

RULES GOVERNING 28 U. S. C. § 2254 CASES IN  
THE UNITED STATES DISTRICT COURTS\*

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*Rule 1. Scope of rules.*

(a) *Applicable to cases involving custody pursuant to a judgment of a state court.*—These rules govern the procedure in the United States district courts on applications under 28 U. S. C. § 2254:

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

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

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

*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

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

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 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 desires to attack the validity of the judgments of two or more state courts under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.

(e) *Return of insufficient petition.*—If a petition received by the clerk of the district court does not comply with the requirements of rule 2 or rule 3, it may be returned by the clerk to the petitioner 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.

*Rule 3. Filing petition.*

(a) *Place of filing; copies; filing fee.*—A petition shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof. It shall also be accompanied by the filing fee prescribed by law unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis. If the petitioner desires to prosecute the petition in forma pauperis, he shall file the affidavit required by 28 U. S. C. § 1915. In all such cases the petition shall also be accompanied by a certificate of the warden or other appropriate officer of the institution in which the petitioner is confined as to the amount of money or securities on deposit to the petitioner's credit in any account in the institution, which certificate may be considered by the court in acting upon his application for leave to proceed in forma pauperis.

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

*Rule 4. Preliminary consideration by judge.*

The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court,

the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.

*Rule 5. Answer; contents.*

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

*Rule 6. Discovery.*

(a) *Leave of court required.*—A party shall be entitled to invoke the processes of discovery available under the

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

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

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

*Rule 7. Expansion of record.*

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

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

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

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

*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.

*Rule 9. Delayed or successive petitions.*

(a) *Delayed petitions.*—A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred. 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.

*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 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.

*Rule 11. Federal Rules of Civil Procedure; extent of applicability.*

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

