addition to the circuit justice, both a circuit and a district judge may issue a certificate of appealability. The language of section 2253 is ambiguous; it states that a certificate of appealability may be issued by ''a circuit justice or judge.'' Since the enactment of the Anti-Terrorism and Effective Death Penalty Act, three circuits have held that both district and circuit judges, as well as the circuit justice, may issue a certificate of appealability. *Else v. Johnson*, 104 F.3d 82 (5th Cir. 1997); *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063 (6th Cir. 1997); and *Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996). The approach taken by the rule is consistent with those decisions.

Subdivision (b), paragraph (3). The Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, amended 28 U.S.C. §2253 to make it applicable to §2255 proceedings. Accordingly, paragraph (3) is amended to provide that when the United States or its representative appeals, a certificate of appealability is not required.

COMMITTEE NOTES ON RULES—2009 AMENDMENT

Subdivision (b)(1). The requirement that the district judge who rendered the judgment either issue a certificate of appealability or state why a certificate should not issue has been deleted from subdivision (b)(1). Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §2254 or §2255 now delineates the relevant requirement. When an applicant has filed a notice of appeal, the district clerk must transmit the record to the court of appeals; if the district judge has issued a certificate of appealability, the district clerk must include in this transmission the certificate and the statement of reasons for grant of the certificate.

Changes Made After Publication and Comment. The Appellate Rules Committee approved the proposed amendment to Appellate Rule 22(b) with the style changes (described below) [omitted] which were suggested by Professor Kimble. As detailed in the report of the Criminal Rules Committee, a number of changes were made to the proposals concerning Rule 11 of the habeas and Section 2255 rules in response to public comment.

At the Standing Committee's direction, the language proposed for Appellate Rule 22(b) was circulated to the circuit clerks for their comment. Pursuant to comments received from the circuit clerks, the second sentence of Rule 22(b) was revised to make clear that the Rule requires the transmission of the record by the district court when an appeal is filed, regardless of whether the certificate of appealability was granted or denied by the district judge; a conforming change was made to the last sentence of the Committee Note.

AMENDMENT BY PUBLIC LAW

1996—Pub. L. 104–132 inserted ''and section 2255'' after ''corpus'' in catchline and amended text generally. Prior to amendment, text read as follows:

''(a) *Application for the original writ.*—An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

''(b) *Necessity of certificate of probable cause for appeal.*—In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.''

Rule 23. Custody or Release of a Prisoner in a Habeas Corpus Proceeding

(a) TRANSFER OF CUSTODY PENDING REVIEW. Pending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United States for the release of a prisoner, the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule. When, upon application, a custodian shows the need for a transfer, the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party.

(b) DETENTION OR RELEASE PENDING REVIEW OF DECISION NOT TO RELEASE. While a decision not to release a prisoner is under review, the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court, may order that the prisoner be:

(1) detained in the custody from which release is sought;

(2) detained in other appropriate custody; or

(3) released on personal recognizance, with or without surety.

(c) RELEASE PENDING REVIEW OF DECISION ORDERING RELEASE. While a decision ordering the release of a prisoner is under review, the prisoner must—unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise—be released on personal recognizance, with or without surety.

(d) MODIFICATION OF THE INITIAL ORDER ON CUSTODY. An initial order governing the prisoner's custody or release, including any recognizance or surety, continues in effect pending review unless for special reasons shown to the court of appeals or the Supreme Court, or to a judge or justice of either court, the order is modified or an independent order regarding custody, release, or surety is issued.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

The rule is the same as Supreme Court Rule 49, as amended on June 12, 1967, effective October 2, 1967.

NOTES OF ADVISORY COMMITTEE ON RULES—1986 AMENDMENT

The amendments to Rules 23(b) and (c) are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style

and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only.

Subdivison (d). The current rule states that the initial order governing custody or release ''shall govern review'' in the court of appeals. The amended language says that the initial order generally ''continues in effect'' pending review.

When Rule 23 was adopted it used the same language as Supreme Court Rule 49, which then governed custody of prisoners in habeas corpus proceedings. The ''shall govern review'' language was drawn from the Supreme Court Rule. The Supreme Court has since amended its rule, now Rule 36, to say that the initial order ''shall continue in effect'' unless for reasons shown it is modified or a new order is entered. Rule 23 is amended to similarly state that the initial order ''continues in effect.'' The new language is clearer. It removes the possible implication that the initial order created law of the case, a strange notion to attach to an order regarding custody or release.

Rule 24. Proceeding in Forma Pauperis

(a) LEAVE TO PROCEED IN FORMA PAUPERIS.

(1) *Motion in the District Court.* Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) *Action on the Motion.* If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) *Prior Approval.* A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court—before or after the notice of appeal is filed—certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

(4) *Notice of District Court's Denial.* The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal in forma pauperis;

(B) certifies that the appeal is not taken in good faith; or

(C) finds that the party is not otherwise entitled to proceed in forma pauperis.

(5) *Motion in the Court of Appeals.* A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).

(b) LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL OR REVIEW OF AN ADMINISTRATIVE-AGENCY PROCEEDING. When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court) proceeds directly in a court of appeals, a party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1).

(c) LEAVE TO USE ORIGINAL RECORD. A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivision (a). Authority to allow prosecution of an appeal in forma pauperis is vested in ''[a]ny court of the United States'' by 28 U.S.C. §1915(a). The second paragraph of section 1915(a) seems to contemplate initial application to the district court for permission to proceed in forma pauperis, and although the circuit rules are generally silent on the question, the case law requires initial application to the district court. *Hayes v. United States*, 258 F.2d 400 (5th Cir., 1958), *cert. den.* 358 U.S. 856, 79 S.Ct. 87, 3 L.Ed.2d 89 (1958); *Elkins v. United States*, 250 F.2d 145 (9th Cir., 1957) see 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960); *United States v. Farley*, 238 F.2d 575 (2d Cir., 1956) see 354 U.S. 521, 77 S.Ct. 1371, 1 L.Ed.2d 1529 (1957). D.C. Cir. Rule 41(a) requires initial application to the district court. The content of the affidavit follows the language of the statute; the requirement of a statement of the issues comprehends the statutory requirement of a statement of ''the nature of the . . . appeal. . . .'' The second sentence is in accord with the decision in *McGann v. United States*, 362 U.S. 309, 80 S.Ct. 725, 4 L.Ed.2d 734 (1960). The requirement contained in the third sentence has no counterpart in present circuit rules, but it has been imposed by decision in at least two circuits. *Ragan v. Cox*, 305 F.2d 58 (10th Cir., 1962); *United States ex rel. Breedlove v. Dowd*, 269 F.2d 693 (7th Cir., 1959).

The second paragraph permits one whose indigency has been previously determined by the district court to proceed on appeal in forma pauperis without the necessity of a redetermination of indigency, while reserving to the district court its statutory authority to certify that the appeal is not taken in good faith, 28 U.S.C. §1915(a), and permitting an inquiry into whether the circumstances of the party who was originally entitled to proceed in forma pauperis have changed during the course of the litigation. Cf. Sixth Circuit Rule 26.

The final paragraph establishes a subsequent motion in the court of appeals, rather than an appeal from the order of denial or from the certification of lack of good faith, as the proper procedure for calling in question the correctness of the action of the district court. The simple and expeditious motion procedure seems clearly preferable to an appeal. This paragraph applies only to applications for leave to appeal in forma pauperis. The order of a district court refusing leave to initiate an action in the district court in forma pauperis is reviewable on appeal. See *Roberts v. United States District Court*, 339 U.S. 844, 70 S.Ct. 954, 94 L.Ed. 1326 (1950).

Subdivision (b). Authority to allow prosecution in forma pauperis is vested only in a ''court of the United States'' (see Note to subdivision (a), above). Thus in proceedings brought directly in a court of appeals to re-