

RULES GOVERNING 28 U. S. C. § 2255 PROCEED-
INGS FOR THE UNITED STATES
DISTRICT COURTS*

Rule 1. Scope of rules.

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

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

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

Rule 2. Motion.

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

*[REPORTER'S NOTE: See Caveat, *supra*, p. 1167.]

(b) *Form of motion.*—The motion shall be in 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 district court does not comply with the requirements of rule 2 or 3, it may be returned by the clerk to the movant 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.

Rule 3. Filing motion.

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

(b) *Filing and service.*—Upon receipt of the motion and having ascertained that it appears on its face to comply with rules 2 and 3, the clerk of the district court

shall file the motion and enter it on the docket in his office in the criminal action in which was entered the judgment to which it is directed. He shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the United States Attorney of the district in which the judgment under attack was entered. The filing of the motion shall not require said United States Attorney to answer the motion or otherwise move with respect to it unless so ordered by the court.

Rule 4. Preliminary consideration by judge.

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

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

Rule 5. Answer; contents.

(a) *Contents of answer.*—The answer shall respond to the allegations of the motion. In addition it shall state

whether the movant has used any other available federal remedies including any prior post-conviction motions under these rules or those existing previous to the adoption of the present rules. The answer shall also state whether an evidentiary hearing was accorded the movant in a federal court.

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

Rule 6. Discovery.

(a) *Leave of court required.*—A party may invoke the processes of discovery available under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a movant who qualifies for appointment of counsel under 18 U. S. C. § 3006A (g).

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

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

Rule 7. Expansion of record.

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

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

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

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

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.

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 movant, 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.

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 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.

Rule 11. Time for appeal.

Nothing in these rules shall be construed as extending the time to appeal from the original judgment of conviction in the district court.

Rule 12. Federal Rules of Criminal and Civil Procedure; extent of applicability.

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

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