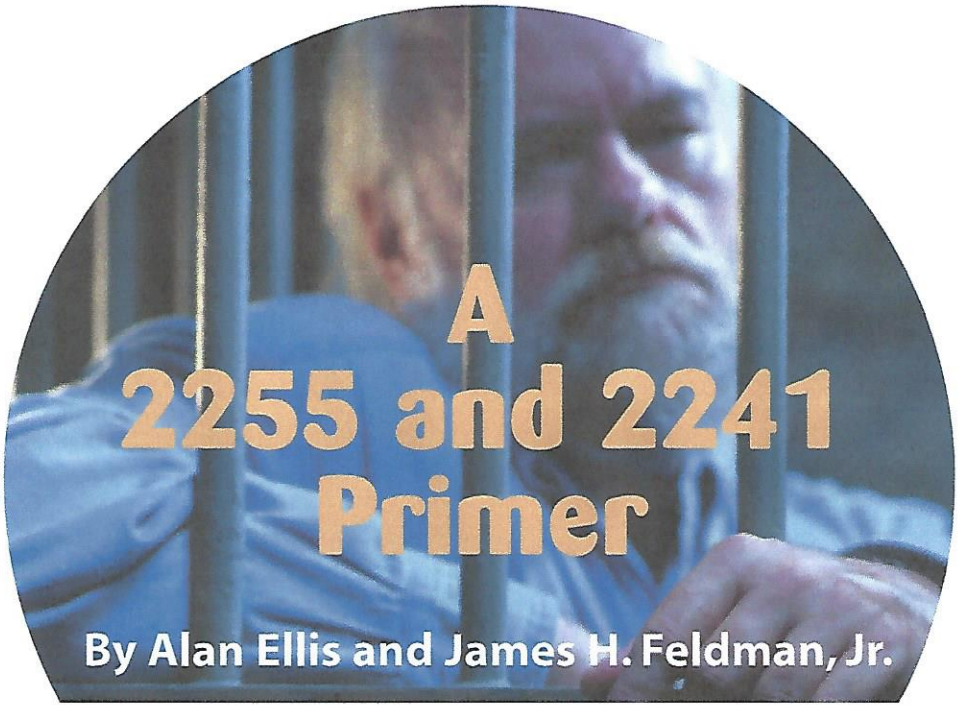

A 2255 and 2241 Primer

By Alan Ellis and James H. Feldman, Jr.

The motion to vacate, set aside or correct a sentence provided by 28 U.S.C. § 2255 is a modern descendant of the common law petition for a writ of *habeas corpus*. It is available only to people convicted in federal courts who are in custody. (The corresponding federal post-conviction tool for state prisoners is the *habeas* petition governed by 28 U.S.C. § 2254.) The § 2255 motion is the post-conviction tool most federal prisoners turn to after they have exhausted their appeals. When it is used effectively, it can be a powerful tool to right injustices that were not or could not have been raised on direct appeal. This is because it gives courts broad discretion in fashioning appropriate relief, including dismissal of all charges and release of the prisoner, retrial, or resentencing.

Occasionally, the remedy provided by § 2255 will be "inadequate or ineffective to test the legality of [a prisoner's] detention."[1] In those rare instances, federal prisoners may petition for traditional writs of *habeas corpus* pursuant to 28 U.S.C. § 2241.

Who Can File a § 2255 Motion?

Only "prisoners" who are "*in custody* under sentence of a court established by Act of Congress" may file motions pursuant to 28 U.S.C. § 2255 to vacate their convictions or sentences.[2] To satisfy this "custody" requirement, a defendant must either be in prison or jail, or else have his or her liberty under some other form of restraint as part of a federal sentence. In other words, the "in custody" requirement is important, while the limitation of the remedy to "prisoners" is not literally enforced. Examples of restraints short of imprisonment which qualify as "custody," include probation, parole, supervised release, and being released on bail or one's own recognizance.[3] A defendant need only satisfy the "custody" requirement at the time he or she files a § 2255 motion. A defendant's being released from custody during the pendency of a § 2255 motion does not make the case moot or divest a court of jurisdiction to hear the case.[4]

A defendant who has completely finished his or her sentence, or who has been sentenced only to a fine, may not obtain relief through § 2255. Similarly, because corporate defendants never have restraints placed on their physical liberty as a result of a federal criminal conviction (corporations receive only fines as criminal punishments), they can never meet the "custody" requirement. Defendants who cannot meet the custody requirement may still be able to obtain relief under the All Writs Act, 28 U.S.C. § 1651, by petitioning for a writ in the nature of *Coram Nobis*, which has no custody requirement.[5]

What Issues Can Be Raised in a § 2255 Motion?

Section 2255 provides that "prisoners" may move for relief "on the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." Most circuits of the U.S. court of appeals have interpreted this language to mean that defendants who meet § 2255's custody requirement may not raise issues which challenge aspects of their sentence which are unrelated to their custody.[6] Most § 2255 motions allege violations of the defendant's Sixth Amendment right to the effective assistance of counsel.

How Does A § 2255 Motion Differ from a Direct Appeal?

One of the most significant differences between a direct appeal and a § 2255 motion is that direct appeals are decided based on the district court record as it exists as of the time the notice of appeal is filed. In contrast, § 2255 motions offer defendants the opportunity to present the court with new evidence. While issues which may be raised in a § 2255 motion are not limited by the record as it exists at the time the motion is filed, unlike in a direct appeal, not all issues may be raised in a § 2255 motion. Section 2255 motions may only be used to raise jurisdictional, constitution-

al, or other fundamental errors.

For example, some circuits hold that guideline calculation errors that escaped notice on direct appeal cannot be raised under § 2255.[7] Others have not questioned the appropriateness of raising guideline issues in a § 2255 motion.[8] A § 2255 motion is, however, always the proper vehicle to question whether an attorney's failure to raise a guideline issue deprived a defendant of their Sixth Amendment right to effective assistance of counsel, either at sentencing, or on direct appeal.[9]

What Are Some of the Obstacles a Defendant May Encounter in Litigating A § 2255 Motion?

Identifying an appropriate § 2255 issue is no guarantee of success. Even prisoners who have good issues must often overcome numerous obstacles before a court will even address them. For example, if an issue could have been raised on direct appeal, but was not, a district court will not consider the issue in a § 2255 proceeding unless the defendant can demonstrate "cause" (such as ineffective assistance of counsel) for not raising the issue earlier and "prejudice" (that is, that the error likely made a difference in the outcome). For this reason, it is generally not a good idea to forego a direct appeal and proceed directly to a § 2255 motion. Conversely, if an issue was raised and decided on appeal, a defendant is procedurally barred from raising it again in a § 2255 motion, absent extraordinary circumstances, such as an intervening change in the law or newly discovered evidence.[10]

Section 2255 motions may not be used as vehicles to create or apply new rules of constitutional law. While new interpretations of substantive law may be applied retroactively in a § 2255 motion,[11] with rare exceptions, new rules of constitutional law may not.[12]

Do Prisoners Have a Right To Appointed Counsel To Assist Them in Filing and Litigating a § 2255 Motion?

Prisoners who cannot afford to hire private counsel have no right to appointed counsel to assist them in filing § 2255 proceedings. Indigent litigants may, however, petition the court for appointment of counsel. A court has discretion to appoint counsel "at any stage of the proceeding if the interest of justice so requires."[13] Appointment of counsel is mandated only if the court grants an evidentiary hearing, Rule 8(c), or if the court permits discovery and deems counsel "necessary for effective utilization of discovery procedures."[14]

Is There a Time Limit Within Which A § 2255 Motion Must Be Filed?

Prior to Congress' enacting the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996, there was no specific limit on the time within which a prisoner was required to file a § 2255 motion. The AEDPA's amendment of 28 U.S.C. § 2255 imposes a one-year statute of limitations which is triggered by the latest of four events:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

All defendants thus have one year from the date on which their judgments of conviction become final within which to file § 2255 motions. Occasionally a particular defendant will be able to file a § 2255 motion beyond that date when a new year-long limitation period is triggered by one of the other events listed above.

Unfortunately, there is no consensus among the courts of appeals as to when a judgment of conviction becomes "final," thus triggering the one-year statute of limitations. Prior to the AEDPA, the Supreme Court held, in the context of deciding when a "new rule" could be applied on collateral attack, that a conviction becomes final when "the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for *certiorari* ha[s] elapsed. . . ."[15] Although a "new rule" may not be applied retroactively on collateral attack, it may be applied in a particular case if it was announced prior to the judgment of conviction becoming "final" in that case. Although it may seem intuitive that the same rule should trigger the statute of limitations in § 2255 cases, not all courts of appeals have seen it that way.[16]

It is clear that when a defendant petitions the Supreme Court for a writ of *certiorari* as part of the direct appeal, the judgment of conviction becomes final on the date the Supreme Court denies the writ. If the Supreme Court grants the writ, then the judgment of conviction becomes final either on the date the Supreme Court rules (if there is no remand), or on the date that the conviction and sentence are ultimately affirmed on remand. What is not so clear is when a conviction becomes final when a defendant fails to appeal, or when he or she appeals, but fails to petition for writ of *certiorari*. Two courts of appeals have held that where a defendant appeals, but fails to petition for writ of *certiorari*, the conviction becomes final, triggering the statute of limitations, when the court of appeals issues its mandate.[17] Other courts of appeals have held that the judgment of conviction becomes final, triggering the statute of limitations, on the last day a defendant has to petition the Supreme Court for *certiorari*.[18]

If a defendant does not appeal, it is clear that in the Third, Fifth, Ninth, and Tenth Circuits, the judgment of conviction becomes final on the last day the defendant could file a notice of appeal — *i.e.*, on the tenth day following the entry of the judgment of sentence. It is not clear yet when the judgment would become final in the Fourth or Seventh Circuits, or in the circuits which have not yet addressed the question of when a judgment of conviction becomes "final" under the AEDPA. If you are in a jurisdiction which has not decided the issue, the prudent course may be to assume that the year runs from the date the judgment of conviction is entered on the docket (if no notice of appeal is filed), or on the date the court of appeals decides the case or denies a timely-filed petition for rehearing.

If a defendant wins a new trial or a resentencing on appeal (or even as a result of a § 2255 motion), then the new judgment of conviction and sentence which is entered after the new trial or resentencing would begin a new year-long statute of limitations.

Is AEDPA's One Year Rule Hard and Fast?

No. Every Circuit to have considered the issue has ruled that the AEDPA's one-year statute of limitations is not jurisdictional in nature, and is therefore subject to equitable tolling.[19] Equitable tolling excuses a movant's untimely filing "because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence."[20] Courts, however, have rarely found that movants meet the requirements of equitable tolling. For example, "mere excusable neglect is not sufficient."[21] Nor is delay by the Postal Service,[22] or the unclarity of a deadline.[23]

A *pro se* movant's being misled by a court, however, *has* supported equitable tolling.[24]

How and Where Do You File a § 2255 Motion?

Section 2255 motions must be filed with the district court which sentenced the defendant. The local rules of most district courts require *pro se* prisoners to use forms supplied by the clerk. Some local rules even require attorneys to use the forms. There is no filing fee.

What Happens After the Motion Is Filed?

Section 2255 motions are first presented to the judge who presided over the defendant's trial and sentencing if that judge is available. The judge examines the motion and attached exhibits, as well as the rest of the case record (including transcripts and correspondence in the file). The court then either dismisses the motion or orders the government to file an answer. Dismissal is required where the court concludes that the claims raised in the motion, even if true, would not provide a ground for § 2255 relief, or where the claims are conclusively refuted by the files and records of the case.

After the government files its answer, the defendant may want to refute the government's arguments. This can be done by filing a memorandum in reply. Sometimes the right to file a reply memorandum exists under local court rules or court order. Sometimes a defendant must file a motion for leave to file a reply.

At this point, the court will either grant or deny relief, or will hold a hearing. While the language of 28 U.S.C. § 2255 seems to require a hearing whenever the court orders the government to file an answer, the rules governing § 2255 motions leave the necessity of a hearing to the court's discretion.[25] In practice, courts grant hearings only where there are critical facts in dispute. Whenever a court holds an evidentiary hearing, Rule 8(c) requires it to appoint counsel for *pro se* defendants who cannot afford to hire counsel. The prisoner can be brought to court for the hearing if his or her testimony is required, or for any other reason approved by the judge.

How Long Does the Process Take?

Once a defendant files a § 2255 motion, it can take anywhere from several weeks (in the event of a summary dismissal) to over a year (if the government is ordered to respond, and a hearing is held) for a court either to grant or dismiss a § 2255 motion.

Do Any Special Rules Apply to § 2255 Motions?

Yes — the "Rules Governing Section 2255 Proceedings For the United States District Courts." The rules address the following issues: scope of the rules (Rule 1), form of the motion (Rule 2), filing of the motion (Rule 3), preliminary consideration by the judge (Rule 4), answer of the government (Rule 5), discovery (Rule 6), expansion of the record (submitting evidence) (Rule 7), evidentiary hearing (Rule 8), delayed or successive motions (Rule 9; which has been largely, if not entirely, superseded by the AEDPA's more stringent restriction on successive motions), the powers of U.S. Magistrate Judges to carry out the duties imposed on the court by the rules (Rule 10), and the time for appeal (Rule 11). If no Rule specifically applies, Rule 12 provides that "the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate. . . ."

Rule 22 of the Federal Rules of Appellate Procedure addresses the procedure for applying for a certificate of appealability (permission to appeal). Local district court and appellate rules often have special sections devoted to § 2255 motions and prisoner petitions.

What Rules of Discovery Apply to § 2255 Motions?

Rule 6 of the Rules Governing § 2255 Proceedings allows defendants as well as the government to conduct discovery pursuant to the Federal Rules of Civil Procedure — but only with permission from the court. The rule gives the district court discretion to grant discovery requests "for good cause shown, but not otherwise."

Can Denial Of § 2255 Motions Be Appealed?

The denial of a § 2255 motion can be appealed only if "a circuit justice or judge issues a certificate of appealability."[26] A circuit justice or judge "may issue a certificate of appealability . . . only if the applicant has made a substantial showing of the denial of a constitutional right."[27] Under this language, even if the § 2255 motion properly raised a non-constitutional issue, the denial of that ground for relief cannot be appealed at all. If a certificate is issued, it must "indicate which specific issue or issues satisfy" the required showing of the denial of a constitutional right.[28] Only defendants need certificates of appealability to appeal the denial of § 2255 motions; the government needs no certificate to appeal the granting of a motion to vacate.

Although the appeal of the court's denial of a § 2255 motion may not proceed without a certificate of appealability, a notice of appeal must nevertheless be filed within 60 days from the date judgment is entered.[29] Since there is no time limit within which a court must rule on an application for a certificate of appealability (some courts have been taking a year or more to rule on such requests), the rules of appellate procedure provide that the notice of appeal itself "constitutes a request [for a certificate of appealability] addressed to the judges of the court of appeals."[30] The filing of a notice of appeal also triggers a requirement that the "district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue."[31] If the district court denies the certificate, the defendant "may request a circuit court judge to issue the certificate."[32] Rule 22(b)(2) provides that "A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes." Some courts of appeals assign this task to a single judge.[33] Others refer such requests to panels of the court.[34] Even when consideration of a request for a certificate of appealability is referred to a panel, the support of only one judge is required for the certificate to issue.[35]

What Is Required To Make a 'Substantial Showing of the Denial of a Constitutional Right'?

The standard for appealability under 28 U.S.C. § 2253(c)(2) is somewhat different depending upon whether the district court has rejected the issue

sought to be appealed on its merits or on procedural grounds.

With respect to constitutional claims rejected on their merits, the Supreme Court has applied to certificate of appealability the standard for granting certificates of probable cause set forth in *Barefoot v. Estelle*,[36] and followed in the AEDPA.[37] Under this standard, the appellant must make a showing that each issue he or she seeks to appeal is at least "debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further."[38] The "substantial showing" standard "does not compel a petitioner to demonstrate that he or she would prevail on the merits."[39]

As to claims denied on procedural grounds (that is, where the district court has not reached the merits), the Supreme Court in *Slack* clarified that the certificate of appealability standard is somewhat different and easier to meet: (1) "whether jurists of reason would find it debatable whether the petition *states* a valid claim of the denial of a constitutional right" (in other words, does the petition at least allege a valid claim, even though it hasn't been proven yet), and (2) whether "jurists of reason would find it debatable whether the district court was correct in its procedural ruling."[40]

Can a Defendant File More Than One § 2255 Motion?

Before a prisoner may file a second § 2255 to challenge a particular judgment, a "*panel* of the appropriate court of appeals" must "certif[y]" that the motion "contain[s]" either:

> (1) newly discovered evidence that, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255 (emphasis added).

This harsh rule is tempered slightly by the fact that it applies only to motions which attack the a judgment that a defendant has previously moved pursuant to § 2255 to vacate. Defendants may file one § 2255 motion as of right for each judgment of conviction and sentence. For example, if a defendant's conviction is vacated as a result of a § 2255 motion, he receives a new trial and is convicted and sentenced again (or simply resentenced), he may file a § 2255 motion to challenge that new judgment without receiving permission from the court of appeals.

If a defendant wants to file a second § 2255 motion attacking the same judgment, his or her options are severely limited. The newly discovered evidence ground, for example, applies only to newly discovered evidence which establishes a defendant's factual innocence. It does not, for example, apply to evidence which, had it been known prior to sentencing, would have resulted in a shorter term of imprisonment. Nor would it apply to newly discovered evidence which, if it had been introduced at trial, might have engendered a reasonable doubt. The evidence must be such that had it be introduced, "no reasonable factfinder would have found the movant guilty of the offense."

The second ground is also quite narrow. It applies only to "new rule[s] of constitutional law" – not to changes in substantive law. The "new rule" must also have been "previously unavailable" *and* have been "made retroactive to cases on collateral review by the Supreme Court." A "new rule" has been "made retroactive to cases on collateral review by the Supreme Court" only if the Supreme Court itself has previously declared it to be retroactive – something which ordinarily can happen only on appeal of someone else's timely *first* § 2255 or *habeas* petition.[41]

Not only must a second § 2255 motion meet one of these criteria before it may be filed, it must also be filed within an applicable clause of the statute of limitations. For most defendants, that will mean within one year of the discovery of the new evidence, or "the date on which the right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."[42]

Habeas Corpus (§ 2241) Petitions

A § 2241 action, also known as a petition for a writ of *habeas corpus*, is essentially a civil lawsuit filed by a federal prisoner to challenge the legality of his or her custody in situations where the § 2255 motion would be inadequate or ineffective. There are two types of *habeas* petitions — those that challenge the validity of the underlying convictions or sentences, and those that do not. Because § 2255 motions are, except in rare instances, "adequate" (even if not successful) to challenge the validity of underlying convictions and sentences, *habeas* petitions are generally limited challenges to federal custody which do not challenge the underlying convictions or sentences.

Challenges to Underlying Convictions and Sentences

The § 2255 remedy is not "inadequate or ineffective" simply because a defendant has filed a § 2255 motion and failed to obtain relief,[43] or because a defendant is barred by the statute of limitations,[44] or by the statutory limitations on second and successive motions, from filing a § 2255 motion.[45] Circumstances under which courts have permitted criminal defendants to employ the *habeas* petition to challenge their convictions and sentences include abolition of the sentencing court,[46] refusal of the sentencing court even to consider the § 2255 motion,[47] and inordinate delay in disposing of a § 2255 motion.[48]

The limitations imposed by the AEDPA on second or successive petitions have created a new (although still rare) circumstance under which the remedy afforded by § 2255 is "inadequate or ineffective." After a defendant has already filed a § 2255 motion challenging his underlying conviction and sentence, and lost, he may receive permission from the court of appeals to file a second § 2255 only in the two limited circumstances discussed previously.

A second or successive § 2255 is not permitted when the Supreme Court reinterprets the meaning of the statute under which the defendant had been convicted so as to render him innocent on the facts. While substantive criminal law rulings by the Supreme Court, such as this, are retroactively applicable on collateral attack (and therefore could support *first* § 2255 motions, so long as the motions are timely filed), they do not come within the two narrow grounds for receiving permission to file a second motion. Under these circumstances, courts have held that § 2255 is inadequate or ineffective and have permitted defendants to challenge their underlying convictions through *habeas* petitions.[49]

Habeas Petitions Which Do Not Challenge Underlying Convictions and Sentences

The § 2241 petition is the proper vehicle for challenging the duration of a

prisoner's confinement without challenging the underlying conviction.[50] The Supreme Court has suggested in dictum that § 2241 petitions may also be used to challenge a prisoner's conditions of confinement.[51] Some courts have permitted federal prisoners to use § 2241 petitions to challenge prison conditions.[52]

Other courts have ruled that such challenges must be made through civil rights actions, such as those brought under the authority of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Investigation*.[53] A court's *mandamus* jurisdiction may also sometimes be invoked to seek redress of prison conditions.[54]

Who May File a § 2241 Action?

Federal *habeas corpus* relief under 28 U.S.C. § 2241(c)(3) is available to anyone held "in custody in violation of the Constitution, laws or treaties of the United States." However, by law, the § 2241 remedy is limited to situations which are not covered by either 28 U.S.C. §§ 2254 (state prisoner challenging state conviction) or 2255 (federal prisoner challenging conviction or sentence). In addition to incarceration, being on parole or bail count as being "in custody." Section 2241 is also used to obtain review of forms of official custody not resulting from convictions, such as detained aliens and military members seeking discharge.

When May a Prisoner File a § 2241 Action?

A prisoner must first exhaust (use all of) his or her administrative remedies, if any, before filing a § 2241 action. For instance, if the Bureau of Prisons (BOP) has sanctioned a prisoner with the loss of good time credits, the prisoner must exhaust BOP administrative remedy procedures, if any, before he or she files a § 2241 action.[55] Courts generally recognize an exception to the "exhaustion" requirement where no timely and potentially effective administrative remedy exists.[56]

Where and How Should A Prisoner File a § 2241 Action?

A § 2241 action is a new civil lawsuit which should be filed in the district court having territorial jurisdiction over the prison or other person or agency having custody of the petitioner. *Habeas* petitions differ in many ways from normal civil lawsuits, however. For example, the filing fee is only $5. Also, a few, but not most, districts, require the use of a form petition. Neither the Federal Rules of Civil Procedure nor the rules applicable to § 2254 cases necessarily applies to § 2241 *habeas* petitions. The question of which rules do apply is complex, and unfortunately beyond the scope of this article.

Once the court reviews the petition, it will do one of four things: dismiss it (but only if the petitioner would lose even if the court accepted its allegations as true), order the petitioner to amend it (for instance, where there is some technical defect), order the respondent to show cause why the petition should not be granted – *i.e.*, to answer the petition by a certain date, or summarily grant the writ (extremely rare). After the respondent answers the petition (assuming it is ordered to do so), the petitioner may file a "traverse" (*i.e.*, a written reply to the reasons the respondent gave for why the court should not grant the petition). If an evidentiary hearing is held, the prisoner has a right to be present. Once a hearing is held (if one is necessary) and all the briefing is complete, the court will decide the case, "as law and justice require."[57]

Can the Denial Of § 2241 Relief Be Appealed?

Yes. Notice of appeal must be filed within 60 days of the entry of final judgment. Rule 4(a) of the Federal Rules of Appellate Procedure.[58] No certificate of appealability is required.[59]

Can a Prisoner File More Than One § 2241 habeas Petition?

Yes. No permission from the court of appeals is required if a prisoner files more than on § 2241 *habeas* petition. A second petition which raises an issue which could have been raised in the first petition must show cause why it was not raised in the first, or be dismissed under the "abuse of the writ" doctrine.[60] Similarly, a second petition which raises an issue which was decided in a prior petition will also be dismissed as an "abuse of the writ."[61]

Legal Assistance

Prisoners need not hire an attorney to file a § 2241 petition for a writ of *habeas corpus*. In fact, most § 2241 petitions are filed by prisoners without the assistance of attorneys. Unfortunately, due in part to the legal minefield that any federal *habeas* litigant must cross, most of these are summarily denied without a hearing. To maximize chances of success, a prisoner should retain the services of competent counsel. Prisoners who are unable to afford private counsel may ask the court to appoint an attorney under the Criminal Justice Act to represent them.[62] Prisoners filing for *habeas corpus* are not entitled to appointed counsel as a matter of right.

Notes

1. 28 U.S.C. § 2255.
2. 28 U.S.C. § 2255 (emphasis added).
3. *See, e.g.* Balik v. United States, 161 F.3d 1341 (11th Cir. 1998) (parole); United States v. Brown, 117 F.3d 471 (11th Cir. 1997) (supervised release).
4. *See, e.g.*, United States v. Brown, 117 F.3d 471 (11th Cir. 1997).
5. United States v. Morgan, 346 U.S. 502 (1954); United States v. Rad-O-Lite of Philadelphia, Inc., 612 F.2d 740 (3d Cir. 1979).
6. *See, e.g.*, United States v. Kramer, 195 F.3d 1129 (9th Cir. 1999) (challenge to restitution not cognizable in § 2255 motion). *But see* Weinberger v. United States, 268 F.3d 346, 351 n.1 (6th Cir. 2001) (allowing defendant to contest restitution in § 2255 motion).
7. United States v. Pregent, 190 F.3d 279, 283-84 (4th Cir. 1999).
8. *See, e.g.*, United States v. Marmolejos, 140 F.3d 488 (3d Cir. 1998).
9. Smullen v. United States, 94 F.3d 20, 23 (1st Cir. 1996)(sentencing); Glover v. United States, 531 U.S. 198 (2001)(direct appeal).
10. Davis v. United States, 417 U.S. 333 (1974).
11. Bousley v. United States, 523 U.S. 614 (1998).
12. Teague v. Lane, 489 U.S. 288 (1989).
13. 18 U.S.C. § 3006A(a)(2)(B); Fed.R.Gov. § 2255 Proc. 8(c).
14. Rule 6(a).
15. Allen v. Hardy, 478 U.S. 255, 258 n.1 (1986) (per curiam).
16. For example, in Gendron v. United States, 154 F.3d 672, 673-74 (7th Cir. 1998), the Seventh Circuit refused to apply this rule to the AEDPA statute of limitations.
17. Gendron v. United States, 154 F.3d 672 (7th Cir. 1998); United States v. Torres, 211 F.3d 836 (4th Cir. 2000).
18. *See* United States v. Garcia, 210 F.3d 1058 (9th Cir. 2000); United States v. Gamble, 208 F.3d 536 (5th Cir. 2000); United States v. Burch, 202 F.3d 1274 (10th Cir. 2000); Kapral v. United States, 166 F.3d 454 (3d Cir. 1999).
19. *See* Dunlap v. United States, 250 F.3d 1001, 1004 n.1 (6th Cir. 2001) (citing cases).
20. Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999).
21. Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 619 (3d Cir. 1998).
22. Sandvik, 177 F.3d at 1272 (counsel should have used a private delivery service or courier).
23. United States v. Marcello, 212 F.3d 1006, 1010 (7th Cir. 2000) (counsel should have filed by the earliest possible deadline). *But cf.* Banks v. Horn, 271 F.3d 527, 533-34 (3d Cir. 2001) (affirming tolling by district

court in § 2254 case where state rules on whether state post-conviction relief was "properly filed" (and thus tolled the one-year statute for § 2254 petitions) were "inhibitively opaque").

24. *See* United States v. Patterson, 211 F.3d 927 (5th Cir. 2000) (statute tolled where one week after running of statute, district court granted, "without prejudice" and "in the interests of justice," movant's request to dismiss timely-filed § 2255 motion to obtain assistance of an experienced "writ-writer").

25. Fed.R.Gov. § 2255 Proc. 8(a).

26. 28 U.S.C. § 2253(c)(1).

27. *Id.* § 2253(c)(2).

28. *Id.* § 2253(c)(3).

29. Fed.R.Gov. § 2255 Proc. 11 (time to appeal is as provided in Fed.R.App.P. 4(a), governing civil appeals).

30. Fed.R.App.P. 22(b)(3).

31. Rule 22(b)(1).

32. *Id.*

33. *See, e.g., In re* Certificates of Appealability, 106 F.3d 1306 (6th Cir. 1997).

34. *See, e.g.*, Bui v. DePaolo, 170 F.3d 232, 238 n.2 (1st Cir. 1999).

35. *See, e.g.*, Third Cir. R. 22.3 (certificate to issue on affirmative vote of one judge); Fourth Cir. R. 22(a) (same).

36. 463 U.S. 880 (1983).

37. Slack v. McDaniel, 529 U.S. 473 (2000).

38. *Barefoot*, 463 U.S. at 893 n.4) (internal quotations omitted; bracketed insertions original).

39. *Id.*

40. *Slack*, 529 U.S. at 478.

41. Tyler v. Cain, 533 U.S. 656 (2001).

42. § 2255 (¶ (3)).

43. Charles v. Chandler, 180 F.3d 753 (6th Cir. 1999) (per curiam).

44. United States v. Lurie, 207 F.3d 1075 (8th Cir. 2000).

45. *In re Davenport,* 147 F.3d 605, 608 (7th Cir. 1998).

46. Spaulding v. Taylor, 336 F.2d 192 (10th Cir. 1964).

47. Stiron v. Markley, 345 F.2d 473 (7th Cir. 1963).

48. *Id.*

49. *See, e.g.*, Triestman v. United States, 124 F.3d 361 (2d Cir. 1997) (defendant factually innocent on § 924(c) gun count following Bailey v. United States, 516 U.S. 137 (1995)). *See also In re Dorsainvil*, 119 F.3d 245 (3d Cir. 1997) (same).

50. *See, e.g.*, Reno v. Koray, 515 U.S. 50 (1995) (seeking credit for time spent in treatment facility); Preiser v. Rodriguez, 411 U.S. 475 (1973) (challenge to revocation of "good-time" credits); Bellis v. Davis, 186 F.3d 1092 (8th Cir. 1999) (challenge to BOP rule excluding certain inmates from eligibility for early release pursuant to 18 U.S.C. § 3621(e)(2)); McIntoch v. United States Parole Commission, 115 F.3d 809 (10th Cir. 1997) (challenge to revocation of parole); Goodman v. Meko, 861 F.2d 1259 (11th Cir. 1988) (prison officials refuse to release a prisoner entitled to mandatory release).

51. Preiser v. Rodriguez, 411 U.S. at 498-99. See also Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979) (open question whether § 2241 may be used to challenge conditions of confinement).

52. *See, e.g.*, Bonacci v. Kindt, 868 F.2d 1442 (5th Cir. 1989) (prisoner alleged denial of access to courts and due process); United States v. Huss, 520 F.2d 598 (2d Cir. 1975) (Jewish prisoners contend that prison's failure to provide them with Kosher food violates constitutional right).

53. 403 U.S. 388 (1971). *See, e.g.* Boyce v. Ashcroft, 251 F.3d 911 (10th Cir. 2001) (affirming dismissal of § 2241 petition challenging constitutionality of transfer to maximum security prison in retaliation for exercise of First Amendment rights), *vacated on reh'g,* 268 F.3d 953 (10th Cir. 2001) (case mooted when BOP granted prisoner relief requested).

54. *See, e.g.,* Long v. Parker, 390 F.2d 816, 189 (3d Cir. 1968) (upholding mandamus jurisdiction under 28 U.S.C. § 1361 for prisoners challenging treatment by the Federal Bureau of Prisons).

55. Carmona v. U.S. Bureau of Prisons, 243 F.3d 629 (2d Cir. 2001).

56. Fuller v. Rich, 11 F.3d 61, 62 (5th Cir. 1994) (per curiam).

57. 28 U.S.C. § 2243.

58. Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257 (1978).

59. *See* Jeffers v. Chandler, 253 F.3d 827, 830 (5th Cir. 2001).

60. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

61. David v. Fechtel, 150 F.3d 486, 490-91 (5th Cir. 1998); George v. Perrill, 62 F.3d 333 (10th Cir. 1995)

62. 18 U.S.C. § 3006A(a)(2)(B).

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