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*** CURRENT THROUGH CHANGES RECEIVED DECEMBER, 2004 ***

RULES GOVERNING SECTION 2254 CASES

USCS Sec 2254 Cases R 1 (2005)

Review Court Orders which may amend this Rule.

Rule 1. Scope

(a) Cases involving a petition under *28 U.S.C. § 2254.* These rules govern a petition for a writ of habeas corpus filed in a United States district court under *28 U.S.C. § 2254* by:

(1) a person in custody under a state–court judgment who seeks a determination that the custody violates the Constitution, laws, or treaties of the United States; and

(2) a person in custody under a state–court or federal–court judgment who seeks a determination that future custody under a state–court judgment would violate the Constitution, laws, or treaties of the United States.

(b) Other cases. The district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a).

HISTORY:

(As amended Dec. 1, 2004.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. Rule 1 provides that the habeas corpus rules are applicable to petitions by persons in custody pursuant to a judgment of a state court.

See *Preiser v Rodriguez, 411 US 475, 484 (1973).* Whether the rules ought to apply to other situations (e.g., person in active military service, *Glazier v Hackel, 440 F2d 592 (9th Cir. 1971);* or a reservist called to active duty but not reported, *Hammond v Lenfest, 398 F2d 705 (2d Cir. 1968))* is left to the discretion of the court.

The basic scope of habeas corpus is prescribed by statute. *28 U.S.C. § 2241*(c) provides that the "writ of habeas corpus shall not extend to a prisoner unless . . . (h)e is in custody in violation of the Constitution *28 USC § 2254* deals specifically with state custody, providing that habeas corpus shall apply only "in behalf of a person in custody pursuant to a judgment of a state court . . . ."

In *Preiser v Rodriguez, supra,* the court said: "It is clear . . . that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." *411 US at 484.*

Initially the Supreme Court held that habeas corpus was appropriate only in those situations in which petitioner's claim would, if upheld, result in an immediate release from a present custody. *McNally v Hill, 293 US 131 (1934).* This was changed in *Peyton v Rowe, 391 US 54 (1968),* in which the court held that habeas corpus was a proper way to attack a consecutive sentence to be served in the future, expressing the view that consecutive sentences resulted in present custody under both judgments, not merely the one imposing the first sentence. This view was expanded in *Carafas v LaVallee, 391 US 234 (1968),* to recognize the propriety of habeas corpus in a case in which petitioner was in custody when the petition had been originally filed but had since been unconditionally released from custody.

See also *Preiser v Rodriguez, 411 US at 486* et seq.

Since Carafas, custody has been construed more liberally by the courts so as to make a § 2255 motion or habeas corpus petition proper in more situations. "In custody" now includes a person who is: on parole, *Jones v Cunningham, 371 US*

236 (1963); at large on his own recognizance but subject to several conditions pending execution of his sentence, *Hensley v Municipal Court, 411 US 345 (1973);* or released on bail after conviction pending final disposition of his case, *Lefkowitz v Newsome, 95 S Ct 886 (1975).* See also *United States v Re, 372 F2d 641* (2d Cir.), cert denied, *388 US 912 (1967)* (on probation); *Walker v North Carolina, 262 F Supp 102 (W.D.N.C. 1966),* aff'd per curiam, *372 F2d 129* (4th Cir.), cert denied, *388 US 917 (1967)* (recipient of a conditionally suspended sentence); *Burris v Ryan, 397 F2d 553 (7th Cir 1968), Marden v Purdy, 409 F2d 784 (5th Cir. 1969)* (free on bail); *United States ex rel. Smith v Dibella, 314 F Supp 446 (D. Conn. 1970)* (release on own recognizance); *Choung v California, 320 F Supp 625 (E.D. Cal. 1970)* (federal stay of state court sentence); *United States ex rel. Meadows v New York, 426 F2d 1176 (2d Cir 1970),* cert denied, *401 US 941 (1971)* (subject to parole detainer warrant); *Capler v City of Greenville, 422 F2d 299 (5th Cir 1970)* (released on appeal bond); *Glover v North Carolina, 301 F Supp 364 (E.D.N.C. 1969)* (sentence served, but as convicted felon disqualified from engaging in several activities).

The courts are not unanimous in dealing with the above situations, and the boundaries of custody remain somewhat unclear. In *Morgan v Thomas, 321 F Supp 565 (S.D. Miss. 1970),* the court noted:

It is axiomatic that actual physical custody or restraint is not required to confer habeas jurisdiction. Rather, the term is synonymous with restraint of liberty. The real question is how much restraint of one's liberty is necessary before the right to apply for the writ comes into play. . . .

It is clear however, that something more than moral restraint is necessary to make a case for habeas corpus. *321 F Supp at 573*

Hammond v Lenfest, 398 F2d 705 (2d Cir 1968), reviewed prior "custody" doctrine and reaffirmed a generalized flexible approach to the issue. In speaking about *28 U.S.C. § 2241,* the first section in the habeas corpus statutes, the court said:

While the language of the Act indicates that a writ of habeas corpus is appropriate only when a petitioner is "in custody," . . . the Act "does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used." . . . And, recent Supreme Court decisions have made clear that "[i]t [habeas corpus] is not now and never has been 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." . . .

"[B]esides 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." *398 F2d at 710-711*

There is, as of now, no final list of the situations which are appropriate for habeas corpus relief. It is not the intent of these rules or notes to define or limit "custody."

It is, however, the view of the Advisory Committee that claims of improper conditions of custody or confinement (not related to the propriety of the custody itself), can better be handled by other means such as *42 U.S.C. § 1983* and other related statutes. In *Wilwording v Swanson, 404 US 249 (1971),* the court treated a habeas corpus petition by a state prisoner challenging the conditions of confinement as a claim for relief under *42 U.S.C. § 1983,* the *Civil Rights Act. Compare Johnson v Avery, 393 US 483 (1969).*

The distinction between duration of confinement and conditions of confinement may be difficult to draw. Compare *Preiser v Rodriguez, 411 US 475 (1973),* with *Clutchette v Procunier, 497 F2d 809 (9th Cir. 1974),* modified, *510 F2d 613 (1975).*

Notes of Advisory Committee on 2004 amendments. The language of Rule 1 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended.