment under Rule 34 within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(b), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 45. Computing and Extending Time

* * * * * *

(b) **Extending Time.**

(1) In General. When an act must or may be done within a specified time period, or the court on its own may extend the time, or for good cause may do so on a party's motion made:

(A) before the originally prescribed or previously extended time expires; or

(B) after the time expires if the party failed to act because of excusable neglect.

(2) **Exceptions.** The court may not extend the time to take any action under Rule ~~Rules 29, 33, 34 and~~ 35, except as stated in ~~those rules~~ that rule.

* * * * *

COMMITTEE NOTE

Rule 45(b) has been amended to conform to amendments to Rules 29, 33, and 34, which have been amended to remove the requirement that the court must act within the seven-day period specified in each of those rules if it sets another time for filing a motion under those rules.

Currently, Rules 29(c)(1), 33(b)(1), and 34(b) require the defendant to move for relief under those rules within the seven-day periods specified in those rules or within some other time set by the court in an order issued during that same seven-day period. Courts have held that the seven-day rule is jurisdictional. Thus, for example, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal or a motion for new trial within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request for an extension of time within the seven days, the court loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that "district court forfeited the power to act when it failed to fix a time for filing a motion for new trial within seven days of the verdict").

Rule 45(b)(2) specifies that a court may not extend the time for taking action under Rules 29, 33, or 34, except as provided in those rules.

Assuming that the current provisions in Rules 29, 33, and 34 were intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, under those rules, as long as it does so within the seven-day period. Thus, the Committee believed that those rules should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing, within a particular period of time or lose jurisdiction to do so. The change to Rule 45(b)(2) is thus a conforming amendment.

The defendant is still required to file motions under Rules 29, 33, and 34 within the seven-day period specified in those rules. The defendant, however, may consistently with Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(1)(b), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 32. Sentencing and Judgment

* * * * *

(i). Sentencing.

* * * * *

(4) Opportunity to Speak

* * * * *

(B) *By a Victim of a Crime of Violence or Sexual Abuse*. Before imposing sentence, the court must address any victim of any crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:

(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or

(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.

(C) *By a Victim of a Felony Offense*. Before imposing sentence, the court must address any victim of a felony offense, not involving violence or sexual abuse, who is present at sentencing and must permit the victim to speak

or submit any information about the sentence. If the felony offense involved multiple victims, the court may limit the number of victims who will address the court.

* * * * *

~~(C)~~ (D) *In Camera Proceedings.* Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

* * * * *

COMMITTEE NOTE

In a series of amendments, Rule 32 has been modified to provide allocution for victims of violent crimes, and more recently for victims of sexual offenses. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-222, 108 Stat. 1796 (amending Rule 32 to provide for victim allocution in crimes of violence). In 2002, Rule 32 was amended to extend the right of victim allocution to victims of sexual abuse. See Rule 32(a)(1)(B). The amendment to Rule 32(i)(4) expands the right of victim-allocution to all felony cases.

The role of victim allocution has become part of the accepted landscape in federal sentencing. *See generally* J. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39 (2001). And although the actual practice varies, some courts currently permit statements from victims of crimes that do not involve violence or sexual abuse. Typical examples include statements from victims of fraud and other economic crimes. Victims of non-violent felonies may have pertinent information that could affect application of a particular sentencing guideline. At the same time, however, there are potential problems with victim allocution, particularly in cases involving a large number of victims. *See* Barnard, *supra*, at 65-78 (noting arguments against victim allocution).

Rule 32(i)(4)(C) is a new provision that extends the right of allocution to victims of felonies that do not involve either sexual abuse or violence. The amendment attempts to strike a reasonable balance between the interest of victims in being heard and the ability of the court to efficiently move its sentencing docket. Although the rule requires

the court to hear from victims if any are present and wish to speak, it gives the court some discretion about the manner in which victims are to be heard. In a particular case, the court may permit, or require some or all of the victims to present their information in the form of written statements. The rule explicitly states that if there are multiple victims, the court may properly limit the number of persons who will be permitted to address the court during sentencing.

The amendment does not include any provision requiring a court to permit a representative to speak on behalf of a victim, as the court must do for victims of sexual abuse or violence. The Committee believed that the policy reasons for permitting a victim to speak through a representative in a case involving sexual abuse or violence do not exist in most other types of cases. Nonetheless, there is nothing in the rule that would prohibit the court from permitting a third person to represent the views of one or more victims of a felony not involving violence or sexual assault.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

* * * * *

(b) Revocation.

* * * * *

(2) Revocation Hearing. Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear; ~~and~~

(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel ~~.~~ ; and

(E) an opportunity to make a statement and present any information in mitigation.

(c) Modification.

(1). In General. Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right

to counsel ; and an opportunity to make a statement and present any information in mitigation.

* * * * *

COMMITTEE NOTE

The amendments to Rule 32.1(b) and (c) are intended to address a gap in the rule. As noted by the court in United States v. Frazier, 283 F.3d 1242 (11th Cir. 2002) (per curiam), there is no explicit provision in current Rule 32.1 for allocution rights for a person upon resentencing. In that case the court noted that several circuits had concluded that the right to allocution in Rule 32 extended to supervised release revocation hearings. *See United States v. Patterson*, 128 F.3d 1259, 1261 (8th Cir. 1997) (Rule 32 right to allocution applies); *United States v. Rodriguez*, 23 F.3d 919, 921 (5th Cir. 1997) (right of allocution, in Rule 32, applies at revocation proceeding). But the court agreed with the Sixth Circuit that the allocution right in Rule 32 was not incorporated into Rule 32.1. *See United States v. Waters*, 158 F.3d 933 (6th Cir. 1998) (allocution right in Rule 32 does not apply to revocation proceedings). The *Frazier* court observed that the problem with the incorporation approach is that it would require application of other provisions specifically applicable to sentencing proceedings under Rule 32, but not expressly addressed in Rule 32.1. 283 F.3d at 1245. The court, however, believed that it would be "better practice" for courts to provide for allocution at revocation proceedings and stated that "[t]he right of allocution seems both important and firmly embedded in our jurisprudence." *Id.*

The amended rule recognizes the importance of allocution and now explicitly recognizes that right at revocation hearings, Rule 32.1(b)(2) and extends it as well to modification hearings where the court may decide to modify the terms or conditions of the defendant's probation, Rule 32.1(c)(1). In each instance the court is required to give the defendant the opportunity to make a statement and present any mitigating information.

Rule 59 Matters Before a Magistrate Judge.

(a) ***Nondispositive Matters***. A district judge may refer to a magistrate judge for determination a matter that does not dispose of the case. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may serve and file any objections to the order within 10 days after being served with a copy of a written order or after the oral order is made on the record, or at some other time the court sets. The district judge must consider any timely objections and modify or set aside any part of the order that is clearly erroneous or contrary to law. Failure to object in accordance with this rule waives a party's right to review.

(b) ***Dispositive Matters***.

(1) ***Referral to magistrate judge.*** A district judge may refer to a magistrate judge for recommendation any matter that may dispose of the case including a defendant's motion to dismiss or quash an indictment or information, or a motion to suppress evidence. The magistrate judge must promptly conduct the required proceedings. A record must be made of any evidentiary proceeding before the magistrate judge and of any other proceeding if the magistrate judge considers it necessary. The magistrate judge must enter on

the record a recommendation for disposing of the matter, including any proposed findings of fact. The clerk must immediately mail copies to all parties.

(2) ***Objections to findings and recommendations.*** Within 10 days after being served with a copy of the recommended disposition, or such other period as fixed by the court, a party may serve and file any specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the party objecting to the recommendation must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

(3) ***De novo review of recommendations.*** The district judge must consider de novo any objection to the magistrate judge's recommendation. The district judge may accept, reject, or modify the recommendation, receive further evidence, or may resubmit the matter to the magistrate judge with instructions.

COMMITTEE NOTE

Rule 59 is a new rule that creates a procedure for a district judge to review nondispositive and dispositive decisions by magistrate judges. The rule is derived in part from Federal Rule of Civil Procedure 72.

The Committee's consideration of a new rule on the subject of review of magistrate judge's decisions resulted from *United States v. Abonce-Barrera*, 257 F.3 959 (9th Cir. 2001). In that case the Ninth Circuit held that the Criminal Rules do not require appeals from nondispositive decisions by magistrate judges to district judges as a requirement for review by a court of appeals. The court suggested that Federal Rule of Civil Procedure 72 could serve as a suitable model for a criminal rule.

New Rule 59(a) sets out procedures to be used in reviewing nondispositive matters, that is, those matters that do not dispose of the case. The rule requires that if the district judge has referred a matter to a magistrate judge, that the magistrate judge must issue an oral or written order on the record. To preserve the issue for further review, a party must object to that order within 10 days after being served with a copy of the order or after the oral order is made on the record or at some other time set by the court. If an objection is made, the district court is required to consider the objection. If the court determines that the magistrate judge's order, or a portion of the order, is clearly erroneous or contrary to law, the court must set aside the order, or the affected part of the order. *See also* 28 U.S.C. § 636(b)(1)(A).

Rule 59(b) provides for assignment and review of recommendations made by magistrate judges on dispositive matters, including motions to suppress or quash an indictment or information. The rule directs the magistrate judge to consider the matter promptly, hold any necessary evidentiary hearings, and enter his or her recommendation on the record. After being served with a copy of the magistrate judge's recommendation, under Rule 59(b)(2), the parties have a period of 10 days to file any objections. If any objections are filed, the district court must consider the matter de novo and accept, reject, or modify the recommendation, or return the matter to the magistrate judge for further consideration.

Both Rule 59(a) and (b) contain a provision that explicitly states that failure to file an objection in accordance with the rule amounts to a waiver of the issue. This waiver provision is intended to establish the requirements for objecting in a district court in order to preserve appellate review of magistrate judges' decisions. In *Thomas v. Arn*, 474 U.S. 140, 155 (1985), the Supreme Court approved the adoption of waiver rules on matters for which a magistrate judge had made a decision or recommendation. The Committee believes that the waiver provisions will enhance the ability of a district court to review a magistrate judge's decision or recommendation by requiring a party to promptly file an

objection to that part of the decision or recommendation at issue. Further, the Supreme Court has held that a de novo review to a magistrate judge's decision or recommendation is required to satisfy Article III concerns only where there is an objection. *Peretz v. United States*, 501 U.S. 293 (1991).

Despite the waiver provisions, the district judge retains the authority to review any magistrate judge's decision or recommendation by a magistrate judge whether or not objections are timely filed. This discretionary review is in accord with the Supreme Court's decision in *Thomas v. Arn, supra,* at 154. *See also Matthews v. Weber*, 423 U.S. 261, 270-271 (1976).