COMMENTS ON FEDERAL HABEAS CORPUS RULES AND FORMS

The overall issue is to make the rules simple and fair enough to be usable by pro se filers, giving them guidance on how to get their issues before the court with the least risk of procedural confusion, while not interfering with the effective presentation of habeas corpus petitions by sophisticated and competent counsel, such as those who regularly handle capital post-conviction litigation. With that in mind, NACDL expects to say the following, in somewhat more detail if the committee would find that helpful. Proposed additions are underlined. Proposed deletions are surrounded by double front-slashes (//):

2254 Rules

Rule 1(b). "... may apply these rules, to the extent appropriate, to a habeas petition not covered ...." [proposal as phrased seems to require all-or-nothing approach to utilizing the rules for a § 2241 habeas, for example; rule should allow court to apply them selectively]

Rule 2(a,b). "... the petition must name or otherwise identify as respondent the state officer ...." [a petition may properly describe respondent as "Superintendent, State Correctional Institution at __ City, State" rather than "name" him; indeed, when a petitioner files while "in custody" of bail pending surrender, for example, the respondent may be the "Court of Common Pleas of __ County, State"; a pro se prisoner might conclude from the proposal as phrased that no knowing the respondent's correct name, or the Attorney General's name, prevents proper filing]

Rule 2(c)(5). "... signed under penalty of perjury by the petitioner or by someone acting on the petitioner's behalf." [this is the statutory rule, 28 U.S.C. § 2242] The Advisory Committee note should also make explicit that the five things a petition "must" contain is an exclusive list; a petition cannot be dismissed for failure to allege or include anything else, such as establishing exhaustion of remedies, or anticipating and refuting potential affirmative defenses.

Rule 2(d). "If filed pro se, the petition must substantially follow //either// the form ...." [mandatory local forms deviating from the national norm should not be permitted, or at least there should be some limit or control over the ways local forms may vary from the national norm. However, local districts should be allowed to exempt capital cases from the use of this form if some other requirements of form are properly established.] "... If the petition is filed by counsel, all information required by the form shall be included, and the petition may either follow the form or comply with the rules of the district court where filed for a complaint in a civil action."

Rule 3(c). "... time for filing may be governed, in whole or in part, by 28 U.S.C. § 2244(d)." [The rules should not presume to judge the validity, or even constitutionality of the statute. Nor should the rule mislead about the existence of extrastatutory issues, such as equitable tolling of the statute of limitations, by stating in an unqualified way that timeliness "is governed" by the statute.]

Rule 3(d). [We assume the use of "Timely filing may be shown," rather than "must be shown," means that the §1746 statement is sufficient but not necessary, and that a could may look elsewhere, such as to the postmark, or to a later-filed affidavit, or even to an unsworn but dated signature as evidence to establish timely prisoners'-mailbox filing. If so, that's good.

Rule 4. "... not entitled to relief in the district court, the judge must dismiss or transfer the petition and direct the clerk to notify the petitioner. The judge must not dismiss the petition under this Rule on any basis that would constitute a waivable affirmative defense that the respondent would have the burden to plead and prove. ...." [See 28 U.S.C. § 1631 (transfer to cure want of jurisdiction) and cases frequently applying it to habeas litigation. A federal court should not advocate on behalf of a state government in adversarial litigation against the state by raising (much less raising and summarily acting upon) defenses which are waivable. See Smith v. Horn, 120 F.3d 400, 409 (3d Cir. 1997), quoting United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring; ellipsis original). Also, the Note should emphasize the narrowness of "plainly appears."]

Rule 5(b). This may sound odd coming from our side, but it seems unnecessarily burdensome on respondents' counsel to require that every answer "must address the allegations in the petition." It also contradicts Rule 4, which tells the judge to require an "answer or other pleading." If respondents' counsel thinks there is a dispositive non-merits answer (lack of exhaustion, for example, or statute of limitations), a motion to dismiss (which does not "address the allegations") should be permissible. The second sentence is inappropriately phrased. The Rule should not seem to mandate a recitation of whether any affirmative defense applies. Rather, it should state that the Answer or other pleading "must specifically plead any affirmative defense on which the respondents rely, such as a failure to exhaust remedies, procedural bar, or a statute of limitations, setting forth detailed facts in support of any such defense." This aspect of the rule (or perhaps it should be a separate subsection) should be modeled on FRCP 12(b), expressly requiring all affirmative defenses to be raised in the answer or first responsive pleading. The Committee Note should make clear that the Rule either does or does not purport to catalog (or determine) what constitutes an "affirmative defense." If it does, we would note that the harmlessness of any constitutional violation

is a matter on which the respondent bears the burden of persuasion (see O'Neal v. McAninch, 513 U.S. 432, 435-36 (1995)) and which therefore should be first pleaded by the respondent. Petitioner has a burden of pleading and proof on prejudice only when prejudice is an intrinsic component of the violation, as with ineffective assistance of counsel.

Arguably, in light of 28 U.S.C. § 2254(b)(3)'s express waiver requirement, the defense of lack of exhaustion of remedies should be treated differently in Rule 5 from all other defenses. Our preference would be for the Committee to utilize its Rules Enabling Act authority to supersede § 2254(b)(3), which is purely procedural, and return exhaustion to the status of other defenses or at least to its prior status under Granberry v. Greer, 481 U.S. 129, 132-33 (1987). Barring that solution, there should be a separate requirement (perhaps in a separate subsection) of Rule 5, requiring the exhaustion issue to be addressed.

Rule 5(c). "... answer must also list what transcripts ...." ["indicate" is a vague and ill-chosen word]

Rule 5(d). "If the respondent claims any failure to exhaust remedies, the respondent must file ...." Also, add "(4) If the petitioner sought discretionary review of any appellate decision and review was not granted, the respondent must also provide a copy of the petition for such discretionary review." See O'Sullivan v. Boerckel, 526 U.S. 838 (1999) (petition for discretionary review is mandatory part of exhaustion requirement, at least unless state declares otherwise)

Rule 5(e). Add, "The petitioner may supply with the reply copies of any additional parts of the record that the petitioner considers relevant. If the petitioner does not have access to copies of the relevant additional parts of the record, the petitioner may file with the reply a designation of additional record items to be supplied by the respondents." Also, should add to Committee Note that the optional reply provided for by Rule 5(e) is intended to supersede any obligation to file a "traverse" under 28 U.S.C. § 2248.

Rule 6. No comments.

Rule 7(b). The relationship between Rule 6 and Rule 7 should be clarified by adding a sentence (or new subsection) to the effect, "If discovery has been allowed under Rule 6, either party may add the fruits of discovery to the record under this Rule." Similarly, the last sentence should be made a separate subsection to clarify that the right to supplement the record with affidavits is not limited to cases in which the court has directed expansion of the record under Rule 7(a), as might presently be inferred.

Rule 8(b). It seems to us that this subsection should be deleted entirely in light of Rule 10. Its redundancy here only

creates confusion about the Committee's intent. In any event, it is to a large extent redundant of both 28 U.S.C. § 636 and FRCP 72(b), which expressly applies, and might just as well be adopted by reference.

Rule 9. Any attorney who has litigated under the present 28 U.S.C. § 2244(b)(3) and any Circuit Judge who has had to review such papers knows that the statutory procedure is cumbersome, wasteful of judicial resources, and redundant of id. § 2244(b)(1-2), and inappropriately placed by AEDPA in the court of appeals. Rather than implement it, the Committee should exercise its authority under the Rules Enabling Act, 28 U.S.C. § 2072(b), to supersede subsection (b)(3). The substantive standards of (b)(1-2), far stricter than the former, discretionary Rule 9(a), would still apply. I'm not sure exactly how that would best be worded. I'm willing to make a suggestion, but would of course defer to the Rules Committee Staff for Enabling Act expertise. The rule should say that any petition for a writ of habeas corpus, including a second or successive petition, shall be filed in the district court, and that no application for leave to file under (b)(3) shall be required. The Note should state that the rule supersedes the statute and that any application hereafter filed in a court of appeals should be transferred under 18 U.S.C. § 1631 to the district court, with filing deemed to be as of the date of filing of the application in the court of appeals.

Rules 10 and 11 are fine. We would only question whether a rule on certificates of appealability might helpfully be added.

2255 Rules. Almost precisely the same comments would apply, other than those with respect to exhaustion of remedies, of course.

Forms. Coming from the same perspective -- clarity and ease of use by pro se litigants, helpfulness to the court, minimal interference with professional litigation tactics of counsel -- we make the following points, following the proposed 2254 Form:

Q2: "Date of the judgment of conviction" is technical and ambiguous. Specify the date desired: "Date you were sentenced"? "Date the sentencing order was filed in the sentencing court"? "Date the sentencing order was entered on the docket of the sentencing court"? A prisoner is not likely to know any date but the first. Why not just ask for that?

Q3: Why only "length" of sentence. Why not "All the terms of the sentence"?

Q4: Remove ambiguity by asking "Identify all crimes for which you were convicted and sentenced in the case giving rise to the custody you are challenging in this petition."

Q6: If your plea was not guilty, what kind of trial did you have? [convictions and sentences resulting from guilty pleas can also be challenged by habeas corpus petitions]

Q7: This question serves no purpose and never has. It should be deleted.

Q9: Eliminate questions 9(f) and 9(g)(6). These and all other questions anticipating possible affirmative defenses are inconsistent with the requirements of Rule 2(c) and should be eliminated from the form. Just as a civil plaintiff need not plead the negation of any affirmative defense in a complaint, no habeas petitioner should be required to do so. The purpose of the form is to assist prisoner/petitioners in asserting cognizable claims. Under our adversary system (not to mention the traditional solicitude of the federal courts for the protection of individual rights) the form, use of which is generally mandatory, should not be designed to ferret out nonjurisdictional grounds for dismissal of petitions or to force the petitioner or counsel to plead and anticipate possible issues which, if not raised by the respondents, might be waived.

Question 9(h)(5) (grounds raised in any certiorari petition) should be eliminated as it calls for information which is entirely immaterial.

Q11: Delete 11(a)(4), (b)(4) and (c)(4) (grounds for prior state post-conviction petitions). Same reasoning. Moreover, the "Caution" under Q12 is fully sufficient to raise the exhaustion issue at the pleading stage. Eliminate 11(e); emphatically the same reasoning.

Q12: (i) We question the usefulness and appropriateness of the list of frequently raised grounds. It would seem to be as likely to be misleading as to be helpful. Can it be explained somehow without giving a list of examples what is meant by "Ground"? (ii) Under each ground, the "Supporting facts" line states "Do not argue or cite law." This is unfair. It is often absolutely necessary to cite law (although perhaps not be "argue") to make the "facts" intelligible as raising the Ground for relief. For all the reasons already given, we adamantly oppose requiring the petitioner, in advance, to anticipate and defend against an unraised, nonjurisdictional defense of lack of exhaustion of remedies under this question (again) in subquestions (b) through (e) under each Ground. Moreover, to require petitioners, often pro se, to answer whether they did or did not "exhaust [their] state remedies" is to require legal analysis of what can be a sophisticated, technical question. There will be time enough, if the defense is raised, for the court to require it to be briefed, with or without the assistance of counsel if needed. See also comments under Rule 5 above.

Q13: Delete. See previous discussion. Moreover, this is the third place in the form where the same issue is raised,

rendering it totally redundant. Overall, the form sends the message that the purpose of the proceedings will be to find some reason to deny relief and that the federal court's agenda is to assist the state in defeating petitions for reasons not going to the merits. This is deeply regrettable and totally inappropriate.

Q14: Separating this question from that raised under Q11, which the 1977 form does not do, is a good idea. Indeed, it fits well with our suggestion under Rule 9 above.

Q17: I have never understood the purpose of this question on the Form. If the answer to this question is actually useful to the court, it should be moved up, as it is closely related to (if not redundant of) Questions 3-5.

Q19: For the reasons already stated and restated, this question is completely inappropriate (and legally erroneous). It is not true, as made clear by all the circuits's decisions holding that the statute of limitations creates a waivable, nonjurisdictional, affirmative defense, that the petitioner "must explain" the timeliness of the petition in the petition itself.

Claim for relief: The proposed Form violates Rule 2(c)(3) by preventing the petitioner from stating the relief requested.

Verification: The two verifications (of the averments and of the mailing) should be separated, unless the form is to be made applicable to pro se, incarcerated petitioners only. The first is always required. The second often applies but not always.