PRESENTENCE AND POSTCONVICTION REMEDIES

BY ALAN ELLIS, WAYNE ANDERSON, AND JAMES H. FELDMAN, JR.

The Basic Tools: 2241 and 2255 Habeas Petitions

The motion to vacate, set aside, or correct a sentence provided by section 2255 of volume 28 of the *United States Code* (U.S.C.) is the modern descendant of the common law writ of habeas corpus. It is available only to people convicted in federal courts who are in custody. (The corresponding federal postconviction remedy for state prisoners is the habeas petition governed by section 2254 of 28 U.S.C.) The section 2255 motion is the postconviction 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.

For a variety of reasons, however, section 2255 motions can be a minefield for the *pro se* litigant or inexperienced lawyer. For example, unlike direct appeals, section 2255 motions can only be used to raise jurisdictional, constitutional, or other fundamental errors. Violations of important statutory rights or even of a rule of procedure can sometimes qualify, however. Unfortunately, identifying an appropriate section 2255 issue is no guarantee of success. Even prisoners who have good issues must overcome numerous obstacles before a court will even address them. For example, some "new rules" cannot be enforced retroactively under section 2255. In addition, unless "cause" (such as ineffective assistance of counsel) and "prejudice" (that is, that the error likely made a difference in the outcome) can be shown, section 2255 motions will not be granted on most issues that could have been, but were not, raised on appeal. If an individual's trial or appellate lawyer fails to identify an issue that should have been raised on appeal, it simply may not be possible to raise it later successfully in a section 2255 motion (unless ineffective assistance can be demonstrated). It is, therefore, not wise for a prisoner to "hold back" any challenge to the conviction until the postconviction phase. Except where new evidence must be introduced from "outside the record," the best 2255 motion is no substitute for a good appeal.

By the same token, prisoners should not look to 2255 motions as an invitation to file their first motion *pro se*, turning to a postconviction specialist only if they lose. This is especially true given the amendments to section 2255 established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). (Pub. L. No. 104–132, Title I, § 106, 110 Stat. 1214, 1220–21 (1996).) Until the AEDPA, section 2255 motions could be filed at any time—and there was no express limit on the number of section 2255 motions a defendant could file. As amended by the AEDPA, however, section 2255 presently contains a one-year statute of limitations period for filing the first 2255 motion and bars the filing of a second or successive 2255 motion in the district court unless a three-judge panel of the appropriate court of appeals serving as a "gatekeeper" allows the second or successive filing as provided in 28 U.S.C. section 2244(b)(3)(A) and 28 U.S.C. section 2255, as amended (unnumbered, new paragraph 8).

The new statute of limitations describes four possible dates from which the one-year limitations period begins to run: the dates on which (1) a governmental impediment to filing is removed, (2) the Supreme Court newly recognized a "right asserted", (3) newly discovered evidence is discovered, and (4) a judgment of conviction becomes final. In most cases the one-year limitations period will begin to run from "the date on which the judgment of conviction becomes final." The new law, however, fails to state when a conviction becomes final. Moreover, the courts have not yet authoritatively interpreted this part of the AEDPA, noting only that the matter remains unsettled. *(See, e.g., Clarke v. United States,* No. 96cv1020, 1997 U.S. Dist. LEXIS 1997 (E.D. Va. Feb. 20 1997).

The new "gatekeeping" process for second or successive 2255 motions expressly instructs the court of appeals to certify a second or successive motion only if the motion contains:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the movant guilty of the underlying offense; or
>
> (2) a new rule of constitutional

Alan Ellis *is a partner with the Law Offices of Alan Ellis, P.C., with offices in Ardmore, Pennsylvania, and Sausalito, California, and specializes in representing federal criminal defendants in connection with plea negotiations, sentencing, appeals, Supreme Court practice, Rule 35 motions, parole and prison matters, and habeas corpus 2241 and 2255 motions. He is a contributing editor for* Criminal Justice *magazine.* **Wayne M. Anderson** *is an associate in the firm's California office and formerly served as a staff attorney in the United States Courts of Appeals for the Second and Ninth Circuits.* **James H. Feldman, Jr.**, *is an associate in the firm's Pennsylvania office and is associate editor of the firm's* Federal Presentencing and Post Conviction News.

law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(28 U.S.C. § 2255.)

The gatekeeping provisions also provide that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." (*See* 28 U.S.C. § 2244(b)(3)(E).) Should a section 2255 movant receive certification from the court of appeals to file a second or successive motion, he or she is faced with yet another obstacle. District courts must dismiss any claim presented in a second or successive motion—even when the court of appeals has certified the motion—"unless the applicant shows that the claim satisfies the requirements of this section." (28 U.S.C. § 2244(b)(4).) For example, section 2244(b)(1) requires a "claim presented in a second or successive application . . . that was presented in a prior application [to] be dismissed."

A court can allow bail for a 2255 applicant to prevent injustice.

The Supreme Court upheld these so called "gatekeeping" provisions in *Felker v. Turpin*, 135 L. Ed. 2d 827, 116 S. Ct. 2333 (1996). The Court found that "the new restrictions on successive petitions constitute a modified *res judicata* rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'" (*Id.* at 2340.)

Given the critical role experienced counsel can play in shepherding prisoners through the section 2255 legal maze, a prisoner contemplating filing 2255 motions should hire the best lawyer he or she can afford. Those who cannot afford to hire a lawyer should consider asking the court to appoint one. Although prisoners who cannot afford to hire private counsel have no *right* to appointed counsel to assist them in a 2255 proceeding, 18 U.S.C. 3006A gives the court discretion to appoint counsel "at any stage of the proceeding if the interest of justice so requires." (*See* Rule 8(c); 18 U.S.C. 3006A(a)(2)(B).) Payment to lawyers appointed under this section is limited to $750 maximum, unless the proceedings are "extended or complex" and the court "certifies that . . . excess payment is necessary to provide fair compensation." (*Id.* at 3006(d)(2) and (3).) Despite the obstacles, a 2255 motion is sometimes the best hope a prisoner has for post conviction relief.

Filing a 2255 motion

Section 2255 motions must be filed with the district court that 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 lawyers to use the forms. There is no filing fee. As already discussed above, second or successive motions may not be filed with the district court absent certification from the appropriate court of appeals.

After section 2255 motions are filed, they 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 judge then either dismisses the motion or orders the government to file an answer. Dismissal is required when the court concludes that the claims raised in the motion, even if true, would not provide a ground for 2255 relief, or when 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 hold a hearing. Although the language of section 2255 of 28 U.S.C. 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. (Fed. R. Gov. § 2255 Proc. 8(a).) 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.

Although bail for a 2255 applicant is not allowed under the Bail Reform Act, (18 U.S.C. § 3141, *et seq.*), nevertheless, a court considering a 2255 motion has the discretion to allow bail (sometimes called "enlargement") to prevent injustice.

The entire process, from the filing of a 2255 to the court's granting or dismissing it, can take anywhere from several weeks (in the event of a summary dismissal) to over a year. In the event of a denial, appeal is possible. The appeals procedure for denial of 2255 motions, however, differs in several significant respects from direct appeals. Notice of appeal in section 2255 cases must be filed with the district court within 60 days after entry of judgment. (*See* Fed. R. Gov. § 2255 P. 11 (referring to Fed. R. App. P. 4(a) for time to appeal; that rule in turn provides for a 60-day appeal period where the United States is a party).) In contrast, direct appeals from criminal convictions must be filed within 10 days. (Fed. R. App. P. 4(b).) The most important difference between direct and section 2255 appeals, however, is that prisoners have no appeal of right in denials of 2255 motions. The "habeas reform" provisions of the AEDPA, provide that "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a proceeding under section 2255." (28 U.S.C. § 2253.) The phrase "circuit justice or judge" has been interpreted to include circuit justices as well as both circuit and district judges. (*Hunter v. United States*, 101 F.3d 1565, 1573–76 (11th Cir. 1996) (en banc).) Thus, district judges as well as circuit judges have the authority to issue certificates of appealability.

Although the statute provides that a certificate of appealability (CAP) "may" issue if "the applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), it

does not specify when or where the applicant must have made that showing. In particular, it is not apparent from a reading of the statute whether this "showing" must have been made: (a) in support of the merits of the motion itself, regardless of the issues to be raised on appeal; or (b) whether a "substantial" question to be raised on appeal is enough, regardless of the underlying issues on the merits of the case; or (c) whether the appellant's "substantial showing" must relate to an issue or issues presented on the merits of the underlying section 2255 petition that is *also* going to be raised, on its merits, in the appeal. The statute, as drafted, seems to incorporate an assumption that whenever a prisoner appeals from the denial of a section 2255 motion, the appeal will pursue the merits of the underlying claim. But that often is not and cannot be the case.

We believe that section 2253(c)(1) should not be read as requiring that each issue raised on appeal must itself present a question of constitutional law. If it did, a prisoner would never have a right to challenge on appeal such questions as whether the petition was sufficiently specific to withstand a summary dismissal, or whether a certain kind of nonconstitutional claim is cognizable in a section 2255 proceeding, or a denial of the right to counsel guaranteed by Federal Rules Governing 2255 Procedure 8(c), or the standard of harmless error, or whether there was a procedural default (or a basis for relief from any default), or any of a host of other important issues. Thus, Congress's use of the phrase "constitutional right" strongly suggests that the focus in considering issuance of a CAP was the issue on the underlying merits, not the issue to be raised on appeal.

Courts should not presume that Congress intended to insulate from review district court decisions on nonconstitutional questions (that may underlie the ultimate resolution of constitutional issues, or may prevent such issues from being decided), or to freeze the development of nonconstitutional forms of law, to this radical extent. There would be no policy reason to limit the grounds for appeal in section 2255 and habeas cases in that particular way. We therefore believe that courts should interpret the phrase "the applicant has made a substantial showing of the denial of a constitutional right" as referring to the showing made in the section 2255 motion papers that a constitutional right was violated in the underlying criminal proceeding, and not necessarily to the issues proposed to be raised on appeal or to a showing that some constitutional right was violated in the 2255 proceedings themselves.

It is also arguable that the AEDPA's limitation of appeals to cases involving the denial of a "constitutional right"

A prisoner must first exhaust all administrative remedies before filing a 2241 action.

should be read to include cases whether the denial was of a "federal right," in the context of 2255 proceedings. (*See Drinkard v. Johnson*, 97 F.3d 751, 756 (5th Cir. 1996) (standard for issuance of a certificate of appealability after the AEDPA amendments is the same as the standard for issuance of a certificate of probable cause to appeal under preexisting law); *Reyes v. Keane*, 90 F.3d 676, 679–80 (2d Cir.1996) (same); *Lennox v. Evans*, 87 F.3d 431, 434 (10th Cir.1996) (same); *cf. Greenawalt v. Stewart*, 105 F.3d 1268, 1273 (9th Cir. 1997) (declining to decide whether AEDPA standard for issuance of certificates of appealability is "more demanding" that former standard for issuance of certificates of probable cause); *Williams v. Calderon*, 83 F.3d 281, 286 (9th Cir.1996) (stating *in dictum* that the standard for obtaining a certificate of appealability under the AEDPA amendments is "more demanding" than the "federal right" standard for CPCs established by *Barefoot v. Estelle*, 463 U.S. 880, 881, (1983)).)

Habeas (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 ineffective or inapplicable. It is unsettled whether the 2241 petition will be available to prisoners who are prevented from filing 2255 motions by the AEDPA amendments. A habeas petition, by definition, seeks a form of relief other than money damages, such as immediate or accelerated release from confinement or a change in improper prison conditions. For example, section 2241 actions are appropriate in the following situations:

1. Conditions of confinement violate a constitutional right. (*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 constitution right).) This case contains a helpful discussion of the various forms of postconviction relief available to federal prisoners.
2. Prison regulations or practices are unconstitutional or unlawful. (*Bonacci v. Kindt*, 868 F.2d 1442 (5th Cir. 1989) (warden denied prisoner access to courts and due process).)
3. Prison transfer is unconstitutional or illegal. (*Ramirez v. Turner*, 991 F.2d 351 (7th Cir. 1993).)
4. Confinement at a particular place is forbidden by federal law. (*United States v. Jalili*, 925 F.2d 889 (6th Cir. 1991).)
5. Prison officials have unconstitutionally or illegally classified a particular prisoner. (*Ralston v. Robinson*, 454 U.S. 201, 102 S. Ct. 233, 70 L. Ed. 2d 345 (1981).)
6. Credit for time incarcerated prior to sentencing or pending appeal is unconstitutionally or illegally denied. (*Reno v. Koray*, 515 U.S. ___, 132 L. Ed. 2d 46 (June 5, 1995).)
7. Prison officials refuse to release a prisoner entitled to mandatory release (after service of sentence less good time). (*Thomas v. Brewer*, 923 F.2d 1361 (9th Cir. 1991).)
8. The paroling authority unconstitutionally or illegally denies, postpones, rescinds, or revokes parole. (*Williams v. Turner*, 5 F.3d 1114 (7th Cir. 1993).)
9. The paroling authority issues an unconstitutional or illegal parole violation warrant. (*Turner v. United States Parole Commission*, 934 F.2d 254 (10th Cir. 1991).)