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Federal Prisoner Petitions.

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FEDERAL PRISONER PETITIONS

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Everyone is familiar with the variety of pressures that have been placed upon the federal courts through the expanded use of prisoner petitions. The Supreme Court of the United States has bestowed an awesome omnipotent power on federal district judges, allowing a state supreme court to be overruled in important constitutional issues involving criminal convictions.[1] This is an anomaly without comparison or precedent in any other system of jurisprudence. While originally there was well accepted authority in the federal system to the effect that its courts would not ordinarily interfere with the internal administration of prison institutions, thereby maintaining a hands-off policy, the record belies this premise.

The original purpose of habeas corpus was to enforce the right of personal liberty where the right was denied and the prisoner confined.[2] But the scope of the "Great Writ" has been greatly expanded, so much so that many legal scholars contend that habeas corpus has been greatly abused and is creating almost impossible burdens for the judiciary. They point to strained relations between state and federal jurisdictions and contend that signficant restrictions are needed to limit the repeated and endless retrial of criminal convictions. Conversely, others say that an adequate opportunity for a person convicted in a state court to have a federal court review is essential, and that none of the suggestions yet made for restricting habeas corpus are adequate substitutions. Additionally, they argue, there should be no limitation upon repeatedly reurging and reasserting alleged errors committed by the trial court in either state or federal jurisdictions.

While our great nation is bound together by a Constitution and a

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1. Sanders v. United States, 373 U.S. 1 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Fay v. Noia, 372 U.S. 391 (1963).

2. Most legal historians doubt that there was ever any intention that habeas corpus writs could be used to obtain relief from unlawful conditions of custody, although the United States Supreme Court has held that a prisoner may attack the terms of his confinement as well as the fact of the custody itself by habeas corpus; *see* Johnson v. Avery, 393 U.S. 483 (1969).

federal judiciary that applies it, the states remain, theoretically at least, the basic repositories of the police power. The states are, in Mr. Justice Brandeis' classic phrase, intended to be "the laboratories where social and economic experiments may be tried without risk to the rest of the country."[3] Conflicts between the state and federal systems under these holdings, however, have created notable abrasive areas.

The reason for the friction between the state and federal courts in this area is apparent when one considers that it is within the power of a single United States District Judge to grant the writ of habeas corpus in any state court criminal conviction, regardless of the fairness, care and conscientiousness with which the state acted in conformity with the then existing constitutional law.[4] Thus, state courts must be ultra clairvoyant and "correctly anticipate" any change in the federal law.[5] This is a situation which demands forbearance. When forbearance and judicial restraint are not exercised, the result creates both strain and distortion to the federal-state relationship, especially where, contrary to the common law, a person may repeatedly attack the final judgment of a court of competent jurisdiction.[6]

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3. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

4. Palmer v. Comstock, 394 F.2d 395 (9th Cir. 1968).

5. O'Neil v. Nelson, 422 F.2d 319 (9th Cir. 1970), *rev'd on other grounds,* 402 U.S. 622 (1971).

6. As Mr. Justice Harlan stated in Mackey v. United States, 401 U.S. 667 (1971):

> No one, not criminal defendants, not the judicial system, not society as a whole, is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and everyday thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

Id. at 691.

Under 28 U.S.C. § 2254(d) (1970), a state court determination of the petitioner's contentions is never *res judicata* as to a subsequent federal proceeding, unless the United States Supreme Court denies certiorari on the merits. Preiser v. Rodriguez, 411 U.S. 475, 497 (1973). A denial or dismissal of a writ of certiorari without a statement of reasons is entitled to no weight in considering the merits of a later petition for habeas corpus. Brown v. Allen, 344 U.S. 443, 489 (1953); Miller v. Carter, 434 F.2d 824, 827 (9th Cir. 1970), *cert. denied,* 402 U.S. 972 (1971).

Neither is the denial of habeas relief by another federal court *res judicata,* Sanders v. United States, 373 U.S. 1, 15 (1963), nor is it *res judicata* even where the claim is denied by the same court, Hutchinson v. Craven, 415 F.2d 279, 280 (9th Cir. 1969). Thus, successive applications repeatedly filed on the same grounds may be denied consideration only if the earlier petitions were denied on their merits. Therefore, a decision on the merits of a factual issue must have been made after an evidentiary hearing, unless it was found that the files and records conclusively resolved any factual issues raised in a prior application; doubt as to whether the grounds are the same should be resolved in favor of the petitioner. Sanders v. United States, 373 U.S. 1, 16 (1963).

Even if the evidentiary hearing was full and fair, redetermination may not be denied if the evidence crucial to the adequate consideration of the petition was not developed in connection with the earlier proceeding for reasons not attributable to the inexcusable neglect of the petitioner. Smith v. Yeager, 393 U.S. 122, 126 (1968). On the other hand, the trial court is not required to tolerate needless piecemeal litigation, or entertain

What I have said with reference to the application of the so-called "Great Writ" in the habeas corpus cases involving state convictions applies with equal force to the ever-continuous and endless review of petition after petition filed by federal prisoners, which are commonly called "2255 petitions."[7] However, the abrasive force caused by federal judges injecting themselves into state court trials and convictions is not present. This never-ending, never-final source of constant litigation in the federal courts, involving both state and federal prisoners, has finally gained the attention of the American Bar Association and the Administrative Office of the United States Courts which are making a concerted survey, study and recommendation in the interest of eliminating this vexing and exasperating situation.

Broadening Remedies

During the past decade, through successive opinions the remedies of injunction, mandamus and declaratory judgment have been added to the writ of habeas corpus as an effective means for prisoners to test the daily restrictions inherent in confinement.[8] Of more recent development is a wave of money damage suits against federal prison authorities for violation of so-called civil rights. These have been generated by recent Supreme Court decisions[9] together with the already popular federal damage suits against state authorities under section 1983.[10]

As previously noted, the prisoner may attack not only the fact of his custody, but any varied and diverse conditions of that custody itself, including the prisoner's place of confinement,[11] denial of a right to

collateral proceedings whose only purpose is to vex, harass or delay. Sanders v. United States, 373 U.S. 1, 18 (1963).

An effort should be made by the judge to submit all possible grounds of attack on the conviction in a comprehensive pretrial order, even though they were not raised in the petition. This suggestion was made in *Sanders. Id.* at 18-19.

7. Under 28 U.S.C. § 2255 (1970), a prisoner may file suit to vacate the sentence imposed by a federal judge. Such a suit is a civil action.

8. Cates v. Ciccone, 422 F.2d 926 (8th Cir. 1970) (injunction); Sobell v. Attorney General, 400 F.2d 986 (3d Cir.), *cert. denied,* 393 U.S. 940 (1968) (declaratory judgment); Walker v. Blackwell, 360 F.2d 66 (5th Cir. 1966) (mandamus).

9. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971); Griffin v. Breckenridge, 403 U.S. 88 (1971). The rights of prisoners apparently have now been elevated beyond those enjoyed by many law-abiding persons in their relations with their neighbors. It now appears that if the executive branch should fail to provide any of these so-called rights to the degree of perfection sought by a particular prisoner, it may be called before a federal court to account for the alleged unlawful action on the pretext of a violation of constitutional law.

10. 42 U.S.C. § 1983 (1970); *accord,* Houghton v. Shafer, 392 U.S. 639 (1968); Jones v. Decker, 436 F.2d 954 (5th Cir. 1970).

11. Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966) (mental hospital for criminally insane).

transmit petitions for habeas corpus relief,[12] and abuse by other inmates or prison officials.[13]

Jurisdiction of federal prisoner suits against the United States for negligence and mistreatment exists under the Federal Tort Claims Act.[14] These include medical malpractice,[15] but would not include suits for claims arising from alleged assault and battery by federal employees or other intentional torts.[16] Of course, this type of action is confronted by the doctrine of official immunity,[17] and if the employees were acting within the course and scope of their employment at the time of the alleged incident the United States would be substituted as the possibly liable party.[18] Further, it is usually held that denial of constitutional rights under the amendments are not actionable against individuals, but against the Government "whose conduct they alone limit."[19]

Requirement of Custody

It is specifically required that a prisoner must be in custody at the time his petition is filed.[20] It is now clear that "custody" includes the prisoner who, though not necessarily in confinement, is on parole or probation.[21] The petitioner is also considered in custody where he has

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

13. Coffin v. Reichard, 143 F.2d 443, 444 (6th Cir. 1944). In addition to attacking the conditions of custody as well as the fact of the custody itself by habeas petition, civil rights suits under 42 U.S.C. § 1983 (1970) are now alternative remedies and the petitioner may seek both, perhaps concurrently. Preiser v. Rodriguez, 411 U.S. 475, 499 n.14 (1973); Wilwording v. Swenson, 404 U.S. 249, 251 (1971). Damages are not available in a strictly habeas corpus action.

Habeas petitions concerning the conditions of confinement should be viewed wherever possible as a civil rights action, so exhaustion of state remedies would not ordinarily be required. Wilwording v. Swenson, 404 U.S. 249, 251 (1971). A petition attacking prison conditions may also be the vehicle for a class action. Williams v. Richardson, 481 F.2d 358, 361 (8th Cir. 1973); Mead v. Parker, 464 F.2d 1108, 1112-13 (9th Cir. 1972).

14. 28 U.S.C. § 1346(b) (1970).

15. United States v. Muniz, 374 U.S. 150 (1963).

16. *See* United States v. Fancea, 332 F.2d 872, 875 (5th Cir. 1964), *cert. denied,* 380 U.S. 971 (1965).

17. Barr v. Matteo, 360 U.S. 564, 569 (1959).

18. Uptagrafft v. United States, 315 F.2d 200, 202 (4th Cir.), *cert. denied,* 375 U.S. 818 (1963).

19. Bell v. Hood, 327 U.S. 678 (1946). Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), held that actions alleging violation of fourth amendment protection against unlawful search and seizure may be brought against federal officials allegedly responsible. *Id.* at 397. Under Lynch v. Household Fin. Corp., 405 U.S. 538, 547 (1972), however, such a suit must meet the jurisdictional requirements that the amount in controversy be in excess of $10,000.

20. 28 U.S.C. § 2241(c) (1970).

21. Jones v. Cunningham, 371 U.S. 236, 243 (1963); Hahn v. Burke, 430 F.2d 100, 102 (7th Cir. 1970), *cert. denied,* 402 U.S. 933 (1971); Benson v. California, 328 F.2d

been released on bail or his own recognizance.[22] Custody does not include a non-confinement type sentence where a misdemeanant is merely fined.[23] Similarly, a prisoner receiving a suspended sentence on unsupervised probation is also presumably not in custody.[24] Thus, the test of confinement is that the petitioner must have some restriction on his freedom.[25]

The confinement requirement presents an interesting problem where the prisoner has served his sentence. In the ordinary case, habeas corpus will not lie, the proper remedy being a writ of *coram nobis*.[26] It has been held, however, that a prisoner is not relegated to *coram nobis* when he is released subsequent to his filing a writ of habeas corpus.[27] Resort to *coram nobis* has been made largely unnecessary by the constantly expanding definition of custody to the point that it is questionable that custody in any form is necessary for a court to have habeas corpus jurisdiction.[28]

EXHAUSTION OF STATE REMEDIES

Section 2254 provides that a state prisoner's application shall not be granted unless he has exhausted the remedies available in the courts of

159, 162 (9th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965). In each of these cases, it was held that the prisoner's release from jail did not render the issue of confinement moot, thereby making the remedy of habeas corpus unavailable. But release by the penal institution does render the petition moot if the attack by the prisoner concerns the conditions of confinement only rather than illegality of detention. Keys v. Dunbar, 405 F.2d 955 (9th Cir.), *cert. denied*, 396 U.S. 880 (1969).

22. Hensley v. Municipal Court, 411 U.S. 345 (1973) (petitioner released on own recognizance); Burris v. Ryan, 397 F.2d 553, 555 (7th Cir. 1968) (bail).

23. Cohen v. Hongisto, No. 72-274 (9th Cir. Sept. 15, 1972), *cert. denied*, 411 U.S. 964 (1973).

24. United States *ex rel.* Dessus v. Pennsylvania, 452 F.2d 557, 560 (3d Cir. 1971), *cert. denied*, 409 U.S. 853 (1972); *cf.* United States *ex rel.* Nunes v. Nelson, 467 F.2d 1380 (9th Cir. 1972) (parolee, not presently incarcerated or facing parole revocation, cannot attack conditions of confinement).

25. The Supreme Court has observed:

> [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 rights to be free from wrongful restraints upon their liberty.

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

26. United States v. Morgan, 346 U.S. 502 (1954). The writ of *coram nobis* was available at common law to correct factual errors. *Id.* at 507.

27. Carafas v. La Vallee, 391 U.S. 234 (1968). *Carafas* specifically overruled Parker v. Ellias, 362 U.S. 574 (1960).

28. It had long been the law that unconditional release from state custody made any pending habeas corpus petition moot since relief from unlawful custody was the sole purpose of the writ. But in Carafas v. La Vallee, 392 U.S. 234, 238 (1968), the Court held that once the district court has jurisdiction to consider the petition, the subsequent unconditional release of the petitioner is of no effect in rendering the case moot.

the state.[29] When interpreting this provision, some courts have held that federal consideration of the merits of a petition for habeas corpus must be deferred until all of the issues raised have been presented in the state courts.[30] In the same month in which the Fifth Circuit so held in *Madeley v. Kern*,[31] a different panel of the Fifth Circuit reached an opposite conclusion in *Harris v. Estelle*.[32] Apparently, these cases present a conflict between comity and avoidance of piecemeal litigation on the one hand, and proper judicial administration and the petitioner's constitutional rights on the other.

Four months later, another Fifth Circuit panel, citing the *Harris* case, also held that it was proper for a district court to dispose of an exhausted claim in a federal habeas corpus petition even though it is joined with other unexhausted claims.[33] In at least three other circuits, the rule is that the district court is required to consider those claims for which the petitioner has exhausted his remedies even though he has also raised unexhausted claims.[34] Of course, if the state's highest court has consistently ruled adversely to the petitioner's contention in a series of cases involving identical claims, indicating clearly that it would be futile for the petitioner to attempt to relitigate the issues, then he is not required to have exhausted his state remedies before raising the issues in a federal petition.[35] This latter case follows the progeny clearly establishing the doctrine of futility.[36]

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29. 28 U.S.C. § 2254(b) (1970). While this section requires exhaustion of state remedies, the concept is one of comity only rather than one of jurisdiction. Fay v. Noia, 372 U.S. 391, 418 (1963). The petitioner is required to exhaust only those state remedies which are still available at the time the petition is filed. *Id.* at 434-35; *accord,* Humphrey v. Cady, 405 U.S. 504, 516 (1972). *But see* Lambeti v. Wainwright, 513 F.2d 277, 282 (5th Cir. 1975).

Fay v. Noia, 372 U.S. 391, 435 (1963) does not require a petition for certiorari to the United States Supreme Court to be filed as an element of exhaustion.

> The exhaustion doctrine is a judicially crafted instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement.'

Braden v. 30th Judicial Cir. Ct., 410 U.S. 484, 490 (1973).

30. *See, e.g.*, Melton v. Patterson, 445 F.2d 410 (10th Cir. 1971); United States *ex rel.* Waldron v. Pate, 380 F.2d 94 (7th Cir. 1967), *cert. denied,* 389 U.S. 1054 (1968). *But see* Ross v. Craven, 478 F.2d 240 (9th Cir. 1973).

31. 488 F.2d 865 (5th Cir. 1974).

32. 487 F.2d 1293 (5th Cir. 1974).

33. Singleton v. Estelle, 492 F.2d 671, 676 (5th Cir. 1974).

34. Tyler v. Swenson, 483 F.2d 611, 614 (8th Cir. 1973); Hewett v. North Carolina, 415 F.2d 1316, 1320 (4th Cir. 1969); United States *ex rel.* Levy v. McMann, 394 F.2d 402, 404-405 (2d Cir. 1968).

35. Layton v. Carson, 479 F.2d 1275 (5th Cir. 1973).

36. Exhaustion requirements do not apply if there is the "existence of circumstances rendering [the available state] process ineffective to protect the rights of the prisoner."

When a petitioner elects to bypass state remedies, good reason must exist or the federal court is free to dismiss the petition for lack of exhaustion. *Fay v. Noia*[37] held that failure to seek a new trial through a state appellate route was not a deliberate waiver of state remedies, where the prisoner was faced with the "grisly choice" of a possible death sentence on remand.[38] Similarly, it is not a voluntary waiver where the accused fears offending an all white jury by a challenge to the composition of the panel.[39]

Fay v. Noia defines a bypass of state remedies as a procedural default, deliberately incurred by the prisoner, preventing an orderly adjudication of federal issues in state courts.[40] The question of this deliberate bypass, and the reasons for it, must be determined by the federal court in an evidentiary hearing or by "some other means."[41] The Second Circuit has held that in an evidentiary hearing the burden of showing a deliberate bypass is on the state;[42] therefore, an evidentiary hearing is not necessary where the record in the trial court clearly shows that counsel's decision to waive a right was deliberate trial strategy.[43]

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28 U.S.C. § 2254(b) (1970). Examples include adverse rulings by the highest state court on the same legal issue, Layton v. Carson, 479 F.2d 1275 (5th Cir. 1973); adverse decisions on substantially the same contentions against a co-defendant, St. Jules v. Savage, 512 F.2d 881 (5th Cir. 1975); and inability to obtain consideration of the claim in courts of the custodial state, *see* Reed v. Beto, 343 F.2d 723, 725 (5th Cir. 1965), *aff'd on other grounds sub nom.* Spencer v. Texas, 385 U.S. 554 (1967).

37. 372 U.S. 391 (1963).

38. *Id.* at 440.

39. Whitus v. Balkcom, 333 F.2d 496, 509 (5th Cir.), *cert. denied,* 379 U.S. 931 (1964).

40. Fay v. Noia, 372 U.S. 391, 438 (1963).

41. *Id.* at 439.

42. United States *ex rel.* Cruz v. La Vallee, 448 F.2d 671, 676 (2d Cir. 1971),*cert. denied,* 406 U.S. 958 (1972).

43. Nance v. United States, 440 F.2d 617, 619 (7th Cir.), *cert. denied,* 404 U.S. 845 (1971). The effect of such a decision as having been made by counsel is not always a bar to relief, especially when the petitioner did not participate in the decision and exercise a "considered choice." Fay v. Noia, 372 U.S. 391, 439 (1963). A deliberate decision by counsel which is a matter of trial strategy, however, may bind a non-participating petitioner and foreclose federal relief. Henry v. Mississippi, 379 U.S. 443, 451 (1965). This is true even if made without consulting the petitioner, as was held in *Henry*, and may be true even if the petitioner objected. Nelson v. California, 346 F.2d 73, 79 (9th Cir.), *cert. denied,* 382 U.S. 964 (1965).

In an analogous situation, recent authority now indicates that a plea of guilty is also subject to collateral attack by habeas petition even though the prisoner had, in response to direct questions personally addressed to him by the trial court, acknowledged that his plea was given voluntarily and that he understood the charges, the consequences of his plea, and fully admitted his guilt. The contention is that the correct answers were given under coercion or instructions by his lawyer or others. Fontaine v. United States, 411 U.S. 213, 215 (1973); *see* Fay v. Noia, 372 U.S. 391, 440 (1963) (guilty plea not a waiver where "grisly choice" was death sentence). *But see* Brady v. United States, 397 U.S. 742, 755 (1970) (guilty plea intelligently made is not invalid merely because it

RULES AND PROCEDURES

The Federal Rules of Civil Procedure apply generally under rule 81(a)(2). Since a petition for habeas corpus is a civil remedy, the burden of proof is on the petitioner and must be established by a preponderance of the evidence.[44] Transcripts of the trial proceedings and the findings of fact in the state court are presumed to be correct under section 2254(d)[45] although a "full and fair" evidentiary hearing must be granted upon appropriate showing.[46]

A federal court may rely on the state court's holding only after it concurs subsequent to an independent review of the state court transcript and the entire record upon which the findings were based. The state court's findings of fact which may be relied upon by the federal court are only those made by the trial judge who heard the evidence, not those of an appellate court.[47] If there is a factual dispute, the federal court must grant an evidentiary hearing if the petitioner alleges that he did not receive a full and fair evidentiary hearing.[48] The petitioner is not entitled to a new hearing, however, merely because he can point to certain errors, irregularities or shortcomings in the state court procedure.[49] He must additionally show that if his version of the events is true, he would be entitled to relief. Thus, a rehearing of historical facts is not required if it would be a mere exercise in futility.[50]

Interpretation of the Petition

In interpreting the habeas corpus petition, certain rules should be

was entered to avoid a possible death sentence); Parker v. North Carolina, 397 U.S. 790, 797 (1970) (intelligent guilty plea not open to attack on ground that lawyer misjudged admissibility of evidence).

A competently counseled defendant who alleges that he pled guilty because of a prior coerced confession is not, without more, entitled to a hearing on his petition for habeas corpus. In such a case, he cannot claim that his bypass of state remedies was not an intelligent act. McMann v. Richardson, 397 U.S. 759, 768-69 (1970).

44. Brown v. Allen, 344 U.S. 443, 457 n.6 (1953).

45. 28 U.S.C. § 2254(d) (1970). While the federal courts have power to try the facts anew and § 2254(d) constitutes a codification of Townsend v. Sain, 372 U.S. 293 (1963), as previously observed, the state court's findings made after a fact-finding hearing are presumptively correct. *See* Johnson v. Copinger, 420 F.2d 395, 398 (4th Cir. 1969).

46. 28 U.S.C. § 2243 (1970).

47. Hill v. Nelson, 466 F.2d 1346, 1348 (9th Cir. 1972).

48. Townsend v. Sain, 372 U.S. 293, 320 (1963).

49. Bishop v. Wainwright, 511 F.2d 664, 666 (5th Cir. 1975).

50. Procunier v. Atchley, 400 U.S. 446, 452 (1971). The federal courts must apply the correct constitutional standards to the historical facts no matter how fairly, conscientiously and completely the claim has been litigated in the state court. Brown v. Allen, 344 U.S. 443, 460 (1953).

kept in mind. The court has the power to deny a petition if it states only stark conclusions of law with no supporting factual allegations.[51] If the petition is largely conclusionary, but also states a ground which, if factually established, would entitle the petitioner to relief, the proper course is to permit the petitioner to proceed in *forma pauperis*, but to dismiss the petition with leave to amend the deficiency.[52] If an application to file in *forma pauperis* is denied, the paper should be retained so as to be available for appellate review.[53]

Final Conclusion and Judgment

In the event it becomes necessary to grant the writ, the judge should make it conditional by inserting the following language: "The Writ will issue unless within sixty days from the date that this order becomes final the state institutes proceedings to retry the petitioner." Preparatory to appeal, a motion for rehearing must be filed by the petitioner within 10 days after the entry of the final judgment and notice of appeal must be filed within 30 days thereafter, unless the period is extended after timely filing of a motion to extend.[54] These periods are jurisdictional.[55]

Appeal

If the district court grants the writ, the state has a statutory right to appeal to the circuit court of appeals.[56] The trial court can either deny or grant the stay of the execution of the judgment pending appeal. If it grants the stay, the release and/or retrial of the petitioner is delayed until the appellate court reaches a decision.[57] In the event the writ is denied by the trial court, the petitioner may either be detained in custody pending appellate review, which is the usual case, or bond may be granted by the judge rendering the decision.[58] Bond is usually allowed only in exceptional cases.[59] Should the writ be granted, "the

51. Sanders v. United States, 373 U.S. 1, 19 (1963). Local rules may prescribe the format and contents for the habeas petition, including the use of an approved form. Fernandez v. Meier, 432 F.2d 426, 428 (9th Cir. 1970).

52. Pembrook v. Wilson, 370 F.2d 37, 39 (9th Cir. 1966). Ordinarily, the petition must be verified before a notary public. 28 U.S.C. § 2242 (1970).

53. Martin v. United States, 273 F.2d 775, 778 (10th Cir. 1960), *cert. denied*, 365 U.S. 853 (1961).

54. Flint v. Howard, 464 F.2d 1084, 1086 (1st Cir. 1972).

55. *Id.* at 1086.

56. *See* 28 U.S.C. § 2253 (1970).

57. *Id.* § 2251.

58. FED. R. APP. P. 23(b). Bail may also be allowed by the court of appeals or the Supreme Court, or any judge or justice thereof.

59. A prisoner should not be released on bail prior to a final determination of the

prisoner shall be [released] upon his recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall order otherwise."[60]

If the petition is dismissed by the trial court as being frivolous and thereafter a notice of appeal is filed, it necessarily follows that the appeal itself would be frivolous since the court has found against the petitioner. In such a case the court is required and should always make exhaustive findings of fact and conclusions of law. Thereafter, in denying the motion to appeal in *forma pauperis*, the court may merely adopt and incorporate by reference the previous findings in support of its order denying the petitioner's right to appeal in *forma pauperis* on the ground of frivolous appeal.

PRACTICAL CONSIDERATIONS FOR HANDLING PRISONER PETITIONS

Judge James M. Carter has proposed a worthwhile and useful tool for processing prisoner petitions. The procedure contemplates that a prisoner, through his court-appointed lawyer, will be required to present and specify in detail any and all conceivable present or possible future grounds which might be available to challenge the conviction.[61] This is strictly a lawyer's pretrial proceeding and does not usually involve the courtroom presence of the prisoner or any character of an evidentiary hearing whatsoever. It is designed and tends to eliminate repeated endless future petitions based on new and other additional grounds and grievances or shades thereof by the same prisoner.

Wingo v. Wedding

While a few of the federal district judges still screen, process and handle all prisoner grievances personally with the aid of their law clerks and deputy district clerks, the vast majority, especially multijudge courts, now rely heavily on their magistrates, frequently with the help of an "intake" or "writ" clerk. Because of this increased reliance on

petition for habeas corpus unless the circumstances are unusual. Glynn v. Donnelly, 470 F.2d 95, 98 (1st Cir. 1972); Benson v. California, 328 F.2d 159, 162 (9th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965). Exceptional circumstances exist when the conviction is clearly invalid and the sentence would have been served before effective state review. Boyer v. City of Orlando, 402 F.2d 966, 968 (5th Cir. 1968).

60. FED. R. APP. P. 23(c).

61. *See* Carter, *Pre-Trial Suggestions for Section 2255 Cases Under Title 28 United States Code*, 32 F.R.D. 391 (1963). This proposed method was approved in Sanders v. United States, 373 U.S. 1, 22-23 (1963).

magistrates, the very recent case of *Wingo v. Wedding*[62] deserves special treatment. The Court, in holding that it is improper for the trial court to delegate to the magistrate the responsibility of conducting an evidentiary hearing in a habeas corpus case, based its decision largely upon the ground that the Magistrates Act[63] expressly provided that the magistrate's report and recommendations were to relate to "whether there should be a hearing." Thus, the decision does not directly decide whether a magistrate may be authorized by statute to conduct such hearings and make his findings of fact and conclusions of law in prisoner civil rights cases.[64]

Because the jurisdiction of the magistrate in section 1983 cases was not before the Supreme Court in the *Wingo* case, that decision can be read as merely dealing with habeas corpus cases. The authority of the magistrate in section 1983 cases may be clarified by changes in the Magistrates Act to define his authority or by an amendment to Rule 53(b) of the Federal Rules of Civil Procedure, providing for the reference of a case to a master. Pending clarification of the magistrate's authority, it still seems appropriate to utilize the magistrate in conducting evidentiary hearings in section 1983 cases.[65] If the authority is challenged, the matter will, of course, be further clarified in the litigated case. Assuming that the magistrate can act in this case as a master, there is doubt as to whether it is necessary for the court to conduct de novo review of the magistrate's findings or whether the review should be that applicable to a district court's handling of a recommendation from a master appointed under present civil rule 53.[66]

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62. 418 U.S. 461 (1974).

63. 28 U.S.C.A. § 636(b)(3) (Supp. 1975).

64. In Campbell v. United States Dist. Ct., 501 F.2d 196, 206-207 (9th Cir. 1974), *cert. denied*, 419 U.S. 879 (1975), the Ninth Circuit held:

> [A] magistrate is authorized to preside at an evidentiary hearing on a motion to suppress evidence and is authorized to make proposed findings . . . of fact, conclusions of law and a proposed order after a hearing on a motion to suppress. . . . [The district court] shall [however] make the final adjudication of the motion to suppress.

65. The recent case of Cruz v. Hauck, 515 F.2d 322 (5th Cir. 1975) seems to hold that a section 1983 civil rights action may be referred to a magistrate for an evidentiary hearing only by consent of the parties. The case is, however, authority for the proposition that the limitations of the master to hold fact-finding hearings "cannot derive from constitutional considerations." *Id.* at 330. This certainly suggests that the Magistrates Act might be amended to afford these judges the same powers as are enjoyed by masters.

Cruz further holds that the prisoner must object to the referral of the case at the earliest possible opportunity. Otherwise, the failure to timely object will constitute a waiver. *Id.* at 331. Also, *Cruz* holds that "the district court need not consider [complaints from] those inmates whose confinement is of a very temporary nature or for purposes of transfer to other institutions." *Id.* at 333.

66. FED. R. CIV. P. 53(e)(2) provides: "In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous."

It seems apparent that a duty of total review by the district court is probably mandatory since it is apparent that the court must make the ultimate and final decision. Certainly, pending a revision of rule 53 to enable the appointment of a magistrate pursuant to that rule, it would seem imperative to grant a de novo review of the magistrate's findings. This is particularly advisable when the court is faced with the current problems caused by the shortage of court reporters and the problems associated with the present practice of tape recording proceedings before magistrates.

Recommendations of the Aldisert Committee

Increasing prisoner cases led the Federal Judicial Center to appoint a special committee under the chairmanship of Judge Ruggero J. Aldisert to study the handling of prisoner cases and to propose improved model procedures and changes to provide more effective handling and disposition of prisoner petitions.[67] The committee readily recognized that while most prisoner petitions are frivolous and should be dismissed without an evidentiary hearing, some such complaints raise constitutional issues of great difficulty and importance. It was the expressed aim of the Aldisert Committee in its temporary report to urge the respective states to assume increasing responsibility for the protection of the constitutional rights of its prisoners while at the same time reserving the opportunity to resort to the federal courts where the state has failed to adequately recognize these rights by providing trial safeguards.

It also recognizes that there has been a general trend in the direction of greater state responsibility in the habeas corpus cases which, as previously noted, are exceedingly disruptive of state-federal relations. The committee found, however, that this type of development providing adequate administrative remedies, reviews and appeals has not occurred in section 1983 prisoner civil rights cases. The committee also predicted that there is little promise of increased state responsiveness in these latter cases since, given the present state of the law, the state courts historically have shown little interest in being involved in prisoner cases of this type. Furthermore, there is absolutely no present requirement that the prisoner exhaust his state judicial remedies in section 1983 cases. If in fact he follows state procedures and goes to the state court, its decision is probably res judicata, thus precluding the opportunity of his obtaining possible repeated federal review of the decision.

67. The preliminary report of the committee may be found in 64 F.R.D. 312 (1974).

This committee has also recommended that there be extensive movement towards centralization in multijudge courts, and that any such courts having a substantial caseload of prisoner complaints should institute a centralized processing method. In these districts, the committee recommended the appointment of an expert "intake" or "writ" clerk to initially process these petitions. After this temporary handling, the court could appoint a law clerk or magistrate to perform the initial screening of the petition. The suggestion was made that in some large multidistrict courts "all actions commenced by one prisoner should be assigned to the same judge."[68] In this connection, the Aldisert committee observed that the choice and variation of such procedures can be made by each court according to its own particular conditions, problems and needs under its local rules.

To standardize the petitions and thereby expedite their handling, a suggested complaint form was formulated by the committee.[69] The form adopted does not contemplate or allow citation of cases and should include the following: (1) the proper complaint form with instructions for processing and handling the application; (2) must be verified; and (3) provide a form for filing under a *forma pauperis* affidavit. As a practical proposition, such a standardized form of sworn petition is absolutely essential to the efficient and expeditious handling and disposition of prisoner cases in any multi-judge court.[70]

In those states where extensive and comprehensive grievance procedures have been adopted—written complaint forms, a review board with adequate appellate procedures inside the institution, etc.—the number of prisoner petitions filed has been dramatically curtailed. Furthermore, the Fifth Circuit has held that a federal prisoner must now exhaust his administrative remedies and that the district court was authorized to order the case held in abeyance for at least 60 days until administrative procedures could be completed through the penitentiary system.[71] In most of these cases, statistics have established that many of the complaints will be abandoned or resolved administratively within 60 to 120 days; in a great many cases during this period the inmate has been

68. *Id.*

69. *Id.* at 316.

70. The requirement of verification has been held to be jurisdictional. Dorsey v. Gill, 148 F.2d 857, 869 (D.C. Cir.), *cert. denied*, 325 U.S. 890 (1945).

71. Rocha v. Beto, 449 F.2d 741, 742 (5th Cir. 1971); *see* Quick v. Thompkins, 425 F.2d 260, 261 (5th Cir. 1970). But the Fourth Circuit has held that even though the state had a grievance procedure applicable to state prisoners the petitioner was not required to exhaust these avenues of relief before filing his complaint in the federal court. McCray v. Burrell, 516 F.2d 357, 364 (4th Cir. 1975) (*en banc*).

released from custody or transferred to another institution, rendering his complaint moot.

According to Judge Aldisert's committee, the result of the adoption of grievance procedures by the respective states has been encouraging. A significant percentage of the grievances are resolved at the institutional level and an additional percentage, also significant in number, are resolved at the administrative appellate level. As previously observed, some of the cases are abandoned or the prisoner is discharged from custody or is transferred to another penitentiary.

CONCLUSION

Hopefully, all the work, time and effort of the Aldisert Committee and many others will resolve or at least alleviate this vexing and frustrating area of litigation which has so troubled the federal judiciary and strained relations between the federal and state governments. This is particularly true since the volume of the grievances is increasing at a staggering rate. Some federal judges now spend as much as 25 percent of their time on prisoner cases alone. With the added burdens imposed on these judges, the bar and the penal system by the new Speedy Trial Act,[72] continued efforts to improve solutions to prisoner complaints must be vigorously pursued.

72. Pub. L. No. 93-619 (Jan. 3, 1975).