94TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT No. 94–1471

HABEAS CORPUS RULES

SEPTEMBER 2, 1976.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HUNGATE, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 15319]

The Committee on the Judiciary, to whom was referred the bill (H.R. 15319) to approve in whole or in part, with amendments, certain rules relating to cases and proceedings under sections 2254 and 2255 of title 28 of the United States Code, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Page 3, line 12, strike out "This rules does" and insert in lieu thereof "These rules do".

Page 3, beginning in line 13, strike out "section 3006A of title 18, United States Code," and insert in lieu thereof "18 U.S.C. § 3006A".

Page 3, line 16, strike out "2555" and insert in lieu thereof "2255".

Page 3, beginning in line 16, strike out "proceeding" and insert in lieu thereof "proceedings".

Page 3, beginning in line 17, strike out "This rules does" and insert in lieu thereof "These rules do".

Page 3, beginning in line 18, strike out "section 3006A of title 18, United States Code," and insert in lieu thereof "18 U.S.C. § 3006A".

Page 3, line 25, insert "in lieu thereof" immediately after "inserting".

Page 4, line 5, insert "in lieu thereof" immediately after "inserting".

Page 4, line 14, strike out "atfer" and insert in lieu thereof "after".

Page 4, line 14, insert a comma immediately after "duties".

PURPOSE

The purpose of this legislation is to make certain amendments to the rules of procedure for use in cases and proceedings arising under 28 U.S.C. §§ 2254 and 2255.

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Background

Section 2254 of title 28, United States Code, provides that someone who is held in State custody may apply to a Federal court for a writ of *habeas corpus* "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Section 2255 of title 28, United States Code, provides that a person who is held in Federal custody may, by motion, seek release from that custody "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack . . . ."

On April 26, 1976, the Supreme Court promulgated two sets of rules of practice and procedure related to these statutes that shall be referred to in this report from time to time as the *habeas corpus* rules.[1] One set of rules governs cases under 28 U.S.C. § 2254; the other set governs proceedings under 28 U.S.C. § 2255. The procedures that they establish, however, are very similar.

The Court, acting pursuant to statutes known as the "Rules Enabling Acts," [2] provided that the rules were to take effect on August 1, 1976. The August 1 effective date was postponed, however, by Public Law 94–349. The habeas corpus rules are now scheduled to take effect 30 days after the 94th Congress adjourns sine die.

The purpose for delaying the effective date of the habeas corpus rules was to give Congress an adequate amount of time in which to study them.[3] H.R. 15319 is the product of the Congressional study of those rules that Public Law 94–349 contemplates.

After a careful study of all of the proposed rules, the Committee on the Judiciary has concluded that the majority of them ought to be approved as drafted. Accordingly, H.R. 15319 amends only 4 of the § 2254 rules and 4 of the § 2255 rules. It approves the rest in their entirety.

During the course of the hearings on the habeas corpus rules, it was suggested that the legislation ought specifically to overturn the recent Supreme Court decision in *Stone* v. *Powell*, 44 U.S.L.W. 5313 (July 6, 1976). In *Stone*, the Supreme Court held that where a State has provided an opportunity for a full and fair litigation of a Fourth Amendment claim, a State prisoner is not entitled to *habeas corpus*

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[1] Rules of practice and procedure promulgated by the Supreme Court are not drafted exclusively by it. The Judicial Conference of the United States is authorized to "carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law." 28 U.S.C. § 331. The Judicial Conference has set up committees to assist it in this responsibility. The Advisory Committee on Criminal Rules gives initial consideration to new rules or amendments to existing rules relating to practice and procedure in criminal cases and proceedings. Any draft of a rule or amendment that it prepares is forwarded to the Standing Committee on Rules of Practice and Procedure. If the Standing Committee approves the draft, it forwards it to the Judicial Conference. The Judicial Conference then decides whether to recommend that the Supreme Court promulgate the rule or amendment.

For a brief discussion of how the Advisory Committee works, see Statement of Judge J. Edward Lumbard in Hearings on Proposed Amendments to Federal Rules of Criminal Procedure Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93d Congress, 2d Session, serial No. 61, 8–19 (1974). See also testimony of Professor Howard Lesnick, *id.*, at 197–209.

[2] In this instance 18 U.S.C. §§ 3771–72 and 28 U.S.C. § 2072. *See also* 28 U.S.C. § 2075 (rules of procedure for bankruptcy proceedings); 28 U.S.C. § 2076 (rules of evidence); and 18 U.S.C. § 3402 (rules of procedure for criminal trials before magistrates).

[3] See House Report 94–1204.

relief on the ground that evidence obtained through an unconstitutional search and seizure was introduced at his trial. This legislation is intended neither to approve nor to disapprove the *Stone* decision.

During the hearings, the forms annexed to the rules were criticized in several respects. One witness,[4] for example, criticized item 12 in the forms insofar as it listed 10 possible grounds upon which the petitioner could base his claim of unlawful incarceration. The witness stated that "it is seriously questioned whether any proposed form should set forth the 'top ten' most popular allegations on federal habeas corpus." He further went on to note that, "The volatile state of federal law itself precludes such an approach."

Representatives of the Judicial Conference who testified conceded that the forms could be improved and ought to be revised from time to time, not only to take account of changing rules of law but also to improve the clarity of the forms. These representatives testified that it was the opinion of the General Counsel of the Administrative Office of the United States Courts that these forms could be changed as necessary by the Administrative Office, without the necessity for the Supreme Court to promulgate the changes. The Committee concurs in this opinion, and the legislation, therefore, does not address itself to the forms annexed to the rules. It is expected that the Administrative Office of the United States Courts, from time to time, will make changes in the forms in order to comply with court decisions or in order to make the forms easier to read and understand.[5]

Section-by-Section Analysis of the Legislation

Section 1

Section 1 of H.R. 15319 provides that the habeas corpus rules promulgated by the Supreme Court on April 26, 1976, as amended by the bill, are approved and shall take effect with respect to petitions and motions filed on or after February 1, 1977. This provision intended to give the Administrative Office of the United States Courts ample time to make changes in the forms annexed to the rules, to print the rules and forms as amended, and to circulate them to bench and bar.

Section 2

Section 2 of H.R. 15319 amends rules 2, 8, 9 and 10 in both the § 2254 rules and the § 2255 rules.

Rule 2

Rule 2(c) of the § 2254 rules, as promulgated by the Supreme Court, required that a petition for *habeas corpus* be in the form annexed to the rules or in a form prescribed by the local rules of the district court. It further provided that the "The petition [for habeas corpus] shall follow the prescribed form." Rule 2(b) of the § 2255 rules, as promul-

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[4] California Assistant Attorney General Daniel J. Kremer, testifying on behalf of California Attorney General Evelle J. Younger and the National Association of Attorneys General.

[5] During the hearings, the following language in the § 2254 petition was objected to as being unclear: "In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date." It is anticipated that the Administrative Office of the United States Courts will review this language and make such changes as are necessary to make it more readily understandable.

gated by the Supreme Court, provided similarly for motions to vacate, set aside, or correct a sentence.

The legislation amends Rule 2(c) in each set of rules by deleting the provision that the petition or motion "shall follow the prescribed form." The legislation also amends the first sentence of each Rule 2(c) to provide that the petition or motion "shall be in *substantially* the form annexed" to the rules (emphasis added). The Committee believes that the rules as promulgated by the Supreme Court put too much emphasis upon a strict compliance with the forms, perhaps leading to a rejection of otherwise meritorious claims on the ground of failure to adhere strictly to the form.

Rule 2(e) of the § 2254 rules deals with the return of a petition for habeas corpus for failure to comply with the requirements of rule 2 or Rule 3 of the § 2254 rules. As promulgated by the Supreme Court, Rule 2(e) permitted a court clerk to return a petition for noncompliance. Rule 2(d) of the § 2255 rules provided similarly with respect to motions to vacate, set aside, or correct a sentence which did not comply with the requirements of Rule 2 or Rule 3 of the § 2255 rules.

The legislation amends Rule 2(e) of the § 2254 rules and Rule 2(d) of the § 2255 rules to permit return of a petition for noncompliance with Rule 2 or Rule 3 only "if a judge of the court so directs * * *." The Committee believes that the decision to return a petition or motion for failure to comply with Rule 2 or Rule 3 is not a decision that a court clerk should make but, rather, is a decision that a judge should make.

Rule 8

Rule 8(c) of the § 2254 rules authorizes the judge to hold an evidentiary hearing and to "appoint counsel for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) * * *."[6] Rule 8(c) of the § 2255 rules provides similarly with respect to motions to vacate, set aside, or correct a sentence.

The legislation adds the following sentence to Rule 8(c) in the § 2254 rules: "These rules do not limit the appointment of counsel under section 3006A of title 18, United States Code, at any stage of the case if the interest of justice so requires."[7] A similar provision is added to Rule 8(c) of the § 2255 rules. This language is intended to state explicitly that appointment of counsel provisions in the habeas corpus rules are not intended to restrict a judge's authority to appoint counsel under 18 U.S.C. § 3006A. For example, it may be appropriate, prior to a request for discovery under Rule 6, for a judge to appoint counsel in an instance where the petition or motion raises a substantial legal issue.

Rule 9

Rule 9(a) of the § 2254 rules is entitled, "Delayed petitions." As promulgated by the Supreme Court, it permitted dismissal of a petition for habeas corpus on the ground that the delay in filing it prejudiced

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[6] 18 U.S.C. § 3006A(g) provides that a person seeking relief under 28 U.S.C. §§ 2254 or 2255 may be furnished with counsel, at government expense, if a court or magistrate "determines that the interests of justice so require and such person is financially unable to obtain representation."

[7] The plural ("These rules") is used in order to cover other provisions in the rules dealing with the appointment of counsel under 18 U.S.C. § 3006A. See Rule 6(a) of both the § 2254 rules and the § 2255 rules.

the State's ability to respond to the petition. As promulgated by the Supreme Court, it further provided that

> If the petition is filed more than five years after the judgment of conviction, there shall be a presumption, rebuttable by the petitioner, that there is prejudice to the state. When a petition challenges the validity of an action, such as revocation of probation or parole, which occurs after judgment of conviction, the five-year period as to that action shall start to run at the time the order in the challenged action took place.

Rule 9(a) of the § 2255 rules provides similarly with respect to motions to vacate, set aside, or correct a sentence.

The legislation amends Rule 9(a) in both the § 2254 rules and the § 2255 rules by deleting the language relating to the rebuttable presumption after 5 years and the calculation of the 5 year period. The Committee believes that it is unsound policy to require the defendant to overcome a presumption of prejudice [8] and that the legislation brings Rule 9(a) into conformity with other provisions of law.[9]

Rule 9(b) of the § 2254 rules is entitled "Successive petitions." As promulgated by the Supreme Court, it permitted a judge to dismiss a petitioner's second or successive petition, even if the petition alleged new and different grounds for relief, if the judge found that the failure to assert those grounds in a prior petition was "not excusable." Rule 9(b) of the § 2255 rules provided similarly with respect to motions to vacate, set aside, or correct a sentence.

The legislation amends Rule 9(b) in both the § 2254 rules and the § 2255 rules by deleting the "not excusable" standard. As amended by the bill, Rule 9(b) of the § 2254 rules permits a judge to dismiss a second or successive petition alleging new and different grounds if the judge finds that the failure to assert those grounds in a prior petition "constituted an abuse of the writ." The legislation makes a similar amendment to Rule 9(b) of the § 2255 rules.

The Committee believes that the "not excusable" language created a new and undefined standard that gave a judge too broad a discretion to dismiss a second or successive petition. The "abuse of writ" standard brings Rule 9(b) into conformity with existing law. As the Supreme Court has noted in reference to successive applications for habeas corpus relief and successive § 2255 motions based upon a new ground or a ground not previously decided on the merits, "full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ or motion remedy; and this the Government

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[8] Those facts which make it difficult for the State to respond to an old claim (such as the death of the prosecutor) can readily be discovered by the State. It is not easy, perhaps in some instances not possible, for a prisoner to discover those facts that he would have to show in order to rebut the presumption of prejudice.

[9] The legislation will bring Rule 9(a) of the § 2255 rules into conformity with the present statute, which permits the filing of an application for a writ of *habeas corpus* "at any time." 28 U.S.C. § 2255. Cf. 28 U.S.C. § 2244.

The legislation will bring Rule 9(a) of the § 2254 rules into conformity with case law. *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116 (1956). See also 28 U.S.C. § 2244.

See also *Heflin* v. *United States*, 358 U.S. 419, 420 (1959) (opinion of Stewart, J.); *Palmer* v. *Ashe*, 342 U.S. 134 (1951). In *Fay* v. *Noia*, 372 U.S. 391, 438 (1963), the Supreme Court noted: "[W]e recognize a limited discretion in the federal judge to deny relief to an applicant under certain circumstances. Discretion is implicit in the statutory command that the judge, after grantng the writ and holding a hearing of appropriate scope, "dispose of the matter as law and justice require." 28 U.S.C. § 2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles."

has the burden of pleading." *Sanders* v. *United States*, 373 U.S. 1, 17 (1963). See also 28 United States Code, section 2244(b).

Rule 10

Rule 10 of the § 2254 rules and the § 2255 rules is entitled, "Powers of magistrates." As promulgated by the Supreme Court, Rule 10 in both sets of rules permits a magistrate to perform certain duties of a judge "if and to the extent that he is so empowered by rule of the district court * * *."

The legislation amends Rule 10 in both sets of rules by adding a provision that a magistrate may perform these duties only "to the extent that the district court has established standards and criteria for the performance of such duties." The Committee believes that the duties which this rule permits to be delegated to a magistrate are important enough to require that they be delegated with standards and criteria.[10]

Cost

Pursuant to clause 7, rule XIII of the Rules of the House of Representatives, the Committee estimates that no new cost to the United States is entailed by H.R. 15319.

New Budget Authority

H.R. 15319 creates no new budget authority.

Statement of the Budget Committee

No statement on this legislation has been received from the House Committee on the Budget.

Statement of the Committee on Government Operations

No statement on this legislation has been received from the House Committee on Government Operations.

Inflation Impact Statement

H.R. 15319 will have no foreseeable inflationary impact on prices or costs in the operation of the national economy.

Oversight

The Committee makes no oversight findings.

Committee Vote

H.R. 15319 was reported out of Committee on Tuesday, August 31, 1976, by voice vote. Twenty-six members of the Committee were present.

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[10] The Committee assumes that it is always within the power of a district judge to reverse the decision of a magistrate in an instance when the magistrate is acting pursuant to authority delegated to him by the district court under Rule 10.

Changes in Proposed Rules Made by the Bill, as Reported

Changes in the rules proposed by the Supreme Court made by the bill, as reported, are shown as follows (portions proposed to be omitted are enclosed in black brackets, new matter in italic, matter in which no change is proposed is shown in roman):

Rules Governing Section 2254 Cases in the United States District Courts

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RULE 2. PETITION

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

(b) Applicants Subject to Future Custody. If the applicant is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future, the application shall be in the form of a petition for a writ of habeas corpus with an added prayer for appropriate relief against the judgment which he seeks to attack. In such a case the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents.

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

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

(e) Return of Insufficient Petition. If a petition received by the clerk of [the] *a* district court does not *substantially* comply with the requirements of rule 2 or rule 3, it may be returned [by the clerk] to the [petitioner] *petitioner, if a judge of the court so directs, together*

with a statement of the reason for its return [, and it shall be returned if the clerk is so directed by a judge of the court] . The clerk shall retain a copy of the petition.

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RULE 8. EVIDENTIARY HEARING

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

(b) FUNCTION OF THE MAGISTRATE. When empowered to do so by rule of the district court, the magistrate may recommend to the district judge that an evidentiary hearing be held or, in the alternative, that the petition be dismissed. In doing so the magistrate shall give to the district judge a sufficiently detailed description of the facts to enable him to make a decision to hold or not to hold an evidentiary hearing.

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

RULE 9. DELAYED OR SUCCESSIVE PETITION

(a) DELAYED PETITIONS. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred. [If the petition is filed more than five years after the judgment of conviction, there shall be a presumption, rebuttable by the petitioner, that there is prejudice to the state. When a petition challenges the validity of an action, such as revocation of probation or parole, which occurs after judgment of conviction, the five-year period as to that action shall start to run at the time the order in the challenged action took place.]

(b) SUCCESSIVE PETITIONS. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition [is not excusable.] *constituted an abuse of the writ.*

RULE 10. POWERS OF MAGISTRATES

The duties imposed upon the judge of the district court by rules 2, 3, 4, 6, and 7 may be performed by a United States magistrate if

and to the extent that he is so empowered by rule of the district court, *and to the extent the district court has established standards and criteria for the performance of such duties*, except that when such duties involve the making of an order, under rule 4, dismissing the petition 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.

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Rules Governing § 2255 Proceedings for the United States District Courts

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RULE 2. MOTION

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

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

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

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

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RULE 8. EVIDENTIARY HEARING

(a) Determination by Court. If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary

hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

(b) FUNCTION OF THE MAGISTRATE. When empowered to do so by rule of the district court, the magistrate may recommend to the district judge that an evidentiary hearing be held or, in the alternative, that the motion be dismissed. In doing so the magistrate shall give to the district judge a sufficiently detailed description of the facts to enable him to make a decision to hold or not to hold an evidentiary hearing.

(c) APPOINTMENT OF COUNSEL; TIME FOR HEARING. If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. § 3006A (g) and shall conduct the hearing as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. *These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the proceeding if the interest of justice so requires.*

RULE 9. DELAYED OR SUCCESSIVE MOTIONS

(a) DELAYED MOTIONS. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred. [If the motion is filed more than five years after the judgment of conviction, there shall be a presumption, rebuttable by the petitioner, that there is prejudice to the government.]

(b) SUCCESSIVE MOTIONS. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion [is not excusable] *constituted an abuse of the procedure governed by these rules.*

RULE 10. POWERS OF MAGISTRATES

The duties imposed upon the judge of the district court by rules 2, 3, 4, 6, and 7 may be performed by a United States magistrate if and to the extent that he is so empowered by rule of the district court, *and to the extent the district court has established standards and criteria for the performance of such duties*, except that, when such duties involve the making of an order under rule 4 dismissing the motion, 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.

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