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AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE THAT HAVE BEEN ADOPTED BY THE SUPREME COURT, PURSUANT TO 28 U.S.C. 2074.

APRIL 21, 2009.—Referred to the Committee on the Judiciary and ordered to be printed

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SUPREME COURT OF THE UNITED STATES,
Washington, DC. March 25, 2009.

Hon. NANCY PELOSI,
Speaker of the House of Representatives,
Washington, DC.

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

Accompanying these rules are excerpts from the report of the Judiciary Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

JOHN G. ROBERTS, JR.,
Chief Justice.

March 26, 2009

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 5.1, 7, 12.1, 12.3, 29, 32, 32.2, 33, 34, 35, 41, 45, 47, 58, and 59, and Rules 8 and 11, and new Rule 12 of the Rules Governing Section 2254 Cases in the United States District Courts, and Rules 8 and 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts.

[See infra., pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2009, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

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

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5.1. Preliminary Hearing

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(c) Scheduling. The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than 14 days after the initial appearance if the defendant is in custody and no later than 21 days if not in custody.

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Rule 7. The Indictment and the Information

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(c) Nature and Contents.

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(2) ***Citation Error.*** Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground

to dismiss the indictment or information or to reverse a conviction.

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(f) Bill of Particulars. The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 14 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

Rule 12.1. Notice of an Alibi Defense

(a) Government's Request for Notice and Defendant's Response.

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(2) ***Defendant's Response.*** Within 14 days after the request, or at some other time the court sets, the defendant must serve written notice on an

attorney for the government of any intended alibi defense. The defendant's notice must state:

(A) each specific place where the defendant claims to have been at the time of the alleged offense; and

(B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.

(b) Disclosing Government Witnesses.

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(2) ***Time to Disclose.*** Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 14 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 14 days before trial.

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Rule 12.3. Notice of a Public-Authority Defense

(a) Notice of the Defense and Disclosure of Witnesses.

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(3) ***Response to the Notice.*** An attorney for the government must serve a written response on the defendant or the defendant's attorney within 14 days after receiving the defendant's notice, but no later than 21 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

(4) ***Disclosing Witnesses.***

(A) *Government's Request.* An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the

defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than 21 days before trial.

(B) *Defendant's Response.* Within 14 days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name, address, and telephone number of each witness.

(C) *Government's Reply.* Within 14 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a

written statement of the name, address, and telephone number of each witness the government intends to rely on to oppose the defendant's public-authority defense.

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Rule 29. Motion for a Judgment of Acquittal

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(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 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

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Rule 32. Sentencing and Judgment

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(d) Presentence Report.

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(2) ***Additional Information.*** The presentence report must also contain the following:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation;

(F) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a); and

(G) specify whether the government seeks forfeiture under Rule 32.2 and any other provision of law.

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Rule 32.2. Criminal Forfeiture

(a) Notice to the Defendant. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the

forfeiture of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information. The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.

(b) Entering a Preliminary Order of Forfeiture.

(1) ***Forfeiture Phase of the Trial.***

(A) *Forfeiture Determinations.* As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If

the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.

(B) *Evidence and Hearing.* The court's determination may be based on evidence already in the record, including any written plea agreement, and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If the forfeiture is contested, on either party's request the court

must conduct a hearing after the verdict or finding of guilty.

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

(A) *Contents of a Specific Order.* If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria. The court must enter the order without regard to any third party's interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

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

(C) *General Order.* If, before sentencing, the court cannot identify all the specific property subject to forfeiture or calculate the total amount of the money judgment, the court may enter a forfeiture order that:

(i) lists any identified property;

(ii) describes other property in general terms; and

(iii) states that the order will be amended under Rule 32.2(e)(1) when additional specific property is identified or the

amount of the money judgment has been calculated.

(3) ***Seizing Property.*** The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

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

(A) *When Final.* At sentencing — or at any time before sentencing if the defendant

consents — the preliminary forfeiture order becomes final as to the defendant. If the order directs the defendant to forfeit specific property, it remains preliminary as to third parties until the ancillary proceeding is concluded under Rule 32.2(c).

(B) *Notice and Inclusion in the Judgment.* The court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing. The court must also include the forfeiture order, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36.

(C) *Time to Appeal.* The time for the defendant or the government to file an appeal from the

forfeiture order, or from the court's failure to enter an order, begins to run when judgment is entered. If the court later amends or declines to amend a forfeiture order to include additional property under Rule 32.2(e), the defendant or the government may file an appeal regarding that property under Federal Rule of Appellate Procedure 4(b). The time for that appeal runs from the date when the order granting or denying the amendment becomes final.

(5) ***Jury Determination.***

(A) *Retaining the Jury.* In any case tried before a jury, if the indictment or information states that the government is seeking forfeiture, the court must determine before

the jury begins deliberating whether either party requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict.

(B) *Special Verdict Form.* If a party timely requests to have the jury determine forfeiture, the government must submit a proposed Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

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

(A) *Publishing and Sending Notice.* If the court orders the forfeiture of specific property, the government must publish notice of the order

and send notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding.

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

(C) *Means of Publication; Exceptions to Publication Requirement.* Publication must take place as described in Supplemental Rule G(4)(a)(iii) of the Federal Rules of Civil Procedure, and may be by any means described in Supplemental Rule G(4)(a)(iv).

Publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

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

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

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Rule 33. New Trial

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(b) Time to File.

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(2) ***Other Grounds.*** Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

Rule 34. Arresting Judgment

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(b) **Time to File.** The defendant must move to arrest judgment within 14 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere.

Rule 35. Correcting or Reducing a Sentence

(a) **Correcting Clear Error.** Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

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Rule 41. Search and Seizure

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(e) Issuing the Warrant.

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(2) *Contents of the Warrant.*

(A) *Warrant to Search for and Seize a Person or Property.* Except for a tracking-device warrant, 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:

(i) execute the warrant within a specified time no longer than 14 days;

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(B) *Warrant Seeking Electronically Stored Information.* A warrant under Rule 41(e)(2)(A) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(e)(2)(A) and (f)(1)(A) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

(C) *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:

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(f) Executing and Returning the Warrant.

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

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(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. 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 describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.

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Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period Stated in Hours.*** When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Inaccessibility of the Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 45(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 45(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located.

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Rule 47. Motions and Supporting Affidavits

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(c) **Timing of a Motion.** A party must serve a written motion — other than one that the court may hear ex parte — and any hearing notice at least 7 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application.

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Rule 58. Petty Offenses and Other Misdemeanors

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(g) **Appeal.**

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(2) ***From a Magistrate Judge's Order or Judgment.***

(A) *Interlocutory Appeal.* Either party may appeal an order of a magistrate judge to a district judge within 14 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a notice with the clerk specifying the order being appealed and must serve a copy on the adverse party.

(B) *Appeal from a Conviction or Sentence.* A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within 14 days of its entry. To appeal, the defendant must file a notice with the clerk specifying the judgment being appealed and must serve a copy on an attorney for the government.

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Rule 59. Matters Before a Magistrate Judge

(a) Nondispositive Matters. A district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense. 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 objections to the order within 14 days after being served with a copy of a written order or after the oral order is stated on the record, or at some other time the court sets. The district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous. Failure to object in accordance with this rule waives a party's right to review.

(b) Dispositive Matters.

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(2) ***Objections to Findings and Recommendations.*** Within 14 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may serve and file specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the objecting party 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.

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AMENDMENTS TO RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 8. Evidentiary Hearing

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(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 14 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.

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Rule 11. Certificate of Appealability; Time to Appeal

(a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to

reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Rule 12. 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.

AMENDMENTS TO RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

Rule 8. Evidentiary Hearing

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(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 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 14 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.

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Rule 11. Certificate of Appealability; Time to Appeal

(a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of

Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability. These rules do not extend the time to appeal the original judgment of conviction.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

November 26, 2008

MEMORANDUM

To: The Chief Justice of the United States and the Associate Justices of the Supreme Court

From: James C. Duff

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 5.1, 7, 12.1, 12.3, 29, 32, 32.2, 33, 34, 35, 41, 45, 47, 58, and 59 of the Federal Rules of Criminal Procedure, Rules 8 and 11 of the Rules Governing Section 2254 Cases in the United States District Courts, Rules 8 and 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts, and new Rule 12 of the Rules Governing Section 2254 Cases in the United States District Courts, which were approved by the Judicial Conference at its September 2008 session. The Judicial Conference recommends that the amendments and new rule be approved by the Court and transmitted to the Congress pursuant to law.

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

Attachments

EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

TIME-COMPUTATION PROJECT

In consultation with the Committee's Time-Computation Subcommittee, the Appellate, Bankruptcy, Civil, and Criminal Rules Advisory Committees proposed amendments to Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45 to make the method of computing time consistent, simpler, and clearer. In tandem with this work, each advisory rules committee also reviewed and proposed changes to the time periods in all the rules to ensure that every deadline is reasonable and that changing the time-computation method did not have the effect of shortening existing time periods.

The time-computation project was launched in response to frequent complaints about the time, energy, and anxiety expended in calculating time periods, the potential for error, and the anomalous results of the current computation provisions.

Proposed Rules Changes

The principal simplifying change in the amended time-computation rules is the adoption of a "days-are-days" approach to computing all time periods. Under some of the current rules, intermediate weekends and holidays are omitted when computing short periods but included when computing longer periods. By contrast, under the proposed rules amendments, intermediate weekends and holidays are counted regardless of the length of the specified period.

Other changes in the amended time-computation rules clarify how to count forward when the period measured is after an event (for example, 21 days after service of a motion) and the

deadline falls on a weekend or holiday; and how to count backward when the period measured is before an event (for example, 14 days before a scheduled hearing) and the deadline falls on a weekend or holiday. The proposed amendments also provide for computing hourly time periods, to address recent legislation affecting court proceedings in which deadlines are expressed in hours (for example, 72 hours for action).

The amended time-computation rules also fill a gap in the present rules by addressing the special timing considerations that accompany electronic filing. Under the proposed amendments, unless a statute, local rule, or court order provides otherwise, the last day of a period for an electronic filing ends at midnight in the court's time zone, while the last day for a paper filing ends when the clerk's office is scheduled to close. (Additional refinements to these principles are made in proposed Appellate Rule 26(a)(4) for reasons specific to appellate practice.) Filing deadlines are extended if the clerk's office is inaccessible. The proposed amendments provide a court with flexibility to define when a deadline should be adjusted or a failure to comply with a deadline should be excused because the clerk's office was "inaccessible." The proposed amendments and the Committee Notes do not specify the meaning of "inaccessibility," which can vary depending on whether a filing is electronic or paper, leaving the definition to local rules and case law development.

The advisory committees also reviewed every rule to ensure that all time periods would be reasonable taking into account the effect of changing the time-computation method. The advisory committees concluded that virtually all short time deadlines should be extended to adjust for the effect of including intermediate weekends and holidays in calculating deadlines. To further simplify time-counting, the advisory committees proposed changing most periods of less than 30 days to multiples of 7 days. The advisory committees adopted 7, 14, 21, and 28-day periods when possible, so that deadlines will usually fall on weekdays. The advisory

committees' comprehensive review of time-computation rules and the rules containing time periods resulted in proposed amendments to a total of 91 rules.

In August 2007, proposed amendments to each set of rules were published for comment from the bench and bar. Scheduled public hearings on the amendments were canceled because no one asked to testify. The specific proposed amendments are discussed later in this report in the respective sections describing the advisory committees' recommendations.

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FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 7, 32, 32.2, 41, and Rule 11 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255 with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench and bar for comment in August 2007. The scheduled public hearings on the proposed changes were canceled because no one asked to testify.

The proposed amendment to Rule 7 deletes, as unnecessary, a forfeiture-related provision that is more appropriately set out in Rule 32.2, which consolidates the forfeiture procedures in a single rule.

The proposed amendment to Rule 32 provides that a presentence report should state whether the government is seeking forfeiture to promote timely consideration of issues concerning forfeiture as part of the sentencing.

The proposed amendments to Rule 32.2: (1) state that the government's notice of forfeiture should not be designated as a count in an indictment or information; (2) provide that the notice of forfeiture need not identify the specific property or money judgment that is subject

to forfeiture (additional detail may be provided in a bill of particulars); (3) require the court to enter a preliminary forfeiture order sufficiently in advance of sentencing to permit the parties to suggest modifications; (4) expressly authorize a court to enter a forfeiture order that is general in nature in a case in which it is not possible to identify all of the property subject to forfeiture; (5) clarify when the forfeiture order becomes final as to the defendant, state what the district court is required to do at sentencing, and require the government to submit a special verdict form; and (6) provide technical changes modifying the notice, publication, and interlocutory sale of property subject to forfeiture.

The proposed amendment to Rule 41 clarifies how the rule's warrant provisions apply to the seizure of electronically stored information. It sets up a two-stage process, authorizing the seizure of electronic storage media or the seizure and copying of electronically stored information and a subsequent review of the storage media or electronically stored information consistent with the warrant. No specific time period is imposed on any off-site review of the media or electronically stored information because the review time can be substantial, depending on the volume of information and the presence of hidden "traps" or encrypted data. A judge may impose a specific deadline, however, for the return of the storage media or access to the electronically stored information when the warrant is issued. Under the proposed amendment, the inventory describing the electronically stored information may be limited to a description of the physical storage media seized or copied.

The proposed amendments to Rule 11 of the Rules Governing Proceedings under §§ 2254 and 2255 consolidate and highlight the requirements concerning certificates of appealability. The proposed amendments also require the district court judge to rule on the certificate of appealability when a final order is issued, rather than later after a notice of appeal is filed. The proposed procedure ensures that the judge will promptly rule on the certificate when the issues

and facts are fresh. The proposed procedure will expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file an appeal. The proposed amendments clarify the requirements for filing a notice of appeal and expressly state that a district court's grant of a certificate of appealability does not eliminate the need to file a notice of appeal. This last provision was added after the public comment period. The advisory committee concluded that the proposed amendments need not be republished because the added provision did not represent a substantial change from the published version, was uncontroversial, and was consistent with the public comments. Also, current Rule 11 of the § 2254 Rules was renumbered Rule 12 to accommodate the proposed amendments on certificates of appealability.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

Approve the proposed amendments to Criminal Rules 7, 32, 32.2, 41, and Rule 11 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255, and renumbered Rule 12 of the § 2254 Rules and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

The advisory committee also proposed amendments to Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, 59, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255, as part of the time-computation project with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendment to Rule 45 clarifies and simplifies the general time-computation method. The proposed amendments to the other rules adjust time periods consistent with the change to the time-computation method.

The proposed adjustments to the time periods in the rules are minor, accounting for the inclusion of holidays and weekends in the time-computation method and the preference for stating periods in multiples of seven days. The following adjustments are proposed:

• Five days are extended to seven days in Rule 47.

• Seven and 10 days are extended to 14 days in Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 58, 59, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2254 and § 2255.

• Twenty days are extended to 21 days in Rules 5.1 and 12.3.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

Approve the proposed amendments to Criminal Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, 59, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255 as part of the project to improve the time-computation rules and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

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

LEE H. ROSENTHAL
CHAIR

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CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

To: **Hon. Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

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

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

Date: **May 12, 2008 (Revised July 6, 2008)**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met on April 27–28, 2008, in Washington, D.C., and took action on a number of proposed amendments to the Rules of Criminal Procedure.

* * * * *

This report addresses a number of action items:

(1) approval for transmission to the Judicial Conference of published amendments to time computation Rule 45(a) and related amendments to Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, 59, and Rule 8 of the Rules Governing §§ 2254 and 2255 Cases;

(2) approval for transmission to the Judicial Conference of published amendments to Rules 7, 32, 32.2, 41, and Rule 11 of the Rules Governing §§ 2254 and 2255 Cases; and

* * * * *

II. Action Items—Recommendations to Forward Amendments to the Judicial Conference

A. Time Computation Rules

The first group of amendments the Committee recommends for transmission to the Judicial Conference are part of the time computation project. No comments specific to the Criminal Rules affected by the time computation project were received during the period for notice and public comment, and the Committee voted unanimously in favor of each of the proposed amendments described below.

1. ACTION ITEM—Rule 45(a)

The Advisory Committee voted unanimously to recommend that Rule 45(a) be amended as part of the time computation project. Only one aspect of the proposed rule deserves special mention. Following the template, proposed Rule 45(a) applies to statutory time periods as well as to periods stated in the rules, with the exception of statutes that provide for a different time counting rule (such as "business days" or "excluding Saturdays, Sundays, and holidays"). At present, it is not clear whether Rule 45(a) applies to statutory time periods. Unlike the comparable provisions in the other rules (such as Fed. R. Civ. P. 6(a)), Rule 45(a) currently contains no reference to statutory time periods, nor did it retain the general language "any time period" used prior to restyling. Accordingly, the proposed Committee Note recognizes that the new language may broaden the applicability of Rule 45. It states that the general time computations do not apply to Rule 46(h), because that rule is based upon a statute that provides for a different time-counting method.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 45(a) be approved as published and forwarded to the Judicial Conference.

The Committee was also unanimous in recommending the following amendments to time periods that are intended to compensate for the change to a "days are days" method of counting time.

2. ACTION ITEM—Rule 5.1

Rule 5.1 requires a preliminary hearing to be held within 10 days after a defendant's initial appearance if the defendant is in custody or 20 days if the defendant is not in custody. The Committee recommends extending these periods to 14 and 21 days if proposed Rule 45(a) is adopted, but notes that the statutory periods are based upon 18 U.S.C. § 3060(b). Because of the statutory basis of the time periods in the current rule, this proposal is contingent upon the adoption of a statutory amendment. If the statute can be amended, conversion to 14 and 21 days would be the rough equivalent of the times under the current rule.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 5.1 be approved as published and forwarded to the Judicial Conference.

3. ACTION ITEM—Rule 7

The Committee unanimously concluded that the time for motions for a bill of particulars should be increased from 10 to 14 days if proposed Rule 45(a) is adopted.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 7 be approved as published and forwarded to the Judicial Conference.

4. ACTION ITEM—Rule 12.1

Rule 12.1 (alibi defense) establishes time periods for responses and disclosure. The Committee concluded that if proposed Rule 45(a) is adopted, the 10 day periods for the defendant's response and the government's disclosure under Rule 12.1(a)(2) and (b)(2) should be increased from 10 to 14 days.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 12.1 be approved as published and forwarded to the Judicial Conference.

5. ACTION ITEM—Rule 12.3

Rule 12.3 (public-authority defense) establishes time periods for responses, requests, and replies. The Committee concluded that if proposed Rule 45(a) is adopted, the 10 day periods in Rule 12.3 should be increased to 14 days, and the 20 day periods should be increased to 21 days.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 12.3 be approved as published and forwarded to the Judicial Conference.

6. ACTION ITEM—Rule 29

Rule 29(c)(1) requires motions for post-verdict acquittal to be filed within 7 days after a verdict or the discharge of the jury. The Committee recommends increasing the time to 14 days if proposed Rule 45(a) is adopted. At present, excluding weekends and holidays from the 7 day period means that the defense has at least 9 days for such motions. Requests for continuances are frequent, and often the motions are filed in a bare bones fashion requiring later supplementation. Rather than

increasing the need for continuances, it would be preferable to set the general time at 14 days (a multiple of 7).

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 29 be approved as published and forwarded to the Judicial Conference.

7. ACTION ITEM—Rule 33

The Committee concluded that the considerations that support extending Rule 29(c)(1)'s 7 day period to 14 days apply equally to motions for a new trial under Rule 33(b)(2).

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 33 be approved as published and forwarded to the Judicial Conference.

8. ACTION ITEM—Rule 34

The Committee concluded that the considerations that support extending Rule 29(c)(1)'s 7 day period to 14 days apply equally to motions for arrest of judgment under Rule 34.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 34 be approved as published and forwarded to the Judicial Conference.

9. ACTION ITEM—Rule 35

Rule 35(a) currently allows the court to correct a sentence for arithmetic, technical, or other clear error within 7 days after sentencing (which is, in practical terms, approximately 9 days under the current counting rules). The Committee concluded that this period should be increased to 14 days if proposed Rule 45(a) is adopted. Sentencing is now so complex that minor technical errors are not uncommon. Extension of the period to 14 days will not cause any jurisdictional problems if an appeal has been filed because Fed. R. App. P. 4(b)(5) expressly provides that the filing of a notice of appeal does not divest the district court of jurisdiction to correct a sentence under Rule 35(a).

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 35 be approved as published and forwarded to the Judicial Conference.

10. ACTION ITEM—Rule 41

Rule 41(e)(2)(A)(i) now states that a warrant must command that it be executed within a specified time no longer than 10 days (which can be up to 14 days under the current time computation rules). The Committee recommends that the period be increased to 14 days, although it notes that the considerations here are significantly different than those pertinent to many of the other rules. First, warrants can and often are executed on nights and weekends. Second, there is a real concern that warrants not be executed on the basis of stale evidence. For that reason, the courts often set a time for execution that is shorter than 10 days. On the other hand, there are situations in which more time may be needed for the proper execution of a highly complex warrant. After weighing these various considerations, the Committee concluded that designating a 14 day period was appropriate because it was the rough equivalent of the present period, followed the multiples of 7 rule of thumb, and still left the court with discretion to set a shorter time period in individual cases, as is frequently done at present.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 41 be approved as published and forwarded to the Judicial Conference.

11. ACTION ITEM—Rule 47

The Committee recommends that the current requirement under Rule 47(c) that motions be served 5 days before the hearing date be increased to 7 days if proposed Rule 45(a) is adopted.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 47 be approved as published and forwarded to the Judicial Conference.

12. ACTION ITEM—Rule 58

Rule 58(g)(2) governs appeals from a magistrate judge's order or judgment in cases involving petty offenses and misdemeanors. The Committee recommends that the time under Rule 58(g)(2) for interlocutory appeals and appeals from a sentence or conviction of a misdemeanor be increased from 10 to 14 days if proposed Rule 45(a) is adopted.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 45(a) be approved as published and forwarded to the Judicial Conference.

13. ACTION ITEM—Rule 59

The Committee concluded that the 10 day period for objections to dispositive and nondispositive determinations, findings, and recommendations by a magistrate judge under Rule 59(a) and (b) should be increased to 14 days if proposed Rule 45(a) is adopted.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 59 be approved as published and forwarded to the Judicial Conference.

14. ACTION ITEM—Rule 8 of the Rules Governing § 2254 Proceedings

The Committee recommends that the 10 day period for filing objections under Rule 8(b) be increased to 14 days if proposed Rule 45(a) is adopted.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 8 of the Rules Governing § 2254 Proceedings be approved as published and forwarded to the Judicial Conference.

15. ACTION ITEM—Rule 8 of the Rules Governing § 2255 Proceedings

The Committee recommends that the 10 day period for filing objections under Rule 8(b) be increased to 14 days if proposed Rule 45(a) is adopted.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 8 of the Rules Governing § 2255 Proceedings be approved as published and forwarded to the Judicial Conference.

B. Forfeiture Rules

Three of the published amendments—Rule 7 (indictment and information), Rule 32 (sentencing), and Rule 32.2 (forfeiture)—concern criminal forfeiture. They were drafted with the assistance of specialists from both the Department of Justice and the private defense bar, and are intended to incorporate current practice as it has developed since the revision of the forfeiture rules in 2000. The Committee recommends approval of each of the rules as published.

1. ACTION ITEM—Rule 7

The amendment removes a provision that duplicates the same language in Rule 32.2, which was intended to consolidate the forfeiture related provisions. No comments were received, and the Committee voted unanimously in favor of recommending the approval of the proposed amendment to Rule 7.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 7 be approved as published and forwarded to the Judicial Conference.

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.

No comments were received, and the Committee voted unanimously in favor of recommending the approval of the proposed amendment to Rule 32.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 32 be approved as published and forwarded to the Judicial Conference.

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) makes two changes. First, it requires the court to 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. Second, it 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)(1)(A), 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.

The only comment received concerned proposed subdivision (b)(2), which provides for the entry of a preliminary order of forfeiture in advance of sentencing. Judge Lawrence Piersol expressed concern that this might delay sentencing because the necessary information may not be available in advance. The Committee concluded that the rule as published provided a mechanism for dealing with such cases, because it provides that a court must enter a preliminary order in advance of sentencing "[u]nless doing so is impractical." Accordingly, the Committee voted unanimously to recommend the approval of the proposed amendment to Rule 32.2.

Recommendation—The Advisory Committee recommends that the proposed amendments to Rule 32.2 be approved as published and forwarded to the Judicial Conference.

C. Other Rules

The Committee also recommends that two other rules which were published for public notice and comment be approved and forwarded to the Judicial Conference.

1. ACTION ITEM—Rule 41

The proposed amendment adapts federal warrant procedures to electronically stored information, which is an increasingly important part of criminal cases. The amendment makes two key changes. First, it acknowledges that the very large volume of information which 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, it is 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 change relates to the inventory. The amendment 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.

The Committee voted, with one member dissenting, to recommend that Rule 41 be approved as amended and forwarded to the Judicial Conference.

Recommendation—The Advisory Committee recommends that the proposed amendments to Rule 41 be approved as amended following publication and forwarded to the Judicial Conference.

2. ACTION ITEM—Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings

The parallel amendments to Rule 11 are intended to make the requirements concerning certificates of appealability more prominent by adding and consolidating them in 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, as now required in the

Third Circuit, *see* 3d Cir. R. 22.2, 111.3, rather than after a notice of appeal is filed.[1] 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.

Several public comments were received urging the Committee to consider bifurcating the issuance of the final order and the ruling on the certificate of appealability in order to permit a party requesting a certificate in the district court to respond to the specific reasons given in the final order as well as the specific standards for issuing a certificate. The Committee considered a proposed modification that would accomplish this, but rejected it after much deliberation. The Committee concluded that a single date for the ruling on the certificate and the final order is essential to simplify and expedite appellate review. Bifurcation also increases the risk of confusion among pro se petitioners. In courts where rulings on certificates are not issued at the time of the final order, some pro se petitioners reportedly delay filing a notice of appeal believing that the time period for filing that notice does not begin until the judge rules on the certificate or a motion for reconsideration of a denial of a certificate. Moreover, even without bifurcation in the district court, a petitioner has an opportunity to brief the question whether a certificate of appealability should issue when applying for a certificate in the court of appeals.

Although the Committee rejected bifurcation, it made several changes in the rules as published to respond to the concerns raised in the public comments. First, the Committee recognized that there are some complex cases, such as death penalty cases with numerous claims, in which the district court might benefit from briefing specifically directed to the issuance of a certificate, to assist in narrowing or focusing claims for appeal. The Committee addressed this point by adding a sentence stating that before entering the order the court may direct the parties to submit arguments on whether a certificate should be issued. The Committee also added two sentences at the end of the new section to address points frequently misunderstood by pro se petitioners. The addition states that (1) the district court's denial of a certificate is not separately appealable, but a certificate may be sought in the court of appeals, and (2) a motion for reconsideration of a denial of a certificate does not extend the time to appeal.

During the Committee's deliberations, there was a great deal of discussion of the confusion among pro se petitioners regarding the relationship between the notice of appeal and the certificate of appealability. The Committee concluded that it would also be desirable to address this issue in the text of the rules with a statement that a notice of appeal must be filed even if the district court issues a certificate of appealability. The Committee proposes to add this language to subdivision (b) of Rule 11 of the Rules Governing § 2255 Proceedings. In the case of Rule 11 of the Rules Governing § 2254 Proceedings, there is currently no subdivision addressing appeals. The

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[1]Cases filed under § 2254 are governed by Fed. R. App. P. 4(a)(1)(A)'s general 30 day period for filing a notice of appeal in civil cases, but the 60 day period under Fed. R. App. P. 4(a)(1)(B) applies to actions under § 2255 because the United States is a party.

Committee, therefore, proposes adding a subdivision that mirrors subdivision (b) in the Rules Governing § 2255 Proceedings. In the Committee's view, it is desirable to address this point in the text where it is most likely to be seen by pro se petitioners. This specific point was not, however, included in the text published for public comment.

The Committee voted to recommend that the published amendments be approved as amended and forwarded to the Judicial Conference. Although a number of changes were made to address issues raised by the public comments and in further deliberations regarding these issues, the Committee did not believe these changes required republication of the proposed amendments.

When the Advisory Committee initially proposed these rules for publication, each rule included another subdivision creating an exclusive procedure for seeking reconsideration in the district court of a final order in §§ 2254 and 2255 cases. This aspect of the proposal was intended to replace motions under Fed. R. Civ. P. 60(b) and incorporate the distinction drawn in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), between Rule 60(b) motions that must be treated as second or successive habeas petitions subject to AEDPA's limitations on successive petitions, and Rule 60(b) motions that did not trigger AEDPA's limits. At its June meeting in 2007, the Standing Committee approved publication of the proposed Rule 11 provisions related to certificates of appealability, but remanded the relief-from-final-order portions for further consideration by the Advisory Committee. After extensive discussion, the Advisory Committee voted at its April meeting not to proceed with this aspect of its original proposal, leaving the issues for further development in the courts. Accordingly, the provisions dealing with the procedures for seeking reconsideration in §§ 2254 and 2255 proceedings are not part of the rules being recommended at this time.

Recommendation—The Advisory Committee recommends that the proposed amendments to Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings be approved as amended following publication and forwarded to the Judicial Conference.

* * * * *

IV. Information Items

A. Statutory Provisions Affected By Time Computation

As part of the time computation project, the Advisory Committee worked to evaluate statutes with short time periods that would be affected by the new time computation rules, in order to determine which statutes would be the highest priority for legislative amendment to offset the effect of the changes.

All members of the committee received a complete listing of the statutes identified by Professor Struve, and each member was asked to rate the importance of amending the statutes on a three point scale. The results of the balloting process were compiled and studied by the time

computation subcommittee, which produced a draft list of 17 statutes that it recommended for inclusion on the list.

The Advisory Committee endorsed that list at its April meeting. It recommends that most of these statutes be amended to provide for periods of 7 or 14 days. There are, however, a group of statutes that presently provide for very short periods of 3 or 4 days for interlocutory appeals involving the Classified Information Procedure Act and the material support statute. Since those time periods reflected a precise policy-based calibration that might be disturbed by a change to 7 days, the Committee recommends that legislation be sought that would exclude weekends and holidays from the calculation; this would leave the periods precisely as they are now. The Committee also recommends the same approach be applied to 18 U.S.C. § 3432, which provides that a person charged with treason or another capital offense shall be furnished with a list of veniremen and witnesses "at least three entire days" before trial.

Subsequent to the Advisory Committee meeting, Professor Struve brought to the attention of the reporter and chair the fact that one statute similar to others proposed for amendment was not on the Committee's list. After determining that this had been an oversight, and that the justification for amending the 10 day period to 14 days was the same as that for another closely related statute that was being recommended for legislative action, we requested this statute's inclusion on the list.

The list compiled by the Advisory Committee (including the statute noted above) is now being circulated to representatives of the appropriate committees of the American Bar and the National Association of Criminal Defense Lawyers.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 45. Computing and Extending Time[2]

1 ~~(a) **Computing Time.** The following rules apply in~~
2 ~~computing any period of time specified in these rules,~~
3 ~~any local rule, or any court order:~~
4 ~~(1) ***Day of the Event Excluded.*** Exclude the day of~~
5 ~~the act, event, or default that begins the period.~~
6 ~~(2) ***Exclusion from Brief Periods.*** Exclude~~
7 ~~intermediate Saturdays, Sundays, and legal~~
8 ~~holidays when the period is less than 11 days.~~
9 ~~(3) ***Last Day.*** Include the last day of the period unless~~
10 ~~it is a Saturday, Sunday, legal holiday, or day on~~
11 ~~which weather or other conditions make the clerk's~~

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[1] New material is underlined; matter to be omitted is lined through.

[2] Incorporates amendments approved by the Supreme Court that are scheduled to take effect on December 1, 2008, unless Congress acts otherwise.

12 ~~office inaccessible. When the last day is excluded,~~

13 ~~the period runs until the end of the next day that is~~

14 ~~not a Saturday, Sunday, legal holiday, or day when~~

15 ~~the clerk's office is inaccessible.~~

16 ~~(4) *"Legal Holiday" Defined.* As used in this rule,~~

17 ~~"legal holiday" means:~~

18 ~~(A) the day set aside by statute for observing:~~

19 ~~(i) New Year's Day;~~

20 ~~(ii) Martin Luther King, Jr.'s Birthday;~~

21 ~~(iii) Washington's Birthday;~~

22 ~~(iv) Memorial Day;~~

23 ~~(v) Independence Day;~~

24 ~~(vi) Labor Day;~~

25 ~~(vii) Columbus Day;~~

26 ~~(viii) Veterans' Day;~~

27 ~~(ix) Thanksgiving Day;~~

28 ~~(x) Christmas Day; and~~

29 ~~(B) any other day declared a holiday by the~~

30 ~~President, the Congress, or the state where~~

31 ~~the district court is held.~~

33 **(a) Computing Time.** The following rules apply in

34 computing any time period specified in these rules, in

35 any local rule or court order, or in any statute that does

36 not specify a method of computing time.

37 (1) ***Period Stated in Days or a Longer Unit.*** When

38 the period is stated in days or a longer unit of time:

39 (A) exclude the day of the event that triggers the

40 period;

41 (B) count every day, including intermediate

42 Saturdays, Sundays, and legal holidays; and

43 (C) include the last day of the period, but if the

44 last day is a Saturday, Sunday, or legal

45 holiday, the period continues to run until the

46 end of the next day that is not a Saturday,
47 Sunday, or legal holiday.
48 (2) ***Period Stated in Hours.*** When the period is stated
49 in hours:
50 (A) begin counting immediately on the
51 occurrence of the event that triggers the
52 period;
53 (B) count every hour, including hours during
54 intermediate Saturdays, Sundays, and legal
55 holidays; and
56 (C) if the period would end on a Saturday,
57 Sunday, or legal holiday, the period continues
58 to run until the same time on the next day that
59 is not a Saturday, Sunday, or legal holiday.
60 (3) ***Inaccessibility of the Clerk's Office.*** Unless the
61 court orders otherwise, if the clerk's office is
62 inaccessible:

63 (A) on the last day for filing under Rule 45(a)(1),
64 then the time for filing is extended to the first
65 accessible day that is not a Saturday, Sunday,
66 or legal holiday; or
67 (B) during the last hour for filing under Rule
68 45(a)(2), then the time for filing is extended
69 to the same time on the first accessible day
70 that is not a Saturday, Sunday, or legal
71 holiday.
72 (4) ***"Last Day" Defined.*** Unless a different time is set
73 by a statute, local rule, or court order, the last day
74 ends:
75 (A) for electronic filing, at midnight in the court's
76 time zone; and
77 (B) for filing by other means, when the clerk's
78 office is scheduled to close.

79 (5) ***"Next Day" Defined.*** The "next day" is
80 determined by continuing to count forward when
81 the period is measured after an event and backward
82 when measured before an event.
83 (6) ***"Legal Holiday" Defined.*** "Legal holiday" means:
84 (A) the day set aside by statute for observing New
85 Year's Day, Martin Luther King Jr.'s
86 Birthday, Washington's Birthday, Memorial
87 Day, Independence Day, Labor Day,
88 Columbus Day, Veterans' Day, Thanksgiving
89 Day, or Christmas Day;
90 (B) any day declared a holiday by the President or
91 Congress; and
92 (C) for periods that are measured after an event,
93 any other day declared a holiday by the state
94 where the district court is located.
95 * * * * *

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a statute that does not specify a method of computing time, a Federal Rule of Criminal Procedure, a local rule, or a court order. In accordance with Rule 57(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). In making these time computation rules applicable to statutory time periods, subdivision (a) is consistent with Civil Rule 6(a). It is also consistent with the language of Rule 45 prior to restyling, when the rule applied to "computing any period of time." Although the restyled Rule 45(a) referred only to time periods "specified in these rules, any local rule, or any court order," some courts nonetheless applied the restyled Rule 45(a) when computing various statutory periods.

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of a date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, 18 U.S.C. § 3142(d) (excluding Saturdays, Sundays, and holidays from 10 day period). In addition, because the time period in Rule 46(h) is derived from 18 U.S.C. §§ 3142(d) and 3144, the Committee concluded that Rule 45(a) should not be applied to Rule 46(h).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. *See, e.g.*, Rule 35(b)(1). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 45(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 45(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: if the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is

provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, the new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change the meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.*, Rules 29(c)(1), 33(b)(2), 34, and 35(a).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Criminal

Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period

of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule CR49.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may, for example, address the problems that might arise if a single district has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 56(a). Some courts have held

that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Criminal Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.*, Rule 35(a) (stating that a court may correct an arithmetic or technical error in a sentence "[w]ithin 14 days after sentencing"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 47(c) (stating that a party must serve a written motion "at least 7 days before the hearing date"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31. If the clerk's office is inaccessible on August 31, then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday, or legal holiday — no earlier than Tuesday, September 4.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Criminal Procedure,

including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are declared a holiday by the President or Congress.

For forward-counted periods — *i.e.*, periods that are measured after an event — subdivision (a)(6)(C) includes certain state holidays within the definition of legal holidays. However, state legal holidays are not recognized in computing backward-counted periods. For both forward- and backward-counted periods, the rule thus protects those who may be unsure of the effect of state holidays. For forward-counted deadlines, treating state holidays the same as federal holidays extends the deadline. Thus, someone who thought that the federal courts might be closed on a state holiday would be safeguarded against an inadvertent late filing. In contrast, for backward-counted deadlines, not giving state holidays the treatment of federal holidays allows filing on the state holiday itself rather than the day before. Take, for example, Monday, April 21, 2008 (Patriot's Day, a legal holiday in the relevant state). If a filing is due 14 days after an event, and the fourteenth day is April 21, then the filing is due on Tuesday, April 22 because Monday, April 21 counts as a legal holiday. But if a filing is due 14 days before an event, and the fourteenth day is April 21, the filing is due on Monday, April 21; the fact that April 21 is a state holiday does not make April 21 a legal holiday for purposes of computing this backward-counted deadline. But note that if the clerk's office is inaccessible on Monday, April 21, then subdivision (a)(3) extends the April 21 filing deadline forward to the next accessible day that is not a Saturday, Sunday or legal holiday — no earlier than Tuesday, April 22.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The Standing Committee changed Rule 45(a)(6) to exclude state holidays from the definition of "legal holiday" for purposes of computing backward-counted periods; conforming changes were made to the Committee Note to subdivision (a)(6).

Rule 5.1. Preliminary Hearing

33 * * * * *

34 (c) **Scheduling.** The magistrate judge must hold the
35 preliminary hearing within a reasonable time, but no
36 later than ~~10~~ 14 days after the initial appearance if the
37 defendant is in custody and no later than ~~20~~ 21 days if
38 not in custody.

39 * * * * *

Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Committee Note to Rule 45(a).

Rule 7. The Indictment and the Information[3]

33 * * * * *

34 (f) **Bill of Particulars.** The court may direct the
35 government to file a bill of particulars. The defendant
36 may move for a bill of particulars before or within ~~10~~ 14
37 days after arraignment or at a later time if the court
38 permits. The government may amend a bill of particulars
39 subject to such conditions as justice requires.

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 12.1. Notice of an Alibi Defense

1 (a) **Government's Request for Notice and Defendant's**
2 **Response.**

3 * * * * *

[3]Additional proposed amendments to Rule 7(c) are on page 33.

4 (2) ***Defendant's Response.*** Within ~~10~~ 14 days after the
5 request, or at some other time the court sets, the
6 defendant must serve written notice on an attorney
7 for the government of any intended alibi defense.
8 The defendant's notice must state:
9 (A) each specific place where the defendant
10 claims to have been at the time of the alleged
11 offense; and
12 (B) the name, address, and telephone number of
13 each alibi witness on whom the defendant
14 intends to rely.
15 **(b) Disclosing Government Witnesses.**
16 * * * * *
17 (2) ***Time to Disclose.*** Unless the court directs
18 otherwise, an attorney for the government must
19 give its Rule 12.1(b)(1) disclosure within ~~10~~ 14
20 days after the defendant serves notice of an

21 intended alibi defense under Rule 12.1(a)(2), but

22 no later than ~~10~~ 14 days before trial.

23 * * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 12.3. Notice of a Public-Authority Defense

1 **(a) Notice of the Defense and Disclosure of Witnesses.**

2 * * * * *

3 **(3)** ***Response to the Notice.*** An attorney for the

4 government must serve a written response on the

5 defendant or the defendant's attorney within ~~10~~ 14

6 days after receiving the defendant's notice, but no

7 later than ~~20~~ 21 days before trial. The response

8 must admit or deny that the defendant exercised

9 the public authority identified in the defendant's

10 notice.

11 **(4)** ***Disclosing Witnesses.***

12 (A) *Government's Request.* An attorney for the
13 government may request in writing that the
14 defendant disclose the name, address, and
15 telephone number of each witness the
16 defendant intends to rely on to establish a
17 public-authority defense. An attorney for the
18 government may serve the request when the
19 government serves its response to the
20 defendant's notice under Rule 12.3(a)(3), or
21 later, but must serve the request no later than
22 ~~20~~ 21 days before trial.

23 (B) *Defendant's Response.* Within ~~7~~ 14 days after
24 receiving the government's request, the
25 defendant must serve on an attorney for the
26 government a written statement of the name,

27 address, and telephone number of each
28 witness.
29 (C) *Government's Reply*. Within ~~7~~ 14 days after
30 receiving the defendant's statement, an
31 attorney for the government must serve on
32 the defendant or the defendant's attorney a
33 written statement of the name, address, and
34 telephone number of each witness the
35 government intends to rely on to oppose the
36 defendant's public-authority defense.
37 * * * * *

Committee Note

The times set in the former rule at 7, 10, or 20 days have been revised to 14 or 21 days. See the Committee Note to Rule 45(a).

Rule 29. Motion for a Judgment of Acquittal

1 * * * * *

2 **(c) After Jury Verdict or Discharge.**

3 **(1)** ***Time for a Motion.*** A defendant may move for a

4 judgment of acquittal, or renew such a motion,

5 within ~~7~~ 14 days after a guilty verdict or after the

6 court discharges the jury, whichever is later.

* * * * *

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period — including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a) — sets a more realistic time for the filing of these motions.

Rule 33. New Trial

1 * * * * *

2 **(b) Time to File.**

3 * * * * *

4 (2) ***Other Grounds.*** Any motion for a new trial

5 grounded on any reason other than newly

6 discovered evidence must be filed within ~~7~~ 14 days

7 after the verdict or finding of guilty.

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period — including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a) — sets a more realistic time for the filing of these motions.

Rule 34. Arresting Judgment

1 * * * * *

2 **(b) Time to File.** The defendant must move to arrest

3 judgment within ~~7~~ 14 days after the court accepts a

4 verdict or finding of guilty, or after a plea of guilty or

5 nolo contendere.

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period — including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a) — sets a more realistic time for the filing of these motions.

Rule 35. Correcting or Reducing a Sentence

1 **(a) Correcting Clear Error.** Within ~~7~~ 14 days after

2 sentencing, the court may correct a sentence that

3 resulted from arithmetical, technical, or other clear error.

4 * * * * *

Committee Note

Former Rule 35 permitted the correction of arithmetic, technical, or clear errors within 7 days of sentencing. In light of the increased complexity of the sentencing process, the Committee concluded it would be beneficial to expand this period to 14 days, including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a). Extension of the period in this fashion will cause no jurisdictional problems if an appeal has been filed, because Federal Rule of Appellate Procedure 4(b)(5) expressly provides that the filing of a notice of appeal does not divest the district court of jurisdiction to correct a sentence under Rule 35(a).

Rule 41. Search and Seizure[4]

1 * * * * *

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

3 * * * * *

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

5 (A) *Warrant to Search for and Seize a Person or*

6 *Property.* Except for a tracking-device

---

[4]Additional proposed amendments to Rule 41(e) and (f) are on pages 53-56.

7 warrant, the warrant must identify the person
8 or property to be searched, identify any
9 person or property to be seized, and designate
10 the magistrate judge to whom it must be
11 returned. The warrant must command the
12 officer to:
13 (i) execute the warrant within a specified
14 time no longer than ~~10~~ 14 days;
15 * * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 47. Motions and Supporting Affidavits

1 * * * * *
2 **(c) Timing of a Motion.** A party must serve a written
3 motion — other than one that the court may hear ex
4 parte — and any hearing notice at least ~~5~~ 7 days before

5 the hearing date, unless a rule or court order sets a
6 different period. For good cause, the court may set a
7 different period upon ex parte application.
8 * * * * *

Committee Note

The time set in the former rule at 5 days, which excluded intermediate Saturdays, Sundays, and legal holidays, has been expanded to 7 days. See the Committee Note to Rule 45(a).

Rule 58. Petty Offenses and Other Misdemeanors

1 * * * * *
2 **(g) Appeal.**
3 * * * * *
4 **(2)** ***From a Magistrate Judge's Order or Judgment.***
5 (A) *Interlocutory Appeal.* Either party may appeal
6 an order of a magistrate judge to a district
7 judge within ~~10~~ 14 days of its entry if a
8 district judge's order could similarly be

9 appealed. The party appealing must file a
10 notice with the clerk specifying the order
11 being appealed and must serve a copy on the
12 adverse party.
13 (B) *Appeal from a Conviction or Sentence.* A
14 defendant may appeal a magistrate judge's
15 judgment of conviction or sentence to a
16 district judge within ~~10~~ 14 days of its entry.
17 To appeal, the defendant must file a notice
18 with the clerk specifying the judgment being
19 appealed and must serve a copy on an
20 attorney for the government.
21 * * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 59. Matters Before a Magistrate Judge

1 **(a) Nondispositive Matters.** A district judge may refer to
2 a magistrate judge for determination any matter that
3 does not dispose of a charge or defense. The magistrate
4 judge must promptly conduct the required proceedings
5 and, when appropriate, enter on the record an oral or
6 written order stating the determination. A party may
7 serve and file objections to the order within ~~10~~ 14 days
8 after being served with a copy of a written order or after
9 the oral order is stated on the record, or at some other
10 time the court sets. The district judge must consider
11 timely objections and modify or set aside any part of the
12 order that is contrary to law or clearly erroneous.
13 Failure to object in accordance with this rule waives a
14 party's right to review.
15 **(b) Dispositive Matters.**
16 * * * * *

17 **(2) Objections to Findings and Recommendations.**

18 Within ~~10~~ 14 days after being served with a copy

19 of the recommended disposition, or at some other

20 time the court sets, a party may serve and file

21 specific written objections to the proposed findings

22 and recommendations. Unless the district judge

23 directs otherwise, the objecting party must

24 promptly arrange for transcribing the record, or

25 whatever portions of it the parties agree to or the

26 magistrate judge considers sufficient. Failure to

27 object in accordance with this rule waives a party's

28 right to review.

29 * * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

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

Rule 8. Evidentiary Hearing

1 * * * * *

2 **(b) Reference to a Magistrate Judge.** A judge may, under
3 28 U.S.C. § 636(b), refer the petition to a magistrate
4 judge to conduct hearings and to file proposed findings
5 of fact and recommendations for disposition. When they
6 are filed, the clerk must promptly serve copies of the
7 proposed findings and recommendations on all parties.
8 Within ~~10~~ 14 days after being served, a party may file
9 objections as provided by local court rule. The judge
10 must determine de novo any proposed finding or
11 recommendation to which objection is made. The judge
12 may accept, reject, or modify any proposed finding or
13 recommendation.

14 * * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Federal Rules of Criminal Procedure 45(a).

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

Rule 8. Evidentiary Hearing

1 * * * * *

2 **(b) Reference to a Magistrate Judge.** A judge may, under
3 28 U.S.C. § 636(b), refer the motion to a magistrate
4 judge to conduct hearings and to file proposed findings
5 of fact and recommendations for disposition. When they
6 are filed, the clerk must promptly serve copies of the
7 proposed findings and recommendations on all parties.
8 Within ~~10~~ 14 days after being served, a party may file
9 objections as provided by local court rule. The judge
10 must determine de novo any proposed finding or
11 recommendation to which objection is made. The judge
12 may accept, reject, or modify any proposed finding or
13 recommendation.

14 * * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Federal Rules of Criminal Procedure 45(a).

Rule 7. The Indictment and the Information[5]

1 * * * * *

2 **(c) Nature and Contents.**

3 * * * * *

4 ~~**(2) Criminal Forfeiture.** No judgment of forfeiture~~

5 ~~may be entered in a criminal proceeding unless the~~

6 ~~indictment or the information provides notice that~~

7 ~~the defendant has an interest in property that is~~

8 ~~subject to forfeiture in accordance with the~~

9 ~~applicable statute.~~

10 ~~(3)~~(2)**Citation Error.** Unless the defendant was misled

11 and thereby prejudiced, neither an error in a

12 citation nor a citation's omission is a ground to

13 dismiss the indictment or information or to reverse

14 a conviction.

15 * * * * *

---

[5]Additional proposed amendments to Rule 7(f) are on page 15.

Committee Note

Subdivision (c). 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.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the proposed amendment to Rule 7.

Rule 32. Sentencing and Judgment[6]

1 * * * * *

2 **(d) Presentence Report.**

3 * * * * *

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

5 must also contain the following:

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

---

[6]Incorporates amendments approved by the Supreme Court that are scheduled to take effect on December 1, 2008, unless Congress acts otherwise.

7 including:

8 (i) any prior criminal record;

9 (ii) the defendant's financial condition; and

10 (iii) any circumstances affecting the

11 defendant's behavior that may be

12 helpful in imposing sentence or in

13 correctional treatment;

14 (B) information that assesses any financial,

15 social, psychological, and medical impact on

16 any victim;

17 (C) when appropriate, the nature and extent of

18 nonprison programs and resources available

19 to the defendant;

20 (D) when the law provides for restitution,

21 information sufficient for a restitution order;

22 (E) if the court orders a study under 18 U.S.C.

23 § 3552(b), any resulting report and

24 recommendation; ~~and~~

25 (F) any other information that the court requires,

26 including information relevant to the factors

27 under 18 U.S.C. § 3553(a); and

28 (G) specify whether the government seeks

29 forfeiture under Rule 32.2 and any other

30 provision of law.

31 * * * * *

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.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the proposed amendment to Rule 32.

* * * * *

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 General.***~~ ***Forfeiture Phase of the Trial.***
13 (A) *Forfeiture Determinations.* As soon as
14 practical after a verdict or finding of guilty, or
15 after a plea of guilty or nolo contendere is
16 accepted, on any count in an indictment or

17 information regarding which criminal
18 forfeiture is sought, the court must determine
19 what property is subject to forfeiture under
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 of a Specific Order.* If the court
41 finds that property is subject to forfeiture, it
42 must promptly enter a preliminary order of
43 forfeiture setting forth the amount of any
44 money judgment, ~~or~~ directing the forfeiture of
45 specific property, and directing the forfeiture
46 of any substitute property if the government
47 has met the statutory criteria ~~without regard~~
48 ~~to any third party's interest in all or part of it~~.
49 The court must enter the order without regard
50 to any third party's interest in the property.

51 Determining whether a third party has such
52 an interest must be deferred until any third
53 party files a claim in an ancillary proceeding
54 under Rule 32.2(c).
55 (B) *Timing.* Unless doing so is impractical, the
56 court must enter the preliminary order
57 sufficiently in advance of sentencing to allow
58 the parties to suggest revisions or
59 modifications before the order becomes final
60 as to the defendant under Rule 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 that:
66 (i) lists any identified property;
67 (ii) describes other property in general

68 terms; and

69 (iii) states that the order will be

70 amended under Rule 32.2(e)(1)

71 when additional specific property

72 is identified or the amount of the

73 money judgment has been

74 calculated.

75 **(3)** ***Seizing Property.*** The entry of a preliminary order

76 of forfeiture authorizes the Attorney General (or a

77 designee) to seize the specific property subject to

78 forfeiture; to conduct any discovery the court

79 considers proper in identifying, locating, or

80 disposing of the property; and to commence

81 proceedings that comply with any statutes

82 governing third-party rights. ~~At sentencing — or~~

83 ~~at any time before sentencing if the defendant~~

84 ~~consents — the order of forfeiture becomes final as~~

85 ~~to the defendant and must be made a part of the~~

86 ~~sentence and be included in the judgment.~~ The

87 court may include in the order of forfeiture

88 conditions reasonably necessary to preserve the

89 property's value pending any appeal.

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

91 (A) *When Final.* At sentencing — or at any time

92 before sentencing if the defendant consents

93 — the preliminary forfeiture order becomes

94 final as to the defendant. If the order directs

95 the defendant to forfeit specific property, it

96 remains preliminary as to third parties until

97 the ancillary proceeding is concluded under

98 Rule 32.2 (c).

99 (B) *Notice and Inclusion in the Judgment.* The

100 court must include the forfeiture when orally

101 announcing the sentence or must otherwise

102 ensure that the defendant knows of the
103 forfeiture at sentencing. The court must also
104 include the forfeiture order, directly or by
105 reference, in the judgment, but the court's
106 failure to do so may be corrected at any time
107 under Rule 36.
108 (C) *Time to Appeal.* The time for the defendant
109 or the government to file an appeal from the
110 forfeiture order, or from the court's failure to
111 enter an order, begins to run when judgment
112 is entered. If the court later amends or
113 declines to amend a forfeiture order to
114 include additional property under Rule
115 32.2(e), the defendant or the government may
116 file an appeal regarding that property under
117 Federal Rule of Appellate Procedure 4(b).
118 The time for that appeal runs from the date

119 when the order granting or denying the
120 amendment becomes final.
121 (~~4~~ 5) ***Jury Determination.***
122 (A) *Retaining the Jury.* ~~Upon a party's request in~~
123 ~~a case in which a jury returns a verdict of~~
124 ~~guilty, the jury must~~ In any case tried before
125 a jury, if the indictment or information states
126 that the government is seeking forfeiture, the
127 court must determine before the jury begins
128 deliberating whether either party requests that
129 the jury be retained to determine the
130 forfeitability of specific property if it returns
131 a guilty verdict.
132 (B) *Special Verdict Form.* If a party timely
133 requests to have the jury determine forfeiture,
134 the government must submit a proposed
135 Special Verdict Form listing each property

136 subject to forfeiture and asking the jury to
137 determine whether the government has
138 established the requisite nexus between the
139 property and the offense committed by the
140 defendant.

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

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

149 (B) *Content of the Notice.* The notice must
150 describe the forfeited property, state the times
151 under the applicable statute when a petition
152 contesting the forfeiture must be filed, and

153 state the name and contact information for the
154 government attorney to be served with the
155 petition.
156 (C) *Means of Publication; Exceptions to*
157 *Publication Requirement.* Publication must
158 take place as described in Supplemental Rule
159 G(4)(a)(iii) of the Federal Rules of Civil
160 Procedure, and may be by any means
161 described in Supplemental Rule G(4)(a)(iv).
162 Publication is unnecessary if any exception in
163 Supplemental Rule G(4)(a)(i) applies.
164 (D) *Means of Sending the Notice.* The notice
165 may be sent in accordance with Supplemental
166 Rules G(4)(b)(iii)-(v) of the Federal Rules of
167 Civil Procedure.
168 (7) ***Interlocutory Sale.*** At any time before entry of a
169 final forfeiture order, the court, in accordance with

170 Supplemental Rule G(7) of the Federal Rules of

171 Civil Procedure, may order the interlocutory sale of

172 property alleged to be forfeitable.

173 * * * * *

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.

Although forfeitures are not charged as counts, the federal judiciary's Case Management and Electronic Case Files system should note that forfeiture has been alleged so as to assist the parties and the court in tracking the subsequent status of forfeiture allegations.

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). *See also United States v. Columbo*, 2006 WL 2012511 * 5 & n.13 (S.D. N.Y. 2006) (denying motion for bill of particulars and noting that government proposed sending letter detailing basis for forfeiture allegations).

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 forfeiture order 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 forfeiture order, 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 forfeiture order 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 a forfeiture order 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 assets in the United States, permitting the government to continue discovery necessary to identify and trace 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 forfeiture order 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 forfeiture order in the judgment and commitment order, the availability of Rule 36 to correct the failure to include the forfeiture order in the judgment and commitment order, and the time to appeal.

New subparagraph (C) clarifies the time for appeals concerning forfeiture by the defendant or government from two kinds of orders: the original judgment of conviction and later orders amending or refusing to amend the judgment under Rule 32.2(e) to add additional property. This provision does not address appeals by the government or a third party from orders in ancillary proceedings under Rule 32.2(c).

Subdivision (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.

Subdivision (b)(5)(B) explains that "the government must submit a proposed Special Verdict Form listing each property 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.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The proposed amendment to Rule 32.2 was modified to use the term "property" throughout. As published, the proposed amendment used the terms property and asset(s) interchangeably. No difference in meaning was intended, and in order to avoid confusion, a single term was used consistently throughout. The term "forfeiture order" was substituted, where possible, for the wordier "order of forfeiture." Other small stylistic changes (such as the insertion of "the" in subpart titles) were also made to conform to the style conventions.

In new subpart (b)(4)(C), dealing with the time for appeals, the words "the defendant or the government" were substituted for the phrase "a party." This portion of the rule addresses only appeals from the original judgment of conviction and later orders amending or refusing to amend the judgment under Rule 32.2(e) to add additional property. Only the defendant and the government are parties at this stage of the proceedings. This portion of the rule does not address

appeals by the government or a third party from orders in ancillary proceedings under Rule 32.2(c). This point was also clarified in the Committee note.

Additionally, two other changes were made to the Committee Note: a reference to the use of the ECF system to aid the court and parties in tracking the status of forfeiture allegations, and an additional illustrative case.

Rule 41. Search and Seizure[7]

1 * * * * *

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

3 * * * * *

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

5 * * * * *

6 (B) *Warrant Seeking Electronically Stored*

7 *Information.* A warrant under Rule

8 41(e)(2)(A) may authorize the seizure of

9 electronic storage media or the seizure or

10 copying of electronically stored information.

[7]Additional proposed amendments to Rule 41(e) are on page 23.

11 Unless otherwise specified, the warrant
12 authorizes a later review of the media or
13 information consistent with the warrant. The
14 time for executing the warrant in Rule
15 41(e)(2)(A) and (f)(1)(A) refers to the seizure
16 or on-site copying of the media or
17 information, and not to any later off-site
18 copying or review.
19 (~~B~~C) *Warrant for a Tracking Device.* A tracking-
20 device warrant must identify the person or
21 property to be tracked, designate the
22 magistrate judge to whom it must be
23 returned, and specify a reasonable length of
24 time that the device may be used. The time
25 must not exceed 45 days from the date the
26 warrant was issued. The court may, for good
27 cause, grant one or more extensions for a

28 reasonable period not to exceed 45 days each.

29 The warrant must command the officer to:

30 * * * * *

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

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

33 ***Property.***

34 * * * * *

35 (B) *Inventory.* An officer present during the

36 execution of the warrant must prepare and

37 verify an inventory of any property seized.

38 The officer must do so in the presence of

39 another officer and the person from whom, or

40 from whose premises, the property was taken.

41 If either one is not present, the officer must

42 prepare and verify the inventory in the

43 presence of at least one other credible person.

44 <u>In a case involving the seizure of electronic</u>

45 storage media or the seizure or copying of
46 electronically stored information, the
47 inventory may be limited to describing the
48 physical storage media that were seized or
49 copied. The officer may retain a copy of the
50 electronically stored information that was
51 seized or copied.
52 * * * * *

Committee Note

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 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. The 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][8] day execution period to the actual execution of the warrant and the on-site activity. While consideration was given to a presumptive national or uniform time period within which any subsequent off-site copying or 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 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 access to the storage media or the electronically stored information earlier than anticipated by law enforcement or ordered by the court, the court on a case by

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[8]The 10 day period under Rule 41(e) may change to 14 days under the current proposals associated with the time computation amendments to Rule 45.

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.

The amended rule does not address the specificity of description that the Fourth Amendment may require in a warrant for electronically stored information, leaving the application of this and other constitutional standards concerning both the seizure and the search to ongoing case law development.

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.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The words "copying or" were added to the last line of Rule 41(e)(2)(B) to clarify that copying as well as review may take place off-site.

The Committee Note was amended to reflect the change to the text and to clarify that the amended Rule does not speak to constitutional questions concerning warrants for electronic information. Issues of particularity and search protocol are presently working their way through the courts. *Compare United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999) (finding warrant authorizing search for "documentary evidence pertaining to the sale and distribution of controlled substances" to prohibit opening of files with a .jpg suffix) *and United States v. Fleet Management Ltd.*, 521 F. Supp. 2d 436 (E.D. Pa. 2007) (warrant invalid when it "did not even attempt to differentiate between data that there was probable cause to seize and data that was completely unrelated to any relevant criminal activity") *with United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085 (9th Cir. 2008) (the government had no reason to confine its search to key words; "computer files are easy to disguise or rename, and were we to limit the warrant to such a specific search protocol, much evidence could escape discovery simply because of [the defendants'] labeling of the files"); *United States v. Brooks*, 427 F.3d 1246 (10th Cir. 2005) (rejecting requirement that warrant describe specific search methodology).

Minor changes were also made to conform to style conventions.

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

Rule 11. Certificate of Appealability; Time to Appeal

1 **(a) Certificate of Appealability.** The district court must
2 issue or deny a certificate of appealability when it enters a
3 final order adverse to the applicant. Before entering the final
4 order, the court may direct the parties to submit arguments on
5 whether a certificate should issue. If the court issues a
6 certificate, the court must state the specific issue or issues that
7 satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the
8 court denies a certificate, the parties may not appeal the denial
9 but may seek a certificate from the court of appeals under
10 Federal Rule of Appellate Procedure 22. A motion to
11 reconsider a denial does not extend the time to appeal.
12 **(b) Time to Appeal.** Federal Rule of Appellate Procedure
13 4(a) governs the time to appeal an order entered under these
14 rules. A timely notice of appeal must be filed even if the
15 district court issues a certificate of appealability.

Committee Note

Subdivision (a). As provided in 28 U.S.C. § 2253(c), an applicant may not appeal to the court of appeals from a final order in a proceeding under § 2254 unless a judge issues a certificate of appealability (COA), identifying 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 COAs more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2254 Cases in the United States District Courts. Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued. *See* 3d Cir. R. 22.2, 111.3. This will ensure prompt decision making when the issues are fresh, rather than postponing consideration of the certificate until after a notice of appeal is filed. These changes will expedite proceedings, avoid unnecessary remands, and help inform the applicant's decision whether to file a notice of appeal.

Subdivision (b). The new subdivision is designed to direct parties to the appropriate rule governing the timing of the notice of appeal and make it clear that the district court's grant of a COA does not eliminate the need to file a notice of appeal.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

In response to public comments, a sentence was added stating that prior to the entry of the final order the district court may direct the parties to submit arguments on whether or not a certificate should issue. This allows a court in complex cases (such as death penalty cases with numerous claims) to solicit briefing that might narrow the issues for appeal. For purposes of clarification, two sentences were

added at the end of subdivision (a) stating that (1) although the district court's denial of a certificate is not appealable, a certificate may be sought in the court of appeals, and (2) a motion for reconsideration of a denial of a certificate does not extend the time to appeal.

Finally, a new subdivision (b) was added to mirror the information provided in subdivision (b) of Rule 11 of the Rules Governing § 2255 Proceedings, directing petitioners to Rule 4 of the appellate rules and indicating that notice of appeal must be filed even if a COA is issued.

Minor changes were also made to conform to style conventions.

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

1 * * * * *

Committee Note

The amendment renumbers current Rule 11 to accommodate the new rule on certificates of appealability.

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.** The district court must
2 issue or deny a certificate of appealability when it enters a
3 final order adverse to the applicant. Before entering the final
4 order, the court may direct the parties to submit arguments on
5 whether a certificate should issue. If the court issues a
6 certificate, the court must state the specific issue or issues that
7 satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the
8 court denies a certificate, a party may not appeal the denial
9 but may seek a certificate from the court of appeals under
10 Federal Rule of Appellate Procedure 22. A motion to
11 reconsider a denial does not extend the time to appeal.
12 **(b) Time to Appeal.** Federal Rule of Appellate Procedure
13 4(a) governs the time to appeal an order entered under these
14 rules. A timely notice of appeal must be filed even if the

15 district court issues a certificate of appealability. These rules

16 do not extend the time to appeal the original judgment of

17 conviction.

Committee Note

Subdivision (a). As provided in 28 U.S.C. § 2253(c), an applicant may not appeal to the court of appeals from a final order in a proceeding under § 2255 unless a judge issues a COA, identifying 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 for the United States District Courts. Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued. *See* 3d Cir. R. 22.2, 111.3. This will ensure prompt decision making when the issues are fresh, rather than postponing consideration of the certificate until after a notice of appeal is filed. These changes will expedite proceedings, avoid unnecessary remands, and help to inform the applicant's decision whether to file a notice of appeal.

Subdivision (b). The amendment is designed to make it clear that the district court's grant of a COA does not eliminate the need to file a notice of appeal.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

In response to public comments, a sentence was added stating that prior to the entry of the final order the district court may direct the parties to submit arguments on whether or not a certificate should issue. This allows a court in complex cases (such as death penalty cases with numerous claims) to solicit briefing that might narrow the issues for appeal. For purposes of clarification, two sentences were added at the end of subdivision (a) stating that (1) although the district court's denial of a certificate is not appealable, a certificate may be sought in the court of appeals, and (2) a motion for reconsideration of a denial of a certificate does not extend the time to appeal. Finally, a sentence indicating that notice of appeal must be filed even if a COA is issued was added to subdivision (b).

Minor changes were also made to conform to style conventions.

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