

**TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE****PART VI - PARTICULAR PROCEEDINGS****CHAPTER 153 - HABEAS CORPUS****§ 2254. State custody; remedies in Federal courts**

- (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

*NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscprint.html>).*

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.

(June 25, 1948, ch. 646, 62 Stat. 967; Pub. L. 89–711, § 2, Nov. 2, 1966, 80 Stat. 1105; Pub. L. 104–132, title I, § 104, Apr. 24, 1996, 110 Stat. 1218.)

## 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.”

## 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.

## Amendments

1996—Subsec. (b). Pub. L. 104–132, § 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, § 104(3), added subsec. (d). Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 104–132, § 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

*NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscprint.html>).*

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, § 104(2), redesignated subsec. (d) as (e). Former subsec. (e) redesignated (f).

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

Subsecs. (h), (i). Pub. L. 104–132, § 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).

### **Approval and Effective Date of Rules Governing Section 2254 Cases and Section 2255 Proceedings for United States District Courts**

For approval and effective date of rules governing petitions under section 2254 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 under section 2074 of this title.

### **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 Feb. 1, 1977, as amended to Jan. 3, 2012)

##### **Rule**

1. Scope.
2. The Petition.
3. Filing the Petition; Inmate Filing.
4. Preliminary Review; Serving the Petition and Order.
5. The Answer and the Reply.
6. Discovery.
7. Expanding the Record.
8. Evidentiary Hearing.
9. Second or Successive Petitions.
10. Powers of a Magistrate Judge.
11. Certificate of Appealability; Time to Appeal.
12. Applicability of the Federal Rules of Civil Procedure.

#### **APPENDIX OF FORMS**

Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus By a Person in State Custody.

### **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 under section 2074 of this title.

#### **Rule 1. Scope**

(a) Cases Involving a Petition under 28 U.S.C. § 2254. These rules govern a petition for a writ of habeas corpus filed in a United States district court under 28 U.S.C. § 2254 by:

- (1) a person in custody under a state-court judgment who seeks a determination that the custody violates the Constitution, laws, or treaties of the United States; and
- (2) a person in custody under a state-court or federal-court judgment who seeks a determination that future custody under a state-court judgment would violate the Constitution, laws, or treaties of the United States.

(b) Other Cases. The district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1 (a).

(As amended Apr. 26, 2004, eff. Dec. 1, 2004.)

## 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. § 2241 (c) provides that the “writ of habeas corpus shall not extend to a prisoner unless \* \* \* (h) is in custody in violation of the Constitution.” 28 U.S.C. § 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 § 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. § 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.”

*NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscpri.html>).*

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. § 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. § 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. Proconier*, 497 F.2d 809 (9th Cir. 1974), modified, 510 F.2d 613 (1975).

### **Committee Notes on Rules—2004 Amendment**

The language of Rule 1 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Changes Made After Publication and Comments. In response to at least one commentator on the published rules, the Committee modified Rule 1 (b) to reflect the point that if the court was considering a habeas petition not covered by § 2254, the court could apply some or all of the rules.

#### **Rule 2. The Petition**

(a) **Current Custody; Naming the Respondent.** If the petitioner is currently in custody under a state-court judgment, the petition must name as respondent the state officer who has custody.

(b) **Future Custody; Naming the Respondents and Specifying the Judgment.** If the petitioner is not yet in custody—but may be subject to future custody—under the state-court judgment being contested, the petition must name as respondents both the officer who has current custody and the attorney general of the state where the judgment was entered. The petition must ask for relief from the state-court judgment being contested.

(c) **Form.** The petition must:

(1) specify all the grounds for relief available to the petitioner;

(2) state the facts supporting each ground;

(3) state the relief requested;

(4) be printed, typewritten, or legibly handwritten; and

(5) be signed under penalty of perjury by the petitioner or by a person authorized to sign it for the petitioner under 28 U.S.C. § 2242.

(d) **Standard Form.** The petition must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule. The clerk must make forms available to petitioners without charge.

(e) **Separate Petitions for Judgments of Separate Courts.** A petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of each court.

(As amended Pub. L. 94–426, § 2(1), (2), Sept. 28, 1976, 90 Stat. 1334; Apr. 28, 1982, eff. Aug. 1, 1982; Apr. 26, 2004, eff. Dec. 1, 2004.)

### **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. § 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. § 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

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscript.html>).

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.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscript.html>).

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

#### Committee Notes on Rules—2004 Amendment

The language of Rule 2 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscprint.html>).

Revised Rule 2 (c)(5) has been amended by removing the requirement that the petition be signed personally by the petitioner. As reflected in 28 U.S.C. § 2242, an application for habeas corpus relief may be filed by the person who is seeking relief, or by someone acting on behalf of that person. See, e.g., *Whitmore v. Arkansas*, 495 U.S. 149 (1990) (discussion of requisites for “next friend” standing in petition for habeas corpus). Thus, under the, [sic] amended rule the petition may be signed by petitioner personally or by someone acting on behalf of the petitioner, assuming that the person is authorized to do so, for example, an attorney for the petitioner. The Committee envisions that the courts will apply third-party, or “next-friend,” standing analysis in deciding whether the signer was actually authorized to sign the petition on behalf of the petitioner.

The language in new Rule 2 (d) has been changed to reflect that a petitioner must substantially follow the standard form, which is appended to the rules, or a form provided by the court. The current rule, Rule 2 (c), seems to indicate a preference for the standard “national” form. Under the amended rule, there is no stated preference. The Committee understood that current practice in some courts is that if the petitioner first files a petition using the national form, the courts may then ask the petitioner to supplement it with the local form.

Current Rule 2 (e), which provided for returning an insufficient petition, has been deleted. The Committee believed that the approach in Federal Rule of Civil Procedure 5(e) was more appropriate for dealing with petitions that do not conform to the form requirements of the rule. That Rule provides that the clerk may not refuse to accept a filing solely for the reason that it fails to comply with these rules or local rules. Before the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the petitioner suffered no penalty, other than delay, if the petition was deemed insufficient. Now that a one-year statute of limitations applies to petitions filed under § 2254, see 28 U.S.C. § 2244 (d)(1), the court’s dismissal of a petition because it is not in proper form may pose a significant penalty for a petitioner, who may not be able to file another petition within the one-year limitations period. Now, under revised Rule 3 (b), the clerk is required to file a petition, even though it may otherwise fail to comply with the provisions in revised Rule 2 (c). The Committee believed that the better procedure was to accept the defective petition and require the petitioner to submit a corrected petition that conforms to Rule 2 (c).

Changes Made After Publication and Comments. The Committee changed Rule 2 (c)(2) to read “state the facts” rather than [sic] “briefly summarize the facts.” As one commentator noted, the current language may actually mislead the petitioner and is also redundant. The Committee modified Rule 2 (c)(5) to emphasize that any person, other than the petitioner, who signs the petition must be authorized to do so; the revised rule now specifically cites § 2242. The Note was changed to reflect that point.

Rule 2 (c)(4) was modified to account for those cases where the petitioner prints the petition on a computer word-processing program.

### **Amendments by Public Law**

1976—Subd. (c). Pub. L. 94–426, § 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, § 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 the Petition; Inmate Filing**

(a) Where to File; Copies; Filing Fee. An original and two copies of the petition must be filed with the clerk and must be accompanied by:

(1) the applicable filing fee, or

(2) a motion for leave to proceed in forma pauperis, the affidavit required by 28 U.S.C. § 1915, and a certificate from the warden or other appropriate officer of the place of confinement showing the amount of money or securities that the petitioner has in any account in the institution.

(b) Filing. The clerk must file the petition and enter it on the docket.

(c) Time to File. The time for filing a petition is governed by 28 U.S.C. § 2244 (d).

(d) Inmate Filing. A paper filed by an inmate confined in an institution is timely if deposited in the institution’s internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(As amended Apr. 26, 2004, eff. Dec. 1, 2004.)



## 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. § 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. § 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.

## Committee Notes on Rules—2004 Amendment

The language of Rule 3 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended except as described below.

The last sentence of current Rule 3 (b), dealing with an answer being filed by the respondent, has been moved to revised Rule 5 (a).

Revised Rule 3 (b) is new and is intended to parallel Federal Rule of Civil Procedure 5(e), which provides that the clerk may not refuse to accept a filing solely for the reason that it fails to comply with these rules or local rules. Before the adoption of a one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the petitioner suffered no penalty, other than delay, if the petition was deemed insufficient. That Act, however, added a one-year statute of limitations to petitions filed under § 2254, see 28 U.S.C. § 2244 (d)(1). Thus, a court's dismissal of a defective petition may pose a significant penalty for a petitioner who may not be able to file a corrected petition within the one-year limitations period. The Committee believed that the better procedure was to accept the defective petition and require the petitioner to submit a corrected petition that conforms to Rule 2. Thus, revised Rule 3 (b) requires the clerk to file a petition, even though it may otherwise fail to comply with Rule 2. The rule, however, is not limited to those instances where the petition is defective only in form; the clerk would also be required, for example, to file the petition even though it lacked the requisite filing fee or an in forma pauperis form.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscpri.html>).

Revised Rule 3 (c), which sets out a specific reference to 28 U.S.C. § 2244 (d), is new and has been added to put petitioners on notice that a one-year statute of limitations applies to petitions filed under these Rules. Although the rule does not address the issue, every circuit that has addressed the issue has taken the position that equitable tolling of the statute of limitations is available in appropriate circumstances. See, e.g., *Smith v. McGinnis*, 208 F.3d 13, 17–18 (2d Cir. 2000); *Miller v. New Jersey State Department of Corrections*, 145 F.3d 616, 618–19 (3d Cir. 1998); *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000). The Supreme Court has not addressed the question directly. See *Duncan v. Walker*, 533 U.S. 167, 181 (2001) (“We . . . have no occasion to address the question that Justice Stevens raises concerning the availability of equitable tolling.”).

Rule 3 (d) is new and provides guidance on determining whether a petition from an inmate is considered to have been filed in a timely fashion. The new provision parallels Federal Rule of Appellate Procedure 25(a)(2)(C).

Changes Made After Publication and Comments. The Committee Note was changed to reflect that the clerk must file a petition, even in those instances where the necessary filing fee or in forma pauperis form is not attached. The Note also includes new language concerning the equitable tolling of the statute of limitations.

#### Rule 4. Preliminary Review; Serving the Petition and Order

The clerk must promptly forward the petition to a judge under the court’s assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

(As amended Apr. 26, 2004, eff. Dec. 1, 2004.)

### 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. § 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. § 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 § 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 § 2243 in determining within what time period an answer must be made. Under § 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. § 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

*NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscpri.html>).*

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. § 2252. Presently, the respondent often does not receive a copy of the petition unless the court directs an answer under 28 U.S.C. § 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.

### **Committee Notes on Rules—2004 Amendment**

The language of Rule 4 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

The amended rule reflects that the response to a habeas petition may be a motion.

The requirement that in every case the clerk must serve a copy of the petition on the respondent by certified mail has been deleted. In addition, the current requirement that the petition be sent to the Attorney General of the state has been modified to reflect practice in some jurisdictions that the appropriate state official may be someone other than the Attorney General, for example, the officer in charge of a local confinement facility. This comports with a similar provision in 28 U.S.C. § 2252, which addresses notice of habeas corpus proceedings to the state's attorney general or other appropriate officer of the state.

**Changes Made After Publication and Comments.** The Rule was modified slightly to reflect the view of some commentators that it is common practice in some districts for the government to file a pre-answer motion to dismiss. The Committee agreed with that recommendation and changed the word "pleading" in the rule to "response." It also made several minor changes to the Committee Note.

#### **Rule 5. The Answer and the Reply**

(a) **When Required.** The respondent is not required to answer the petition unless a judge so orders.

(b) **Contents: Addressing the Allegations; Stating a Bar.** The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations.

(c) **Contents: Transcripts.** The answer must also indicate what transcripts (of pretrial, trial, sentencing, or post-conviction proceedings) are available, when they can be furnished, and what proceedings have been recorded but not transcribed. The respondent must attach to the answer parts of the transcript that the respondent considers relevant. The judge may order that the respondent furnish other parts of existing transcripts or that parts of untranscribed recordings be transcribed and furnished. If a transcript cannot be obtained, the respondent may submit a narrative summary of the evidence.

(d) **Contents: Briefs on Appeal and Opinions.** The respondent must also file with the answer a copy of:

- (1) any brief that the petitioner submitted in an appellate court contesting the conviction or sentence, or contesting an adverse judgment or order in a post-conviction proceeding;
- (2) any brief that the prosecution submitted in an appellate court relating to the conviction or sentence; and
- (3) the opinions and dispositive orders of the appellate court relating to the conviction or the sentence.

(e) **Reply.** The petitioner may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

(As amended Apr. 26, 2004, eff. Dec. 1, 2004.)

### **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 role 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).

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscpri.html>).

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. § 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. § 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. § 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 § 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.

### **Committee Notes on Rules—2004 Amendment**

The language of Rule 5 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

Revised Rule 5 (a), which provides that the respondent is not required to file an answer to the petition, unless a judge so orders, is taken from current Rule 3 (b). The revised rule does not address the practice in some districts, where the respondent files a pre-answer motion to dismiss the petition. But revised Rule 4 permits that practice and reflects the view that if the court does not dismiss the petition, it may require (or permit) the respondent to file a motion.

Rule 5 (b) has been amended to require that the answer address not only failure to exhaust state remedies, but also procedural bars, non-retroactivity, and any statute of limitations. Although the latter three matters are not addressed in the current rule, the Committee intends no substantive change with the additional new language. See, e.g., 28 U.S.C. § 2254 (b)(3). Instead, the Committee believes that the explicit mention of those issues in the rule conforms to current case law and statutory provisions. See, e.g., 28 U.S.C. § 2244 (d)(1).

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscp.html>).

Revised Rule 5 (d) includes new material. First, Rule 5 (d)(2), requires a respondent—assuming an answer is filed—to provide the court with a copy of any brief submitted by the prosecution to the appellate court. And Rule 5 (d)(3) now provides that the respondent also file copies of any opinions and dispositive orders of the appellate court concerning the conviction or sentence. These provisions are intended to ensure that the court is provided with additional information that may assist it in resolving the issues raised, or not raised, in the petition.

Finally, revised Rule 5 (e) adopts the practice in some jurisdictions of giving the petitioner an opportunity to file a reply to the respondent’s answer. Rather than using terms such as “traverse,” see 28 U.S.C. § 2248, to identify the petitioner’s response to the answer, the rule uses the more general term “reply.” The Rule prescribes that the court set the time for such responses and in lieu of setting specific time limits in each case, the court may decide to include such time limits in its local rules.

Changes Made After Publication and Comments. Rule 5 (a) was modified to read that the government is not required to “respond” to the petition unless the court so orders; the term “respond” was used because it leaves open the possibility that the government’s first response (as it is in some districts) is in the form of a pre-answer motion to dismiss the petition. The Note has been changed to reflect the fact that although the rule itself does not reflect that particular motion, it is used in some districts and refers the reader to Rule 4.

The Committee also deleted the reference to “affirmative defenses,” because the Committee believed that the term was a misnomer in the context of habeas petitions. The Note was also changed to reflect that there has been a potential substantive change from the current rule, to the extent that the published rule now requires that the answer address procedural bars and any statute of limitations. The Note states that the Committee believes the new language reflects current law.

The Note was modified to address the use of the term “traverse.” One commentator noted that that is the term that is commonly used but that it does not appear in the rule itself.

#### Rule 6. Discovery

(a) Leave of Court Required. A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery. If necessary for effective discovery, the judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A.

(b) Requesting Discovery. A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.

(c) Deposition Expenses. If the respondent is granted leave to take a deposition, the judge may require the respondent to pay the travel expenses, subsistence expenses, and fees of the petitioner’s attorney to attend the deposition.

(As amended Apr. 26, 2004, eff. Dec. 1, 2004.)

### 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. § 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 § 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

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscprint.html>).

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 § 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 § 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. § 3006A (g), court-appointed counsel in a § 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.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscpri.html>).

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. § 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. § 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).

### **Committee Notes on Rules—2004 Amendment**

The language of Rule 6 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Although current Rule 6 (b) contains no requirement that the parties provide reasons for the requested discovery, the revised rule does so and also includes a requirement that the request be accompanied by any proposed interrogatories and requests for admission, and must specify any requested documents. The Committee believes that the revised rule makes explicit what has been implicit in current practice.

Changes Made After Publication and Comments. Rule 6 (b) was modified to require that discovery requests be supported by reasons, to assist the court in deciding what, if any, discovery should take place. The Committee believed that the change made explicit what has been implicit in current practice.

#### **Rule 7. Expanding the Record**

(a) In General. If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition. The judge may require that these materials be authenticated.

(b) Types of Materials. The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.

(c) Review by the Opposing Party. The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

(As amended Apr. 26, 2004, eff. Dec. 1, 2004.)

### **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 § 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 (2d Cir. 1968); *Mirra v. United States*, 379 F.2d 782 (2d Cir. 1967); *Accardi v. United States*, 379 F.2d 312 (2d 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:

*NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscpri.html>).*

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. §§ 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.

### **Committee Notes on Rules—2004 Amendment**

The language of Rule 7 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as noted below.

Revised Rule 7 (a) is not intended to restrict the court's authority to expand the record through means other than requiring the parties themselves to provide the information. Further, the rule has been changed to remove the reference to the "merits" of the petition in the recognition that a court may wish to expand the record in order to assist it in deciding an issue other than the merits of the petition.

The language in current Rule 7 (d), which deals with authentication of materials in the expanded record, has been moved to revised Rule 7 (a).

**Changes Made After Publication and Comments.** The Committee modified Rule 7 (a) by removing the reference to the "merits" of the petition. One commentator had commented that the court might wish to expand the record for purposes other than the merits of the case. The Committee agreed to the change and also changed the rule to reflect that someone other than a party may authenticate the materials.

#### **Rule 8. Evidentiary Hearing**

(a) **Determining Whether to Hold a Hearing.** If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.

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

(c) **Appointing Counsel; Time of Hearing.** If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. These rules do not limit the appointment of counsel under § 3006A at any stage of the proceeding.

(As amended Pub. L. 94-426, § 2(5), Sept. 28, 1976, 90 Stat. 1334; Pub. L. 94-577, § 2(a)(1), (b)(1), Oct. 21, 1976, 90 Stat. 2730, 2731; Apr. 26, 2004, eff. Dec. 1, 2004; Mar. 26, 2009, eff. Dec. 1, 2009.)

### **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



NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscprint.html>).

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. § 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. § 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. § 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

*NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscodeprint.html>).*

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 § 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. § 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. § 1915 will be entitled to the benefits of counsel under 18 U.S.C. § 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. § 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 § 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 § 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. § 1825 on the payment of witness fees is dealt with in an opinion of the Comptroller General, February 28, 1974.

### **Committee Notes on Rules—2004 Amendment**

The language of Rule 8 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Rule 8 (a) is not intended to supersede the restrictions on evidentiary hearings contained in 28 U.S.C. § 2254 (e)(2).

The requirement in current Rule 8 (b)(2) that a copy of the magistrate judge's findings must be promptly mailed to all parties has been changed in revised Rule 8 (b) to require that copies of those findings be served on all parties. As used in this rule, "service" means service consistent with Federal Rule of Civil Procedure 5(b), which allows mailing the copies.

Changes Made After Publication and Comments. The Committee changed the Committee Note to reflect the view that the amendments to Rule 8 were not intended to supersede the restrictions on evidentiary hearings contained in § 2254(e)(2).

### **Committee Notes on Rules—2009 Amendment**

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

## Amendments by Public Law

1976—Subd. (b). Pub. L. 94–577, § 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, § 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. Second or Successive Petitions

Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2244 (b)(3) and (4).

(As amended Pub. L. 94–426, § 2(7), (8), Sept. 28, 1976, 90 Stat. 1335; Apr. 26, 2004, eff. Dec. 1, 2004.)

## 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 § 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:

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscp.html>).

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 § 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 § 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 § 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 § 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. § 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 § 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

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscript.html>).

The requirement is that the prior determination of the same ground has been on the merits. This requirement is in 28 U.S.C. § 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. § 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 § 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 § 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.

*NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscpri.html>).*

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.

### **Committee Notes on Rules—2004 Amendment**

The language of Rule 9 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as noted below.

First, current Rule 9 (a) has been deleted as unnecessary in light of the applicable one-year statute of limitations for § 2254 petitions, added as part of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244 (d).

Second, current Rule 9 (b), now Rule 9, has been changed to also reflect provisions in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244 (b)(3) and (4), which now require a petitioner to obtain approval from the appropriate court of appeals before filing a second or successive petition.

Finally, the title of Rule 9 has been changed to reflect the fact that the only topic now addressed in the rules is that of second or successive petitions.

Changes Made After Publication and Comments. The Committee made no changes to Rule 9.

### **Amendments by Public Law**

1976—Subd. (a). Pub. L. 94–426, § 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, § 2(8), substituted “constituted an abuse of the writ” for “is not excusable”.

Rule 10. Powers of a Magistrate Judge

A magistrate judge may perform the duties of a district judge under these rules, as authorized under 28 U.S.C. § 636.

(As amended Pub. L. 94–426, § 2(11), Sept. 28, 1976, 90 Stat. 1335; Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 26, 2004, eff. Dec. 1, 2004.)

### **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. § 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. § 2255.” Committee on the Judiciary, The Federal Magistrates Act, S.Rep. No. 371, 90th Cong., 1st sess., 26 (1967).

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

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscript.html>).

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. § 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. § 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. § 636, as amended in 1976 by Pub. L. 94–577. To the extent that rule 10 is more restrictive than § 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 § 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 § 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 § 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).

### Committee Notes on Rules—2004 Amendment

The language of Rule 10 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Changes Made After Publication and Comments. The Committee restyled the proposed rule.

### Amendments by Public Law

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”.

#### Rule 11. Certificate of Appealability; Time to Appeal

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

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

(As added Mar. 26, 2009, eff. Dec. 1, 2009.)

### Committee Notes on Rules—2009

Subdivision (a). As provided in 28 U.S.C. § 2253 (c), an applicant may not appeal to the court of appeals from a final order in a proceeding under § 2254 unless a judge issues a certificate of appealability (COA), identifying the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11 (a) makes the requirements concerning COAs more prominent by adding and consolidating them in the appropriate rule

*NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscp.html>).*

of the Rules Governing § 2254 Cases in the United States District Courts. Rule 11 (a) also requires the district judge to grant or deny the certificate at the time a final order is issued. See 3d Cir. R. 22.2, 111.3. This will ensure prompt decision making when the issues are fresh, rather than postponing consideration of the certificate until after a notice of appeal is filed. These changes will expedite proceedings, avoid unnecessary remands, and help inform the applicant's decision whether to file a notice of appeal.

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

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

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

Minor changes were also made to conform to style conventions.

## References in Text

The Federal Rules of Appellate Procedure, referred to in text, are set out in the Appendix to this title.

Rule 12. Applicability of the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

(As amended Apr. 26, 2004, eff. Dec. 1, 2004; Mar. 26, 2009, eff. Dec. 1, 2009.)

## 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. § 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. § 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



NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscprint.html>).

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. § 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. § 2254.

### **Committee Notes on Rules—2004 Amendment**

The language of Rule 11 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.

Changes Made After Publication and Comments. The Committee made no changes to Rule 11.

### **Committee Notes on Rules—2009 Amendment**

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

### **References in Text**

The Federal Rules of Civil Procedure, referred to in heading and text, are set out in the Appendix to this title.

#### APPENDIX OF FORMS



NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscpri.html>).

IN FORMA PAUPERIS DECLARATION  
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

[Insert appropriate court]

XXXXXXXXXXXXXXXXXXXX

DECLARATION IN

(Petitioner)

SUPPORT

OF REQUEST

v.

TO PROCEED

XXXXXXXXXXXXXXXXXXXX

IN FORMA

(Respondent(s))

PAUPERIS

I, XXXXXXXXXXXXXXX, 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.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

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.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

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.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

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.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscpri.html>).

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

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.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

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.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

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

(date)

XXXXXXXXXXXXXXXXXXXX

Signature of Petitioner

Certificate

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

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXXX

Authorized Officer of

Institution

(As amended Apr. 28, 1982, eff. Aug. 1, 1982; Apr. 26, 2004, eff. Dec. 1, 2004.)

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

Form No. 9

[Abrogated Apr. 30, 2007, eff. Dec. 1, 2007.]

Changes Made After Publication and Comments—Forms Accompanying Rules Governing § 2254 and § 2255 Proceedings. Responding to a number of comments from the public, the Committee deleted from both sets of official forms the list of possible grounds of relief. The Committee made additional minor style corrections to the forms.