PLEADING STANDARDS FOR FEDERAL HABEAS CORPUS PETITIONS

The writ of habeas corpus[1] is a procedural device for subjecting executive, judicial, or private restraints on liberty to judicial scrutiny.[2] To be precise, the writ itself only tells a custodian, "You have a person in your possession, produce him before the court and show why you hold him in custody in restraint of his liberty."[3] Therefore, when a federal court grants the writ of habeas corpus, this does not mean that it is granting the relief requested by the petitioner, but only that it will consider granting the appropriate form of relief.

The history of the writ is closely associated with the growth of fundamental rights of personal liberty, for the root principle of the writ is that in a civilized society government must always be accountable to the judiciary for a person's imprisonment.[4] If the imprisonment cannot be shown to conform with the constitutional requirements of due process, such as when the evidence used against the petitioner was obtained by an illegal search and seizure, the individual is entitled to his immediate release.[5] In habeas corpus proceedings, the denial of a fair hearing by the trial court is not established by proving merely that the decision was wrong.[6] In other words, the petitioner's guilt or innocence is not a vital consideration in determining whether habeas corpus relief should be available.[7]

The writ is available by statute in only five different situations. It cannot extend to a prisoner unless he is either in the custody of the federal government,[8] he is in the custody of a state for some act done pursuant to federal authority,[9] he is in custody in violation of federal law,[10] he is a foreign citizen in custody for an act done under color of authority from any

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[1] "Habeas corpus" is the name given to a variety of writs having the purpose of bringing a party before a court or judge. In common usage, wherever the words "habeas corpus" stand alone, they are understood to mean the "great writ" of habeas corpus *ad subjudiciendum*. For a concise discussion of the history of the writ, *see* Longsdorf, *Habeas Corpus A Protean Writ and Remedy*, 8 F.R.D. 179 (1948).

[2] Peyton v. Rowe, 391 U.S. 54, 58 (1968).

[3] Brooks v. Texas, 256 F. Supp. 807, 808 (N.D. Tex. 1966).

[4] Fay v. Noia, 372 U.S. 391, 401-02 (1963).

[5] *Id.*; Heikkila v. Barber, 345 U.S. 229, 236 (1953).

[6] Tisi v. Tod, 264 U.S. 131, 133 (1924).

[7] For a discussion of why the law should be otherwise, *see* Kaufman v. United States, 394 U.S. 217, 235-36 (1969) (Black, J., dissenting); Friendly, *Is Innocence Irrelevant?*, 38 U. CHI. L. REV. 142 (1970).

[8] 28 U.S.C. § 2241(c)(1) (1970). Because of § 2255 of the Judicial Code, this provision is of little importance except in non-criminal cases. *See, e.g.*, Rowoldt v. Perfitto, 355 U.S. 115 (1957).

[9] 28 U.S.C. § 2241(c)(2) (1970). This condition is of small practical importance because agents of the federal government have the right under §§ 1442 and 1442a of the Judicial Code to remove the state prosecutions.

[10] 28 U.S.C. § 2241(c)(3) (1970). As for people in custody pursuant to a judgment of a state court, § 2254(a) of the Judicial Code provides that a federal judge shall entertain their applications for the writ of habeas corpus only on this ground.

foreign state and international law is involved,[11] or it is necessary to bring him into court to testify for trial.[12] Consequently, the federal court's jurisdiction to pass on an application for the writ depends upon the petitioner somehow being "in custody." This is required not only by the repeated references in the statute, but also by the history of the writ.[13]

Habeas corpus has been characterized by many as a collateral attack on a judgment of conviction,[14] but the use of the writ has not been solely restricted to situations in which the petitioner is in jail. The Supreme Court has recognized that "besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English speaking world to support the issuance of habeas corpus."[15] Besides being applicable to those in confinement under civil and criminal process, the writ has been held applicable to "[w]ives restrained by husbands, children withheld from the proper parent or guardian, persons held under arbitrary custody by private individuals, as in a madhouse, as well as those under military control . . . ."[16] A prisoner serving consecutive sentences is regarded as being "in custody" under any of them and may attack the validity of the sentence he will serve in the future as well as the one he is currently serving.[17] Aliens seeking entry into the United States[18] and state prisoners placed on parole under the custody and control of parole boards[19] are proper parties to seek habeas corpus relief. The writ even applies to restraints placed on people in lawful custody. A prisoner is entitled to habeas corpus relief when "he is deprived of some right to which he is lawfully entitled even in his confinement, the deprivation of which serves to make his imprisonment more burdensome than the law allows or curtails his liberty to a greater extent than the law permits."[20] As a consequence, habeas corpus can inquire into the lawfulness of an added punishment even though the inquiry will not result in the petitioner's unconditional release from prison. The writ's mandate with respect to the relief that may be granted is quite broad due to the language of the appropriate statutes that provide in one place that the petitioned courts shall "dispose of the matter as law and justice re-

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[11] 28 U.S.C. § 2241(c)(4) (1970).

[12] 28 U.S.C. § 2241(c)(5) (1970).

[13] Carafas v. LaVallee, 391 U.S. 234, 238 (1968).

[14] Hicks v. Michigan, 281 F.2d 645 (6th Cir. 1960).

[15] Jones v. Cunningham, 371 U.S. 236, 240 (1963).

[16] Wales v. Whitney, 114 U.S. 564, 571 (1885).

[17] Peyton v. Rowe, 391 U.S. 54 (1968).

[18] Brownell v. Tom We Shung, 352 U.S. 180 (1956).

[19] Jones v. Cunningham, 371 U.S. 236 (1963).

[20] Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945).

quire"[21] and in another that the courts can order "release from custody or other remedy."[22]

In recent years, state and federal prisoners have been urging their various types of petitions upon federal district courts in mounting quantities. There were nearly 16,000 such filings in 1970, up 635 percent over 1960, while other civil filings increased only 47 percent during the same period.[23] From 1962 to 1970, habeas corpus petitions from state prisoners increased by at least 1000 per year, reaching 9,063 in 1970. In 1971, however, they dropped to 8,372, a 7.6 percent decrease. This decrease may be based on the fact that in 96 percent of the prisoner cases, the relief prayed for has not been granted. Thus there may be a spreading acceptance by prisoners of the futility of pressing unfounded or trivial claims.[24]

Though the burden of habeas corpus petitions represents only a small fraction of the total number of civil and criminal actions commenced each year in federal district courts,[25] it would be impossible to justify the expenditure of judicial time and energy to grant the writ and hold a hearing as a matter of course in every case. The lives, liberty, and property of all the other federal litigants simply cannot wait upon the hearing of petitions which are obviously lacking in merit. On the other hand, petitions for habeas corpus ought not to be viewed with too jaundiced an eye and held to artificial pleading standards designed only to frustrate petitioners. Underlying many summary dismissals of petitions there seems to be a judicial assumption that all convicted prisoners are in fact guilty and that prisoner allegations should be automatically suspect. One eminent jurist has recently lamented that "[a]fter trial, conviction, sentence, appeal, affirmance, and denial of certiorari by the Supreme Court, in proceedings where the defendant had the assistance of counsel at every step, the criminal process . . . has not reached the end, or even the beginning of the end, but only the end of the beginning."[26] Since the habeas corpus process does in many respects challenge the efficacy of the entire judicial process, it is quite understandable why courts who are drowning in new cases may be inclined to resist attacks on apparently complete adjudications by, for example, requiring that applications for the writ meet strict and shadowy standards of pleading.

It is to this last mentioned manifestation of judicial hostility to the writ

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[21] 28 U.S.C. § 2243 (1970).

[22] 28 U.S.C. § 2244(b) (1970).

[23] 1970 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 118 [hereinafter cited as ANNUAL REPORT].

[24] 1971 ANNUAL REPORT 132.

[25] There were 134,686 civil and criminal filings in federal district courts during fiscal year 1971, up seven percent from 1970. 1971 ANNUAL REPORT 114.

[26] Friendly, *Is Innocence Irrelevant?*, 38 U. CHI. L. REV. 142 (1970). Circuit Judge Friendly's thesis was that convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence.

that this note is directed. In order to discuss the standards by which federal courts do and should pass upon the flood of habeas corpus applications, the text has been organized in the following manner: Section I deals with the relation of the habeas corpus procedure to the Federal Rules of Civil Procedure; section II attempts to briefly list the numerous requirements of a complete petition; and section III discusses the way courts are expected to act upon the petitions presented to them.

I. HABEAS CORPUS AND THE FEDERAL RULES OF CIVIL PROCEDURE

Because habeas corpus is brought to assert the civil right of liberty, courts have commonly characterized it as a civil proceeding.[27] As a consequence, it has not been held that there is a constitutional obligation on the courts to appoint counsel for prisoners who indicate that they wish post conviction relief,[28] and in most federal courts it is the practice to appoint counsel only after a petition has passed initial judicial evaluation and the court has determined that issues are presented which call for an evidentiary hearing.[29] Likewise, during the habeas corpus hearing, the requisite standard of proof that the petitioner must meet is the civil "preponderance of the evidence."[30] Recently, however, it has been recognized that the civil label is gross and inexact, for the habeas corpus proceeding is in reality unique and has conformed in the federal courts with civil practice only in a general sense.[31]

Rule 1 of the Federal Rules of Civil Procedure provides that the rules govern the procedure in district courts in all suits of a civil nature "with the exceptions stated in Rule 81." Rule 81(a)(2) provides that the rules are applicable to habeas corpus proceedings "to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." Prior to 1968, Rule 81(a)(2) provided, in relevant part, that the Federal Rules were inapplicable to habeas corpus "except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity." It is generally understood that the present wording of the rule, which became effective July 1, 1968, was not intended to change matters as they stood before the amendment. The total amendment merely eliminated refer-

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[27] *See, e.g.*, Townsend v. Sain, 372 U.S. 293, 312 (1963).

[28] *See, e.g.*, Eskridge v. Rhay, 345 F.2d 778 (9th Cir. 1965), *cert. denied*, 382 U.S. 996 (1966); Barker v. Ohio, 330 F.2d 594 (6th Cir. 1964).

[29] Johnson v. Avery, 393 U.S. 483, 487 (1969).

[30] Walker v. Johnston, 312 U.S. 275, 286 (1941).

[31] Harris v. Nelson, 394 U.S. 286, 293-94 (1969).

ences to appellate procedure made inappropriate by the adoption of the Federal Rules of Appellate Procedure.[32]

The meaning of Rule 81(a)(2) is somewhat cryptic, and courts have applied the individual rules to habeas corpus proceedings by paying closer attention to policy considerations than to the language of the rule.[33] For example, one district court has held that the habeas corpus pleadings should be limited to those specified in Rule 7(a).[34] Another has held that the Rule 8(a) requirement that a complaint contain "a short plain statement of the claim showing that the pleader is entitled to relief" was applicable to habeas corpus and, consequently, dismissed a 2000 page petition for being "prolix and redundant."[35] The Supreme Court has maintained that the concern of the rule's draftsmen was to provide for the continuing applicability of the Federal Rules to those areas of practice in habeas corpus in which it had theretofore utilized the modes of civil practice. Otherwise, except by appropriate application by analogy, habeas corpus was considered outside the scope of the rules. What evidence there was with respect to the intent of the draftsmen indicated to the Supreme Court "nothing more than a general and nonspecific understanding that the rules would have very limited application to habeas corpus proceedings."[36]

The Federal Rules have been interpreted so that the claimant is not required to set out in great detail the facts upon which he bases his claim.[37] All that is required in a complaint is a short, plain statement that will give the other party fair notice of what the claim is and the grounds upon which it rests. While it would be inaccurate to characterize this as mere "notice" pleading, it is clear that the Federal Rules have rejected the approach that one misstep in the pleadings may be decisive to the outcome. Habeas corpus pleading, on the other hand, is generally considered to require "some particularity of pleading beyond that normally necessary in other civil cases . . . ."[38] Whatever the outcome of the debate over whether the Federal Rules sanction mere notice in the petition or complaint, it is clear beyond doubt that the habeas corpus petition may not be in the form of bare notice pleading.[39] This apparent departure from the spirit of the Federal Rules has been justified on the ground that, "Habeas corpus is a special proceeding to right wrongs, not a routine procedure to search for them,

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[32] *Id.* at 293 n.3.

[33] 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1021 (1969).

[34] Pappas v. Buchkow, 156 F. Supp. 492 (W.D. Mich. 1957).

[35] Passic v. State, 98 F. Supp. 1015, 1016 (E.D. Mich. 1951).

[36] Harris v. Nelson, 394 U.S. 286, 294-95 (1969).

[37] Conley v. Gibson, 355 U.S. 41 (1957).

[38] United States *ex rel.* Goldsby v. Harpole, 249 F.2d 417, 419-20 (5th Cir. 1957).

[39] United States *ex rel.* Bagley v. La Vallee, 209 F. Supp. 529, 530 (N.D.N.Y. 1962), *aff'd*, 332 F.2d 890 (2d Cir. 1964).

nor a means of requiring the federal courts to review, as a matter of course, state proceedings."[40]

II. Formal Pleading Requirements

The formal prerequisites of a complete application for the writ are interspersed throughout sections 2241 to 2255 of the Judicial Code of 1948 and judicial opinions. What follows is an attempt to briefly list all of the elements of a habeas corpus application to which a federal court could raise no objection as to completeness.

A. *Writing, Signature, and Verification*

An application must "be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf."[41] While it is recognized that a person has the right to petition for the writ in order to secure the release of another, the right exists only when the application sets forth some reason or explanation satisfactory to the court showing why the detained person does not sign and verify the petition himself and telling who the next friend applicant is. It was not intended that the writ should be availed of, as a matter of course, by intruders and uninvited meddlers.[42] The practice of a next friend applying for the writ is, nevertheless, fully accepted in cases where it may not be possible or feasible for the detained person to sign and verify his own application. Examples of such cases would be when the detained person does not understand English or is mentally or legally incompetent.

The requirement of verification means that an affidavit must be appended to the end of the application to the effect that the person making it knows, or to the extent stated is informed and believes, that the matters contained in the application are true.[43] At least one district court has held that it could consider the application even though it was not so verified.[44]

B. *Addressed to the Proper Court*

Federal district courts have only such jurisdiction as Congress, by statute, has conferred upon them and this is true with regard to jurisdiction to grant petitions for writs of habeas corpus.[45] Congress has authorized that writs of habeas corpus "may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respec-

[40] Bernier v. Moore, 441 F.2d 395, 396 (1st Cir. 1971).

[41] 28 U.S.C. § 2242 (1970).

[42] Gusman v. Marrero, 180 U.S. 81 (1901).

[43] D. Louisell & G. Hazard, Pleading and Procedure 119 (2d ed. 1968).

[44] Lewis v. Connett, 291 F. Supp. 583, 585 (W.D. Ark. 1968).

[45] Hancock v. Nelson, 363 F.2d 249 (1st Cir. 1966).

tive jurisdictions."[46] However, Rule 22 of the Federal Rules of Appellate Procedure requires that an application for the writ be made to the appropriate district court, and if made to a circuit judge the application will ordinarily be transferred to the appropriate district court. Petitions addressed to circuit judges are discouraged for a circuit judge who unnecessarily entertains applications thereby disqualifies himself to hear such matters on appeal and to that extent limits his usefulness as an appellate judge.[47] Where there are special circumstances making immediate action by a circuit court or the Supreme Court necessary or expedient, the application must state what these special circumstances are for not making application to the district court of the district in which the applicant is held.[48] When made in behalf of a person in custody pursuant to a state court judgment of a state which contains more than one federal judicial district, the application may be made to either the district court in the district in which the applicant is held or in the district in which he was tried.[49]

C. *Allegations Pertaining to Custody*

Because the petitioned court's jurisdiction depends on the fact of the petitioner's custody, the petition must "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."[50] This requirement can be satisfied, for example, by a statement that the petitioner is in prison, the name of the warden, and a description of the crime and sentence. The Supreme Court has held "that if the detention is claimed to be unlawful by reason of the invalidity of the process or proceedings under which the party is held in custody, copies of such process or proceedings must be annexed to or the essential parts thereof set out in the petition . . . ."[51] Thus, in the case of a prisoner attacking the sufficiency of the indictment, sentence, commitment and verdict in his prosecution, he should attach copies of each or the essential parts of each record. Otherwise, the petition may be deemed insufficient. If the petitioner does not know by what authority he is being detained, he should state this fact[52] and if he is unable to append the record as required he should likewise explain the omission.[53]

The cost of providing these records would act as a screen for prospective applicants except for provisions in the Judicial Code which make al-

[46] 28 U.S.C. § 2241(a) (1970).

[47] H.R. REP. No. 308, 80th Cong., 1st Sess. A178 (1947).

[48] 28 U.S.C. § 2242 (1970).

[49] 28 U.S.C. § 2241(d) (1970).

[50] 28 U.S.C. § 2242 (1970).

[51] Craemer v. Washington, 168 U.S. 114, 128-29 (1897).

[52] Cuddy's case, 131 U.S. 280 (1889).

[53] Hom Moon Ong v. Nagle, 32 F.2d 470, 472 (9th Cir. 1929).

lowance for indigents. If a federal prisoner fails to attach copies of the requisite records to his application, the respondent custodian must attach such materials to his return to the writ or to his answer to show cause.[54] If an applicant has been permitted to prosecute his application in forma pauperis,[55] then the court clerk, on the order of the judge before whom the application is pending, will furnish the petitioner, without cost, copies of such documents as the judge thinks are required for his application.[56] When a state applicant challenges the sufficiency of the evidence adduced in his state court proceeding, the state can be required to produce the relevant portion of the record on direction from the petitioned federal court.[57]

D. *Allegations Pertaining to the Illegality of the Restraint*

The application must allege that the petitioner is unlawfully restrained of his liberty and show precisely the alleged illegality of restraint by stating the pertinent facts in such a manner as to make possible an intelligent judgment by the court upon the question.[58] Unless the allegation is very simple, such as denial of the right to counsel, the petition should consist of direct averments of "ultimate facts," as distinguished from "conclusions of law."[59] Neither the petitioner's "naked assertion, without any background factual substantiation whatsoever,"[60] nor his bare allegation of confinement[61] afford the court an adequate basis to order a hearing. The mere assertion that the petitioner had ineffective counsel, for example,

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[54] 28 U.S.C. § 2249 (1970).

[55] 28 U.S.C. § 1915 (1970).

[56] 28 U.S.C. § 2250 (1970).

[57] 28 U.S.C. § 2254(e) (1970).

[58] Whitten v. Tomlinson, 160 U.S. 231, 242 (1895).

[59] Craemer v. Washington, 168 U.S. 124 (1897). At common law, the theory developed that the purpose of pleading was to isolate and formulate the issues and, as a consequence, the rules of pleading became limited and rigid to an infamously absurd degree. After 1848, the Field Code began to gain acceptance among the states as a step in the direction of flexibility, but the courts, by strict enforcement, managed to hamper the reform movement by requiring among other things that the pleaders state "facts" rather than "conclusions." When the Federal Rules of Civil Procedure were being drafted, the drafters concluded that such distinctions were useless in light of the logical impossibility of making distinctions between such concepts as "ultimate facts," evidence, and "conclusions." Consequently, the Federal Rules only require that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief" and courts are required to construe pleadings so "as to do substantial justice." *See* FED. R. CIV. P. 8. As previously shown, *see* text accompanying notes 27 through 40 *supra*, the Federal Rules of Civil Procedure do not generally apply to habeas corpus pleading. This, no doubt, accounts for the continued applicability of some of the old code pleading concepts. On this whole subject generally, *see, e.g.*, Weinstein and Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518 (1957); Cook, *"Facts" and "Statements of Fact,"* U. CHI. L. REV. 233 (1937). Though the cite to *Craemer* dates back to before the adoption of the Federal Rules, modern decisions tend to employ similar old-fashioned language. *See, e.g.*, Ward v. Page, 424 F.2d 491, 493 (10th Cir. 1970); Gray v. Wingo, 391 F.2d 268, 269 (6th Cir. 1957).

[60] Midgett v. Warden, 329 F.2d 185, 187 (4th Cir. 1964).

[61] Murray v. Radauskas, 229 F. Supp. 561, 562 (D. Md. 1964).

would not suffice. If he knows that his counsel is guilty of some misconduct amounting to the denial of petitioner's constitutional rights, he must inform the court of the factual basis for this conclusion. If he fails to do this, "then his recitation of standard claims and stock phrases will not be regarded an adequate claim for habeas corpus relief."[62] Likewise, a general allegation that the petitioner is detained in violation of the federal constitution or laws is insufficient, for this is regarded as a mere conclusion of law.[63]

E. *Allegations Pertaining to Exhaustion of Remedies*

It is commonly stated that the writ of habeas corpus cannot be made a substitute for an appeal or a writ of error.[64] This requirement is codified in section 2254 of the Judicial Code which provides that a writ shall not be granted unless it appears that the petitioner has either exhausted available state remedies, there is no available state corrective process, or such process is ineffective to protect the petitioner's rights. This requirement is an accommodation of the federal system designed to give the state an initial opportunity to pass upon and correct alleged violations of its prisoner's federal rights.[65] Petitioners are, consequently, not required to file repetitious applications in the state courts[66] and the mere possibility of success in additional proceedings does not bar federal relief.[67] The substance of the federal habeas corpus claim must in the first instance be fairly presented to the state courts and if those courts have not had fair opportunity to consider and act upon the petitioner's claim, he has not exhausted his state remedies.[68] The state remedies are exhausted when the constitutional question has been presented once to the state courts.[69] Prior to 1963, the petitioner had to also appeal or make application to the Supreme Court for a writ of certiorari to review the state decision, but this requirement was found to be unjustifiable.[70] A judgment by the Supreme Court on an appeal or certiorari, however, shall be conclusive as to all issues of fact or law actually adjudicated by the Court.[71]

Consequently, the habeas corpus application should state precisely what remedies were pursued in the state courts and should give citations to any published opinions involving the case. If state remedies are not ex-

[62] Bernier v. Moore, 441 F.2d 395, 396 (1st Cir. 1971).
[63] Kohl v. Lehlback, 160 U.S. 293 (1895).
[64] Larson v. United States, 275 F.2d 673 (5th Cir.) *cert. denied*, 363 U.S. 849 (1960).
[65] Fay v. Noia, 372 U.S. 391, 438 (1963).
[66] Brown v. Allen, 344 U.S. 443, 449 n.3 (1953).
[67] Roberts v. LaVallee, 389 U.S. 40, 42-43 (1967).
[68] Picard v. Conner, 404 U.S. 270 (1971).
[69] Brown v. Allen, 344 U.S. 443 (1953).
[70] Fay v. Noia, 372 U.S. 391 (1963).
[71] 28 U.S.C. § 2244(c) (1970).

hausted, the petitioner must set forth in detail the special reasons which would justify the federal court's intervention to protect his constitutional rights.[72] If the issues the petitioner is raising have already been decided once by the Supreme Court, he must plead and the district court must find the existence of a controlling fact not presented to the Court and which could not have been presented by the exercise of reasonable diligence.[73]

The federal courts have the power to grant relief despite the petitioner's failure to have pursued a state remedy not available to him at the time he applies for habeas corpus.[74] The doctrine that a state procedural default is an adequate and independent state law ground barring direct review in the Supreme Court does not limit the power of the district court to grant a petitioner relief despite his failure to make a timely appeal of his conviction, provided that the decision not to appeal was not a deliberate bypassing of the state court system.[75]

Just as state prisoners have to exhaust their state remedies before habeas corpus becomes available to them, federal prisoners should be aware that habeas corpus is not a substitute for a motion pursuant to section 2255 of the Judicial Code. This statute provides that a prisoner in custody under sentence of a federal court who claims the right to be released because his sentence either violates federal law, the court lacked jurisdiction, the sentence was excessive, or is otherwise subject to collateral attack, may move the sentencing court to vacate, set aside, or correct the sentence. The purpose of section 2255 is to require a federal prisoner to exhaust his remedies in the courts of the district and circuit in which he was convicted and sentenced, and to apply to the Supreme Court, on certiorari from a denial of such remedies, before seeking release on habeas corpus.[76] An application for a writ of habeas corpus in behalf of one authorized to use the section 2255 procedure shall not be entertained unless it appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.[77] As a general proposition, the instances in which habeas corpus is available to a federal prisoner are exceptional and usually confined to situations where there is peculiar and pressing need for it or where the

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[72] *See* United States v. Cavell, 151 F. Supp. 675, 677 (W.D. Pa. 1957); R. SOKOL, FEDERAL HABEAS CORPUS § 9 (1969).

[73] 28 U.S.C. § 2244(c) (1970).

[74] Fay v. Noia, 372 U.S. 391 (1963).

[75] *Id.*

[76] Weber v. Steele, 185 F.2d 799, 800 (8th Cir. 1950). In 1970, about 1,600 federal prisoners filed petitions for the writ of habeas corpus in federal district courts. 1970 ANNUAL REPORT 121. Prisoners in custody under sentence of a federal court, rather than using habeas corpus, normally use a motion to vacate sentence pursuant to § 2255 of the Judicial Code. The reason for this is discussed in the above text. Section 2255 attempts to restate the procedure in the nature of the ancient writ of error *coram nobis* and provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus. H.R. REP. NO. 308. 80th Cong., 1st Sess. A180 (1947).

[77] 28 U.S.C. § 2255 (1970).

process or judgment under which the prisoner is held is wholly void.[78] When pleading that the section 2255 remedy is inadequate or ineffective, the applicant must also specifically relate the inadequacy or ineffectiveness to a procedural deficiency.[79]

The unavailability of the writ of habeas corpus to federal prisoners is amplified by the rule that the mere fact that relief under section 2255 has been denied on the merits on a prior occasion does not render the motion remedy inadequate or ineffective so as to allow resort to habeas corpus.[80] Similarly, distance from the sentencing court does not render the remedy inadequate or ineffective[81] and the motion for relief may be made at any time.

F. *Allegations Pertaining to Prior Applications*

Though res judicata does not apply to habeas corpus cases,[82] district and circuit judges are not required to entertain an application if the legality of the petitioner's detention has already been determined by a federal court on a prior habeas corpus application and the present application presents no new ground for inquiry.[83] An applicant who has had a prior petition dismissed on its merits needs to allege a factual ground for release that was not adjudicated on the hearing of the earlier application and needs to plead sufficient facts to assure the court that he did not deliberately withhold the newly asserted ground in the earlier application.[84] The rationale for this is that where there have been repeated petitions, the onus may properly be cast on the applicant of satisfying the court that an abusive use is not being made of the writ. The statute setting forth this requirement[85] is designed to eliminate repetitive assertions of identical claims and drawing out of litigation by deliberate presentation of claims in bits and pieces.[86] However, since the primary purpose of the habeas corpus proceeding is to insure that people are not unjustly imprisoned, if for some justifiable reason the petitioner was previously unable to assert his rights or was unaware of the significance of relevant facts, then it is neither necessary nor reasonable to deny him an opportunity of obtaining judicial relief.[87] It should be enough that the petitioner presents an allegation and supporting facts which, if proved, would entitle him to relief. It is then up

78 Gotto v. Lane, 265 U.S. 393, 401-02 (1924).
79 Cain v. Markley, 347 F.2d 408, 410 (7th Cir. 1965).
80 Burchfield v. United States, 296 F.2d 120 (5th Cir. 1961).
81 Machibroda v. United States, 368 U.S. 487 (1962).
82 Sanders v. United States, 373 U.S. 1, 8 (1963).
83 28 U.S.C. § 2244(a) (1970).
84 28 U.S.C. § 2244(b) (1970).
85 28 U.S.C. § 2244 (1970).
86 Johnson v. Copinger, 420 F.2d 395 (4th Cir. 1969).
87 Price v. Johnston, 334 U.S. 266 (1948).

to the government in its return to raise the allegation that the petitioner has abused the writ. Once this has been alleged, then the petitioner must answer the allegation and if his answer is inadequate the court can dismiss the petition. If there is substantial conflict, a hearing may be necessary.[88]

G. *Compliance with Local Rules*

Finally, relying on section 2071 of the Judicial Code[89] and Rule 83 of the Federal Rules of Civil Procedure,[90] federal district courts have been adopting local rules setting forth additional requirements of a petition which must be carefully checked by a prospective applicant. One of the most common of these rules is the requirement that applications be submitted on court-provided forms. In cases where petitioners insist on mailing in their handwritten applications despite the local rules requiring use of a specified form, the court can dismiss the petition without a hearing.[91] This development has been defended on the ground that the volume of petitions does not permit a "search for merit in every layman's narrative of grievance prepared in the traditional prison style."[92] While there is much substance to the argument that a judge's time must be efficiently used, unless erring petitioners are immediately provided with the correct form and forms are easy to understand and are easily available to all prospective applicants, forced compliance with such a rule merely becomes an expedient method of frustrating a disfavored remedy.

III. Acting on the Petition

An application for the writ "usurps the attention and displaces the calendar of the judge or justice who entertains it and receives prompt action from him within the four corners of the application."[93] Habeas corpus can, therefore, be described as an "extraordinary, summary and emergency remedy"[94] even though it is also a remedy available to a petitioner irrespective of the length of time that has elapsed since his trial.[95]

When a petition is filed in a district court, that court is required to

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[88] *Id. Price* was decided shortly before the enactment of § 2244 of the Judicial Code, but this section was not intended to change the law as it had judicially evolved. Sanders v. United States, 373 U.S. 1, 11 (1963).

[89] This provides that federal courts may prescribe rules for the conduct of their business so long as they are consistent with acts of Congress and rules prescribed by the Supreme Court.

[90] This provides that each district court may, by action of a majority of the judges within the district, make and amend rules governing its practice so long as they are not inconsistent with the Federal Rules of Civil Procedure.

[91] United States *ex rel.* Wilson v. Maroney, 395 F.2d 207 (3d Cir. 1968).

[92] Hooker v. United States District Court, 380 F.2d 5, 6 (9th Cir. 1967).

[93] Ruby v. United States, 341 F.2d 585, 587 (9th Cir. 1965), *cert. denied*, 384 U.S. 979 (1966).

[94] *Id.*

[95] Palmer v. Ashe, 342 U.S. 134 (1951).

either "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."[96] This means that there are only four immediate choices open to a court upon receiving an application for the writ. First, if upon the face of the petition it appears that the petitioner is not entitled to the writ, the court can dismiss the petition summarily. Second, if the petition is insufficient in substance, the court can issue an order to the petitioner requiring him to amend or supplement it.[97] Third, if the allegations are merely inconclusive, the court can issue an order to the custodian of the petitioner, who is called the "respondent," to show cause why the writ should not be granted. Finally, the court can simply issue the writ and hold a hearing on the petitioner's allegations.

If the latter course is taken, the writ will be directed to the respondent who will then be required to make a return certifying the true cause of the petitioner's detention. When this return is made, which must be within three days unless the respondent shows good cause for allowing more time,[98] the court will set a day for a hearing. Unless only issues of law are presented, the person to whom the writ is directed must produce the detained person at the hearing. The court must then "hear and determine the facts, and dispose of the matter as law and justice require."[99]

If the petition is not summarily dismissed or ordered amended, the most likely course of action for the court to take is to issue an order directing the petitioner's custodian to show cause why the writ should not be granted. This order requires the respondent to make an answer explaining the true cause of detention. If this procedure is followed, the facts on which the opposing parties rely can be exhibited to the judge and if he finds that no issue of fact or law is involved he may then refuse to grant the writ, in which event it is not necessary to hold an evidentiary hearing.[100] If an issue of fact is presented, the court must issue the writ and hold a hearing at which evidence is received.[101] It is also possible that the facts admitted in response to the order to show cause entitle the petitioner to an immediate discharge as a matter of law.[102]

In *Townsend v. Sain*[103] the Supreme Court held that where an appli-

[96] 28 U.S.C. § 2243 (1970).

[97] 28 U.S.C. § 2242 (1970).

[98] FED. R. CIV. P. 81(a)(2).

[99] 28 U.S.C. § 2243 (1970).

[100] Dorsey v. Gill, 148 F.2d 857, 866 (D.C. Cir.), *cert. denied*, 325 U.S. 890 (1945). By "issues of fact" it is meant basic, primary, or historic facts; facts "in the sense of a recital of external events and the credibility of their narrators." Brown v. Allen, 344 U.S. 443, 506 (1953).

[101] Walker v. Johnston, 312 U.S. 275, 285 (1941).

[102] *Id.* at 284.

[103] 372 U.S. 293 (1963).

cant alleges facts which, if proved, would entitle him to relief, the federal court has the power to hold an evidentiary hearing. But where the facts are in dispute, the federal court must hold such a hearing if the applicant did not receive a full and fair evidentiary hearing in a state court, either at trial or in a collateral proceeding. The Court went on to particularize the test for determining whether the state court trier of fact has after a full and fair hearing reliably found the relevant facts. Thus a hearing has to be held in the following circumstances:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed in the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.[104]

In 1966, Congress amended sections 2244 and 2254 of the Judicial Code in what has been characterized as an attempt to codify the principles established in the *Townsend* decision and two other cases decided by the Court in 1963.[105] The amendment to section 2254 provides that the state court determination of a factual issue shall be presumed correct unless the habeas corpus applicant establishes, the respondent admits, or it otherwise becomes apparent that any of eight listed conclusions about the state hearing are true.[106] While the *Townsend* criteria quoted above and the statutory criteria are not exactly the same, it has been concluded that the intent of the amendment was only to make the rules stated in the case better understood.[107] Therefore, the practices announced in *Townsend* were not changed.

It has been held by at least one circuit court that an application omitting any of the essential pleading requirements listed earlier in the text fails to establish a prima facie case for the issuance of the writ.[108] It does not necessarily follow, however, that a petition must be dismissed because of a failure to comply with the precise niceties of technical procedure.[109] Not only can the petition be amended or supplemented,[110] but if any es-

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[104] *Id.* at 313.

[105] These other two decisions are Fay v. Noia, 372 U.S. 391 (1963) and Sanders v. United States, 373 U.S. 1 (1963).

[106] 28 U.S.C. § 2254(d) (1970).

[107] White v. Swenson, 261 F. Supp. 42, 61 (W.D. Mo. 1966).

[108] Dorsey v. Gill, 148 F.2d 857, 869 (D.C. Cir.), *cert. denied*, 325 U.S. 890 (1945). The term "prima facie" is usually used in the context of such evidence as is sufficient to establish a given fact until contradicted by the other party. The court in *Dorsey* evidently meant that a petition which contains all the requirements is sufficient to support issuance of the writ unless the respondent can rebut the applicant's well-pleaded allegations.

[109] Rice v. Olson, 324 U.S. 786 (1945).

[110] 28 U.S.C. § 2242 (1970).

sential item has been omitted, the defect may be cured by information appearing in the record under the rule that the application consists of both the petition and facts of which the court is required to take judicial notice.[111]

The Supreme Court has encouraged a liberal interpretation of petitions by saying that a judge should be alert to examine facts for himself which, if true, would make the trial absolutely void[112] and for this purpose the petition should not be scrutinized with technical nicety[113] or the duty discharged as a matter of mere routine.[114] The Court's observation that, "Meticulous insistence upon regularity in procedural allegations is foreign to the purpose of habeas corpus"[115] is quite consistent with the Rule 8(f) declaration that all pleadings drafted pursuant to the Federal Rules of Civil Procedure are to be so construed as to do substantial justice.

More than simple facts are needed in order to file an adequate petition, and an applicant needs to know rules about venue, jurisdiction, exhaustion of remedies, and proper parties respondent. Equally important, he needs to know which facts are legally significant and which are irrelevant. The Court recognized the importance of such legal expertise when it held that in the absence of some state provision for a reasonable alternative to assist illiterate or poorly educated inmates in preparing petitions, the state could not enforce a regulation absolutely barring inmates from furnishing legal assistance to other prisoners.[116] The Court has also held that federal judges cannot impose upon prisoners "the same high standards of the legal art which we might place on the members of the legal profession."[117] One practical consequence of such a holding is that the lower courts have tried not to be overly concerned with such mundane matters as the title given to the documents filed with them by prisoners.[118]

A liberal construction of a petition would have the judge look at the petition by the simple test of whether facts are alleged in it that entitle the applicant to relief.[119] This does not mean that courts are compelled to blindly accept all allegations in the petition as presumptively valid. The petitioned court need not accept allegations which the record reveals are untrue or "patently unbelievable."[120]

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111 Anderson v. Treat, 172 U.S. 25 (1898).

112 Johnson v. Zerbst, 304 U.S. 458 (1938).

113 Holiday v. Johnston, 313 U.S. 342, 350 (1941).

114 Patton v. United States, 281 U.S. 276, 312 (1930).

115 Gibbs v. Burke, 337 U.S. 773, 779 (1949).

116 Johnson v. Avery, 393 U.S. 483 (1969).

117 Price v. Johnston, 334 U.S. 266, 292 (1948).

118 Chapman v. Texas, 242 F. Supp. 378, 381 (S.D. Tex. 1965).

119 Darr v. Burford, 339 U.S. 200 (1950).

120 Edge v. Wainwright, 347 F.2d 190, 192 (5th Cir. 1965), *cert. denied*, 385 U.S. 953 (1966).

IV. CONCLUSION

It should be questioned whether courts should make a distinction between layman-drawn and lawyer-drawn petitions. That a petitioner should not suffer for his own mistakes, but should suffer for those of his lawyer is not a logically compelling notion. Furthermore, it should be remembered that if a petition is dismissed because incompletely drafted, the dismissal cannot be on the merits. This means that the petitioner will be allowed to submit a subsequent petition which, unless the petitioner is instructed as to why his first petition failed, is not likely to be remarkably superior to the first. Thus the court will be required to strictly construe two petitions rather than just one. This predicament could be avoided by an order to amend which explicitly tells the petitioner what information needs to be included in the petition to allow consideration on the merits. When the court finally gets down to the merits, only then will it be properly and productively disposing of the petition. It is not doubted that the district courts have the power to dismiss the incomplete petition,[121] only that such power should always be exercised.

Requiring amendment of insufficient petitions is also the course most consistent with the nature and scope of the writ. After all, habeas corpus is not "a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."[122] The court should use pleading standards only as a vehicle for getting to the ultimate question of whether the petitioner's liberty is unduly restricted. To rely on procedural rules as a means to another end, such as quick dismissal of burdensome applications without a consideration of the merits, not only violates the purpose of the writ, but also does not in reality ease the burden. Justice Jackson thought that the Supreme Court had sanctioned "trivilization" of the writ to the point that a flow of stale, frivolous and repetitious petitions have now inundated the lower federal dockets, prejudicing the occasional meritorious application buried in this flood. He compared reviewing petitions to searching through a haystack for a needle and he added that a judge is likely to conclude that the needle is not really worth the search.[123] Nevertheless, the search must go on for, as the Supreme Court has said, "[t]here is no higher duty of a court . . . than the careful processing and adjudication of petitions for the writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement."[124]

Charles J. Pruitt

[121] Stephens v. United States, 246 F.2d 607 (10th Cir. 1957).

[122] Jones v. Cunningham, 371 U.S. 236, 243 (1963).

[123] Brown v. Allen, 341 U.S. 443, 536-37 (1953) (Jackson, J., concurring).

[124] Harris v. Nelson, 394 U.S. 286, 292 (1969).