RULES AND STATUTES ON HABEAS CORPUS

with Amendments through June 2007

CRIMINAL JUSTICE LEGAL FOUNDATION

Introduction

In 1996, following the enactment of the Antiterrorism and Effective Death Penalty Act, CJLF published a booklet of the rules and statutes governing federal habeas corpus, showing the changes made by AEDPA. Today, AEDPA is familiar to all attorneys practicing in federal habeas corpus on a regular basis, but further changes have been made.

This second edition contains the rules and statutes as amended through June 2007. Changes since AEDPA are shown with *italics* for added language and ~~strikeout~~ for deleted language. Amendments include the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub.L. 109-177, 120 Stat. 192, and the 2004 revision of the Habeas Rules. Regulations issued by the U.S. Department of Justice to certify states for the federal fast track under the 2005 legislation are printed in their proposed form. We will make available an updated version of this booklet when the regulations are final.

We hope you find this booklet useful.

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Sacramento, California
July 2007

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RULES AND STATUTES ON HABEAS CORPUS

with Amendments and Additions through June 30, 2007

UNITED STATES CODE—TITLE 28—CHAPTER 153—HABEAS CORPUS

Sec.

§ 2241. Power to Grant Writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the

district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) *No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.*

(2) *Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.*

(June 25, 1948, ch. 646, 62 Stat. 964; May 24, 1949, ch. 139, § 112, 63 Stat. 105; Sept. 19, 1966, Pub. L. 89-590, 80 Stat. 811, Dec. 30, 2005, Pub.L. 109-148, Div. A, Title X, § 1005(e)(1), 119 Stat 2742; Jan. 6, 2006, Pub.L. 109-163, Title XIV, § 1405(e)(1), 119 Stat. 3477; Oct. 17, 2006, Pub.L. 109-366, § 7(a), 120 Stat. 2635.)

§ 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

(June 25, 1948, ch. 646, 62 Stat. 965.)

§ 2243. Issuance of Writ; Return; Hearing; Decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless 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.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

(June 25, 1948, ch. 646, 62 Stat. 965.)

§ 2244. Finality of Determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

> **(A)** the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> **(B)(i)** the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> **(ii)** the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

> **(B)** A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

(June 25, 1948, ch. 646, 62 Stat. 965; Nov. 2, 1966, Pub. L. 89-711, § 1, 80 Stat. 1104; Apr. 24, 1996, Pub. L. 104-132, Title I, §§ 101, 106, 110 Stat. 1217, 1220.)

§ 2245. Certificate of Trial Judge Admissible in Evidence

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

(June 25, 1948, ch. 646, 62 Stat. 966.)

§ 2246. Evidence; Depositions; Affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the

right to propound written interrogatories to the affiants, or to file answering affidavits.

(June 25, 1948, ch. 646, 62 Stat. 966.)

§ 2247. Documentary Evidence

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

(June 25, 1948, ch. 646, 62 Stat. 966.)

§ 2248. Return or Answer; Conclusiveness

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

(June 25, 1948, ch. 646, 62 Stat. 966.)

§ 2249. Certified Copies of Indictment, Plea and Judgment; Duty of Respondent

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

(June 25, 1948, ch. 646, 62 Stat. 966.)

§ 2250. Indigent Petitioner Entitled to Documents Without Cost

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

(June 25, 1948, ch. 646, 62 Stat. 966.)

§ 2251. Stay of State Court Proceedings

(a) In general.—

(1) Pending matters.—A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

(2) Matter not pending.—*For purposes of this section, a habeas corpus proceeding is not pending until the application is filed.*

(3) Application for appointment of counsel.—*If a State prisoner sentenced to death applies for appointment of counsel pursuant to section 3599(a)(2) of title 18 in a court that would have jurisdiction to entertain a habeas corpus application regarding that sentence, that court may stay execution of the sentence of death, but such stay shall terminate not later than 90 days after counsel is appointed or the application for appointment of counsel is withdrawn or denied.*

(b) No further proceedings.—After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any

such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

(June 25, 1948, ch. 646, 62 Stat. 966; Mar. 9, 2006, Pub.L. 109-177, Title V, § 507(f), 120 Stat. 251.)

§ 2252. Notice

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.

(June 25, 1948, ch. 646, 62 Stat. 967.)

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

> **(A)** the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> **(B)** the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 113, 63 Stat. 105; Oct. 31, 1951, ch. 655, § 52, 65 Stat. 727; Apr. 24, 1996, Pub. L. 104-132, Title I, § 102, 110 Stat. 1217.)

§ 2254. State Custody; Remedies in Federal Courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the

applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

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

§ 2255. Federal Custody; Remedies on Motion Attacking Sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released 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, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the

movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 114, 63 Stat. 105; Apr. 24, 1996, Pub. L. 104-132, Title I, § 105, 110 Stat. 1220.)

UNITED STATES CODE—TITLE 28—CHAPTER 154— SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

Sec.

§ 2261. Prisoners in State Custody Subject to Capital Sentence; Appointment of Counsel; Requirement of Rule of Court or Statute; Procedures for Appointment

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) ***Counsel.***—This chapter is applicable if— ~~a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose~~

~~capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.~~

(1) *the Attorney General of the United States certifies that a State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265; and*

(2) *counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.*

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial ~~or on direct appeal~~ in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or

at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

(Added Pub.L. 104-132, Title I, § 107(a), Apr. 24, 1996, 110 Stat. 1221, and amended Pub.L. 109-177, Title V, § 507(a), (b), Mar. 9, 2006, 120 Stat. 250.)

§ 2262. Mandatory Stay of Execution; Duration; Limits on Stays of Execution; Successive Petitions

(a) Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

(b) A stay of execution granted pursuant to subsection (a) shall expire if—

(1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;

(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or

(3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.

(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a

stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b).

(Added Pub.L. 104-132, Title I, § 107(a), Apr. 24, 1996, 110 Stat. 1222.)

§ 2263. Filing of Habeas Corpus Application; Time Requirements; Tolling Rules

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled—

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if—

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

(Added Pub.L. 104-132, Title I, § 107(a), Apr. 24, 1996, 110 Stat. 1223.)

§ 2264. Scope of Federal Review; District Court Adjudications

(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—

(1) the result of State action in violation of the Constitution or laws of the United States;

(2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or

(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

(b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

(Added Pub.L. 104-132, Title I, § 107(a), Apr. 24, 1996, 110 Stat. 1223.)

§ 2265. ~~Application to State Unitary Review Procedure~~ *Certification and Judicial Review*

~~**(a)** For purposes of this section, a "unitary review" procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.~~

~~**(b)** To qualify under this section, a unitary review procedure must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2261(c), concerning appointment of counsel or waiver or denial of appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.~~

~~**(c)** Sections 2262, 2263, 2264, and 2266 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State "post-conviction review" and "direct review" in such sections shall be understood as referring to unitary review under the State procedure. The reference in section 2262(a) to "an order under section 2261(c)" shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the 180-day limitation period under section 2263 shall be deferred until a transcript is made available to the prisoner or counsel of the prisoner.~~

(a) Certification.—

(1) ***In general.***— *If requested by an appropriate State official, the Attorney General of the United States shall determine—*

(A) whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death;

(B) the date on which the mechanism described in subparagraph (A) was established; and

(C) whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A).

*(2) **Effective date.**—The date the mechanism described in paragraph (1)(A) was established shall be the effective date of the certification under this subsection.*

(3) Only express requirements.—There are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.

***(b) Regulations.**—The Attorney General shall promulgate regulations to implement the certification procedure under subsection (a).*

***(c) Review of certification.**—*

*(1) **In general.**—The determination by the Attorney General regarding whether to certify a State under this section is subject to review exclusively as provided under chapter 158 of this title.*

*(2) **Venue.**—The Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction over matters under paragraph (1), subject to review by the Supreme Court under section 2350 of this title.*

*(3) **Standard of review.**—The determination by the Attorney General regarding whether to certify a State under this section shall be subject to de novo review.*

(Added Pub.L. 109-177, Title V, § 507(c)(1), Mar. 9, 2006, 120 Stat. 250.)

§ 2266. Limitation Periods for Determining Applications and Motions

(a) The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.

(b)(1)(A) A district court shall render a final determination and enter a final judgment on any application for

a writ of habeas corpus brought under this chapter in a capital case not later than ~~180~~ *450* days after the date on which the application is filed, *or 60 days after the date on which the case is submitted for decision, whichever is earlier*.

(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.

(C)(i) A district court may delay for not more than one additional 30-day period beyond the period specified in subparagraph (A), the rendering of a determination of an application for a writ of habeas corpus if the court issues a written order making a finding, and stating the reasons for the finding, that the ends of justice that would be served by allowing the delay outweigh the best interests of the public and the applicant in a speedy disposition of the application.

(ii) The factors, among others, that a court shall consider in determining whether a delay in the disposition of an application is warranted are as follows:

(I) Whether the failure to allow the delay would be likely to result in a miscarriage of justice.

(II) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate briefing within the time limitations established by subparagraph (A).

(III) Whether the failure to allow a delay in a case that, taken as a whole, is not so unusual or so complex as described in subclause (II), but would otherwise deny the applicant reasonable time to obtain counsel, would unreasonably deny the applicant or the government continuity of counsel, or would deny counsel for the applicant or the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(iii) No delay in disposition shall be permissible because of general congestion of the court's calendar.

(iv) The court shall transmit a copy of any order issued under clause (i) to the Director of the Administrative Office of the United States Courts for inclusion in the report under paragraph (5).

(2) The time limitations under paragraph (1) shall apply to—

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus following a remand by the court of appeals or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3)(A) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(B) No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by petitioning for a writ of mandamus to the court of appeals. The court of appeals shall act on the petition for a writ of mandamus not later than 30 days after the filing of the petition.

(5)(A) The Administrative Office of *the* United States Courts shall submit to Congress an annual report on the compliance by the district courts with the time limitations under this section.

(B) The report described in subparagraph (A) shall include copies of the orders submitted by the district courts under paragraph (1)(B)(iv).

(c)(1)(A) A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed.

(B)(i) A court of appeals shall decide whether to grant a petition for rehearing or other request for rehearing en banc not later than 30 days after the date on which the petition for rehearing is filed unless a responsive pleading is required, in which case the court shall decide whether to grant the petition not later than 30 days after the date on which the responsive pleading is filed.

(ii) If a petition for rehearing or rehearing en banc is granted, the court of appeals shall hear and render a final determination of the appeal not later than 120 days after the date on which the order granting rehearing or rehearing en banc is entered.

(2) The time limitations under paragraph (1) shall apply to—

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus or related appeal following a remand by the court of appeals en banc or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by applying for a writ of mandamus to the Supreme Court.

(5) The Administrative Office of *the* United States Courts shall submit to Congress an annual report on the compliance by the courts of appeals with the time limitations under this section.

(Added Pub.L. 104-132, Title I, § 107(a), Apr. 24, 1996, 110 Stat. 1224, and amended Pub.L. 109-177, Title V, § 507(e), Mar. 9, 2006, 120 Stat. 251.)

This section contains language formerly found in 21 U. S. C. § 848(q)(4). Changes from that subdivision other than subdivision numbering are indicated with italic and strikeout.

18 U.S.C. § 3599. *Counsel for Financially Unable Defendants.*

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with ~~paragraphs (5), (6), (7), (8), and (9)~~ *subsections (b) through (f).*

(2) In any post conviction proceeding under section 2254 or 2255 of Title 28 , *United States Code,* seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with ~~paragraphs (5), (6), (7), (8), and (9)~~ *subsections (b) through (f).*

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less

than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to ~~paragraphs (5) and (6)~~ *subsections (b) and (c)*, the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under ~~paragraph (10)~~ *subsection (g)*. No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)(1) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than $125, per hour for in-court and out-of-court time. ~~Not less than 3 years after the date of the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the~~ *The* Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) ~~[F]ees~~ *Fees* and expenses paid for investigative, expert, and other reasonably necessary services authorized under ~~paragraph (9)~~ *subsection (f)* shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active circuit judge.

(3) The amounts paid under this paragraph for services in any case shall be disclosed to the public, after the disposition of the petition.

(Added Pub.L. 109-177, Title II, § 222(a), Mar. 9, 2006, 120 Stat. 231.)

18 U.S.C. § 3771. Crime Victims' Rights

(a) Rights of crime victims.—A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole

proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) Rights afforded.—~~In any court proceeding~~

(1) In general.—*In any court proceeding* involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) Habeas corpus proceedings.—

> ***(A) In general.***—*In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).*

(B) Enforcement.—

(i) In general.—*These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).*

(ii) Multiple victims.—*In a case involving multiple victims, subsection (d)(2) shall also apply.*

(C) Limitation.—*This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.*

(D) Definition.—*For purposes of this paragraph, the term "crime victim" means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.*

(c) Best efforts to accord rights.—

(1) Government.—Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) Advice of attorney.—The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) Notice.—Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d) Enforcement and limitations.—

(1) Rights.—The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2) Multiple crime victims.—In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

(3) Motion for relief and writ of mandamus.—The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) Error.—In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

(5) Limitation on relief.—In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) No cause of action.—Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) Definitions.—For the purposes of this chapter, the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

(f) Procedures to promote compliance.—

(1) Regulations.—Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) Contents.—The regulations promulgated under paragraph (1) shall—

(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.

(Added Pub. L. 108-405, Title I, § 102(a), Oct. 30, 2004, 118 Stat. 2261, and amended Pub.L. 109-248, Title II, § 212, July 27, 2006, 120 Stat. 616.)

Rule 20. Procedure on a Petition for an Extraordinary Writ

.1. Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

.2. A petition seeking a writ authorized by 28 U.S.C. § 1651(a), § 2241, or § 2254(a) shall be prepared in all respects as required by Rules 33 and 34. The petition shall be captioned "In re [name of petitioner]" and shall follow, insofar as applicable, the form of a petition for a writ of certiorari prescribed by Rule 14. All contentions in support of the petition shall be included in the petition. The case will be placed on the docket when 40 copies of the petition are filed with the Clerk and the docket fee is paid, except that a petitioner proceeding in forma pauperis under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed in forma pauperis, a copy of which shall precede and be attached to each copy of the petition. The petition shall be served as required by Rule 29 (subject to subparagraph 4(b) of this Rule).

.3. (a) A petition seeking a writ of prohibition, a writ of mandamus, or both in the alternative shall state the name and office or function of every person against whom relief is sought and shall set out with particularity why the relief sought is not available in any other court. A copy of the judgment with respect to which the writ is sought, including any related opinion, shall be appended to the petition together with any other document essential to understanding the petition.

(b) The petition shall be served on every party to the proceeding with respect to which relief is sought. Within 30 days after the petition is placed on the docket, a party shall file 40 copies of any brief or briefs in opposition thereto, which shall comply fully with Rule 15. If a party named as a respondent does not wish to respond to the petition, that party may so advise the Clerk and all other parties by letter. All persons served are deemed respondents for all purposes in the proceedings in this Court.

.4. (a) A petition seeking a writ of habeas corpus shall comply with the requirements of 28 U.S.C. § 2241 and § 2242, and in particular with the provision in the last paragraph of § 2242, which requires a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted.

(b) Habeas corpus proceedings are ex parte, unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted. A response, if ordered, shall comply fully with Rule 15. Neither the denial of the petition, without more, nor an order of transfer to a district court under the authority of 28 U.S.C. § 2241(b), is an adjudication on the merits, and therefore does not preclude further application to another court for the relief sought.

.5. The Clerk will distribute the documents to the Court for its consideration when a brief in opposition under subparagraph 3(b) of this Rule has been filed, when a response under subparagraph 4(b) has been ordered and filed, when the time to file has expired, or when the right to file has been expressly waived.

.6. If the Court orders the case set for argument, the Clerk will notify the parties whether additional briefs are required,

when they shall be filed, and, if the case involves a petition for a common-law writ of certiorari, that the parties shall prepare a joint appendix in accordance with Rule 26.

Rule 36. Custody of Prisoners in Habeas Corpus Proceedings

.1. Pending review in this Court of a decision in a habeas corpus proceeding commenced before a court, Justice, or judge of the United States, the person having custody of the prisoner may not transfer custody to another person unless the transfer is authorized under this Rule.

.2. Upon application by a custodian, the court, Justice, or judge who entered the decision under review may authorize transfer and the substitution of a successor custodian as a party.

.3. (a) Pending review of a decision failing or refusing to release a prisoner, the prisoner may be detained in the custody from which release is sought or in other appropriate custody or may be enlarged on personal recognizance or bail, as may appear appropriate to the court, Justice, or judge who entered the decision, or to the court of appeals, this Court, or a judge or Justice of either court.

(b) Pending review of a decision ordering release, the prisoner shall be enlarged on personal recognizance or bail, unless the court, Justice, or judge who entered the decision, or the court of appeals, this Court, or a judge or Justice of either court, orders otherwise.

.4. An initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall continue in effect pending review in the court of appeals and in this Court unless for reasons shown to the court of appeals, this Court, or a judge or Justice of either court, the order is modified or an independent order respecting custody, enlargement, or surety is entered.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 22. Habeas Corpus and Section 2255 Proceedings

(a) Application for the Original Writ. An application for a writ of habeas corpus ~~shall~~ *must* be made to the appropriate district court. If ~~application is~~ made to a circuit judge, the application ~~shall~~ *must* be transferred to the appropriate district court. If *a district court denies* an application ~~is~~ made ~~to~~ or transferred to *it,* ~~the district court and denied,~~ renewal of the application before a circuit judge ~~shall~~ *is* not be permitted. The applicant may, ~~pursuant to section 2253 of title 28, United States Code,~~ *under 28 U.S.C. § 2253,* appeal to the ~~appropriate~~ court of appeals from the *district court's* order ~~of the district court~~ denying the ~~writ~~ *application*.

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises ~~out of~~ *from* process issued by a ~~State~~ *state* court, *or in a 28 U.S.C. § 2255 proceeding,* ~~an appeal by~~ the applicant ~~for the writ may not proceed~~ *cannot take an appeal* unless a ~~district or a circuit judge~~ *circuit justice or a circuit or district judge* issues a certificate of appealability ~~pursuant to section 2253(c) of title 28, United States Code~~ *under 28 U.S.C. § 2253(c).* If an ~~appeal is taken by the~~ applicant *files a notice of appeal*, the district judge who rendered the judgment ~~shall~~ *must* either issue a certificate of appealability or state ~~the reasons~~ why ~~such~~ a certificate should not issue. The *district clerk must send the* certificate or ~~the~~ statement ~~shall be forwarded~~ to the court of appeals with the notice of appeal and the file of the *district-court* proceedings ~~in the district court~~. If the district judge has denied the certificate, the applicant ~~for the writ~~ may ~~then~~ request ~~issuance of the certificate by~~ a circuit judge *to issue the certificate*.

(2) ~~If such a~~ *A* request ~~is~~ addressed to the court of appeals~~, it shall be deemed addressed to the judges thereof and shall~~ *may* be considered by a circuit judge or judges*,* as the court ~~deems appropriate~~ *prescribes*. If no express request for a certificate is filed, the notice of appeal ~~shall be deemed to constitute~~ *constitutes* a request addressed to the judges of the court of appeals.

(3) ~~If an appeal is taken by a State or its representative, a~~ *A* certificate of appealability is not required *when a state or its representative or the United States or its representative appeals*.

(Adopted 1967; as amended Pub.L. 104-132, Title I, § 103, Apr. 24, 1996, 110 Stat. 1218; Apr. 24, 1998, eff. Dec. 1, 1998.)

Rule 23. Custody *or Release* of a ~~Prisoners~~ *Prisoner* in *a* Habeas Corpus ~~Proceedings~~ *Proceeding*

(a) Transfer of Custody Pending Review. Pending review of a decision in a habeas corpus proceeding commenced before a court, justice*,* or judge of the United States for the release of a prisoner, ~~a~~ *the* person having custody of the prisoner ~~shall~~ *must* not transfer custody to another unless ~~such~~ *a* transfer is directed in accordance with ~~the provisions of~~ this rule. ~~Upon~~ *When, upon* application, ~~of~~ a custodian ~~showing a~~ *shows the* need ~~therefor~~ *for a transfer*, the court, justice*,* or judge rendering the decision *under review* may ~~make an order authorizing~~ *authorize the* transfer and ~~providing for the substitution of~~ *substitute* the successor custodian as a party.

(b) Detention or Release ~~of Prisoner~~ Pending Review of Decision ~~Failing~~ *Not* to Release. ~~Pending review of a decision failing or refusing to release a prisoner in such a proceeding,~~ *While a decision not to release a prisoner is under review, the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court, may order that* the prisoner ~~may~~ be*:*

(1) detained in the custody from which release is sought*;*

(2) *detained* ~~or~~ in other appropriate custody*;* or

(3) ~~may be enlarged upon the prisoner's~~ *released on personal* recognizance, with or without surety.~~, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.~~

(c) Release ~~of Prisoner~~ Pending Review of Decision Ordering Release. ~~Pending review of~~ *While* a decision ordering the release of a prisoner ~~in such a proceeding~~ *is under review*, the prisoner ~~shall be enlarged upon the prisoner's recognizance, with or without surety,~~ *must*—unless the court or ~~justice or~~ judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court ~~shall otherwise order~~ *orders otherwise—be released on personal recognizance, with or without surety*.

(d) Modification of *the* Initial Order ~~Respecting~~ *on* Custody. An initial order ~~respecting~~ *governing* the *prisoner's* custody or ~~enlargement of the prisoner and~~ *release, including* any recognizance or surety ~~taken~~ , ~~shall govern review in the court of appeals and in the Supreme Court~~ *continues in effect pending review* unless for special reasons shown to the court of appeals or ~~to~~ the Supreme Court, or *to* a judge or justice of either court, the order ~~shall be~~ *is* modified or an independent order ~~respecting~~ *regarding* custody, ~~enlargement~~ *release,* or surety ~~shall be made~~ *is issued*.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

(EFFECTIVE FEBRUARY 1, 1977, AS AMENDED TO DECEMBER 1, 2004.)

Rule

Rule 1. Scope ~~of Rules~~

(a) ~~Applicable to cases involving custody pursuant to a judgment of a state court~~ *Cases Involving a Petition under 28* U.S.C. *§ 2254*. These rules govern ~~the procedure~~ *a petition for a writ of habeas corpus filed* in ~~the~~ *a* United States district court~~s~~ ~~on applications~~ under 28 U.S.C. § 2254 *by*:

> **(1)** ~~by~~ a person in custody ~~pursuant to~~ *under* a *state-court* judgment ~~of a state court, for~~ *who seeks* a determination that ~~such~~ *the* custody ~~is in violation of the~~ *violates the* Constitution, laws, or treaties of the United States; and

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

(b) Other ~~situations~~ *Cases*. ~~In applications for~~ *The district court may apply any or all of these rules to a* habeas corpus *petition* ~~in cases~~ not covered by ~~subdivision (a), these rules may be applied at the discretion of the United States district court~~ *Rule 1(a)*.

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

Rule 2. *The* Petition

(a) ~~Applicants in present custody~~ *Current Custody; Naming the Respondent*. If the ~~applicant~~ *petitioner* is ~~presently~~ *currently* in custody ~~pursuant to the~~ *under a* ~~state~~ *state-court* 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~~ *, the petition must name as respondent the state officer who has custody*.

(b) ~~Applicants subject to future custody~~ *Future Custody; Naming the Respondents and Specifying the Judgment*. If the ~~applicant~~ *petitioner* is not ~~presently~~ *yet* in custody ~~pursuant to the state judgment against which he seeks relief~~ —but may be subject to ~~such custody in the~~ future *custody—under the state-court judgment being contested*, 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~~ *petition must name as respondents both* the officer ~~having present~~ *who has current* custody ~~of the applicant~~ and the attorney general of the state ~~in which~~ *where* the judgment ~~which he seeks to attack was entered shall each be named as respondents~~ *was entered. The petition must ask for relief from the state-court judgment being contested*.

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

~~*(1)* 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. It shall~~ specify all the grounds for relief ~~which are~~ available to the petitioner*;*

~~*(2)* and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form~~ *state* the facts supporting each ~~of the grounds~~ *ground;*

~~*(3)* thus specified. It shall also~~ state the relief requested*;*

~~*(4)* . The petition shall~~ be *printed,* typewritten*,* or legibly handwritten*;* and

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

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

(e) ~~Return of insufficient petition~~ *Separate Petitions for Judgments of Separate Courts*. ~~If a petition received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the petitioner, if a judge of the court so directs, together with a~~

~~statement of the reason for its return. The clerk shall retain a copy of the petition~~ *A petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of each court.*

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

Rule 3. Filing *the* Petition*; Inmate Filing*

(a) ~~Place of filing~~ *Where to file*; ~~*copies; filing fee*~~ *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~~ *An original and two copies of the petition must be filed with the clerk and must be accompanied by:*

(1) *the applicable* ~~be accompanied by the~~ filing fee*, or*

(2) ~~prescribed by law unless the petitioner applies for and is given leave to prosecute the petition~~ *a motion for leave to proceed* 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*, and* ~~. In all such cases the petition shall also be accompanied by~~ a certificate ~~of~~ *from* 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~~ *place of confinement showing the amount of money or securities that the petitioner has* 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 clerk must file* 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~~.

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

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

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

Rule 4. Preliminary ~~Consideration by Judge~~ *Review; Serving the Petition and Order*

~~The original petition shall be presented~~ *The clerk must* promptly *forward the petition* to a judge ~~of the district court in accordance with the procedure of the court for the assignment of its business~~ *under the court's assignment procedure, and the judge must promptly examine it.* ~~The petition shall be examined promptly by the judge to whom it is assigned.c;~~ If it plainly appears from the ~~face of the~~ petition and any *attached* 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~~ *must dismiss the petition and direct the clerk to notify the petitioner.* ~~Otherwise the~~ *If the petition is not dismissed, the* judge ~~shall~~ *must* order the respondent to file an answer ~~or other pleading within the period of time~~ *, motion, or other response within a* fixed ~~by the court~~ *time,* or to take ~~such~~ other action ~~as~~ the judge ~~deems appropriate~~ *may order.* In every case*, the clerk must serve* a copy of the petition and any order ~~shall be served by certified mail~~ on the respondent and *on* the attorney general *or other appropriate officer* of the state involved.

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

Rule 5. *The* Answer~~; Contents~~ and the Reply

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

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

(c) Contents: Transcripts. The answer ~~shall~~ *must also* indicate what transcripts (of pretrial, trial, sentencing, ~~and~~ *or* post-conviction proceedings) are available, when they can be furnished, and ~~also~~ what proceedings have been recorded ~~and~~ *but* not transcribed. ~~There shall be attached~~ *The respondent must attach* to the answer ~~such portions~~ *parts* of the transcript~~s as the answering party deems~~ *that the respondent considers* relevant. The ~~court on its own motion or upon request of the petitioner~~ *judge* may order that ~~further portions~~ *the respondent furnish other parts* of ~~the~~ existing transcripts ~~be furnished~~ or that ~~certain portions~~ *parts* of ~~the non-transcribed proceedings~~ *untranscribed recordings* be transcribed and furnished. If a transcript ~~is neither available nor procurable,~~ *cannot be obtained, the respondent may submit a* narrative summary of the evidence ~~may be submitted~~.

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

> ***(1)*** ~~If the~~ *any brief that the* petitioner ~~appealed from the judgment of conviction or from~~ *submitted in an appellate court contesting the conviction or sentence, or contesting* 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~~ *;*

(2) any brief that the prosecution submitted in an appellate court relating to the conviction or sentence; and

(3) the opinions and dispositive orders of the appellate court relating to the conviction or the sentence.

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

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

Rule 6. Discovery

(a) Leave of ~~court required~~ Court Required. A *judge may, for good cause, authorize a* party ~~shall be entitled to invoke the processes of~~ *to conduct* discovery ~~available~~ under the Federal Rules of Civil Procedure ~~if, and to~~ *and may limit* the extent ~~that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise~~ *of discovery*. If necessary for effective ~~utilization of~~ discovery ~~procedures, counsel shall be appointed by the judge~~ *, the judge must appoint an attorney* for a petitioner who qualifies ~~for the appointment of~~ *to have* counsel *appointed* under 18 U.S.C. § 3006A~~(g)~~.

(b) Request*ing Discovery*~~s for discovery~~. *A party requesting* ~~Requests for~~ discovery ~~shall be accompanied by a statement of the~~ *must provide reasons for the request. The request must also include any proposed* interrogatories ~~or~~ *and* requests for admission ~~and a list of the documents, if any, sought to be produced~~ *, and must specify any requested documents*.

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

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

Rule 7. ~~Expansion of~~ *Expanding* the Record

(a) ~~Direction for expansion~~ In General. 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~~ *the parties to expand the record by submitting additional materials relating to the petition. The judge may require that these materials be authenticated.*

(b) *Types of* Materials ~~to be added~~. ~~The expanded record may include, without limitation,~~ *The materials that may be required include* 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 *also* be submitted and considered as a part of the record.

(c) ~~Submission to~~ *Review by the* ~~opposing party~~ *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 judge must give* the party against whom ~~they~~ *the additional materials* 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).~~

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

Rule 8. Evidentiary Hearing

(a) ~~Determination by court~~ *Determining Whether to Hold a Hearing*. If the petition is not dismissed ~~at a previous stage in the proceeding~~ , the judge~~, after~~ *must review* the answer*, any* ~~and the~~ transcript*s* and record*s* of ~~state court~~ *state-court* proceedings ~~are filed, shall, upon a review of those proceedings and of the expanded record, if any,~~ *and any materials submitted under Rule 7 to* determine whether an evidentiary hearing is ~~required~~ *warranted*. ~~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~~ *Reference to a Magistrate Judge*.

~~(1) When designated to do so in accordance with~~ *A judge may, under* 28 U.S.C. § 636(b), *refer the petition to* a magistrate *judge to* ~~may~~ conduct hearings~~, including evidentiary hearings, on the petition, and submit to a judge of the court~~ *and to file* proposed findings of fact and recommendations for disposition.

~~(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.~~ *When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties.*

~~(3)~~ Within ~~ten~~ *10* days after being served ~~with a copy, any~~ *,* *a* party may ~~serve and~~ file ~~written~~ objections ~~to such proposed findings and recommendations~~ as provided by ~~rules of~~ *local* court *rule*.

~~(4) A~~ *The* judge ~~of the court shall make a de novo determination of those portions of the report or specified~~ *must determine* ***de novo*** *any* proposed finding~~s~~ or recommendation~~s~~ to which objection is made. ~~A~~ *The* judge ~~of the court~~ may accept, reject, or modify ~~in whole or in part~~ any *proposed* finding~~s~~ or recommendation~~s made by the magistrate~~.

(c) ~~Appointment of counsel; time for hearing~~ *Appointing Counsel; Time of Hearing*. If an evidentiary hearing is ~~required~~ *warranted,* the judge ~~shall~~ *must* appoint ~~counsel for~~ *an attorney to represent* a petitioner who qualifies ~~for the appointment of~~ *to have* counsel *appointed* under 18 U.S.C. § 3006A~~(g)~~. *The judge must conduct* ~~and~~ the hearing ~~shall be conducted~~ as *soon* ~~promptly~~ as practicable~~, having regard for the need of counsel for both parties for~~ *after giving the attorneys* adequate time ~~for investigation~~ *to investigate* and ~~preparation~~ *prepare*. 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~~ *proceeding*.

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

Rule 9. ~~Delayed or~~ *Second 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.~~

~~**(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 constituted an abuse of the writ.~~

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

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

Rule 10. Powers of *a* ~~Magistrates~~ *Magistrate Judge*

~~The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to~~ *A magistrate judge may perform the duties of a district judge under these rules, as authorized under* 28 U.S.C. § 636.

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

Rule 11. *Applicability of the* Federal Rules of Civil Procedure~~; Extent of Applicability~~

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

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

Rule 81. Applicability in General

(a) To What Proceedings Applicable.

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.

(As amended Dec. 28, 1939, eff. Apr. 3, 1941; Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 30, 1951, eff. Aug. 1, 1951; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 23, 2001, eff. Dec. 1, 2001; Apr. 29, 2002, eff. Dec. 1, 2002.)

Effective Dec. 1, 2007, this paragraph will be renumbered paragraph (4) and read as follows:

(4) Special Writs. These rules apply to proceedings for habeas corpus and for quo warranto to the extent that the practice in those proceedings:

(A) is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and

(B) has previously conformed to the practice in civil actions.

Proposed Regulations on CERTIFICATION PROCESS FOR STATE CAPITAL COUNSEL SYSTEMS

Sec.

§ 26.20 Purpose.

Sections 2261(b)(1) and 2265(a) of title 28 of the United States Code require the Attorney General to certify whether a State has a mechanism for providing legal representation to indigent prisoners in State postconviction proceedings in capital cases that satisfies the requirements of chapter 154 of title 28. If certification is granted, sections 2262, 2263, 2264, and 2266 of chapter 154 of the U.S. Code apply in relation to Federal habeas corpus review of capital cases from the State. Subsection (b) of 28 U.S.C. 2265 directs the Attorney General to promulgate regulations to implement the certification procedure under subsection (a) of that section.

§ 26.21 Definitions.

For purposes of this part, the term—

Appropriate State official means the State Attorney General, except that, in a State in which the State Attorney General does not have responsibility for Federal habeas corpus litigation, it means the Chief Executive thereof.

State postconviction proceedings means collateral proceedings following direct State review or expiration of the time for seeking direct State review, except that, in a State with a unitary review system under which direct review and collateral review take place concurrently, the term includes the collateral review aspect of the unitary review process.

§ 26.22 Requirements.

A State meets the requirements for certification under 28 U.S.C. 2261 and 2265 if the Attorney General determines each of the following to be satisfied:

(a) The State has established a mechanism for the appointment of counsel for indigent prisoners under sentence of death in State postconviction proceedings. As provided in 28 U.S.C. 2261(c) and (d), the mechanism must offer to all such prisoners postconviction counsel, who may not be counsel who previously represented the prisoner at trial unless the prisoner and counsel expressly request continued representation, and the mechanism must provide for the entry of an order by a court of record—

(1) Appointing one or more attorneys as counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) Finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) Denying the appointment of counsel, upon a finding that the prisoner is not indigent.

Example 1. A State provides that attorneys in a public defender's office are to be appointed to represent indigent capital defendants in State postconviction proceedings in capital cases. The counsel appointment mechanism otherwise satisfies the requirements of 28 U.S.C. 2261(c) and (d). Such a mechanism would satisfy the chapter 154 requirement relating to appointment of counsel.

Example 2. A State provides that in any capital case in which a defendant is found to be indigent, the court shall appoint counsel for State postconviction proceedings from a list of attorneys available to represent defendants in a manner consistent with 28 U.S.C. 2261(c) and (d). Such a mechanism would satisfy the chapter 154 requirement relating to appointment of counsel.

Example 3. State law provides that local jurisdictions are to determine whether counsel is appointed for indigents in State postconviction proceedings in capital cases and not all jurisdictions provide for the appointment of such counsel. This mechanism would not satisfy the chapter 154 requirement relating to appointment of counsel.

(b) The State has established a mechanism for compensation of appointed counsel in State postconviction proceedings.

Example 1. A State sets hourly rates and allowances for compensation of capital counsel, with judicial discretion to authorize additional compensation if necessary in particular cases. For example, State law may provide that capital counsel in State postconviction proceedings will be paid an hourly rate not to exceed $100 for up to 200 hours of work, and that these caps can be judicially waived if compensation would otherwise be unreasonable. Such a system would meet this requirement, as the State has established a mechanism to compensate counsel in State postconviction proceedings.

Example 2. A State provides that attorneys in a public defender's office are to be appointed to serve as counsel for indigent defendants in capital postconviction proceedings. The attorney's compensation is his or her regular salary provided by the public defender's office. Such a system would meet the requirement of establishing a mechanism to compensate counsel in State postconviction proceedings.

Example 3. A State appoints attorneys who serve on a volunteer basis as counsel for indigent defendants in all capital postconviction proceedings. There is no provision for compensation of appointed counsel by the State. Such a system would not meet the requirement regarding compensation of counsel.

(c) The State has established a mechanism for the payment of reasonable litigation expenses.

Example 1. A State may simply authorize the court to approve payment of reasonable litigation expenses. For example, State law may provide that the court shall order reimbursement of counsel for expenses if the expenses are

reasonably necessary and reasonably incurred. Such a system would meet the requirement of establishing a mechanism for payment of reasonable litigation expenses.

Example 2. A State authorizes reimbursement of counsel for litigation expenses up to a set cap, but with allowance for judicial authorization to reimburse expenses above that level if necessary. This system would parallel the approach in postconviction proceedings in Federal capital cases and in Federal habeas corpus review of State capital cases under 18 U.S.C. 3599(a)(2), (f), (g)(2), which sets a presumptive cap of $7,500 but provides a procedure for judicial authorization of greater amounts. Such a system would meet the requirement of establishing a mechanism for payment of reasonable litigation expenses as required for certification under chapter 154.

Example 3. State law authorizes reimbursement of counsel for litigation expenses in capital postconviction proceedings up to $1000. There is no authorization for payment of litigation expenses above that set cap, even if the expenses are determined by the court to be reasonably necessary and reasonably incurred. This mechanism would not satisfy the chapter 154 requirement regarding payment of reasonable litigation expenses.

(d) The State provides competency standards for the appointment of counsel representing indigent prisoners in capital cases in State postconviction proceedings.

Example 1. A State requires that postconviction counsel must have been a member of the State bar for at least five years and have at least three years of felony litigation experience. This standard is similar to that set by Federal law for appointed counsel for indigent defendants in postconviction proceedings in Federal capital cases, and in Federal habeas corpus review of State capital cases, under 18 U.S.C. 3599(a)(2), (c). Because this State has adopted standards of competency, it meets this requirement.

Example 2. A State appoints counsel for indigent capital defendants in postconviction proceedings from a public defender's office. The appointed defender must be an attorney

admitted to practice law in the State and must possess demonstrated experience in the litigation of capital cases. This State would meet the requirement of having established standards of competency for postconviction capital counsel.

Example 3. A State law requires some combination of training and litigation experience. For example, State law might provide that in order to represent an indigent defendant in State postconviction proceedings in a capital case an attorney must—(1) Have attended at least twelve hours of training or educational programs on postconviction criminal litigation and the defense of capital cases; (2) have substantial felony trial experience; and (3) have participated as counsel or co-counsel in at least five appeals or postconviction review proceedings relating to violent felony convictions. This State would meet the requirement of having established standards of competency for postconviction capital counsel.

Example 4. State law allows any attorney licensed by the State bar to practice law to represent indigent capital defendants in postconviction proceedings. No effort is made to set further standards or guidelines for such representation. Such a mechanism would not meet the requirement of having established standards of competency for postconviction capital counsel.

§ 26.23 Certification process.

(a) An appropriate State official may request that the Attorney General determine whether the State meets the requirements for certification under § 26.22.

(b) The request shall include:

(1) An attestation by the submitting State official that he or she is the ''appropriate State official'' as defined in § 26.21; and

(2) An affirmation by the State that it has provided notice of its request for certification to the chief justice of the State's highest court.

(c) Upon receipt of a State's request for certification, the Attorney General will publish a notice in the **Federal Register**—

(1) Indicating that the State has requested certification;

(2) Listing any statutes, regulations, rules, policies, and other authorities identified by the State in support of the request; and

(3) Soliciting public comment on the request.

(d) The State's request will be reviewed by the Attorney General, who may, at any time, request supplementary information from the State or advise the State of any deficiencies that would need to be remedied in order to obtain certification. The review will include consideration of timely public comments received in response to the **Federal Register** notice under paragraph (c) of this section, and the certification will be published in the **Federal Register**, if certification is granted.

(e) Upon certification by the Attorney General that a State meets the requirements of § 26.22, such certification is final and will not be reopened. Subsequent changes in a State's mechanism for providing legal representation to indigent prisoners in State postconviction proceedings in capital cases do not affect the validity of a prior certification or the applicability of chapter 154 in any case in which a mechanism certified by the Attorney General existed during State postconviction proceedings in the case. If a State with a certified mechanism amends governing State law to change its mechanism in a manner that may affect satisfaction of the requirements of § 26.22, the certification of the State's mechanism prior to the change does not apply to the changed mechanism, but the State may request a new certification by the Attorney General that the changed mechanism satisfies the requirements of § 26.22.

(As published in 72 Fed. Reg. 31217-31220, June 6, 2007.)