



12-1-1971

Primary Requirements for the Application of the Federal Writ of Habeas Corpus and Its Problem Areas.

L. Vance Stanton

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

L. Vance Stanton, *Primary Requirements for the Application of the Federal Writ of Habeas Corpus and Its Problem Areas.*, 3 ST. MARY'S L.J. (1971).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol3/iss2/3>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

THE LAWYER'S FORUM

PRIMARY REQUIREMENTS FOR THE APPLICATION OF THE FEDERAL WRIT OF HABEAS CORPUS AND ITS PROBLEM AREAS

L. VANCE STANTON*

INTRODUCTION

Applications for issuance of writs of habeas corpus and motions to vacate are probably the most frequently filed petitions in federal courts today. One reason for the substantial number of applications and the wide variety of fact situations for which the applications are utilized may be due to the fact that habeas corpus can be the fastest and most effective method which the law provides to insure individual liberty.¹ Although habeas corpus is the oldest remedy known in the common law which is still used today, there are still areas within its framework which are unsettled and questions remain either unanswered or else the answers are not sufficient to provide fast and efficient operation of the remedy. The primary purposes of this article are to set forth the requirements for the application and issuance of the federal writ of habeas corpus and to discuss two of the more unsettled problems existing in habeas corpus proceedings at the federal level.

DEFINITION AND GENERAL TERMINOLOGY

A writ of habeas corpus can be broadly defined as a court order directing the respondent to produce the petitioner before the court at a certain time to determine the legality of the restraint on the petitioner's liberty.² Upon receiving the petition the court can initially issue one of three orders. It may grant the writ, issue an order to the respondent to show cause, or grant the relief.

If the court *grants the writ*, the respondent is ordered to produce the petitioner in court. Of course this can involve time and travel expense;

* Attorney at Law, Dallas, Texas; B.A., Texas Technological College, 1961; J.D., Southern Methodist University, 1964.

¹ In *Jones v. Cunningham*, 371 U.S. 236, 243, 83 S. Ct. 373, 377, 9 L. Ed.2d 285, 291 (1963), the Supreme Court characterized the remedy of habeas corpus by stating that: "[i]t 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."

² MEADOR, *HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY* 7 (1966).

therefore, the court usually issues an order to the respondent for him to appear and *show cause* why the petitioner is detained. At the show cause hearing the court can make a determination as to whether the writ should be granted and an evidentiary hearing is held in order to determine if the *relief* should be granted or denied.

The court may grant or deny the *relief* either at the show cause hearing or at the evidentiary hearing in the event the writ is granted. If the court finds at the show cause hearing that it needs no further evidence to determine that the petitioner is being wrongfully detained, it can grant the relief and discharge the prisoner. If it determines at the show cause hearing that additional facts should be developed and the petitioner can supply at least a portion of those facts it can grant the writ, conduct a fact finding hearing, and if it finds an illegal detention, it can grant the relief, and discharge the petitioner.

HISTORICAL BACKGROUND

The writ of habeas corpus was first recognized in the English common law and later by statute in 1679 A.D.³ The colonies adopted the writ as a part of the common law.⁴ Article I, section 9, clause 2 of the United States Constitution⁵ was enacted to prohibit the suspension of the writ except in cases of rebellion or invasion. Oddly enough, the provision did not affirmatively provide for the granting of the writ. The affirmative provision for granting the writ was authorized by the Judiciary Act of 1789.⁶

Initially, the writ was available only to persons in federal custody,⁷ and there was no provision for appeal from denial of the writ.⁸ In 1867 the scope of the remedy was expanded to include persons in state custody, and to provide a right to appeal from denial of the writ.⁹ Although until 1942 granting of the writ was limited to whether the court rendering the final conviction had jurisdiction,¹⁰ the present test is whether the petitioner is restrained of his liberty in violation of the United States Constitution.¹¹ At this time the habeas corpus statutes are located in articles 2241 through 2254 of the federal statutes.

³ See generally Oaks, *Habeas Corpus in the State—1776–1865*, 32 U. CHI. L. REV. 243, 245 (1965).

⁴ *Id.*

⁵ U.S. Const., art. 1, § 9, cl. 2.

⁶ Act of Sept. 24, 1789, c. 20, 1 Stat. 73, 81.

⁷ Longsdorf, *The Federal Habeas Corpus Acts Original and Amended*, 13 F.R.D. 407 (1953).

⁸ Longsdorf, *Habeas Corpus A Protean Writ and Remedy*, 8 F.R.D. 179, 189 (1949).

⁹ Act of Feb. 5, 1867, c. 28, 14 Stat. 385.

¹⁰ *Waley v. Johnston*, 316 U.S. 101, 62 S. Ct. 964, 86 L. Ed. 1302 (1942).

¹¹ *Fay v. Noia*, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed.2d 837 (1963); *Waley v. Johnston*, 316 U.S. 101, 62 S. Ct. 964, 86 L. Ed. 1302 (1942).

THE WRIT TODAY: ITS PURPOSE, NATURE AND USES

Purposes and Nature

The purpose of the "Great Writ" is to test in court the executive, judicial or private restraint of one's liberty. Although the restraint normally arises in a criminal action, the writ is a *civil* remedy;¹² therefore, as a civil remedy it is governed by equitable principles.¹³ The reasoning behind the civil nature of the writ is that it is the method which the law provides for the enforcement of the civil right of personal liberty.¹⁴ The nature of the suit is limited to the legality of the restraint and does not inquire into the guilt or innocence of the petitioner. In addition, it is not a substitute for appeal or writ of error because its purpose is not to test ordinary errors in trial procedure.¹⁵

Although the writ is civil in nature the rule of *res judicata* has historically been inapplicable to habeas corpus proceedings.¹⁶ Simply because the petitioner has previously presented his application for a writ to a state court does not bar a federal court from granting the writ or the relief.¹⁷ The rationale for this distinction is that an application for habeas corpus is a summary proceeding and the decision thereon is not a final judgment. No writ of error would be available on such a decision¹⁸ inasmuch as only a final judgment reviewable by writ of error is subject to *res judicata*.

Uses

Today the writ of habeas corpus is used in the vast majority of cases as a means of post-conviction review.¹⁹ "Its function in the overwhelming number of cases is as a collateral attack on a conviction by either a state or federal prisoner claiming that [his] conviction was obtained in violation of the Constitution."²⁰

Section 2241²¹ provides for the use of the writ when a person is in custody under the authority of the United States; when he is in custody for an act done pursuant to an act of Congress or an order of a United States Court; when he is in custody in violation of the Constitution or

¹² Riddle v. Dyche, 262 U.S. 333, 43 S. Ct. 555, 67 L. Ed. 1009 (1923). Cf. Harris v. Nelson, 394 U.S. 286, 294, 89 S. Ct. 1082, 1087, 22 L. Ed.2d 281, 287 (1969).

¹³ Sanders v. United States, 373 U.S. 1, 83 S. Ct. 1068, 10 L. Ed.2d 148 (1963). See also SOKOL, FEDERAL HABEAS CORPUS 32-34 (1969).

¹⁴ *Ex parte* Tom Tong, 108 U.S. 556, 2 S. Ct. 871, 27 L. Ed. 826 (1883).

¹⁵ Glasgow v. Moyer, 225 U.S. 420, 428, 32 S. Ct. 753, 755, 56 L. Ed. 1147, 1150 (1912).

¹⁶ Salinger v. Loisel, 265 U.S. 224, 230, 44 S. Ct. 519, 521, 68 L. Ed. 989, 995 (1924). See also SOKOL, FEDERAL HABEAS CORPUS 156-158 (1969).

¹⁷ WRIGHT, FEDERAL COURTS 182 (1963).

¹⁸ Gordon, *The Unruly Writ of Habeas Corpus*, 26 MODERN L. REV. 520, 523 (1963).

¹⁹ Peyton v. Rowe, 391 U.S. 54, 88 S. Ct. 1549, 20 L. Ed.2d 426 (1968).

²⁰ SOKOL, FEDERAL HABEAS CORPUS 20 (1969).

²¹ 28 U.S.C. § 2241 (1964).

laws or treaties of the United States; when he is in custody for an act done under any alleged right claimed under the order of any foreign state the validity and effect of which depend upon the law of nations; when it is necessary to bring him into court to testify or for trial.

Pursuant to these provisions the writ has been used for myriad purposes including testing deportation and exclusion orders;²² extradition proceedings;²³ seeking release from mental institutions;²⁴ seeking release prior to trial;²⁵ testing validity of military custody;²⁶ testing selective service classifications;²⁷ producing one to testify;²⁸ and producing one for trial.²⁹

PROCEDURAL CONSIDERATIONS IN APPLYING FOR THE WRIT AND REQUIREMENTS TO BE MET BEFORE THE WRIT IS AVAILABLE

Persons to Whom the Writ is Available

Any person *in custody*, but not necessarily in prison, has standing to apply for a writ of habeas corpus.³⁰ The only persons to whom the writ is probably not available are nonresident citizens who are outside the boundaries of the United States or its territories and resident and nonresident enemy aliens. The probable reason for the writ's unavailability to the first class is that there exists no court with jurisdiction to grant the writ.³¹ As regards resident enemy aliens, they cannot use our courts to hamper our war efforts or to give aid to the enemy,³² but these appear to be the only limitations upon the availability of the writ even to this class. The nonresident enemy alien has no access to habeas corpus primarily due to territorial jurisdiction rather than the meaning of the word "person."³³ Consequently, since most individuals can find a federal court with jurisdiction, the writ becomes an available remedy to test the legality of their detention.

The Requirement of Custody or Restraint

Before habeas corpus is available as a remedy, an individual must be restrained of his liberty.³⁴ However, restraint of liberty does not

²² *The Japanese Immigrant Case*, 189 U.S. 86, 23 S. Ct. 611, 47 L. Ed. 721 (1903).

²³ *Sweeney v. Woodall*, 344 U.S. 86, 73 S. Ct. 139, 97 L. Ed. 114 (1952).

²⁴ SOKOL, *FEDERAL HABEAS CORPUS* 18-21 (1969).

²⁵ *Id.*

²⁶ *Johnson v. Eisentrager*, 339 U.S. 763, 70 S. Ct. 936, 94 L. Ed. 1255 (1950).

²⁷ *Ex parte Beck*, 245 F. 967, 969 (D. Mont. 1917).

²⁸ *Wong Wing v. United States*, 163 U.S. 228, 16 S. Ct. 977, 41 L. Ed. 140 (1896).

²⁹ *United States v. Hayman*, 342 U.S. 205, 221 nn.34, 35, 72 S. Ct. 263, 273 nn.34,35, 96 L. Ed. 232, 242 nn.34, 35 (1952).

³⁰ 28 U.S.C. § 2241 (1964).

³¹ SOKOL, *FEDERAL HABEAS CORPUS* 60 (1969).

³² *Ex parte Kawato*, 317 U.S. 69, 63 S. Ct. 115, 87 L. Ed. 58 (1942).

³³ SOKOL, *FEDERAL HABEAS CORPUS* 60 (1969).

³⁴ 28 U.S.C. § 2241 (1964).

necessarily mean actual physical restraint.³⁵ The present test for the amount of restraint necessary in order to utilize the writ is: that detention, even though not actual, which deprives one from going when and where he pleases.³⁶ “[A]ny character or kind of restraint that precludes an absolute and perfect freedom of action” is sufficient to invoke the remedy and require some legal justification for the detention.³⁷

Undoubtedly, a prisoner in jail is in custody for purposes of the writ, but other forms of restraint can qualify. In *Jones v. Cunningham*³⁸ the Supreme Court held that a person released on parole or probation is still in custody and may apply for the writ. However, no case has been found holding that a person released on bail is considered to be sufficiently restrained to use the writ to test the legality thereof.³⁹

In *Peyton v. Rowe*⁴⁰ the court circumvented the rule that the only relief available in habeas corpus was a release from custody and shifted the emphasis to disposal of the matter as law and justice require.⁴¹ As a result of that decision the restraints that are subject to attack by means of habeas corpus have been substantially expanded. In *Peyton* the court said that one can attack the legality of future or consecutive sentences if the person is in custody under any one of the sentences.⁴² Also, a prisoner who is subject to being categorized as an habitual criminal can use habeas corpus to test a sentence he has already served.⁴³ After one has paid his debt to society unfavorable consequences can result from a conviction. One’s employment potential is limited; he may not be able to vote; he cannot serve as a juror; and other ramifications may result which have an adverse effect on his role as a citizen in today’s society.⁴⁴

The Appropriate Court

Although the Supreme Court, courts of appeal and district courts are authorized by statute⁴⁵ to grant a writ of habeas corpus, the normal procedure is to file the application in the appropriate district court. The reason being that if the case is filed in the Supreme Court or a court of

³⁵ HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1238 (1953).

³⁶ FERRIS & FERRIS, *THE LAW OF EXTRAORDINARY LEGAL REMEDIES* 32-33 (1926).

³⁷ *Ex parte Snodgrass*, 43 Tex. Crim. 359, 362, 65 S.W. 1061, 1062 (1901).

³⁸ 371 U.S. 236, 83 S. Ct. 373, 9 L. Ed.2d 285 (1963).

³⁹ *Odell v. Haas*, 280 F. Supp. 208 (W.D. Wis. 1968); *Moss v. Maryland*, 272 F. Supp. 371 (D. Md. 1967).

⁴⁰ 391 U.S. 54, 88 S. Ct. 1549, 20 L. Ed.2d 426 (1968).

⁴¹ *Id.* at 67, 88 S. Ct. at 1556, 20 L. Ed.2d at 434.

⁴² *Id.*

⁴³ *Peyton v. Rowe*, 391 U.S. 54, 88 S. Ct. 1549, 20 L. Ed.2d 426 (1968); *United States v. Morgan*, 346 U.S. 502, 74 S. Ct. 247, 98 L. Ed. 248 (1954).

⁴⁴ *Carafas v. La Vallee*, 391 U.S. 234, 88 S. Ct. 1556, 20 L. Ed.2d 554 (1968). *See also* SOKOL, *FEDERAL HABEAS CORPUS* 75-77 (1969).

⁴⁵ 28 U.S.C. § 2241(a) (1964).

appeals it will usually be transferred to the appropriate district court, especially if any evidentiary hearing is necessary.

The appropriate court for an applicant in *state* custody pursuant to a sentence from a state court is either in⁴⁶ the federal district court in whose district the state court is located or the federal district court for the district within which the petitioner is detained. These two courts have concurrent jurisdiction and either may transfer the application to the other.⁴⁷ However, it is important to note that before a petitioner in state custody can properly file a petition in federal court he must have exhausted his state remedies. Comity,⁴⁸ rather than jurisdiction, is the foundation of the doctrine of exhaustion of state remedies.⁴⁹ The exhaustion doctrine applies *only* to persons who are in *state* custody.

As a general rule an applicant has complied with the doctrine of exhaustion when the state's highest court has decided the issue or issues presented. It is unnecessary for the applicant to file a petition for habeas corpus with the state's highest court after appeal and assert the same issues before he has exhausted his remedies. However, if he has exhausted his state remedies by direct appeal and later in his application in federal court he adds new issues, the application will be dismissed by the federal court without prejudice to the petitioner to refile an application for habeas corpus in the state trial court.⁵⁰ Also, the federal writ may be dismissed without prejudice when the United States Supreme Court renders a new decision which has relevance to the applicant's alleged unconstitutional detention.⁵¹ As a result the petitioner must return to the state courts and file his application for habeas corpus relating the pertinent facts of his case to the new decision handed down by the Supreme Court.

Since the United States Supreme Court is the highest court in the land and appeal is allowed from the highest state court to the United States Supreme Court, it was previously held that the exhaustion doctrine required an appeal to the United States Supreme Court before one could file an application for habeas corpus in federal court.⁵² However, this is no longer a requirement.⁵³ Also, it is not necessary that the applicant wait the ninety days after decision by his highest state court until

⁴⁶ 28 U.S.C. § 2241(d) (Supp. V 1969).

⁴⁷ *Id.* See also SOKOL, FEDERAL HABEAS CORPUS 85 (1969).

⁴⁸ Darr v. Burford, 339 U.S. 200, 70 S. Ct. 587, 94 L. Ed. 761 (1950).

⁴⁹ Fay v. Noia, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed.2d 837 (1963); Whippler v. Bulcom, 342 F.2d 388 (5th Cir. 1965).

⁵⁰ Miller v. Gladden, 341 F.2d 972 (9th Cir. 1965).

⁵¹ See Miller v. Gladden, 341 F.2d 972 (9th Cir. 1965); Hunt v. Warden, 335 F.2d 936 (4th Cir. 1964); Midgett v. Warden, 329 F.2d 185 (4th Cir. 1964).

⁵² Darr v. Burford, 339 U.S. 200, 70 S. Ct. 587, 94 L. Ed. 761 (1950).

⁵³ Fay v. Noia, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed.2d 837 (1963).

the avenue to the United States Supreme Court is no longer open, before he can file his habeas corpus application in federal court.⁵⁴

If the applicant deliberately attempts to bypass his remedies under state law and the federal court so finds, the applicant is generally barred from seeking a writ in federal court.⁵⁵ The test for exhaustion was set out in *Fay v. Noia* as:

If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas [corpus] to deny him all relief if the state courts refused to entertain his federal claims on the merits⁵⁶

Although exhaustion of state remedies is a strict requirement, there are two statutory exceptions;⁵⁷ absence of state remedies⁵⁸ and circumstances which render the state procedure ineffective to protect the applicant's rights.⁵⁹ As a result, if no remedy or only an ineffective state remedy is available to the applicant under state law at the time he files his application for writ of habeas corpus in federal court, there is no need for him to return to state court; he can proceed directly to federal court.⁶⁰

If the petitioner is in *federal* custody he should file his motion to vacate in the sentencing court.⁶¹ In 1948, Congress provided federal prisoners with a statutory substitute for habeas corpus, which is known as a motion to vacate. This motion is limited to federal prisoners and requires the applicant to "move the court which imposed his sentence to vacate, set aside, or correct his sentence."⁶² If the applicant files his motion in a court different from the sentencing court, it will be dismissed, and the applicant will be instructed to file his motion or a habeas corpus petition in the sentencing court.⁶³

In the event the applicant is not in *federal* or *state* custody he must file his application in the court within the territorial jurisdiction where

⁵⁴ *Id.*

⁵⁵ *Id.* at 439, 83 S. Ct. at 849, 9 L. Ed.2d at 869.

⁵⁶ *Id.* at 439, 83 S. Ct. at 849, 9 L. Ed.2d at 869.

⁵⁷ 28 U.S.C. § 2254 (Supp. V 1969).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ 28 U.S.C. § 2255 (1964).

⁶² *Id.*

⁶³ *Id.*

both the respondent⁶⁴ and petitioner are located at the time of filing the application for habeas corpus.⁶⁵ It appears that if the respondent is not within the same territorial area as the applicant, the petitioner is deprived of a forum. However, even though as a practical matter neither the United States Supreme Court nor the courts of appeal are the proper courts in which to file the application (and if filed there, the appellate court will usually transfer the proceeding to the most appropriate district court)⁶⁶ there may be times when the application should be filed in the court of appeals. For instance, if the territorial jurisdiction limitation applies and the respondent is outside the jurisdiction of the district court in which the petitioner is located, but both are within the territorial jurisdiction of a court of appeals, the petition should and could be filed in the appropriate court of appeals.⁶⁷ The same is true of the Supreme Court.

The Petition for Habeas Corpus

By statute the original application for the writ of habeas corpus must allege the facts concerning the applicant's detention; the name of the person restraining the applicant of his liberty; and the authority pursuant to which the applicant is being detained.⁶⁸ In addition to these statutory requirements the application must state why the detention is unlawful, and if the applicant is in state custody, he must allege that he has exhausted his state remedies.⁶⁹

The individual named as the respondent in the application must be the petitioner's custodian.⁷⁰ He should be the petitioner's *immediate* custodian; have the power to produce the applicant before the court; have the power to discharge the applicant; and *may* have to be located within the territorial jurisdiction of the court in which the application is filed.⁷¹ The respondent must be named if his name is known to the applicant which includes designating his official capacity.⁷² However, if the applicant does not know the respondent's name, a description of his official capacity will suffice.⁷³

⁶⁴ *Wales v. Whitney*, 114 U.S. 564, 5 S. Ct. 1050, 29 L. Ed. 277 (1885).

⁶⁵ *Ahrens v. Clark*, 335 U.S. 188, 68 S. Ct. 1443, 92 L. Ed. 1888 (1948); *Emerson v. McKean*, 322 F. Supp. 251 (N.D. Ala. 1971); *United States v. Wheeler*, 321 F. Supp. 471 (E.D. Pa. 1970).

⁶⁶ FED. R. APP. P. 22(a).

⁶⁷ SOKOL, *FEDERAL HABEAS CORPUS* 90 (1969).

⁶⁸ 28 U.S.C. § 2242 (1964).

⁶⁹ 28 U.S.C. § 2254 (Supp. V 1969).

⁷⁰ 28 U.S.C. § 2243 (1964).

⁷¹ *Ahrens v. Clark*, 335 U.S. 188, 68 S. Ct. 1443, 92 L. Ed. 1888 (1948).

⁷² 28 U.S.C. § 2243 (1964).

⁷³ FED. R. CIV. P. 25(d)(2).

The Doctrine of Successive Petitions

Obviously, some limitations must be placed upon the number of times a prisoner may seek relief by habeas corpus or a motion to vacate. Inasmuch as *res judicata* is not applicable, Congress has enacted the doctrine of successive petitions.⁷⁴ Basically, the doctrine provides that if a motion to vacate or an application for the writ has been heard once, the court is not required to consider the same matters again. The case of *Sanders v. United States*⁷⁵ sets forth the restrictive guidelines imposed by this doctrine by stating that an application for habeas corpus or a motion to vacate a sentence can be denied only if:

- (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application,
- (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.⁷⁶

The Court's decision regarding successive petitions is apparently based upon the proposition that in the event a new theory for relief is presented to the Court, or an old theory has not been adjudicated by the trial court, the successive petition cannot be dismissed.⁷⁷ The only exception to the rule announced in the case is that if the applicant has abused the remedy, he cannot prevail and the respondent has the burden of establishing the abuse.⁷⁸

GENERAL CONSIDERATIONS

Representation by an Attorney

Upon receiving the habeas corpus application one of the court's first concerns should be to determine whether the applicant is represented by an attorney. Although the Supreme Court has not held that an indigent applicant has a constitutional right to counsel at a habeas corpus hearing, it is presumed that such a guarantee does exist. However, the court does have a statutory power to appoint counsel for the applicant even though the right may not be constitutionally required.⁷⁹

⁷⁴ 28 U.S.C. §§ 2244, 2255 (1964).

⁷⁵ 373 U.S. 1, 83 S. Ct. 1068, 10 L. Ed.2d 148 (1963).

⁷⁶ *Id.* at 15, 83 S. Ct. at 1077, 10 L. Ed.2d at 161.

⁷⁷ *Id.*

⁷⁸ *Id.* at 17, 83 S. Ct. at 1078, 10 L. Ed.2d at 162.

⁷⁹ 28 U.S.C. § 1915(d) (1964).

Applicability of the Federal Rules of Civil Procedure

Questions have been presented as to whether the Federal Rules of Civil Procedure are applicable to habeas corpus proceedings.⁸⁰ There can be no question that the civil rules apply to appeals, because their applicability is specifically provided in Rule 81(a)(2).⁸¹ As regards the general applicability of the rules of civil procedure there is no answer. One of the most important cases in this area is *Harris v. Nelson*.⁸² In that case the only issue before the Supreme Court was the applicability of Rule 33, regarding interrogatories to parties to habeas corpus proceedings. The Court rendered no decision as to whether all of the Federal Rules of Civil Procedure were applicable to habeas corpus matters. However, it did hold that Rule 33 does not apply to habeas corpus proceedings. At least one authority has correctly noted that ". . . where the statute is silent and when the rule seems in harmony with the general tenor of habeas corpus proceedings, courts have readily applied the Civil Rules."⁸³

REQUIREMENTS FOR PERFECTING THE APPEAL

Appeal to the Court of Appeals

1. *Notice of Appeal.* It appears that the only jurisdictional requirement for an appeal is the filing of a notice of appeal with the district court.⁸⁴ The time within which the notice of appeal shall be filed is thirty days after entry of the order denying the writ.⁸⁵ However, "[u]pon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed thirty days from the expiration of the time otherwise prescribed . . ."⁸⁶ Such request for extension must be made by presentation of a motion to the court.⁸⁷ The time limits for notice of appeal are *absolutely jurisdictional* and failure to comply as specifically provided in the rules will result in a dismissal of the appeal.⁸⁸ It should be specifically noted that a certificate of probable cause, which is discussed below,

⁸⁰ *United States v. Wiman*, 304 F.2d 53 (5th Cir. 1962); *Bowdidge v. Lehman*, 252 F.2d 366 (6th Cir. 1958).

⁸¹ FED. R. CIV. P. 81(a)(2).

⁸² 394 U.S. 286, 89 S. Ct. 1082, 22 L. Ed.2d 281 (1969).

⁸³ Note, *Civil Discovery in Habeas Corpus*, 67 COL. L. REV. 1296, 1299 (1967).

⁸⁴ FED. R. CIV. P. 3(a).

⁸⁵ FED. R. APP. P. 4(a). It should be noted if the United States or any of its agencies is a party, the notice may be filed by *any party* within sixty days.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *United States v. Robinson*, 361 U.S. 220, 80 S. Ct. 282, 4 L. Ed.2d 259 (1960).

is not a substitute for filing a notice of appeal, although one circuit court has so held.⁸⁹

2. *Certificate of Probable Cause.* In the event the federal court denies the relief sought and the non-indigent petitioner desires to appeal, he should request the denying court to issue a certificate of probable cause.⁹⁰ Such a certificate is a statement by the judge who denied the relief that there exists probable cause to appeal his decision. The primary purpose of the certificate is "to evidence the opinion of a judge that an issue is presented which is not plainly frivolous."⁹¹ The certificate is necessary only if the detention which is the subject of the writ is out of process issued by a *state* court.⁹² However, if the detention arises from state process and the state is appealing, a certificate is not necessary.⁹³ If the certificate is issued, the appellate court must hear the appeal. Whether or not the requirement is jurisdictional has not been determined. If the applicant does not request a certificate, but a notice of appeal is filed, such notice is probably sufficient to constitute a request for the certificate.⁹⁴ If the court denies the request for the certificate, the reasons for such denial must be stated.⁹⁵ The applicant may then request a circuit judge to issue the certificate.⁹⁶

Neither the statutes nor the federal rules provide a time limit for filing the application for issuance of the certificate, although some courts of appeal have held that it has the same time limit as is required for filing a notice of appeal from a denial of the relief.⁹⁷ In both events the time limit is thirty days from the date of rendition of the judgment, unless the United States or one of its agencies is a party to the action in which event the notice of appeal may be filed by any party within sixty days from the entry of judgment.⁹⁸

Appeal to the United States Supreme Court

Review in the Supreme Court is discretionary, and application for review by that Court is accomplished by the applicant filing a petition

⁸⁹ *Nethery v. Culver*, 259 F.2d 41 (5th Cir. 1958).

⁹⁰ 28 U.S.C. § 2253 (1964). The relevant portion of the statute states that "[a]n appeal may not be taken . . . unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause." (Emphasis added.)

⁹¹ *Poe v. Gladden*, 287 F.2d 249, 251 (9th Cir. 1961).

⁹² 28 U.S.C. § 2253 (1964); *FED. R. APP. P.* 22(b) (1964).

⁹³ *FED. R. APP. P.* 22(b) (1964).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Zimmer v. Langlois*, 331 F.2d 424 (1st Cir. 1964); *Buder v. Bell*, 306 F.2d 71 (6th Cir. 1962); *United States ex rel. Carey v. Keeper of Montgomery County Prison*, 202 F.2d 267 (3d Cir. 1953); *Ex parte Farrell*, 189 F.2d 540 (1st Cir. 1951).

⁹⁸ *FED. R. APP. P.* 4(a).

for certiorari in the Supreme Court within ninety days from the date of the rendition of judgment by the court of appeals.⁹⁹ If the Supreme Court denies certiorari its only effect is that the court will not hear the matter at that time. If the petitioner somehow reaches the Supreme Court again and the same issue is presented, the Supreme Court is not precluded from considering the matter.

PROBLEM AREAS

Two of the more interesting problems in habeas corpus today are the certificate of probable cause and whether the federal rules apply to habeas corpus proceedings.

Certificate of Probable Cause

The certificate of probable cause presents two obvious problems. One is whether or not securing the certificate is a *jurisdictional* requirement to a petitioner perfecting his appeal. The second involves the time limit within which the certificate must be filed.

Some courts have said that in the absence of filing the certificate, the appellate court lacks jurisdiction to hear the appeal.¹⁰⁰ The Ninth Circuit, however, indicates that it is not a jurisdictional requirement.¹⁰¹ The statute seems to indicate that filing the certificate is a prerequisite to perfecting the appeal and the certificate should be filed because it states: "An appeal *may* not be taken . . . unless the justice or judge who rendered the order *or a circuit justice* or judge issues a certificate of probable cause."¹⁰²

It is believed that the portion of the statute¹⁰³ relating to filing the certificate of probable cause should be deleted. It seems fairly obvious that if the district judge denies the relief and sets forth his reasons therefore in the order, it would be much quicker for the appellate court to review the merits of the appeal than by the petitioner bouncing between the district court and the court of appeals seeking a decision that says the appellate court should read the trial judge's order denying the relief. It seems to be an unnecessary and cumbersome step in the habeas corpus proceeding.¹⁰⁴

⁹⁹ 28 U.S.C. §§ 2254(a), 2350(a) (Supp. V 1969).

¹⁰⁰ *McCoy v. Tucker*, 259 F.2d 714 (4th Cir. 1958); *Joyner v. Parkinson*, 227 F.2d 505 (7th Cir. 1955); *Maulding v. Ellis*, 217 F.2d 134 (5th Cir. 1954); *Schenk v. Plummer*, 113 F.2d 726 (9th Cir. 1940).

¹⁰¹ *Poe v. Gladden*, 287 F.2d 249 (9th Cir. 1961).

¹⁰² 28 U.S.C. § 2253 (1964). (Emphasis added.)

¹⁰³ *Id.*

¹⁰⁴ For instance see the numerous tests for the issuance of a certificate discussed in *United States ex rel. Siegal v. Follette*, 290 F. Supp. 636, 637 n.3 (S.D.N.Y. 1968).

If Congress retains the statutory requirement for the certificate, the position taken by some circuit courts to the effect that the certificate must be filed within the same time limits as the notice of appeal¹⁰⁶ seems unsound. The better approach would appear to be the establishment of a federal rule or the enactment of a statute providing for the certificate of probable cause to be filed within ten days after notice of appeal has been filed. There is apparently nothing very difficult or time consuming in the judge issuing the certificate, inasmuch as at the close of the hearing he can make a docket sheet entry of his opinion as to whether or not a certificate of probable cause should be filed if his denial is appealed. As a result, at the time the notice of appeal is filed and request made for issuance of the certificate, the judge needs only refer to his docket sheet entry which was made at the time he rendered his decision of denial. If the certificate continues to have no time limit established within which it should be filed, presumably a reasonable time for filing will be placed thereon. This will present yet another issue for the court to determine; that is, what is a reasonable time for the filing of the certificate of probable cause? In the meantime, a careful practitioner should file his certificate within the thirty-day time limit established for filing his notice of appeal.

Federal Rules

The most interesting questions in federal habeas corpus are the extent to which the Federal Rules of Civil Procedure apply to habeas corpus proceedings and if specific civil rules are inapplicable, what is the source of the rules needed to bridge the gaps?

All of the Federal Rules of *Appellate* Procedure relating to habeas corpus apply to such proceedings.¹⁰⁶ Rule 81(a)(2) of the Federal Rules of Civil Procedure states that: "These rules are applicable to proceedings for . . . habeas corpus, . . . 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.*" (Emphasis added.) At first glance the last phrase in Rule 81(a)(2) would appear to make all of the federal civil rules apply to habeas corpus inasmuch as habeas corpus is a civil action. However, in *Harris v. Nelson* the Supreme Court said that "[E]ssentially the [habeas corpus] proceeding [is not purely civil, but] is unique."¹⁰⁷ The practice in habeas corpus

¹⁰⁶ *Zimmer v. Langlois*, 331 F.2d 424 (1st Cir. 1964); *Buder v. Bell*, 306 F.2d 71 (6th Cir. 1962); *United States ex rel. Carey v. Keeper of Montgomery County Prison*, 202 F.2d 267 (3d Cir. 1953); *United States ex rel. Kreuter v. Baldwin*, 49 F.2d 262 (7th Cir. 1931).

¹⁰⁶ FED. R. CIV. P. 81(a)(2).

¹⁰⁷ 394 U.S. 286, 294, 89 S. Ct. 1082, 1087, 22 L. Ed.2d 281, 287 (1969).

proceedings does not conform "to the practice in civil actions"¹⁰⁸ for the reason that Rule 33 provides for serving interrogatories upon the adverse party. In habeas corpus proceedings this would customarily be the warden of the prison in which the petitioner is being detained, who would not be capable of answering the petitioner's interrogatories regarding his arrest and trial based upon personal knowledge.¹⁰⁹ As a result, ". . . the warden is clearly not the kind of 'adverse party' contemplated by the discovery rules, and the result of . . . [the] literal application [of Rule 33] would be to invoke a procedure which is circuitous, burdensome and time consuming."¹¹⁰ If, by reference to Rule 26(b)¹¹¹ the interrogatories were permitted as a part of habeas corpus proceedings, the applicant could conceivably inquire into ". . . any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ."¹¹² whether admissible at trial or not. This appears to be too broad for habeas corpus proceedings, inasmuch as Rule 33 permits the questions to be served without leave of court. As a result, if the questions were irrelevant to any issue or inquired into privileged matters, a preliminary hearing would be necessitated for the respondent to contest such interrogatories. For the above reasons and others the Supreme Court has held that Rule 33 does not apply to habeas corpus proceedings.¹¹³

If interrogatories pursuant to Rule 33 are not permitted, what discovery is available to the petitioner? If the writ is granted, the petitioner can resort to oral testimony in open court. In addition he may serve written interrogatories for the limited purpose of obtaining evidence from witnesses when affidavits are admissible in evidence.¹¹⁴ The unavailability of Rule 33 will not place the petitioner in a disadvantageous position because the court has the power and duty to provide all necessary facilities and procedures to the petitioner for sufficient inquiry into the facts. In exercising that power the court can and should resort to the All Writs Act.¹¹⁵ In *Price v. Johnston*, the Supreme Court stated that the nature and function of the All Writs Act is to supply the federal courts with the necessary tools to perform their duties as prescribed by Congress and the Constitution;

¹⁰⁸ FED. R. CIV. P. 81(a)(2).

¹⁰⁹ *Harris v. Nelson*, 394 U.S. 286, 89 S. Ct. 1082, 22 L. Ed.2d 281 (1969).

¹¹⁰ *Id.* at 296, 89 S. Ct. at 1089, 22 L. Ed.2d at 289.

¹¹¹ FED. R. CIV. P. 26(b).

¹¹² FED. R. CIV. P. 26(b)(1).

¹¹³ *Harris v. Nelson*, 394 U.S. 286, 89 S. Ct. 1082, 22 L. Ed.2d 281 (1969).

¹¹⁴ 28 U.S.C. § 2246 (1964).

¹¹⁵ 28 U.S.C. § 1651 (1964).

provided only that such instruments are agreeable to the usages and principles of law, they extend to habeas corpus proceedings.¹¹⁶

In *Harris v. Nelson* the court stated that the provisions of the All Writs Act are specifically applicable to the court in assisting the petitioner sufficiently to develop the facts in habeas corpus proceedings.¹¹⁷

The All Writs Act leaves substantial discretion in the trial judge; however, unless a complete and separate set of rules is established for habeas corpus proceedings, it appears that the All Writs Act is the best remedy to use in conducting fact finding inquiries in habeas corpus proceedings.

The habeas corpus proceeding is a hybrid action inasmuch as it is a civil remedy ordinarily utilized to test the constitutionality of restraint pursuant to criminal actions. As a result, if it continues to be used at the ever increasing rate to test the constitutionality of criminal proceedings, it would probably be best to establish a separate body of rules, in order to reduce the questions as to which particular federal civil rules apply to habeas corpus. It is hoped that the courts will apply the civil rules as liberally as possible and as is required by due process, but never to the abuse or prejudice of the petitioner's constitutional rights.

CONCLUSION

The areas of confusion remaining in habeas corpus proceedings should be clarified so far as possible by remedies which would promote a faster and more efficient proceeding. Although any remedies adopted for improving the system should of necessity take into consideration the matter of judicial economy, such considerations should never be taken to the extent that habeas corpus would be limited to a "static, narrow, formalistic remedy" for the petitioner.

¹¹⁶ 334 U.S. 266, 68 S. Ct. 1049, 92 L. Ed. 1356 (1948).

¹¹⁷ 394 U.S. 286, 89 S. Ct. 1082, 22 L. Ed.2d 281 (1969).