Subdivision (b). The amendment provides that even if relief is requested of a particular judge, although the judge may request permission to respond, the judge may not do so unless the court invites or orders a response.

The court of appeals ordinarily will be adequately informed not only by the opinions or statements made by the trial court judge contemporaneously with the entry of the challenged order but also by the arguments made on behalf of the party opposing the relief. The latter does not create an attorney-client relationship between the party's attorney and the judge whose action is challenged, nor does it give rise to any right to compensation from the judge.

If the court of appeals desires to hear from the trial court judge, however, the court may invite or order the judge to respond. In some instances, especially those involving court administration or the failure of a judge to act, it may be that no one other than the judge can provide a thorough explanation of the matters at issue. Because it is ordinarily undesirable to place the trial court judge, even temporarily, in an adversarial posture with a litigant, the rule permits a court of appeals to invite an *amicus curiae* to provide a response to the petition. In those instances in which the respondent does not oppose issuance of the writ or does not have sufficient perspective on the issue to provide an adequate response, participation of an *amicus* may avoid the need for the trial judge to participate.

Subdivision (c). The changes are stylistic only. No substantive changes are 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.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Subdivision (d). A petition for a writ of mandamus or prohibition, an application for another extraordinary writ, and an answer to such a petition or application are all ''other papers'' for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers, except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate Procedure, Rule 21(d) was inadvertently changed to suggest that only the requirements of Rule 32(a)(1) apply to such papers. Rule 21(d) has been amended to correct that error.

Rule 21(d) has been further amended to limit the length of papers filed under Rule 21.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note, except that the page limit was increased from 20 pages to 30 pages. The Committee was persuaded by some commentators that petitions for extraordinary writs closely resemble principal briefs on the merits and should be allotted more than 20 pages.

TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

Rule 22. Habeas Corpus and Section 2255 Proceedings

(a) APPLICATION FOR THE ORIGINAL WRIT. An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. §2253, appeal to the court of appeals from the district court's order denying the application.

(b) CERTIFICATE OF APPEALABILITY.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. §2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. §2254 or §2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

(As amended Pub. L. 104–132, title I, §103, Apr. 24, 1996, 110 Stat. 1218; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 26, 2009, eff. Dec. 1, 2009.)

NOTES OF ADVISORY COMMITTEE ON RULES—1967

Subdivision (a). Title 28 U.S.C. §2241(a) authorizes circuit judges to issue the writ of habeas corpus. Section 2241(b), however, authorizes a circuit judge to decline to entertain an application and to transfer it to the appropriate district court, and this is the usual practice. The first two sentences merely make present practice explicit. Title 28 U.S.C. §2253 seems clearly to contemplate that once an application is presented to a district judge and is denied by him, the remedy is an appeal from the order of denial. But the language of 28 U.S.C. §2241 seems to authorize a second original application to a circuit judge following a denial by a district judge. *In re Gersing*, 79 U.S.App.D.C. 245, 145 F.2d 481 (D.C. Cir., 1944) and *Chapman v. Teets*, 241 F.2d 186 (9th Cir., 1957) acknowledge the availability of such a procedure. But the procedure is ordinarily a waste of time for all involved, and the final sentence attempts to discourage it.

A court of appeals has no jurisdiction as a court to grant an original writ of habeas corpus, and courts of appeals have dismissed applications addressed to them. *Loum v. Alvis*, 263 F.2d 836 (6th Cir., 1959); *In re Berry*, 221 F.2d 798 (9th Cir., 1955); *Posey v. Dowd*, 134 F.2d 613 (7th Cir., 1943). The fairer and more expeditious practice is for the court of appeals to regard an application addressed to it as being addressed to one of its members, and to transfer the application to the appropriate district court in accordance with the provisions of this rule. Perhaps such a disposition is required by the rationale of *In re Burwell*, 350 U.S. 521, 76 S.Ct. 539, 100 L.Ed. 666 (1956).

Subdivision (b). Title 28 U.S.C. §2253 provides that an appeal may not be taken in a habeas corpus proceeding where confinement is under a judgment of a state court unless the judge who rendered the order in the habeas corpus proceeding, or a circuit justice or judge, issues a certificate of probable cause. In the interest of insuring that the matter of the certificate will not be overlooked and that, if the certificate is denied, the reasons for denial in the first instance will be available on any subsequent application, the proposed rule requires the district judge to issue the certificate or to state reasons for its denial.

While 28 U.S.C. §2253 does not authorize the court of appeals as a court to grant a certificate of probable cause, *In re Burwell*, 350 U.S. 521, 76 S.Ct. 539, 100 L.Ed. 666 (1956) makes it clear that a court of appeals may not decline to consider a request for the certificate addressed to it as a court but must regard the request as made to the judges thereof. The fourth sentence incorporates the Burwell rule.

Although 28 U.S.C. §2253 appears to require a certificate of probable cause even when an appeal is taken by a state or its representative, the legislative history strongly suggests that the intention of Congress was to require a certificate only in the case in which an appeal is taken by an applicant for the writ. See *United States ex rel. Tillery v. Cavell*, 294 F.2d 12 (3d Cir., 1960). Four of the five circuits which have ruled on the point have so interpreted section 2253. *United States ex rel. Tillery v. Cavell*, supra; *Buder v. Bell*, 306 F.2d 71 (6th Cir., 1962); *United States ex rel. Calhoun v. Pate*, 341 F.2d 885 (7th Cir., 1965); *State of Texas v. Graves*, 352 F.2d 514 (5th Cir., 1965). Cf. *United States ex rel. Carrol v. LaVallee*, 342 F.2d 641 (2d Cir., 1965). The final sentence makes it clear that a certificate of probable cause is not required of a state or its representative.

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; in this rule, however, substantive changes are made in paragraphs (b)(1) and (b)(3).

Subdivision (b), paragraph (1). Two substantive changes are made in this paragraph. First, the paragraph is made applicable to 28 U.S.C. §2255 proceedings. This brings the rule into conformity with 28 U.S.C. §2253 as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132. Second, the rule states that a certificate of appealability may be issued by ''a circuit justice or a circuit or district judge.'' That language adds a reference to the circuit justice which also brings the rule into conformity with section 2253. The language continues to state that in 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: