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Martha A. Mills

Sue A. Herrmann

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MARTHA A. MILLS*

and SUE A. HERRMANN**

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* Private Practioner, Chicago, Illinois. Macalester College, St. Paul, Minnesota, B.A. 1964; University of Minnesota Law School, Minneapolis, Minnesota, J.D. 1965.

** Associate, Law Offices of Martha A. Mills, Ltd. University of Dayton, Dayton, Ohio, B.A. 1969; Loyola University of Chicago, J.D. 1976.

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I. INTRODUCTION

There are four commonly used avenues for collaterally attacking criminal convictions in federal courts. They are: 28 U.S.C. section 2241, the general habeas corpus statute; 28 U.S.C. section 2254, the remedy in federal courts for persons attacking state convictions; 28 U.S.C. section 2255, the remedy for persons attacking federal convictions; and 28 U.S.C. section 1651, the All-Writs Statute.

Section 2254 is part of the general habeas corpus statute located at 28 U.S.C. section 2241. It provides relief for persons in custody pursuant to judgment of a state court,[1] or in custody pursuant to judgment of either a state or federal court if the attack is on a future state sentence.[2]

Section 2255 provides relief against federal convictions for persons in federal custody, or for persons in state custody who challenge a future federal sentence.[3] Because a section 2255 motion is a step in the original criminal proceeding, it must be brought in the sentencing court. In contrast section 2241 and 2254 proceedings are separate civil proceedings for which more flexible venue provisions exist.

The general habeas corpus statute, 28 U.S.C. section 2241, provides relief for persons in custody under the authority of the United States[4] or who are committed for trial before some court of the United States,[5] or who are in custody in violation of the Constitution, laws, or treaties of the United States.[6] It is avail-

1. 28 U.S.C. § 2254(a)(1976).

2. Rules Governing § 2254 Cases in the U.S. District Courts, Rule 1 ("§ 2254"). These rules are referred to here as the Habeas Corpus Rules. Two sets of rules were promulgated—one set for section 2254 cases, and another set for section 2255 cases. Act of September 28, 1976, Pub. L. 94-426, 90 Stat. 1334. When discussed in the text, the rules will be stated with the section appearing in paranthesis. The rules as finally approved, together with the Advisory Committee Notes, appear in 28 U.S.C. § 2254 (1976).

3. Rules Governing § 2255 Proceedings for the U.S. District Courts, Rule 1 ("§ 2255"). In the text these are referred to as Habeas Corpus Rules (section 2255). For legislative enactment, see note 2 *supra*. The rules as finally approved, together with the Advisory Committee Notes, appear in 28 U.S.C. §2255 (1976).

4. 28 U.S.C. § 2241(c)(1)(1976).

5. *Id.*

6. 28 U.S.C. § 2241(c)(3)(1976).

able to state or federal prisoners, but only to federal prisoners when a section 2255 motion is inappropriate or inadequate.[7]

The All-Writs Statute, 28 U.S.C. section 1651, makes the old writ of coram nobis available to persons not in custody who wish to attack federal convictions.[8] This writ must be brought in the court of conviction.

A. Habeas Corpus Through 1970

The original common law writ of habeas corpus was employed as early as A.D. 1200 to ensure the appearance of parties before English courts. The writ of habeas corpus *ad subjiciendum*, the "Great Writ," was but one form of the original writ and was used in cases of criminal confinement. Two pieces of parliamentary legislation, the Act of 1641[9] and the Habeas Corpus Act of 1679,[10] empowered common law courts to release persons arbitrarily arrested by the King and Council. Courts were empowered to review the legal sufficiency of the grounds of imprisonment. Ironically, under the Act of 1679, court ordered confinements and criminal convictions, as opposed to executive ordered confinements, were exempt from review.

In this country, the Writ was memorialized in the Judiciary Act of 1789 which granted federal courts the power to issue writs of habeas corpus to prisoners "in custody under or by colour of the authority of the United States."[11] Only nonjudicial detentions or confinement by the judgment of a court without competence in the matter could be challenged.[12]

The Writ was expanded in 1867 to allow federal courts to hear habeas petitions from state prisoners.[13] Nevertheless, the "jurisdiction" fiction persisted. A prisoner could be released only if the sentencing court lacked jurisdiction, and all state remedies had been exhausted.[14]

Until 1942, the availability of habeas corpus relief against federal or state convictions was limited to jurisdictional issues.

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7. *See* notes 103-155 and accompanying text *infra*.
8. *See* text accompanying notes 271-289 *infra*.
9. 16 Car. I, c. 10, §§ III, VIII (1641).
10. 31 Car. 2, c. 2 (1679) (true warrant of commitment must be returned; return must be made within specified time (§ II); writ to issue during vacations (§ III); person released by habeas corpus for an unlawful confinement cannot be recommitted for same offense (§ VI); prisoners not to be sent beyond the seas (§ XII)).
11. 1 Stat. 73, 81-82 (1789).
12. *Ex parte* Watkins, 28 U.S. 193, 201 (1830).
13. Act of Febrûary 5, 1876, ch. 28, § 1, 14 Stat. 385, *codified* as 28 U.S.C. § 2241(c)(3)(1976).
14. Pepke v. Cronan, 155 U.S. 100 (1894); *Ex parte* Royall, 117 U.S. 241 (1896).

In *Waley v. Johnston*,[15] the Supreme Court decided that the Writ was available to consider constitutional claims other than questions of jurisdiction, at least in an attack on federal convictions. Finally in *Brown v. Allen*,[16] the Court decided that all constitutional claims of petitioners attacking state convictions could be heard by the federal courts regardless of the adequacy of state procedures or the fact that the state court had fully and fairly considered the claim.[17]

Prior to 1948, collateral attacks on convictions proceeded under general statutory provisions somewhat comparable to 28 U.S.C. sections 2241-2253[18] and 28 U.S.C. section 1651. In 1948 the statutes were revised to modernize the general habeas corpus provision[19] and to separate and clarify the remedy available to attack state convictions (section 2254) and federal convictions (section 2255). The impetus for the legislation was in large part the requirement that a prisoner attacking a federal conviction apply for habeas corpus in the district of confinement. This caused severe overburdening of the few districts where federal institutions were located. Section 2255 now requires motions to be filed in the district of conviction.

In *United States v. Hayman*,[20] the Supreme Court held that section 2255 provided federal prisoners with a remedy equivalent to habeas corpus. Nevertheless, lower courts balked at the idea of hearing certain questions in section 2255 proceedings which would have been heard in habeas corpus proceedings. *Kaufman v. United States*,[21] finally made it clear that all constitutional claims could be raised in a section 2255 proceeding. The Court found no basis to conclude that federal prisoners had lesser rights under section 2255 than state prisoners under section 2254. To ensure this, Congress built an escape hatch into section 2255, providing that where the motion is inadequate or ineffective, a petition for a writ of habeas corpus under 28 U.S.C. section 2241 might be entertained.

Kaufman, along with three cases involving attacks on state convictions for section 2254 petitioners, launched what critics later described as a flood of habeas corpus petitions. The first of

15. 316 U.S. 101 (1942).

16. 344 U.S. 443 (1953).

17. For an in depth discussion of the history of habeas corpus see *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970). That commentary, however, antedates the adoption of the Habeas Corpus Rules.

18. Judiciary Act of 1789, *as amended*, 28 U.S.C. §§ 451-466 (1970).

19. 28 U.S.C. §§ 2241-2253 (1976).

20. 342 U.S. 205, 219 (1952).

21. 394 U.S. 217 (1969).

the state petitioner cases was *Fay v. Noia*.[22] The Court held the exhaustion requirement "refers only to a failure to exhaust state remedies still open to the applicant at the time he files his application for habeas corpus in the federal court."[23] *Fay* also held that res judicata was inapplicable in habeas proceedings, thus allowing federal district courts to review federal constitutional claims regardless of any prior state court determination. Next, *Townsend v. Sain*,[24] compelled federal district courts to conduct evidentiary hearings when any one of several conditions was lacking.[25]

> [A] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.[26]

The *Townsend* rule was later codified in the 1966 amendments to section 2254. Finally, in *Sanders v. United States*,[27] the Court held that denial of a prior application for relief would not prevent reapplication unless "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."[28]

The *Sanders* ruling was later reaffirmed in *Davis v. United States*.[29] Here the petitioner was convicted for failure to report for induction into the military service. While appeal was pending, the Supreme Court in *Gutknecht v. United States*[30] rescinded the regulation under which Davis was to be inducted. The appellate court remanded, and the district court held *Gutknecht* inapplicable. The Ninth Circuit affirmed. While the petition for certiorari was pending, the Ninth Circuit reversed an identical conviction in *United States v. Fox*.[31] Davis's peti-

22. 372 U.S. 391 (1963).
23. *Id.* at 399.
24. 372 U.S. 293 (1963).
25. *Townsend* was held to be retroactive in Smith v. Yeager, 393 U.S. 122 (1968).
26. 372 U.S. at 313.
27. 373 U.S. 1 (1963).
28. 373 U.S. at 15.
29. 417 U.S. 333 (1974).
30. 396 U.S. 295 (1970).
31. 454 F.2d 593 (9th Cir. 1971).

tion for certiorari was denied, and he sought section 2255 relief on the basis of the change in the law. Relying on *Sanders*, the Court held that the petitioner could relitigate the issue where the law had changed despite an adverse decision in a prior section 2255 proceeding or on direct appeal.

B. Habeas Corpus and the Burger Court

The "flood" of habeas corpus petitions began to ebb with the Burger Court's use of a "guilt-related" distinction. In *Schneckloth v. Bustamonte*,[32] Mr. Justice Powell in a concurring opinion, argued that since claims of unconstitutional searches have no effect on the guilt or innocence of the criminal defendant, federal habeas relief is not warranted.

The Court adopted this rationale in *Stone v. Powell*,[33] and held that once a state "has provided an opportunity for full and fair litigation of a Fourth Amendment claim . . . a state prisoner may not be granted federal habeas corpus relief" on the basis of use of illegally seized evidence.[34] The *Stone* Court reasoned that since the exclusionary rule of the fourth amendment is a prophylactic device designed to deter police misconduct, "the application of the rule [should be] restricted to those areas where its remedial objectives are thought most efficaciously served."[35] Collateral review of fourth amendment violations would not effectively deter police misconduct.[36]

Federal habeas corpus relief was further restricted in *Francis v. Henderson*.[37] Petitioner Francis failed to object to the unconstitutional exclusion of blacks from the grand jury prior to trial, as required by Louisiana law. The Court extended *Davis v. United States*[38] to section 2254 petitioners. *Davis* held that a

32. 412 U.S. 218 (1973).

33. 428 U.S. 465 (1976). For an in depth discussion of Stone v. Powell, *see* Robbins & Sanders, *Judicial Integrity, The Appearance of Justice, And The Great Writ of Habeas Corpus: How to Kill Two Thirds (Or More) With One Stone*, 15 AM. CRIM. L. REV. 63 (1977). *See also* Note, *Stone v. Powell: Scope of Habeas Corpus Revisited*, 10 J. MAR. J. 401 (1977).

34. 428 U.S. at 494.

35. 428 U.S. at 486, *citing* United States v. Calandra, 414 U.S. 338, 348 (1974).

36. The danger inherent in the majority opinion was pointed out by Mr. Justice Brennan. The "guilt-related" rationale easily could be expanded to restrict relief for violations of double jeopardy, entrapment, self-incrimination, *Miranda* warnings and use of invalid identification procedures. 428 U.S. at 517-18. So far, this expansion has not materialized. *See, e.g.*, White v. Finkbeiner, 570 F.2d 194 (7th Cir. 1978); United States *ex rel.* Henne v. Fike, 563 F.2d 809 (7th Cir. 1977) (declining to apply Stone v. Powell to fifth amendment issues).

37. 425 U.S. 536 (1976).

38. 411 U.S. 233 (1973).

federal prisoner who failed timely to object to the composition of the grand jury, was not entitled to relief under section 2255. Several interests were advanced for the opinion, including the possibility that a defendant could take his chances on an acquittal, and later raise the grand jury issue on appeal. Reprosecution would be difficult, and material witnesses and grand jurors might then be unavailable. Finally, a finding that the grand jury was unconstitutionally composed might affect other indictments brought by the same grand jury.

In *Estelle v. Williams*,[39] the Burger Court held that the petitioner's failure to object to standing trial in prison clothes "is sufficient to negate the presence of compulsion necessary to establish a constitutional violation."[40] Where there was no practice in the state court that compelled criminal defendants to stand trial in prison garb and where the petitioner had not objected at trial, the petitioner's silence precluded any hint of compulsion.

In dissent, Mr. Justice Brennan argued that since trial in prison garb is a denial of due process, there must be a finding by the court that waiver of the right was "knowingly, voluntarily, and intelligently" made.[41] Since the majority conceded that trial in prison garb detracts from the presumption of innocence, an objection would have been irrelevant to the purpose underlying the prohibition.[42] The majority decision augurs danger for state and federal petitioners. No longer does the *Johnson v. Zerbst*[43] standard of intentional relinquishment or abandonment of a known right or privilege control. The waiver in *Estelle v. Williams* resulted from inaction alone.

The Supreme Court again limited habeas corpus jurisdiction in *Wainwright v. Sykes*,[44] by extending the ruling of *Francis v. Henderson* to the admission of allegedly involuntary confessions at trial. Without timely objection, the Court held review is "barred on habeas, as on direct appeal, absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation.[45] The Court fails to define, however, the "cause" and "prejudice"

39. 425 U.S. 501 (1976).

40. 425 U.S. at 513.

41. This standard was announced in Johnson v. Zerbst, 304 U.S. 458 (1938).

42. 425 U.S. at 520.

43. *See* text accompanying note 41 *supra*.

44. 433 U.S. 72 (1977). *See* notes 210-234 and accompanying text *infra*.

45. *Id.* at 84. This holding is limited to situations where there was no timely objection. The Court specifically declined to decide whether it would extend the *Stone* ruling to *Miranda* violations.

exception, noting only that it is narrower than the *Fay v. Noia* standard. "It is the sweeping language of *Fay v. Noia,* going far beyond the facts of the case eliciting it, which we today reject."[46] Specifically, the Court discarded the dicta of *Fay* which had suggested an "all-inclusive rule rendering state timely objection rules ineffective to bar review of underlying federal claims . . . absent a 'knowing waiver' or a 'deliberate bypass' of the right to so object."[47]

In short, the pendulum is swinging toward limiting the availability of habeas corpus relief. The tendency of the present Supreme Court is to extend its restrictive holdings in *Francis v. Henderson*, *Stone v. Powell*, *Estelle v. Williams*, and *Wainwright v. Sykes*,[48] rather than limit them to their facts, and in general, to contract federal jurisdiction wherever possible. This inclination promises an uncertain future for habeas corpus petitioners.

II. Nature and Scope of Remedy

A. Relief Available

Historically, the Writ of Habeas Corpus was a civil proceeding to contest the legality of a prisoner's restraint or confinement in violation of the Constitution, laws, or treaties of the United States.[49] However, the writ is not 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."[50] No longer is a claim for immediate release from custody the only relief which may be sought.[51]

Thus, in *Carafas v. LaVallee*,[52] where the petitioner's sentence expired after he filed his petition, the Supreme Court held that the case was not moot and the federal court released him from the consequences of his conviction: inability to engage in certain businesses, to serve as an official of a labor union, to vote in state elections, and to serve as a juror. Also, the remedies contemplated include: release from prison disciplinary confine-

46. *Id.* at 87-88.

47. *Id.* at 85.

48. *See* text accompanying notes 32-47 *supra.*

49. Walker v. Wainwright, 390 U.S. 335 (1968).

50. Janes v. Cunningham, 371 U.S. 236, 243 (1963).

51. Walker v. Wainwright, 390 U.S. 335 (1968); Carafas v. LaVallee, 391 U.S. 234 (1968) and Peyton v. Rowe, 391 U.S. 54 (1968), *overruling* McNally v. Hill, 293 U.S. 131 (1934) (to the extent that immediate release from custody was a requirement for a petition).

52. 391 U.S. 234 (1968).

ment to the status of an ordinary prisoner,[53] restoration of good-time credits resulting in a shortening of the length of actual confinement,[54] invalidation of a prior conviction making petitioner ineligible for probation on a subsequent conviction,[55] stay of deportation pending appeal of administrative actions,[56] testing the validity of induction or enlistment into military service,[57] or to test the validity of an alien's exclusion from the United States.[58]

B. Claims Reviewable by Writ of Habeas Corpus—Sections 2241 and 2254

The list of claims reviewable by the federal courts on habeas corpus petitions is inexhaustible. Any person in custody, whether present or future,[59] pursuant to a state court judgment that violates the Constitution, laws or treaties of the United States, may petition the federal district court for a writ of habeas corpus.[60] Only recently has the Supreme Court begun to restrict the remedy after a long period of expansion.[61]

The most common grounds for section 2254 petitions are enumerated in the Model Form for use in Applications for Habeas Corpus.[62] Some representative issues under sections 2241 and 2254 are: denial of the right to counsel;[63] ineffective assistance of counsel;[64] illegal execution of sentence;[65] invalidity

53. Johnson v. Avery, 393 U.S. 483 (1969); Hudson v. Hardy, 424 F.2d 854 (D.C. Cir. 1970).

54. Preiser v. Rodriguez, 411 U.S. 475 (1973).

55. Arketa v. Wilson, 373 F.2d 582 (9th Cir. 1967).

56. Pierre v. United States, 525 F.2d 933 (5th Cir. 1976).

57. Grazier v. Hackel, 440 F.2d 593 (9th Cir. 1971); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); *Ex parte* Fabiani, 105 F. Supp. 139 (E.D. Pa. 1952).

58. Brownell v. Tom We Shung, 352 U.S. 180 (1956).

59. Preiser v. Rodriguez, 411 U.S. 475 (1973); Peyton v. Rowe, 391 U.S. 54 (1968) (future custody). When the petitioner is no longer in custody, *see* 28 U.S.C. § 1651 (1976), and text accompanying notes 271-289 *infra*.

60. Rules Governing § 2254 Cases in the United States District Court, Rule 1. Persons in custody pursuant to a judgment of a federal court may challenge that conviction via 28 U.S.C. § 2255. If this remedy is inadequate or ineffective, federal prisoners may apply for habeas relief under 28 U.S.C. § 2241, the general habeas corpus statute.

61. *See* text accompanying notes 32-48 *supra*.

62. 28 U.S.C. § 2254 (1976) at 276-77.

63. Moore v. Illinois, 434 U.S. 220 (1977) *on remand*, 577 F.2d 411 (7th Cir. 1978); Brewer v. Williams, 430 U.S. 387 (1977); Loper v. Beto, 405 U.S. 473 (1972); Chewning v. Cunningham, 368 U.S. 443 (1962); White v. Finkbeiner, 570 F.2d 194 (7th Cir. 1978) (denial resulted in coerced confession); Davis v. Estelle, 529 F.2d 437 (5th Cir. 1976); Daniels v. Alabama, 487 F.2d 887 (5th Cir. 1973) (not informed of right to counsel on appeal, or of right to appeal); Lumpkin v. Smith, 439 F.2d 1084 (5th Cir. 1971); Braun v. Rhay, 416 F.2d 1055 (9th Cir. 1969).

64. White v. Estelle, 566 F.2d 500 (5th Cir. 1978); Morrow v. Parratt, 574 F.2d 411 (8th Cir. 1978); Bonds v. Wainwright, 564 F.2d 1125 (5th Cir. 1977),

of proceedings or statute;[66] defects in verdict, sentence, or commitment;[67] former jeopardy;[68] prosecutor's comments on de-

reh. en banc granted Feb. 13, 1978; Rinehart v. Brewer, 561 F.2d 126 (8th Cir. 1977); United States *ex rel.* Healey v. Cannon, 553 F.2d 1052 (7th Cir. 1977); Mason v. Balcom, 531 F.2d 717 (5th Cir. 1976); United States *ex rel.* Williams v. Twomey, 510 F.2d 634 (7th Cir. 1975), *cert. denied*, 423 U.S. 876 (1976); Garza v. Wolff, 528 F.2d 208 (8th Cir. 1975); Riser v. Craven, 501 F.2d 381 (9th Cir. 1974); Sawicki v. Johnson, 475 F.2d 183 (6th Cir. 1973); Newberry v. Wingo, 449 F.2d 344 (6th Cir. 1971); Nelson v. Peyton, 415 F.2d 1154 (4th Cir. 1969), *cert. denied, sub nom.* Cox v. Nelson, 397 U.S. 1007 (1970). *But see* Alvarez v. Wainwright, 522 F.2d 100 (5th Cir. 1975) (split in Fifth Circuit as to state action requirement).

65. Preiser v. Rodriguez, 411 U.S. 475 (1973); Wilwording v. Swenson, 404 U.S. 249 (1971); United States *ex rel.* Ferris v. Finkbeiner, 551 F.2d 185 (7th Cir. 1977) (failure to inform defendant of mandatory 5-year parole term); Ron v. Wilkinson, 565 F.2d 1254 (2d Cir. 1977) (writ is available to attack penalties in prison disciplinary hearings); Hayes v. Walker, 555 F.2d 625 (7th Cir. 1977); Ross v. Mebane, 536 F.2d 1199 (7th Cir. 1976) (federal prisoner deprived of good time credit); United States v. DiRusso, 535 F.2d 673 (1st Cir. 1976) (federal sentencing court could only correct mistake in effect of sentence through § 2241, not § 2255); Davis v. Willingham, 415 F.2d 344 (10th Cir. 1969) (presentence credit). Challenges to prison conditions are better brought under 42 U.S.C. § 1983 for several practical reasons: there is no exhaustion requirement, or "in custody" requirement, Federal Rules of Civil Procedure are applicable including broader discovery, fees and costs are recoverable under the Attorney's Fees Award Act of 1976, and there is a greater chance of surviving a motion to dismiss. *Accord*, Advisory Committee. *But see* Secret v. Brierton, 584 F.2d 823 (1978) (prisoners must exhaust adequate administrative remedies).

66. Balthzar v. Superior Court of Mass., 573 F.2d 698 (3d Cir. 1978) (statute unconstitutionally vague); Allen v. County Court, Ulster City, 568 F.2d 998 (2d Cir. 1977); Royal v. Superior Court of N.H., 531 F.2d 1084 (1st Cir. 1976), *cert. denied*, 429 U.S. 869 (1977) (flag desecration statute unconstitutionally vague); Vuitch v. Hardy, 473 F.2d 1370 (4th Cir. 1973), *cert. denied*, 414 U.S. 824 (1974) (abortion statute unconstitutional).

67. Preiser v. Rodriguez, 411 U.S. 475 (1973); North Carolina v. Pearce, 395 U.S. 711 (1969) (second sentence exceeded first); Peyton v. Rowe, 391 U.S. 54 (1968) (§ 2241 is available to attack constitutionality of consecutive sentence); Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978) (invalid prior convictions may not be considered in sentencing defendant); Goins v. Brierly, 464 F.2d 947 (3d Cir. 1972) (district court could review validity of 1947 convictions). *But see* Bordenkircher v. Hayes, 434 U.S. 357 (1978) (threat of reindictment on more serious charge if defendant does not plead guilty does not violate due process).

68. Greene v. Massey, — U.S. —, 98 S.Ct. 2151 (1978) (defendant may not be retried where appellate court reversed conviction for insufficient evidence); Crist v. Bretz, — U.S. —, 98 S.Ct. 2156 (1978) (jeopardy attaches in jury trial when jury is empaneled and sworn, and Montana statute providing that jeopardy attached when first witness was sworn could not be constitutionally applied to jury trial); Sumpter v. DeGroote, 552 F.2d 1206 (7th Cir. 1977) (failure to prove essential element of crime); Alvarez v. Estelle, 531 F.2d 1319 (5th Cir. 1976), *cert. denied*, 429 U.S. 1044 (1977) (claim properly before federal court though not raised at state trial); Mizell v. Attorney General, 442 F. Supp. 868 (E.D.N.Y. 1977); Grizzle v. Turner, 387 F. Supp. 1 (W.D. Okla. 1975) *But see* Arizona v. Washington, 98 S.Ct. 824 (1978) (manifest necessity for mistrial precludes double jeopardy bar).

fendant's failure to testify;[69] standing trial in prison garb;[70] prosecutor's use of perjured testimony;[71] failure to produce exculpatory material under *Brady*;[72] right to bail;[73] parole and probation decisions;[74] invalid guilty plea;[75] trial court errors;[76]

69. Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978) (other inflammatory and prejudicial remarks); Berryman v. Colbert, 538 F.2d 1247 (6th Cir. 1976).

70. Estelle v. Williams, 425 U.S. 501 (1976) (failure to object to standing trial in prison garb); Gaito v. Brierly, 485 F.2d 86 (3d Cir. 1973).

71. Annunziato v. Manson, 566 F.2d 410 (2d Cir. 1977). United States *ex rel.* Wilson v. Warden, 538 F.2d 1272 (7th Cir. 1976); United States *ex rel.* Washington v. Vincent, 525 F.2d 262 (2d Cir. 1975), *cert. denied, sub nom.* Bombard v. Washington, 424 U.S. 934 (1976) (petition granted even though defendant had reason to know perjury and did not inform the court); Burks v. Egeler, 512 F.2d 221 (6th Cir. 1975), *cert. denied*, 423 U.S. 937 (1976) (must be knowing and deliberate use).

72. Austin v. Wyrick, 535 F.2d 443 (8th Cir. 1976). *See also* United States *ex rel.* Washington v. Vincent, 525 F.2d 262 (2d Cir. 1975), *cert. denied, sub nom.* Bombard v. Washington, 424 U.S. 934 (1976). *But see* United States *ex rel.* Moore v. Brierton, 560 F.2d 288 (7th Cir. 1977).

73. United States *ex rel.* Barbour v. District Dir. of I. & N.S., 491 F.2d 573 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974) ("bad bail risk" improper basis to deny bail to alien); Abbott v. Laurie, 422 F. Supp. 976 (D.R.I. 1976) and United States *ex rel.* Rainwater v. Morris, 411 F. Supp. 1252 (N.D. Ill. 1976) (arbitrary denial of bail authorized by state statute); Bobick v. Schaeffer, 366 F. Supp. 503 (S.D.N.Y. 1973) (court will inquire whether state court's action is arbitrary, discriminatory, or results in denial of counsel or fair trial); United States *ex rel.* Kane v. Bensinger, 359 F. Supp. 181 (N.D. Ill. 1972), *aff'd*, 484 F.2d 874 (7th Cir. 1973) (failure of state court to give reason for denial of bail pending appeal).

74. Preiser v. Rodriguez, 411 U.S. 475 (1973) (unlawful parole revocation); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation); United States *ex rel.* Sims v. Sielaff, 563 F.2d 821 (7th Cir. 1977) (Barker v. Wingo standards applied to delay in revocation hearing); Cox v. Benson, 548 F.2d 186 (7th Cir. 1977) (false, insufficient, capricious or no reasons given for denial of parole); Lee v. United States, 501 F.2d 494 (5th Cir. 1974) (§2241 is proper avenue for federal prisoner to challenge parole board actions). *See* text accompanying notes 239-246 *infra*. A cautionary word is due regarding parole revocation and parole violator warrants. Federal parolees are not entitled to prompt parole revocation hearings when a warrant is lodged with the institution but not served on parolee. Moody v. Daggett, 429 U.S. 78 (1976). *Moody* is applicable to detainers placed against state as well as federal prisoners. Head v. United States Bd. of Parole, 553 F.2d 22 (7th Cir.), *cert. denied*, 431 U.S. 959 (1977). *See also* United States *ex. rel.* Caruso v. United States Bd. of Parole, 570 F.2d 1150 (3d Cir. 1978).

75. Blackledge v. Allison, 431 U.S. 63 (1977) (unkept plea agreement); Henderson v. Morgan, 426 U.S. 637 (1976) (element of intent not explained); Rinehart v. Brewer, 561 F.2d 126 (8th Cir. 1977) (no understanding of nature of crime); United States *ex rel.* Healey v. Cannon, 553 F.2d 1052 (7th Cir. 1977) (misinformation by counsel).

76. Woodcock v. McCauley, 563 F.2d 806 (7th Cir. 1977) (court would only allow continuance if defendant waived jury trial); Welcome v. Vincent, 549 F.2d 853 (2d Cir. 1977), *cert. denied, sub nom.* Fogg v. Welcome, 432 U.S. 911 (1977) (trial court refused to permit examination of witness concerning witness's prior confession to crime); Davis v. Alabama, 545 F.2d 460 (5th Cir.), *cert. denied*, 431 U.S. 957 (1977) (refusal to grant continuance); Shirley v. North Carolina, 528 F.2d 819 (4th Cir. 1975) (denial of continuance to procure testimony of indispensable witness); Painter v. Looke, 485 F.2d 427 (4th Cir. 1973) (refusal to allow defense counsel to make pretrial motions); Favre

denial of right to confront witnesses;[77] incompetence to stand trial;[78] challenges to jury selection procedures;[79] due process violations;[80] denial of right to speedy trial;[81] unconstitutionally suggestive pre-trial identifications;[82] intervening change of law;[83] improper prison conditions;[84] improper jury instructions;[85] excessive pre-trial publicity;[86] failure to give free tran-

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v. Henderson, 464 F.2d 359 (5th Cir. 1972), *cert. denied*, 409 U.S. 942 (1973) (denial of right to cross-examine informants).

77. Burkhart v. Lane, 574 F.2d 346 (6th Cir. 1978) (admission of nontestifying codefendant's confession at trial in violation of Bruton v. United States, 391 U.S. 123 (1968)). Favre v. Henderson, 464 F.2d 359 (5th Cir. 1972), *cert. denied*, 409 U.S. 942 (1973) (denial of right to cross-examine informants); United States *ex rel.* Jones v. Morris, 430 F. Supp. 478 (N.D. Ill. 1977) (cross-examination of eyewitness not allowed).

78. Pate v. Robinson, 383 U.S. 375 (1966); Suggs v. LaVallee, 570 F.2d 1092 (2d Cir. 1978); Tillery v. Eyman, 492 F.2d 1056 (9th Cir. 1974); Bruce v. Estelle, 536 F.2d 1051 (5th Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977).

79. Mitchell v. Rose, 570 F.2d 129 (6th Cir. 1978); Bradley v. Judges of Superior Court, 531 F.2d 413 (9th Cir. 1976) (petitioners must show prejudice from jury selection methods).

80. Manson v. Brathwaite, 432 U.S. 98 (1977) ("totality of circumstances" test to be used to determine whether pretrial identification evidence and testimony violated due process); Blackedge v. Perry, 421 U.S. 21 (1974) (subsequent felony indictment after petitioner appealed misdemeanor conviction violated due process); Lockett v. Blackburn, 571 F.2d 309 (5th Cir. 1978) (state's deliberate concealment of two eyewitnesses violated due process); United States *ex rel.* Morgan v. Sielaff, 546 F.2d 218 (7th Cir. 1976) (lesser standard of proof for sentencing under Illinois Sexually Dangerous Persons Act denied due process). *But see* Bordenkircher v. Hayes, 434 U.S. 357 (1978) (threat of reindictment on more serious charge if defendant does not plead guilty does not violate due process).

81. Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973); Kane v. Virginia, 419 F.2d 1369 (4th Cir. 1970) (state must make diligent effort to try defendant after lodging detainer); Morrison v. Jones, 428 F. Supp. 82 (W.D.N.C. 1977) (state waited 3 years to retry petitioner following mistrial). *See also* Smith v. Mabry, 564 F.2d 249 (8th Cir. 1977) (Barker v. Wingo factors apply to determine denial of right). *But see* Brown v. Estelle, 530 F.2d 1280 (5th Cir. 1976).

82. Manson v. Braithwaite, 432 U.S. 98 (1977); Swicegood v. Alabama, 577 F.2d 1322 (5th Cir. 1978) (unduly suggestive lineup); Jones v. Wisconsin, 562 F.2d 440 (7th Cir. 1977).

83. Francisco v. Gathright, 419 U.S. 59 (1974) (no need to resubmit cause to state court which declined review where statute was subsequently declared unconstitutional). *But see* Bonner v. Wyrick, 563 F.2d 1293 (8th Cir. 1977) (Missouri statute struck down).

84. Preiser v. Rodriguez, 411 U.S. 475 (1973) (challenges to fact or duration of confinement cognizable by habeas corpus petition, conditions of confinement may also be challenged by civil rights action); Wilwording v. Swenson, 404 U.S. 249 (1971) (challenge to living conditions and disciplinary measures). *See also* note 65 *supra*.

85. Cupp v. Naughten, 414 U.S. 141 (1973) (erroneous instruction must so infect entire trial that resulting conviction violates due process); Dunn v. Perrin, 570 F.2d 21 (1st Cir. 1978); Reid v. Riddle, 550 F.2d 1003 (4th Cir. 1977) (refusal to give curative instruction following improper closing argument). *But see* Henderson v. Kibbe, 431 U.S. 145 (1977) (failure to object to instruction results in little hope for success); Frazier v. Weatherholtz, 572 F.2d 994 (4th Cir. 1978) (failure to object as required by Virginia rules). *See also*

script to indigent defendant;[87] use of defendant's silence as impeachment;[88] failure to inform or misinforming defendant about sentence;[89] and bailiff's testimony as to substance of attorney-client conversation.[90]

The following issues are no longer reviewable via habeas corpus petition: search and seizure questions where the state has conducted a full and fair hearing;[91] failure to object to voluntariness of confession;[92] failure to object to standing trial in prison garb;[93] denial of right to allocution before sentencing;[94] technical defects in indictment;[95] sufficiency of evidence;[96] prej-

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Taylor v. Kentucky, 98 S. Ct. 1930 (1978) (failure to give presumption of innocence instruction violated right to fair trial).

86. Sheppard v. Maxwell, 384 U.S. 333 (1966).

87. United States *ex rel.* Cleveland v. Warden, 544 F.2d 1200 (3d Cir. 1976) (failure aborted opportunity to appeal).

88. Douglas v. Cupp, 578 F.2d 266 (9th Cir. 1978); Morgan v. Hall, 569 F.2d 1161 (1st Cir. 1977); Jones v. Wyrick, 542 F.2d 1013 (8th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977).

89. United States *ex rel.* Baker v. Finkbeiner, 551 F.2d 180 (7th Cir. 1977) (failure to inform petitioner of 2-year mandatory parole term); United States *ex rel.* Ferris v. Finkbeiner, 551 F. 2d 185 (7th Cir. 1977) (petitioner misinformed by court as to parole term); Rinehart v. Brewer, 561 F.2d 126 (8th Cir. 1977) (failure to inform as to maximum sentence).

90. Poulin v. Gunn, 548 F.2d 1379 (9th Cir. 1977).

91. Stone v. Powell, 428 U.S. 465 (1976); Gates v. Henderson, 568 F.2d 830 (2d Cir. 1977) (federal habeas court refused to hear objection to fourth amendment violations which were not raised until state coram nobis proceeding); Moore v. Cowan, 560 F.2d 1298 (6th Cir. 1977) (federal habeas court refused to hear claim where state appellate court found error harmless beyond a reasonable doubt without addressing merits of claim); O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977) (where facts were undisputed, evidentiary hearing not required, full and fair hearing requirement satisfied when state appellate court fully considered claim); Tisnado v. United States, 547 F.2d 452 (9th Cir. 1976) (claim rejected by state Supreme Court, fairness of proceedings not challenged); United States *ex rel.* Saiken v. Bensinger, 546 F.2d 1292, (7th Cir. 1976), *cert. denied*, 431 U.S. 930 (1977) (*Stone* applied where writ was granted, subsequently vacated, and granted again); United States *ex rel.* Placek v. Illinois, 546 F.2d 1298 (7th Cir. 1976); Bracco v. Reed, 540 F.2d 1019 (9th Cir. 1976) (*Stone* enunciated no new formulation of exclusionary rule; *Stone* applicable to case on appeal from district court when decision was rendered); Chavez v. Rodriguez, 540 F.2d 500 (10th Cir. 1976) (*Stone* decision applied to case on appeal from district court when decision was rendered); Poindexter v. Wolff, 540 F.2d 390 (8th Cir. 1976). *But see* Petillo v. New Jersey, 418 F. Supp. 686 (D. N.J. 1976) (where petitioners were not allowed to assert claim that warrant was procured by police perjury, federal habeas court would issue writs).

92. Wainwright v. Sykes, 433 U.S. 72 (1977) (rule of Francis v. Henderson extended to failure to object to admission of confession; defendant must show cause for noncompliance with procedural rule and actual prejudice). *But see* Ferguson v. Boyd, 566 F.2d 863 (4th Cir. 1977).

93. Estelle v. Williams, 425 U.S. 501 (1976).

94. Lunz v. Henderson, 533 F.2d 1322 (2d Cir.), *cert. denied, sub nom.* Lunz v. Smith, 429 U.S. 849 (1976).

95. Blake v. Morford, 563 F.2d 248 (6th Cir. 1977); Burrows v. Engle, 545 F.2d 552 (6th Cir. 1976); United States *ex rel.* O'Neill v. Burke, 379 F.2d 656

udicial remarks by prosecutor;[97] length of state sentence;[98] admission of evidence at trial;[99] entrapment;[100] and limited exclusion of the public from trial.[101]

With the decision in *Wainwright v. Sykes*,[102] the Court appears to be moving toward a "New Federalism." Whatever the motivation, the appearance of comity and harmony in federal-state relations is enjoying peak popularity. Prior to *Wainwright*, it was, at best, unclear how far *Stone v. Powell*, *Francis v. Henderson*, and *Estelle v. Williams* would be extended. At this time, however, the practical view is that habeas petitioners should expect the worst.

C. Claims Reviewable on Section 2255 Motion

The most common grounds for a section 2255 motion are enumerated in the model form.[103] The following are claims often raised: lack of jurisdiction;[104] invalidity of proceedings or statute;[105] failure of the indictment to charge an offense;[106] de-

(7th Cir.), *cert. denied*, 389 U.S. 876 (1967). *But see* Watson v. Jago, 558 F.2d 330 (6th Cir. 1977) (constructive amendment impermissible).

96. Spratlin v. Solem, 577 F.2d 56 (8th Cir. 1978) (conviction must be totally devoid of evidentiary support); Talavera v. Wainwright, 547 F.2d 1238 (5th Cir. 1977); Jackson v. Alabama, 534 F.2d 1136 (5th Cir. 1976); White v. Wyrick, 530 F.2d 818 (8th Cir. 1976) (petition must be denied if any credible evidence appears in state trial); Fish v. Cardwell, 523 F.2d 976 (9th Cir. 1975), *cert. denied*, 423 U.S. 1062 (1976).

97. Maggit v. Wyrick, 533 F.2d 383 (8th Cir.), *cert. denied*, 429 U.S. 898 (1976); Marlin v. Florida, 489 F.2d 702 (5th Cir. 1974); Bergenthal v. Cady, 466 F.2d 635 (7th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

98. Willeford v. Estelle, 538 F.2d 1194 (5th Cir. 1976). *But see* Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978) (considering invalid prior convictions in sentencing defendant requires resentencing or release).

99. United States *ex rel.* Clark v. Fike, 538 F.2d 750, 758 (7th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1977) (error must be of such magnitude to deny fundamental fairness).

100. Ainsworth v. Reed, 542 F.2d 243 (5th Cir. 1976), *cert. denied*, 430 U.S. 917 (1977) (rule is not a constitutional doctrine, but court created limitation on governmental activity).

101. United States *ex rel.* Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977) (public excluded during testimony of rape victim; court should balance harm to witness and prejudice to defendant); United States *ex rel.* Lloyd v. Vincent, 520 F.2d 1272 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975) (public excluded during undercover agent's testimony).

102. 433 U.S. 72 (1977).

103. 28 U.S.C. § 2255 (1976) at 288-89.

104. *See* Sunal v. Large, 332 U.S. 174, 178 (1947); United States v. Allocco, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963); United States v. Rider, 282 F.2d 476 (9th Cir. 1960).

105. Strauss v. United States, 516 F.2d 980 (7th Cir. 1975) (checkkiting scheme not criminal under Supreme Court ruling). *See generally* Sunal v. Large, 332 U.S. 174, 178 (1947). *But see* note 155 *infra*.

106. Hilderbrand v. United States, 261 F.2d 354 (9th Cir. 1958).

nial of right to speedy trial;[107] fourth amendment violations;[108] involuntary or invalid guilty plea;[109] failure of the trial court to determine the factual basis for a guilty plea;[110] incompetency to stand trial;[111] language barrier preventing understanding of right to trial by jury;[112] denial of effective assistance of counsel;[113] consecutive sentences for same transaction;[114] or concurrent sentences;[115] nondisclosure of *Brady* material;[116] knowing

107. Waugaman v. United States, 331 F.2d 189 (5th Cir. 1964). *Contra,* United States v. Shields, 291 F.2d 798 (6th Cir.), *cert. denied*, 368 U.S. 933 (1961).

108. Kaufman v. United States, 394 U.S. 217 (1969); Duhart v. United States, 476 F.2d 597 (6th Cir. 1973), *cert. dismissed*, 421 U.S. 1006 (1975). *But see* Tisnado v. United States, 547 F.2d 452 (9th Cir. 1976) (Stone v. Powell precluded federal court from reexamining validity of prior state conviction on fourth amendment grounds in § 2255 proceeding); Green v. United States, 460 F.2d 317 (5th Cir. 1972) (illegal arrest, but no property seized).

109. Fontaine v. United States, 411 U.S. 213 (1973); Machibroda v. United States, 368 U.S. 487 (1962); United States *ex. rel.* Robinson v. Israel, 581 F.2d 1276 (7th Cir. 1978); Coody v. United States, 570 F.2d 540 (5th Cir. 1978) (compliance with Rule 11 necessary); Wilson v. United States, 554 F.2d 893 (8th Cir. 1977); Rose v. United States, 513 F.2d 1251 (8th Cir. 1975); Bannister v. United States, 446 F.2d 1250 (3d Cir. 1971). *See generally* United States v. Sams, 521 F.2d 421 (3d Cir. 1975). *But see* Micklus v. United States, 537 F.2d 381 (9th Cir. 1976) (mistake by counsel overstating maximum penalty did not invalidate plea).

110. Herron v. United States, 512 F.2d 439 (4th Cir. 1975); Gilbert v. United States, 466 F.2d 533 (5th Cir. 1972); Schworak v. United States, 419 F.2d 1313 (2d Cir. 1970). *But see* Arias v. United States, 484 F.2d 577 (7th Cir. 1973), *cert. denied*, 418 U.S. 905 (1974).

111. Sanders v. United States, 373 U.S. 1 (1963); United States v. Hollis, 569 F.2d 199 (3d Cir. 1977) (burden of proof as to incompetency); Rose v. United States, 513 F.2d 1251 (8th Cir. 1975); Bryant v. United States, 468 F.2d 812 (8th Cir. 1972). *See also* Bishop v. United States, 350 U.S. 961 (1956) (question of competency inadequately resolved); Taylor v. United States, 282 F.2d 16 (8th Cir. 1960) (incompetent defendant cannot be expected to raise claim before trial).

112. United States v. Reyes-Meza de Polanco, 422 F.2d 1304 (9th Cir. 1970), *cert. denied*, 397 U.S. 1081 (1970); Atilus v. United States, 378 F.2d 52 (5th Cir. 1967).

113. Gideon v. Wainwright, 372 U.S. 335 (1963); Sincox v. United States, 571 F.2d 876 (5th Cir. 1978) (failure of counsel to object to nonunanimous verdict and failure to appeal); Summers v. United States, 538 F.2d 1208 (5th Cir. 1976); Kent v. United States, 423 F.2d 1050 (5th Cir. 1970) (failure of counsel to timely appeal resulted in ineffective assistance of counsel). *But see* cases cited in note 153 *infra*.

114. United States v. Southerland, 565 F.2d 1281 (4th Cir. 1977); Natarelli v. United States, 516 F.2d 149 (2d Cir. 1975); United States v. Barnett, 407 F.2d 1114 (6th Cir.), *cert. denied*, 395 U.S. 907 (1969); Mathis v. United States, 200 F.2d 697 (6th Cir. 1952); Neeley v. United States, 405 F. Supp. 1186 (W.D. Va. 1975).

115. Gentry v. United States, 533 F.2d 998 (6th Cir. 1976).

116. Brady v. Maryland, 373 U.S. 83 (1963); United States v. Dansker, 565 F.2d 1262 (3d Cir. 1977) (summary dismissal of claim improper). *But see* United States v. Smith, 538 F.2d 1332 (8th Cir. 1976) (where evidence withheld was for impeachment only and wealth of impeachment evidence was presented at trial, vacation of conviction not required); Hampton v. United

use of perjured testimony;[117] misinformation in presentence investigation;[118] failure to find defendant would not benefit from Youth Corrections Act;[119] denial of defendant's right to be present at certain proceedings;[120] trial court's mistake as to sentence;[121] violations relating to probation conditions or revocation;[122] failure to inform or misinforming as to parole;[123] failure to produce statements under the Jencks Act;[124] jury instruction which had the effect of amending the indictment;[125] denial of right to appeal;[126] invalid prior convictions used to en-

States, 504 F.2d 600 (10th Cir. 1974), *cert. denied*, 421 U.S. 917 (1975) (where defendant knew of material but failed to make request, claim is waived).

117. Crismon v. United States, 510 F.2d 356 (8th Cir. 1975).

118. United States v. Tucker, 404 U.S. 443 (1972); Townsend v. Burke, 334 U.S. 736 (1948); Moore v. United States, 571 F.2d 179 (3d Cir. 1978); Avery v. United States, 494 F.2d 33 (5th Cir. 1974); United States v. Powell, 487 F.2d 325 (4th Cir. 1973); United States v. Buckley, 379 F.2d 424 (7th Cir.), *cert. denied*, 389 U.S. 929 (1967). *See also* United States v. Dinapoli, 519 F.2d 104 (6th Cir. 1975) (failure to obtain presentence report for first offenders is grounds to vacate conviction).

119. Dorszynski v. United States, 418 U.S. 424 (1974); *But see* Bustillo v. United States, 573 F.2d 368 (5th Cir. 1978) (explicit findings not required); DeVerse v. United States, 536 F.2d 804 (8th Cir.), *cert. denied*, 429 U.S. 897 (1976).

120. United States v. Behrens, 375 U.S. 162 (1963) (sentencing); Williams v. United States, 521 F.2d 590 (8th Cir. 1975) (impanelling of jury); United States v. Jasper, 481 F.2d 976 (3d Cir. 1973) (resentencing). *But see* Phillips v. United States, 533 F.2d 369 (8th Cir.), *cert. denied*, 429 U.S. 924 (1976) (does not extend to presence at § 2255 hearing).

121. Addonizo v. United States, 573 F.2d 147 (3d Cir. 1978) (change in parole guidelines); Kortness v. United States, 514 F.2d 167 (8th Cir. 1975) (change in parole guidelines); Russell v. United States, 507 F.2d 1029 (4th Cir. 1974) (mistake as to maximum penalty); Hightower v. United States, 455 F.2d 481 (6th Cir. 1972) (misunderstanding by judge as to state sentence). *But see* Musto v. United States, 571 F.2d 36 (3d Cir. 1978) (court exceeded jurisdiction in altering sentence where judge misapprehended effect of parole guidelines in particular case).

122. United States v. Webster, 492 F.2d 1048 (D.C. Cir. 1974) (revocation); Porth v. Templar, 453 F.2d 330 (10th Cir. 1971) (probation conditions violated first amendment rights).

123. United States *ex. rel.* Robinson v. Israel, 581 F.2d 1276 (7th Cir. 1978); Timmreck v. United States, 577 F.2d 372 (6th Cir. 1978) (court failed to advise defendant of 3-year special parole term); Yothers v. United States, 572 F.2d 1326 (9th Cir. 1978); Brown v. United States, 565 F.2d 862 (3d Cir. 1977); United States v. Harris, 534 F.2d 141 (9th Cir. 1976) (failure to inform of 6-year mandatory special parole term); Gates v. United States, 515 F.2d 73 (7th Cir. 1975) (misinformed regarding parole eligibility).

124. Krilich v. United States, 502 F.2d 680 (7th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975) (where purpose of statute was to effectuate constitutional right noncompliance may be reviewed on § 2255 motion). *Contra*, Wilson v. United States, 554 F.2d 893 (8th Cir. 1977); United States v. Angelet, 255 F.2d 383 (2d Cir. 1958).

125. Howard v. Daggett, 526 F.2d 1388 (9th Cir. 1975). *But see* note 137 *infra*.

126. United States v. Duhart, 511 F.2d 7 (6th Cir. 1975), *cert. dismissed*, 421 U.S. 1006 (1975); Kirk v. United States, 447 F.2d 749 (7th Cir. 1971) (even

hance punishment for a subsequent crime;[127] breach of plea bargain agreements;[128] newly discovered evidence (after two-year limitation in F.R. Crim. P. Rule 33);[129] and substantial disparity in sentencing for defendant who exercised right to stand trial.[130]

The following are not cognizable on a section 2255 motion: illegal arrest alone;[131] untimely challenges to grand jury composition;[132] sufficiency of or defects in indictment or information;[133] improper venue or removal;[134] sufficiency or admissibility of evidence;[135] ordinary trial errors;[136] jury instructions;[137] waiver of nonjurisdictional defenses by guilty plea;[138]

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though retained counsel had filed notice of appeal, appeal was never perfected).

127. United States v. Tucker, 404 U.S. 443 (1972) (right to counsel previously violated); O'Shea v. United States, 491 F.2d 774 (1st Cir. 1974); Dameron v. United States, 488 F.2d 724 (5th Cir. 1974).

128. Richardson v. United States, 577 F.2d 477 (8th Cir. 1978) (noncompliance with formal requirements of rule of criminal procedure is cognizable in § 2255 proceeding only if defendant is prejudiced); Brown v. United States, 565 F.2d 862 (3d Cir. 1977); Vandenades v. United States, 523 F.2d 1220 (5th Cir. 1975); Walters v. Harris, 460 F.2d 988 (4th Cir. 1972), *cert. denied*, 409 U.S. 1129 (1973). *But see* Bryan v. United States, 492 F.2d 775 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974).

129. Anderson v. United States, 443 F.2d 1226 (10th Cir. 1971) (confession by another to crime).

130. United States v. Capriola, 537 F.2d 319 (9th Cir. 1976) (record silent as to sentencing court's reasons for more severe sentence).

131. Green v. United States, 460 F.2d 317 (5th Cir. 1972); Runge v. United States, 427 F.2d 122 (10th Cir. 1970); Cox v. United States, 351 F.2d 280 (8th Cir. 1965); Moreland v. United States, 347 F.2d 376 (10th Cir. 1965).

132. Davis v. United States, 411 U.S. 233 (1973).

133. Campbell v. United States, 538 F.2d 692 (5th Cir. 1976) (failure to object before trial); Entrekin v. United States, 508 F.2d 1328 (8th Cir. 1974), *cert. denied*, 421 U.S. 977 (1975); Tallman v. United States, 465 F.2d 282 (7th Cir. 1972) (unless exceptional circumstances exist).

134. Entrekin v. United States, 508 F.2d 1328 (8th Cir. 1974), *cert.denied*, 421 U.S. 977 (1975); Runge v. United States, 427 F.2d 122 (10th Cir. 1970); Marcella v. United States, 344 F.2d 876 (9th Cir. 1965), *cert. denied*, 382 U.S. 1016 (1966) (untimely objection).

135. Crismon v. United States, 510 F.2d 356 (8th Cir. 1975) (admissibility of evidence); Whitney v. United States, 513 F.2d 326 (8th Cir. 1974) (sufficiency of evidence); Cauley v. United States, 294 F.2d 318 (9th Cir. 1961) (weight of evidence).

136. Middlebrooks v. United States, 500 F.2d 1355 (5th Cir. 1974).

137. Egger v. United States, 509 F.2d 745 (9th Cir.), *cert. denied*, 423 U.S. 842 (1975); DiPiazza v. United States, 471 F.2d 719 (6th Cir. 1973); Lorraine v. United States, 444 F.2d 1 (10th Cir. 1971) (unless so fundamentally unfair to deny due process); Hall v. United States, 410 F.2d 653 (4th Cir.), *cert. denied*, 396 U.S. 970 (1969); Feeney v. United States, 392 F.2d 541 (1st Cir. 1968). *But see* note 125 *supra*.

138. Grier v. United States, 472 F.2d 1157 (5th Cir. 1973) (privilege against self-incrimination); Eaton v. United States, 458 F.2d 704 (7th Cir.), *cert. denied*, 409 U.S. 880 (1972) (entrapment defense); McDonald v. United States, 437 F.2d 1251 (5th Cir. 1971) (incompetence at time statement was signed); Runge v. United States, 427 F.2d 122 (10th Cir. 1970) (illegal detention before arraignment); Rice v. United States, 420 F.2d 863 (5th Cir. 1969),

entrapment;[139] denial of right to allocution at sentencing;[140] failure to grant continuance;[141] issues already decided on direct appeal (Eighth Circuit only);[142] expiration of the statute of limitations;[143] absence of judge during voir dire;[144] prejudicial joinder;[145] denial of request to subpoena witnesses;[146] prejudicial pre-trial publicity;[147] denial of public trial;[148] insanity at time of offense;[149] improper use of informers;[150] alleged prejudicial statement by judge or prosecutor;[151] improper statements by bailiff to jury;[152] ineffective assistance of counsel not resulting in deprivation of constitutional rights;[153] mistake of counsel

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cert. denied, 398 U.S. 910 (1970) (holding defendant without bail, failure to show defendant indictment before arraignment, failure to take defendant before magistrate); Austin v. United States, 408 F.2d 808 (9th Cir. 1969) (failure to have preliminary hearing); United States v. French, 274 F.2d 297 (7th Cir. 1960) (delay in bringing defendant before magistrate).

139. Eaton v. United States, 458 F.2d 704 (7th Cir.), *cert. denied*, 409 U.S. 880 (1972); Evans v. United States, 408 F.2d 369 (7th Cir. 1969); Black v. United States, 269 F.2d 38 (9th Cir. 1959).

140. Hill v. United States, 368 U.S. 424 (1962). *But see* Green v. United States, 313 F.2d 6 (1st Cir.), *cert. dismissed*, 372 U.S. 951 (1963) ("other aggravating circumstances" present).

141. Houser v. United States, 508 F.2d 509 (8th Cir. 1974); Weinreich v. United States, 414 F.2d 279 (9th Cir. 1969), *cert. denied*, 397 U.S. 996 (1970).

142. Whitney v. United States, 513 F.2d 326 (8th Cir. 1974); Houser v. United States, 508 F.2d 509 (8th Cir. 1974); Cardarella v. United States, 351 F.2d 443 (8th Cir. 1965), *cert. denied*, 382 U.S. 1020 (1966) (§ 2255 is not a substitute remedy for appeal).

143. *See generally* United States v. Wild, 551 F.2d 418 (D.C. Cir.), *cert. denied*, 431 U.S. 916 (1977); Askins v. United States, 251 F.2d 909 (D.C. Cir. 1958) (if statute of limitations applies to indictment, defense must be raised at or before trial).

144. Stirone v. United States, 341 F.2d 253 (3d Cir.), *cert. denied*, 381 U.S. 902 (1965).

145. Cardarella v. United States, 351 F.2d 443 (8th Cir. 1965), *cert. denied*, 382 U.S. 1020 (1966) (no objection below); Neeley v. United States, 405 F. Supp. 1186 (W.D. Va. 1975) (no objection below).

146. United States v. Shields, 291 F.2d 798 (6th Cir. 1961); Olsen v. United States, 390 F. Supp. 1264 (D. Minn. 1975), *appeal dismissed*, 521 F.2d 1404 (8th Cir. 1975), *cert. denied*, 423 U.S. 1075 (1976).

147. Wingo v. United States, 244 F.2d 800 (6th Cir. 1957) (claim not raised below).

148. Geise v. United States, 262 F.2d 151 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959).

149. Rice v. United States, 420 F.2d 863 (5th Cir. 1969), *cert. denied*, 398 U.S. 910 (1970); Bradley v. United States, 347 F.2d 121 (8th Cir. 1965), *cert. denied*, 382 U.S. 1016 (1966).

150. Ruiz v. United States, 328 F.2d 56 (9th Cir. 1964).

151. Vandergrift v. United States, 313 F.2d 93 (9th Cir. 1963); Holt v. United States, 303 F.2d 791 (8th Cir. 1962), *cert. denied*, 372 U.S. 970 (1963); Smith v. United States, 265 F.2d 14 (5th Cir.), *cert. denied*, 360 U.S. 910 (1959) (claim not raised on appeal).

152. Zachary v. United States, 275 F.2d 793 (6th Cir.), *cert. denied*, 364 U.S. 816 (1960) (failure to raise on appeal).

153. Johnson v. United States, 506 F.2d 640 (8th Cir. 1974), *cert. denied*, 420 U.S. 978 (1975) (reaffirming Cardarella v. United States); United States

as to sentence;[154] and change in law.[155]

III. Substantive Requirements for Habeas Corpus Relief

A. In Custody Requirement—Sections 2241, 2254, and 2255

Rule 1 of the Rules Governing Section 2254 Cases states the initial ground rule for entertainment of a petition for writ of habeas corpus—a person must be in custody pursuant to a state court judgment[156] to determine whether such custody violates the Constitution, laws, or treaties of the United States; or a person must be in custody pursuant to either a state or federal court judgment but challenging future custody under a state court judgment, to determine whether such future custody violates the Constitution, laws, or treaties of the United States. This requirement applies to Section 2255 motions.[157]

It is of little significance how custody occurred—whether by executive order, court order, private party or other reason[158]—so long as physical liberty is restrained. Nor is it necessary that the restraint be actual physical confinement. In *Jones v. Cunningham*,[159] the Supreme Court held that a prisoner on parole is sufficiently deprived of freedom as to be "in custody" for federal habeas purposes.[160] The Court extended *Jones* to an individual released on a personal recognizance bond in *Hensley v.*

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v. Haywood, 464 F.2d 756 (D.C. Cir. 1972) (reaffirming Bruce v. United States, 379 F.2d 113 (D.C. Cir. 1967)). *But see* note 113 *supra*.

154. Micklus v. United States, 537 F.2d 381 (9th Cir. 1976) (mistake as to maximum would not invalidate plea); Ellis v. United States, 353 F.2d 402 (8th Cir. 1965) (error as to eligibility for parole had no bearing on sentence).

155. Sunal v. Large, 332 U.S. 174 (1947); Heinecke v. United States, 316 F.2d 685 (D.C. Cir.), *cert. denied*, 375 U.S. 846 (1963); United States v. Sobell, 314 F.2d 314 (2d Cir.), *cert. denied*, 374 U.S. 857 (1963). *But see* Davis v. United States, 417 U.S. 333 (1974); Sosa v. United States, 550 F.2d 244 (5th Cir. 1977); Strauss v. United States, 516 F.2d 980 (7th Cir. 1975) (proof of mail fraud changed by Supreme Court ruling); United States v. Liguori, 438 F.2d 663 (2d Cir. 1971) (invalid statutory presumption of knowledge of illegal importation from possession disallowed).

156. *Cf.* Jackson v. Justices of Superior Court, 423 F. Supp. 50 (D. Mass. 1976), *rev'd on other grounds*, 549 F.2d 215 (1st Cir.), *cert. denied*, 430 U.S. 975 (1977) (judgment of conviction not necessary where claim is that trial will violate double jeopardy).

157. Habeas Corpus Rule 1 (§2255).

158. Morrissey v. Brewer, 408 U.S. 471 (1972) (unlawful parole revocation); Parisi v. Davidson, 405 U.S. 34 (1972) (unlawful detention by executive or military); Von Moltke v. Gillies, 332 U.S. 708 (1948) (invalid guilty plea); Johnson v. Zerbst, 304 U.S. 458 (1938) (denial of constitutional rights at trial); *In re* Bonner, 151 U.S. 242 (1894) (unlawful detention in wrong institution); *Ex parte* Royall, 117 U.S. 241 (1886) (imprisonment under defective indictment); *Ex parte* Siebold, 100 U.S. 371 (1880) (petitioner convicted under unconstitutional statute).

159. 371 U.S. 236 (1963).

160. *But see* Huante v. Craven, 500 F.2d 1004 (9th Cir. 1974) (federal pris-

Municipal Court.[161] Where the petitioner was subject to restraints "not shared by the public generally," the requirements of "in custody" were met for federal habeas purposes.[162]

In other situations, the Court has taken a flexible, practical approach to the "in custody" requirement. In *Peyton v. Rowe*,[163] the Court held that habeas corpus was proper to attack a future consecutive sentence.[164] In the same term, the Court upheld a habeas attack on a conviction where the petitioner had been unconditionally released from custody, but the petition had been filed prior to his release.[165]

The Advisory Committee Note to Habeas Corpus Rule 1 (section 2254) lists the following additional situations as examples of "in custody": probation,[166] conditionally suspended sentence,[167] bail,[168] federal stay of state sentence,[169] parole detainer

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oner who was paroled to immigration authorities for deportation not "in custody").

161. 411 U.S. 345 (1976).

162. The Court emphasized, of course, that this holding would not apply to a state defendant released on bail or his own recognizance pending trial or appeal because of the exhaustion doctrine. *See also* Lefkowitz v. Newsome, 420 U.S. 283, 286 n.2 (1975) (*Hensley* applied to prisoner released on bail pending final disposition of his case in federal court).

163. 391 U.S. 54 (1968).

164. In the same year the Court also disposed of the idea that in order to petition for habeas relief, a prisoner must be entitled to immediate release. In the converse situation of Peyton v. Rowe, note 163 *supra*, the Court held that a state prisoner could attack a life sentence currently being served in spite of the pendency of a consecutive sentence of 5 years of assault. Walker v. Wainwright, 390 U.S. 335 (1968). *See also* Preiser v. Rodriguez, 411 U.S. 475 (1973) (habeas corpus is appropriate to seek shortening of actual confinement by restoring good time credit).

165. Carafas v. LaVallee, 391 U.S. 234 (1968). When a petitioner has completed a sentence and is unconditionally released, there is technically no custody, but collateral legal consequences nevertheless may be suffered, including inability to hold certain offices, jobs, or to sit on a jury. It is clear that if suit is instituted before release, the court retains jurisdiction. But may it be instituted after release when there is no case or controversy? The answer would appear to be "yes" under Carafas v. LaVallee, *supra*, so long as collateral consequences exist. *See also* Scarborough v. Kellum, 525 F.2d 931 (5th Cir. 1976); Glover v. North Carolina, 301 F. Supp. 364 (E.D.N.C. 1969). *But see* Harvey v. South Dakota, 526 F.2d 840 (8th Cir. 1975), *cert. denied*, 426 U.S. 911 (1976) (collateral consequences in *Carafas* only kept case from becoming moot, but could not give the court habeas jurisdiction); Carter v. Hardy, 526 F.2d 314 (5th Cir.), *cert. denied*, 429 U.S. 838 (1976) (writ not available when conviction is not used for enhancement purposes).

166. United States v. Re, 372 F.2d 641 (2d Cir.), *cert. denied*, 388 U.S. 912 (1967).

167. 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).

168. Burris v. Ryan, 397 F.2d 553 (7th Cir. 1968).

169. Choung v. California, 320 F. Supp. 625 (E.D. Cal. 1970).

warrant,[170] appeal bond,[171] and sentence served but convicted felon precluded from certain activities.[172] State detainer warrants also satisfy the "in custody" requirement.[173]

Unfortunately for the practitioner, courts are divided on what constitutes "in custody" where less than physical restraint is involved. As the Advisory Committee noted, "[t]here 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."[174] Citing *Morgan v. Thomas*,[175] the Committee agreed that "something more than moral restraint is necessary." Moreover, "there are other restraints on a man's liberty, restraint not shared by the public generally which have been thought sufficient . . . to support the issuance of habeas corpus."[176]

The following circumstances have been held insufficient to satisfy the "in custody" requirement: imposition of fine only,[177] and petition for expungement of prior conviction.[178]

B. Exhaustion of State Remedies—Sections 2241, 2254, and 1651

A state prisoner seeking habeas relief must exhaust available state remedies.[179] The justification for this requirement is comity; it is not a jurisdictional limitation on federal courts.[180] Dismissal, as opposed to a stay of proceedings, is the appropriate disposition before all state remedies have been ex-

170. United States *ex rel.* Meadows v. New York, 426 F.2d 1176 (2d Cir. 1970), *cert. denied*, 401 U.S. 941 (1971).

171. Capler v. City of Greenville, 422 F.2d 299 (5th Cir. 1970).

172. Scarborough v. Kellum, 525 F.2d 931 (5th Cir. 1976); Glover v. North Carolina, 301 F. Supp. 364 (E.D.N.C. 1969). *But see* Carter v. Hardy, 526 F.2d 314 (5th Cir. 1976) and Harvey v. South Dakota, 526 F.2d 840 (8th Cir. 1975), *cert. denied*, 426 U.S. 911 (1976). *See also* Writ of Error Coram Nobis, notes 271-289 and accompanying text *infra*.

173. Estelle v. Dorrough, 420 U.S. 534 (1975); Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973).

174. Habeas Corpus Rule 1 (§ 2254), Advisory Committee Note.

175. 321 F. Supp. 565, 573 (S.D. Miss. 1970).

176. *E.g.*, Hammond v. Lenfest, 398 F.2d 705, 710-11 (2d Cir. 1968) (naval reservist denied discharge).

177. Wright v. Bailey, 544 F.2d 737 (4th Cir. 1976); Russell v. City of Pierre, 530 F.2d 791 (8th Cir.), *cert. denied*, 429 U.S. 855 (1976); Edmunds v. Won Bae Chang, 509 F.2d 39 (9th Cir.), *cert. denied*, 423 U.S. 825 (1975).

178. Hill v. Johnson, 539 F.2d 439 (5th Cir. 1976).

179. This limitation to attacks on state convictions is applicable whether under § 2254 or § 2241. It does not relate to attacks on federal convictions. *But see* Waiver Doctrine Revisited, notes 260-70 and accompanying text *infra*.

180. Fay v. Noia, 372 U.S. 391, 418 , 430-31 (1963); Bowen v. Johnston, 306 U.S. 19, 27 (1939).

hausted.[181]

Since *Fay v. Noia*, the requirement has meant exhaustion of those remedies available to the petitioner at the time of application for the writ. This was subject to the exception that a petitioner could not deliberately bypass orderly state procedures in hopes of presenting his constitutional claim to the federal court.[182]

The exhaustion requirement is satisfied if a claim is presented to the state courts. In *Irby v. Missouri*,[183] the requirement was held by the Eighth Circuit to be "merely an accommodation of our federal system designed to give the state an opportunity to pass upon and correct alleged violations" of federal rights.[184] Once the substance of the claim is presented so that the state court may rule on the question, the exhaustion requirement is satisfied.[185] If the state court denies the claim without a reason, the federal court may assume it was resolved adversely to the petitioner.[186]

In *Roberts v. LaVallee*,[187] the Supreme Court relaxed the exhaustion doctrine to include among those who had exhausted state remedies a petitioner who challenged a state statute which was later struck down when it would serve no purpose to send the case back to state court. In that case an indigent petitioner

181. Slayton v. Smith, 404 U.S. 53 (1971). *But see* Montgomery v. Rumsfield, 572 F.2d 250 (9th Cir. 1978) (district court is entitled to determine whether exhaustion is required where remedy is not a statutorily mandated prerequisite, and court may retain jurisdiction pending exhaustion).

182. Under recent Supreme Court rulings, the deliberate bypass doctrine also includes situations where objections not raised at trial were involuntarily waived. *See* Deliberate Bypass and/or Waiver Doctrine, text accompanying notes 210-34 *infra*.

183. 502 F.2d 1096 (8th Cir. 1974).

184. *Id.* at 1098.

185. Smith v. Digmon, 434 U.S. 332 (1978) (district court committed plain error in assuming petitioner failed to raise claim where state court contained no reference to claim); Picard v. Connor, 404 U.S. 270 (1971); Girard v. Goins, 575 F.2d 160 (8th Cir. 1978); United States *ex. rel.* Hickey v. Jeffes, 571 F.2d 762 (3d Cir. 1978) (petitioner exhausted state remedies by presenting claims at trial and on direct appeal, although post-conviction relief had not been sought); Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978) (exhaustion satisfied if presented to, though not decided by, state courts); Anderson v. Casscles, 531 F.2d 682 (2d Cir. 1976); Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975), *rev'd on other grounds, sub nom.* Stone v. Powell, 428 U.S. 465 (1976). *See also* Brown v. Allen, 344 U.S. 443, *reh. denied*, 345 U.S. 946 (1953); Crononn v. Alabama, 557 F.2d 472 (5th Cir. 1977); United States *ex rel.* Saiken v. Elrod, 350 F. Supp. 1156 (N.D. Ill. 1972), *vacated on other grounds*, 489 F.2d 865 (7th Cir. 1973) (petitioner exhausted state remedies by obtaining final ruling from state supreme court, though postconviction remedy was still available).

186. Thompson v. Procunier, 539 F.2d 26 (9th Cir. 1976). *See also* Smith v. Digmon, 434 U.S. 332 (1978).

187. 389 U.S. 40 (1967).

was denied a free transcript of the preliminary hearing. The Virginia Supreme Court declined review, and petitioner sought habeas relief. Subsequently the Virginia Supreme Court declared the practice denying free transcripts unconstitutional. The case was ordered resubmitted to the state court. The Supreme Court reversed the district court and the court of appeals, holding that resubmission would not serve any state interest. This holding was reiterated in *Francisco v. Gathright*,[188] where the Supreme Court found it of no consequence that a state court had declared a statute unconstitutional before the petitioner filed for federal habeas relief.[189]

1. *Exceptions*

Nevertheless, situations exist where exhaustion of state remedies is not required. Exhaustion is not required when there is: 1) "an absence of available state corrective process,"[190] or 2) "circumstances render such process ineffective to protect the rights of the prisoner."[191] It would be futile to present a claim to a state court whose state court substantive decisions on the particular federal right in question refuse to recognize the claim. The Supreme Court confronted this situation in *Wilwording v. Swenson*.[192] There, the Court entertained habeas corpus petitions because Missouri state courts had never granted hearings to prisoners concerning detention conditions. Similarly, when state courts steadfastly refused to recognize incompetence of counsel as a basis for post-conviction relief, the federal court entertained the petition.[193]

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188. 419 U.S. 59 (1974).

189. *But see* Bonner v. Wyrick, 563 F.2d 1293 (8th Cir. 1977) (Missouri statute struck down). If the statute involved has not been interpreted by the state courts, however, such opportunity must be provided before initiating a federal challenge to its constitutionality. Mohr v. Jordan, 370 F. Supp. 1149 (D. Md. 1974). *See also* Franklin v. Conway, 546 F.2d 579 (4th Cir. 1976) (case remanded to state court to determine scope of statute).

190. *See, e.g.*, United States *ex rel.* Morgan v. Sielaff, 546 F.2d 218 (7th Cir. 1976) (neither state habeas corpus nor writ of mandamus available to challenge standard of proof for Sexually Dangerous Persons Act); Scott v. Plante, 523 F.2d 939 (3d Cir. 1976) (district court erroneously failed to consider adequacy of state proceedings); Jackson v. Alabama, 530 F.2d 1231 (5th Cir. 1976) (request for presentence credit not proper subject of collateral attack in Alabama).

191. 28 U.S.C. § 2254(b) (1976).

192. 404 U.S. 249 (1971).

193. United States *ex rel.* Reis v. Wainwright, 525 F.2d 1269 (5th Cir. 1976). *See also* Stubbs v. Smith, 533 F.2d 64 (2d Cir. 1976) (state supreme court recently upheld constitutionality of statutory presumption); United States *ex rel.* Williams v. Brantley, 502 F.2d 1383 (7th Cir. 1974) (firmly entrenched rule that prior direct appeal is res judicata on all issues raised or which could have been raised); Mucie v. Missouri State Dept. of Corrections, 543 F.2d 633 (8th Cir. 1976) (nothing to indicate change in state's posi-

Exceptional circumstances will also justify excusing a petitioner from exhausting state remedies. Such circumstances may include inordinate delay by state courts,[194] the unconstitutionality of the state's obscenity statute,[195] and imposition of the death penalty.[196]

2. *Multiple Claims for Relief*

If multiple claims for relief exist and state remedies have been exhausted for some, but not all claims, should the entire petition be dismissed, or only for those claims as to which state remedies have not been exhausted? The circuits are divided. Most recently, in *Gonzalez v. Stone*,[197] the Ninth Circuit affirmed the dismissal of a petition where state remedies had not been exhausted as to all claims, asserting disdain for piecemeal litigation and a desire to promote federal-state comity. The court conceded, however, that this is not a hard and fast rule.

> When certain circumstances are present such as a substantial or undue delay in state court proceedings, or when there is a reasonable explanation for failure to allege the unexhausted claims in earlier state proceedings, then considerations of fairness may require the court to examine the exhausted claims while refusing to hear the unexhausted issues.[198]

The Fifth Circuit took a similar stance in *Stinson v. Alabama*,[199] and reiterated its position in *Turner v. Wainwright*: "The policy of this court is to defer consideration . . . until [the petitioner] has exhausted his state remedies on *all* issues raised in his federal habeas petition."[200]

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tion on abortion statute); Sarzen v. Gaughan, 489 F.2d 1076 (1st Cir. 1973) (state supreme court had not indicated any change in their position).

194. Jones v. Shell, 572 F.2d 1278 (8th Cir. 1978); Mucie v. Missouri State Dept. of Corrections, 543 F.2d 633 (8th Cir. 1976) (no response by state to petition for over one year); United States *ex rel.* Senk v. Brierly, 471 F.2d 657 (3d Cir. 1973) (3½ year wait for decision); Holland v. Swenson, 313 F. Supp. 565 (W.D. Mo.), *aff'd*, 433 F.2d 909 (8th Cir. 1970) (habeas relief sought 25 years after conviction).

195. Amato v. Divine, 496 F.2d 441 (7th Cir. 1974), *aff'd after remand*, 558 F.2d 364 (7th Cir. 1977).

196. United States *ex rel.* De Vita v. McCorkle, 216 F.2d 743, 744 (3d Cir. 1954); Thomas v. Teets, 205 F.2d 236, 240 (9th Cir.), *cert. denied*, 346 U.S. 910 (1953). *Cf.* Spencer v. Wainwright, 403 F.2d 778 (5th Cir. 1968) (may stay execution and require exhaustion).

197. 546 F.2d 807 (9th Cir. 1976).

198. *Id.* at 810.

199. 545 F.2d 485 (5th Cir. 1977).

200. 550 F.2d 1012, 1013 (5th Cir. 1977) (emphasis in original). *See also* Galtieri v. Wainwright, 582 F.2d 348 (1978); Watson v. Patterson, 358 F.2d 297 (10th Cir.), *cert. denied*, 385 U.S. 876 (1966). *But see* Gaines v. Hopper, 430 F. Supp. 1173, 1175 n.4 (M.D. Ga. 1977) (court reached merits of exhausted claims).

The First,[201] Second,[202] Third,[203] Fourth,[204] and Eighth[205] Circuits have held that the court may hear those claims which have been exhausted, at least so long as the unexhausted claims are not related or frivolous. So far, the Seventh Circuit has remained silent on this issue.

3. *Post-Conviction Relief and Exhaustion*

Peculiar problems arise in states that have post-conviction remedies. No attempt will be made herein to analyze the various state statutes and their particular idiosyncracies. Rather, this note is intended to warn the reader about these potential obstacles.

For example, under the Illinois post-conviction statute,[206] the judgment of an appellate court operates as res judicata for all constitutional claims of the record which might have been raised on appeal. Thus, if a petitioner appeals his conviction, files a post-conviction petition, but does not appeal the denial of the petition, he has exhausted his state remedies.[207] Furthermore, grounds not raised in the post-conviction petition are waived with the one exception of "fundamental fairness." When this exception is applicable, the waiver doctrine will not apply, and hence, state remedies are not exhausted.[208]

Another exception recently arose in *United States ex rel. Williams v. Israel*,[209] in which the petitioner raised a claim "not wholly within the record." Such a claim is not waived and

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201. Miller v. Hall, 536 F.2d 967 (1st Cir. 1976) (dismissal of entire petition erroneous).

202. Mercado v. Rockfeller, 502 F.2d 666, 668 n.1 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (jurisdiction not affected unless unexhausted claims are both related to exhausted claim and nonfrivolous).

203. United States *ex rel.* Trantino v. Hatrack, 563 F.2d 86 (3d Cir. 1977); United States *ex rel.* Boyance v. Myers, 372 F.2d 111 (3d Cir. 1967).

204. Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969) (exhaustion is a matter of comity, not jurisdiction).

205. Girard v. Goins, 575 F.2d 160 (8th Cir. 1978); Kelsey v. Minnesota, 565 F.2d 503 (8th Cir. 1977); Johnson v. United States Dist. Court, 519 F.2d 738, 740 (8th Cir. 1975) (court may consider claims that are not "interrelated and intertwined").

206. ILL. REV. STAT. ch. 38, § 122-1 to -7 (1977).

207. United States *ex rel.* Williams v. Brantley, 502 F.2d 1383 (7th Cir. 1974).

208. *Id.* at 1385. Federal courts, however, are aware of the very limited application of this exception. *See, e.g.* United States *ex rel.* Bonner v. Warden, 553 F.2d 1091 (7th Cir.), *cert. denied*, 431 U.S. 943 (1977) (Illinois precedent existed that claim of ineffective assistance of counsel could not have been raised on appeal where client was represented by one public defender at trial and by another on appeal).

209. 556 F.2d 865 (7th Cir. 1977) (claim of ineffective assistance of counsel could not be resolved from record).

should be presented to the state court in a post-conviction proceeding.

C. *Deliberate Bypass and Waiver Doctrine—Sections 2254 and 2241*[210]

Another potential obstacle to habeas corpus is the court created doctrine of deliberate bypass or waiver. As is now history, the Supreme Court in *Fay v. Noia* held that a petitioner need exhaust only those state remedies available at the time of application for habeas corpus.[211] The Court further held that the doctrine preventing review of state court judgments, which rest on independent and adequate state grounds, was not applicable in habeas corpus cases. To protect the legitimate interests of states in their procedural rules, however, *Fay* allowed one exception—where a defendant deliberately bypassed state procedures, he could not later complain of a violation of his federal rights.[212] The test adopted was that of *Johnson v. Zerbst*,[213] requiring an intentional relinquishment or abandonment of a known right or privilege.[214]

The standard enunciated in *Fay*, however, was subsequently diluted. In *Davis v. United States*,[215] the Court stated that a collateral attack on a federal conviction for the unconstitutional composition of a grand jury was barred for failure to object, deliberately or otherwise, prior to trial. In *United States ex rel. Allum v. Twomey*,[216] the Seventh Circuit seized upon the reasoning in *Davis* to hold that the failure to object at trial to the admissibility of evidence "gave rise to the kind of waiver that should be placed in the same category as a 'deliberate bypass' of state remedies barring subsequent collateral attack in the federal courts."[217]

In the last two years *Davis* has steadily been extended to

210. The waiver doctrine applies to both §§ 2254 and 2255, and will be discussed in detail regarding § 2255 motions, *see* text accompanying notes 260-70 *infra*.

211. This decision bolstered the holding in Brown v. Allen, 344 U.S. 443 (1953), allowing federal courts to relitigate state prisoners' federal constitutional claims.

212. However, a state court finding of waiver does not bar an independent determination by the federal court, for waiver affecting federal rights is a federal question. 372 U.S. at 439.

213. 304 U.S. 458 (1938).

214. *Id.* at 464. This rule was equally applicable to § 2255 petitioners, Kaufman v. United States, 394 U.S. 217, 227 n.8 (1969).

215. 411 U.S. 233 (1973).

216. 484 F.2d 740 (7th Cir. 1973).

217. *Id.* at 745.

limit federal habeas relief. In *Francis v. Henderson*,[218] the Court applied the rationale of *Davis* to section 2254 petitioners in holding that an untimely objection to a state grand jury composition barred federal review. Preservation of the integrity of Louisiana's criminal procedure and "considerations of comity and federalism" permitted the Louisiana statute to override the constitutional standard. Likewise in *Estelle v. Williams*,[219] the failure to object to standing trial in prison garb absent any compulsion by the state negated whatever constitutional violation occurred.

Finally, in *Wainwright v. Sykes*,[220] the Supreme Court held that failure to comply with the Florida contemporaneous objection rule, which requires motions to suppress evidence, including confessions, to be made before trial, barred consideration of a claim of coerced confession. Mr. Justice Rehnquist stated the issue and resolution as: "Shall the rule of *Francis v. Henderson*, barring federal habeas review absent a showing of 'cause' and 'prejudice' attendant to a state procedural waiver, be applied to a waived objection to admission of a confession at trial? We answer that question in the affirmative."[221]

Gone are the days of knowing and deliberate waivers of orderly state procedures.[222] The new standard is that used in *Wainwright* and *Davis*.[223] Review via federal habeas corpus petition is barred absent a showing of cause for failure to raise a claim, and some showing of actual prejudice resulting from the alleged constitutional violation.[224] Thus, the burden has shifted from requiring the prosecution to show a knowing and intelligent waiver to requiring the petitioner to show cause and prejudice.

Only two minute rays of optimism remain in the area of deliberate bypass and waiver. In *Henderson v. Kibbe*,[225] the petitioner failed to object to the omission of an instruction on

218. 425 U.S. 536 (1976).

219. 425 U.S. 501 (1976).

220. 433 U.S. 72 (1977).

221. 433 U.S. at 87. *See also* Habeas Corpus and the Burger Court, text accompanying notes 32-48 *supra*. *But see* Berrier v. Egeler, 583 F.2d 515 (6th Cir. 1978) (plain error not raised below is no bar to habeas corpus in state with contemporaneous objection below.).

222. Humphrey v. Cady, 405 U.S. 504, 517 (1972) (waiver must be the product of an understanding and knowing decision by petitioner); Fay v. Noia, 372 U.S. 391 (1963). *See also* Sincox v. United States, 571 F.2d 876 (5th Cir. 1978) (failure to object to nonunanimous verdict did not amount to waiver of right to unanimous jury verdict).

223. *See* text accompanying notes 32-48 *supra*.

224. 433 U.S. 85-86 (1977).

225. 431 U.S. 145 (1977).

causation for second degree murder. Although the Court reversed the grant of the writ, it did not rely on waiver grounds but addressed the merits of the claim. The majority cited *Cupp v. Naughten*,[226] to determine "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process."[227] Mr. Justice Stevens, writing for the majority, emphasized that "[i]t is a rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court."[228] In a concurring opinion, howver, Chief Justice Burger opined that the identical result should have been reached, but based on the failure to object to the jury instructions at the time they were given, or on a waiver theory.[229]

The second ray is an avenue left open by *Francis v. Henderson*.[230] When the state court voluntarily considers a claim on its merits, though untimely raised, the federal courts are also free to do so.[231] This allowed the petitioners to challenge the grand jury selection process in *Castaneda v. Partida*.[232] Though the objection was not timely raised, the Texas courts considered the claim on the merits. Hence, the federal habeas court could consider it.[233] In addition, if the state would hear the petitioner's claims at any other stage of the proceedings, though not raised at trial, such claims may also be raised on federal habeas review.[234]

IV. Jurisdiction and Venue

A petition for writ of habeas corpus (section 2254, section 2241) may be filed either in the district court wherein the peti-

226. 414 U.S. 141 (1973).

227. 414 U.S. at 147.

228. 431 U.S. at 154.

229. 431 U.S. at 91-94. As for nonconstitutional claims, those not raised on appeal are not reviewable in collateral proceedings, unless so fundamental as to deny due process, Hill v. United States, 368 U.S. 424 (1962). Though *Hill* involved the scope of § 2255, it has been equated to relief allowable under § 2254, *see e.g.*, Vitello v. Gaughan, 544 F.2d 17 (1st Cir. 1976), *cert. denied*, 431 U.S. 904 (1977). *See also* Forbes v. Estelle, 559 F.2d 967 (5th Cir. 1977) (unless state procedure denied fundamental fairness, not reviewable by habeas corpus).

230. 425 U.S. 536 (1976).

231. *Id.* at 542 n.5 (1976).

232. 430 U.S. 482 (1977).

233. *Id.* at 1275 n.4. *See also* United States *ex rel.* Ross v. Fike, 534 F.2d 731 (7th Cir. 1976).

234. Jones v. Wisconsin, 562 F.2d 440 (7th Cir. 1977) (Wisconsin statute allowed attack after guilty plea). Journingan v. Duffy, 552 F.2d 283 (9th Cir. 1977) (guilty plea is not forfeiture of claims under California law); Malley v. Manson, 547 F.2d 25 (2d Cir. 1976), *cert. denied*, 430 U.S. 918 (1977) (Connecticut law allowed claim to be raised for first time on appeal).

tioner is confined or where the conviction occurred.[235] If, within the state of conviction these two districts are different, the district court that received the petition has discretion to transfer the case "in the interests of justice."[236]

This latitude is not available to federal prisoners seeking relief under 28 U.S.C. section 2255.[237] These motions must be brought in the sentencing court. In enacting section 2255, Congress was particularly concerned with venue because of the difficulty and expense of transporting prisoners, the availability of witnesses and records, communications generally between attorney and client, and the unequal distribution of habeas petitions throughout the district court system. After weighing these factors, Congress decided that for federal prisoners the scales tipped in favor of the district of conviction.[238]

The opposite is true, however, for federal prisoners seeking general habeas relief under section 2241. Not only would the place of conviction be an extremely inconvenient forum for federal prisoners who wish to challenge the fact or duration of their confinement, but also, it would be an inappropriate forum under 28 U.S.C. section 2241. Under this section the district court needs only jurisdiction over the custodian of the prisoner.[239] The custodian is determined at the time the petition is filed.[240] Thus, where a person in federal custody wishes to challenge loss of good time credits,[241] parole board decisions,[242] execution of

235. R. SOKOL, FEDERAL HABEAS CORPUS § 8 (2d ed. 1969). The procedure governing § 2254 proceedings is contained in both § 2254 and its rules and in 28 U.S.C. §§ 2241-2253. In case of conflict between the rules and §§ 2241-2253, the rules will govern. 28 U.S.C. §2072 (1976).

236. With state prisoners seeking § 2254 relief, generally, the state of conviction and of confinement will be the same. If not, the district wherein the conviction was had will be the better forum. *See e.g.*, Wilkins v. Erickson, 484 F.2d 969 (8th Cir. 1973) (petitioner convicted in Montana imprisoned in South Dakota pursuant to interstate agreement).

237. Prior to 1948, all federal prisoners seeking habeas relief had to file their petitions in the district where they were confined. The burden of this restriction fell on the five districts in which the federal penitentiaries were located. *See* United States v. Hayman, 342 U.S. 205 (1952).

238. *Id.* at 214-219. *See also* S. REP. NO. 1502, 89TH CONG. 2D SESS. (1966), *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2968, 2969-74.

239. Braden v. 30th Judicial Circuit Court of Ky. 410 U.S. 484, 495 (1973); Strait v. Laird, 406 U.S. 341, 343 (1972). *But see* Dillworth v. Barker, 465 F.2d 1338 (5th Cir. 1972) (custodian present pursuant to Uniform Act for Out-of-State Parole Supervision).

240. Propotnik v. Putman, 538 F.2d 806 (8th Cir. 1976); Ross v. Mebane, 536 F.2d 1199 (7th Cir. 1976) (transfer of prisoner did not defeat jurisdiction).

241. Propotnik v. Putman, 538 F.2d 806 (8th Cir. 1976) (petition filed subsequent to transfer, court had no jurisdiction over either prisoner or custodian); Ross v. Mebane, 536 F.2d 1199 (7th Cir. 1976) (district court had jurisdiction over petition though prisoner was subsequently transferred).

242. McCoy v. United States Bd. of Parole, 537 F.2d 962 (8th Cir. 1976)

sentence,[243] custody of aliens in United States detained against their will,[244] or the validity of a state detainer or conviction,[245] the district court with jurisdiction over the custodian is the proper forum, although convenience may dictate transfer to the place of detention.[246]

Where is the custodian for a *state* prisoner who seeks to challenge the legality of an out-of-state detainer? The Supreme Court addressed this issue in *Braden v. 30th Judicial Circuit Court of Kentucky*.[247] The Court held that an Alabama prisoner could seek a writ of habeas corpus to compel the state of Kentucky, which had lodged a detainer against him, to give him a speedy trial in the district court of Kentucky. The opinion discredited the holding of *Ahrens v. Clark*,[248] which stated that habeas corpus jurisdiction is limited to cases where the prisoner is within the court's territorial jurisdiction.[249] In contrast to *Ahrens*, the reasoning in *Braden* seems improved. The state of confinement acts "as agent for the demanding state."[250] The former state, Alabama here, has no interest in the outcome of the case. All documents and records were in Kentucky. Moreover, a judge sitting in the district court of Kentucky would be more familiar with that state's law than a district judge in Alabama.[251]

(failure to hold prompt parole revocation hearing; since parole board was custodian, it was properly served at regional office, and transfer to place of confinement was proper); Harbolt v. Carpenter, 536 F.2d 791 (8th Cir. 1976) (outstanding parole violation warrant; venue proper where Regional Director located; transfer, not dismissal, remedy for inconvenience); Reese v. United States Bd. of Parole, 498 F.2d 698 (D.C. Cir. 1974) (Washington, D.C. is proper forum for suit against parole board, transfer to place of confinement also proper).

243. Andrino v. United States Bd. of Parole, 550 F.2d 519 (9th Cir. 1977); United States v. Clinkenbeard, 542 F.2d 59 (8th Cir. 1976); Gomori v. Arnold, 533 F.2d 871 (3d Cir.), *cert. denied*, 429 U.S. 851 (1976) (error in computation of concurrent time following transfer from state institution).

244. Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975).

245. Orito v. Powers, 479 F.2d 435 (7th Cir. 1973) (where petitioner was released on bail, district court of issuing state had jurisdiction).

246. Ross v. Mebane, 536 F.2d 1199 (7th Cir. 1976) (subsequent transfer does not defeat jurisdiction, though convenience may dictate transfer to place of confinement).

247. 410 U.S. 484 (1973).

248. 335 U.S. 188 (1948).

249. Ahrens v. Clark, *supra* note 248, had already been overruled in part by the special venue sections in 28 U.S.C. § 2241 (1976).

250. 410 U.S. at 498.

251. *See also* Wilkins v. Erickson, 484 F.2d 969 (8th Cir. 1973) (state of conviction was proper forum for challenge, where state of confinement was only acting as agent). *Compare* Noll v. Nebraska, 537 F.2d 967 (8th Cir. 1976) and Craig v. Beto, 458 F.2d 1131 (5th Cir. 1972) (where prior out-of-state conviction enhances current conviction, state of current conviction is proper forum).

V. 28 U.S.C. SECTION 2255—MOTION ATTACKING SENTENCE

A. Sections 2255, 2241, and Federal Rule 35 of Criminal Procedure—A Comparison

A section 2255 motion is not the exclusive post-conviction remedy for federal prisoners. When this motion is "inadequate or ineffective to test the legality of his detention,"[252] federal habeas corpus under 28 U.S.C. section 2241 is available for such collateral attacks. For example, challenges to illegal actions of a parole board, as revoking parole or probation without cause, are not cognizable by a section 2255 motion. Since parole or probation revocation is not part of the original proceeding, any violations arising from revocation should be attacked by federal habeas corpus under section 2241.[253] Matters concerning the execution of the sentence are also challenged under section 2241.[254]

Another remedy, Rule 35 of the Federal Rules of Criminal Procedure, is available to attack illegal sentences or those imposed in an illegal manner, or to seek reduction of a sentence. Though Rule 35 has no "in custody" requirement,[255] it does carry a 120-day time limit.[256] The basic difference between these two provisions is that Rule 35 does not attack the legality

252. 28 U.S.C. § 2255 (1976). For criminal convictions in the District of Columbia Superior Court, *see* D.C. Code § 23-110(g) (1973) patterned after § 2255. § 2255 is no longer available to prisoners convicted in the District. A petitioner may petition the District Court for a writ of habeas corpus only if the remedy by motion under the D.C. Code is inadequate or ineffective to test the legality of the detention. Swain v. Pressley, 430 U.S. 372 (1977).

253. *See* Grosso v. Norton, 520 F.2d 27 (2d Cir. 1975); Garafola v. Benson, 505 F.2d 1212 (7th Cir. 1974) (habeas corpus petitions of federal prisoners sentenced under 18 U.S.C. § 4208(a)(2) granted where parole board refused to hold parole hearings prior to expiration of one-third of sentence). *See also* Jacobson v. United States, 542 F.2d 725 (8th Cir. 1976) (court would only have jurisdiction over claim that parole hearing was not meaningful because of erroneous evidence under 28 U.S.C. § 2241); Thompson v. United States, 536 F.2d 459 (1st Cir. 1976) (§ 2255 motion not proper avenue to attack execution of sentence); United States v. DiRusso, 535 F.2d 673 (1st Cir. 1976) (application of parole guidelines). *But see* Kortness v. United States, 514 F.2d 167 (8th Cir. 1975); United States v. Slutsky, 514 F.2d 1222 (2d Cir. 1975) (where trial court was not aware at sentencing of change in parole board guidelines, sentencing court could modify sentences under § 2255 or Rule 35).

254. Gomori v. Arnold, 533 F.2d 871 (3d Cir.), *cert. denied*, 429 U.S. 851 (1976) (effects of events subsequent to sentence cognizable via habeas corpus). *See also* notes 65 and 243 *supra*.

255. Heflin v. United States, 358 U.S. 415, 418 , 422 (1959).

256. An illegal sentence may be corrected at any time, but to correct a sentence imposed in an illegal manner, or to reduce the sentence, the motion must be filed within 120 days after sentence is imposed or within 120 days after receipt by the court of the mandate issued on affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of an order of the Supreme Court denying review or upholding the conviction.

of the underlying conviction, whereas section 2255 does.[257]

The provisions of section 2255 and Rule 35 overlap somewhat, particularly in the area of "illegal sentence," a term which has not yet been adequately defined. Obvious examples, however, would be punishment in excess of the statutory maximum or multiple terms for the same offense.[258] In any event, whether the action is brought as a Rule 35 motion, a section 2255 motion, or a writ of error coram nobis, the court should construe it according to which one is proper under the circumstances, and then proceed on the merits.[259]

B. Waiver Doctrine Revisited

While there is no exhaustion problem for section 2255 petitions, there is a waiver problem, particularly regarding nonconstitutional errors. In presenting objections to nonconstitutional errors in a section 2255 petition that have not been raised below, the error must be "a complete miscarriage of justice" and involve exceptional circumstances.[260]

In *Sunal v. Large*,[261] petitioners were not permitted to attack by habeas petition the trial court's failure to allow a nonconstitutional defense where no appeal was taken from the conviction, even though there was an intervening change of law which subsequently recognized the defense. The Court stated:

> So far as convictions obtained in the federal courts are concerned, the general rule is that the writ of habeas corpus will not be allowed to do service for an appeal. There have been, however, some exceptions . . . . Illustrative are those instances where the conviction was under a federal statute alleged to be unconstitutional, where the conviction was by a federal court whose jurisdiction over the person or the offense was challenged, where the trial or sentence by a federal court violated specific constitutional guarantees. It is plain, however, that the writ is not designed for collateral review of errors of law committed by the trial court.[262]

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257. *See* Habeas Corpus Rule 2 (§ 2255), Advisory Committee Note, *reprinted* in 28 U.S.C. § 2255 (1976).

258. *See* Hill v. United States, 368 U.S. 424, 430 (1962).

259. *See* Habeas Corpus Rule 2 (§ 2255), Advisory Committee Note; 28 U.S.C. § 2255 (1976). This flexible approach has been utilized particularly where the 120 day time for a Rule 35 motion has passed. *See, e.g.*, United States v. McCarthy, 433 F.2d 591 (1st Cir. 1970); United States v. Coke, 404 F.2d 836 (2d Cir. 1968); Jones v. United States, 400 F.2d 892 (8th Cir. 1968), *cert. denied*, 394 U.S. 991 (1969); United States v. Lewis, 392 F.2d 440 (4th Cir. 1968). *See also* F.R. CRIM. P. 33, which provides that a motion for new trial may be granted in the interest of justice. The applicable time limits are: 2 years after final judgment for newly discovered evidence; and 7 days after verdict or finding of guilty on any other grounds.

260. Hill v. United States, 368 U.S. at 428-29 (1962).

261. 332 U.S. 174 (1947).

262. *Id.* at 178-79.

In *Hill v. United States*,[263] the Court held that to present nonconstitutional claims at all in a section 2255 motion, the claimed error must be a "fundamental defect which inherently results in a complete miscarriage of justice," and it must "present exceptional circumstances where the need for the remedy becomes apparent."[264] The Court affirmed the denial of a section 2255 motion where the evidence showed a failure to comply with the formal requirements of Rule 32(a) of the Federal Rules of Criminal Procedure which directs the court to allow the defendant to make a statement on his own behalf at sentencing. The error was not cognizable in the absence of any prejudice to the petitioner; indeed, it was not even alleged that the petitioner would have said anything if allowed to. Hence the defect was not fundamental, nor did it result in a miscarriage of justice.

Exceptional circumstances were, however, found in *Sosa v. United States*,[265] where an intervening Supreme Court decision required the reversal of similar convictions based on evidence obtained by a "chekar" signal alone. The petitioners were granted leave to dismiss their appeal for the purpose of permitting the trial court to vacate the judgment and sentence on a section 2255 motion. The motion was granted and the government appealed. The government, relying on *Fay v. Noia*,[266] contended that this was a "deliberate bypass," and thereby forfeited any right to section 2255 relief. Noting that the "deliberate bypass" doctrine is not a jurisdictional doctrine, but an equitable one relating to the appropriate exercise of power, the Fifth Circuit held:

> Our cases firmly reject any rigid application of the rule against surrogate appeals. Instead, they establish the principle that habeas will not be permitted to substitute for an appeal when the choice to seek habeas relief is made in order to seize some legal or tactical advantage for the defendant.[267]

In *Kaufman v. United States*,[268] petitioner alleged in a section 2255 motion that a finding of sanity was based on admission

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263. 368 U.S. 424 (1962). *See also* Bowen v. Johnston, 306 U.S. 19 (1939).

264. *Id.* at 428-29.

265. 550 F.2d 244 (5th Cir. 1977). *See also* Davis v. United States, 417 U.S. 333 (1974), ("fundamental defect" and "exceptional circumstances" present, though claim was raised below), and notes 29-31 and accompanying text *supra*.

266. 372 U.S. 391 (1963).

267. 550 F.2d at 248.

268. 394 U.S. 217 (1969). In the interim, the Court has decided Stone v. Powell, 428 U.S. 465 (1976), which, although not overruling *Kaufman*, cast doubt on its continued viability. The Court rejected the "dictum in *Kaufman* concerning the applicability of the exclusionary rule in federal habeas corpus review of state court decisions pursuant to § 2254." 428 U.S. 468, 481 n.16.

of evidence seized in violation of the fourth amendment. The only defense was insanity. The objection was raised at trial but not on appeal. The district court denied relief because the constitutional claim was not raised on appeal. Recalling that *Sunal v. Large*,[269] did not require waiver of constitutional claims not raised on appeal, the Supreme Court held that there was no reason to restrict federal prisoners from asserting fourth amendment violations in a section 2255 motion where there was no similar restriction on state prisoners seeking section 2254 habeas relief.

Claims of constitutional errors can be waived when specific rules require them to be raised at a certain time. In *Davis v. United States*,[270] the petitioner attacked the composition of the grand jury three years after his conviction. Under Rule 12(b)(2) of the Federal Rules of Criminal Procedure, objections to defects in the institution of prosecution or in the indictment must be raised before trial. The claim was first raised in the section 2255 motion. Although a constitutional claim was involved, the Rule specifically provided that failure to object at the proper time constituted a waiver of all such claims in the absence of a showing of "cause" for relief from the waiver. The Court distinguished *Kaufman* on the ground that there was no such waiver provision involved. Section 2255 did not limit or preclude the assertion of the claim, rather, the separate provisions of Rule 12(b)(2) precluded the petitioner from raising the claim at a later date.

VI. 28 U.S.C. Section 1651—Writ of Error Coram Nobis

Another, though not so widely used vehicle for attack on federal convictions,[271] is the writ of error coram nobis provided in 28 U.S.C. section 1651(a). As there is no requirement that the petitioner be "in custody," the writ can be sought long after the petitioner has been unconditionally released from federal custody.[272] This is the most important function of the writ in cur-

269. 332 U.S. 174 (1947).

270. 411 U.S. 233 (1973).

271. The writ cannot issue to set aside state convictions. Theriault v. Mississippi, 390 F.2d 657 (5th Cir. 1968). *But see* Jackson v. Louisiana, 452 F.2d 451 (5th Cir. 1971); Peterson v. Missouri, 355 F. Supp. 1371 (W.D. Mo. 1973) (petitioner was allowed to attack state court convictions which enhanced federal sentence then being served). It is suggested that the better way to attack a prior state conviction which is used to enhance a current federal sentence is via § 2255. *See* note 127 *supra*.

272. In Deckard v. United States, 381 F.2d 77 (8th Cir. 1967), the petitioner was allowed to attack the last of three consecutive sentences as violative of his right against self-incrimination. Under the new rules governing § 2255 proceedings, Habeas Corpus Rule 1(2), it is suggested that the petitioner

rent criminal practice.

At common law, the writ allowed a court to review a conviction based on an alleged error of fact affecting the validity and regularity of the proceedings that did not appear on the face of the record (the literal meaning is "let the record remain before us").[273] Today the writ is regarded as a step in the criminal proceeding and may be used to correct any fundamental errors which render the proceeding invalid.[274] Like a section 2255 motion, it is a step in the criminal proceeding, and must be brought in the court that imposed the penalty.[275]

In *United States v. Morgan*,[276] the Supreme Court sought to limit the scope of this relief stating that "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice."[277]

The power of the court to vacate judgments exists only where the errors are "of the most fundamental character."[278] Thus, *Morgan* added an "exhaustion" requirement to application for this writ. Furthermore, the writ of coram nobis has been held to be open to a prisoner only when his statutory remedies are unavailable or inadequate.[279]

The limitation to factual errors as grounds for coram nobis relief has been extended. The Reviser's Notes to section 2255 state that "this section [2255] restates, clarifies, and simplifies the procedure in the nature of the ancient writ of error coram nobis," except of course that section 2255 has the "in custody" requirement. Most courts now consider the grounds for issuance of this writ as coterminous with the grounds for section 2255 relief or the grounds for issuance of a writ of habeas corpus.[280]

Possible grounds for the issuance of a writ under section 1651 include: review of prior invalid federal conviction used to

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was "in custody" for purposes of a § 2255 motion, and such a motion is the better way to attack the conviction.

273. For a history of some common law uses, *see* United States v. Morgan, 346 U.S. 502 (1954).

274. Abel v. Tinsley, 338 F.2d 514 (10th Cir. 1964).

275. Robson v. United States, 279 F. Supp. 631 (E.D. Pa.), *vacated on other grounds*, 404 F.2d 885 (3d Cir. 1968).

276. 346 U.S. 502(1954).

277. *Id.* at 511.

278. *Id.* at 512, *quoting* United States v. Mayer, 235 U.S. 55 (1914).

279. Correa-Negron v. United States, 473 F.2d 684 (5th Cir.), *cert. denied*, 414 U.S. 870 (1973).

280. United States v. McCord, 509 F.2d 334 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 930 (1975).

enhance state sentence;[281] review of sentencing error which resulted in an adult criminal record and handicapped employment opportunities;[282] review of conviction where there has been a subsequent change in the law;[283] entry of plea without assistance of counsel;[284] mental capacity;[285] recovery of fines paid for conviction under a statute later declared unconstitutional;[286] selective prosecution;[287] subsequent changes in the law;[288] or expunging records where the indictment had been dismissed.[289]

VII. PROCEDURE

A. Procedure Governing Section 2254 and 2255 Proceedings

The procedure surrounding post-conviction petitions pursuant to 28 U.S.C. sections 2254 and 2255 has, for the most part, not caused substantial difficulty. The procedure governing section 2254 petitions is contained in 28 U.S.C. sections 2241-2253, and in the Rules governing sections 2254 proceedings[290] for the United States District Courts, promulgated by the Supreme Court and made effective February 1, 1977.[291] The procedure governing

281. United States v. Morgan, 346 U.S. 502 (1954).

282. Rewak v. United States, 512 F.2d 1184 (9th Cir. 1975) (no finding that 19 year old defendant would not benefit from Youth Corrections Act; collateral consequences handicapped petitioner in obtaining employment as security guard or nurse so that court was allowed to resentence petitioner in light of his good record since conviction).

283. United States v. Travers, 514 F.2d 1171 (2d Cir. 1974) (subsequent to conviction and sentence for mail fraud, Supreme Court held that proof must establish relation between mailing and scheme, which it had not done at petitioner's trial).

284. United States v. Morgan, 346 U.S. 502 (1954); Correa-Negron v. United States, 473 F.2d 684 (5th Cir.), *cert. denied*, 414 U.S. 870 (1973) (also failure to advise of constitutional rights and consequences of guilty plea); United States v. Liska, 409 F. Supp. 1405 (E.D. Wis. 1976) (also voluntariness of guilty plea).

285. Johnson v. United States, 344 F.2d 401 (5th Cir. 1965) (attack allowed before sentence had begun).

286. Pasha v. United States, 484 F.2d 630 (7th Cir. 1973); Lawson v. United States, 397 F. Supp. 370 (N.D. Ga. 1975); United States v. Russo, 358 F. Supp. 436 (D.N.J. 1973); United States v. Summa, 362 F. Supp. 1177 (D. Conn. 1972); United States v. Lewis, 342 F. Supp. 833, (E.D. La. 1972) (failure to report wagering income).

287. United States v. Danks, 357 F. Supp. 193 (D. Haw. 1973) (fine recoverable where defendant was target of constitutionally impermissible discrimination).

288. United States v. Loschiavo, 531 F.2d 659 (2d Cir. 1976) (petitioner convicted of bribing public official who was held not to be public official in subsequent case).

289. United States v. Bohr, 406 F. Supp. 1218 (E.D. Wis. 1976).

290. In any case where there is a conflict between the Rules and the statutes, the Rules shall govern. 28 U.S.C. § 2072 (1976).

291. Act of Sept. 28, 1976, Pub. L. 94-426, 90 Stat. 1334. The Habeas Corpus Rules for § 2254 proceedings and for § 2255 proceedings, together with Advi-

section 2255 motions is contained only in the Rules governing section 2255 proceedings for the United States District Courts, again promulgated by the United States Supreme Court and made effective February 1, 1977.[292]

Because of space limitations, the procedures will be summarized as simply as possible. In this regard, one should consult the Rules, and particularly the notes of the Advisory Committee. Changes in prior law, and changes between what was originally proposed and what became effective will not generally be noted, but only those procedures presently required.

B. Procedural Comparison of Sections 2254 and 2255

Section 2254 governs federal habeas relief for state prisoners. Section 2255 basically covers challenges to federal convictions and sentences. A section 2254 proceeding commences by a petition and is a new civil proceeding. A section 2255 proceeding, however, is a motion in the original federal criminal proceeding.[293]

A section 2254 petition will be sustained because some right—as lack of counsel—has been denied to the petitioner. The writ does not pertain to the determination of guilt or innocence, but only to the fairness of the criminal trial. Even though the court has power "to dispose of the matters as law and justice require,"[294] the relief obtainable in a section 2254 proceeding is less than that possible in a section 2255 proceeding. Under section 2255 the court in granting the appropriate relief may discharge the prisoner, resentence the prisoner, grant a new trial, or correct the sentence.

1. *Form of Petition or Motion*

A section 2254 petition and section 2255 motion shall be in the form of the models following as Appendices A and B, unless the local district court has adopted a local form. Substantial compliance with the models will generally meet the requirements of Habeas Corpus Rule 2 (section 2254) and 28 U.S.C. sec-

sory Committee Notes, are *reprinted* in 28 U.S.C. § 2254 and in 28 U.S.C. § 2255 (1976). The Rules are applicable only to proceedings commenced on or after February 1, 1977. Browder v. Director, Dept. of Corrections of Ill., 434 U.S. 257, 265 n.9 (1978).

292. *See id.*

293. Though a § 2255 proceeding is a further step in the criminal case, it will not necessarily be governed by all of the legal principles which govern a criminal trial, such as counsel, presence, confrontation, self-incrimination and burden of proof. See Advisory Committee Note, Rule 1 (§ 2255), *supra* note 291.

294. 28 U.S.C. § 2243 (1976).

tion 2242 for section 2254 proceedings and Habeas Corpus Rule 2 (section 2255) for section 2255 proceedings.

Habeas Corpus Rule 2(b) (section 2254) requires the respondents to be the officer having present custody of the petitioner and the attorney general of the state in which the judgment being attacked was entered. In section 2255 proceedings the parties will be the parties in the original suit (*i.e.* the moving party and the United States). If the moving party in a section 2255 proceeding is in the custody of a state court, that custodian need not be included as a respondent.

Habeas Corpus Rules 2(c) (section 2254) and 2(b) (section 2255) require that the district court clerk make copies of the model petition, or the local form if different, available free of charge upon request. The petition or motion may be typewritten or legibly handwritten, and must be signed and sworn to by the petitioner or individual acting on that person's behalf.

More importantly, Habeas Corpus Rules 2(c) (section 2254) and 2(b) (section 2255) require that all available grounds for relief be presented at once with facts in support, including those grounds of which by the exercise of reasonable diligence, the petitioner should be aware. The requirement should be read with Habeas Corpus Rules 9(b) (sections 2254 and 2255) requiring dismissal of a second petition or motion which fails to allege new grounds, or, if new grounds are alleged, the judge finds that the failure to assert those grounds in the prior pleading constitutes an abuse of the procedure, or, as the Advisory Committee Notes suggest, "an unexcusable failure." The petition or motion shall also describe the relief requested.

Habeas Corpus Rule 2(d) (section 2254) requires that a petition be limited to the assertion of a claim for relief against the "judgment or judgments" of a single state court. If two or more state courts are involved, separate petitions must be filed. If a petitioner wants to challenge more than one judgment of a single court, the claims may be combined in a single petition, or stated in separate petitions.[295] In contrast, Habeas Corpus Rule 2(c) (section 2255) requires that a motion be directed to only one judgment. A separate motion must be filed to attack any other judgment.

Habeas Corpus Rules 2(e) (section 2254) and 2(d) (section 2255) provide that if a petition or motion received by the court does not substantially comply with the requirements of Rules 2 or 3, it may be returned to the petitioner with a statement of the

295. *See* Advisory Committee Note, Habeas Corpus Rule 2(§ 2254), *supra* note 291.

reason for its return if a judge of the court so directs. The clerk of court, upon returning the pleading will retain a copy of it. Thus if the petitioner claims that the original pleading was in compliance with the rules, the court has a ready reference.

2. *Filing and Service of Section 2254 Petition*

Ordinarily, a petition should be filed in the office of the clerk of the district court. The petition must be accompanied by two conformed copies and by the filing fee prescribed by law.[296] If the petitioner desires to prosecute the petition *in forma pauperis*, an affidavit required by 28 U.S.C. section 1915 must be filed. The affidavit must be accompanied by a certificate of the warden or other appropriate custodial officer indicating the amount of funds in the petitioner's institutional account.[297] If the petitioner is on probation or parole, the Advisory Committee Notes suggest that the court may wish to require a similar certificate from the supervising officer.[298]

The clerk will docket the petition upon a receipt of the filing fee or an order granting leave to proceed *in forma pauperis*. Habeas Corpus Rule 3(b) (section 2254) specifically provides that the filing of the petition shall not require the respondent to answer or otherwise move with respect to it unless ordered by the court.

3. *Filing and Service of Section 2255 Motion*

A motion shall be filed with two conformed copies in the office of the clerk of the district court. In this respect Habeas Corpus Rule 3 (section 2255) is not artfully drafted. However, it undoubtedly means the office of the clerk in the district where the movant was convicted and sentenced. The clerk will serve a copy on the United States Attorney. The United States Attorney need not answer or otherwise move with respect to the motion unless so ordered by the court.

Previously there was a filing fee of $15.00 for opening a section 2255 proceeding. The Advisory Committee Notes suggest that no filing fee be required since this is a motion in the original criminal proceeding. Technically there would then be no need

296. Habeas Corpus Rule 3 (§ 2254), *supra* note 291. 28 U.S.C. § 1914(a)(1976) (presently requires a $5.00 filing fee).

297. *See* Habeas Corpus Rule 3(a) (§ 2254), *supra* note 291.

298. In an effort to discourage in forma pauperis proceedings, the Advisory Committee also suggests that a district court might by local rule require that any amount credited to a petitioner, in excess of a stated maximum, must be used for the payment of a filing fee. *See* Habeas Corpus Rule 3 (§ 2254), *supra* note 291.

for an *in forma pauperis* affidavit. The affidavit is nevertheless recommended since it constitutes evidence in the record of indigency that a judge can rely upon in appointing counsel, having the government pay witness fees, allowing the docketing of an appeal, or granting other rights to which an indigent may be entitled.[299]

4. *Preliminary Consideration by the Court*

Under Habeas Corpus Rule 4 (section 2254) and 28 U.S.C. section 2243, the court is authorized to weed out petitions that plainly show a petitioner is not entitled to relief. The court will consider the petition and any exhibits including transcripts,[300] sentencing records, and copies of state court opinions. If some of these items are not included as exhibits to the petition, the judge may order them.

Habeas Corpus Rule 4 (section 2255) provides that the motion shall be sent to the judge who tried and sentenced the movant. If the sentencing judge is not the trial judge, then the petition shall go to the judge who was in charge of that part of the proceeding now being attacked by the movant. If the appropriate judge is not available, then the case shall be assigned to another district judge in accordance with the local rules governing assignment of cases. Since the section 2255 motion is part of the criminal action, the files, records, transcripts, and correspondence will normally be available to the court.[301]

The court must give the petitioner's claims careful and plenary consideration, including a full opportunity to present all relevant facts.[302] If the court does not summarily dismiss the petition or motion for lack of merit, it shall order an answer or other pleading within such time as it fixes or may take any other

299. Even though movant is permitted to proceed in forma pauperis he will not be entitled to a free transcript unless the district court makes an initial finding that the motion is not frivolous and that a transcript is needed to decide the issues presented. United States v. MacCollom, 426 U.S. 317 (1976).

300. *See* 28 U.S.C. § 753(f) (1976) authorizing payment for transcripts in habeas corpus cases. Transcripts will not be ordered without a certification of nonfrivolity and need. United States v. MacCollom, 426 U.S. 317 (1976).

301. Thus, the more detailed provisions about what will be required or considered in connection with § 2254 proceedings are not necessary here. Nevertheless, the Court has the power to require anything it needs.

302. Blackledge v. Allison, 431 U.S. 63 (1977); White v. Finkbeiner, 570 F.2d 194 (7th Cir. 1978) (case remanded for third evidentiary hearing where findings of fact were inadequate); Burkhart v. Lane, 574 F.2d 346 (6th Cir. 1978) (district court erred in summarily dismissing petition without determining if nontestifying codefendant's confession improperly incriminated defendant); Scott v. Estelle, 567 F.2d 632 (5th Cir. 1978) (error to decide motion for summary judgment on affadavits and magistrate's ex parte communication with witness where genuine issue of fact existed).

action it deems appropriate. Whether or not the court orders a response, a copy of the petition or motion and any order of the court will be served by certified mail on the respondent and on the attorney general of the state involved, or on the United States Attorney.

The phrase in Habeas Corpus Rules 4 (sections 2254 and 2255) that the court may "take such other action as the judge deems appropriate" is described as follows by the Advisory Committee Note (this note relates to section 2254, but would in part be applicable to the same language in Rule 4 (section 2255)):

> 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 on 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 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.

It is clear that at this stage the court may grant the petition or motion. For there are situations where "on the facts admitted, it may appear that, as a matter of law, the prisoner is entitled to the writ and to a discharge."[303] This possibility was recently reiterated in *Browder v. Director, Department of Corrections of Illinois*.[304]

5. *Contents of Answer in Section 2254 Proceeding*

28 U.S.C. section 2243 required little specificity in response to a petition. As a result, indefinite responses prevailed. Many answers were form responses, and thus of little or no help to the court.

This practice, however, has been curtailed by the enactment of the Habeas Corpus Rules. Habeas Corpus Rule 5 (section 2254) requires that the answer shall respond to the allegations of the petition. In addition, the rule compels the answer to address itself to certain specific items. First, the answer must

303. Walker v. Johnston, 312 U.S. 275, 284 (1941).
304. 434 U.S. 257 (1978).

state whether petitioner has exhausted state remedies including any post-conviction remedy available under the statutes or procedural rules of the state, and any right to appeal from any adverse judgment or order in a post-conviction proceeding. The answer shall indicate what transcripts (pre-trial, trial, sentencing and post-conviction) are available, when they can be furnished, and also what proceedings have been recorded but not transcribed. The answering party should attach to the answer portions of the transcript that it considers relevant.[305] Still the court may request additional transcripts or portions thereof.

The above Rule provides that if a transcript is not available or procurable, a narrative summary of the evidence may be submitted. The Rule also states that if the petitioner appeals from a conviction or from any post-conviction proceeding, a copy of petitioner's brief on appeal and of the opinion of the appellate court must be filed by the respondent with the answer.

Habeas Corpus Rule 5 (section 2254) does not require that an answer be served upon the petitioner or his attorney. Nevertheless, it should be so served, for undoubtedly Rule 5 of the Federal Rules of Civil Procedure would be applicable in this case.

28 U.S.C. section 2248 requires that an answer (called there a return) would be presumed true if not "traversed" (replied to) unless the judge found otherwise. Since no reply is required by the Habeas Corpus Rules, the assumption of truthfulness is no longer applicable.[306] Thus, when a petition and answer present a material issue of fact, evidence is required to resolve the issue. In addition, under Habeas Corpus Rule 11 (section 2254) the court is given discretion to incorporate the Federal Rules of Civil Procedure, hence Rule 15(a) of those rules can be employed to allow a petitioner to amend his petition if necessary.

Also, one should note that the new Habeas Corpus Rules do not prevent a respondent from filing a pleading other than an answer.[307] Thus, if the respondent determines that state remedies have not been exhausted, a motion to dismiss or for summary judgment may be filed instead of a formal answer. However, the purpose of the new Rules is to avoid delay and hence the court should not countenance any frivolous or "form" motions.

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305. In addition, the respondent may attach whatever else is deemed necessary or helpful. *See* Habeas Corpus Rule 5 (§ 2254), Advisory Committee Note, *supra* note 291.

306. *Id.*

307. *See* Habeas Corpus Rule 4 (§ 2254), Advisory Committee Notes, *supra* note 291. *See, e.g.*, Blackledge v. Allison, 431 U.S. 63 (1977).

6. *Contents of Answer in Section 2255 Proceeding*

Section 2255 does not specifically call for an answer by the United States Attorney. Habeas Corpus Rule 4 (section 2255) provides that the court may order one, and Habeas Corpus Rule 5 (section 2255) provides that if an answer is ordered, it must respond to the allegations of the motion. In addition, it shall state whether the moving party has used other available federal remedies, including prior post-conviction motions or proceedings that existed prior to the adoption of these Rules. The answer shall also state whether an evidentiary hearing was accorded in a federal court. The ordering of an answer will not preclude the filing of appropriate motions.[308]

After examining the record, the court can order the government to supplement its answer if there is any material still needed. Habeas Corpus Rule 5 (section 2255), perhaps in recognition that the government sometimes moves slowly, states that the court shall allow the government an appropriate amount of time in which to supplement the record, but that the time shall not unduly delay the consideration of the motion.

There is no requirement under section 2255, unlike section 2254, that a party exhaust other remedies. Many courts, however, have held that a section 2255 motion is not appropriate if the moving party is simultaneously pursuing an appeal. This is not a matter of jurisdiction, but of orderly judicial procedures.[309] There may also be problems of waiver of claims.[310]

7. *Discovery*

Habeas Corpus Rule 6 (section 2254) provides that all the discovery devices available under the Federal Rules of Civil Procedure are available to parties in a habeas corpus proceeding "to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so." Habeas Corpus Rule 6 (section 2255) is identical plus whatever discovery devices are available under the Federal Rules of Criminal Procedure as well. Discovery may occur either before or after the granting of an evidentiary hearing.[311]

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308. *See* Habeas Corpus Rule 4 (§ 2254), Advisory Committee Note, *supra* note 291 (discussion in connection with § 2254 answers is equally applicable to § 2255).

309. *See* Womack v. United States, 395 F.2d 630 (D.C. Cir. 1968).

310. *See* text accompanying notes 260-270 *supra*.

311. Rules 7, which provide for expansion of the record, are hoped by the drafters of the Rules to avoid much of the need for at least pre-hearing discovery. This, however, should not discourage the use of discovery when appropriate, Blackledge v. Allison, 431 U.S. 63 (1977).

If necessary for effective utilization of discovery, the court may appoint counsel to conduct discovery under the provisions of the Criminal Justice Act.[312] This will normally be necessary since a request for discovery must be accompanied by either a statement of the interrogatories or requests for admission, and a list of the documents, if any, sought to be produced.[313]

If the respondent is granted leave to take the deposition of the petitioner, movant, or any other person, the court may condition the right to take it on paying the expenses of travel and subsistence and fees of counsel for the petitioner or movant to attend such taking. Though the court is not required to impose that condition, the ability to do so may protect the indigent petitioner who otherwise might be prejudiced by his inability to have counsel present at the taking of the deposition. An additional reason for this provision is that the funds available under the Criminal Justice Act for court-appointed counsel are minimal. Counsel may receive in a habeas proceeding or for post-trial motions only $250 and reimbursement for expenses reasonably incurred. This provision cannot adequately reimburse counsel for extensive deposition or prehearing proceedings. Habeas Corpus Rules 6(c) (sections 2254 and 2255) now make this additional form of compensation available.

The Advisory Committee Notes state that while the Rule is silent about costs when a petitioner wishes to depose someone, it is assumed that a petitioner, who qualifies for appointment of counsel under the Criminal Justice Act, will be allowed witness costs, including the recording and transcription of the deposition.[314]

The drafters of the Rules considered but rejected the view that respondent should not be allowed to depose the petitioner or movant. The Committee felt that the nature of the proceeding together with the safeguards of the fifth amendment and the presence of counsel justified this allowance. This language by the Advisory Committee clarifies the drafter's intent that where discovery is utilized, counsel must be appointed. Otherwise, the sentence in Habeas Corpus Rules 6(a) (sections 2254 and 2255) is ambiguous by stating that counsel shall be appointed if "necessary for effective utilization of discovery procedures."

312. 18 U.S.C. § 3006A(g) (1976).

313. *See* Habeas Corpus Rule 6(b) (§ 2254), *supra* note 291.

314. 28 U.S.C. § 1825 (1976). Opinion of Comptroller General, February 28, 1974.

8. *Expansion of Record*

Habeas Corpus Rule 7 (sections 2254 and 2255) provide that where a petition or motion is not summarily dismissed, the judge may direct that the record be expanded. Rule 7 (section 2254) provides that this may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, answers under oath to written interrogatories propounded by the judge, or affidavits. Rule 7 (section 2255) is not so specific because it assumes that most of this information will already be in the record. A section 2255 judge, however, has the same power to expand the record, if he deems it warranted.

Where the judge directs an expanded record, copies of all documents proposed to be included must be submitted to the opposing party who shall then be afforded an opportunity to admit or deny their correctness. Since affidavits may also be submitted, presumably documents may not only be "admitted" or "denied" but also controverted. In this respect the court may require the authentication of any submitted material.[315]

The rationale for expanding the record is to eliminate unnecessary hearings. Even where a hearing is still required, the issues to be litigated should be considerably narrowed.

9. *Evidentiary Hearing*

If a petitioner or movant survives summary dismissal under Rule 4 of sections 2254 and 2255, dismissal pursuant to any motion filed by the respondent, dismissal after the answer and petition (or motion) are considered, or dismissal after consideration of the pleadings, expanded record, or any discovery, then the court reaches the question under Habeas Corpus Rules 8 (sections 2254 and 2255)—whether it must hold a hearing. The standard to be applied is: "[w]here 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."[316]

In *Blackledge v. Allison*,[317] the Supreme Court overturned the summary dismissal of a habeas petition where the allegations of the petition were not vague and conclusory but the record of trial court proceedings was ambiguous. The Court stated:

> In short, it may turn out upon remand that a full evidentiary hearing is not required [because the use of discovery on an expanded

315. *See also* 28 U.S.C. §§ 2246, 2447 (1976).

316. Townsend v. Sain, 372 U.S. 293, 312 (1962).

317. 431 U.S. 63 (1977).

record has clarified that no genuine issue of fact exists]. But Allison is "entitled to careful consideration and plenary processing of [his claim] including full opportunity for presentation of the relevant facts."[318]

An evidentiary hearing will be mandatory pursuant to section 2254(d) where the petitioner establishes, or it otherwise appears, or respondent admits that at the state court hearing: (1) the merits of the factual dispute were not resolved; (2) that the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (3) that the material facts were not adequately developed; (4) that the state court lacked jurisdiction of the subject matter or over the person of the applicant; (5) that the applicant was an indigent and the state court in deprivation of his constitutional rights failed to appoint counsel to represent him; (6) that the applicant did not receive a full, fair and adequate hearing; (7) that the applicant was otherwise denied due process of law; or (8) the state court determination of the factual issue in question is not fairly supported by the record.

The district court will normally accept as correct the factual determinations made by the state court, but may make its own additional consistent findings.[319] A state court's factual determinations may be set aside, however, if clearly erroneous.[320] The importance of complete findings of fact cannot be overemphasized. Recently, in *White v. Finkbeiner*,[321] the Seventh Circuit reversed the district court's dismissal of the petition and remanded for an evidentiary hearing where two prior state court determinations were inadequate.

The burden is on the petitioner when there has 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. The burden is, of course, on the petitioner throughout the hearing.

Unlike section 2254 petitioners, there is no "mandatory" categorization of hearing requirements for section 2255 movants. Nevertheless, the same general standards ought to apply. A hearing would normally be required whenever material facts are in dispute.

318. 431 U.S. at 82. *See also* Harris v. Nelson, 394 U.S. 286, 298 (1969); Scott v. Estelle, 567 F.2d 632 (5th Cir. 1978).

319. Brewer v. Williams, 431 U.S. 925 (1977). *See also* LaVallee v. Delle Rose, 410 U.S. 690 (1973) (if state court fails to articulate specific findings of fact, federal court must assume state court found contested factual issues against petitioner and that state court applied proper legal standards).

320. United States *ex. rel.* Henne v. Fike, 563 F.2d 809 (7th Cir. 1977).

321. 570 F.2d 194 (7th Cir. 1978).

If the court determines that an evidentiary hearing is neither required nor desirable, the court may make such disposition of the petition as justice dictates.[322] If no hearing is required, most petitions or motions will be dismissed. In an unusual case the court can grant relief without a hearing, including immediate release from custody or nullification of a judgment under which a sentence is to be served in the future.[323]

Habeas Corpus Rules 8(b) (sections 2254 and 2255) authorize the federal courts, by local rule, to utilize the services of a magistrate (28 U.S.C. section 636(b)) to conduct hearings on the petition or motion, and to submit proposed findings of fact and recommendations for disposition. If a magistrate is so utilized, the proposed findings and recommendations must be filed with the court, and a copy forwarded to all parties. Within ten days after being served with a copy of the proposed findings and recommendations, any party may file and serve written objections. The judge of the court will then make a *de novo* determination of the proposed findings or recommendations objected to.[324] Regardless of whether objections are filed, the court is free to accept, reject, or modify, in whole or in part, any of the findings or recommendations.

Habeas Corpus Rules 8(c) (sections 2254 and 2255) provide for the appointment of counsel for any petitioner or movant qualifying for an appointment under the Criminal Justice Act when an evidentiary hearing is required. Rules 8(c) expressly point out that this appointment of counsel at an evidentiary hearing does not limit the appointment of counsel under the Criminal Justice Act at any other stage of the proceeding if "the interest of justice" so requires.[325]

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322. Habeas Corpus Rule 8(a) (§ 2255), *supra* note 291.

323. Browder v. Director, Dep. of Corrections of Ill., 434 U.S. 257 (1978). Walker v. Johnston, 312 U.S. 275 (1941). *See* text accompanying notes 300-304 *supra*.

324. This does not mean that the judge must hold a *de novo* evidentiary hearing. *See* House Report No. 941609 to Rule 8(§ 2254).

325. 18 U.S.C. § 3006A(g) (1976) permits compensation in a habeas proceeding up to a maximum of $250, plus reimbursement for expenses reasonably incurred, including investigation and expert assistance. Requests can be made for investigative or expert assistance by ex parte application, 18 U.S.C. § 3006A(e) (1976). It is advisable to make this request prior to incurring these expenses to preclude any risk that the expenses might not be allowed, and to preclude application of the provision that $150 is the total amount of money that will be available for services obtained without prior authorization.

Counsel fees are also available under Rule 6(c) if the court orders respondent to reimburse counsel from state funds for fees and expenses incurred as a result of the utilization of discovery procedures by the respondent. The Note is not clear, but it seems to assume that these fees or

The Advisory Committee notes that appointment of counsel under the provisions of the Criminal Justice Act may be available even when a petitioner does not meet the strict requirements for eligibility to prosecute the petition *in forma pauperis* under 28 U.S.C. section 1915. No authority for this position is apparent unless the Committee is attempting to suggest that a partial *in forma pauperis* proceeding is possible where a party could meet minimal costs, but not all.

Habeas Corpus Rules 8(c) under both sections require that the evidentiary hearing be conducted as promptly as possible. It also cautions that the court should take specific notice of the "need of counsel for both parties for adequate time for investigation and preparation." It appears that Rules 8(c) permit more flexibility than available under prior law while insuring counsel adequate time to use prehearing devices as discovery or expanded records.

The Habeas Corpus Rule 8 (section 2254) says nothing about prehearing conferences, but the Advisory Committee Note to this rule suggests that such a conference may be desirable to "limit the questions to be resolved, identify areas of agreement and dispute, and explore evidentiary problems that may be expected to arise." It might also disclose that a hearing was unnecessary. A court should use its discretion in determining whether a prehearing conference might be useful. The Habeas Corpus Rules do not contain a provision with regard to subpoenaing witnesses. This matter is left to local practice.[326]

10. *Delayed or Successive Petitions*

As originally drafted Habeas Corpus Rules 9(a) (sections 2254 and 2255) provided that if a petition or motion was filed more than five years after the judgment of conviction, there would be a presumption of prejudice that the petitioner had to overcome. Congress found this policy unfair and deleted that language. Habeas Corpus Rules 9(a) (sections 2254 and 2255), as passed, provide that a petition or motion may be dismissed if it appears that the government has been prejudiced in its ability to respond by the delay, unless petitioner or movant shows that his pleading is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred. This change by Congress is sound since facts in response to old claims can more readily be discovered by the government than

expenses would be available to appointed counsel apart from the maximum provisions.

326. *See also* 28 U.S.C. § 1825 (1976).

by a petitioner.[327]

Habeas Corpus Rules 9(b) (sections 2254 and 2255) authorize the dismissal of a second or successive petition or motion if the court finds: (1) the pleading fails to allege new or different grounds for relief, and the prior determination was on the merits; or (2) if new and different grounds are alleged, the court finds that the failure to assert those grounds in a prior pleading constitutes an abuse of the proceeding.[328]

The burden is on the government to show that there was an abuse of the writ or proceeding.[329] If met, the petitioner then has the burden of proving that he did not abuse the writ.[330] A court cannot dismiss a petition or motion for abuse unless petitioner has been given the chance to respond and explain.[331] Thus, the government's claim must be stated with particularity so petitioner is able to respond.

Examples of abuse of the writ, stated by the Advisory Committee, are as follows:

> 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 the 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.[332]

The Note recognizes that abuse is the exception rather than the rule. It also realizes that there are instances in which a petitioner's failure to assert a ground in a prior petition is clearly excusable. The more common instances are a retroactive change in the law or newly discovered evidence.

In rare instances, a court may even feel a need to entertain a petition alleging grounds previously decided on the merits. In

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327. *See, e.g.*, Bartlett v. United States, 574 F.2d 1268 (5th Cir. 1978) (§ 2255 motion filed 35 years after conviction, evidentiary hearing granted).

328. Rules 9(b) as originally promulgated permitted a judge to dismiss a second or successive pleading even if it alleged new and different grounds for relief if the court found that the failure to assert those grounds in a prior petition was "not excusable." Congress deleted the "not excusable" standard because it felt that the language created a new and undefined standard "that gave a judge too broad a discretion to dismiss a second or a successive petition." The substitution of an abuse of a writ or procedure standard conforms the rule to existing law. 28 U.S.C. § 2244(b) (1976).

329. *See* Sanders v. United States, 371 U.S. 1 (1963). *But cf.* Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978).

330. Price v. Johnston, 334 U.S. 266 (1948).

331. Johnson v. Copinger, 420 F.2d 395 (4th Cir. 1969).

332. Habeas Corpus Rule 9 (§ 2254), Advisory Committee Note, *supra* note 291.

Sanders v. United States,[333] the Supreme Court held that the denial of a prior federal habeas corpus petition would bar a second petition or motion only if: (1) the same ground presented in the subsequent application had been 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. If there is doubt as to whether separate grounds are raised, it should be resolved in petitioner-movant's favor. If the determination of the prior petition is not on the merits, a successive petition may not be dismissed. In rare cases where the first two requirements are met, the court may wish to redetermine an issue where there was not a full and fair hearing on the prior petition, or there has been an intervening change in law, or some other justification for failure to raise a particular argument or issue in the prior petition. Still, the standards of Rules 9(b) are subject to a claim that the petitioner-movant's successive pleading is an abuse of the procedure.

11. *Powers of Magistrates*

Habeas Corpus Rules 10 (sections 2254 and 2255) provide that a magistrate may be empowered to perform all of the duties imposed upon a judge by Rules 2, 3, 4, 6 and 7 (to the extent he is empowered by local rule) except he cannot order a dismissal of the motion or petition under Habeas Corpus Rules 4. Where such an order is involved, the magistrate shall submit to the court his report as to the facts and his recommendation with respect to the order to be made by the court.[334] The order, if given, must be made by the Court.

12. *Applicability of Federal Rules of Civil and Criminal Procedure*

Habeas Corpus Rules 11 (section 2254) and 12 (section 2255) provide that the Federal Rules of Civil Procedure, to the extent that they are not inconsistent, may be applied when appropriate to habeas corpus proceedings under these Rules. Habeas Corpus Rule 11 (section 2254) is intended to codify the Supreme Court's opinion in *Harris v. Nelson*,[335] that courts should be free to exercise judicial discretion in formulating rules and procedures for habeas corpus proceedings, and to adopt the Federal Rules of Civil Procedure where their use seems appropriate. An example of an inappropriate use is

333. 373 U.S. 1 (1963).
334. *See* text accompanying notes 316-326 *supra*.
335. 394 U.S. 286 (1969).

Pitchess v. Davis.[336] There the Court held that Federal Rule 60(b) of Civil Procedure should not apply in a habeas case when it would alter the statutory exhaustion requirement of 28 U.S.C. section 2254.[337]

In *Browder v. Director, Department of Corrections of Illinois*,[338] the Court held Federal Rules of Civil Procedure 52(b) (10-day limit on amending judgments) and 59 (new trials, amendment of judgments) applicable to habeas corpus proceedings. The Court opted for "settled conformity" for habeas and other civil proceedings "with respect to time limits on postjudgment relief."[339]

Habeas Corpus Rule 12 (section 2255) differs from Rule 11 (section 2254), because it includes the Rules of Criminal Procedure as well as the Federal Rules of Civil Procedure as sources to be drawn on where appropriate.

13. *Presence of Petitioner*

28 U.S.C. section 2243 requires that, if the court is going to hold an evidentiary hearing, petitioner be present. No comparable provision for section 2255 proceedings exists, though the same general admonitions should be relevant. The precise language in section 2243 states that "[u]nless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained."[340] Thus, once the court has determined to hold an evidentiary hearing, the petitioner, with the exception noted, must be present.

Although a petitioner is not required by law to be present at a hearing involving only issues of law or in a section 2255 proceeding, it would still be advisable to require it, particularly where no substantial difficulty and expense are involved. Such a requirement ensures to petitioner-movant's satisfaction that there has been a full and fair hearing with all favorable arguments having been presented. This elementary fairness serves as protection for both the court and counsel.

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336. 421 U.S. 482 (1975).

337. This does not mean that Rule 60(b) may not be applicable in other appropriate circumstances. *Cf.* Browder v. Director, Dept. of Corrections of Ill., 434 U.S. 257 (1978).

338. 434 U.S. 257 (1978).

339. *Id.* at 271.

340. 28 U.S.C. § 2243 (1976). *See also* Walker v. Johnston, 312 U.S. 275 (1941).

14. *Stay of State Court Proceedings*

28 U.S.C. section 2251 provides that a justice or judge before whom a habeas corpus (section 2254) proceeding is pending may, either before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any state court involving matters which are also raised in the habeas corpus proceeding. This statutory authorization refers to state court proceedings, not service of sentence.[341]

This provision is infrequently used. It has been resorted to in order to stay the execution of a death sentence.[342] In *Jackson v. Justices of Superior Court of Massachusetts*,[343] a district court stayed the state trials of certain juveniles pending determination of their claim that the very occurrence of the trials would subject them to double jeopardy. There is no comparable statutory provision for section 2255 proceedings, but it is difficult to imagine a situation in which it would be required.

15. *Appeal of Section 2254 Proceedings—Certificate of Probable Cause*

An appeal from a section 2254 order may not be taken to the court of appeals unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.[344] This is a statement by a judge that there exists probable cause to appeal. This requirement ensures that the appeal will not be frivolous. The certificate is required only when a petitioner in state custody seeks to appeal; it is not required if the respondent seeks to appeal. Once the certificate is issued, the court of appeals must hear the appeal.[345]

Appeals in habeas corpus proceedings are governed by the Federal Rules of Appellate Procedure. A notice of appeal must be filed within thirty days after judgment is entered.[346] The notice of appeal is jurisdictional,[347] and hence should be filed even though a certificate of probable cause has not yet been obtained

341. Kleczka v. Massachusetts, 259 F. Supp. 462 (D. Mass. 1966).

342. *Cf.* Reese v. Teets, 248 F.2d 147 (9th Cir. 1957) (vacated stay of execution entered erroneously where district court lacked jurisdiction because of failure to exhaust remedies).

343. 423 F. Supp. 50 (D. Mass. 1976), *rev'd on other grounds*, 549 F.2d 215 (1st Cir.), *cert. denied*, 430 U.S. 975 (1977).

344. 28 U.S.C. §2253 (1976).

345. Nowakowski v. Maroney, 386 U.S. 542 (1967).

346. FED. R. APP. P. 3, 4.

347. Browder v. Director, Dept. of Corrections of Ill., 434 U.S. 257 (1978); Hayward v. Britt, 572 F.2d 1324 (9th Cir. 1978).

from either the district court or the circuit court. While some older authority required both the certificate and the notice of appeal be filed within thirty days,[348] modern cases take a realistic view that allows the notice of appeal to be filed and later supplemented with the certificate.[349] The modern approach will relieve the time pressures placed on district and circuit court judges to issue certificates which may have been requested at the last minute, and it will also prevent the technical loss of an appeal by habeas corpus petitioners.

16. *Appeal of Section 2255 Proceedings*

Since a section 2255 proceeding is part of the original criminal proceeding, the time for appeal is governed by Federal Rule 4(b) of Appellate Procedure. An appeal must be filed within ten days after entry of the judgment or order appealed from. This time period may be extended not to exceed thirty days, upon a showing of excusable neglect. In order to appeal, a movant need not obtain a certificate of probable cause as is required for a section 2254 proceeding, but may appeal as of right.

Habeas Corpus Rule 11 (section 2255) provides that nothing in the Rules shall be construed as extending the time to appeal from the original judgment of conviction. Thus, the filing of a section 2255 action does not extend the normal time period for appeal. An appeal from a conviction must be filed within ten days after entry of the judgment or order appealed from.[350]

17. *Representative Habeas Corpus Proceedings—Class Actions*

Habeas corpus proceedings in the nature of class actions are useful vehicles to resolve certain kinds of issues. There should be no question about the propriety of this type of action since Habeas Corpus Rule 11 (section 2254) and Habeas Corpus Rule 12 (section 2255) expressly permit the Federal Rules of Civil Procedure to be adopted to the extent that they may be useful. Generally, representative habeas corpus proceedings are required to meet the eligibility standards of Federal Rule 23(a) and (b) of Civil Procedure. Other technical requirements, as notice, may not be insisted upon unless it would serve a useful

348. *See* Sagaser v. Sigler, 374 F.2d 509 (8th Cir. 1967); United States *ex rel.* Geach v. Ragen, 231 F.2d 455 (7th Cir. 1956). The Seventh Circuit has not overruled the *Geach* case, but the Seventh Circuit Clerk has informed the authors that the Circuit no longer follows that practice.

349. Klier v. Wainwright, 464 F.2d 1245 (5th Cir. 1972), *cert. denied*, 409 U.S. 1129 (1973); Fitzsimmons v. Yeager, 391 F.2d 849 (3d Cir.) *cert. denied*, 393 U.S. 868 (1968).

350. FED. R. APP. P. 4(b).

purpose in the context of the habeas proceeding. Conversely, the requirements of Habeas Corpus Rules 2(c) (section 2254) and 2(b) (section 2255) that each petitioner or movant sign and swear to a petition or motion will be relaxed where the court permits a class-type proceeding.[351]

The kinds of situations in which a habeas corpus class action may be useful are illustrated in the cases utilizing the procedure. In *United States ex rel. Sero v. Preiser*,[352] the petitioners were young adults challenging sentences of up to four years as juvenile offenders where, if adults, the sentence would be only one year. *United States ex rel. Morgan v. Sielaff*[353] involved a suit on behalf of all persons committed under the Sexually Dangerous Persons Act that required a standard of proof less than beyond a reasonable doubt. *Williams v. Richardson*[354] involved a challenge to conditions of confinement at a United States Medical Center. *Mead v. Parker*[355] involved a refusal to provide inmates with access to legal materials.

Class proceedings are available under either section 2254 or section 2255.[356] In a section 2255 proceeding, however, relief may be limited to those persons within the court's territorial jurisdiction at the time of filing.[357]

18. *Federal Rule 23 of Appellate Procedure—Matters Pending Review*

There is no provision in the Habeas Corpus Rules governing the transfer of a petitioner pending initial decision of his petition. It is Federal Rule 23(a) of Appellate Procedure that prohibits the transfer of a petitioner pending review of a decision in a habeas corpus proceeding. The Rule does, however, provide that upon showing a need therefor, the custodian of the petitioner may obtain an order authorizing a transfer. If granted, the order will substitute the successor custodian as a named party.

The court, judge, or justice who initially considers a habeas corpus petition has no power to release the petitioner or admit him to bail pending a ruling on the petition. Once a decision,

351. *See* United States *ex. rel.* Morgan v. Sielaff, 546 F.2d 218 (7th Cir. 1976); United States *ex rel.* Sero v. Preiser, 506 F.2d 1115 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975) (discussing habeas corpus class actions).

352. 506 F.2d 1115 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975).

353. 546 F.2d 218 (7th Cir. 1976).

354. 481 F.2d 358 (8th Cir. 1973).

355. 464 F.2d 1108 (9th Cir. 1972).

356. United States *ex rel.* Morgan v. Sielaff, 546 F.2d 218 (7th Cir. 1976); Bijeol v. Benson, 513 F.2d 965 (7th Cir. 1975).

357. Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975).

however, has been made on the petition, other options become available. Federal Rule 23(b) of Appellate Procedure provides that pending review of a decision refusing to release a petitioner, (1) the petitioner may be detained in the custody from which release is sought; (2) the petitioner may be released on his own recognizance, or with or without surety, as may appear fitting. This decision may be made by the court or judge rendering the initial decision, by the court of appeals or the Supreme Court, or by a judge or a justice of either court.

If the initial decision orders the release of the petitioner, then Federal Rule 23(c) of Appellate Procedure states that petitioner shall be released upon his own recognizance, with or without surety. It is thus presumed that petitioner should be released. This rule further provides that a court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or any judge or justice thereof, may otherwise order.

Federal Rule 23(d) of Appellate Procedure provides that whatever the initial order is respecting custody, it shall continue to govern in all courts, unless for special reasons shown to a subsequent court, judge, or justice the order should be modified or an independent order respecting custody, enlargement, or surety should be made. Federal Rule of Appellate Procedure 23(d) does not, however, deprive the district court of jurisdiction to review its custody or bail orders during the pendency of an appeal. Indeed, the district court may have a special obligation to modify, if circumstances require, an order the court of appeals might otherwise consider at least morally binding under that rule.[358]

C. Procedure Governing Habeas Corpus Proceedings Pursuant to 28 U.S.C. Section 2241

All habeas corpus proceedings concerning state prisoners will be brought in federal court under 28 U.S.C. section 2254. Although 28 U.S.C. section 2255 is supposed to be as broad as section 2254 in terms of providing habeas corpus relief for federal prisoners, there exist situations where a federal prisoner may not bring a section 2255 proceeding. Under these circumstances, the federal courts permit a federal prisoner to file a writ of habeas corpus that the courts consider as a section 2241 writ. The procedure governing this writ is contained in sections 2241 through 2253.[359] These are the same statutory proceedings that

358. Jago v. United States District Court, 570 F.2d 618 (6th Cir. 1978).
359. 28 U.S.C. §§ 2241-2253 (1976).

had governed section 2254 proceedings, which are now governed by the Habeas Corpus Rules together with whatever portions of these statutes that are not inconsistent therewith. A section 2241 proceeding, however, will be governed solely by the statutes.

The procedure of section 2241 is to submit a petition for a writ of habeas corpus to the Supreme Court, and a justice thereof, the district courts, and any circuit judge. Actually, the petition is to be filed with the district court in the first instance, since the other courts will send it back there in any event. The petition may be filed in the district of confinement or conviction. As a practical matter, though not governed by statute, the proceeding will probably be transferred to the court with the greater proximity to the alleged problem—the court of confinement if the complaint relates to conditions of confinement; the court of conviction if the complaint relates to trial or conviction.

The petition shall be in writing, signed, and verified by the person seeking relief, or by someone on his behalf. It shall allege facts concerning his commitment or detention, and the name of the person who has custody over him and the authority of that person to do so. This petition may be amended or supplemented as provided in the Federal Rules of Civil Procedure. If the petition is addressed in the first instance to an appellate court judge or justice, the petition shall state the reasons why it was not first submitted to the district court.

Section 2243 provides for summary dismissal where it appears from the petition that the applicant is not entitled thereto. Otherwise, the writ shall be issued or the court or judge or justice shall direct the respondent to show cause why it should not be granted. The writ shall be directed to the person having custody of the detainee, and it must be returned within three days unless good cause is shown, in which case an additional twenty days may be allowed.

The person to whom the writ is directed shall make a return (answer) certifying the true cause of the detention. When the writ is returned (answered), a date shall be set for hearing not more than five days after the return unless good cause for additional time is shown. The applicant for the writ must be brought to the hearing unless it is clear that only issues of law are involved.

The applicant for the writ must deny any of the facts set forth in the return, or allege alternative facts; otherwise under section 2248 (unless the judge otherwise finds), the facts set forth in the answer shall be accepted as true. As evidenced from the above timetables, all this must be done in a brief period

of time. The only saving grace to the time strictures is that the return and any reply may be amended by leave of court, before or after being filed. The court will then summarily hear and determine the facts, and dispose of the matters "as law and justice require."

28 U.S.C. section 2244 deals with successive petitions. It states that no circuit or district judge shall be required to entertain an application for a writ of habeas corpus if the legality of such detention has been previously determined by a judge or court of the United States, the petition presents no new ground, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

Where an evidentiary hearing has been previously held, the standards are slightly stricter. A court or judge need not consider a successive application where an evidentiary hearing on the merits of a material factual issue has been held, unless it is predicated on a ground not adjudicated in the earlier hearing and the court is satisfied that the applicant did not deliberately withhold the newly asserted ground, or otherwise abuse the writ.

Where a record is not available, section 2245 provides that the certificate of the trial judge setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of this certificate must be filed with the court in which the application is pending and with the court in which the trial took place.

28 U.S.C. section 2246 provides that on the application for a writ, evidence may be taken orally or by deposition, or in the discretion of the judge by affidavit. If affidavits are submitted, the opposing party may propound written interrogatories to the affiants or file answering affidavits. In addition, documentary evidence pursuant to section 2247 will be admissible, such as transcripts of proceedings upon arraignment, plea and sentence, and the transcript of the oral testimony introduced on any previous similar application.

If petitioner fails to attach to his petition copies of the indictment, plea and judgment, or such of them as may be material to his application, then the respondent shall file certified copies of those items with his return to the writ, or answer to an order to show cause.[360]

An indigent petitioner is entitled to prosecute his application for a writ of habeas corpus *in forma pauperis*, and the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record as may be

360. 28 U.S.C. § 2249 (1976).

required by order of the judge before whom the application is pending.[361]

28 U.S.C. section 2251 allows for a stay of state court proceedings. 28 U.S.C. section 2252 apparently requires, prior to the hearing of the habeas corpus proceeding on behalf of a person who is presently in the custody of state officers, even though his habeas goes to a federal conviction, that notice be given to the attorney general or other appropriate officer of the state, as the justice or judge at the time of issuing the writ shall direct. This provision may be obsolete, but is nevertheless still law.

A habeas corpus proceeding before a circuit or district judge is appealable as of right under 28 U.S.C. section 2253. No appeal as of right lies, however, from such an order in a proceeding to test the validity of a warrant to remove to another jurisdiction or district, or place for committment or trial a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

361. 28 U.S.C. § 2250 (1976).