

SUMMARY

**REPORT OF THE JUDICIAL CONFERENCE COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE**

This report contains the following recommendations for the consideration of the Conference:

1. That the Conference approve the proposed amendments to the Federal Rules of Criminal Procedure, set out in Appendix A, and transmit them to the Supreme Court with the recommendation that they be approved by the Court and transmitted to the Congress pursuant to law.

2. That the Chief Justice be requested to reactivate an Advisory Committee on the Federal Rules of Evidence.

**REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

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

Your Committee on Rules of Practice and Procedure met in Washington, D.C. on June 18 and 19, 1981. All members of the Committee were present. The Secretary of the Committee, Mr. Spaniol, also attended the meeting.

I. Federal Rules of Criminal Procedure

The Advisory Committee on the Federal Rules of Criminal Procedure has submitted to your Committee proposed amendments to Rules 1, 5(b), 9(a), (9)(b)(1), (9)(b)(2), 9(c)(1) and 9(c)(2), 9(d)-abrogated, 11(c)(1), 11(c)(4), 11(c)(5), 20(b), 40(d)(1), 40(d)(2), 45(a), 54(a), 54(b)(4), and 54(c), of the Federal Rules of Criminal Procedure; an amendment to Rule 2(c) of the ~~Rules Governing Section 2254 Cases in the United States District Courts~~ and an amendment to Rule 2(b) of the Rules Governing Section 2255 Proceedings. Included are proposed amendments to the forms for Section 2254 cases and Section 2255 proceedings. These proposed amendments, set out in Appendix A, are accompanied by Advisory Committee notes which explain their purpose and intent.

The amendments proposed by the Advisory Committee are "technical" in nature and are reported to be noncontroversial. They would update the criminal rules in the light of the 1979 amendments to the

Federal Magistrates Act, correct some inaccuracies and simplify some procedures. The proposed amendment to Rule 20, which does involve a matter of substance, was submitted to the bench and bar for comment in November 1979 and the Advisory Committee reported that the amendment has met with unanimous approval. The proposed amendments to the rules governing Section 2254 and Section 2255 proceedings and the corresponding changes in the forms would eliminate the requirement that petitions be "sworn to" and would provide that the signing of the petition is "under penalty of perjury". See 28 U.S.C. 1746.

Your Committee recommends that these proposed amendments be approved by the Conference and transmitted to the Supreme Court for its consideration with a recommendation that they be approved by the Court and transmitted to the Congress pursuant to law.

The Advisory Committee also intends to circulate additional amendments to the criminal rules to the bench and bar for comment sometime after October 1, 1981 and to hold public hearings on them probably in February 1982.

II. Federal Rules of Evidence

Recently a small group of judges, practicing attorneys and academicians convened in Williamsburg, Va. under the auspices of the Federal Judicial Center to review the operation of the Federal Rules of Evidence during the six years the rules have been in effect. The group concluded that the Evidence Rules have been an outstanding success and are working extremely well. Some problems have arisen which should be addressed, but the group concluded there is no problem serious enough to require any immediate or emergency action.

Based on a detailed report of the discussions at this meeting, your Committee believes that the time has arrived to reactivate an Advisory Committee on Rules of Evidence to review the forthcoming report on the Williamsburg Conference and to consider various proposals for rules changes recommended in legal literature.

It is therefore recommended that the Chief Justice be requested to reconstitute an Advisory Committee on the Federal Rules of Evidence and that the Committee commence a study of suggested amendments to these rules.

III. Bankruptcy Rules

The Committee received a report from Charles Horsky, Esq., a member of the Advisory Committee on Bankruptcy Rules, on the progress being made by the Committee in drafting rules under the new Bankruptcy Code. Mr. Horsky reported that the Committee has met on eight separate occasions and has made substantial progress in its work. The Committee has scheduled seven more meetings extending into 1982. When the drafts are complete, the new rules will be circulated to the bench and bar for comment, probably in May 1982. The Committee hopes to complete its work on these new rules in time for them to become effective by March 1, 1984 when the new Bankruptcy Code becomes fully effective.

IV. Federal Rules of Civil Procedure

Judge Walter Mansfield, Chairman of the Advisory Committee on the Federal Rules of Civil Procedure, submitted to your Committee a proposed set of amendments to the Rules of Civil Procedure and requested that they be printed and circulated to the bench and bar for comment.

Hearings will be held in Washington, D.C. on October 16, 1981 and in Los Angeles, California on November 6, 1981. Your Committee, through its Chairman, authorized the printing and distribution of these rules to the bench and bar for comment by November 16, 1981, and they were circulated early in July.

The proposed amendments to the Civil Rules address three subjects which the Advisory Committee has had under study for some time:

- (1) Reform of procedures for the conduct of pretrial conferences and for the scheduling and management of litigation by district judges;
- (2) The control of discovery abuse and the abuse of process; and
- (3) The need to conform the rules to the jurisdictional provisions of the Federal Magistrates Act of 1979.

The Advisory Committee will meet again in January 1982 to consider the comments received and thereafter will submit proposed amendments to your Committee.

Judge Mansfield also reported that the Committee is studying a proposed amendment to Rule 4, Federal Rules of Civil Procedure. There is urgency to this endeavor because of the desire of the United States Marshal's Service to discontinue the service of process in private civil litigation for lack of funding. The Advisory Committee is considering alternative methods of service in these cases, will submit a proposal to the bench and bar for written comment in late summer, and will ask for oral statements at the hearings to be conducted in the fall. A proposed amendment to Rule 4 will be submitted to the Conference at its session in March 1982.

V. Federal Rules of Appellate Procedure

The Chairman of the Advisory Committee on the Federal Rules of Appellate Procedure, Judge Robert A. Ainsworth, reported that the Committee has under consideration proposed amendments to the appellate rules required by the new Bankruptcy Code and the Federal Magistrates Act of 1979 and in particular is studying the separate appendix requirement of present Rule 30, F.R.A.P. A survey of the clerks of the courts of appeals on the operation of this rule, conducted by the reporter to the Committee, has yielded valuable information. See Ainsworth and Ripple, The Separate Appendix in Federal Appellate Practice - Necessary Tool or Costly Luxury? 34 Sw.L.J. 1159 (1981). Because of a shortage of appropriated funds the Committee has held only one meeting during the current fiscal year, but plans to meet again after October 1, 1981.

VI. Procedures of the Standing Committee and Advisory Committees

At its most recent meeting your Committee reviewed a report of the Federal Judicial Center on the rulemaking process which sets out various criticisms and observations which have appeared in legal literature in the last few years. A summary of the report was presented by Professor A. Leo Levin and Mr. William B. Eldridge of the Federal Judicial Center. All aspects of the report were thoroughly discussed.

On the whole, your Committee believes that the existing rulemaking procedures - (1) drafting by an Advisory committee of judges, law professors and practicing attorneys, assisted by a reporter (2) an opportunity for public participation through the wide distribution of proposed amendments for public comment, (3) the conduct of public hearings and (4) review by the Standing Committee - have worked well and

have produced a superior product. Yet the Committee perceives that the procedures followed by the Committees are not understood by the public generally since they are, for the most part, unwritten or unpublished. Your Committee has therefore undertaken to prepare a formal statement of the procedures of the Standing Committee and the Advisory Committees which can thereafter be published. The Administrative Office of the United States Courts has been requested to prepare such a statement in draft form for the consideration of the Committee at its next meeting.

VII. Local Rules of Court

Legal commentators in recent years have criticized the proliferation of local rules of the courts of appeals and district courts and have pointed out what appear to be conflicts and inconsistencies between locally adopted rules of court and the general rules of practice and procedure. Your Committee has requested the Administrative Office of the United States Courts to assemble background information and to submit recommendations for the consideration of the Committee at its next meeting. At that time the Committee will determine whether a full study of the problem is warranted or what other appropriate action may be taken.

VIII. Appropriations

The Appropriations Act for the fiscal year 1981 contains a limitation of \$150,000 on the amount of money that can be spent for the rules program. A similar provision has appeared in each Appropriations Act since the Judicial Conference was given the responsibility for the study of rules more than 20 years ago. Because of the reactivation of the Advisory Committee on Bankruptcy Rules, which has met frequently in order to

complete its work before the new Bankruptcy Code becomes fully effective in March 1984, there has been a shortage of funds. Priority in the allocation of available funds has been given to this Committee. As a result, scheduled meetings of other Advisory Committees have been postponed and other measures of economy have been taken.

The budget requests for the fiscal year 1982, approved by the Conference last September, contained a recommendation that the amount of the limitation be increased from \$150,000 to \$190,000. Your Committee has been informed, however, that the Appropriations Committees of the Congress are considering a proposal to drop the limitation entirely as being unnecessary. If the limitation on expenditures is either increased, as recommended, or deleted, ample funds should be available during the next fiscal year.

Respectively submitted,

Judge Edward T. Gignoux, Chairman
Judge Carl McGowan
Judge James S. Holden
Professor Frank J. Remington
Professor Bernard J. Ward
Edward H. Hickey, Esq.
Francis N. Marshall, Esq.

July 20, 1981

TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE:

On behalf of the Advisory Committee on Criminal Rules, I am submitting herewith various proposals to amend the Federal Rules of Criminal Procedure. These proposed amendments were circulated to the bench and bar in 1979 and, in the judgment of the Committee, contain only non-controversial items. The vast majority are technical in nature and some are modified to comply with the intermediate actions of Congress.

The changes in Rules 1, 5, 9(a), 9(b)(1), 9(b)(2), 9(c)(1), 9(c)(2), and the abrogation of 9(d), are purely technical, correcting type or printing errors, and modifications of terms by reason of the passage of the Federal Magistrate Act of 1979. There are one or two minor clarifications.

Rule 11(c)(1) adds to the judge's duty, in advising of the maximum possible penalty in the event of a plea of guilty or nolo contendere, to include "the effect of any special parole term." Under case law the circuits have already concluded that this advice is required.

Rules 11(c)(4) and 11(c)(5) are reworded to correct obvious misinterpretations occasioned by Congress having modified the draft of Rule 11 submitted by the Supreme Court in 1975.

Comments received on the proposed amendment to Rule 20 were all favorable. It will provide that a defendant arrested, held, or present in another district may waive venue and trial if he desires to plead guilty or nolo contendere, all of which must still meet with the approval of the United States Attorney in each district. Thus, rather than wait for all papers from the district where the offense was committed, the prosecution may proceed in the other district as if venue were in such district.

The amendments to Rules 40(d) and 40(d)(1) are technical and require no discussion.

Rule 45(a) fills the gap occasioned by unusually bad weather making the clerk's office inaccessible.

Rules 54(a) and 54(c) are modified to conform with 48 U.S.C. §1694 to include the District Court for the Northern Mariana Islands. Rule 54(b)(4) is necessitated by the elimination of "minor offenses" in the Federal Magistrate Act of 1979.

The suggested changes in the Rules governing Section 2254 and Section 2255 cases in the district courts, and in the forms appended thereto, are merely to recognize 28 U.S.C. §1746, enacted since the adoption of these Rules. The statute no longer requires an affidavit but provides that an unsworn statement may be given under penalty of perjury if certain language is used. The Committee has adopted this language as prisoners frequently claim that they have difficulty locating a prison official authorized to administer an oath.

While these proposed amendments are not critical in time, they were, as noted, circulated to the bench and bar in 1979, and the Committee feels that it is our obligation, after circulation and review of any comments received, to submit them to you. They cannot possibly be controversial. Moreover, the Committee plans to circulate to the bench, bar and media a new group of proposed amendments immediately after October 1, 1981, which will be the subject of public hearings and a few may be controversial. By adopting the presently proposed amendments at this time, they will undoubtedly be approved by Congress in the spring of 1982, whereas they would not become effective until the summer of 1983, at the earliest, if they are further delayed.

Respectfully submitted,

Walter E. Hoffman, *Chairman*
Advisory Committee on
Criminal Rules

June 19, 1981

**PROPOSED AMENDMENTS
TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE
FOR THE
UNITED STATES DISTRICT COURTS***

Rule 1. Scope

1 These rules govern the procedure in all criminal proceedings in
2 the courts of the United States, as ~~defined~~ provided in Rule 54(e a);
3 and, whenever specifically provided in one of the rules, to
4 preliminary, supplementary, and special proceedings before United
5 States magistrates and at proceedings before state and local judicial
6 officers.

ADVISORY COMMITTEE NOTE

The amendment corrects an erroneous cross reference, from Rule 54(c) to Rule 54(a), and replaces the word "defined" with the more appropriate word "provided."

*New matter is underscored; matter to be omitted is lined through.

**Rule 5. Initial Appearance
Before the Magistrate**

1 * * *

2 (b) MINOR OFFENSES MISDEMEANORS. If the charge against
3 the defendant is a minor offense misdemeanor triable by a United
4 States magistrate under 18 U.S.C. § 3401, the United States
5 magistrate shall proceed in accordance with the Rules of Procedure
6 for the Trial of Minor Offenses Misdemeanors Before United States
7 Magistrates.

8 * * *

ADVISORY COMMITTEE NOTE

Rule 5(b)

The amendment of subdivision (b) reflects the recent amendment of 18 U.S.C. § 3401(a), by the Federal Magistrate Act of 1979, to read: "When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district."

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

1 (a) ISSUANCE. Upon the request of the attorney for the
2 government the court shall issue a warrant for each defendant
3 named in an information supported by a showing of probable cause
4 under oath as is required by Rule 4(a), or in an indictment. Upon the
5 request of the attorney for the government a summons instead of a
6 warrant shall issue. If no request is made, the court may issue
7 either a warrant or a summons in its discretion. More than one
8 warrant or summons may issue for the same defendant. The clerk

9 shall deliver the warrant or summons to the marshal or other person
10 authorized by law to execute or serve it. If a defendant fails to
11 appear in response to the summons, a warrant shall issue. When a
12 defendant arrested with a warrant or given a summons appears
13 initially before a magistrate, the magistrate shall proceed in
14 accordance with the applicable subdivisions of Rule 5.

15 (b) FORM.

16 (1) Warrant. The form of the warrant shall be as provided
17 in Rule 4(c)(1) except that it shall be signed by the clerk, it shall
18 describe the offense charged in the indictment or information
19 and it shall command that the defendant be arrested and brought
20 before the court ~~or, if the information or indictment charges a~~
21 ~~minor offense, before a United States~~ nearest available
22 magistrate. The amount of bail may be fixed by the court and
23 endorsed on the warrant.

24 (2) Summons. The summons shall be in the same form as
25 the warrant except that it shall summon the defendant to appear
26 before the court ~~or, if the information or indictment charges a~~
27 ~~minor offense, before a United States~~ a magistrate at a stated
28 time and place.

29 (c) EXECUTION OR SERVICE; AND RETURN.

30 (1) Execution or Service. The warrant shall be executed or
31 the summons served as provided in Rule 4(d)(1), (2) and (3). A
32 summons to a corporation shall be served by delivering a copy to
33 an officer or to a managing or general agent or to any other

34 agent authorized by appointment or by law to receive service of
35 process and, if the agent is one authorized by statute to receive
36 service and the statute so requires, by also mailing a copy to the
37 corporation's last known address within the district or at its
38 principal place of business elsewhere in the United States. The
39 officer executing the warrant shall bring the arrested person
40 ~~promptly before the court or before a United States magistrate~~
41 without unnecessary delay before the nearest available federal
42 magistrate or, in the event that a federal magistrate is not
43 reasonably available, before a state or local judicial officer
44 authorized by 18 U.S.C. § 3041.

45 (2) Return. The officer executing a warrant shall make
46 return thereof to the ~~court or United States magistrate~~ or other
47 officer before whom the defendant is brought. At the request of
48 the attorney for the government any unexecuted warrant shall
49 be returned and cancelled. On or before the return day the
50 person to whom a summons was delivered for service shall make
51 return thereof. At the request of the attorney for the
52 government made at any time while the indictment or
53 information is pending, a warrant returned unexecuted and not
54 cancelled or a summons returned unserved or a duplicate thereof
55 may be delivered by the clerk to the marshal or other authorized
56 person for execution or service.

57 (d) REMAND TO UNITED STATES MAGISTRATE FOR TRIAL
 58 OF MINOR OFFENSES (Abrogated) If the information or
 59 indictment charges a minor offense and the return is to a judge of
 60 the district court, the case may be remanded to a United States
 61 magistrate for further proceedings in accordance with the Rules of
 62 Procedure for the Trial of Minor Offenses Before United States
 63 Magistrates.

ADVISORY COMMITTEE NOTE

Rule 9(a)

The amendment of subdivision (a), by reference to Rule 5, clarifies what is to be done once the defendant is brought before the magistrate. This means, among other things, that no preliminary hearing is to be held in a Rule 9 case, as Rule 5(c) provides that no such hearing is to be had "if the defendant is indicted or if an information against the defendant is filed."

Rule 9(b)

The amendment of subdivision (b) conforms Rule 9 to the comparable provisions in Rule 4(c)(1) and (2).

Rule 9(c)

The amendment of subdivision (c) conforms Rule 9 to the comparable provisions in Rules 4(d)(4) and 5(a) concerning return of the warrant.

Rule 9(d)

This subdivision, incorrect in its present form in light of the recent amendment of 18 U.S.C. § 3401(a), has been abrogated as unnecessary in light of the change to subdivision (a).

Rule 11. Pleas

1 * * *

2 (c) ADVICE TO DEFENDANT. Before accepting a plea of guilty
3 or nolo contendere, the court must address the defendant personally
4 in open court and inform him of, and determine that he understands,
5 the following:

6 (1) the nature of the charge to which the plea is offered,
7 the mandatory minimum penalty provided by law, if any, and the
8 maximum possible penalty provided by law, including the effect
9 of any special parole term; and

10 * * *

11 (4) that if he ~~pleads~~ his plea of guilty or nolo contendere is
12 accepted by the court there will not be a further trial of any
13 kind, so that by pleading guilty or nolo contendere he waives the
14 right to a trial; and

15 (5) that if he ~~pleads guilty or nolo contendere~~ the court
16 may ask him questions about the offense to which he has
17 ~~pleaded~~, and if he answers these questions if the court intends to
18 question the defendant under oath, on the record, and in the
19 presence of counsel about the offense to which he has pleaded,
20 that his answers may later be used against him in a prosecution
21 for perjury or false statement.

22 * * *

ADVISORY COMMITTEE NOTE

Rule 11(c)(1)

Subdivision (c)(1) has been amended by specifying "the effect of any special parole term" as one of the matters about which a defendant who has tendered a plea of guilty or nolo contendere is to be advised by the court. This amendment does not make any change in the law, as the courts are in agreement that such advice is presently required by Rule 11. See, e.g., Moore v. United States, 592 F.2d 753 (4th Cir. 1979); United States v. Eaton, 579 F.2d 1181 (10th Cir. 1978); Richardson v. United States, 577 F.2d 447 (8th Cir. 1978); United States v. Del Prete, 567 F.2d 928 (9th Cir. 1978); United States v. Watson, 548 F.2d 1058 (D.C. Cir. 1977); United States v. Crusco, 536 F.2d 21 (2d Cir. 1976); United States v. Yarbuck, 524 F.2d 641 (1st Cir. 1975); United States v. Wolak, 510 F.2d 164 (6th Cir. 1975). In United States v. Timmreck, 441 U.S. 780 (1979), 99 S.Ct. 2085 (1979), the Supreme Court assumed that the judge's failure in that case to describe the mandatory special parole term constituted "a failure to comply with the formal requirements of the Rule."

The purpose of the amendment is to draw more specific attention to the fact that advice concerning special parole terms is a necessary part of Rule 11 procedure. As noted in Moore v. United States, supra:

Special parole is a significant penalty. * * * Unlike ordinary parole, which does not involve supervision beyond the original prison term set by the court and the violation of which cannot lead to confinement beyond that sentence, special parole increases the possible period of confinement. It entails the possibility that a defendant may have to serve his original sentence plus a substantial additional period, without credit for time spent on parole. Explanation of special parole in open court is therefore essential to comply with the Rule's mandate that the defendant be informed of "the maximum possible penalty provided by law."

As the afocited cases indicate, in the absence of specification of the requirement in the rule, it has sometimes happened that such advice has been inadvertently omitted from Rule 11 warnings.

The amendment does not attempt to enumerate all of the characteristics of the special parole term which the judge ought to bring to the defendant's attention. Some flexibility in this respect must be preserved, although it is well to note that the unique characteristics of this kind of parole are such that they may not be readily perceived by laymen. Moore v. United States, supra, recommends that in an appropriate case the judge

inform the defendant and determine that he understands the following:

(1) that a special parole term will be added to any prison sentence he receives;

(2) the minimum length of the special parole term that must be imposed and the absence of a statutory maximum;

(3) that special parole is entirely different from--and in addition to--ordinary parole; and

(4) that if the special parole is violated, the defendant can be returned to prison for the remainder of his sentence and the full length of his special parole term.

The amendment should not be read as meaning that a failure to comply with this particular requirement will inevitably entitle the defendant to relief. See United States v. Timmreck, supra. Likewise, the amendment makes no change in the existing law to the effect

that many aspects of traditional parole need not be communicated to the defendant by the trial judge under the umbrella of Rule 11. For example, a defendant need not be advised of all conceivable consequences such as when he may be considered for parole or that, if he violates his parole, he will again be imprisoned.

Bunker v. Wise, 550 F.2d 1155, 1158 (9th Cir. 1977).

Rule 11(c)(4)

The amendment to subdivision (c)(4) is intended to overcome the present conflict between the introductory language of subdivision (c), which contemplates the advice being given "[b]efore accepting a plea of guilty or nolo contendere," and thus presumably after the plea has been tendered, and the "if he pleads" language of subdivision (c)(4) which suggests the plea has not been tendered.

As noted by Judge Doyle in United States v. Sinagub, No. 78-CR-38 (W.D.Wis. March 29, 1979):

Taken literally, this wording of subsection (4) of 11(c) suggests that before eliciting any plea at an arraignment, the court is required to insure that a defendant understands that if he or she pleads guilty or nolo contendere, the defendant will be waiving the right to trial. Under subsection (3) of 11(c), however, there is no requirement that at this pre-plea stage, the court must insure that the defendant understands that he or she enjoys the right to a trial and, at trial, the right to the assistance of counsel, the right to confront and cross-examine witnesses

against him or her, and the right not to be compelled to incriminate himself or herself. It would be incongruous to require that at the pre-plea stage the court insure that the defendant understands that if he enters a plea of guilty or nolo contendere he will be waiving a right, the existence and nature of which need not be explained until after such a plea has been entered. I conclude that the insertion of the words "that if he pleads guilty or nolo contendere," as they appear in subsection (4) of 11(c), was an accident of draftsmanship which occurred in the course of Congressional rewriting of 11(c) as it has been approved by the Supreme Court. Those words are to be construed consistently with the words "Before accepting a plea of guilty or nolo contendere," as they appear in the opening language of 11(c), and consistently with the omission of the words "that if he pleads" from subsections (1), (2), and (3) of 11(c). That is, as they appear in subsection (4) of 11(c), the words, "that if he pleads guilty or nolo contendere" should be construed to mean "that if his plea of guilty or nolo contendere is accepted by the court."

Although this is a very logical interpretation of the present language, the amendment will avoid the necessity to engage in such analysis in order to determine the true meaning of subdivision (c)(4).

Rule 11(c)(5)

Subdivision (c)(5), in its present form, may easily be read as contemplating that in every case in which a plea of guilty or nolo contendere is tendered, warnings must be given about the possible use of defendant's statements, obtained under oath, on the record and in the presence of counsel, in a later prosecution for perjury of false statement. The language has prompted some courts to reach the remarkable result that a defendant who pleads guilty or nolo contendere without receiving those warnings must be allowed to overturn his plea on appeal even though he was never questioned under oath, on the record, in the presence of counsel about the offense to which he pleaded. United States v. Artis, No. 78-5012 (4th Cir. March 12, 1979); United States v. Boone, 543 F.2d 1090 (4th Cir. 1976). Compare United States v. Michaelson, 552 F.2d 472 (2d Cir. 1977) (failure to give subdivision (c)(5) warnings not a basis for reversal, "at least when, as here, defendant was not put under oath before questioning about his guilty plea"). The present language of subdivision (c)(5) may also have contributed to the conclusion, not otherwise supported by the rule, that "Rule 11 requires that the defendant be under oath for the entirety of the proceedings" conducted pursuant to that rule and that failure to place the defendant under oath would itself make necessary overturning the plea on appeal. United States v. Aldridge, 553 F.2d 922 (5th Cir. 1977).

When questioning of the kind described in subdivision (c)(5) is not contemplated by the judge who is receiving the plea, no purpose is served by giving the (c)(5) warnings, which in such circumstances can only confuse

the defendant and detract from the force of the other warnings required by Rule 11. As correctly noted in United States v. Sinagub, supra,

subsection (5) of section (c) of Rule 11 is qualitatively distinct from the other sections of the Rule. It does not go to whether the plea is knowingly or voluntarily made, nor to whether the plea should be accepted and judgment entered. Rather, it does go to the possible consequences of an event which may or may not occur during the course of the arraignment hearing itself, namely, the administration of an oath to the defendant. Whether this event is to occur is wholly within the control of the presiding judge. If the event is not to occur, it is pointless to inform the defendant of its consequences. If a presiding judge intends that an oath not be administered to a defendant during an arraignment hearing, but alters that intention at some point, only then would the need arise to inform the defendant of the possible consequences of the administration of the oath.

The amendment to subdivision (c)(5) is intended to make it clear that this is the case.

The amendment limits the circumstances in which the warnings must be given, but does not change the fact, as noted in Sinagub, that these warnings are "qualitatively distinct" from the other advice required by Rule 11(c). This being the case, a failure to give the subdivision (c)(5) warnings even when the defendant was questioned under oath, on the record and in the presence of counsel would in no way affect the validity of the defendant's plea. Rather, this failure bears upon the admissibility of defendant's answers pursuant to subdivision (e)(6) in a later prosecution for perjury or false statement.

Rule 20.

Transfer From the District for Plea and Sentence

1 * * *

2 (b) INDICTMENT OR INFORMATION NOT PENDING. A
3 defendant arrested, held, or present, in a district other than the
4 district in which a complaint is pending against him may state in
5 writing that he wishes to plead guilty or nolo contendere, to waive
6 venue and trial in the district in which the warrant was issued, and
7 to consent to disposition of the case in the district in which he was
8 arrested, held, or present, subject to the approval of the United

9 States attorney for each district. Upon filing the written waiver of
10 venue in the district in which the defendant is present, the
11 prosecution may proceed as if venue were in such district. Upon
12 receipt of the defendant's statement and of the written approval of
13 the United States attorneys and upon the filing of an information or
14 the return of an indictment, the clerk of the court for the district in
15 which the warrant was issued shall transmit the papers in the
16 proceeding or certified copies thereof to the clerk of the court for
17 the district in which the defendant was arrested, held, or present,
18 and the prosecution shall continue in that district. When the
19 defendant is brought before the court to plead to an information
20 filed in the district where the warrant was issued, he may at that
21 time waive indictment as provided in Rule 7, and the prosecution
22 may continue based upon the information originally filed.

23 * * *

ADVISORY COMMITTEE NOTE

Rule 20(b)

This amendment to subdivision (b) is intended to expedite transfer proceedings under Rule 20. At present, considerable delay - sometimes as long as three or four weeks - occurs in subdivision (b) cases, that is, where no indictment or information is pending. This time is spent on the transmittal of defendant's statement to the district where the complaint is pending, the filing of of an information or return of an indictment there, and the transmittal of papers in the case from that district to the district where the defendant is present. Under the amendment, the defendant, by also waiving venue, would make it possible for charges to be filed in the district of his arrest or presence. This would advance the interests of both the prosecution and defendant in a timely entry of a plea of guilty. No change has been made in the requirement that the transfer occur with the consent of both United States attorneys.

Rule 40. Commitment to Another District

1 * * *

2 (d) ARREST OF PROBATIONER. If a person is arrested for a
3 violation of his probation in a district other than the district of
4 ~~supervision~~ having probation jurisdiction, he shall be taken without
5 unnecessary delay before the nearest available federal magistrate.

6 The federal magistrate shall:

7 (1) Proceed under Rule 32.1 if jurisdiction over the
8 probationer is transferred to that district pursuant to 18 U.S.C.
9 § 3653;

10 (2) Hold a prompt preliminary hearing if the alleged
11 violation occurred in that district, and either (i) hold the
12 probationer to answer in the district court of the district having
13 probation ~~supervision~~ jurisdiction or (ii) dismiss the proceedings
14 and so notify that court; or

15 (3) Otherwise order the probationer held to answer in the
16 district court of the district having probation jurisdiction upon
17 production of certified copies of the probation order, the
18 warrant, and the application for the warrant, and upon a finding
19 that the person before him is the person named in the warrant.

20 * * *

ADVISORY COMMITTEE NOTE

Rule 40(d)

The amendment to 40(d) is intended to make it clear that the transfer provisions therein apply whenever the arrest occurs other than in the district of probation jurisdiction, and that if probable cause is found at a

preliminary hearing held pursuant to Rule 40(d)(2) the probationer should be held to answer in the district having probation jurisdiction.

On occasion, the district of probation supervision and the district of probation jurisdiction will not be the same. See, e.g., Cupp v. Byington, 179 F.Supp. 669 (S.D.Ind. 1960) (supervision in Southern District of Indiana, but jurisdiction never transferred from District of Nevada). In such circumstances, it is the district having jurisdiction which may revoke the defendant's probation. Cupp v. Byington, supra; 18 U.S.C. § 3653 ("the court for the district having jurisdiction over him * * * may revoke the probation"; if probationer goes to another district, "jurisdiction over him may be transferred," and only then does "the court for the district to which jurisdiction is transferred * * * have all the power with respect to the probationer that was previously possessed by the court for the district from which the transfer was made"). That being the case, that is the jurisdiction to which the probationer should be transferred as provided in Rule 40(d).

Because Rule 32.1 has now taken effect, a cross-reference to those provisions has been made in subdivision (d)(1) so as to clarify how the magistrate is to proceed if jurisdiction is transferred.

Rule 45. Time

1 (a) COMPUTATION. In computing any period of time the day
 2 of the act or event from which the designated period of time begins
 3 to run shall not be included. The last day of the period so computed
 4 shall be included, unless it is a Saturday, a Sunday, or a legal
 5 holiday, or, when the act to be done is the filing of some paper in
 6 court, a day on which weather or other conditions have made the
 7 office of the clerk of the district court inaccessible, in which event
 8 the period runs until the end of the next day which is not one of the
 9 aforementioned days. a Saturday, a Sunday, or a legal holiday When
 10 a period of time prescribed or allowed is less than 7 days,
 11 intermediate Saturdays, Sundays and legal holidays shall be excluded
 12 in the computation. As used in these rules, "legal holiday" includes
 13 New Year's Day, Washington's Birthday, Memorial Day,

14 Independence Day, Labor Day, Columbus Day, Veterans Day,
15 Thanksgiving Day, Christmas Day, and any other day appointed as a
16 holiday by the President or the Congress of the United States, or by
17 the state in which the district court is held.

18 * * *

ADVISORY COMMITTEE NOTE

Rule 45(a)

The amendment to subdivision (a) takes account of the fact that on rare occasion severe weather conditions or other circumstances beyond control will make it impossible to meet a filing deadline under Rule 45(a). Illustrative is an incident which occurred in Columbus, Ohio during the "great blizzard of 1978," in which weather conditions deteriorated to the point where personnel in the clerk's office found it virtually impossible to reach the courthouse, and where the GSA Building Manager found it necessary to close and secure the entire building. The amendment covers that situation and also similar situations in which weather or other conditions made the clerk's office, though open, not readily accessible to the lawyer. Whether the clerk's office was in fact "inaccessible" on a given date is to be determined by the district court. Some state time computation statutes contain language somewhat similar to that in the amendment; see, e.g., Md. Code Ann. art. 94, § 2.

Rule 54. Application and Exception

1 (a) COURTS. These rules apply to all criminal proceedings in
2 the United States District Courts; in the District Court of Guam; in
3 the District Court for the Northern Mariana Islands, except as
4 otherwise provided in articles IV and V of the covenant provided by
5 the Act of March 24, 1976 (90 Stat. 263); in the District Court of the
6 Virgin Islands; and (except as otherwise provided in the Canal Zone
7 Code) in the United States District Court for the District of the
8 Canal Zone; in the United States Courts of Appeals; and in the
9 Supreme Court of the United States; except that all offenses shall

10 continue to be prosecuted in the District Court of Guam and in the
 11 District Court of the Virgin Islands by information as heretofore
 12 except such as may be required by local law to be prosecuted by
 13 indictment by grand jury.

14 (b) PROCEEDINGS.

15 * * *

16 (4) Proceedings Before United States Magistrates.
 17 Proceedings involving ~~minor offenses~~ misdemeanors before
 18 United States Magistrates, ~~as defined in subdivision (e) of this~~
 19 ~~rule~~, are governed by the Rules of Procedure for the Trial of
 20 ~~Minor Offenses~~ Misdemeanors before United States Magistrates.

21 * * *

22 (c) APPLICATION OF TERMS. As used in these rules the
 23 following terms have the designated meanings.

24 * * *

25 "Attorney for the government" means the Attorney General, an
 26 authorized assistant of the Attorney General, a United States
 27 Attorney, an authorized assistant of a United States Attorney and,
 28 when applicable to cases arising under the laws of Guam ~~means the~~
 29 Attorney General of Guam or such other person or persons as may be
 30 authorized by the laws of Guam to act therein, and when applicable
 31 to cases arising under the laws of the Northern Mariana Islands the
 32 Attorney General of the Northern Mariana Islands or any other
 33 person or persons as may be authorized by the laws of the Northern
 34 Marianas to act therein.

35 * * *

36 "~~Minor offense~~" is defined in ~~18 U.S.C. § 3401.~~

37 * * *

ADVISORY COMMITTEE NOTE

Rule 54(a)

The amendment of subdivision (a) conforms to 48 U.S.C. § 1694(c), which provides that "the rules heretofore or hereafter promulgated and made effective by the Congress or the Supreme Court of the United States pursuant to Titles 11, 18, and 28 shall apply to the District Court for the Northern Mariana Islands and appeals therefrom where appropriate, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263)." The reference is to the "Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America." Article IV of the covenant provides that except when exercising "the jurisdiction of a district court of the United States," the District Court will be considered a court of the Northern Mariana Islands for the purposes of determining the requirements of indictment by grand jury or trial by jury." Article V provides that "neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except when required by local law."

Rule 54(b)(4)

This change is necessitated by the recent amendment of 18 U.S.C. § 3401 by the Federal Magistrate Act of 1979.

Rule 54(c)

The first amendment to subdivision (c) conforms to 48 U.S.C. § 1694(c), which states: "The terms 'attorney for the government' and 'United States Attorney' as used in the Federal Rules of Criminal Procedure (Rule 54(c)) shall, when applicable to cases arising under the laws of the Northern Mariana Islands, include the attorney general of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein."

The second amendment to subdivision (c) eliminates any reference to minor offenses. By virtue of the recent amendment of 18 U.S.C. § 3401 by the Federal Magistrate Act of 1979, the term "minor offense" is no longer utilized in the statute. It is likewise no longer used in these rules. See amendments to Rules 5(b) and 9(d).

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

Rule 2. Petition

1 * * *

2 (c) FORM OF PETITION. The petition shall be in
3 substantially the form annexed to these rules, except that any
4 district court may by local rule require that petitions filed with it
5 shall be in a form prescribed by the local rule. Blank petitions in the
6 prescribed form shall be made available without charge by the clerk
7 of the district court to applicants upon their request. It shall
8 specify all the grounds for relief which are available to the
9 petitioner and of which he has or by the exercise of reasonable
10 diligence should have knowledge and shall set forth in summary form
11 the facts supporting each of the grounds thus specified. It shall also
12 state the relief requested. The petition shall be typewritten or
13 legibly handwritten and shall be signed ~~and sworn to~~ under penalty of
14 perjury by the petitioner.

15 * * *

ADVISORY COMMITTEE NOTE

Rule 2(c)

The amendment takes into account 28 U.S.C. § 1746, enacted after adoption of the § 2254 rules. Section 1746 provides that in lieu of an affidavit an unsworn statement may be given under penalty of perjury in substantially the following form if executed within the United States, its territories, possessions or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)." The statute is "intended to encompass prisoner litigation," and the statutory alternative is especially appropriate in such cases because a notary might not be readily available. Carter v. Clark, 616 F.2d 228 (5th Cir. 1980). The § 2254 forms have been revised accordingly.

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

Rule 2. Motion

1 * * *

2 (b) FORM OF MOTION. The motion shall be in substantially
3 the form annexed to these rules, except that any district court may
4 by local rule require that motions filed with it shall be in a form
5 prescribed by the local rule. Blank motions in the prescribed form
6 shall be made available without charge by the clerk of the district
7 court to applicants upon their request. It shall specify all the
8 grounds for relief which are available to the movant and of which he
9 has or, by the exercise of reasonable diligence, should have
10 knowledge and shall set forth in summary form the facts supporting
11 each of the grounds thus specified. It shall also state the relief
12 requested. The motion shall be typewritten or legibly handwritten
13 and shall be signed ~~and sworn to~~ under penalty of perjury by the
14 petitioner.

ADVISORY COMMITTEE NOTE

Rule 2(b)

The amendment takes into account 28 U.S.C. § 1746, enacted after adoption of the § 2255 rules. Section 1746 provides that in lieu of an affidavit an unsworn statement may be given under penalty of perjury in substantially the following form if executed within the United States, its territories, possessions or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)." The statute is "intended to encompass prisoner litigation," and the statutory alternative is especially appropriate in such cases because a notary might not be readily available. Carter v. Clark, 616 F.2d 228 (5th Cir. 1980). The § 2255 forms have been revised accordingly.

APPENDIX OF FORMS

MODEL FORM FOR USE IN APPLICATIONS FOR
HABEAS CORPUS UNDER 28 U.S.C. § 2254

Name _____

Prison number _____

Place of confinement _____

United States District Court _____ District of _____

Case No. _____

(To be supplied by Clerk of U. S. District Court)

_____, PETITIONER
(Full name)

v.

_____, RESPONDENT
(Name of Warden, Superintendent, Jailor, or authorized person hav-
ing custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF _____
_____, ADDITIONAL RESPONDENT.

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

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

Instructions—Read Carefully

- (1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury and sworn to before a notary public or institutional officer authorized to administer an oath. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.
- (2) Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) Upon receipt of a fee of \$5 your petition will be filed if it is in proper order.

- (4) If you do not have the necessary filing fee, you may request permission to proceed *in forma pauperis*, in which event you must execute the **affidavit declaration** on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds \$ _____, you must pay the filing fee as required by the rule of the district court.
- (5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.
- (6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking from any judgment of conviction.
- (7) When the petition is fully completed, *the original and two copies* must be mailed to the Clerk of the United States District Court whose address is _____

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

PETITION

1. Name and location of court which entered the judgment of conviction under attack _____
2. Date of judgment of conviction _____
3. Length of sentence _____
4. Nature of offense involved (all counts) _____

5. What was your plea? (Check one)
 - (a) Not guilty
 - (b) Guilty
 - (c) Nolo contendere

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

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

7. Did you testify at the trial?
Yes No
8. Did you appeal from the judgment of conviction?
Yes No
9. If you did appeal, answer the following:
(a) Name of court _____
(b) Result _____
(c) Date of result _____
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes No
11. If your answer to 10 was "yes," give the following information:
(a)(1) Name of court _____
(2) Nature of proceeding _____
(3) Grounds raised _____
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes No
(5) Result _____
(6) Date of result _____
- (b) As to any second petition, application or motion give the same information:
(1) Name of court _____
(2) Nature of proceeding _____
(3) Grounds raised _____
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes No
(5) Result _____
(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

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

Yes No

(5) Result _____

(6) Date of result _____

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

(1) First petition, etc. Yes No

(2) Second petition, etc. Yes No

(3) Third petition, etc. Yes No

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

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

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

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

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

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

A. Ground one: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

B. Ground two: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

C. Ground three: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

D. Ground four: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

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

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes No

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

(a) At preliminary hearing _____

(b) At arraignment and plea _____

(c) At trial _____

(d) At sentencing _____

(e) On appeal _____

(f) In any post-conviction proceeding _____

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
 Yes No
17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
 Yes No
- (a) If so, give name and location of court which imposed sentence to be served in the future: _____
- (b) And give date and length of sentence to be served in the future: _____
- (c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
 Yes No

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

Executed at _____
_____, 19____

Signature of Attorney (if any)

Signature of Petitioner

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____
(date)

Signature of Petitioner

IN FORMA PAUPERIS AFFIDAVIT DECLARATION

[Insert appropriate court]

(Petitioner)
v.

(Respondent(s))

**AFFIDAVIT DECLARATION IN SUPPORT
OF REQUEST
TO PROCEED
IN FORMA PAUPERIS**

I, _____, being first duly sworn, depose and say declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes No
- a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.
- _____
- _____
- b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.
- _____
- _____
2. Have you received within the past twelve months any money from any of the following sources?
- a. Business, profession or form of self-employment? Yes No
- b. Rent payments, interest or dividends? Yes No
- c. Pensions, annuities or life insurance payments? Yes No
- d. Gifts or inheritances? Yes No
- e. Any other sources? Yes No
- If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. _____
- _____
- _____
3. Do you own cash, or do you have money in checking or savings account?
- Yes No (Include any funds in prison accounts.)
- If the answer is "yes," state the total value of the items owned.
- _____
- _____
4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
- Yes No
- If the answer is "yes," describe the property and state its approximate value. _____
- _____
5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. _____
- _____

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

(Petitioner's signature)

State of _____
County (City) of _____

_____ being first duly sworn under oath,
(Name of Petitioner)
~~presents that he has read and subscribed to the above and states
that the information therein is true and correct.~~

~~Signature of Petitioner
(Required as to each
petitioner)~~

~~Subscribed and sworn to before me this
_____ day of _____, 19__.~~

~~Notary Public or other person
authorized to administer
an oath~~

I declare (or certify, verify, or state) under penalty of perjury that the
foregoing is true and correct. Executed on _____
(date)

Signature of Petitioner

Certificate

I hereby certify that the petitioner herein has the sum of \$_____ on account to his credit at he _____ institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said _____ institution:

Authorized Officer of
Institution

MODEL FORM FOR USE IN 28 U.S.C. § 2254 CASES
INVOLVING A RULE 9 ISSUE

Form No. 9

United States District Court,

_____ District of _____

Case No. _____

_____, PETITIONER

v.

_____, RESPONDENT

and

_____, ADDITIONAL RESPONDENT

Petitioner's Response as to Why His Petition Should
Not Be Barred Under Rule 9

Explanation and Instructions—Read Carefully

(I) Rule 9. Delayed or successive petitions.

(a) **Delayed petitions.** A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred. If the petition is filed more than five years after the judgment of conviction, there shall be a presumption, rebuttable by the petitioner, that there is prejudice to the state. When a petition challenges the validity of an action, such a revocation of probation or parole, which occurs after judgment of conviction, the five-year period as to that action shall start to run at the time the order in the challenged action took place.

(b) **Successive petitions.** A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition is not excusable.

(II) Your petition for habeas corpus has been found to be subject to dismissal under rule 9() for the following reason(s):

(III) This form has been sent so that you may explain why your petition contains the defect(s) noted in (II) above. It is required that you fill out this form and send it back to the court within _____ days. Failure to do so will result in the automatic dismissal of your petition.

(IV) When you have fully completed this form, the original and two copies must be mailed to the Clerk of the United States District Court whose address is _____

- (V) This response must be legibly handwritten or typewritten, and signed by the petitioner, and sworn to before a notary public or institutional officer authorized to administer an oath under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.
- (VI) Additional pages are not permitted except with respect to the *facts* which you rely upon in item 4 or 5 in the response. Any citation of authorities should be kept to an absolute minimum and is only appropriate if there has been a change in the law since the judgment you are attacking was rendered.
- (VII) Respond to 4 *or* 5 below, not to both, unless (II) above indicates that you must answer both sections.

RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your petition is attacking was entered?
 Yes No
2. If you checked "yes" above, specify as precisely as you can the period(s) of time during which you received such assistance, up to and including the present. _____

3. Describe the nature of the assistance, including the names of those who rendered it to you. _____

4. If your petition is in jeopardy because of delay prejudicial to the state under rule 9(a), explain why you feel the delay has not been prejudicial and/or why the delay is excusable under the terms of 9(a). This should be done by relying upon FACTS, not your opinions or conclusions. _____

5. If your petition is in jeopardy under rule 9(b) because it asserts the same grounds as a previous petition, explain why you feel it deserves a reconsideration. If its fault under rule 9(b) is that it asserts new grounds which should have been included in a prior petition, explain why you are raising these grounds now rather than previously. Your explanation should rely on FACTS, not your opinions or conclusions. _____

~~State of _____~~

~~County (City) of _____~~

~~_____, being first duly sworn under oath pre-
(Name of Petitioner)~~

~~sents that he has read and subscribed to the above and states that
the information therein is true and correct.~~

~~Signature of Petitioner
(Required as to each
petitioner)~~

~~Subscribed and sworn to before me this _____ day of
_____, 19__.~~

~~Notary Public or other person
authorized to administer
an oath~~

I declare (or certify, verify, or state) under penalty of perjury that the
foregoing is true and correct. Executed on _____
(date)

Signature of Petitioner

MODEL FORM FOR MOTIONS UNDER 28 U.S.C. § 2255

Name _____
 Prison Number _____
 Place of Confinement _____
 United States District Court _____ District of _____
 Case No. _____ (to be supplied by Clerk of U. S. District Court)
 United States, _____

v.

(full name of movant)

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

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

Instructions—Read Carefully

- (1) This motion must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury and sworn to before a notary public or institutional officer authorized to administer an oath. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.
- (2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.
- (4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed *in forma pauperis*, in which event you must execute the affidavit declaration on the last page, setting forth information establishing your inability to pay the costs. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (5) Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each such judgment.
- (6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.
- (7) When the motion is fully completed, the *original and two copies* must be mailed to the Clerk of the United States District Court whose address is _____
- (8) Motions which do not conform to these instructions will be returned with a notation as to the deficiency.

MOTION

1. Name and location of court which entered the judgment of conviction under attack _____
2. Date of judgment of conviction _____

APPENDIX OF FORMS

3. Length of sentence _____
4. Nature of offense involved (all counts) _____

5. What was your plea? (Check one)
 (a) Not guilty
 (b) Guilty
 (c) Nolo contendere
- If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. Kind of trial: (Check one)
 (a) Jury
 (b) Judge only
7. Did you testify at the trial?
 Yes No
8. Did you appeal from the judgment of conviction?
 Yes No
9. If you did appeal, answer the following:
 (a) Name of court _____
 (b) Result _____
 (c) Date of result _____
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
 Yes No
11. If your answer to 10 was "yes," give the following information:
 (a) (1) Name of court _____
 (2) Nature of proceeding _____
 (3) Grounds raised _____

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

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

(c) As to any third petition, application or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

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

Yes No

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

(1) First petition, etc. Yes No

(2) Second petition, etc. Yes No

(3) Third petition, etc. Yes No

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

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, *you should raise in this motion all available grounds* (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

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

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

(j) Denial of right of appeal.

A. Ground one: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

B. Ground two: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

C. Ground three: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

D. Ground four: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

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

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes No

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

(a) At preliminary hearing _____

(b) At arraignment and plea _____

(c) At trial _____

(d) At sentencing _____

- (e) On appeal _____
- (f) In any post-conviction proceeding _____
- (g) On appeal from any adverse ruling in a post-conviction proceeding _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes No

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

Yes No

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

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

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

Yes No

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

Executed at _____

on _____, 19__.

~~Signature of Attorney (if any)~~ _____

Signature of Movant _____

Signature of Attorney (if any) _____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____

(date)

Signature of Movant _____

IN FORMA PAUPERIS AFFIDAVIT DECLARATION

[Insert appropriate court]

United States
v.

(Movant)

AFFIDAVIT DECLARATION IN SUPPORT
OF REQUEST
TO PROCEED
IN FORMA PAUPERIS

I, _____, being first duly sworn, depose and say declare that I am the movant in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

APPENDIX OF FORMS

1. Are you presently employed? Yes No
- a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.
- _____
- b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.
- _____
2. Have you received within the past twelve months any money from any of the following sources?
- a. Business, profession or form of self-employment? Yes No
- b. Rent payments, interest or dividends? Yes No
- c. Pensions, annuities or life insurance payments? Yes No
- d. Gifts or inheritances? Yes No
- e. Any other sources? Yes No
- If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.
- _____
- _____
3. Do you own any cash, or do you have money in a checking or savings account?
- Yes No (Include any funds in prison accounts)
- If the answer is "yes," state the total value of the items owned.
- _____
- _____
4. Do you own real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
- Yes No
- If the answer is "yes," describe the property and state its approximate value.
- _____
- _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. _____

~~I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.~~

(Movant's signature)

State ~~of~~ _____
County (City) of _____

~~(Name of Movant) being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.~~

Signature of Movant
(Required as to each
movant)

~~Subscribed and sworn to before me this _____ day of _____, 19__.~~

~~Notary Public or other
person authorized to
administer an oath~~

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____ (date)

Signature of Movant

CERTIFICATE

I hereby certify that the movant herein has the sum of \$ _____ on account to his credit at the _____ institution where he is confined.

I further certify that movant likewise has the following securities to his credit according to the records of said _____ institution: _____

Authorized Officer of
Institution

MODEL FORM FOR USE IN 28 U.S.C. § 2255
CASES INVOLVING A RULE 9 ISSUE

Form No. 9

United States District Court

_____ District of _____

Case No. _____

United States

v.

(Name of Movant)

*Movant's Response as to Why His Motion Should
Not be Barred Under Rule 9*

Explanation and Instructions—Read Carefully

(I) Rule 9. Delayed or Successive Motions.

(a) Delayed motions. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred. If the motion is filed more than five years after the judgment of conviction, there shall be a presumption, rebuttable by the movant, that there is prejudice to the government.

(b) Successive motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion is not excusable.

(II) Your motion to vacate, set aside, or correct sentence has been found to be subject to dismissal under rule 9() for the following reason(s): _____

(III) This form has been sent so that you may explain why your motion contains the defect(s) noted in (II) above. It is required that you fill out this form and send it back to the court within _____ days. Failure to do so will result in the automatic dismissal of your motion.

- (IV) When you have fully completed this form, the original and two copies must be mailed to the Clerk of the United States District Court whose address is _____
- (V) This response must be legibly handwritten or typewritten, and signed by the movant, and sworn to before a notary public or institutional officer authorized to administer an oath under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.
- (VI) Additional pages are not permitted except with respect to the facts which you rely upon in item 4 or 5 in the response. Any citation of authorities should be kept to an absolute minimum and is only appropriate if there has been a change in the law since the judgment you are attacking was rendered.
- (VII) Respond to 4 or 5, not to both, unless (II) above indicates that you must answer both sections.

RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your motion is attacking was entered?
Yes No
2. If you checked "yes" above, specify as precisely as you can the period(s) of time during which you received such assistance, up to and including the present. _____
3. Describe the nature of the assistance, including the names of those who rendered it to you. _____

4. If your motion is in jeopardy because of delay prejudicial to the government under rule 9(a), explain why you feel the delay has not been prejudicial and/or why the delay is excusable under the terms of 9(a). This should be done by relying upon FACTS, not your opinions or conclusions. _____

5. If your motion is in jeopardy under rule 9(b) because it asserts the same grounds as a previous motion, explain why you feel it deserves a reconsideration. If its fault under rule 9(b) is that it asserts new grounds which should have been included in a prior motion, explain why you are raising these grounds now rather than previously. Your explanation should rely on FACTS, not your opinions or conclusions.

State of _____
 County (City) of _____
 _____, being first duly sworn under oath, presents
 (Name of Movant)
 that he has read and subscribed to the above and states that the information therein is true and correct.

 Signature of Movant
 (Required as to each
 movant)

Subscribed and sworn to before me this _____ day of _____, 19__.

 Notary Public or other
 person authorized to
 administer an oath

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____
 (date)

 Signature of Movant