−CITE−

28 USC CHAPTER 153 − HABEAS CORPUS 01/06/03

−EXPCITE−

TITLE 28 − JUDICIARY AND JUDICIAL PROCEDURE

PART VI − PARTICULAR PROCEEDINGS

CHAPTER 153 − HABEAS CORPUS

−HEAD−

CHAPTER 153 − HABEAS CORPUS

−MISC1−

Sec.

2254. State custody; remedies in Federal courts.

2255. Federal custody; remedies on motion attacking

sentence.

[2256. Omitted.]

SENATE REVISION AMENDMENT

Chapter catchline was changed by Senate amendment. See 80th

Congress Senate Report No. 1559.

AMENDMENTS

1978 − Pub. L. 95−598, title II, Sec. 250(b), Nov. 6, 1978, 92

Stat. 2672, directed the addition of item 2256 "Habeas corpus from

bankruptcy courts", which amendment did not become effective

pursuant to section 402(b) of Pub. L. 95−598, as amended, set out

as an Effective Date note preceding section 101 of Title 11,

Bankruptcy.

1966 − Pub. L. 89−711, Sec. 3, Nov. 2, 1966, 80 Stat. 1106,

substituted "Federal courts" for "State Courts" in item 2254.

−SECREF−

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 1657 of this title.

−End−

−CITE−

28 USC Sec. 2241 01/06/03

−EXPCITE−

TITLE 28 − JUDICIARY AND JUDICIAL PROCEDURE

PART VI − PARTICULAR PROCEEDINGS

CHAPTER 153 − HABEAS CORPUS

−HEAD−

Sec. 2241. Power to grant writ

−STATUTE−

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless −

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any

foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

−SOURCE−

(June 25, 1948, ch. 646, 62 Stat. 964; May 24, 1949, ch. 139, Sec. 112, 63 Stat. 105; Pub. L. 89−590, Sept. 19, 1966, 80 Stat. 811.)

−MISC1−

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., Secs. 451, 452, 453 (R.S. Secs. 751, 752, 753; Mar. 3, 1911, ch. 231, Sec. 291, 36 Stat. 1167; Feb. 13, 1925, ch. 229, Sec. 6, 43 Stat. 940).

Section consolidates sections 451, 452 and 453 of title 28,

U.S.C., 1940 ed., with changes in phraseology necessary to effect the consolidation.

Words "for the purpose of an inquiry into the cause of restraint of liberty" in section 452 of title 28, U.S.C., 1940 ed., were omitted as merely descriptive of the writ.

Subsection (b) was added to give statutory sanction to orderly and appropriate procedure. A circuit judge who unnecessarily entertains applications which should be addressed to the district court, thereby disqualifies himself to hear such matters on appeal and to that extent limits his usefulness as a judge of the court of appeals. The Supreme Court and Supreme Court Justices should not be burdened with applications for writs cognizable in the district courts.

1949 ACT

This section inserts commas in certain parts of the text of subsection (b) of section 2241 of title 28, U.S.C., for the purpose of proper punctuation.

AMENDMENTS

1966 − Subsec. (d). Pub. L. 89−590 added subsec. (d).

1949 − Subsec. (b). Act May 24, 1949, inserted commas after "Supreme Court" and "any justice thereof".

−SECREF−

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 8 section 1226a; title 18 section 3006A.

−End−

−CITE−

28 USC Sec. 2242 01/06/03

−EXPCITE−

TITLE 28 − JUDICIARY AND JUDICIAL PROCEDURE

PART VI − PARTICULAR PROCEEDINGS

CHAPTER 153 − HABEAS CORPUS

−HEAD−

Sec. 2242. Application

−STATUTE−

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

−SOURCE−

(June 25, 1948, ch. 646, 62 Stat. 965.)

−MISC1−

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., Sec. 454 (R.S. Sec. 754).

Words "or by someone acting in his behalf" were added. This

follows the actual practice of the courts, as set forth in United States ex rel. Funaro v. Watchorn, C.C. 1908, 164 F. 152; Collins v. Traeger, C.C.A. 1928, 27 F.2d 842, and cases cited.

The third paragraph is new. It was added to conform to existing practice as approved by judicial decisions. See Dorsey v. Gill (App.D.C.) 148 F.2d 857, 865, 866. See also Holiday v. Johnston, 61 S.Ct. 1015, 313 U.S. 342, 85 L.Ed. 1392.

Changes were made in phraseology.

−End−

−CITE−

28 USC Sec. 2243 01/06/03

−EXPCITE−

TITLE 28 − JUDICIARY AND JUDICIAL PROCEDURE

PART VI − PARTICULAR PROCEEDINGS

CHAPTER 153 − HABEAS CORPUS

−HEAD−

Sec. 2243. Issuance of writ; return; hearing; decision

−STATUTE−

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding

twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

−SOURCE−

(June 25, 1948, ch. 646, 62 Stat. 965.)

−MISC1−

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., Secs. 455, 456, 457, 458, 459, 460, and 461 (R.S. Secs. 755−761).

Section consolidates sections 455−461 of title 28, U.S.C., 1940 ed.

The requirement for return within 3 days "unless for good cause additional time, not exceeding 20 days is allowed" in the second

paragraph, was substituted for the provision of such section 455 which allowed 3 days for return if within 20 miles, 10 days if more than 20 but not more than 100 miles, and 20 days if more than 100 miles distant.

Words "unless for good cause additional time is allowed" in the fourth paragraph, were substituted for words "unless the party petitioning requests a longer time" in section 459 of title 28, U.S.C., 1940 ed.

The fifth paragraph providing for production of the body of the detained person at the hearing is in conformity with Walker v. Johnston, 1941, 61 S.Ct. 574, 312 U.S. 275, 85 L.Ed. 830.

Changes were made in phraseology.

−End−

−CITE−

28 USC Sec. 2244 01/06/03

−EXPCITE−

TITLE 28 − JUDICIARY AND JUDICIAL PROCEDURE

PART VI − PARTICULAR PROCEEDINGS

CHAPTER 153 − HABEAS CORPUS

−HEAD−

Sec. 2244. Finality of determination

−STATUTE−

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has

been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless −

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three−judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the

proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1−year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of −

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post−conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

−SOURCE−

(June 25, 1948, ch. 646, 62 Stat. 965; Pub. L. 89−711, Sec. 1, Nov. 2, 1966, 80 Stat. 1104; Pub. L. 104−132, title I, Secs. 101, 106, Apr. 24, 1996, 110 Stat. 1217, 1220.)

−MISC1−

HISTORICAL AND REVISION NOTES

This section makes no material change in existing practice. Notwithstanding the opportunity open to litigants to abuse the writ, the courts have consistently refused to entertain successive "nuisance" applications for habeas corpus. It is derived from H.R. 4232 introduced in the first session of the Seventy−ninth Congress by Chairman Hatton Sumners of the Committee on the Judiciary and referred to that Committee.

The practice of suing out successive, repetitious, and unfounded writs of habeas corpus imposes an unnecessary burden on the courts. See Dorsey v. Gill, 1945, 148 F.2d 857, 862, in which Miller, J., notes that "petitions for the writ are used not only as they should be to protect unfortunate persons against miscarriages of justice, but also as a device for harassing court, custodial, and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1, 1939, and April 1944 presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions; a third, 24; a fourth, 22; a fifth, 20. One hundred nineteen persons have presented 597 petitions − an average of 5."

SENATE REVISION AMENDMENTS

Section amended to modify original language which denied Federal judges power to entertain application for writ where legality of detention had been determined on prior application and later application presented no new grounds, and to omit reference to rehearing in section catch line and original provision authorizing hearing judge to grant rehearing. 80th Congress, Senate Report No. 1559, Amendment No. 45.

AMENDMENTS

1996 − Subsec. (a). Pub. L. 104−132, Sec. 106(a), substituted ", except as provided in section 2255." for "and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry."

Subsec. (b). Pub. L. 104−132, Sec. 106(b), amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: "When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the

hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ."

Subsec. (d). Pub. L. 104−132, Sec. 101, added subsec. (d).

1966 − Pub. L. 89−711 designated existing provisions as subsec. (a), struck out provision making the subsection's terms applicable to applications seeking inquiry into detention of persons detained pursuant to judgments of State courts, and added subsecs. (b) and (c).

−SECREF−

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2255, 2262, 2266 of this title.

−End−

−CITE−

28 USC Sec. 2245 01/06/03

−EXPCITE−

TITLE 28 − JUDICIARY AND JUDICIAL PROCEDURE

PART VI − PARTICULAR PROCEEDINGS

CHAPTER 153 − HABEAS CORPUS

−HEAD−

Sec. 2245. Certificate of trial judge admissible in evidence

−STATUTE−

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to

a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

−SOURCE−

(June 25, 1948, ch. 646, 62 Stat. 966.)

−MISC1−

HISTORICAL AND REVISION NOTES

This section makes no substantive change in existing law. It is derived from H.R. 4232 introduced in the first session of the Seventy−ninth Congress by Chairman Sumners of the House Committee on the Judiciary. It clarifies existing law and promotes uniform procedure.

−End−

−CITE−

28 USC Sec. 2246 01/06/03

−EXPCITE−

TITLE 28 − JUDICIARY AND JUDICIAL PROCEDURE

PART VI − PARTICULAR PROCEEDINGS

CHAPTER 153 − HABEAS CORPUS

−HEAD−

Sec. 2246. Evidence; depositions; affidavits

−STATUTE−

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by

affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

−SOURCE−

(June 25, 1948, ch. 646, 62 Stat. 966.)

−MISC1−

HISTORICAL AND REVISION NOTES

This section is derived from H.R. 4232 introduced in the first session of the Seventy−ninth Congress by Chairman Sumners of the House Committee on the Judiciary. It clarifies existing practice without substantial change.

−End−

−CITE−

28 USC Sec. 2247 01/06/03

−EXPCITE−

TITLE 28 − JUDICIARY AND JUDICIAL PROCEDURE

PART VI − PARTICULAR PROCEEDINGS

CHAPTER 153 − HABEAS CORPUS

−HEAD−

Sec. 2247. Documentary evidence

−STATUTE−

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

−SOURCE−

(June 25, 1948, ch. 646, 62 Stat. 966.)

−MISC1−

HISTORICAL AND REVISION NOTES

Derived from H.R. 4232, Seventy−ninth Congress, first session. It is declaratory of existing law and practice.

−End−

−CITE−

28 USC Sec. 2248 01/06/03

−EXPCITE−

TITLE 28 − JUDICIARY AND JUDICIAL PROCEDURE

PART VI − PARTICULAR PROCEEDINGS

CHAPTER 153 − HABEAS CORPUS

−HEAD−

Sec. 2248. Return or answer; conclusiveness

−STATUTE−

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

−SOURCE−

(June 25, 1948, ch. 646, 62 Stat. 966.)

−MISC1−

HISTORICAL AND REVISION NOTES

Derived from H.R. 4232, Seventy−ninth Congress, first session. At common law the return was conclusive and could not be controverted

but it is now almost universally held that the return is not conclusive of the facts alleged therein. 39 C.J.S. pp. 664−666, Secs. 98, 99.

−End−

−CITE−

28 USC Sec. 2249 01/06/03

−EXPCITE−

TITLE 28 − JUDICIARY AND JUDICIAL PROCEDURE

PART VI − PARTICULAR PROCEEDINGS

CHAPTER 153 − HABEAS CORPUS

−HEAD−

Sec. 2249. Certified copies of indictment, plea and judgment; duty of respondent

−STATUTE−

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

−SOURCE−

(June 25, 1948, ch. 646, 62 Stat. 966.)

−MISC1−

HISTORICAL AND REVISION NOTES

Derived from H.R. 4232, Seventy−ninth Congress, first session. It conforms to the prevailing practice in habeas corpus proceedings.

−End−

−CITE−

28 USC Sec. 2250 01/06/03

−EXPCITE−

TITLE 28 − JUDICIARY AND JUDICIAL PROCEDURE

PART VI − PARTICULAR PROCEEDINGS

CHAPTER 153 − HABEAS CORPUS

−HEAD−

Sec. 2250. Indigent petitioner entitled to documents without cost

−STATUTE−

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

−SOURCE−

(June 25, 1948, ch. 646, 62 Stat. 966.)

−MISC1−

HISTORICAL AND REVISION NOTES

Derived from H.R. 4232, Seventy−ninth Congress, first session. It conforms to the prevailing practice.

−End−

−CITE−

28 USC Sec. 2251 01/06/03

−EXPCITE−

TITLE 28 − JUDICIARY AND JUDICIAL PROCEDURE

PART VI − PARTICULAR PROCEEDINGS

CHAPTER 153 − HABEAS CORPUS

−HEAD−

Sec. 2251. Stay of State court proceedings

−STATUTE−

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

−SOURCE−

(June 25, 1948, ch. 646, 62 Stat. 966.)

−MISC1−

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., Sec. 465 (R.S. Sec. 766; Mar. 3, 1893, ch. 226, 27 Stat. 751; Feb. 13, 1925, ch. 229, Sec. 8(c), 43 Stat. 940; June 19, 1934, ch. 673, 48 Stat. 1177).

Provisions relating to proceedings pending in 1934 were deleted as obsolete.

A provision requiring an appeal to be taken within 3 months was omitted as covered by sections 2101 and 2107 of this title.

Changes were made in phraseology.

−End−

−CITE−

28 USC Sec. 2252 01/06/03

−EXPCITE−

TITLE 28 − JUDICIARY AND JUDICIAL PROCEDURE

PART VI − PARTICULAR PROCEEDINGS

CHAPTER 153 − HABEAS CORPUS

−HEAD−

Sec. 2252. Notice

−STATUTE−

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.

−SOURCE−

(June 25, 1948, ch. 646, 62 Stat. 967.)

−MISC1−

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., Sec. 462 (R.S. Sec. 762).

Section 462 of title 28, U.S.C., 1940 ed., was limited to alien

prisoners described in section 453 of title 28, U.S.C., 1940 ed.

The revised section extends to all cases of all prisoners under State custody or authority, leaving it to the justice or judge to prescribe the notice to State officers, to specify the officer served, and to satisfy himself that such notice has been given.

Provision for making due proof of such service was omitted as unnecessary. The sheriff's or marshal's return is sufficient.

Changes were made in phraseology.

−End−

−CITE−

28 USC Sec. 2253 01/06/03

−EXPCITE−

TITLE 28 − JUDICIARY AND JUDICIAL PROCEDURE

PART VI − PARTICULAR PROCEEDINGS

CHAPTER 153 − HABEAS CORPUS

−HEAD−

Sec. 2253. Appeal

−STATUTE−

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity

of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from −

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

−SOURCE−

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, Sec. 113, 63 Stat. 105; Oct. 31, 1951, ch. 655, Sec. 52, 65 Stat. 727; Pub. L. 104−132, title I, Sec. 102, Apr. 24, 1996, 110 Stat. 1217.)

−MISC1−

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., Secs. 463(a) and 466 (Mar. 10, 1908, ch. 76, 36 Stat. 40; Feb. 13, 1925, ch. 229, Secs. 6, 13, 43 Stat. 940, 942; June 29, 1938, ch. 806, 52 Stat. 1232).

This section consolidates paragraph (a) of section 463, and section 466 of title 28, U.S.C., 1940 ed.

The last two sentences of section 463(a) of title 28, U.S.C., 1940 ed., were omitted. They were repeated in section 452 of title 28, U.S.C., 1940 ed. (See reviser's note under section 2241 of this title.)

Changes were made in phraseology.

1949 ACT

This section corrects a typographical error in the second paragraph of section 2253 of title 28.

AMENDMENTS

1996 − Pub. L. 104−132 reenacted section catchline without change and amended text generally. Prior to amendment, text read as follows:

"In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

1951 − Act Oct. 31, 1951, substituted "to remove, to another

district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his" for "of removal issued pursuant to section 3042 of Title 18 or the" in second par.

1949 − Act May 24, 1949, substituted "3042" for "3041" in second par.

−SECREF−

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 8 section 1226a.

−End−

−CITE−

28 USC Sec. 2254 01/06/03

−EXPCITE−

TITLE 28 − JUDICIARY AND JUDICIAL PROCEDURE

PART VI − PARTICULAR PROCEEDINGS

CHAPTER 153 − HABEAS CORPUS

−HEAD−

Sec. 2254. State custody; remedies in Federal courts

−STATUTE−

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall

not be granted unless it appears that −

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim −

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that −

(A) the claim relies on −

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a

determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post−conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

−SOURCE−

(June 25, 1948, ch. 646, 62 Stat. 967; Pub. L. 89−711, Sec. 2, Nov.

2, 1966, 80 Stat. 1105; Pub. L. 104−132, title I, Sec. 104, Apr. 24, 1996, 110 Stat. 1218.)

−MISC1−

HISTORICAL AND REVISION NOTES

This new section is declaratory of existing law as affirmed by the Supreme Court. (See Ex parte Hawk, 1944, 64 S. Ct. 448, 321, U.S. 114, 88L. Ed. 572.)

SENATE REVISION AMENDMENTS

Senate amendment to this section, Senate Report No. 1559, amendment No. 47, has three declared purposes, set forth as follows:

"The first is to eliminate from the prohibition of the section applications in behalf of prisoners in custody under authority of a State officer but whose custody has not been directed by the judgment of a State court. If the section were applied to applications by persons detained solely under authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty.

"The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that the State court has denied a prisoner a 'fair adjudication of the legality of his detention under the Constitution and laws of the United States.' The Judicial Conference believes that this would be an undesirable ground for Federal jurisdiction in addition to exhaustion of State remedies or

lack of adequate remedy in the State courts because it would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies or if he had no adequate State remedy.

"The third purpose is to substitute detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not sufficiently specific and precise, and its meaning should, therefore, be spelled out in more detail in the section as is done by the amendment."

−REFTEXT−

REFERENCES IN TEXT

Section 408 of the Controlled Substances Act, referred to in subsec. (h), is classified to section 848 of Title 21, Food and Drugs.

−MISC2−

AMENDMENTS

1996 − Subsec. (b). Pub. L. 104−132, Sec. 104(1), amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to

protect the rights of the prisoner."

Subsec. (d). Pub. L. 104−132, Sec. 104(3), added subsec. (d).

Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 104−132, Sec. 104(4), amended subsec. (e) generally, substituting present provisions for provisions which stated that presumption of correctness existed unless applicant were to establish or it otherwise appeared or respondent were to admit that any of several enumerated factors applied to invalidate State determination or else that factual determination by State court was clearly erroneous.

Pub. L. 104−132, Sec. 104(2), redesignated subsec. (d) as (e).

Former subsec. (e) redesignated (f).

Subsecs. (f), (g). Pub. L. 104−132, Sec. 104(2), redesignated subsecs. (e) and (f) as (f) and (g), respectively.

Subsecs. (h), (i). Pub. L. 104−132, Sec. 104(5), added subsecs. (h) and (i).

1966 − Pub. L. 89−711 substituted "Federal courts" for "State Courts" in section catchline, added subsec. (a), designated existing paragraphs as subsecs. (b) and (c), and added subsecs. (d) to (f).

−SECREF−

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2244, 2261, 2262, 2263, 2264, 2266 of this title; title 18 section 3006A; title 21 section 848.

−MISC3−

APPROVAL AND EFFECTIVE DATE OF RULES GOVERNING SECTION 2254 CASES AND SECTION 2255 PROCEEDINGS FOR UNITED STATES DISTRICT COURTS

Pub. L. 94−426, Sec. 1, Sept. 28, 1976, 90 Stat. 1334, provided:

"That the rules governing section 2254 cases in the United States district courts and the rules governing section 2255 proceedings for the United States district courts, as proposed by the United States Supreme Court, which were delayed by the Act entitled 'An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court' (Public Law 94−349), are approved with the amendments set forth in section 2 of this Act and shall take effect as so amended, with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code filed on or after February 1, 1977."

POSTPONEMENT OF EFFECTIVE DATE OF PROPOSED RULES GOVERNING PROCEEDINGS UNDER SECTIONS 2254 AND 2255 OF THIS TITLE

Rules and forms governing proceedings under sections 2254 and 2255 of this title proposed by Supreme Court order of Apr. 26, 1976, effective 30 days after adjournment sine die of 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier, see section 2 of Pub. L. 94−349, set out as a note under section 2074 of this title.

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

(EFFECTIVE FEBRUARY 1, 1977, AS AMENDED TO JANUARY 22, 2002)

Rule

EFFECTIVE DATE OF RULES; EFFECTIVE DATE OF 1975 AMENDMENT

Rules governing Section 2254 cases, and the amendments thereto by

Pub. L. 94−426, Sept. 28, 1976, 90 Stat. 1334, effective with

respect to petitions under section 2254 of this title and motions

under section 2255 of this title filed on or after Feb. 1, 1977,

see section 1 of Pub. L. 94−426, set out as a note above.

RULE 1. SCOPE OF RULES

(a) Applicable to cases involving custody pursuant to a judgment

of a state court. These rules govern the procedure in the United States district courts on applications under 28 U.S.C. Sec. 2254:

(1) by a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States; and

(2) by a person in custody pursuant to a judgment of either a state or a federal court, who makes application for a determination that custody to which he may be subject in the future under a judgment of a state court will be in violation of the Constitution, laws, or treaties of the United States.

(b) Other situations. In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court.

ADVISORY COMMITTEE NOTE

Rule 1 provides that the habeas corpus rules are applicable to petitions by persons in custody pursuant to a judgment of a state court. See Preiser v. Rodriguez, 411 U.S. 475, 484 (1973). Whether the rules ought to apply to other situations (e.g., person in active military service, Glazier v. Hackel, 440 F.2d 592 (9th Cir. 1971); or a reservist called to active duty but not reported, Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968)) is left to the discretion of the court.

The basic scope of habeas corpus is prescribed by statute. 28 U.S.C. Sec. 2241(c) provides that the "writ of habeas corpus shall not extend to a prisoner unless * * * (h)e is in custody in violation of the Constitution." 28 U.S.C. Sec. 2254 deals

specifically with state custody, providing that habeas corpus shall apply only "in behalf of a person in custody pursuant to a judgment of a state court * * *."

In Preiser v. Rodriguez, supra, the court said: "It is clear . . . that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." 411 U.S. at 484.

Initially the Supreme Court held that habeas corpus was appropriate only in those situations in which petitioner's claim would, if upheld, result in an immediate release from a present custody. McNally v. Hill, 293 U.S. 131 (1934). This was changed in Peyton v. Rowe, 391 U.S. 54 (1968), in which the court held that habeas corpus was a proper way to attack a consecutive sentence to be served in the future, expressing the view that consecutive sentences resulted in present custody under both judgments, not merely the one imposing the first sentence. This view was expanded in Carafas v. LaVallee, 391 U.S. 234 (1968), to recognize the propriety of habeas corpus in a case in which petitioner was in custody when the petition had been originally filed but had since been unconditionally released from custody.

See also Preiser v. Rodriguez, 411 U.S. at 486 et seq.

Since Carafas, custody has been construed more liberally by the courts so as to make a Sec. 2255 motion or habeas corpus petition proper in more situations. "In custody" now includes a person who is: on parole, Jones v. Cunningham, 371 U.S. 236 (1963); at large

on his own recognizance but subject to several conditions pending execution of his sentence, Hensley v. Municipal Court, 411 U.S. 345 (1973); or released on bail after conviction pending final disposition of his case, Lefkowitz v. Newsome, 95 S.Ct. 886 (1975). See also United States v. Re, 372 F.2d 641 (2d Cir.), cert. denied, 388 U.S. 912 (1967) (on probation); Walker v. North Carolina, 262 F.Supp. 102 (W.D.N.C. 1966), aff'd per curiam, 372 F.2d 129 (4th Cir.), cert. denied, 388 U.S. 917 (1967) (recipient of a conditionally suspended sentence); Burris v. Ryan, 397 F.2d 553 (7th Cir. 1968); Marden v. Purdy, 409 F.2d 784 (5th Cir. 1969) (free on bail); United States ex rel. Smith v. Dibella, 314 F.Supp. 446 (D.Conn. 1970) (release on own recognizance); Choung v. California, 320 F.Supp. 625 (E.D.Cal. 1970) (federal stay of state court sentence); United States ex rel. Meadows v. New York, 426 F.2d 1176 (2d Cir. 1970), cert. denied, 401 U.S. 941 (1971) (subject to parole detainer warrant); Capler v. City of Greenville, 422 F.2d 299 (5th Cir. 1970) (released on appeal bond); Glover v. North Carolina, 301 F.Supp. 364 (E.D.N.C. 1969) (sentence served, but as convicted felon disqualified from engaging in several activities).

The courts are not unanimous in dealing with the above situations, and the boundaries of custody remain somewhat unclear. In Morgan v. Thomas, 321 F.Supp. 565 (S.D.Miss. 1970), the court noted:

It is axiomatic that actual physical custody or restraint is not required to confer habeas jurisdiction. Rather, the term is

synonymous with restraint of liberty. The real question is how much restraint of one's liberty is necessary before the right to apply for the writ comes into play. * * *

It is clear however, that something more than moral restraint is necessary to make a case for habeas corpus.

321 F.SUPP. AT 573

Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968), reviewed prior "custody" doctrine and reaffirmed a generalized flexible approach to the issue. In speaking about 28 U.S.C. Sec. 2241, the first section in the habeas corpus statutes, the court said:

While the language of the Act indicates that a writ of habeas corpus is appropriate only when a petitioner is "in custody," * * * the Act "does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used." * * * And, recent Supreme Court decisions have made clear that "[i]t [habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose − the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." * * * "[B]esides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English−speaking world to support the issuance of habeas corpus."

398 F.2D AT 710−711

There is, as of now, no final list of the situations which are

appropriate for habeas corpus relief. It is not the intent of these rules or notes to define or limit "custody."

It is, however, the view of the Advisory Committee that claims of improper conditions of custody or confinement (not related to the propriety of the custody itself), can better be handled by other means such as 42 U.S.C. Sec. 1983 and other related statutes. In Wilwording v. Swanson, 404 U.S. 249 (1971), the court treated a habeas corpus petition by a state prisoner challenging the conditions of confinement as a claim for relief under 42 U.S.C. Sec. 1983, the Civil Rights Act. Compare Johnson v. Avery, 393 U.S. 483 (1969).

The distinction between duration of confinement and conditions of confinement may be difficult to draw. Compare Preiser v. Rodriguez, 411 U.S. 475 (1973), with Clutchette v. Procunier, 497 F.2d 809 (9th Cir. 1974), modified, 510 F.2d 613 (1975).

RULE 2. PETITION

(a) Applicants in present custody. If the applicant is presently in custody pursuant to the state judgment in question, the application shall be in the form of a petition for a writ of habeas corpus in which the state officer having custody of the applicant shall be named as respondent.

(b) Applicants subject to future custody. If the applicant is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future, the application shall be in the form of a petition for a writ of habeas corpus with an added prayer for appropriate relief against

the judgment which he seeks to attack. In such a case the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents.

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

(d) Petition to be directed to judgments of one court only. A petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.

(e) Return of insufficient petition. If a petition received by

the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the petitioner, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the petition.

(As amended Pub. L. 94−426, Sec. 2(1), (2), Sept. 28, 1976, 90 Stat. 1334; Apr. 28, 1982, eff. Aug. 1, 1982.)

ADVISORY COMMITTEE NOTE

Rule 2 describes the requirements of the actual petition, including matters relating to its form, contents, scope, and sufficiency. The rule provides more specific guidance for a petitioner and the court than 28 U.S.C. Sec. 2242, after which it is patterned.

Subdivision (a) provides that an applicant challenging a state judgment, pursuant to which he is presently in custody, must make his application in the form of a petition for a writ of habeas corpus. It also requires that the state officer having custody of the applicant be named as respondent. This is consistent with 28 U.S.C. Sec. 2242, which says in part, "[Application for a writ of habeas corpus] shall allege * * * the name of the person who has custody over [the applicant] * * *." The proper person to be served in the usual case is either the warden of the institution in which the petitioner is incarcerated (Sanders v. Bennett, 148 F.2d 19 (D.C.Cir. 1945)) or the chief officer in charge of state penal institutions.

Subdivision (b) prescribes the procedure to be used for a

petition challenging a judgment under which the petitioner will be subject to custody in the future. In this event the relief sought will usually not be released from present custody, but rather for a declaration that the judgment being attacked is invalid.

Subdivision (b) thus provides for a prayer for "appropriate relief." It is also provided that the attorney general of the state of the judgment as well as the state officer having actual custody of the petitioner shall be named as respondents. This is appropriate because no one will have custody of the petitioner in the state of the judgment being attacked, and the habeas corpus action will usually be defended by the attorney general. The attorney general is in the best position to inform the court as to who the proper party respondent is. If it is not the attorney general, he can move for a substitution of party.

Since the concept of "custody" requisite to the consideration of a petition for habeas corpus has been enlarged significantly in recent years, it may be worthwhile to spell out the various situations which might arise and who should be named as respondent(s) for each situation.

(1) The applicant is in jail, prison, or other actual physical restraint due to the state action he is attacking. The named respondent shall be the state officer who has official custody of the petitioner (for example, the warden of the prison).

(2) The applicant is on probation or parole due to the state judgment he is attacking. The named respondents shall be the particular probation or parole officer responsible for supervising

the applicant, and the official in charge of the parole or probation agency, or the state correctional agency, as appropriate.

(3) The applicant is in custody in any other manner differing from (1) and (2) above due to the effects of the state action he seeks relief from. The named respondent should be the attorney general of the state wherein such action was taken.

(4) The applicant is in jail, prison, or other actual physical restraint but is attacking a state action which will cause him to be kept in custody in the future rather than the government action under which he is presently confined. The named respondents shall be the state or federal officer who has official custody of him at the time the petition is filed and the attorney general of the state whose action subjects the petitioner to future custody.

(5) The applicant is in custody, although not physically restrained, and is attacking a state action which will result in his future custody rather than the government action out of which his present custody arises. The named respondent(s) shall be the attorney general of the state whose action subjects the petitioner to future custody, as well as the government officer who has present official custody of the petitioner if there is such an officer and his identity is ascertainable.

In any of the above situations the judge may require or allow the petitioner to join an additional or different party as a respondent if to do so would serve the ends of justice.

As seen in rule 1 and paragraphs (4) and (5) above, these rules contemplate that a petitioner currently in federal custody will be

permitted to apply for habeas relief from a state restraint which is to go into effect in the future. There has been disagreement in the courts as to whether they have jurisdiction of the habeas application under these circumstances (compare Piper v. United States, 306 F.Supp. 1259 (D.Conn. 1969), with United States ex rel. Meadows v. New York, 426 F.2d 1176 (2d Cir. 1970), cert. denied, 401 U.S. 941 (1971)). This rule seeks to make clear that they do have such jurisdiction.

Subdivision (c) provides that unless a district court requires otherwise by local rule, the petition must be in the form annexed to these rules. Having a standard prescribed form has several advantages. In the past, petitions have frequently contained mere conclusions of law, unsupported by any facts. Since it is the relationship of the facts to the claim asserted that is important, these petitions were obviously deficient. In addition, lengthy and often illegible petitions, arranged in no logical order, were submitted to judges who have had to spend hours deciphering them. For example, in Passic v. Michigan, 98 F.Supp. 1015, 1016 (E.D.Mich. 1951), the court dismissed a petition for habeas corpus, describing it as "two thousand pages of irrational, prolix and redundant pleadings * * *."

Administrative convenience, of benefit to both the court and the petitioner, results from the use of a prescribed form. Judge Hubert L. Will briefly described the experience with the use of a standard form in the Northern District of Illinois:

Our own experience, though somewhat limited, has been quite

satisfactory. * * *

In addition, [petitions] almost always contain the necessary basic information * * *. Very rarely do we get the kind of hybrid federal−state habeas corpus petition with civil rights allegations thrown in which were not uncommon in the past. * * * [W]hen a real constitutional issue is raised it is quickly apparent * * *.

33 F.R.D. 363, 384

Approximately 65 to 70% of all districts have adopted forms or local rules which require answers to essentially the same questions as contained in the standard form annexed to these rules. All courts using forms have indicated the petitions are time−saving and more legible. The form is particularly helpful in getting information about whether there has been an exhaustion of state remedies or, at least, where that information can be obtained. The requirement of a standard form benefits the petitioner as well. His assertions are more readily apparent, and a meritorious claim is more likely to be properly raised and supported. The inclusion in the form of the ten most frequently raised grounds in habeas corpus petitions is intended to encourage the applicant to raise all his asserted grounds in one petition. It may better enable him to recognize if an issue he seeks to raise is cognizable under habeas corpus and hopefully inform him of those issues as to which he must first exhaust his state remedies.

Some commentators have suggested that the use of forms is of little help because the questions usually are too general,

amounting to little more than a restatement of the statute. They contend the blanks permit a prisoner to fill in the same ambiguous answers he would have offered without the aid of a form. See Comment, Developments in the Law − Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1177−1178 (1970). Certainly, as long as the statute requires factual pleading, the adequacy of a petition will continue to be affected largely by the petitioner's intelligence and the legal advice available to him. On balance, however, the use of forms has contributed enough to warrant mandating their use. Giving the petitioner a list of often−raised grounds may, it is said, encourage perjury. See Comment, Developments in the Law − Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1178 (1970). Most inmates are aware of, or have access to, some common constitutional grounds for relief. Thus, the risk of perjury is not likely to be substantially increased and the benefit of the list for some inmates seems sufficient to outweigh any slight risk that perjury will increase. There is a penalty for perjury, and this would seem the most appropriate way to try to discourage it.

Legal assistance is increasingly available to inmates either through paraprofessional programs involving law students or special programs staffed by members of the bar. See Jacob and Sharma, Justice After Trial: Prisoners' Need for Legal Services in the Criminal−Correctional Process, 18 Kan.L.Rev. 493 (1970). In these situations, the prescribed form can be filled out more competently, and it does serve to ensure a degree of uniformity in the manner in which habeas corpus claims are presented.

Subdivision (c) directs the clerk of the district court to make available to applicants upon request, without charge, blank petitions in the prescribed form.

Subdivision (c) also requires that all available grounds for relief be presented in the petition, including those grounds of which, by the exercise of reasonable diligence, the petitioner should be aware. This is reinforced by rule 9(b), which allows dismissal of a second petition which fails to allege new grounds or, if new grounds are alleged, the judge finds an inexcusable failure to assert the ground in the prior petition.

Both subdivision (c) and the annexed form require a legibly handwritten or typewritten petition. As required by 28 U.S.C. Sec. 2242, the petition must be signed and sworn to by the petitioner (or someone acting in his behalf).

Subdivision (d) provides that a single petition may assert a claim only against the judgment or judgments of a single state court (i.e., a court of the same county or judicial district or circuit). This permits, but does not require, an attack in a single petition on judgments based upon separate indictments or on separate counts even though sentences were imposed on separate days by the same court. A claim against a judgment of a court of a different political subdivision must be raised by means of a separate petition.

Subdivision (e) allows the clerk to return an insufficient petition to the petitioner, and it must be returned if the clerk is so directed by a judge of the court. Any failure to comply with the

requirements of rule 2 or 3 is grounds for insufficiency. In situations where there may be arguable noncompliance with another rule, such as rule 9, the judge, not the clerk, must make the decision. If the petition is returned it must be accompanied by a statement of the reason for its return. No petitioner should be left to speculate as to why or in what manner his petition failed to conform to these rules.

Subdivision (e) also provides that the clerk shall retain one copy of the insufficient petition. If the prisoner files another petition, the clerk will be in a better position to determine the sufficiency of the new petition. If the new petition is insufficient, comparison with the prior petition may indicate whether the prisoner has failed to understand the clerk's prior explanation for its insufficiency, so that the clerk can make another, hopefully successful, attempt at transmitting this information to the petitioner. If the petitioner insists that the original petition was in compliance with the rules, a copy of the original petition is available for the consideration of the judge. It is probably better practice to make a photocopy of a petition which can be corrected by the petitioner, thus saving the petitioner the task of completing an additional copy.

1982 AMENDMENT

Subdivision (c). The amendment takes into account 28 U.S.C. Sec. 1746, enacted after adoption of the Sec. 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 Sec. 2254 forms have been revised accordingly.

AMENDMENTS

1976 − Subd. (c). Pub. L. 94−426, Sec. 2(1), inserted "substantially" after "The petition shall be in", and struck out requirement that the petition follow the prescribed form.

Subd. (e). Pub. L. 94−426, Sec. 2(2), inserted "substantially" after "district court does not", and struck out provision which permitted the clerk to return a petition for noncompliance without a judge so directing.

RULE 3. FILING PETITION

(a) Place of filing; copies; filing fee. A petition shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof. It shall also be accompanied by the filing fee prescribed by law unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis. If the petitioner desires to prosecute the petition in forma pauperis, he shall file the affidavit required by 28 U.S.C. Sec. 1915. In all such cases the petition shall also be accompanied by a certificate of the warden or other appropriate

officer of the institution in which the petitioner is confined as to the amount of money or securities on deposit to the petitioner's credit in any account in the institution, which certificate may be considered by the court in acting upon his application for leave to proceed in forma pauperis.

(b) Filing and service. Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, and having ascertained that the petition appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the petition and enter it on the docket in his office. The filing of the petition shall not require the respondent to answer the petition or otherwise move with respect to it unless so ordered by the court.

ADVISORY COMMITTEE NOTE

Rule 3 sets out the procedures to be followed by the petitioner and the court in filing the petition. Some of its provisions are currently dealt with by local rule or practice, while others are innovations. Subdivision (a) specifies the petitioner's responsibilities. It requires that the petition, which must be accompanied by two conformed copies thereof, be filed in the office of the clerk of the district court. The petition must be accompanied by the filing fee prescribed by law (presently $5; see 28 U.S.C. Sec. 1914(a)), unless leave to prosecute the petition in forma pauperis is applied for and granted. In the event the petitioner desires to prosecute the petition in forma pauperis, he must file the affidavit required by 28 U.S.C. Sec. 1915, together

with a certificate showing the amount of funds in his institutional account.

Requiring that the petition be filed in the office of the clerk of the district court provides an efficient and uniform system of filing habeas corpus petitions.

Subdivision (b) requires the clerk to file the petition. If the filing fee accompanies the petition, it may be filed immediately, and, if not, it is contemplated that prompt attention will be given to the request to proceed in forma pauperis. The court may delegate the issuance of the order to the clerk in those cases in which it is clear from the petition that there is full compliance with the requirements to proceed in forma pauperis.

Requiring the copies of the petition to be filed with the clerk will have an impact not only upon administrative matters, but upon more basic problems as well. In districts with more than one judge, a petitioner under present circumstances may send a petition to more than one judge. If no central filing system exists for each district, two judges may independently take different action on the same petition. Even if the action taken is consistent, there may be needless duplication of effort.

The requirement of an additional two copies of the form of the petition is a current practice in many courts. An efficient filing system requires one copy for use by the court (central file), one for the respondent (under 3(b), the respondent receives a copy of the petition whether an answer is required or not), and one for petitioner's counsel, if appointed. Since rule 2 provides that

blank copies of the petition in the prescribed form are to be furnished to the applicant free of charge, there should be no undue burden created by this requirement.

Attached to copies of the petition supplied in accordance with rule 2 is an affidavit form for the use of petitioners desiring to proceed in forma pauperis. The form requires information concerning the petitioner's financial resources.

In forma pauperis cases, the petition must also be accompanied by a certificate indicating the amount of funds in the petitioner's institution account. Usually the certificate will be from the warden. If the petitioner is on probation or parole, the court might want to require a certificate from the supervising officer. Petitions by persons on probation or parole are not numerous enough, however, to justify making special provision for this situation in the text of the rule.

The certificate will verify the amount of funds credited to the petitioner in an institution account. The district court may by local rule require that any amount credited to the petitioner, in excess of a stated maximum, must be used for the payment of the filing fee. Since prosecuting an action in forma pauperis is a privilege (see Smart v. Heinze, 347 F.2d 114, 116 (9th Cir. 1965)), it is not to be granted when the petitioner has sufficient resources.

Subdivision (b) details the clerk's duties with regard to filing the petition. If the petition does not appear on its face to comply with the requirements of rules 2 and 3, it may be returned in

accordance with rule 2(e). If it appears to comply, it must be filed and entered on the docket in the clerk's office. However, under this subdivision the respondent is not required to answer or otherwise move with respect to the petition unless so ordered by the court.

RULE 4. PRELIMINARY CONSIDERATION BY JUDGE

The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.

ADVISORY COMMITTEE NOTE

Rule 4 outlines the options available to the court after the petition is properly filed. The petition must be promptly presented to and examined by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits attached thereto that the petitioner is not entitled to relief in the district court, the judge must enter an order summarily dismissing

the petition and cause the petitioner to be notified. If summary dismissal is not ordered, the judge must order the respondent to file an answer or to otherwise plead to the petition within a time period to be fixed in the order.

28 U.S.C. Sec. 2243 requires that the writ shall be awarded, or an order to show cause issued, "unless it appears from the application that the applicant or person detained is not entitled thereto." Such consideration may properly encompass any exhibits attached to the petition, including, but not limited to, transcripts, sentencing records, and copies of state court opinions. The judge may order any of these items for his consideration if they are not yet included with the petition. See 28 U.S.C. Sec. 753(f) which authorizes payment for transcripts in habeas corpus cases.

It has been suggested that an answer should be required in every habeas proceeding, taking into account the usual petitioner's lack of legal expertise and the important functions served by the return. See Developments in the Law − Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1178 (1970). However, under Sec. 2243 it is the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer. Allen v. Perini, 424 F.2d 134, 141 (6th Cir. 1970). In addition, "notice" pleading is not sufficient, for the petition is expected to state facts that point to a "real possibility of constitutional error." See Aubut v. State of Maine, 431 F.2d 688, 689 (1st Cir. 1970).

In the event an answer is ordered under rule 4, the court is accorded greater flexibility than under Sec. 2243 in determining within what time period an answer must be made. Under Sec. 2243, the respondent must make a return within three days after being so ordered, with additional time of up to forty days allowed under the Federal Rules of Civil Procedure, Rule 81(a)(2), for good cause. In view of the widespread state of work overload in prosecutors' offices (see, e.g., Allen, 424 F.2d at 141), additional time is granted in some jurisdictions as a matter of course. Rule 4, which contains no fixed time requirement, gives the court the discretion to take into account various factors such as the respondent's workload and the availability of transcripts before determining a time within which an answer must be made.

Rule 4 authorizes the judge to "take such other action as the judge deems appropriate." This is designed to afford the judge flexibility in a case where either dismissal or an order to answer may be inappropriate. For example, the judge may want to authorize the respondent to make a motion to dismiss based upon information furnished by respondent, which may show that petitioner's claims have already been decided on the merits in a federal court; that petitioner has failed to exhaust state remedies; that the petitioner is not in custody within the meaning of 28 U.S.C. Sec. 2254; or that a decision in the matter is pending in state court.

In these situations, a dismissal may be called for on procedural grounds, which may avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the

petition. In other situations, the judge may want to consider a motion from respondent to make the petition more certain. Or the judge may want to dismiss some allegations in the petition, requiring the respondent to answer only those claims which appear to have some arguable merit.

Rule 4 requires that a copy of the petition and any order be served by certified mail on the respondent and the attorney general of the state involved. See 28 U.S.C. Sec. 2252. Presently, the respondent often does not receive a copy of the petition unless the court directs an answer under 28 U.S.C. Sec. 2243. Although the attorney general is served, he is not required to answer if it is more appropriate for some other agency to do so. Although the rule does not specifically so provide, it is assumed that copies of the court orders to respondent will be mailed to petitioner by the court.

RULE 5. ANSWER; CONTENTS

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post−conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post−conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post−conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There

shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non−transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post−conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

ADVISORY COMMITTEE NOTE

Rule 5 details the contents of the "answer". (This is a change in terminology from "return," which is still used below when referring to prior practice.) The answer plays an obviously important rule in a habeas proceeding:

The return serves several important functions: it permits the court and the parties to uncover quickly the disputed issues; it may reveal to the petitioner's attorney grounds for release that the petitioner did not know; and it may demonstrate that the petitioner's claim is wholly without merit.

Developments in the Law − Federal Habeas Corpus, 83 Harv.L.Rev. 1083, 1178 (1970).

The answer must respond to the allegations of the petition. While some districts require this by local rule (see, e.g., E.D.N.C.R. 17(B)), under 28 U.S.C. Sec. 2243 little specificity is demanded.

As a result, courts occasionally receive answers which contain only a statement certifying the true cause of detention, or a series of delaying motions such as motions to dismiss. The requirement of the proposed rule that the "answer shall respond to the allegations of the petition" is intended to ensure that a responsive pleading will be filed and thus the functions of the answer fully served.

The answer must also state whether the petitioner has exhausted his state remedies. This is a prerequisite to eligibility for the writ under 28 U.S.C. Sec. 2254(b) and applies to every ground the petitioner raises. Most form petitions now in use contain questions requiring information relevant to whether the petitioner has exhausted his remedies. However, the exhaustion requirement is often not understood by the unrepresented petitioner. The attorney general has both the legal expertise and access to the record and thus is in a much better position to inform the court on the matter of exhaustion of state remedies. An alleged failure to exhaust state remedies as to any ground in the petition may be raised by a motion by the attorney general, thus avoiding the necessity of a formal answer as to that ground.

The rule requires the answer to indicate what transcripts are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. This will serve to inform the court and petitioner as to what factual allegations can be checked against the actual transcripts. The transcripts include pretrial transcripts relating, for example, to pretrial motions to suppress; transcripts of the trial or guilty plea proceeding; and

transcripts of any post−conviction proceedings which may have taken place. The respondent is required to furnish those portions of the transcripts which he believes relevant. The court may order the furnishing of additional portions of the transcripts upon the request of petitioner or upon the court's own motion.

Where transcripts are unavailable, the rule provides that a narrative summary of the evidence may be submitted.

Rule 5 (and the general procedure set up by this entire set of rules) does not contemplate a traverse to the answer, except under special circumstances. See advisory committee note to rule 9. Therefore, the old common law assumption of verity of the allegations of a return until impeached, as codified in 28 U.S.C. Sec. 2248, is no longer applicable. The meaning of the section, with its exception to the assumption "to the extent that the judge finds from the evidence that they (the allegations) are not true," has given attorneys and courts a great deal of difficulty. It seems that when the petition and return pose an issue of fact, no traverse is required; Stewart v. Overholser, 186 F.2d 339 (D.C. Cir. 1950).

We read Sec. 2248 of the Judicial Code as not requiring a traverse when a factual issue has been clearly framed by the petition and the return or answer. This section provides that the allegations of a return or answer to an order to show cause shall be accepted as true if not traversed, except to the extent the judge finds from the evidence that they are not true. This contemplates that where the petition and return or answer do

present an issue of fact material to the legality of detention, evidence is required to resolve that issue despite the absence of a traverse. This reference to evidence assumes a hearing on issues raised by the allegations of the petition and the return or answer to the order to show cause.

186 F.2D AT 342, N. 5

In actual practice, the traverse tends to be a mere pro forma refutation of the return, serving little if any expository function. In the interests of a more streamlined and manageable habeas corpus procedure, it is not required except in those instances where it will serve a truly useful purpose. Also, under rule 11 the court is given the discretion to incorporate Federal Rules of Civil Procedure when appropriate, so civil rule 15(a) may be used to allow the petitioner to amend his petition when the court feels this is called for by the contents of the answer.

Rule 5 does not indicate who the answer is to be served upon, but it necessarily implies that it will be mailed to the petitioner (or to his attorney if he has one). The number of copies of the answer required is left to the court's discretion. Although the rule requires only a copy of petitioner's brief on appeal, respondent is free also to file a copy of respondent's brief. In practice, courts have found it helpful to have a copy of respondent's brief.

RULE 6. DISCOVERY

(a) Leave of court required. A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the

exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. Sec. 3006A(g).

(b) Requests for discovery. Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

(c) Expenses. If the respondent is granted leave to take the deposition of the petitioner or any other person the judge may as a condition of taking it direct that the respondent pay the expenses of travel and subsistence and fees of counsel for the petitioner to attend the taking of the deposition.

ADVISORY COMMITTEE NOTE

This rule prescribes the procedures governing discovery in habeas corpus cases. Subdivision (a) provides that any party may utilize the processes of discovery available under the Federal Rules of Civil Procedure (rules 26−37) if, and to the extent that, the judge allows. It also provides for the appointment of counsel for a petitioner who qualifies for this when counsel is necessary for effective utilization of discovery procedures permitted by the judge.

Subdivision (a) is consistent with Harris v. Nelson, 394 U.S. 286 (1969). In that case the court noted,

[I]t is clear that there was no intention to extend to habeas

corpus, as a matter of right, the broad discovery provisions * *

* of the new [Federal Rules of Civil Procedure].

394 U.S. AT 295

However, citing the lack of methods for securing information in habeas proceedings, the court pointed to an alternative.

Clearly, in these circumstances * * * the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. * * * Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. Sec. 1651.

394 U.S. AT 299

The court concluded that the issue of discovery in habeas corpus cases could best be dealt with as part of an effort to provide general rules of practice for habeas corpus cases:

In fact, it is our view that the rulemaking machinery should be invoked to formulate rules of practice with respect to federal habeas corpus and Sec. 2255 proceedings, on a comprehensive basis and not merely one confined to discovery. The problems presented by these proceedings are materially different from those dealt with in the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, and reliance upon usage and the opaque language of Civil Rule 81(a)(2) is transparently inadequate. In our view the results of a meticulous formulation and adoption of special rules for federal habeas corpus and Sec. 2255 proceedings would promise much benefit.

394 U.S. AT 301 N. 7

Discovery may, in appropriate cases, aid in developing facts necessary to decide whether to order an evidentiary hearing or to grant the writ following an evidentiary hearing:

We are aware that confinement sometimes induces fantasy which has its basis in the paranoia of prison rather than in fact. But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the "usages and principles."

Granting discovery is left to the discretion of the court, discretion to be exercised where there is a showing of good cause why discovery should be allowed. Several commentators have suggested that at least some discovery should be permitted without leave of court. It is argued that the courts will be burdened with weighing the propriety of requests to which the discovered party has no objection. Additionally, the availability of protective orders under Fed.R.Civ.R., Rules 30(b) and 31(d) will provide the necessary safeguards. See Developments in the Law − Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1186−87 (1970); Civil Discovery in Habeas Corpus, 67 Colum.L.Rev. 1296, 1310 (1967).

Nonetheless, it is felt the requirement of prior court approval

of all discovery is necessary to prevent abuse, so this requirement is specifically mandated in the rule.

While requests for discovery in habeas proceedings normally follow the granting of an evidentiary hearing, there may be instances in which discovery would be appropriate beforehand. Such an approach was advocated in Wagner v. United States, 418 F.2d 618, 621 (9th Cir. 1969), where the opinion stated the trial court could permit interrogatories, provide for deposing witnesses, "and take such other prehearing steps as may be appropriate." While this was an action under Sec. 2255, the reasoning would apply equally well to petitions by state prisoners. Such pre−hearing discovery may show an evidentiary hearing to be unnecessary, as when there are "no disputed issues of law or fact." 83 Harv. L.Rev. 1038, 1181 (1970). The court in Harris alluded to such a possibility when it said "the court may * * * authorize such proceedings with respect to development, before or in conjunction with the hearing of the facts * * *." [emphasis added] 394 U.S. at 300. Such pre−hearing discovery, like all discovery under rule 6, requires leave of court. In addition, the provisions in rule 7 for the use of an expanded record may eliminate much of the need for this type of discovery. While probably not as frequently sought or granted as discovery in conjunction with a hearing, it may nonetheless serve a valuable function.

In order to make pre−hearing discovery meaningful, subdivision (a) provides that the judge should appoint counsel for a petitioner who is without counsel and qualifies for appointment when this is

necessary for the proper utilization of discovery procedures. Rule 8 provides for the appointment of counsel at the evidentiary hearing stage (see rule 8(b) and advisory committee note), but this would not assist the petitioner who seeks to utilize discovery to stave off dismissal of his petition (see rule 9 and advisory committee note) or to demonstrate that an evidentiary hearing is necessary. Thus, if the judge grants a petitioner's request for discovery prior to making a decision as to the necessity for an evidentiary hearing, he should determine whether counsel is necessary for the effective utilization of such discovery and, if so, appoint counsel for the petitioner if the petitioner qualifies for such appointment.

This rule contains very little specificity as to what types and methods of discovery should be made available to the parties in a habeas proceeding, or how, once made available, these discovery procedures should be administered. The purpose of this rule is to get some experience in how discovery would work in actual practice by letting district court judges fashion their own rules in the context of individual cases. When the results of such experience are available it would be desirable to consider whether further, more specific codification should take place.

Subdivision (b) provides for judicial consideration of all matters subject to discovery. A statement of the interrogatories, or requests for admission sought to be answered, and a list of any documents sought to be produced, must accompany a request for discovery. This is to advise the judge of the necessity for

discovery and enable him to make certain that the inquiry is relevant and appropriately narrow.

Subdivision (c) refers to the situation where the respondent is granted leave to take the deposition of the petitioner or any other person. In such a case the judge may direct the respondent to pay the expenses and fees of counsel for the petitioner to attend the taking of the deposition, as a condition granting the respondent such leave. While the judge is not required to impose this condition subdivision (c) will give the court the means to do so. Such a provision affords some protection to the indigent petitioner who may be prejudiced by his inability to have counsel, often court−appointed, present at the taking of a deposition. It is recognized that under 18 U.S.C. Sec. 3006A(g), court−appointed counsel in a Sec. 2254 proceeding is entitled to receive up to $250 and reimbursement for expenses reasonably incurred. (Compare Fed.R. Crim.P. 15(c).) Typically, however, this does not adequately reimburse counsel if he must attend the taking of depositions or be involved in other pre−hearing proceedings. Subdivision (c) is intended to provide additional funds, if necessary, to be paid by the state government (respondent) to petitioner's counsel. Although the rule does not specifically so provide, it is assumed that a petitioner who qualifies for the appointment of counsel under 18 U.S.C. Sec. 3006A(g) and is granted leave to take a deposition will be allowed witness costs. This will include recording and transcription of the witness's statement. Such costs are payable pursuant to 28 U.S.C. Sec. 1825. See Opinion of

Comptroller General, February 28, 1974.

Subdivision (c) specifically recognizes the right of the respondent to take the deposition of the petitioner. Although the petitioner could not be called to testify against his will in a criminal trial, it is felt the nature of the habeas proceeding, along with the safeguards accorded by the Fifth Amendment and the presence of counsel, justify this provision. See 83 Harv.L.Rev. 1038, 1183−84 (1970).

RULE 7. EXPANSION OF RECORD

(a) Direction for expansion. If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

(b) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(c) Submission to opposing party. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(d) Authentication. The court may require the authentication of any material under subdivision (b) or (c).

ADVISORY COMMITTEE NOTE

This rule provides that the judge may direct that the record be expanded. The purpose is to enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing. An expanded record may also be helpful when an evidentiary hearing is ordered.

The record may be expanded to include additional material relevant to the merits of the petition. While most petitions are dismissed either summarily or after a response has been made, of those that remain, by far the majority require an evidentiary hearing. In the fiscal year ending June 30, 1970, for example, of 8,423 Sec. 2254 cases terminated, 8,231 required court action. Of these, 7,812 were dismissed before a prehearing conference and 469 merited further court action (e.g., expansion of the record, prehearing conference, or an evidentiary hearing). Of the remaining 469 cases, 403 required an evidentiary hearing, often time−consuming, costly, and, at least occasionally, unnecessary. See Director of the Administrative Office of the United States Courts, Annual Report, 245a−245c (table C4) (1970). In some instances these hearings were necessitated by slight omissions in the state record which might have been cured by the use of an expanded record.

Authorizing expansion of the record will, hopefully, eliminate some unnecessary hearings. The value of this approach was articulated in Raines v. United States, 423 F.2d 526, 529−530 (4th Cir. 1970):

Unless it is clear from the pleadings and the files and records

that the prisoner is entitled to no relief, the statute makes a hearing mandatory. We think there is a permissible intermediate step that may avoid the necessity for an expensive and time consuming evidentiary hearing in every Section 2255 case. It may instead be perfectly appropriate, depending upon the nature of the allegations, for the district court to proceed by requiring that the record be expanded to include letters, documentary evidence, and, in an appropriate case, even affidavits. United States v. Carlino, 400 F.2d 56 (2nd Cir. 1968); Mirra v. United States, 379 F.2d 782 (2nd Cir. 1967); Accardi v. United States, 379 F.2d 312 (2nd Cir. 1967). When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive, but that is not to say they may not be helpful.

In Harris v. Nelson, 394 U.S. 286, 300 (1969), the court said:

At any time in the proceedings * * * either on [the court's] own motion or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings * * * before or in conjunction with the hearing of the facts * * * [emphasis added]

Subdivision (b) specifies the materials which may be added to the record. These include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath directed to written interrogatories propounded by the judge. Under this subdivision affidavits may be submitted and considered part of the record. Subdivision (b) is consistent with 28 U.S.C. Secs. 2246 and 2247 and the decision in

Raines with regard to types of material that may be considered upon application for a writ of habeas corpus. See United States v. Carlino, 400 F.2d 56, 58 (2d Cir. 1968), and Machibroda v. United States, 368 U.S. 487 (1962).

Under subdivision (c) all materials proposed to be included in the record must be submitted to the party against whom they are to be offered.

Under subdivision (d) the judge can require authentication if he believes it desirable to do so.

RULE 8. EVIDENTIARY HEARING

(a) Determination by court. If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

(b) Function of the magistrate.

(1) When designated to do so in accordance with 28 U.S.C. Sec. 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

(c) Appointment of counsel; time for hearing. If an evidentiary hearing is required the judge shall appoint counsel for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. Sec. 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. Sec. 3006A at any stage of the case if the interest of justice so requires.

(As amended Pub. L. 94−426, Sec. 2(5), Sept. 28, 1976, 90 Stat. 1334; Pub. L. 94−577, Sec. 2(a)(1), (b)(1), Oct. 21, 1976, 90 Stat. 2730, 2731.)

ADVISORY COMMITTEE NOTE

This rule outlines the procedure to be followed by the court immediately prior to and after the determination of whether to hold an evidentiary hearing.

The provisions are applicable if the petition has not been dismissed at a previous stage in the proceeding [including a

summary dismissal under rule 4; a dismissal pursuant to a motion by the respondent; a dismissal after the answer and petition are considered; or a dismissal after consideration of the pleadings and an expanded record].

If dismissal has not been ordered, the court must determine whether an evidentiary hearing is required. This determination is to be made upon a review of the answer, the transcript and record of state court proceedings, and if there is one, the expanded record. As the United States Supreme Court noted in Townsend v. Sam, 372 U.S. 293, 319 (1963):

Ordinarily [the complete state−court] record − including the transcript of testimony (or if unavailable some adequate substitute, such as a narrative record), the pleadings, court opinions, and other pertinent documents − is indispensable to determining whether the habeas applicant received a full and fair state−court evidentiary hearing resulting in reliable findings. Subdivision (a) contemplates that all of these materials, if available, will be taken into account. This is especially important in view of the standard set down in Townsend for determining when a hearing in the federal habeas proceeding is mandatory.

The appropriate standard * * * is this: Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding.

372 U.S. AT 312

The circumstances under which a federal hearing is mandatory are now specified in 28 U.S.C. Sec. 2254(d). The 1966 amendment clearly places the burden on the petitioner, when there has already been a state hearing, to show that it was not a fair or adequate hearing for one or more of the specifically enumerated reasons, in order to force a federal evidentiary hearing. Since the function of an evidentiary hearing is to try issues of fact (372 U.S. at 309), such a hearing is unnecessary when only issues of law are raised. See, e.g., Yeaman v. United States, 326 F.2d 293 (9th Cir. 1963). In situations in which an evidentiary hearing is not mandatory, the judge may nonetheless decide that an evidentiary hearing is desirable:

The purpose of the test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge.

372 U.S. AT 318

If the judge decides that an evidentiary hearing is neither required nor desirable, he shall make such a disposition of the petition "as justice shall require." Most habeas petitions are dismissed before the prehearing conference stage (see Director of the Administrative Office of the United States Courts, Annual Report 245a−245c (table C4) (1970)) and of those not dismissed, the majority raise factual issues that necessitate an evidentiary hearing. If no hearing is required, most petitions are dismissed, but in unusual cases the court may grant the relief sought without

a hearing. This includes immediate release from custody or nullification of a judgment under which the sentence is to be served in the future.

Subdivision (b) provides that a magistrate, when so empowered by rule of the district court, may recommend to the district judge that an evidentiary hearing be held or that the petition be dismissed, provided he gives the district judge a sufficiently detailed description of the facts so that the judge may decide whether or not to hold an evidentiary hearing. This provision is not inconsistent with the holding in Wingo v. Wedding, 418 U.S. 461 (1974), that the Federal Magistrates Act did not change the requirement of the habeas corpus statute that federal judges personally conduct habeas evidentiary hearings, and that consequently a local district court rule was invalid insofar as it authorized a magistrate to hold such hearings. 28 U.S.C. Sec. 636(b) provides that a district court may by rule authorize any magistrate to perform certain additional duties, including preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.

As noted in Wingo, review "by Magistrates of applications for post−trial relief is thus limited to review for the purpose of proposing, not holding, evidentiary hearings."

Utilization of the magistrate as specified in subdivision (b)

will aid in the expeditious and fair handling of habeas petitions. A qualified, experienced magistrate will, it is hoped, acquire an expertise in examining these [postconviction review] applications and summarizing their important contents for the district judge, thereby facilitating his decisions. Law clerks are presently charged with this responsibility by many judges, but judges have noted that the normal 1−year clerkship does not afford law clerks the time or experience necessary to attain real efficiency in handling such applications.

S. REP. NO. 371, 90TH CONG., 1ST SESS., 26 (1967)

Under subdivision (c) there are two provisions that differ from the procedure set forth in 28 U.S.C. Sec. 2243. These are the appointment of counsel and standard for determining how soon the hearing will be held.

If an evidentiary hearing is required the judge must appoint counsel for a petitioner who qualified for appointment under the Criminal Justice Act. Currently, the appointment of counsel is not recognized as a right at any stage of a habeas proceeding. See, e.g., United States ex rel. Marshall v. Wilkins, 338 F.2d 404 (2d Cir. 1964). Some district courts have, however, by local rule, required that counsel must be provided for indigent petitioners in cases requiring a hearing. See, e.g., D.N.M.R. 21(f), E.D. N.Y.R. 26(d). Appointment of counsel at this stage is mandatory under subdivision (c). This requirement will not limit the authority of the court to provide counsel at an earlier stage if it is thought desirable to do so as is done in some courts under current

practice. At the evidentiary hearing stage, however, an indigent petitioner's access to counsel should not depend on local practice and, for this reason, the furnishing of counsel is made mandatory. Counsel can perform a valuable function benefiting both the court and the petitioner. The issues raised can be more clearly identified if both sides have the benefit of trained legal personnel. The presence of counsel at the prehearing conference may help to expedite the evidentiary hearing or make it unnecessary, and counsel will be able to make better use of available prehearing discovery procedures. Compare ABA Project on Standards for Criminal Justice, Standards Relating to Post−Conviction Remedies Sec. 4.4, p. 66 (Approved Draft 1968). At a hearing, the petitioner's claims are more likely to be effectively and properly presented by counsel.

Under 18 U.S.C. Sec. 3006A(g), payment is allowed counsel up to $250, plus reimbursement for expenses reasonably incurred. The standards of indigency under this section are less strict than those regarding eligibility to prosecute a petition in forma pauperis, and thus many who cannot qualify to proceed under 28 U.S.C. Sec. 1915 will be entitled to the benefits of counsel under 18 U.S.C. Sec. 3006A(g). Under rule 6(c), the court may order the respondent to reimburse counsel from state funds for fees and expenses incurred as the result of the utilization of discovery procedures by the respondent.

Subdivision (c) provides that the hearing shall be conducted as promptly as possible, taking into account "the need of counsel for

both parties for adequate time for investigation and preparation."

This differs from the language of 28 U.S.C. Sec. 2243, which requires that the day for the hearing be set "not more than five days after the return unless for good cause additional time is allowed." This time limit fails to take into account the function that may be served by a prehearing conference and the time required to prepare adequately for an evidentiary hearing. Although "additional time" is often allowed under Sec. 2243, subdivision (c) provides more flexibility to take account of the complexity of the case, the availability of important materials, the workload of the attorney general, and the time required by appointed counsel to prepare.

While the rule does not make specific provision for a prehearing conference, the omission is not intended to cast doubt upon the value of such a conference:

The conference may limit the questions to be resolved, identify areas of agreement and dispute, and explore evidentiary problems that may be expected to arise. * * * [S]uch conferences may also disclose that a hearing is unnecessary * * *.

ABA Project on Standards for Criminal Justice, Standards Relating to Post−Conviction Remedies Sec. 4.6, commentary pp. 74−75. (Approved Draft, 1968.)

See also Developments in the Law − Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1188 (1970).

The rule does not contain a specific provision on the subpoenaing of witnesses. It is left to local practice to determine the method

for doing this. The implementation of 28 U.S.C. Sec. 1825 on the payment of witness fees is dealt with in an opinion of the Comptroller General, February 28, 1974.

AMENDMENTS

1976 − Subd. (b). Pub. L. 94−577, Sec. 2(a)(1), substituted provisions which authorized magistrates, when designated to do so in accordance with section 636(b) of this title, to conduct hearings, including evidentiary hearings, on the petition and to submit to a judge of the court proposed findings of fact and recommendations for disposition, which directed the magistrate to file proposed findings and recommendations with the court with copies furnished to all parties, which allowed parties thus served 10 days to file written objections thereto, and which directed a judge of the court to make de novo determinations of the objected−to portions and to accept, reject, or modify the findings or recommendations for provisions under which the magistrate had been empowered only to recommend to the district judge that an evidentiary hearing be held or that the petition be dismissed.

Subd. (c). Pub. L. 94−577, Sec. 2(b)(1), substituted "and the hearing shall be conducted" for "and shall conduct the hearing".

Pub. L. 94−426 provided that these rules not limit the appointment of counsel under section 3006A of title 18, if the interest of justice so require.

EFFECTIVE DATE OF 1976 AMENDMENT

Section 2(c) of Pub. L. 94−577 provided that: "The amendments made by this section [amending subdivs. (b) and (c) of this rule

and Rule 8(b), (c) of the Rules Governing Proceedings Under Section 2255 of this title] shall take effect with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code filed on or after February 1, 1977."

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.

(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 constituted an abuse of the writ.

(As amended Pub. L. 94−426, Sec. 2(7), (8), Sept. 28, 1976, 90 Stat. 1335.)

ADVISORY COMMITTEE NOTE

This rule is intended to minimize abuse of the writ of habeas corpus by limiting the right to assert stale claims and to file multiple petitions. Subdivision (a) deals with the delayed petition. Subdivision (b) deals with the second or successive petition.

Subdivision (a) provides that a petition attacking the judgment of a state court may be dismissed on the grounds of delay if the petitioner knew or should have known of the existence of the grounds he is presently asserting in the petition and the delay has resulted in the state being prejudiced in its ability to respond to the petition. If the delay is more than five years after the judgment of conviction, prejudice is presumed, although this presumption is rebuttable by the petitioner. Otherwise, the state has the burden of showing such prejudice.

The assertion of stale claims is a problem which is not likely to decrease in frequency. Following the decisions in Jones v. Cunningham, 371 U.S. 236 (1963), and Benson v. California, 328 F.2d 159 (9th Cir. 1964), the concept of custody expanded greatly, lengthening the time period during which a habeas corpus petition may be filed. The petitioner who is not unconditionally discharged may be on parole or probation for many years. He may at some date, perhaps ten or fifteen years after conviction, decide to challenge the state court judgment. The grounds most often troublesome to the courts are ineffective counsel, denial of right of appeal, plea of guilty unlawfully induced, use of a coerced confession, and illegally constituted jury. The latter four grounds are often interlocked with the allegation of ineffective counsel. When they are asserted after the passage of many years, both the attorney for the defendant and the state have difficulty in ascertaining what the facts are. It often develops that the defense attorney has little or no recollection as to what took place and that many of

the participants in the trial are dead or their whereabouts unknown. The court reporter's notes may have been lost or destroyed, thus eliminating any exact record of what transpired. If the case was decided on a guilty plea, even if the record is intact, it may not satisfactorily reveal the extent of the defense attorney's efforts in behalf of the petitioner. As a consequence, there is obvious difficulty in investigating petitioner's allegations.

The interest of both the petitioner and the government can best be served if claims are raised while the evidence is still fresh. The American Bar Association has recognized the interest of the state in protecting itself against stale claims by limiting the right to raise such claims after completion of service of a sentence imposed pursuant to a challenged judgment. See ABA Standards Relating to Post−Conviction Remedies Sec. 2.4 (c), p. 45 (Approved Draft, 1968). Subdivision (a) is not limited to those who have completed their sentence. Its reach is broader, extending to all instances where delay by the petitioner has prejudiced the state, subject to the qualifications and conditions contained in the subdivision.

In McMann v. Richardson, 397 U.S. 759 (1970), the court made reference to the issue of the stale claim:

What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another

choice between admitting their guilt and putting the State to its proof. [Emphasis added.]

397 U.S. AT 773

The court refused to allow this, intimating its dislike of collateral attacks on sentences long since imposed which disrupt the state's interest in finality of convictions which were constitutionally valid when obtained.

Subdivision (a) is not a statute of limitations. Rather, the limitation is based on the equitable doctrine of laches. "Laches is such delay in enforcing one's rights as works disadvantage to another." 30A C.J.S. Equity Sec. 112, p. 19. Also, the language of the subdivision, "a petition may be dismissed" [emphasis added], is permissive rather than mandatory. This clearly allows the court which is considering the petition to use discretion in assessing the equities of the particular situation.

The use of a flexible rule analogous to laches to bar the assertion of stale claims is suggested in ABA Standards Relating to Post−Conviction Remedies Sec. 2.4, commentary at 48 (Approved Draft, 1968). Additionally, in Fay v. Noia, 372 U.S. 391 (1963), the Supreme Court noted:

Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. United States ex rel. Smith v. Baldi, 344 U.S. 561, 573 (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.

372 U.S. AT 438

Finally, the doctrine of laches has been applied with reference to another postconviction remedy, the writ of coram nobis. See 24 C.J.S. Criminal Law Sec. 1606(25), p. 779.

The standard used for determining if the petitioner shall be barred from asserting his claim is consistent with that used in laches provisions generally. The petitioner is held to a standard of reasonable diligence. Any inference or presumption arising by reason of the failure to attack collaterally a conviction may be disregarded where (1) there has been a change of law or fact (new evidence) or (2) where the court, in the interest of justice, feels that the collateral attack should be entertained and the prisoner makes a proper showing as to why he has not asserted a particular ground for relief.

Subdivision (a) establishes the presumption that the passage of more than five years from the time of the judgment of conviction to the time of filing a habeas petition is prejudicial to the state. "Presumption" has the meaning given it by Fed.R.Evid. 301. The prisoner has "the burden of going forward with evidence to rebut or meet the presumption" that the state has not been prejudiced by the passage of a substantial period of time. This does not impose too heavy a burden on the petitioner. He usually knows what persons are important to the issue of whether the state has been prejudiced. Rule 6 can be used by the court to allow petitioner liberal discovery to learn whether witnesses have died or whether other circumstances prejudicial to the state have occurred. Even if the petitioner should fail to overcome the presumption of prejudice to

the state, he is not automatically barred from asserting his claim. As discussed previously, he may proceed if he neither knew nor, by the exercise of reasonable diligence, could have known of the grounds for relief.

The presumption of prejudice does not come into play if the time lag is not more than five years.

The time limitation should have a positive effect in encouraging petitioners who have knowledge of it to assert all their claims as soon after conviction as possible. The implementation of this rule can be substantially furthered by the development of greater legal resources for prisoners. See ABA Standards Relating to Post−Conviction Remedies Sec. 3.1, pp. 49−50 (Approved Draft, 1968).

Subdivision (a) does not constitute an abridgement or modification of a substantive right under 28 U.S.C. Sec. 2072. There are safeguards for the hardship case. The rule provides a flexible standard for determining when a petition will be barred.

Subdivision (b) deals with the problem of successive habeas petitions. It provides that the judge may dismiss a second or successive petition (1) if it fails to allege new or different grounds for relief or (2) if new or different grounds for relief are alleged and the judge finds the failure of the petitioner to assert those grounds in a prior petition is inexcusable.

In Sanders v. United States, 373 U.S. 1 (1963), the court, in dealing with the problem of successive applications, stated:

Controlling weight may be given to denial of a prior

application for federal habeas corpus or Sec. 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. [Emphasis added.]

373 U.S. AT 15

The requirement is that the prior determination of the same ground has been on the merits. This requirement is in 28 U.S.C. Sec. 2244(b) and has been reiterated in many cases since Sanders. See Gains v. Allgood, 391 F.2d 692 (5th Cir. 1968); Hutchinson v. Craven, 415 F.2d 278 (9th Cir. 1969); Brown v. Peyton, 435 F.2d 1352 (4th Cir. 1970).

With reference to a successive application asserting a new ground or one not previously decided on the merits, the court in Sanders noted:

In either case, full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ * * * and this the Government has the burden of pleading. * * *

Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, * * * he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.

373 U.S. AT 17−18

Subdivision (b) has incorporated this principle and requires that the judge find petitioner's failure to have asserted the new grounds in the prior petition to be inexcusable.

Sanders, 18 U.S.C. Sec. 2244, and subdivision (b) make it clear that the court has discretion to entertain a successive application.

The burden is on the government to plead abuse of the writ. See Sanders v. United States, 373 U.S. 1, 10 (1963); Dixon v. Jacobs, 427 F.2d 589, 596 (D.C.Cir. 1970); cf. Johnson v. Copinger, 420 F.2d 395 (4th Cir. 1969). Once the government has done this, the petitioner has the burden of proving that he has not abused the writ. In Price v. Johnston, 334 U.S. 266, 292 (1948), the court said:

[I]f the Government chooses * * * to claim that the prisoner has abused the writ of habeas corpus, it rests with the Government to make that claim with clarity and particularity in its return to the order to show cause. That is not an intolerable burden. The Government is usually well acquainted with the facts that are necessary to make such a claim. Once a particular abuse has been alleged, the prisoner has the burden of answering that allegation and of proving that he has not abused the writ.

Subdivision (b) is consistent with the important and well established purpose of habeas corpus. It does not eliminate a remedy to which the petitioner is rightfully entitled. However, in Sanders, the court pointed out:

Nothing in the traditions of habeas corpus requires the federal

courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

373 U.S. AT 18

There are instances in which petitioner's failure to assert a ground in a prior petition is excusable. A retroactive change in the law and newly discovered evidence are examples. In rare instances, the court may feel a need to entertain a petition alleging grounds that have already been decided on the merits. Sanders, 373 U.S. at 1, 16. However, abusive use of the writ should be discouraged, and instances of abuse are frequent enough to require a means of dealing with them. For example, a successive application, already decided on the merits, may be submitted in the hope of getting before a different judge in multijudge courts. A known ground may be deliberately withheld in the hope of getting two or more hearings or in the hope that delay will result in witnesses and records being lost. There are instances in which a petitioner will have three or four petitions pending at the same time in the same court. There are many hundreds of cases where the application is at least the second one by the petitioner. This subdivision is aimed at screening out the abusive petitions from this large volume, so that the more meritorious petitions can get quicker and fuller consideration.

The form petition, supplied in accordance with rule 2(c), encourages the petitioner to raise all of his available grounds in one petition. It sets out the most common grounds asserted so that

these may be brought to his attention.

Some commentators contend that the problem of abuse of the writ of habeas corpus is greatly overstated:

> Most prisoners, of course, are interested in being released as soon as possible; only rarely will one inexcusably neglect to raise all available issues in his first federal application. The purpose of the "abuse" bar is apparently to deter repetitious applications from those few bored or vindictive prisoners * * *.
>
> 83 HARV.L.REV. AT 1153−1154

See also ABA Standards Relating to Post−Conviction Remedies Sec. 6.2, commentary at 92 (Approved Draft, 1968), which states: "The occasional, highly litigious prisoner stands out as the rarest exception." While no recent systematic study of repetitious applications exists, there is no reason to believe that the problem has decreased in significance in relation to the total number of Sec. 2254 petitions filed. That number has increased from 584 in 1949 to 12,088 in 1971. See Director of the Administrative Office of the United States Courts, Annual Report, table 16 (1971). It is appropriate that action be taken by rule to allow the courts to deal with this problem, whatever its specific magnitude. The bar set up by subdivision (b) is not one of rigid application, but rather is within the discretion of the courts on a case−by−case basis.

If it appears to the court after examining the petition and answer (where appropriate) that there is a high probability that the petition will be barred under either subdivision of rule 9, the

court ought to afford petitioner an opportunity to explain his apparent abuse. One way of doing this is by the use of the form annexed hereto. The use of a form will ensure a full airing of the issue so that the court is in a better position to decide whether the petition should be barred. This conforms with Johnson v. Copinger, 420 F.2d 395 (4th Cir. 1969), where the court stated:

[T]he petitioner is obligated to present facts demonstrating that his earlier failure to raise his claims is excusable and does not amount to an abuse of the writ. However, it is inherent in this obligation placed upon the petitioner that he must be given an opportunity to make his explanation, if he has one. If he is not afforded such an opportunity, the requirement that he satisfy the court that he has not abused the writ is meaningless. Nor do we think that a procedure which allows the imposition of a forfeiture for abuse of the writ, without allowing the petitioner an opportunity to be heard on the issue, comports with the minimum requirements of fairness.

420 F.2D AT 399

Use of the recommended form will contribute to an orderly handling of habeas petitions and will contribute to the ability of the court to distinguish the excusable from the inexcusable delay or failure to assert a ground for relief in a prior petition.

AMENDMENTS

1976 − Subd. (a). Pub. L. 94−426, Sec. 2(7), struck out provision which established a rebuttable presumption of prejudice to the state if the petition was filed more than five years after

conviction and started the running of the five year period, where a petition challenged the validity of an action after conviction, from the time of the order of such action.

Subd. (b). Pub. L. 94−426, Sec. 2(8), substituted "constituted an abuse of the writ" for "is not excusable".

RULE 10. POWERS OF MAGISTRATES

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. Sec. 636.

(As amended Pub. L. 94−426, Sec. 2(11), Sept. 28, 1976, 90 Stat. 1335; Apr. 30, 1979, eff. Aug. 1, 1979.)

ADVISORY COMMITTEE NOTE

Under this rule the duties imposed upon the judge of the district court by rules 2, 3, 4, 6, and 7 may be performed by a magistrate if and to the extent he is empowered to do so by a rule of the district court. However, when such duties involve the making of an order under rule 4 disposing of the petition, that order must be made by the court. The magistrate in such instances must submit to the court his report as to the facts and his recommendation with respect to the order.

The Federal Magistrates Act allows magistrates, when empowered by local rule, to perform certain functions in proceedings for post−trial relief. See 28 U.S.C. Sec. 636(b)(3). The performance of such functions, when authorized, is intended to "afford some degree of relief to district judges and their law clerks, who are presently burdened with burgeoning numbers of habeas corpus

petitions and applications under 28 U.S.C. Sec. 2255." Committee on the Judiciary, The Federal Magistrates Act, S.Rep. No. 371, 90th Cong., 1st sess., 26 (1967).

Under 28 U.S.C. Sec. 636(b), any district court,

> by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full−time United States magistrate * * * may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States.

The proposed rule recognizes the limitations imposed by 28 U.S.C. Sec. 636(b) upon the powers of magistrates to act in federal postconviction proceedings. These limitations are: (1) that the magistrate may act only pursuant to a rule passed by the majority of the judges in the district court in which the magistrate serves, and (2) that the duties performed by the magistrate pursuant to such rule be consistent with the Constitution and laws of the United States.

It has been suggested that magistrates be empowered by law to hold hearings and make final decisions in habeas proceedings. See Proposed Reformation of Federal Habeas Corpus Procedure: Use of Federal Magistrates, 54 Iowa L.Rev. 1147, 1158 (1969). However, the Federal Magistrates Act does not authorize such use of magistrates. Wingo v. Wedding, 418 U.S. 461 (1974). See advisory committee note to rule 8. While the use of magistrates can help alleviate the strain imposed on the district courts by the large number of

unmeritorious habeas petitions, neither 28 U.S.C. Sec. 636(b) nor this rule contemplate the abdication by the court of its decision−making responsibility. See also Developments in the Law − Federal Habeas Corpus, 83 Harv. L.Rev. 1038, 1188 (1970)

Where a full−time magistrate is not available, the duties contemplated by this rule may be assigned to a part−time magistrate.

1979 AMENDMENT

This amendment conforms the rule to subsequently enacted legislation clarifying and further defining the duties which may be assigned to a magistrate, 18 U.S.C. Sec. 636, as amended in 1976 by Pub. L. 94−577. To the extent that rule 10 is more restrictive than Sec. 636, the limitations are of no effect, for the statute expressly governs "[n]otwithstanding any provision of law to the contrary."

The reference to particular rules is stricken, as under Sec. 636(b)(1)(A) a judge may designate a magistrate to perform duties under other rules as well (e.g., order that further transcripts be furnished under rule 5; appoint counsel under rule 8). The reference to "established standards and criteria" is stricken, as Sec. 636(4) requires each district court to "establish rules pursuant to which the magistrates shall discharge their duties."

The exception with respect to a rule 4 order dismissing a petition is stricken, as that limitation appears in Sec. 636(b)(1)(B) and is thereby applicable to certain other actions under these rules as well (e.g., determination of a need for an evidentiary hearing

under rule 8; dismissal of a delayed or successive petition under rule 9).

AMENDMENTS

1976 − Pub. L. 94−426 inserted ", and to the extent the district court has established standards and criteria for the performance of such duties" after "rule of the district court".

CHANGE OF NAME

Reference to United States magistrate or to magistrate deemed to refer to United States magistrate judge pursuant to section 321 of Pub. L. 101−650, set out as a note under section 631 of this title.

RULE 11. FEDERAL RULES OF CIVIL PROCEDURE; EXTENT OF APPLICABILITY

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

ADVISORY COMMITTEE NOTE

Habeas corpus proceedings are characterized as civil in nature. See e.g., Fisher v. Baker, 203 U.S. 174, 181 (1906). However, under Fed.R.Civ.P. 81(a)(2), the applicability of the civil rules to habeas corpus actions has been limited, although the various courts which have considered this problem have had difficulty in setting out the boundaries of this limitation. See Harris v. Nelson, 394 U.S. 286 (1969) at 289, footnote 1. Rule 11 is intended to conform with the Supreme Court's approach in the Harris case. There the court was dealing with the petitioner's contention that Civil Rule 33 granting the right to discovery via written interrogatories is wholly applicable to habeas corpus proceedings. The court held:

We agree with the Ninth Circuit that Rule 33 of the Federal Rules of Civil Procedure is not applicable to habeas corpus proceedings and that 28 U.S.C. Sec. 2246 does not authorize interrogatories except in limited circumstances not applicable to this case; but we conclude that, in appropriate circumstances, a district court, confronted by a petition for habeas corpus which establishes a prima facie case for relief, may use or authorize the use of suitable discovery procedures, including interrogatories, reasonably fashioned to elicit facts necessary to help the court to "dispose of the matter as law and justice require" 28 U.S.C. Sec. 2243.

394 U.S. AT 290

The court then went on to consider the contention that the "conformity" provision of Rule 81(a)(2) should be rigidly applied so that the civil rules would be applicable only to the extent that habeas corpus practice had conformed to the practice in civil actions at the time of the adoption of the Federal Rules of Civil Procedure on September 16, 1938. The court said:

Although there is little direct evidence, relevant to the present problem, of the purpose of the "conformity" provision of Rule 81(a)(2), the concern of the draftsmen, as a general matter, seems to have been to provide for the continuing applicability of the "civil" rules in their new form to those areas of practice in habeas corpus and other enumerated proceedings in which the "specified" proceedings had theretofore utilized the modes of civil practice. Otherwise, those proceedings were to be

considered outside of the scope of the rules without prejudice, of course, to the use of particular rules by analogy or otherwise, where appropriate.

394 U.S. AT 294

The court then reiterated its commitment to judicial discretion in formulating rules and procedures for habeas corpus proceedings by stating:

[T]he habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage.

Where their duties require it, this is the inescapable obligation of the courts. Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. Sec. 1651.

394 U.S. AT 299

Rule 6 of these proposed rules deals specifically with the issue of discovery in habeas actions in a manner consistent with Harris. Rule 11 extends this approach to allow the court considering the petition to use any of the rules of civil procedure (unless inconsistent with these rules of habeas corpus) when in its discretion the court decides they are appropriate under the circumstances of the particular case. The court does not have to rigidly apply rules which would be inconsistent or inequitable in the overall framework of habeas corpus. Rule 11 merely recognizes and affirms their discretionary power to use their judgment in promoting the ends of justice.

Rule 11 permits application of the civil rules only when it would be appropriate to do so. Illustrative of an inappropriate application is that rejected by the Supreme Court in Pitchess v. Davis, 95 S.Ct. 1748 (1975), holding that Fed.R.Civ.P. 60(b) should not be applied in a habeas case when it would have the effect of altering the statutory exhaustion requirement of 28 U.S.C. Sec. 2254.

APPENDIX OF FORMS

MODEL FORM FOR USE IN APPLICATIONS FOR HABEAS CORPUS UNDER 28 U.S.C. SEC. 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 having 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. Sec. 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. 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 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 relief 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 postconviction

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.

_____

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 DECLARATION

_____

[Insert appropriate court]

_____

DECLARATION IN

(Petitioner)

SUPPORT

OF REQUEST

v.

TO PROCEED

_____

IN FORMA

(Respondent(s))

PAUPERIS

I, _____, 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.

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 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 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 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 the ____ 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

(As amended Apr. 28, 1982, eff. Aug. 1, 1982.)

MODEL FORM FOR USE IN 28 U.S.C. SEC. 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.

(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 constituted an abuse of the writ.

(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, 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.

_____

_____

_____

_____

_____

_____

_____

_____

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

(date)

_____

Signature of Petitioner

(As amended Apr. 28, 1982, eff. Aug. 1, 1982.)

−End−

−CITE−

28 USC Sec. 2255 01/06/03

−EXPCITE−

TITLE 28 − JUDICIARY AND JUDICIAL PROCEDURE

PART VI − PARTICULAR PROCEEDINGS

CHAPTER 153 − HABEAS CORPUS

−HEAD−

Sec. 2255. Federal custody; remedies on motion attacking sentence

−STATUTE−

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1−year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of −

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain −

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

−SOURCE−

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, Sec. 114, 63 Stat. 105; Pub. L. 104−132, title I, Sec. 105, Apr. 24, 1996, 110 Stat. 1220.)

−MISC1−

HISTORICAL AND REVISION NOTES

1948 ACT

This section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis. It provides an expeditious remedy for correcting erroneous sentences without

resort to habeas corpus. It has the approval of the Judicial Conference of the United States. Its principal provisions are incorporated in H.R. 4233, Seventy−ninth Congress.

1949 ACT

This amendment conforms language of section 2255 of title 28, U.S.C., with that of section 1651 of such title and makes it clear that the section is applicable in the district courts in the Territories and possessions.

−REFTEXT−

REFERENCES IN TEXT

Section 408 of the Controlled Substances Act, referred to in text, is classified to section 848 of Title 21, Food and Drugs.

−MISC2−

AMENDMENTS

1996 − Pub. L. 104−132 inserted at end three new undesignated paragraphs beginning "A 1−year period of limitation", "Except as provided in section 408 of the Controlled Substances Act", and "A second or successive motion must be certified" and struck out second and fifth undesignated pars. providing, respectively, that "A motion for such relief may be made at any time." and "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

1949 − Act May 24, 1949, substituted "court established by Act of Congress" for "court of the United States" in first par.

−SECREF−

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 753, 1825, 2244, 2253, 2266 of this title; title 18 section 3006A; title 21 section 848.

−MISC3−

APPROVAL AND EFFECTIVE DATE OF RULES GOVERNING SECTION 2254 CASES AND SECTION 2255 PROCEEDINGS FOR UNITED STATES DISTRICT COURTS

Pub. L. 94−426, Sec. 1, Sept. 28, 1976, 90 Stat. 1334, provided:

"That the rules governing section 2254 cases in the United States district courts and the rules governing section 2255 proceedings for the United States district courts, as proposed by the United States Supreme Court, which were delayed by the Act entitled 'An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court' (Public Law 94−349), are approved with the amendments set forth in section 2 of this Act and shall take effect as so amended, with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code filed on or after February 1, 1977."

POSTPONEMENT OF EFFECTIVE DATE OF PROPOSED RULES AND FORMS GOVERNING PROCEEDINGS UNDER SECTIONS 2254 AND 2255 OF THIS TITLE

Rules and forms governing proceedings under sections 2254 and 2255 of this title proposed by Supreme Court order of Apr. 26, 1976, effective 30 days after adjournment sine die of 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier, see section 2 of Pub. L. 94−349, set out as a

note under section 2074 of this title.

RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

(EFFECTIVE FEBRUARY 1, 1977, AS AMENDED TO JANUARY 22, 2002)

Rule

EFFECTIVE DATE OF RULES; EFFECTIVE DATE OF 1975 AMENDMENT

Rules, and the amendments thereto by Pub. L. 94−426, Sept. 28, 1976, 90 Stat. 1334, effective with respect to petitions under section 2254 of this title and motions under section 2255 of this

title filed on or after Feb. 1, 1977, see section 1 of Pub. L. 94−426, set out as a note above.

RULE 1. SCOPE OF RULES

These rules govern the procedure in the district court on a motion under 28 U.S.C. Sec. 2255:

(1) by a person in custody pursuant to a judgment of that court for a determination that the judgment was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack; and

(2) by a person in custody pursuant to a judgment of a state or other federal court and subject to future custody under a judgment of the district court for a determination that such future custody will be in violation of the Constitution or laws of the United States, or that the district court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

ADVISORY COMMITTEE NOTE

The basic scope of this postconviction remedy is prescribed by 28 U.S.C. Sec. 2255. Under these rules the person seeking relief from federal custody files a motion to vacate, set aside, or correct sentence, rather than a petition for habeas corpus. This is consistent with the terminology used in section 2255 and indicates the difference between this remedy and federal habeas for a state

prisoner. Also, habeas corpus is available to the person in federal custody if his "remedy by motion is inadequate or ineffective to test the legality of his detention."

Whereas sections 2241−2254 (dealing with federal habeas corpus for those in state custody) speak of the district court judge "issuing the writ" as the operative remedy, section 2255 provides that, if the judge finds the movant's assertions to be meritorious, he "shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." This is possible because a motion under Sec. 2255 is a further step in the movant's criminal case and not a separate civil action, as appears from the legislative history of section 2 of S. 20, 80th Congress, the provisions of which were incorporated by the same Congress in title 28 U.S.C. as Sec. 2255. In reporting S. 20 favorably the Senate Judiciary Committee said (Sen. Rep. 1526, 80th Cong. 2d Sess., p. 2):

The two main advantages of such motion remedy over the present habeas corpus are as follows:

First, habeas corpus is a separate civil action and not a further step in the criminal case in which petitioner is sentenced (Ex parte Tom Tong, 108 U.S. 556, 559 (1883)). It is not a determination of guilt or innocence of the charge upon which petitioner was sentenced. Where a prisoner sustains his right to discharge in habeas corpus, it is usually because some right − such as lack of counsel − has been denied which reflects no determination of his guilt or innocence but affects solely the

fairness of his earlier criminal trial. Even under the broad power in the statute "to dispose of the party as law and justice require" (28 U.S.C.A., sec. 461), the court or judge is by no means in the same advantageous position in habeas corpus to do justice as would be so if the matter were determined in the criminal proceeding (see Medley, petitioner, 134 U.S. 160, 174 (1890)). For instance, the judge (by habeas corpus) cannot grant a new trial in the criminal case. Since the motion remedy is in the criminal proceeding, this section 2 affords the opportunity and expressly gives the broad powers to set aside the judgment and to "discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

The fact that a motion under Sec. 2255 is a further step in the movant's criminal case rather than a separate civil action has significance at several points in these rules. See, e.g., advisory committee note to rule 3 (re no filing fee), advisory committee note to rule 4 (re availability of files, etc., relating to the judgment), advisory committee note to rule 6 (re availability of discovery under criminal procedure rules), advisory committee note to rule 11 (re no extension of time for appeal), and advisory committee not to rule 12 (re applicability of federal criminal rules). However, the fact that Congress has characterized the motion as a further step in the criminal proceedings does not mean that proceedings upon such a motion are of necessity governed by the legal principles which are applicable at a criminal trial regarding such matters as counsel, presence, confrontation,

self−incrimination, and burden of proof.

The challenge of decisions such as the revocation of probation or parole are not appropriately dealt with under 28 U.S.C. Sec. 2255, which is a continuation of the original criminal action. Other remedies, such as habeas corpus, are available in such situations.

Although rule 1 indicates that these rules apply to a motion for a determination that the judgment was imposed "in violation of the . . . laws of the United States," the language of 28 U.S.C. Sec. 2255, it is not the intent of these rules to define or limit what is encompassed within that phrase. See Davis v. United States, 417 U.S. 333 (1974), holding that it is not true "that every asserted error of law can be raised on a Sec. 2255 motion," and that the appropriate inquiry is "whether the claimed error of law was a fundamental defect which inherently results in a complete miscarriage of justice,' and whether [i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.' "

For a discussion of the "custody" requirement and the intended limited scope of this remedy, see advisory committee note to Sec. 2254 rule 1.

RULE 2. MOTION

(a) Nature of application for relief. If the person is presently in custody pursuant to the federal judgment in question, or if not presently in custody may be subject to such custody in the future pursuant to such judgment, the application for relief shall be in the form of a motion to vacate, set aside, or correct the sentence.

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

(c) Motion to be directed to one judgment only. A motion shall be limited to the assertion of a claim for relief against one judgment only of the district court. If a movant desires to attack the validity of other judgments of that or any other district court under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate motions.

(d) Return of insufficient motion. If a motion received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the movant, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion.

(As amended Pub. L. 94−426, Sec. 2(3), (4), Sept. 28, 1976, 90 Stat. 1334; Apr. 28, 1982, eff. Aug. 1, 1982.)

ADVISORY COMMITTEE NOTE

Under these rules the application for relief is in the form of a motion rather than a petition (see rule 1 and advisory committee note). Therefore, there is no requirement that the movant name a respondent. This is consistent with 28 U.S.C. Sec. 2255. The United States Attorney for the district in which the judgment under attack was entered is the proper party to oppose the motion since the federal government is the movant's adversary of record.

If the movant is attacking a federal judgment which will subject him to future custody, he must be in present custody (see rule 1 and advisory committee note) as the result of a state or federal governmental action. He need not alter the nature of the motion by trying to include the government officer who presently has official custody of him as a psuedo−respondent, or third−party plaintiff, or other fabrication. The court hearing his motion attacking the future custody can exercise jurisdiction over those having him in present custody without the use of artificial pleading devices.

There is presently a split among the courts as to whether a person currently in state custody may use a Sec. 2255 motion to obtain relief from a federal judgment under which he will be subjected to custody in the future. Negative, see Newton v. United States, 329 F.Supp. 90 (S.D. Texas 1971); affirmative, see Desmond v. The United States Board of Parole, 397 F.2d 386 (1st Cir. 1968), cert. denied, 393 U.S. 919 (1968); and Paalino v. United States, 314 F.Supp. 875 (C.D.Cal. 1970). It is intended that these rules settle the matter in favor of the prisoner's being able to file a

Sec. 2255 motion for relief under those circumstances. The proper district in which to file such a motion is the one in which is situated the court which rendered the sentence under attack.

Under rule 35, Federal Rules of Criminal Procedure, the court may correct an illegal sentence or a sentence imposed in an illegal manner, or may reduce the sentence. This remedy should be used, rather than a motion under these Sec. 2255 rules, whenever applicable, but there is some overlap between the two proceedings which has caused the courts difficulty.

The movant should not be barred from an appropriate remedy because he has misstyled his motion. See United States v. Morgan, 346 U.S. 502, 505 (1954). The court should construe it as whichever one is proper under the circumstances and decide it on its merits.

For a Sec. 2255 motion construed as a rule 35 motion, see Heflin v. United States, 358 U.S. 415 (1959); and United States v. Coke, 404 F.2d 836 (2d Cir. 1968). For writ of error coram nobis treated as a rule 35 motion, see Hawkins v. United States, 324 F.Supp. 223 (E.D.Texas, Tyler Division 1971). For a rule 35 motion treated as a Sec. 2255 motion, see Moss v. United States, 263 F.2d 615 (5th Cir. 1959); Jones v. United States, 400 F.2d 892 (8th Cir. 1968), cert. denied 394 U.S. 991 (1969); and United States v. Brown, 413 F.2d 878 (9th Cir. 1969), cert. denied, 397 U.S. 947 (1970).

One area of difference between Sec. 2255 and rule 35 motions is that for the latter there is no requirement that the movant be "in custody." Heflin v. United States, 358 U.S. 415, 418, 422 (1959); Duggins v. United States, 240 F.2d 479, 483 (6th Cir. 1957).

Compare with rule 1 and advisory committee note for Sec. 2255 motions. The importance of this distinction has decreased since Peyton v. Rowe, 391 U.S. 54 (1968), but it might still make a difference in particular situations.

A rule 35 motion is used to attack the sentence imposed, not the basis for the sentence. The court in Gilinsky v. United States, 335 F.2d 914, 916 (9th Cir. 1964), stated, "a Rule 35 motion presupposes a valid conviction. * * * [C]ollateral attack on errors allegedly committed at trial is not permissible under Rule 35." By illustration the court noted at page 917: "a Rule 35 proceeding contemplates the correction of a sentence of a court having jurisdiction. * * * [J]urisdictional defects * * * involve a collateral attack, they must ordinarily be presented under 28 U.S.C. Sec. 2255." In United States v. Semet, 295 F.Supp. 1084 (E.D. Okla. 1968), the prisoner moved under rule 35 and Sec. 2255 to invalidate the sentence he was serving on the grounds of his failure to understand the charge to which he pleaded guilty. The court said:

As regards Defendant's Motion under Rule 35, said Motion must be denied as its presupposes a valid conviction of the offense with which he was charged and may be used only to attack the sentence. It may not be used to examine errors occurring prior to the imposition of sentence.

295 F.SUPP. AT 1085

See also: Moss v. United States, 263 F.2d at 616; Duggins v. United States, 240 F. 2d at 484; Migdal v. United States, 298 F.2d 513,

514 (9th Cir. 1961); Jones v. United States, 400 F.2d at 894; United States v. Coke, 404 F.2d at 847; and United States v. Brown, 413 F.2d at 879.

A major difficulty in deciding whether rule 35 or Sec. 2255 is the proper remedy is the uncertainty as to what is meant by an "illegal sentence." The Supreme Court dealt with this issue in Hill v. United States, 368 U.S. 424 (1962). The prisoner brought a Sec. 2255 motion to vacate sentence on the ground that he had not been given a Fed.R.Crim. P. 32(a) opportunity to make a statement in his own behalf at the time of sentencing. The majority held this was not an error subject to collateral attack under Sec. 2255. The five−member majority considered the motion as one brought pursuant to rule 35, but denied relief, stating:

[T]he narrow function of Rule 35 is to permit correction at any time of an illegal sentence, not to re−examine errors occurring at the trial or other proceedings prior to the imposition of sentence. The sentence in this case was not illegal. The punishment meted out was not in excess of that prescribed by the relevant statutes, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect.

368 U.S. AT 430

The four dissenters felt the majority definition of "illegal" was too narrow.

[Rule 35] provides for the correction of an "illegal sentence" without regard to the reasons why that sentence is illegal and

contains not a single word to support the Court's conclusion that only a sentence illegal by reason of the punishment it imposes is "illegal" within the meaning of the Rule. I would have thought that a sentence imposed in an illegal manner − whether the amount or form of the punishment meted out constitutes an additional violation of law or not − would be recognized as an "illegal sentence" under any normal reading of the English language.

368 U.S. AT 431−432

The 1966 amendment of rule 35 added language permitting correction of a sentence imposed in an "illegal manner." However, there is a 120−day time limit on a motion to do this, and the added language does not clarify the intent of the rule or its relation to Sec. 2255.

The courts have been flexible in considering motions under circumstances in which relief might appear to be precluded by Hill v. United States. In Peterson v. United States, 432 F.2d 545 (8th Cir. 1970), the court was confronted with a motion for reduction of sentence by a prisoner claiming to have received a harsher sentence than his codefendants because he stood trial rather than plead guilty. He alleged that this violated his constitutional right to a jury trial. The court ruled that, even though it was past the 120−day time period for a motion to reduce sentence, the claim was still cognizable under rule 35 as a motion to correct an illegal sentence.

The courts have made even greater use of Sec. 2255 in these types of situations. In United States v. Lewis, 392 F.2d 440 (4th Cir.

1968), the prisoner moved under Sec. 2255 and rule 35 for relief from a sentence he claimed was the result of the judge's misunderstanding of the relevant sentencing law. The court held that he could not get relief under rule 35 because it was past the 120 days for correction of a sentence imposed in an illegal manner and under Hill v. United States it was not an illegal sentence. However, Sec. 2255 was applicable because of its "otherwise subject to collateral attack" language. The flaw was not a mere trial error relating to the finding of guilt, but a rare and unusual error which amounted to "exceptional circumstances" embraced in Sec. 2255's words "collateral attack." See 368 U.S. at 444 for discussion of other cases allowing use of Sec. 2255 to attack the sentence itself in similar circumstances, especially where the judge has sentenced out of a misapprehension of the law.

In United States v. McCarthy, 433 F.2d 591, 592 (1st Cir. 1970), the court allowed a prisoner who was past the time limit for a proper rule 35 motion to use Sec. 2255 to attack the sentence which he received upon a plea of guilty on the ground that it was induced by an unfulfilled promise of the prosecutor to recommend leniency. The court specifically noted that under Sec. 2255 this was a proper collateral attack on the sentence and there was no need to attack the conviction as well.

The court in United States v. Malcolm, 432 F.2d 809, 814, 818 (2d Cir. 1970), allowed a prisoner to challenge his sentence under Sec. 2255 without attacking the conviction. It held rule 35 inapplicable because the sentence was not illegal on its face, but the manner in

which the sentence was imposed raised a question of the denial of due process in the sentencing itself which was cognizable under Sec. 2255.

The flexible approach taken by the courts in the above cases seems to be the reasonable way to handle these situations in which rule 35 and Sec. 2255 appear to overlap. For a further discussion of this problem, see C. Wright, Federal Practice and Procedure; Criminal Secs. 581−587 (1969, Supp. 1975).

See the advisory committee note to rule 2 of the Sec. 2254 rules for further discussion of the purposes and intent of rule 2 of these Sec. 2255 rules.

1982 AMENDMENT

Subdivision (b). The amendment takes into account 28 U.S.C. Sec. 1746, enacted after adoption of the Sec. 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 Sec. 2255 forms have been revised accordingly.

AMENDMENTS

1976 − Subd. (b). Pub. L. 94−426, Sec. 2(3), inserted

"substantially" after "The motion shall be in", and struck out requirement that the motion follow the prescribed form.

Subd. (d). Pub. L. 94−426, Sec. 2(4), inserted "substantially" after "district court does not", and struck out provision which permitted the clerk to return a motion for noncompliance without a judge so directing.

RULE 3. FILING MOTION

(a) Place of filing; copies. A motion under these rules shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof.

(b) Filing and service. Upon receipt of the motion and having ascertained that it appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the motion and enter it on the docket in his office in the criminal action in which was entered the judgment to which it is directed. He shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the United States Attorney of the district in which the judgment under attack was entered. The filing of the motion shall not require said United States Attorney to answer the motion or otherwise move with respect to it unless so ordered by the court.

ADVISORY COMMITTEE NOTE

There is no filing fee required of a movant under these rules. This is a change from the practice of charging $15 and is done to recognize specifically the nature of a Sec. 2255 motion as being a continuation of the criminal case whose judgment is under attack. The long−standing practice of requiring a $15 filing fee has

followed from 28 U.S.C. Sec. 1914(a) whereby "parties instituting any civil action * * * pay a filing fee of $15, except that on an application for a writ of habeas corpus the filing fee shall be $5." This has been held to apply to a proceeding under Sec. 2255 despite the rationale that such a proceeding is a motion and thus a continuation of the criminal action. (See note to rule 1.)

A motion under Section 2255 is a civil action and the clerk has no choice but to charge a $15.00 filing fee unless by leave of court it is filed in forma pauperis.

McCune v. United States, 406 F.2d 417, 419 (6th Cir. 1969).

Although the motion has been considered to be a new civil action in the nature of habeas corpus for filing purposes, the reduced fee for habeas has been held not applicable. The Tenth Circuit considered the specific issue in Martin v. United States, 273 F.2d 775 (10th Cir. 1960), cert. denied, 365 U.S. 853 (1961), holding that the reduced fee was exclusive to habeas petitions.

Counsel for Martin insists that, if a docket fee must be paid, the amount is $5 rather than $15 and bases his contention on the exception contained in 28 U.S.C. Sec. 1914 that in habeas corpus the fee is $5. This reads into Sec. 1914 language which is not there. While an application under Sec. 2255 may afford the same relief as that previously obtainable by habeas corpus, it is not a petition for a writ of habeas corpus. A change in Sec. 1914 must come from Congress.

273 F.2D AT 778

Although for most situations Sec. 2255 is intended to provide to

the federal prisoner a remedy equivalent to habeas corpus as used by state prisoners, there is a major distinction between the two. Calling a Sec. 2255 request for relief a motion rather than a petition militates toward charging no new filing fee, not an increased one. In the absence of convincing evidence to the contrary, there is no reason to suppose that Congress did not mean what it said in making a Sec. 2255 action a motion. Therefore, as in other motions filed in a criminal action, there is no requirement of a filing fee. It is appropriate that the present situation of docketing a Sec. 2255 motion as a new action and charging a $15 filing fee be remedied by the rule when the whole question of Sec. 2255 motions is thoroughly thought through and organized.

Even though there is no need to have a forma pauperis affidavit to proceed with the action since there is no requirement of a fee for filing the motion the affidavit remains attached to the form to be supplied potential movants. Most such movants are indigent, and this is a convenient way of getting this into the official record so that the judge may appoint counsel, order the government to pay witness fees, allow docketing of an appeal, and grant any other rights to which an indigent is entitled in the course of a Sec. 2255 motion, when appropriate to the particular situation, without the need for an indigency petition and adjudication at such later point in the proceeding. This should result in a streamlining of the process to allow quicker disposition of these motions.

For further discussion of this rule, see the advisory committee

note to rule 3 of the Sec. 2254 rules.

RULE 4. PRELIMINARY CONSIDERATION BY JUDGE

(a) Reference to judge; dismissal or order to answer. The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business.

(b) Initial consideration by judge. The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

ADVISORY COMMITTEE NOTE

Rule 4 outlines the procedure for assigning the motion to a specific judge of the district court and the options available to the judge and the government after the motion is properly filed.

The long−standing majority practice in assigning motions made pursuant to Sec. 2255 has been for the trial judge to determine the merits of the motion. In cases where the Sec. 2255 motion is directed against the sentence, the merits have traditionally been decided by the judge who imposed sentence. The reasoning for this was first noted in Currell v. United States, 173 F.2d 348, 348−349 (4th Cir. 1949):

Complaint is made that the judge who tried the case passed upon the motion. Not only was there no impropriety in this, but it is highly desirable in such cases that the motions be passed on by the judge who is familiar with the facts and circumstances surrounding the trial, and is consequently not likely to be misled by false allegations as to what occurred.

This case, and its reasoning, has been almost unanimously endorsed by other courts dealing with the issue.

Commentators have been critical of having the motion decided by the trial judge. See Developments in the Law − Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1206−1208 (1970).

[T]he trial judge may have become so involved with the decision that it will be difficult for him to review it objectively.

Nothing in the legislative history suggests that "court" refers to a specific judge, and the procedural advantages of section 2255 are available whether or not the trial judge presides at the hearing.

The theory that Congress intended the trial judge to preside at a section 2255 hearing apparently originated in Carvell v. United

States, 173 F.2d 348 (4th Cir. 1949) (per curiam), where the panel of judges included Chief Judge Parker of the Fourth Circuit, chairman of the Judicial Conference committee which drafted section 2255. But the legislative history does not indicate that Congress wanted the trial judge to preside. Indeed the advantages of section 2255 can all be achieved if the case is heard in the sentencing district, regardless of which judge hears it. According to the Senate committee report the purpose of the bill was to make the proceeding a part of the criminal action so the court could resentence the applicant, or grant him a new trial. (A judge presiding over a habeas corpus action does not have these powers.) In addition, Congress did not want the cases heard in the district of confinement because that tended to concentrate the burden on a few districts, and made it difficult for witnesses and records to be produced.

83 HARV.L.REV. AT 1207−1208

The Court of Appeals for the First Circuit has held that a judge other than the trial judge should rule on the 2255 motion. See Halliday v. United States, 380 F.2d 270 (1st Cir. 1967).

There is a procedure by which the movant can have a judge other than the trial judge decide his motion in courts adhering to the majority rule. He can file an affidavit alleging bias in order to disqualify the trial judge. And there are circumstances in which the trial judge will, on his own, disqualify himself. See, e.g., Webster v. United States, 330 F.Supp. 1080 (1972). However, there has been some questioning of the effectiveness of this procedure.

See Developments in the Law − Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1200−1207 (1970).

Subdivision (a) adopts the majority rule and provides that the trial judge, or sentencing judge if different and appropriate for the particular motion, will decide the motion made pursuant to these rules, recognizing that, under some circumstances, he may want to disqualify himself. A movant is not without remedy if he feels this is unfair to him. He can file an affidavit of bias. And there is the right to appellate review if the trial judge refuses to grant his motion. Because the trial judge is thoroughly familiar with the case, there is obvious administrative advantage in giving him the first opportunity to decide whether there are grounds for granting the motion.

Since the motion is part of the criminal action in which was entered the judgment to which it is directed, the files, records, transcripts, and correspondence relating to that judgment are automatically available to the judge in his consideration of the motion. He no longer need order them incorporated for that purpose.

Rule 4 has its basis in Sec. 2255 (rather than 28 U.S.C. Sec. 2243 in the corresponding habeas corpus rule) which does not have a specific time limitation as to when the answer must be made. Also, under Sec. 2255, the United States Attorney for the district is the party served with the notice and a copy of the motion and required to answer (when appropriate). Subdivision (b) continues this practice since there is no respondent involved in the motion (unlike habeas) and the United States Attorney, as prosecutor in

the case in question, is the most appropriate one to defend the judgment and oppose the motion.

The judge has discretion to require an answer or other appropriate response from the United States Attorney. See advisory committee note to rule 4 of the Sec. 2254 rules.

RULE 5. ANSWER; CONTENTS

(a) Contents of answer. The answer shall respond to the allegations of the motion. In addition it shall state whether the movant has used any other available federal remedies including any prior post−conviction motions under these rules or those existing previous to the adoption of the present rules. The answer shall also state whether an evidentiary hearing was accorded the movant in a federal court.

(b) Supplementing the answer. The court shall examine its files and records to determine whether it has available copies of transcripts and briefs whose existence the answer has indicated. If any of these items should be absent, the government shall be ordered to supplement its answer by filing the needed records. The court shall allow the government an appropriate period of time in which to do so, without unduly delaying the consideration of the motion.

ADVISORY COMMITTEE NOTE

Unlike the habeas corpus statutes (see 28 U.S.C. Secs. 2243, 2248) Sec. 2255 does not specifically call for a return or answer by the United States Attorney or set any time limits as to when one must be submitted. The general practice, however, if the motion is

not summarily dismissed, is for the government to file an answer to the motion as well as counter−affidavits, when appropriate. Rule 4 provides for an answer to the motion by the United States Attorney, and rule 5 indicates what its contents should be.

There is no requirement that the movant exhaust his remedies prior to seeking relief under Sec. 2255. However, the courts have held that such a motion is inappropriate if the movant is simultaneously appealing the decision.

We are of the view that there is no jurisdictional bar to the District Court's entertaining a Section 2255 motion during the pendency of a direct appeal but that the orderly administration of criminal law precludes considering such a motion absent extraordinary circumstances.

WOMACK V. UNITED STATES, 395 F.2D 630, 631 (D.C.CIR. 1968)

Also see Masters v. Eide, 353 F.2d 517 (8th Cir. 1965). The answer may thus cut short consideration of the motion if it discloses the taking of an appeal which was omitted from the form motion filed by the movant.

There is nothing in Sec. 2255 which corresponds to the Sec. 2248 requirement of a traverse to the answer. Numerous cases have held that the government's answer and affidavits are not conclusive against the movant, and if they raise disputed issues of fact a hearing must be held. Machibroda v. United States, 368 U.S. 487, 494, 495 (1962); United States v. Salerno, 290 F.2d 105, 106 (2d Cir. 1961); Romero v. United States, 327 F.2d 711, 712 (5th Cir. 1964); Scott v. United States, 349 F.2d 641, 642, 643 (6th Cir.

1965); Schiebelhut v. United States, 357 F.2d 743, 745 (6th Cir. 1966); and Del Piano v. United States, 362 F.2d 931, 932, 933 (3d Cir. 1966). None of these cases make any mention of a traverse by the movant to the government's answer. As under rule 5 of the Sec. 2254 rules, there is no intention here that such a traverse be required, except under special circumstances. See advisory committee note to rule 9.

Subdivision (b) provides for the government to supplement its answers with appropriate copies of transcripts or briefs if for some reason the judge does not already have them under his control. This is because the government will in all probability have easier access to such papers than the movant, and it will conserve the court's time to have the government produce them rather than the movant, who would in most instances have to apply in forma pauperis for the government to supply them for him anyway.

For further discussion, see the advisory committee note to rule 5 of the Sec. 2254 rules.

RULE 6. DISCOVERY

(a) Leave of court required. A party may invoke the processes of discovery available under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a movant who qualifies for appointment of counsel under 18 U.S.C.

Sec. 3006A(g).

(b) Requests for discovery. Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

(c) Expenses. If the government is granted leave to take the deposition of the movant or any other person, the judge may as a condition of taking it direct that the government pay the expenses of travel and subsistence and fees of counsel for the movant to attend the taking of the deposition.

ADVISORY COMMITTEE NOTE

This rule differs from the corresponding discovery rule under the Sec. 2254 rules in that it includes the processes of discovery available under the Federal Rules of Criminal Procedure as well as the civil. This is because of the nature of a Sec. 2255 motion as a continuing part of the criminal proceeding (see advisory committee note to rule 1) as well as a remedy analogous to habeas corpus by state prisoners.

See the advisory committee note to rule 6 of the Sec. 2254 rules. The discussion there is fully applicable to discovery under these rules for Sec. 2255 motions.

RULE 7. EXPANSION OF RECORD

(a) Direction for expansion. If the motion is not dismissed summarily, the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.

(b) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the motion in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(c) Submission to opposing party. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(d) Authentication. The court may require the authentication of any material under subdivision (b) or (c).

ADVISORY COMMITTEE NOTE

It is less likely that the court will feel the need to expand the record in a Sec. 2255 proceeding than in a habeas corpus proceeding, because the trial (or sentencing) judge is the one hearing the motion (see rule 4) and should already have a complete file on the case in his possession. However, rule 7 provides a convenient method for supplementing his file if the case warrants it.

See the advisory committee note to rule 7 of the Sec. 2254 rules for a full discussion of reasons and procedures for expanding the record.

RULE 8. EVIDENTIARY HEARING

(a) Determination by court. If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer

is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

(b) Function of the magistrate.

(1) When designated to do so in accordance with 28 U.S.C. Sec. 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the motion, and submit to a judge of the court proposed findings and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

(c) Appointment of counsel; time for hearing. If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. Sec. 3006A(g) and the hearing shall be conducted as promptly as

practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. Sec. 3006A at any stage of the proceeding if the interest of justice so requires.

(d) Production of statements at evidentiary hearing.

(1) In general. Federal Rule of Criminal Procedure 26.2(a)−(d), and (f) applies at an evidentiary hearing under these rules.

(2) Sanctions for failure to produce statement. If a party elects not to comply with an order under Federal Rule of Criminal Procedure 26.2(a) to deliver a statement to the moving party, at the evidentiary hearing the court may not consider the testimony of the witness whose statement is withheld.

(As amended Pub. L. 94−426, Sec. 2(6), Sept. 28, 1976, 90 Stat. 1335; Pub. L. 94−577, Sec. 2(a)(2), (b)(2), Oct. 21, 1976, 90 Stat. 2730, 2731; Apr. 22, 1993, eff. Dec. 1, 1993.)

ADVISORY COMMITTEE NOTE

The standards for Sec. 2255 hearings are essentially the same as for evidentiary hearings under a habeas petition, except that the previous federal fact−finding proceeding is in issue rather than the state's. Also Sec. 2255 does not set specific time limits for holding the hearing, as does Sec. 2243 for a habeas action. With these minor differences in mind, see the advisory committee note to rule 8 of Sec. 2254 rules, which is applicable to rule 8 of these Sec. 2255 rules.

1993 AMENDMENT

The amendment to Rule 8 is one of a series of parallel amendments

to Federal Rules of Criminal Procedure 32, 32.1, and 46 which extend the scope of Rule 26.2 (Production of Witness Statements) to proceedings other than the trial itself. The amendments are grounded on the compelling need for accurate and credible information in making decisions concerning the defendant's liberty. See the Advisory Committee Note to Rule 26.2(g). A few courts have recognized the authority of a judicial officer to order production of prior statements by a witness at a Section 2255 hearing, see, e.g., United States v. White, 342 F.2d 379, 382, n.4 (4th Cir. 1959). The amendment to Rule 8 grants explicit authority to do so. The amendment is not intended to require production of a witness's statement before the witness actually presents oral testimony.

AMENDMENTS

1976 − Subd. (b). Pub. L. 94−577, Sec. 2(a)(2), substituted provisions which authorized magistrates, when designated to do so in accordance with section 636(b) of this title, to conduct hearings, including evidentiary hearings, on the petition and to submit to a judge of the court proposed findings of fact and recommendations for disposition, which directed the magistrate to file proposed findings and recommendations with the court with copies furnished to all parties, which allowed parties thus served 10 days to file written objections thereto, and which directed a judge of the court to make de novo determinations of the objected−to portions and to accept, reject, or modify the findings or recommendations for provisions under which the magistrate had been empowered only to recommend to the district judge that an

evidentiary hearing be held or that the petition be dismissed.

Subd. (c). Pub. L. 94−577, Sec. 2(b)(2), substituted "and the hearing shall be conducted" for "and shall conduct the hearing."

Pub. L. 94−426 provided that these rules not limit the appointment of counsel under section 3006A of title 18, if the interest of justice so require.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendments made by Pub. L. 94−577 effective with respect to motions under section 2255 of this title filed on or after Feb. 1, 1977, see section 2(c) of Pub. L. 94−577, set out as a note under Rule 8 of the Rules Governing Cases Under Section 2254 of this title.

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.

(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 constituted an abuse of the procedure governed by

these rules.

(As amended Pub. L. 94−426, Sec. 2(9), (10), Sept. 28, 1976, 90 Stat. 1335.)

ADVISORY COMMITTEE NOTE

Unlike the statutory provisions on habeas corpus (28 U.S.C. Secs. 2241−2254), Sec. 2255 specifically provides that "a motion for such relief may be made at any time." [Emphasis added.] Subdivision (a) provides that delayed motions may be barred from consideration if the government has been prejudiced in its ability to respond to the motion by the delay and the movant's failure to seek relief earlier is not excusable within the terms of the rule. Case law, dealing with this issue, is in conflict.

Some courts have held that the literal language of Sec. 2255 precludes any possible time bar to a motion brought under it. In Heflin v. United States, 358 U.S. 415 (1959), the concurring opinion noted:

The statute [28 U.S.C. Sec. 2255] further provides; "A motion * * * may be made at any time." This * * * simply means that, as in habeas corpus, there is no statute of limitations, no res judicata, and that the doctrine of laches is inapplicable.

358 U.S. AT 420

McKinney v. United States, 208 F.2d 844 (D.C.Cir. 1953) reversed the district court's dismissal of a Sec. 2255 motion for being too late, the court stating:

McKinney's present application for relief comes late in the day: he has served some fifteen years in prison. But tardiness is

irrelevant where a constitutional issue is raised and where the prisoner is still confined.

208 F.2D AT 846, 847

In accord, see: Juelich v. United States, 300 F.2d 381, 383 (5th Cir. 1962); Conners v. United States, 431 F.2d 1207, 1208 (9th Cir. 1970); Sturrup v. United States, 218 F.Supp. 279, 281 (E.D.N.Car. 1963); and Banks v. United States, 319 F.Supp. 649, 652 (S.D.N.Y. 1970).

It has also been held that delay in filing a Sec. 2255 motion does not bar the movant because of lack of reasonable diligence in pressing the claim.

The statute [28 U.S.C. Sec. 2255], when it states that the motion may be made at any time, excludes the addition of a showing of diligence in delayed filings. A number of courts have considered contentions similar to those made here and have concluded that there are no time limitations. This result excludes the requirement of diligence which is in reality a time limitation.

HAIER V. UNITED STATES, 334 F.2D 441, 442 (10TH CIR. 1964)

Other courts have recognized that delay may have a negative effect on the movant. In Raines v. United States, 423 F.2d 526 (4th Cir. 1970), the court stated:

[B]oth petitioners' silence for extended periods, one for 28 months and the other for nine years, serves to render their allegations less believable. "Although a delay in filing a section 2255 motion is not a controlling element * * * it may merit some consideration * * *."

In Aiken v. United States, 191 F.Supp. 43, 50 (M.D.N.Car. 1961), aff'd 296 F.2d 604 (4th Cir. 1961), the court said: "While motions under 28 U.S.C. Sec. 2255 may be made at any time, the lapse of time affects the good faith and credibility of the moving party." For similar conclusions, see: Parker v. United States, 358 F.2d 50, 54 n. 4 (7th Cir. 1965), cert. denied, 386 U.S. 916 (1967); Le Clair v. United States, 241 F.Supp. 819, 824 (N.D. Ind. 1965); Malone v. United States, 299 F.2d 254, 256 (6th Cir. 1962), cert. denied, 371 U.S. 863 (1962); Howell v. United States, 442 F.2d 265, 274 (7th Cir. 1971); and United States v. Wiggins, 184 F. Supp. 673, 676 (D.C.Cir. 1960).

There have been holdings by some courts that a delay in filing a Sec. 2255 motion operates to increase the burden of proof which the movant must meet to obtain relief. The reasons for this, as expressed in United States v. Bostic, 206 F.Supp. 855 (D.C.Cir. 1962), are equitable in nature.

Obviously, the burden of proof on a motion to vacate a sentence under 28 U.S.C. Sec. 2255 is on the moving party. . . . The burden is particularly heavy if the issue is one of fact and a long time has elapsed since the trial of the case. While neither the statute of limitations nor laches can bar the assertion of a constitutional right, nevertheless, the passage of time may make it impracticable to retry a case if the motion is granted and a new trial is ordered. No doubt, at times such a motion is a product of an afterthought. Long delay may raise a question of

good faith.

206 F.SUPP. AT 856−857

See also United States v. Wiggins, 184 F.Supp. at 676.

A requirement that the movant display reasonable diligence in filing a Sec. 2255 motion has been adopted by some courts dealing with delayed motions. The court in United States v. Moore, 166 F.2d 102 (7th Cir. 1948), cert. denied, 334 U.S. 849 (1948), did this, again for equitable reasons.

[W]e agree with the District Court that the petitioner has too long slept upon his rights. * * * [A]pparently there is no limitation of time within which * * * a motion to vacate may be filed, except that an applicant must show reasonable diligence in presenting his claim. * * *

The reasons which support the rule requiring diligence seem obvious. * * * Law enforcement officials change, witnesses die, memories grow dim. The prosecuting tribunal is put to a disadvantage if an unexpected retrial should be necessary after long passage of time.

166 F.2D AT 105

In accord see Desmond v. United States, 333 F.2d 378, 381 (1st Cir. 1964), on remand, 345 F.2d 225 (1st Cir. 1965).

One of the major arguments advanced by the courts which would penalize a movant who waits an unduly long time before filing a Sec. 2255 motion is that such delay is highly prejudicial to the prosecution. In Desmond v. United States, writing of a Sec. 2255 motion alleging denial of effective appeal because of deception by

movant's own counsel, the court said:

[A]pplications for relief such as this must be made promptly. It will not do for a prisoner to wait until government witnesses have become unavailable as by death, serious illness or absence from the country, or until the memory of available government witnesses has faded. It will not even do for a prisoner to wait any longer than is reasonably necessary to prepare appropriate moving papers, however inartistic, after discovery of the deception practiced upon him by his attorney.

333 F.2D AT 381

In a similar vein are United States v. Moore and United States v. Bostic, supra, and United States v. Wiggins, 184 F. Supp. at 676.

Subdivision (a) provides a flexible, equitable time limitation based on laches to prevent movants from withholding their claims so as to prejudice the government both in meeting the allegations of the motion and in any possible retrial. It includes a reasonable diligence requirement for ascertaining possible grounds for relief. If the delay is found to be excusable, or nonprejudicial to the government, the time bar is inoperative.

Subdivision (b) is consistent with the language of Sec. 2255 and relevant case law.

The annexed form is intended to serve the same purpose as the comparable one included in the Sec. 2254 rules.

For further discussion applicable to this rule, see the advisory committee note to rule 9 of the Sec. 2254 rules.

AMENDMENTS

1976 − Subd. (a). Pub. L. 94−426, Sec. 2(9), struck out provision which established a rebuttable presumption of prejudice to government if the petition was filed more than five years after conviction.

Subd. (b). Pub. L. 94−426, Sec. 2(10), substituted "constituted an abuse of the procedure governed by these rules" for "is not excusable".

RULE 10. POWERS OF MAGISTRATES

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. Sec. 636.

(As amended Pub. L. 94−426, Sec. 2(12), Sept. 28, 1976, 90 Stat. 1335; Apr. 30, 1979, eff. Aug. 1, 1979.)

ADVISORY COMMITTEE NOTE

See the advisory committee note to rule 10 of the Sec. 2254 rules for a discussion fully applicable here as well.

1979 AMENDMENT

This amendment conforms the rule to 18 U.S.C. Sec. 636. See Advisory Committee Note to rule 10 of the Rules Governing Section 2254 Cases in the United States District Courts.

AMENDMENTS

1976 − Pub. L. 94−426 inserted ", and to the extent the district court has established standards and criteria for the performance of such duties," after "rule of the district court".

CHANGE OF NAME

Reference to United States magistrate or to magistrate deemed to

refer to United States magistrate judge pursuant to section 321 of Pub. L. 101−650, set out as a note under section 631 of this title.

RULE 11. TIME FOR APPEAL

The time for appeal from an order entered on a motion for relief made pursuant to these rules is as provided in Rule 4(a) of the Federal Rules of Appellate Procedure. Nothing in these rules shall be construed as extending the time to appeal from the original judgment of conviction in the district court.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

ADVISORY COMMITTEE NOTE

Rule 11 is intended to make clear that, although a Sec. 2255 action is a continuation of the criminal case, the bringing of a Sec. 2255 action does not extend the time.

1979 AMENDMENT

Prior to the promulgation of the Rules Governing Section 2255 Proceedings, the courts consistently held that the time for appeal in a section 2255 case is as provided in Fed.R.App.P. 4(a), that is, 60 days when the government is a party, rather than as provided in appellate rule 4(b), which says that the time is 10 days in criminal cases. This result has often been explained on the ground that rule 4(a) has to do with civil cases and that "proceedings under section 2255 are civil in nature." E.g., Rothman v. United States, 508 F.2d 648 (3d Cir. 1975). Because the new section 2255 rules are based upon the premise "that a motion under Sec. 2255 is a further step in the movant's criminal case rather than a separate civil action," see Advisory Committee Note to rule 1, the question

has arisen whether the new rules have the effect of shortening the time for appeal to that provided in appellate rule 4(b). A sentence has been added to rule 11 in order to make it clear that this is not the case.

Even though section 2255 proceedings are a further step in the criminal case, the added sentence correctly states current law. In United States v. Hayman, 342 U.S. 205 (1952), the Supreme Court noted that such appeals "are governed by the civil rules applicable to appeals from final judgments in habeas corpus actions." In support, the Court cited Mercado v. United States, 183 F.2d 486 (1st Cir. 1950), a case rejecting the argument that because Sec. 2255 proceedings are criminal in nature the time for appeal is only 10 days. The Mercado court concluded that the situation was governed by that part of 28 U.S.C. Sec. 2255 which reads: "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus." Thus, because appellate rule 4(a) is applicable in habeas cases, it likewise governs in Sec. 2255 cases even though they are criminal in nature.

RULE 12. FEDERAL RULES OF CRIMINAL AND CIVIL PROCEDURE; EXTENT OF APPLICABILITY

If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed

under these rules.

ADVISORY COMMITTEE NOTE

This rule differs from rule 11 of the Sec. 2254 rules in that it includes the Federal Rules of Criminal Procedure as well as the civil. This is because of the nature of a Sec. 2255 motion as a continuing part of the criminal proceeding (see advisory committee note to rule 1) as well as a remedy analogous to habeas corpus by state prisoners.

Since Sec. 2255 has been considered analogous to habeas as respects the restrictions in Fed.R.Civ.P. 81(a)(2) (see Sullivan v. United States, 198 F.Supp. 624 (S.D.N.Y. 1961)), rule 12 is needed.

For discussion, see the advisory committee note to rule 11 of the Sec. 2254 rules.

REFERENCES IN TEXT

The Federal Rules of Criminal Procedure, referred to in text, are classified generally to the Appendix to Title 18, Crimes and Criminal Procedure.

The Federal Rules of Civil Procedure, referred to in text, are classified generally to the Appendix to this title.

APPENDIX OF FORMS

MODEL FORM FOR MOTIONS UNDER 28 U.S.C. SEC. 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

(1) This motion must be legibly handwritten or typewritten, and signed by the movant 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.

(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 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 _____

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 impanelled.

(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 imposed 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.

_____

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 DECLARATION

_____

[INSERT APPROPRIATE COURT]

United States

DECLARATION IN

SUPPORT

v.

OF REQUEST

_____

TO PROCEED

(Movant)

IN FORMA

PAUPERIS

I, _____, 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.

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 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

(As amended Apr. 28, 1982, eff. Aug. 1, 1982.)

MODEL FORM FOR USE IN 28 U.S.C. SEC. 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.

(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 constituted an abuse of the procedure governed by these rules.

(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 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.

_____

_____

_____

_____

_____

_____

_____

_____

I declare (or certify, verify, or state) under penalty of perjury

that the foregoing is true and correct. Executed on _____.

(date)

_____

Signature of Movant

(As amended Apr. 28, 1982, eff. Aug. 1, 1982.)

−End−

−CITE−

28 USC Sec. 2256 01/06/03

−EXPCITE−

TITLE 28 − JUDICIARY AND JUDICIAL PROCEDURE

PART VI − PARTICULAR PROCEEDINGS

CHAPTER 153 − HABEAS CORPUS

−HEAD−

[Sec. 2256. Omitted]

−COD−

CODIFICATION

Section, added Pub. L. 95−598, title II, Sec. 250(a), Nov. 6,

1978, 92 Stat. 2672, did not become effective pursuant to section

402(b) of Pub. L. 95−598, as amended, set out as an Effective Date

note preceding section 101 of Title 11, Bankruptcy. Section read as

follows:

Sec. 2256. Habeas corpus from bankruptcy courts

A bankruptcy court may issue a writ of habeas corpus −

(1) when appropriate to bring a person before the court −

(A) for examination;

(B) to testify; or

(C) to perform a duty imposed on such person under this

title; or

(2) ordering the release of a debtor in a case under title 11

in custody under the judgment of a Federal or State court if −

(A) such debtor was arrested or imprisoned on process in any

civil action;

(B) such process was issued for the collection of a debt −

(i) dischargeable under title 11; or

(ii) that is or will be provided for in a plan under

chapter 11 or 13 of title 11; and

(C) before the issuance of such writ, notice and a hearing

have been afforded the adverse party of such debtor in custody

to contest the issuance of such writ.

−MISC1−

PRIOR PROVISIONS

A prior section 2256, added Pub. L. 95−144, Sec. 3, Oct. 28,

1977, 91 Stat. 1220, related to jurisdiction of proceedings

relating to transferred offenders, prior to transfer to section

3244 of Title 18, Crimes and Criminal Procedure, by Pub. L. 95−598,

title III, Sec. 314(j), Nov. 6, 1978, 92 Stat. 2677.

−End−