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UNITED STATES CODE SERVICE
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*** CURRENT THROUGH CHANGES RECEIVED DECEMBER, 2004 ***

RULES GOVERNING SECTION 2254 CASES

USCS Sec 2254 Cases R 4 (2005)

Review Court Orders which may amend this Rule.

Rule 4. Preliminary Review; Serving the Petition and Order

The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

HISTORY:

(As amended Dec. 1, 2004.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. Rule 4 outlines the options available to the court after the petition is properly filed. The petition must be promptly presented to and examined by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits attached thereto that the petitioner is not entitled to relief in the district court, the judge must enter an order summarily dismissing the petition and cause the petitioner to be notified. If summary dismissal is not ordered, the judge must order the respondent to file an answer or to otherwise plead to the petition within a time period to be fixed in the order. *28 USC § 2243* requires that the writ shall be awarded, or an order to show cause issued, "unless it appears from the application that the applicant or person detained is not entitled thereto." Such consideration may properly encompass any exhibits attached to the petition, including, but not limited to, transcripts, sentencing records, and copies of state court opinions. The judge may order any of these items for his consideration if they are not yet included with the petition. See *28 USC § 753(f)* which authorizes payment for transcripts in habeas corpus cases.

It has been suggested that an answer should be required in every habeas proceeding, taking into account the usual petitioner's lack of legal expertise and the important functions served by the return. See *Developments in the Law—Federal Habeas Corpus, 83 Harv L Rev 1038, 1178 (1970)*. However, under § 2243 it is the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer. *Allen v Perini, 424 F2d 134, 141 (6th Cir. 1970)*. In addition, "notice" pleading is not sufficient, for the petition is expected to state facts that point to a "real possibility of constitutional error." See *Aubut v State of Maine, 431 F2d 688, 689 (1st Cir. 1970)*.

In the event an answer is ordered under rule 4, the court is accorded greater flexibility than under § 2243 in determining within what time period an answer must be made. Under § 2243, the respondent must make a return within three days after being so ordered, with additional time of up to forty days allowed under the *Federal Rules of Civil Procedure, rule 81(a)(2)*, for good cause. In view of the widespread state of work overload in prosecutors' offices (see, e.g., *Allen, 424 F2d at 141*), additional time is granted in some jurisdictions as a matter of course. Rule 4, which contains no fixed time requirement, gives the court the discretion to take into account various factors such as the respondent's workload and the

availability of transcripts before determining a time within which an answer must be made.

Rule 4 authorizes the judge to "take such other action as the judge deems appropriate." This is designed to afford the judge flexibility in a case where either dismissal or an order to answer may be inappropriate. For example, the judge may want to authorize the respondent to make a motion to dismiss based upon information furnished by respondent, which may show that petitioner's claims have already been decided on the merits in a federal court; that petitioner has failed to exhaust state remedies; that the petitioner is not in custody within the meaning of *28 USC § 2254*; or that a decision in the matter is pending in state court. In these situations, a dismissal may be called for on procedural grounds, which may avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the petition. In other situations, the judge may want to consider a motion from respondent to make the petition more certain. Or the judge may want to dismiss some allegations in the petition, requiring the respondent to answer only those claims which appear to have some arguable merit.

Rule 4 requires that a copy of the petition and any order be served by certified mail on the respondent and the attorney general of the state involved. See *28 USC § 2252*. Presently, the respondent often does not receive a copy of the petition unless the court directs an answer under *28 USC § 2243*. Although the attorney general is served, he is not required to answer if it is more appropriate for some other agency to do so. Although the rule does not specifically so provide, it is assumed that copies of the court orders to respondent will be mailed to petitioner by the court.

Notes of Advisory Committee on 2004 amendments. The language of Rule 4 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, except as described below.

The amended rule reflects that the response to a habeas petition may be a motion.

The requirement that in every case the clerk must serve a copy of the petition on the respondent by certified mail has been deleted. In addition, the current requirement that the petition be sent to the Attorney General of the state has been modified to reflect practice in some jurisdictions that the appropriate state official may be someone other than the Attorney General, for example, the officer in charge of a local confinement facility. This comports with a similar provision in *28 U.S.C. § 2252*, which addresses notice of habeas corpus proceedings to the state's attorney general or other appropriate officer of the state.