

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

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

THOMAS S. ZILLY
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

**To: Hon. David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure**

**From: Hon. Susan C. Bucklew, Chair
Advisory Committee on Federal Rules of Criminal Procedure**

Subject: Report of the Advisory Committee on Criminal Rules

Date: May 19, 2007 (revised July 2007)

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure (“the Committee”) met on April 16-17, 2007, in Brooklyn, N.Y. and took action on a number of proposed amendments to the Rules of Criminal Procedure.

* * * * *

This report addresses a number of action items:

* * * * *

(3) approval for publication and comment of proposed amendments to Rules 7, 32.2, 41, and Rule 11 of the Rules Governing §§ 2254 and 2255 Cases.

* * * * *

III. Action Items—Recommendations to Publish Amendments to the Rules

* * * * *

C. Forfeiture Rules

Working through a subcommittee, and with the substantial assistance of forfeiture specialists in the Department of Justice and Mr. David Smith (an authority on forfeiture who presented the views of the National Association of Criminal Defense Lawyers), the Committee developed and approved a package of amendments intended to incorporate current practice as it has developed since the revision of the forfeiture rules in 2000. Although the Committee heard proposals for more

fundamental changes, in general it chose not to break new ground, and adopted what are largely consensus proposals. All members of the Committee concurred in recommending that the proposed amendments be forwarded to the Standing Committee for publication. Three rules are affected: Rule 7 (indictment and information), Rule 32 (sentencing), and Rule 32.2 (forfeiture).

1. ACTION ITEM-Rule 7

The proposal to amend Rule 7 removes a provision that duplicates the same language in Rule 32.2, which was intended to consolidate the forfeiture related provisions.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 7 be published for public comment.

2. ACTION ITEM-Rule 32

The proposed amendment provides that the presentence report should state whether the government is seeking forfeiture. This is intended to promote timely consideration of issues concerning forfeiture as part of the sentencing process.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 32 be published for public comment.

3. ACTION ITEM-Rule 32.2

Several changes to Rule 32.2 are proposed. In subdivision (a) the Committee proposes new language to respond to uncertainty regarding the form of the required notice that the government is seeking forfeiture. The amendment states that the notice should not be designated as a count in an indictment or information, and that it need not identify the specific property or money judgment that is sought. Where additional detail is needed, it is generally provided in a bill of particulars. After extensive consideration in the subcommittee of language that would provide more detail about the use of bills of particulars, the Committee determined that the better course at this point is to leave the matter to further judicial development guided by general comments in the committee note.

In subdivision (b)(1) the Committee proposes to add language clarifying the point that the court's forfeiture determination may be based on additional evidence or information accepted by the court in the forfeiture phase of the trial. The amendment also states that the court must conduct a hearing when requested to do so by either party, and notes that in some instances live testimony will be needed. The Committee noted that the present rule, which refers to "evidence or information," does not limit the court to considering evidence that would be admissible under the Rules of

Evidence (which themselves provide that they are not applicable to sentencing). Whether this is a good policy can be debated, but it reflects a decision made in 2000 and the Committee did not seek to reopen the matter.

Proposed subdivision (b)(2) requires that the court enter a preliminary order of forfeiture sufficiently in advance of sentencing to permit the parties to suggest modifications before the order becomes final as to the defendant, and also expressly authorizes the court to enter a forfeiture order that is general in nature in cases where it is not possible to identify all of the property subject to forfeiture at the time of sentencing. Recognizing the authority to issue a general order reconciles the requirement that the court make the forfeiture order part of the sentence with Rule 32.2(e), which allows the court on motion of the government to amend the forfeiture order to include property “located and identified” after the forfeiture order was entered. The committee note cautions that the authority to enter a general order should be used only in unusual circumstances, and not as a matter of course.

The proposed amendments to subdivisions (b)(3) and (4) clarify when the forfeiture order becomes final as to the defendant (as opposed to third parties whose interests may be affected), what the district court is required to do at sentencing, and how to deal with clerical errors.

Proposed subdivision (b)(5) clarifies the procedure for requesting a jury determination of forfeiture, and requires the government to submit a special verdict form.

Proposed subdivisions (b)(6) and (7) govern technical issues of notice, publication, and interlocutory sale. They are based upon the civil forfeiture provisions in Supplemental Rule G of the Federal Rules of Civil Procedure.

Recommendation--The Advisory Committee recommends that the proposed amendments to Rule 32.2 be published for public comment.

D. Electronically Seized Evidence

ACTION ITEM-Rule 41

After study by a subcommittee and a tutorial on the technology for storing and recovering electronic information, the Advisory Committee approved two changes in Rule 41.

The first change acknowledges that the very large volume of information that can be stored on computers and other electronic storage media generally requires a two-step process in which the government first seizes the storage medium and then reviews it to determine what information within it falls within the scope of the warrant. In light of the enormous quantities of information that are

often involved, as well as the difficulties often encountered involving encryption and booby traps, the Committee concluded that it would be impractical to set a definite time period during which the offsite review must be completed. The committee note emphasizes, however, that the court may impose a deadline for the return of the medium or access to the electronically stored information.

The second proposed change provides that in a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information the inventory may be limited to a description of the physical storage media seized or copied. Similarly, when business papers or other documents are seized, the inventory will often refer to a file cabinet or file drawer, rather than seeking to list each document.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 41 be published for public comment.

E. Motions For Reconsideration and Certificates of Appealability in Actions Under §§ 2254 and 2255

ACTION ITEM-Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings

The amendments to Rule 11 of the Rules governing 2254 proceedings, and to Rule 11 of the Rules Governing 2255 proceedings are intended to make the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2254 and § 2255 Proceedings in the District Courts. The amendments also require the district judge to grant or deny the certificate at the time a final order is issued, *see* 3d Cir. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, *see* Fed. R. App. P. 4(a)(1)(B). This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

The Committee voted unanimously to forward the proposed amendments to Rule 11 to the Standing Committee. **Related amendments to these rules were remanded to the Advisory Committee for further consideration in light of issues raised by the Standing Committee.**

Recommendation--The Advisory Committee recommends that the proposed amendments to Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings be published for public comment.

* * * * *

2 FEDERAL RULES OF CRIMINAL PROCEDURE

15

* * * * *

Committee Note

The provision regarding forfeiture is obsolete. In 2000 the same language was repeated in subdivision (a) of Rule 32.2, which was intended to consolidate the rules dealing with forfeiture.

The committee's proposed Booker amendment to Rule 32(d)(2)(F) – shown as a single underline below -- has been approved by the Supreme Court (and will take effect on December 1, 2007, unless Congress acts otherwise). The Rules Committee has proposed a further amendment to the rule, which is shown below as a double underline.

1 **Rule 32. Sentence and Judgment**

2 * * * * *

3 **(d) Presentence Report.**

4 * * * * *

5 **(2) *Additional Information.*** The presentence report

6 must also contain the following information:

7 (A) the defendant's history and characteristics,

8 including:

9 (i) any prior criminal record;

- 10 (ii) the defendant's financial condition; and
- 11 (iii) any circumstances affecting the
- 12 defendant's behavior that may be
- 13 helpful in imposing sentence or in
- 14 correctional treatment;
- 15 (B) verified information, stated in a
- 16 nonargumentative style, that assesses the
- 17 financial, social, psychological, and medical
- 18 impact on any individual against whom the
- 19 offense has been committed;
- 20 (C) when appropriate, the nature and extent of
- 21 nonprison programs and resources available
- 22 to the defendant;
- 23 (D) when the law provides for restitution,
- 24 information sufficient for a restitution order;

4 FEDERAL RULES OF CRIMINAL PROCEDURE

- 25 (E) if the court orders a study under 18 U.S.C.
26 § 3552(b), any resulting report and
27 recommendation; ~~and~~
28 (F) any other information that the court requires,
29 including information relevant to the factors
30 under 18 U.S.C. § 3553(a); and
31 (G) whether the Government seeks forfeiture
32 under Rule 32.2.

33 * * * * *

Committee Note

Subdivision (d)(2)(G). Rule 32.2(a) requires that the indictment or information provide notice to the defendant of the government's intent to seek forfeiture as part of the sentence. The amendment provides that the same notice be provided as part of the presentence report to the court. This will ensure timely consideration of the issues concerning forfeiture as part of the sentencing process.

Rule 32.2. Criminal Forfeiture

- 1 **(a) Notice to the Defendant.** A court must not enter a
2 judgment of forfeiture in a criminal proceeding unless

3 the indictment or information contains notice to the
4 defendant that the government will seek the forfeiture of
5 property as part of any sentence in accordance with the
6 applicable statute. The notice should not be designated
7 as a count of the indictment or information. The
8 indictment or information need not identify the property
9 subject to forfeiture or specify the amount of any
10 forfeiture money judgment that the government seeks.

11 **(b) Entering a Preliminary Order of Forfeiture**

12 **(1) *In-Generat. Forfeiture Phase of the Trial.***

13 (A) Forfeiture Determinations. As soon as
14 practical after a verdict or finding of guilty;
15 — or after a plea of guilty or nolo contendere
16 is accepted; — on any count in an indictment
17 or information on regarding which criminal
18 forfeiture is sought, the court must determine
19 what property is subject to forfeiture under

6 FEDERAL RULES OF CRIMINAL PROCEDURE

20 the applicable statute. If the government
21 seeks forfeiture of specific property, the court
22 must determine whether the government has
23 established the requisite nexus between the
24 property and the offense. If the government
25 seeks a personal money judgment, the court
26 must determine the amount of money that the
27 defendant will be ordered to pay.

28 (B) Evidence and Hearing. The court's
29 determination may be based on evidence
30 already in the record, including any written
31 plea agreement, or, and on any additional
32 evidence or information submitted by the
33 parties and accepted by the court as relevant
34 and reliable. If if the forfeiture is contested,
35 on either party's request the court must
36 conduct a hearing on evidence or information

37 presented by the parties at a hearing after the
38 verdict or finding of guilt.

39 **(2) *Preliminary Order.***

40 (A) Contents. If the court finds that property is
41 subject to forfeiture, it must promptly enter a
42 preliminary order of forfeiture setting forth
43 the amount of any money judgment, or
44 directing the forfeiture of specific property,
45 and directing the forfeiture of any substitute
46 assets if the government has met the statutory
47 criteria, without regard to any third party's
48 interest in all or part of it. The order must be
49 entered without regard to any third party's
50 interest in the property. Determining whether
51 a third party has such an interest must be
52 deferred until any third party files a claim in
53 an ancillary proceeding under Rule 32.2(c).

8 FEDERAL RULES OF CRIMINAL PROCEDURE

54 (B) Timing. Unless doing so is impractical, the
55 court must enter the preliminary order of
56 forfeiture sufficiently in advance of
57 sentencing to allow the parties to suggest
58 revisions or modifications before the order
59 becomes final as to the defendant under Rule
60 32.2(b)(4).

61 (C) General Order. If, before sentencing, the
62 court cannot identify all the specific property
63 subject to forfeiture or calculate the total
64 amount of the money judgment, the court
65 may enter a forfeiture order listing any
66 identified property, describing other property
67 in general terms, and stating that the order
68 will be amended under Rule 32.2(e)(1) when
69 additional specific property is identified or

70 the amount of the money judgment has been
71 calculated.

72 (3) ***Seizing Property.*** The entry of a preliminary order
73 of forfeiture authorizes the Attorney General (or a
74 designee) to seize the specific property subject to
75 forfeiture; to conduct any discovery the court
76 considers proper in identifying, locating, or
77 disposing of the property; and to commence
78 proceedings that comply with any statutes
79 governing third party rights. ~~At sentencing—or at~~
80 ~~any time before sentencing if the defendant~~
81 ~~consents—the order of forfeiture becomes final as~~
82 ~~to the defendant and must be made a part of the~~
83 ~~sentence and be included in the judgment.—The~~
84 court may include in the order of forfeiture
85 conditions reasonably necessary to preserve the
86 property's value pending any appeal.

10 FEDERAL RULES OF CRIMINAL PROCEDURE

87 **(4) *Sentence and Judgment.***

88 (A) When Final. At sentencing — or at any time
89 before sentencing if the defendant consents
90 — the preliminary order of forfeiture
91 becomes final as to the defendant. If the
92 order directs the defendant to forfeit specific
93 assets, it remains preliminary as to third
94 parties until the ancillary proceeding is
95 concluded under Rule 32.2 (c).

96 (B) Notice and Inclusion in Judgment. The
97 district court must include the forfeiture when
98 orally announcing the sentence or otherwise
99 ensure that the defendant knows of the
100 forfeiture at sentencing. The court must also
101 include the order of forfeiture, directly or by
102 reference, in the judgment, but the court's

103 failure to do so may be corrected at any time
104 under Rule 36.

105 (C) Time for Appeal. The time for a party to file
106 an appeal from the order of forfeiture, or
107 from the district court's failure to enter an
108 order, begins to run when judgment is
109 entered. If the court later amends or declines
110 to amend an order of forfeiture to include an
111 additional asset under Rule 32.2(e), a party
112 may file an appeal regarding that asset under
113 Federal Rule of Appellate Procedure 4(b).
114 The time for that appeal runs from the date
115 when the order granting or denying the
116 amendment becomes final.

117 **(4 5) Jury Determination.**

118 (A) Retaining Jury. ~~Upon a party's request in a~~
119 ~~case in which a jury returns a verdict of~~

12 FEDERAL RULES OF CRIMINAL PROCEDURE

120 guilty, the jury must In any case tried before
121 a jury, if the indictment or information states
122 that the government is seeking forfeiture, the
123 court must determine before the jury begins
124 deliberating whether either party requests that
125 the jury be retained to determine the
126 forfeitability of specific property if it returns
127 a guilty verdict.

128 (B) Special Verdict Form. If a timely request to
129 have the jury determine the forfeiture is
130 made, the government must submit a
131 proposed Special Verdict Form listing each
132 asset subject to forfeiture and asking the jury
133 to determine whether the government has
134 established the requisite nexus between the
135 property and the offense committed by the
136 defendant.

137 **(6) Notice of the Order of Forfeiture.**

138 (A) Publishing and Sending Notice. If the court
139 orders the forfeiture of specific property, the
140 government must publish notice of the order
141 and send notice to any person who reasonably
142 appears to be a potential claimant with
143 standing to contest the forfeiture in the
144 ancillary proceeding.

145 (B) Content of Notice. The notice must describe
146 the forfeited property, state the times under
147 the applicable statute when a petition
148 contesting the forfeiture must be filed, and
149 state the name and contact information for the
150 attorney for the government to be served with
151 the petition.

152 (C) Means of Publication. Publication must take
153 place as described in Supplemental Rule

14 FEDERAL RULES OF CRIMINAL PROCEDURE

154 G(4)(a)(iii) of the Federal Rules of Civil
155 Procedure, and may be by any means
156 described in Supplemental Rule G(4)(a)(iv).
157 Publication is unnecessary if any exception in
158 Supplemental Rule G(4)(a)(i) applies.

159 (D) Means of Sending Notice. The notice may be
160 sent in accordance with Supplemental Rule
161 G(4)(b)(iii)-(v) of the Federal Rules of Civil
162 Procedure.

163 (7) Interlocutory Sale. At any time before entry of a
164 final order of forfeiture, the court may, in
165 accordance with Supplemental Rule G(7) of the
166 Federal Rules of Civil Procedure, order the
167 interlocutory sale of property alleged to be
168 forfeitable.

169 * * * * *

Committee Note

Subdivision (a). The amendment responds to some uncertainty regarding the form of the required notice that the government will seek forfeiture as part of the sentence, making it clear that the notice should not be designated as a separate count in an indictment or information. The amendment also makes it clear that the indictment or information need only provide general notice that the government is seeking forfeiture, without identifying the specific property being sought. This is consistent with the 2000 Committee Note, as well as many lower court decisions.

The court may direct the government to file a bill of particulars to inform the defendant of the identity of the property that the government is seeking to forfeit or the amount of any money judgment sought [if necessary] to enable the defendant to prepare a defense [or to avoid unfair surprise]. *See, e.g., United States v. Moffitt, Zwerdling, & Kemler, P.C.*, 83 F.3d 660, 665 (4th Cir. 1996) (holding that the government need not list each asset subject to forfeiture in the indictment because notice can be provided in a bill of particulars); *United States v. Vasquez-Ruiz*, 136 F. Supp.2d 941, 944 (N.D. Ill. 2001) (directing the government to identify in a bill of particulars, at least 30 days before trial, the specific items of property, including substitute assets, that it claims are subject to forfeiture); *United States v. Best*, 657 F. Supp. 1179, 1182 (N.D. Ill. 1987) (directing the government to provide a bill of particulars apprising the defendants as to the time periods during which they obtained the specified classes of property through their alleged racketeering activity and the interest in each of these properties that was allegedly obtained unlawfully).

Subdivision (b)(1). Rule 32.2(b)(1) sets forth the procedure for determining if property is subject to forfeiture. Subparagraph (A) is carried forward from the current Rule without change.

Subparagraph (B) clarifies that the parties may submit additional evidence relating to the forfeiture in the forfeiture phase of the trial, which may be necessary even if the forfeiture is not contested. Subparagraph (B) makes it clear that in determining what evidence or information should be accepted, the court should consider relevance and reliability. Finally, subparagraph (B) requires the court to hold a hearing when forfeiture is contested. The Committee foresees that in some instances live testimony will be needed to determine the reliability of proffered information. [*Cf.* Rule 32.1(b)(1)(B)(iii) (providing the defendant in a proceeding for revocation of probation or supervised release with the opportunity, upon request, to question any adverse witness unless the judge determines this is not in the interest of justice).]

Subdivision (b)(2)(A). Current Rule 32.2(b) provides the procedure for issuing a preliminary order of forfeiture once the court finds that the government has established the nexus between the property and the offense (or the amount of the money judgment). The amendment makes clear that the preliminary order may include substitute assets if the government has met the statutory criteria.

Subdivision (b)(2)(B). This new subparagraph focuses on the timing of the preliminary forfeiture order, stating that the court should issue the order “sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final.” Many courts have delayed entry of the preliminary order until the time of sentencing. This is undesirable because the parties have no opportunity to advise the court of omissions or errors in the order before it becomes final as to the defendant (which occurs upon oral announcement of the sentence and the entry of the criminal judgment). Once the sentence has been announced, the rules give the sentencing court only very limited authority to correct errors or omissions in the preliminary forfeiture order. Pursuant to Rule 35(a),

the district court may correct a sentence, including an incorporated order of forfeiture, within seven** days after oral announcement of the sentence. During the seven day period, corrections are limited to those necessary to correct “arithmetical, technical, or other clear error.” See *United States v. King*, 368 F. Supp. 2d 509, 512-13 (D. S.C. 2005). Corrections of clerical errors may also be made pursuant to Rule 36. If the order contains errors or omissions that do not fall within Rules 35(a) or 36, and the court delays entry of the preliminary forfeiture order until the time of sentencing, the parties may be left with no alternative to an appeal, which is a waste of judicial resources. The amendment requires the court to enter the preliminary order in advance of sentencing to permit time for corrections, unless it is not practical to do so in an individual case.

Subdivision (b)(2)(C). The amendment explains how the court is to reconcile the requirement that it make the order of forfeiture part of the sentence with the fact that in some cases the government will not have completed its post-conviction investigation to locate the forfeitable property by the time of sentencing. In that case the court is authorized to issue an order of forfeiture describing the property in “general” terms, which order may be amended pursuant to Rule 32.2(e)(1) when additional specific property is identified.

The authority to issue a general forfeiture order should be used only in unusual circumstances and not as a matter of course. For cases in which a general order was properly employed, see *United States v. BCCI Holdings (Luxembourg)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (ordering forfeiture of all of a large, complex corporation’s

**The seven day period under Rule 35(a) may change to 14 days under the current proposals associated with the time computation amendments to Rule 45.

assets in the United States, permitting the government to continue discovery necessary to identify those assets); *United States v. Saccoccia*, 898 F. Supp. 53 (D.R.I. 1995) (ordering forfeiture of up to a specified amount of laundered drug proceeds so that the government could continue investigation which led to the discovery and forfeiture of gold bars buried by the defendant in his mother's back yard).

Subdivisions (b)(3) and (4). The amendment moves the language explaining when the order of forfeiture becomes final as to the defendant to new subparagraph (b)(4)(A), where it is coupled with new language explaining that the order is not final as to third parties until the completion of the ancillary proceedings provided for in Rule 32.2(c).

New subparagraphs (B) and (C) are intended to clarify what the district court is required to do at sentencing, and to respond to conflicting decisions in the courts regarding the application of Rule 36 to correct clerical errors. The new subparagraphs add considerable detail regarding the oral announcement of the forfeiture at sentencing, the reference to the order of forfeiture in the judgment and commitment order, the availability of Rule 36 to correct the failure to include the order of forfeiture in the judgment and commitment order, and the time to appeal.

Subparagraph (b)(5)(A). The amendment clarifies the procedure for requesting a jury determination of forfeiture. The goal is to avoid an inadvertent waiver of the right to a jury determination, while also providing timely notice to the court and to the jurors themselves if they will be asked to make the forfeiture determination. The amendment requires that the court determine whether either party requests a jury determination of forfeiture in cases where the government has given notice that it is seeking forfeiture and a jury

has been empaneled to determine guilt or innocence. The rule requires the court to make this determination before the jury retires. Jurors who know that they may face an additional task after they return their verdict will be more accepting of the additional responsibility in the forfeiture proceeding, and the court will be better able to plan as well.

Although the rule permits a party to make this request just before the jury retires, it is desirable, when possible, to make the request earlier, at the time when the jury is empaneled. This allows the court to plan, and also allows the court to tell potential jurors what to expect in terms of their service.

Subparagraph (b)(5)(B) explains that “the government must submit a proposed Special Verdict Form listing each asset subject to forfeiture.” Use of such a form is desirable, and the government is in the best position to draft the form.

Subdivisions (b)(6) and (7). These provisions are based upon the civil forfeiture provisions in Supplemental Rule G of the Federal Rules of Civil Procedure, which are also incorporated by cross reference. The amendment governs such mechanical and technical issues as the manner of publishing notice of forfeiture to third parties and the interlocutory sale of property, bringing practice under the Criminal Rules into conformity with the Civil Rules.

Rule 41. Search and Seizure

1 * * * * *

2 (e) **Issuing the Warrant.**

20 FEDERAL RULES OF CRIMINAL PROCEDURE

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19

* * * * *

(2) *Contents of the Warrant.*

* * * * *

(B) Warrant to Search for Electronically Stored Information. A warrant may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes later review of the storage media or electronically stored information consistent with the warrant. The time for the executing the warrant in Rule 41(e) and (f) refers to the seizing or on-site copying of the storage media or electronically stored information, and not to any later review.

(BC) Warrant for a Tracking Device. A tracking-device warrant must identify the person or

20 property to be tracked, designate the
21 magistrate judge to whom it must be
22 returned, and specify a reasonable length of
23 time that the device may be used. The time
24 must not exceed 45 days from the date the
25 warrant was issued. The court may, for good
26 cause, grant one or more extensions for a
27 reasonable period not to exceed 45 days each.
28 The warrant must command the officer to:

29 * * * * *

30 **(f) Executing and Returning the Warrant.**

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

33 * * * * *

34 **(B) *Inventory.*** An officer present during the
35 execution of the warrant must prepare and
36 verify an inventory of any property seized.

Subdivision (e)(2). Computers and other electronic storage media commonly contain such large amounts of information that it is often impractical for law enforcement to review all of the information during execution of the warrant at the search location. This rule acknowledges the need for a two-step process: officers may seize or copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant.

The term “electronically stored information” is drawn from Rule 34(a) of the Federal Rules of Civil Procedure, which states that it includes “writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained.” The 2006 Advisory Committee Note to Rule 34(a) explains that the description is intended to cover all current types of computer-based information and to encompass future changes and developments. This same broad and flexible description is intended under Rule 41.

In addition to addressing the “two step process” inherent in searches for electronically stored information, the Rule limits the 10 [14]*** day execution period to the actual execution of the warrant and the on-site activity. While consideration was given to a presumptive time period within which any subsequent offsite review of the media or electronically stored information would take place, the practical reality is that there is no basis for a “one size fits all” presumptive period. A substantial amount of time can be involved in the forensic imaging and review of information. This is due to the sheer size of the storage capacity of media, difficulties created by encryption and booby traps, and the workload of the computer labs. The rule does

***The ten day period under Rule 41(e) may change to 14 days under the current proposals associated with the time computation amendments to Rule 45.

not prevent a judge from imposing a deadline for the return of the storage media or access to the electronically stored information at the time the warrant is issued. However, to arbitrarily set a presumptive time period for the return could result in frequent petitions to the Court for additional time.

It was not the intent of the amendment to leave the property owner without an expectation of the timing for return of the property, excluding contraband or instrumentalities of crime, or a remedy. Current Rule 41(g) already provides a process for the “person aggrieved” to seek an order from the Court for a return of the property, including storage media or electronically stored information, under reasonable circumstances.

Where the “person aggrieved” requires earlier access to the storage media or the electronically stored information than anticipated by law enforcement or ordered by the Court, the Court on a case by case basis can fashion an appropriate remedy taking into account the time needed to image and search the data, and any prejudice to the aggrieved party.

Subdivision (f)(1). Current Rule 41(f)(1) does not address the question of whether the inventory should include a description of the electronically stored information contained in the media seized. Where it is impractical to record a description of the electronically stored information at the scene, the inventory may list the physical storage media seized. Recording a description of the electronically stored information at the scene is likely to be the exception, and not the rule, given the large amounts of information contained on electronic storage media, and the impracticality for law enforcement to image and review all of the information during the execution of the warrant. This is consistent with practice in the “paper world.” In circumstances where filing cabinets of documents are seized, routine

practice is to list the storage devices, i.e. the cabinets, on the inventory, as opposed to making a document by document list of the contents.

**PROPOSED AMENDMENT TO RULES
GOVERNING SECTION 2254 CASES IN THE
UNITED STATES DISTRICT COURTS**

Rule 11. Certificate of Appealability

1 At the same time the judge enters a final order adverse
2 to the petitioner, the judge must either issue or deny a
3 certificate of appealability. If the judge issues a certificate,
4 the judge must state the specific issue or issues that satisfy the
5 showing required by 28 U.S.C. § 2253(c)(2).

Committee Note

As provided in 28 U.S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2254 unless a judge issues a certificate of appealability, which must specify the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11 makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2254 Proceedings in the District Courts. Rule 11 also requires the judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

Rule 12 ~~11~~. Applicability of the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

**PROPOSED AMENDMENT TO RULES
GOVERNING SECTION 2255 PROCEEDINGS FOR
THE UNITED STATES DISTRICT COURTS**

Rule 11. Certificate of Appealability; Time to Appeal

- 1 **(a) Certificate of Appealability.** At the same time the
2 judge enters a final order adverse to the applicant, the
3 judge must either issue or deny a certificate of
4 appealability. If the judge issues a certificate, the judge
5 must state the specific issue or issues that satisfy the
6 showing required by 28 U.S.C. § 2253(c)(2).
- 7 **(b) Time to Appeal.** Federal Rule of Appellate Procedure
8 4(a) governs the time to appeal an order entered under
9 these rules. These rules do not extend the time to appeal
10 the original judgment of conviction.

Committee Note

Subdivision (a). As provided in 28 U.S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 unless a judge issues a certificate of appealability, which must specify the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in

the appropriate rule of the Rules Governing § 2255 Proceedings in the District Courts. Rule 11(a) also requires the judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.