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HABEAS CORPUS IN NEW MEXICO

THOMAS A. DONNELLY* and WILLIAM T. MacPHERSON**

INTRODUCTION

The United States Supreme Court has characterized the writ of habeas corpus as "the precious safeguard of personal liberty."¹ This writ, however, is one of the least understood rights recognized in Anglo-American jurisprudence. The mystique surrounding the writ lies primarily in the procedural requirements engrafted upon its usage, and not in the remedy itself, which is conceptually simple.² Historically, a writ of habeas corpus was a written command issued by a court directing the person to whom it was addressed to bring before the court the body of the person named in the writ.³ Evolution and modern practice have changed this concept. Today, the writ is used as an expeditious means of challenging restraints on freedom imposed by either the government or a private individual,⁴ and to correct unconstitutional conditions of confinement.⁵

The purpose of this article is to provide both an overview of habeas corpus proceedings and an examination of the use of the writ in New Mexico. Habeas corpus in New Mexico is a blend of common law, constitutional precepts, statutory provisions and court rules.⁶ Any discussion of habeas corpus requires some consideration of the rel-

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2. In New Mexico the confusion created by the statutes governing habeas corpus was noted in Orosco v. Cox, 75 N.M. 431, 405 P.2d 668 (1965). The court stated:
   At first brush, these provisions [the New Mexico statutes on habeas corpus] if applied literally would seem to foreclose habeas corpus as a means of testing the validity of a judgment or sentence of a court having general jurisdiction, as is true of the district court in this state.


tionship between federal and state practice in this area of law, and, because authorities discussing habeas corpus in New Mexico law are limited, occasional reference will be made to federal law to provide guidance in using the writ in the courts of this state.

I. NATURE AND EVOLUTION OF THE WRIT

Habeas corpus is recognized to be a prerogative writ which may be used by the petitioner to challenge collaterally the jurisdiction of the court which issued the judgment and sentence imposed on him. The grounds generally alleged in a habeas corpus petition are that either the court exceeded its jurisdiction in imposing petitioner's sentence, the sentence was erroneous, or the court's procedure was defective. A petition for habeas corpus is also available when a person is denied custody of minor children and wishes to determine his right to custody. The confusion surrounding the nature of the writ is compounded by its characterization as a civil, legal action governed by equitable principles and by its own doctrines concerning custody, exhaustion of remedies, res judicata and procedure. Frequently, difficulty in understanding when the writ is an appropriate remedy lies in a failure to recognize its flexibility. The writ is not a static remedy, but is an evolving legal right.

The exact origin of the writ is obscure. Legal historians have determined, however, that proceedings involving habeas corpus were in use long before the signing of the Magna Charta in 1215. The writ originated as a means by which the superior common law courts and the king's chancellors sought to extend their jurisdiction at the expense of inferior or rival courts. There is evidence that within a

7. In re Piazza, 7 Ohio St. 2d 102, 218 N.E.2d 459 (1966); In Ex parte Tail, 144 Neb. 820, 14 N.W.2d 840 (1944), it was held that:

Habeas corpus is a writ of right, but not a writ of course, and probable cause must first be shown which rightly prevents the writ from being trifled with by those who manifestly have no right to be at liberty. Judicial discretion is exercised in its allowance, and such facts must be made to appear in the application to the court as its judgment will, prima facie, entitle the applicant to be discharged from custody. 144 Neb. at 842, 14 N.W.2d at 842 (emphasis added).

8. In re Cica, 18 N.M. 452, 137 P. 598 (1913).
10. Wilkinson v. Lee, 138 Ga. 360, 75 S.E. 477 (1912), describes the writ as summary in nature. The writ also has been described as a personal right and not a property right because it is concerned with the prisoner's liberty and not with the act for which he is detained. In re Borrego, 8 N.M. 655, 46 P. 211 (1896).
century after the Norman Conquest in 1066 the writ of habeas corpus was in general use in England. Chronicles dating from as early as 1341 suggest that the writ then was being used somewhat as it is used today. The king’s courts would issue the writ to direct a jailor to produce the petitioner before the court and to respond and show cause for the arrest and detention of the prisoner. The writ evolved further when the English Parliament clarified and enlarged its scope by enacting the Habeas Corpus Act of 1679, thereby giving legislative recognition to the widespread use of the remedy in England. Eventually, the writ evolved into its modern form as the principal legal means of speedily challenging the basis of the detention of a person held in another’s custody.

Because the writ was an integral part of English parliamentary and common law, it was available to, and frequently invoked by, the American colonists. Following the adoption of the Declaration of Independence, the use of the writ was expressly assured by Article I, section 9 of the United States Constitution. Significantly, the Constitution does not define the writ of habeas corpus, but provides that the writ shall not be suspended except in extreme circumstances. The inference to be drawn from this omission is that such a basic right requires no legal definition. Similarly, the New Mexico Constitution does not define the writ, but only prohibits its suspension except in extraordinary circumstances.

The writ became a part of the laws of the Territory of New Mexico through the adoption of the common law in this jurisdiction. Early decisions in this state adhered to the view that, because habeas corpus proceedings were collateral attacks upon the judgments on which commitments were based, the writ would issue only when the court rendering the judgment lacked jurisdiction to issue the judgment.

15. Federal Habeas Corpus, supra note 3. The requirement that the respondent answer the writ by filing a statement with the court setting forth the reason for the petitioner's detention came to be known as habeas corpus cum causa. 1 Tidd, § 809.
17. U.S. Const. art. I, § 9, cl. 2.
18. In the Federalist Papers No. 84, Alexander Hamilton observed that the “establishment of the writ of habeas corpus, the prohibition of ex post facto laws and of titles of nobility [in the Constitution] ... are perhaps greater securities to liberty and republicanism than any it contains....” The Federalist No. 84 (A. Hamilton) at 596 (Univ. Ed., edited under the supervision of H. Dawson, reprinted from text of 1787).
20. In re Forest, 45 N.M. 204, 113 P.2d 582 (1941). See also, Bill of Rights as Declared by Brigadier General Stephen W. Kearney, Art. Nine (1846); Kearny Code, Habeas Corpus (New Mexico 1846); Administrative Office of the Courts, New Mexico State Courts, defines habeas corpus as the name given to a variety of writs to bring a party before a court or judge in order to release the person from unlawful imprisonment.
21. In re Forest, 45 N.M. 204, 113 P.2d 582 (1941).
Recent decisions have expanded this narrow interpretation of the use of the writ, and recognize that habeas corpus may be used to attack a mistake in sentencing even where the conviction was valid, or to correct conditions of a sentence. The usage of the writ has also been expanded by statutory provision. For example, the legislature of New Mexico has provided that the writ now may be employed to test the validity of extradition proceedings against persons held in this state and sought by authorities of another state for prosecution or imprisonment for criminal charges.

The New Mexico Constitution vests original jurisdiction in both the New Mexico Supreme Court and the district courts to hear cases involving petitions for writs of habeas corpus. In addition to these constitutional investitures of original jurisdiction, comprehensive statutory provisions govern habeas corpus proceedings. No statute or court rule can limit the substantive right to the writ, which is con-

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22. See Section III, infra, for when the writ applies.
24. Id., Kelly v. Dowd, 140 F.2d 81 (7th Cir. 1944), cert. denied, 320 U.S. 786 (1944).
Habeas corpus does lie, however, where prison conditions amount to cruel and unusual punishment. Mahaffey v. State, 87 Idaho 228, 392 P.2d 279 (1964). Attacks on prison conditions may be made by habeas corpus or in civil rights actions. In a recent case in district court of the First Judicial District, Cox v. Haron, No. 50874, the Penitentiary of New Mexico entered into a consent decree whereby prison authorities agreed that the basement areas would no longer be used to house inmates, and agreed to improve, repair and upgrade certain facilities used to house inmates, and consented that there would be no assignment of more than one inmate to cells in the disciplinary unit (Cell Block 3), intended for use by a single inmate "absent exigent circumstances of the most compelling nature." The decree also agreed "to assure the Court that classification and adjustment committee hearing procedures mandated by the supreme court case of Wolf v. McDonnel will be employed at all appearances of inmates before said committees involving disciplinary matters." The decree was approved by the court as a class action suit. See also the order entered in Duran v. Apodaca, No. 77-721-C (D.N.M. April 18, 1979).
25. The generic term "habeas corpus" encompasses several different types of proceedings. Each originated in the common law and several have been recognized in New Mexico law. The first, habeas corpus ad subjiciendum, is a remedy inquiring into the legality of a prisoner's restraint or confinement. See In re Forest, 45 N.M. 204, 113 P.2d 582 (1941). This writ has been described as the predecessor of the modern writ referred to in the United States Constitution. See McFeeley, The Historical Development of Habeas Corpus, 30 Sw.L.J. 585 (1976). The second, habeas corpus ad prosequendum, is issued to remove a prisoner from his place of confinement in order to prosecute him in the jurisdiction where the alleged offense was committed. N.M. Stat. Ann. § 31-4-10 (1978). A good discussion of this type of writ is contained in State v. Heisler, 95 Ariz. 353, 390 P.2d 846 (1964). See also 18 U.S.C. § 4085 (1976). The third, habeas corpus testificandum, issues when a prisoner is transferred to a court within the state to testify as a witness. N.M. Stat. Ann. § 31-8-1 (1978). This writ has been replaced by a special statutory proceeding. See United States v. McGaha, 205 F. Supp. 949 (E.D. Tenn. 1962); Ex parte Marmaduke, 91 Mo. 228, 4 S.W. 91 (1886).
27. N.M. Const. art. 6, § 3; N.M. Const. art. 6, § 13.
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stitutionally protected.29 State laws or court rules concerning habeas corpus may only add to the efficient procedural use of the writ; they may not impair this fundamental right.30

Presently, habeas corpus is recognized as a civil proceeding, regardless of whether the party seeking release from custody or restraint has been detained under civil or criminal process.31 Although the legislature has enacted provisions32 relating to the filing of habeas corpus "actions," the proceedings have been declared not to be special statutory actions, but legal common law actions.33 Additional confusion surrounds the extent to which the Rules of Civil Procedure govern a habeas corpus proceeding. Procedural rules do not govern the use of the writ, but are used by the courts to further the policy behind the writ: the providing of a speedy means of challenging restraints on freedom.

New Mexico law contains few procedural rules governing the use of the writ, except for the basic requirement that a court must make findings of fact and conclusions of law.34 It is in the federal courts that the use of procedural rules to expand the application of the writ and to create flexibility in its use is most often demonstrated. The interplay between the policies behind habeas corpus and the procedural rules may be seen, for example, in how the rules of discovery apply in federal habeas corpus actions. While holding that discovery is not available in habeas corpus proceedings, the United States Supreme Court in Harris v. Nelson stated: "the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage."35 Again, in United States v. Preiser,36 the court recognized the need for flexibility in habeas corpus proceedings:

To say that the precise provisions of Rule 23 do not apply to habeas corpus proceedings, however, is toto caelo different from asserting

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29. N.M. Const. art. 2, § 7.
30. In re Forest, 45 N.M. 204, 113 P.2d 582 (1941).
31. Roberts v. Staples, 79 N.M. 289, 442 P.2d 788 (1968); Sneed v. Cox, 74 N.M. 659, 397 P.2d 308 (1964); In re Fullen, 17 N.M. 394, 128 P. 64 (1912); In re Borrego, 8 N.M. 655, 46 P. 211 (1896).
33. In re Forest, 45 N.M. 204, 113 P.2d 582 (1941). It is important to note that habeas corpus is not a writ that will be issued or granted in every case. A judge has discretion to determine when the writ should be granted. See Ex parte Tail, 144 Neb. 820, 14 N.W.2d 840, 842 (1944).
34. State v. Hardy, 78 N.M. 374, 431 P.2d 752 (1967).
that we do not have authority to fashion expeditious methods of procedure in a specific case. *Harris* confirms the power of the judiciary, under the All Writs Act . . . to fashion for habeas actions appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage.\textsuperscript{37}

It is important to the practitioner seeking a writ of habeas corpus to recognize its historical limitations; however, it is equally important that he appreciate the willingness of modern courts to issue the writ in an increasing number of situations.

II. INSTANCES WHEN THE WRIT IS APPROPRIATE

It is difficult to categorize the instances when habeas corpus will be granted. Custody is the basic principle used by the courts to determine whether the writ should issue.\textsuperscript{38} This concept developed historically from the notion that physical confinement, or the present means of enforcing it, must exist for habeas corpus to be the proper remedy.\textsuperscript{39}

New Mexico case law does not discuss custody, but it appears that this concept is used in New Mexico as it is articulated in federal case law. Federal law no longer requires physical confinement as a condition for seeking habeas corpus.\textsuperscript{40} The right to habeas corpus now exists as long as one's freedom is restrained.\textsuperscript{41} Exactly what degree of restraint is needed to create a right to habeas corpus is difficult to determine. Federal courts appear to view the concept of custody as broadening petitioner's access to the writ.

\begin{quote}
[I]t is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.\textsuperscript{42}
\end{quote}

While the trend in the case law appears to be toward expanding the applicability of the writ, procedural restraints on the usage of the writ have run counter to this trend.

The doctrine of mootness acts to counter-balance this liberal policy of access to habeas corpus. If the actual restraint has ceased, there may be no custody, and without custody the writ may not issue.\textsuperscript{43} For ex-

\begin{footnotesize}
\begin{enumerate}
\item 506 F.2d at 1125.
\item Wales v. Whitney, 114 U.S. 564 (1885).
\item Jones v. Cunningham, 371 U.S. 236 (1963).
\item Id.
\item 371 U.S. at 243.
\item Carafas v. LaVallee, 391 U.S. 234 (1968).
\end{enumerate}
\end{footnotesize}
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ample, petitioner may have been granted an unconditional release from confinement, or the sentence may have been completely served. Whereas mootness and custody are often discussed as separate doctrines, these concepts should be considered together to avoid confusion. The concept of mootness may be used in deciding when the stigma of restraint is sufficient to establish the existence of custody necessary for the writ to issue. The doctrine of collateral consequence has developed to counter the effects of the mootness doctrine and to expand the applicability of habeas corpus. This doctrine provides that even if the restraint is ended, such as by the completion of a sentence, the issue of illegal confinement is not moot and habeas corpus may still be an appropriate means to challenge the confinement. In this situation, collateral consequence may be applied to support the habeas corpus proceeding because a continuing disability is created by the conviction and confinement. Social stigma resulting from the conviction will not cause the doctrine to be applied. The distinction to be drawn is between a mere social stigma and a stigma actually affecting one's ability to participate in society productively. Thus, an adjudication affecting one's ability to obtain employment, such as parole or probation, a consecutive sentence to be served in the future, or personal recognizance bail, are consequences where challenge by writ of habeas corpus is appropriate. An attack on one sentence or several concurrent sentences will not be an appropriate ground on which to base a habeas corpus petition.

Habeas corpus has been held to be appropriate in cases involving confinement and bail where persons were held under charges and awaited trial where bail was denied or never set, and where individuals were held under unreasonable requirements for bail. Similarly, habeas corpus relief is available where the petitioner was denied a fair trial or substantial procedural error occurred denying him due pro-

44. Conditions of confinement can be challenged by habeas corpus even after release. Carafas v. LaVallee, 391 U.S. 234 (1968). However, a pardon or offer of a pardon will preclude an attack on the sentence by habeas corpus if the petitioner is no longer in respondent's custody. Hudspeth v. Tornello, 128 F.2d 172 (10th Cir. 1942), cert. denied, 318 U.S. 792 (1943). See Weber v. Squier, 124 F.2d 618 (1941), cert. denied, 315 U.S. 810 (1942).


cess of law.\textsuperscript{5} \textsuperscript{3} The writ has been held proper where a defendant had ineffective assistance of counsel, regardless of whether the counsel was retained or appointed.\textsuperscript{5} \textsuperscript{4} Individuals held in the custody of the National Guard or military authorities\textsuperscript{5} \textsuperscript{5} have made successful use of the writ, as have prisoners under sentence of death.\textsuperscript{5} \textsuperscript{6} Habeas corpus has issued where the prisoners challenged the lawfulness of a parole revocation proceeding.\textsuperscript{5} \textsuperscript{7} It has been held that a court, in considering an application for post-conviction relief, may remand a petitioner’s case to the trial court for resentencing where the sentence was erroneous.\textsuperscript{5} \textsuperscript{8}

Habeas corpus has been held to be a proper remedy not only in cases where petitioner asserts that he is entitled to be free of all restraints, but also where he contests his confinement at a particular prison facility or segregation unit in a prison\textsuperscript{5} \textsuperscript{9} or where he claims that his imprisonment has been served under conditions vitiating the justification for continued confinement.\textsuperscript{6} \textsuperscript{0} It has been held also that a prisoner held in lawful custody may obtain relief by habeas corpus to enforce a right to which he is lawfully entitled.\textsuperscript{6} \textsuperscript{1} Habeas corpus will be granted to secure relief other than release from custody where the petitioner is lawfully in custody, but is deprived of a right to which he is entitled in his confinement.\textsuperscript{6} \textsuperscript{2} Finally, habeas corpus may be used to test the validity of sentences or confinement of minor children in state institutions.\textsuperscript{6} \textsuperscript{3} Rival par-

\begin{itemize}
\item \textsuperscript{54} Castillo v. Estelle, 504 F.2d 1243 (5th Cir. 1974), cited with approval in State v. Aguilar, 87 N.M. 503, 504, 536 P.2d 263, 264 (1975). In Castillo, petitioner successfully sought habeas corpus based on denial of effective assistance of counsel at his criminal trial. It was shown that his defense attorney had a conflict of interest at the time of trial because the attorney was representing, in unrelated litigation, the principal witness for the prosecution who was the victim of the offense for which the defendant was charged.
\item \textsuperscript{56} Nelson v. Cox, 66 N.M. 397, 349 P.2d 118 (1960); United States ex rel. Almeida v. Baldi, 195 F.2d 815 (3rd Cir. 1952).
\item \textsuperscript{57} Argro v. United States, 505 F.2d 1374 (2d Cir. 1974); Morrissey v. Brewer, 443 F.2d 942 (8th Cir. 1971), rev’d on other grounds, 408 U.S. 471 (1972); State v. Murray, 81 N.M. 445, 468 P.2d 416 (Ct. App. 1970).
\item \textsuperscript{58} Jordan v. Swope, 36 N.M. 84, 8 P.2d 788 (1932).
\item \textsuperscript{59} Winford v. Wilkinson, 288 F. Supp. 916 (W.D. Mo. 1968).
\item \textsuperscript{60} Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970); Winford v. Wilkinson, 288 F. Supp. 916 (W.D. Mo. 1968).
\item \textsuperscript{61} Johnson v. Avery, 393 U.S. 483 (1969) (the right to seek or file habeas corpus).
\item \textsuperscript{62} Rodriguez v. District Court of the 1st Judicial District State of New Mexico, 83 N.M. 200, 490 P.2d 458 (1971) (discharge conditioned on granting petitioner a right of appeal). See also Hunagan v. District Court of the 1st Judicial District, 75 N.M. 390, 405 P.2d 232 (1965).
\item \textsuperscript{63} N.M. Stat. Ann. § 43-1-16 (1978).
\end{itemize}
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ents, relatives, or third parties also may use habeas corpus to contest the custody of minor children. The remedy is available to persons confined in alcoholic treatment programs or persons adversely affected by a final order of a state agency covered by the Administrative Procedure Act, and to persons held in custody for purposes of extradition. A person confined in a mental hospital under court commitment who attacks the validity of the commitment or asserts that his or her sanity has been recovered also has the right to petition for a writ of habeas corpus.

III. THE EXHAUSTION OF REMEDIES DOCTRINE

New Mexico follows the general rule that a petition for habeas corpus must show that other available remedies have been exhausted. This doctrine flows from the characterization of habeas corpus as an extraordinary writ which should not be available if other remedies

69. The publication “Information and Instructions, Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. Sec. 2254 (Persons in State Custody)” provides the following non-exhaustive list of frequently raised grounds for relief in post-conviction proceedings:
(a) denial of effective assistance of counsel;
(b) denial of right of appeal; conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge or consequences of the plea;
(c) conviction obtained by use of coerced confession;
(d) conviction obtained by use of evidence obtained pursuant to an unlawful search and seizure;
(e) conviction obtained by use of evidence obtained pursuant to an unlawful arrest;
(f) conviction obtained by violation of the privilege against self-incrimination;
(g) conviction obtained by the unlawful failure of the prosecution to disclose evidence favorable to the defendant;
(h) conviction obtained by a violation of the protection against double jeopardy;
(i) conviction obtained by the action of a grand or petit jury which was unconstitutionally selected and impaneled;
(j) conviction was obtained by the knowing use of perjured testimony;
(k) denial of compulsory process to obtain witnesses favorable to the defendant;
(l) sentence imposed is cruel and unusual punishment;
(m) conviction obtained by the use of evidence obtained pursuant to an unlawful lineup or identification procedure;
(n) denial of a speedy trial;
(o) conviction was obtained as a result of a plea of guilty or trial while the defendant was mentally incompetent.
are adequate and speedy. Determination of whether other remedies are available in a particular case may cause perplexing problems.

Presently, in New Mexico, there are two primary court rules providing for post-conviction remedies and one statute. All stem from an attempt to conform to directives mandated, or at least suggested by, the United States Supreme Court and all are modeled on Section 2255 of the United States Judicial Code. New Mexico Statute § 31-11-6 (1978) and Rule 93 of the Rules of Civil Procedure were both promulgated in 1965 to become effective on January 1, 1966 and are identical. Neither attempts to replace the writ of habeas corpus, but both provide that an applicant for habeas corpus must show that he or she has exhausted whatever remedies are available under the statute or rule. The adoption of identical provisions by both the supreme court and the legislature avoided any question of which body has the prerogative of determining the law in this area and apparently caused little, if any, confusion. As a matter of practice, attorneys have tended to frame their petitions under the rule rather than the statute, and “Rule 93 Proceedings” are common in this state.

Rule 93 requires a prisoner in custody to seek relief before the same court that imposed the sentence. The remedy has been characterized as an independent action and an appeal is available when relief is denied, even if the applicant previously took an appeal from a judgment and sentence following trial. The purpose of the rule is to provide a remedy whereby a prisoner in custody under a sentence of the court can be freed upon a proper showing: that the sentence imposed violated the federal or state constitution; that the court was without jurisdiction to impose the sentence; that the sentence was in excess of the maximum authorized by law; or that the sentence was otherwise subject to collateral attack. Rule 93, however, has been held inapplicable where the petitioner was not, at

75. Committee Commentary to N.M.R. Crim. P. 57.
76. N.M. Laws 1966, ch. 29.
77. N.M.R. Civ. P. 93(f); N.M.R. Crim. P. 57(j).
78. N.M.R. Civ. P. 93.
the time of application, in legal custody under a sentence from a
New Mexico court.\textsuperscript{8,2} Rule 93 has been construed as a post-conviction remedy, civil in
nature, and substantially equivalent to habeas corpus. Accordingly,
a claim not properly cognizable in habeas corpus cannot furnish a
basis for relief under the rule.\textsuperscript{8,3} Over the years, a substantial body of
case law has developed under Rule 93, much of which will be appli-
cable to the construction of Criminal Rule 57.

Rule 57 of the Criminal Rules of Procedure was adopted by the
court in 1975, with an effective date of September 1 of that year.\textsuperscript{8,4} This new rule, which was part of a comprehensive project providing
rules of criminal procedure in this state for the first time, was mod-
eled upon a suggested rule for the implementation of Section 2255
of the United States Judicial Code.\textsuperscript{8,5} The provisions of Criminal Rule
57 specifying when relief is to be granted are the same as those found
in Rule 93, but in many other ways it departs from the civil rule. For
example, there are enumerated situations where a motion for relief is
to be denied,\textsuperscript{8,6} and there is no right of appeal from the denial of a
motion.\textsuperscript{8,7} In the context of exhaustion of remedies prior to the ap-
plication for a writ of habeas corpus, these differences are important
because Rule 57 provides, as did Rule 93, that a prisoner must ex-
haust his or her remedy under the rule prior to seeking habeas corpus
relief.\textsuperscript{8,8}

Because the court has replaced Civil Rule 93 with Criminal Rule 57
in criminal proceedings, there is no need to seek relief under Rule 93
prior to petitioning for habeas corpus where the detention is the re-
sult of a criminal proceeding. Section 3-11-6 has not been repealed by
the legislature, and may provide an alternate to Rule 57 if the legisla-
ture has the power to provide for post-conviction remedies. If this is
true, it could be argued that a petitioner's remedies are not exhausted
unless resort is had to this means of relief, including the right of ap-
peal, where relief is not available under Rule 57.\textsuperscript{8,9} Such a result

\textsuperscript{82.} Cox v. Raburn, 314 F.2d 856 (10th Cir. 1963), \textit{cert. denied}, 374 U.S. 853 (1963).
\textsuperscript{83.} \textit{See} Committee Commentary to N.M.R. Crim. P. 57.
\textsuperscript{84.} 87 N.M. 672 (1975).
\textsuperscript{85.} \textit{See} Preliminary Draft of Proposed Rules Governing § 2255 Proceedings for the
United States District Courts, 93 Sup. Ct. Rep. No. 16 (1973). \textit{See also} Committee Com-
mentary to N.M.R. Crim. P. 57.
\textsuperscript{86.} N.M.R. Crim. P. 57(b).
\textsuperscript{87.} N.M.R. Crim. P. 57(a).
\textsuperscript{88.} N.M.R. Crim. P. 57(j).
\textsuperscript{89.} This might raise still another question. Assuming that § 31-11-6 is valid, could the
court determine that its requirement that relief under the section be sought prior to seeking
habeas corpus is not within the province of the legislature and declare that the doctrine of
exhaustion of remedies will no longer be followed?
would be unfortunate because Rule 57 addresses the problem of post-conviction remedies in light of developments since 1966, and provides a comprehensive rule. Where a motion is made under Rule 57 and the motion is denied, the requirements of the doctrine of exhaustion of remedies ought to be held satisfied without more being demanded of the petitioner. Where, however, a ground for relief could have been raised in the Rule 57 proceeding and was not, the petitioner should not be permitted to raise it in the habeas corpus proceeding.

In addition to the court rules and statute providing for post-conviction remedies, another civil rule has been construed to provide a mechanism for allowing post-conviction relief from criminal convictions. In State v. Romero, the New Mexico Supreme Court observed that, by adoption of this rule, it had replaced a number of common law writs with a simplified post-conviction remedy. In Romero, the court held: "Our Rule 60(b) (4), which is identical with Federal Rule 60(b) (4), provides that: 'on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (4) the judgment is void.'"

Rule 26(c) of Criminal Procedure, which provides a challenge to bail, must be used before filing for habeas corpus where it is applicable. A petitioner who is denied bail or is unable to meet the terms of bail imposed by the court may challenge this decision by motion under Rule 26(c), and an appeal from this proceeding may be taken to the supreme court or the court of appeals. Filing the motion and taking an appeal from its denial are prerequisites for petitioning for a writ of habeas corpus.

In cases where a right to appeal from the judgment confining the individual exists, the petitioner must seek appellate review before invoking post-conviction relief under either Rule 57 or by habeas corpus, and the petitioner's failure to exercise a right to appeal may result in waiver of the right to seek relief by writ of habeas corpus. The rationale for this rule appears to be that the right to an appeal constitutes an available and adequate remedy.

90. See Committee Commentary to N.M.R. Crim. P. 57.
92. 76 N.M. at 453, 415 P.2d at 840.
93. N.M.R. Crim. P. 26(c).
95. Id.
96. Id. This case appears to be at odds with the holding in State v. Weddle, 77 N.M. 420, 423 P.2d 611 (1967), that the right of relief by habeas corpus cannot be replaced or supplanted by court rule or statute. Apparently the court has carved out an exception that while it may not omit habeas corpus by statute or rule, it can be restricted by judicial decision.
It is important to distinguish between the requirement that the petitioner exhaust his available remedies and the waiver of certain post-conviction remedies or habeas corpus. In certain cases habeas corpus may be the only relief possible because circumstances preclude the exercising of a right to appeal or any other post-conviction relief. For example, remedies other than habeas corpus are not available to parties seeking custody of minor children.\(^9\) If a petitioner for habeas corpus has pled guilty to a criminal charge, or the time for appeal has expired, to require the petitioner to appeal the criminal charges prior to seeking habeas corpus would unreasonably and unconstitutionally restrict the scope of the writ. In such a case, the right to habeas corpus is not waived.\(^9\)

Habeas corpus may not be used as a substitute for an appeal challenging trial errors where the error was not one of jurisdiction.\(^9\)\(^9\) The failure to appeal, the failure to perfect the appeal, or the fact that the appeal was considered and denied do not determine whether habeas corpus has or has not been waived.\(^10\)\(^0\) Rather, the analysis turns on the question of whether the error alleged in the habeas corpus petition challenges the jurisdiction of the trial court or the competency of the defendant to stand trial.

In addition to complying with statutory law and court rules, a petitioner challenging conditions of serving a sentence by seeking relief by habeas corpus may first be required to exhaust available existing administrative remedies.\(^10\)\(^1\) The State Department of Corrections in the past has adopted and distributed a penitentiary prisoner's handbook which provides for administrative hearings in matters relating to disciplinary proceedings against inmates, forfeiture of good time benefits, and right to parole hearings.\(^10\)\(^2\) These administrative rules and regulations provide for administrative hearings and adminis-

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\(^9\) The doctrine of exhaustion of available remedies contemplates utilization of existing remedies and, where such relief is no longer available, resort to habeas corpus is proper.

\(^9\) Roehm v. Woodruff, 64 N.M. 278, 327 P.2d 339 (1958); In re Canavan, 17 N.M. 100, 130 P. 248 (1912).


\(^10\) United States ex rel. Whitaker v. Callaway, 371 F. Supp. 585 (E.D. Penn. 1974); McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973). In Wright v. McMann, 387 F.2d 519 (2d Cir. 1967), it was held that if effective administrative procedures similar to the Maryland statute scrutinized in McCray v. Burrell were promulgated in the future, prisoners would be required to use these administrative channels before taking their grievances to court.

\(^10\) See "Inmate Manual of Policy Statement," published by New Mexico Department of Corrections, 1977, and which booklet is distributed to each inmate confined to the State Penitentiary of New Mexico.
trative appeals and review. Additionally, a federal consent decree entered in the United States District Court for New Mexico against the Department of Corrections requires administrative hearings for prison inmates.

Before petitioning for a writ of habeas corpus, a petitioner should investigate carefully the other available post-conviction remedies, and should seek relief thereunder on each point of contention. If the appropriate remedies have been exhausted but relief has not been granted, the petitioner then may properly seek relief by petitioning for a writ of habeas corpus in the state district court in the county where he or she is confined. As a general rule, where a habeas corpus petition does not recite appropriate exhaustion of remedies on its face, or where subsequent inquiry discloses a failure to exhaust available judicial or administrative remedies, the court will dismiss the petition summarily. Such dismissal is without prejudice, and the petitioner may refile the petition after having sought the appropriate post-conviction remedies.

Federal district courts in New Mexico follow the rule as used in the state courts requiring the exhaustion of remedies before petitioner may seek a writ of habeas corpus. In addition to requiring the exhaustion of other federal remedies, federal courts insist that a prisoner exhaust state remedies in state court before his petition for habeas corpus will be considered. An exception to this federal rule exists where petitioner clearly shows that exhaustion of state remedies would be futile. For example, the exhaustion of state remedies is not required where resort to state court would be an idle or useless effort, or where the state courts have failed or refused to act within a reasonable time upon petitions for relief by habeas corpus.

Another important exception to the requirement of exhaustion of state remedies prior to seeking relief in federal court occurs where

103. Id.
104. Id.
106. Id.
109. Lewis v. New Mexico, 423 F.2d 1048 (10th Cir. 1970).
petitioner's claim arises under Section 1983 of the Civil Rights Act.\textsuperscript{111} Under this statute, the federal district court can grant relief only for wrongs which amount to the denial of federal constitutional rights by a person acting under color of state law. In such actions, the petition for habeas corpus may be brought in the Federal District Court of New Mexico only if one or more of the named respondents is located within this jurisdiction.\textsuperscript{112}

It is generally thought that the requirement of exhaustion of state remedies includes a requirement that a petition for habeas corpus raising the specific claim relied on by petitioner must have been filed in state court before a federal court will consider a habeas corpus petition. In a recent decision of the Tenth Circuit Court of Appeals, \textit{Ford v. Griffin},\textsuperscript{113} an important exception to this rule was announced. The court held that where the issue involved is purely one of law and has been presented to the state’s highest court on direct appeal, the fact that such a claim has not been presented in a state habeas corpus proceeding does not prevent its consideration in a federal habeas corpus action.\textsuperscript{114}

Habeas corpus may be sought where a person is held without being formally charged, or where a charge has been filed but the court does not have the jurisdiction to hear the case. The writ also may be sought in cases where a petitioner has not been brought to trial within the time prescribed by law, where the petitioner has been unable to obtain the setting of bail or reasonable terms of bail,\textsuperscript{115} or where the petitioner seeks to test the validity of extradition proceedings.\textsuperscript{116}

\textsuperscript{111} In Comment, \textit{Intolerable Conditions as a Defense to Prison Escapes}, 26 U.C.L.A. L. Rev. 1126 (1979) it is noted:


\textsuperscript{112} See publication by United States District Court Clerk, Jesse Casaus, entitled “Information and Instructions for Filing Complaint Under 42 U.S.C. § 1983.” This publication is distributed by the Clerk’s office, United States District Court, Albuquerque, New Mexico.

\textsuperscript{113} \textit{Id.} See also \textit{Henning v. Malley}, No. 79-1317 (10th Cir., filed June 30, 1980).

\textsuperscript{114} Except in matters relating to bail, wherein the requirement of N.M.R. Crim. P. 26(b) must be first exhausted.

\textsuperscript{115} See \textit{State of Michigan v. Doran}, 439 U.S. 282 (1978). In reviewing a habeas corpus proceeding brought by a prisoner to avoid extradition from Michigan to Arizona, the Supreme Court of the United States held that once the governor of the asylum state has
each of these cases, habeas corpus may be sought initially without exhausting other remedies.

IV. PROCEDURE

A. Successive Application for the Writ

The right to petition for relief by writ of habeas corpus is always available, except when the writ is ordered suspended by the President of the United States or, in New Mexico, by the Governor, pursuant to express constitutional provision.\(^{117}\) Prisoners who are sentenced following criminal proceedings and seek release from custody or restraint by habeas corpus are not precluded from making successive, similar applications for a writ of habeas corpus to the state district court which imposed the original sentence, the state district court where the petitioner is confined or imprisoned, the state supreme court, or subsequently to the federal district court for the district of New Mexico.\(^{118}\) Denial of an application for a writ of habeas corpus by one court does not, in most instances, operate as a bar under the principle of \textit{res judicata}, or preclude subsequent application for relief under this writ upon the same or different grounds as previously asserted to the same or different courts.\(^{119}\)

It is well recognized in New Mexico that a court’s refusal to grant a writ of habeas corpus, or its denial of such relief after a court hearing, does not preclude the filing of subsequent habeas corpus petitions.\(^{120}\) It has been held, for example, that the supreme court may grant relief by habeas corpus, despite the fact that the court on a previous occasion had considered the applicant’s petition and denied the relief sought.\(^{121}\) In an early case the New Mexico Supreme Court recognized that, in the absence of a statute providing otherwise, a refusal to grant relief by habeas corpus, or dismissal of the writ, remand of the relator to custody, or other refusal to discharge the petitioner, does not constitute a bar, on \textit{res judicata} principles, of a subsequent application for the writ.\(^{122}\) The federal courts reviewing cases where granted extradition a court of that state considering release by habeas corpus can do no more than decide: (1) whether the extradition documents on their face are in order; (2) whether the petitioner has been charged with a crime in the demanding state; (3) whether the petitioner is the person named in the request for extradition; and (4) whether the petitioner is a fugitive.

\(^{117}\) U.S. Const. art. I, § 9; N.M. Const. art. 2, § 7.

\(^{118}\) Henning v. Malley, No. 79-1317 (10th Cir., filed June 30, 1980); Ex parte Nabors, 33 N.M. 324, 267 P. 58 (1928).

\(^{119}\) Id.

\(^{120}\) Leach v. Cox, 74 N.M. 143, 391 P.2d 649 (1964).

\(^{121}\) Nance v. Baker, 400 F.2d 864 (10th Cir. 1968); Cordova v. Cox, 351 F.2d 269 (10th Cir. 1965).

\(^{122}\) Notevillie v. Rogers, 18 N.M. 462, 138 P. 207 (1914); See also, Ex parte Nabors, 33 N.M. 324, 267 P. 58 (1928).
prisoners in the custody of state authorities have sought relief by habeas corpus also adhere to the principle that res judicata is inapplicable in habeas corpus proceedings. 1, 2, 3

This rule has an exception, however. On its own motion a court may dismiss a petition for habeas corpus without hearing argument or evidence where the court, based on its reading of the petition, finds the petition to be virtually identical to previous petitions filed with the court that were considered and found to be without merit. 1, 2, 4 However, the denial of repetitious petitions is severely restricted. The guidelines for federal courts were stated as follows:

Controlling weight may be given to denial of a prior application for federal habeas corpus... only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. 1, 2, 5

Although the doctrine of res judicata is inapplicable to bar subsequent petitions by prisoners seeking relief by habeas corpus from incarceration in state custody, it has been held that a former adjudication in a habeas corpus hearing on the rights of rival claimants to custody of a minor child is conclusive as between the parties in a subsequent proceeding involving the same questions and facts, 1, 2, 6 and the doctrine of res judicata does apply where a state district court grants relief to a petitioner held in state court custody. A ruling in favor of the petitioner also has been held to be a conclusive determination of the illegality of the detention or imprisonment of such an

123. Preiser v. Rodriguez, 411 U.S. 475 (1973). See also the publication of the United States District Court Clerk, Jesse Casaus, Federal District Court, entitled "Information and Instructions, Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 ‘Persons in State Custody’." The publication states "[i]n your petition you should raise all available grounds for relief. If you fail to do so, you may be barred from presenting additional grounds at a later date. Rule 9 of the Supreme Court Rules governing § 2254 cases provides that a second or successive petition may be dismissed if the judge finds the failure of the petitioner to assert those grounds in a prior petition constitutes an abuse of the writ." In Salinger v. Loisel, 265 U.S. 224 (1924) the court stated:

But it does not follow that a refusal to discharge on one application is without bearing or weight when a later application is being considered...

A study of the cases will show that this has been construed as meaning that each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are ... (b) a prior refusal to discharge on a like application.

265 U.S. at 230-231.


individual, and is deemed *res judicata* of those issues of law and fact.\(^1\)\(^2\)\(^7\)

The principle that *res judicata* does not bar successive applications for writs of habeas corpus has been held to be inapposite where an order or judgment has been issued discharging an individual from custody following a hearing by a court in habeas corpus proceedings.\(^1\)\(^2\)\(^8\)

Such an order is deemed conclusive as to the illegality of the petitioner's custody in subsequent proceedings and the prisoner cannot be arrested, imprisoned or restrained again based on the same facts.\(^1\)\(^2\)\(^9\)

**B. Parties**

By statute, in New Mexico habeas corpus is available to "every person imprisoned or otherwise restrained of his liberty."\(^1\)\(^3\)\(^0\) The meaning of "every person" has not been defined in New Mexico law. Who may properly petition for a writ of habeas corpus is best determined with reference to the concepts of custody and collateral consequences previously discussed.\(^1\)\(^3\)\(^1\)

The New Mexico statutes provide that the petition should name the person imprisoning or detaining the petitioner.\(^1\)\(^3\)\(^2\) New Mexico case law gives no additional guidance concerning who should be the named respondent on the petition for habeas corpus. It appears to be the practice of New Mexico courts to follow federal law on this question. Federal law does provide guidelines in determining who is the proper person to be named as respondent in a petition for habeas corpus. In *Sanders v. Bennett*,\(^1\)\(^3\)\(^3\) the Attorney General of the United States was named as respondent in a petition by a federal prisoner. The court responded by stating:

But the Attorney General is not the person directly responsible for the operation of our federal penitentiaries. He is a supervising official

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128. Id.
129. Id. Note, however, the holding in State v. Sisneros, 79 N.M. 600, 446 P.2d 875 (1968), where the supreme court held that, where it had once denied relief by habeas corpus and thereafter the petitioner sought relief on the same issues before the trial court under another form of post-conviction relief, that such claim would not be reconsidered. *Sisneros* appears to be inconsistent with earlier court decisions of the same court in *Ex parte Nabors*, 33 N.M. 324, 267 P. 58 (1928); and *Notesine v. Rogers*, 18 N.M. 462, 138 P. 207 (1914) without expressly overruling them, appears to be violative of N.M. Const. art. 2, § 7, which clearly permits successive applications to both the district courts and supreme court. Compare *Sisneros* with *Ex parte Lott*, 77 N.M. 612, 426 P.2d 588 (1967).
131. See Sec. III, *supra*.
rather than a jailer. For that reason, the proper person to be served in the ordinary case is the warden of the penitentiary in which the prisoner is confined rather than an official in Washington, D.C., who supervises the warden.\textsuperscript{134}

Federal law also suggests that if the name of the person directly responsible for the wrongful detention is unknown or uncertain it is proper to identify the individual by describing his official title.\textsuperscript{135} If the official’s name is known, but his title is unknown, his name may be stated without stating his official title. The court may require the official title to be discovered and added to the petition at a later date.\textsuperscript{136}

Misjoinder or non-joinder of parties normally is not grounds for dismissal of a habeas corpus petition.\textsuperscript{137} If the respondent dies or vacates his office, his successor automatically is substituted without a motion being required.\textsuperscript{138}

In summary, it is suggested that the following criteria should be used in determining who should be named as respondent in a habeas corpus petition. The respondent should:

1. be the petitioner’s immediate custodian;
2. have the power to produce the body of the petitioner before the court; and
3. have the power to discharge the petitioner from custody if the petition is granted.

\textbf{C. Forum}

A petitioner seeking relief by writ of habeas corpus must select the appropriate forum and determine proper venue.\textsuperscript{139} In New Mexico the district court and the supreme court have concurrent jurisdiction over petitions for habeas corpus.\textsuperscript{140} The power of any other court to consider and grant the writ has been removed by statute.\textsuperscript{141} Although

\begin{itemize}
  \item \textsuperscript{134} 148 F.2d at 20.
  \item \textsuperscript{135} Fed. R. Civ. P. 25(d)(2).
  \item \textsuperscript{136} 28 U.S.C. § 2242 (1976).
  \item \textsuperscript{137} See Fed. R. Civ. P. 21; Davis v. California, 341 F.2d 982, 983, n. 1 (9th Cir. 1965).
  \item \textsuperscript{138} Fed. R. Civ. P. 25(d)(1).
  \item \textsuperscript{139} Further, once the writ is issued and served by a court having proper jurisdiction, the writ has paramount authority. \textit{Ex parte} Dodd, 72 Idaho 351, 241 P.2d 359 (1952). If a prisoner is in custody, the service of the writ operates to suspend the original order causing his restraint and the prisoner is held by virtue of the writ. \textit{State ex rel.} Stringer v. Quigg, 91 Fla. 197, 107 So. 409 (1926); \textit{State ex rel.} O’Connell v. Nangle, 365 Mo. 198, 280 S.W.2d 96 (1955).
  \item \textsuperscript{140} N.M. Const. art. 6, § 3, and N.M. Const. art. 6, § 13.
\end{itemize}
the jurisdictional statute appears to allow a petition for habeas corpus to be filed directly with the Supreme Court of New Mexico, New Mexico case law provides that the court of first jurisdiction is the appropriate district court. Unless there is some pressing necessity to do so, the New Mexico Supreme Court will not consider the petition, but will refer it to the proper district court.

This policy may be a result of the supreme court's recognition that there should be a right of appeal from a denial of a petition for habeas corpus in a criminal case. The statutory law expressly denies the petitioner this right, but the supreme court apparently has created it essentially by allowing petitions to be filed with the supreme court only after the petitioner has been unsuccessful in district court. The court, therefore, appears reluctant to hear new evidence at a habeas corpus hearing before it, preferring to rely on the record made in district court. Given the supreme court's policy, a petitioner who decides to file with the supreme court initially would be wise to state specifically in the pleadings why the petition is being filed originally in the supreme court, rather than in the appropriate district court.

Once a decision has been made to file in the district court, the venue question remains: which is the correct district court? In New Mexico, the correct district is that having territorial jurisdiction over the place where the petitioner is held in custody. The only statutory exception to this rule is that, if the court having proper jurisdiction refuses to act or cannot act, the petition may be filed in any other district. If it is necessary to file in another district, the petition should be accompanied by an affidavit stating why the petition cannot be filed in the proper district court.

Although New Mexico law provides a simple, clear answer to the venue question, the policy underlying that answer reflects poor thinking and planning. Most petitions for habeas corpus are filed by prisoners residing in the New Mexico State Penitentiary located in Santa Fe County. Under this venue rule, the burden of hearing these numer-

143. Ex parte Nabors, 33 N.M. 324, 267 P. 58 (1928).
145. Thus, the importance of requested findings of fact and conclusions of law becomes greater when habeas corpus is sought from the supreme court.
ous petitions falls heavily on the courts of the First Judicial District. Therefore, petitions cannot be heard quickly and efficiently, and the major function of the writ, to speedily and efficiently consider questions of wrongful custody or detention, is defeated.

New Mexico could benefit from the federal experience concerning the problem of unjustifiable delays caused by an inflexible venue rule. Several years ago the venue rule in federal courts was similar to that presently followed in New Mexico. In *Aherns v. Clark*, the United States Supreme Court stated that the venue rule for federal courts required both petitioner and respondent to be within the territorial jurisdiction of the federal district court considering the petition. This rule proved to be impractical. The Court subsequently rejected narrow venue requirements in *Braden v. 30th Judicial Circuit Court* stating that *Aherns* should no longer be read "as establishing an inflexible jurisdiction rule, dictating the choice of an inconvenient forum even in a class of cases which could not have been foreseen at the time of our decision." Now, convenience dictates which federal district court is the appropriate forum.

The rule of convenience also should apply in New Mexico. If a petition for habeas corpus alleges that constitutional errors were made at the time of trial or sentencing, the district court that tried the case could best consider the merits of the petition. All of the records of the trial and sentencing will be available to this district court. If witnesses are required for an evidentiary hearing, they are likely to be found conveniently near the trial court. If a petition for habeas corpus questions the conditions under which a sentence is being served, the district court having territorial jurisdiction over the place of custody is the logical district court in which to raise this issue. That court can hear the petition at the place of custody where witnesses testifying to the conditions can be produced easily and quickly. A rule based on convenience is preferable to a fixed venue rule where a petition claims some type of record or bookkeeping error. In that case, the district court having territorial jurisdiction over the records may be the logical court to hear the petition. It is more efficient to transport the petitioner to a hearing than it is to reproduce records and transport witnesses to a hearing.

The weakness of a rule based on territorial jurisdiction may be best examined in light of the present New Mexico policy of placing prisoners tried and sentenced by New Mexico courts in institutions lo-

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151. *Id.* at 499-500 (footnote omitted).
cated outside the territorial boundaries of the State of New Mexico. If a New Mexico prisoner, who is incarcerated outside the state, wishes to challenge his detention, a New Mexico district court would not have jurisdiction to consider the petition. Apparently, the court with jurisdiction over this challenge would be the federal district court. This result violates the exhaustion of remedies doctrine by not allowing the state court to first consider the merits of the prisoner's petition. A federal habeas corpus proceeding should not be proper in this case, because allowing the state forum to be by-passed strengthens the federal jurisdiction at the expense of local and state governments. A basic policy consideration underlying state habeas corpus actions and the doctrine of exhaustion is the promotion of strong state courts. Clearly, one of the present results of allowing federal writs to challenge state decisions is to weaken local state governments by forcing them to conform to federal standards.

D. Form of the Petition for Habeas Corpus

The form of a petition for habeas corpus has not been discussed extensively in New Mexico case law. The allegations essential for a proper petition for habeas corpus are stated in the statute:

The petition shall state in substance:

A. that the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty, the officer or person by whom he is so confined or restrained and the place where, naming both parties, if their names are known, or describing them if they are not;

B. that such person is not committed or detained by virtue of any process, judgment, decree or execution, specified in Section 44-1-2 N.M.S.A. 1978;

C. the cause or pretense of such confinement or restraint, according to the knowledge or belief of the party verifying the petition;

D. if the confinement or restraint is by virtue of any warrant or order, or process, a copy thereof shall be annexed, or it shall be averred that by reason of such prisoner being removed or concealed before application, a demand of such copy could not be made, or that such demand was made, and the legal fees therefor tendered to the officer or persons having such prisoner in his custody and that such copy was refused;

E. if the imprisonment is alleged to be illegal, the petition shall state in what the illegality consists.¹⁵²

The petition for habeas corpus must conform substantially to the

statutory requirements, must recite facts making a *prima facie* showing that the applicant is entitled to relief, and must be verified under oath.

Although the statute does not require that the petition contain statements averring that petitioner has exhausted all available post-conviction or other adequate remedies, proper pleading practice nevertheless dictates that these statements be included. The petitioner should list the steps taken to exhaust other available remedies and include a statement of the result of each application, the name of the case, the docket number of the proceeding, and the name of the court in which the relief was sought.

The petition should be simple, short, and written in plain, everyday language. It is not necessary to cite legal authority. A naked assertion made with no factual background whatsoever does not provide an adequate basis for the court to order a hearing nor does a bare allegation of confinement.

It will be helpful to the court for the petitioner to state whether prior petitions for habeas corpus have been filed, and to give the dis-

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153. *Id.* N.M.R. Civ. P. 65(d) requires a petition to allege facts showing venue, jurisdiction, standing of the filing party; the grounds upon which the petition is based and the facts required by the substantive law for issuance of the writ. A concise statement of the relief sought must be included, and, if respondent is a public official, the name of the real party in interest must be given.


155. N.M. Stat. Ann. § 44-1-3 (1978). *See also* N.M. R. Civ. P. 65(c) requiring the verified petition to be accompanied by a copy of the proposed writ. The petition may be signed by a person acting in behalf of the petitioner. N.M. Stat. Ann. § 44-1-3 (1978). Federal law also allows the petition to be brought by someone acting in behalf of the prisoner. 28 U.S.C. § 2242 (1976). When a third person signs the petition on behalf of another it has been suggested that "the application must set forth facts, which will satisfy the court that the interest of the next friend is appropriate, and that there is good reason why the detained person does not himself sign and verify the complaint. . ." United States *ex rel.* Bryant v. Houston, 273 F. 915, 917 (2d Cir. 1921).

156. This suggestion is based on the observations of one of the writers, Thomas Donnelly, Judge, New Mexico Court of Appeals, that such pleading will improve and expedite the handling of habeas corpus proceedings.

157. Failure to allege the exhaustion of available remedies, or prior resort to post-conviction relief may result in summary denial of the petition by the court, and refusal to issue the writ because of failure to allege compliance with N.M.R. Crim. P. 57.

158. Midgett v. Warden, 329 F.2d 185 (4th Cir. 1964); Schlette v. California, 284 F.2d 827 (9th Cir. 1960).

position of each petition, along with its docket number or case citation. If a prior petition for habeas corpus was filed, the petition should explain why the claim now being made was not raised in the previous petition. In habeas corpus proceedings, the burden is upon the applicant to show, by the allegations in the petition, that he is entitled to the writ, and the application generally will be denied where the petition is found to be insufficient on its face to state a claim for relief.\(^\text{160}\)

The petition should contain a demand for relief; the traditional demand is that the prisoner be discharged from custody. Today, however, relief is no longer limited to release from custody. Federal law has recognized this change and the petition may request only that the court dispose of the matter as law and justice may require.\(^\text{161}\) However, there is no need to be vague about the relief sought. Release from custody, release from custody pending retrial, vacating of a sentence as unconstitutional, transfer from one institution to another, or change in the nature of conditions of custody are all appropriate requests. General principles of good pleading suggest that the demand for relief be reasonably specific.\(^\text{162}\)

A motion to quash a writ of habeas corpus will be granted where the writ was issued improvidently, or where the relief sought lies outside the scope of relief which properly may be sought by habeas corpus. However, a motion to quash admits that all facts of the petition are well pled and is tantamount to a motion to dismiss for failure to state a claim for relief.\(^\text{163}\) If, prior to a hearing, the petition is dismissed for failure to allege facts entitling the petitioner to relief upon any grounds recited in the petition, the order denying the application should recite the grounds for such dismissal and state that the order is without prejudice to file further application seeking relief by habeas corpus.\(^\text{164}\)

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162. Observations of the writer, Thomas Donnelly, suggests that if the relief requested is not clearly set forth in the pleadings, it will be requested by the judge at the hearing on the merits.
163. Valdez v. City of Las Vegas, 68 N.M. 304, 361 P.2d 613 (1961). Generally a motion to dismiss a complaint or in the case of habeas corpus to dismiss the petition is equivalent to a motion to quash and only raises the question as to sufficiency of the complaint. A motion to quash the petition for habeas corpus is equivalent to a demurrer. 27A Words and Phrases 379 (1956). A demurrer tests the sufficiency of a pleading, admitting for that purpose truth of the allegations of fact contained therein and ordinarily relevant inferences of fact necessarily deducible therefrom are also admitted, 12 Words and Phrases 88 (1956). Also, a motion to quash may be used to raise issues as to the propriety of issuance of the writ after the filing of a return, Kennedy v. Walker, 135 Conn. 262, 63 A.2d 589 (1948).
164. As our previous discussion of exhaustion has suggested, unless the order denying relief is specific as to the reasons for the denial, the proceeding may be mistaken for an ad-
If the court to which the petition for habeas corpus is directed fails or refuses to consider the petition and the petition otherwise makes a \textit{prima facie} case for according the petitioner a hearing upon the allegations of the petition, the petitioner may seek relief in another state court that has jurisdiction.\footnote{Ex parte Nabors, 33 N.M. 324, 267 P. 58 (1928); Notestine v. Rogers, 18 N.M. 462, 138 P. 207 (1914).} The petitioner may also seek relief in the state supreme court by seeking a writ of mandamus to compel the district court to consider the application for habeas corpus.\footnote{N.M. Stat. Ann. § 44-2-44 (1978); State ex rel. Mahoney v. Neal, 80 N.M. 460, 457 P.2d 708 (1969).} In the alternative, the petitioner may refile the petition before the state supreme court, asking the high court to hear the matter under its original jurisdiction.\footnote{Ex parte Nabors, 33 N.M. 324, 267 P. 58 (1928).} In instances where relief is denied or where both the state district court and the state supreme court fail to act within a reasonable time, the petition may be filed in the federal district court in New Mexico.\footnote{Lewis v. New Mexico, 423 F.2d 1048 (10th Cir. 1970).}

\textbf{E. Filing the Petition}

The petition for habeas corpus should be filed with the clerk of the appropriate court and the proper filing fee must be tendered at the time of filing. Where the applicant is indigent, the petition should be accompanied by a verified affidavit attesting to the petitioner's indigency, together with a motion seeking permission to proceed \textit{in forma pauperis}.\footnote{Ex parte Nabors, 33 N.M. 324, 267 P. 58 (1928).} The petitioner should also submit to the court a proposed order granting the motion for permission to proceed as an indigent. Finally, the petition should be accompanied by a proposed writ of habeas corpus complying with the statutory requirements as to the form of the writ.\footnote{See N.M. Stat. Ann. § 44-1-6 (1978), which sets out the form of the writ.}

In cases where the petitioner does not have legal representation, the applicant should ask the court to appoint counsel. The petition for habeas corpus should request, or an accompanying motion should be made, that the court appoint an attorney to represent the petitioner. The petition should set out facts sufficient to show that the petitioner is indigent and justice requires the appointment of an attorney.
ney.\textsuperscript{171} In New Mexico, a statute provides that an indigent who is being detained by law enforcement officers, either under pending criminal charges, or because he was convicted of a crime carrying a penalty of more than six months imprisonment, is entitled to the appointment of counsel under the Indigent Defense Act.\textsuperscript{172} A showing of indigency, however, has been held to be a prerequisite to the petitioner's right to court-appointed counsel, and the court has discretion to deny appointment of counsel where no adequate showing has been made that the petitioner is unable to employ counsel.\textsuperscript{173} Where a party refuses or fails to complete, under oath, a certificate revealing his income or property, the court may deny appointment of counsel.\textsuperscript{174}

In \textit{Orris v. Rodriguez},\textsuperscript{175} the court of appeals held that the Indigent Defense Act does not empower the court to appoint counsel for indigents in civil damage actions. Similarly, in \textit{Birdo v. Rodriguez},\textsuperscript{176} the court held that, because many post-conviction proceedings are civil, a right to counsel does not exist in all cases where post-conviction relief is sought. Although habeas corpus proceedings have been held to be civil and not criminal in nature,\textsuperscript{177} the courts follow the practice of appointing counsel for indigents in appropriate cases either under the Indigent Defense Act or pursuant to the inherent power of the courts.\textsuperscript{178}

Clearly, there is no absolute right to appointment of counsel in habeas corpus actions in New Mexico. Appointment is within the sound discretion of the court, and is limited to cases where the petitioner is shown to be indigent. If it is doubtful that petitioner could

\textsuperscript{171} The motion or recitation in the petition must set forth facts that justify the appointment of counsel. If no such facts are stated, it will not be presumed.
\textsuperscript{175} State v. Pina, 90 N.M. 141, 501 P.2d 195 (1972). The court in this case upheld dismissal \textit{sua sponte} by the trial court of a petition seeking relief from alleged improper prison conditions, and held “[a]ppointment of counsel is not required for such assistance or exploratory evolutions in Rule 93 cases,” 84 N.M. at 210, 501 P.2d at 198. However, N.M. Stat. Ann. § 31-11-6 (1978) expressly states that the court shall appoint an attorney to represent the petitioner in post-conviction proceedings brought under that section. The rule in federal courts is that an indigent applicant is not entitled as a matter of right in federal habeas corpus proceedings to appointed counsel, but such appointment is within the discretion of the court. United States v. Masters, 484 F.2d 1251 (10th Cir. 1973); Ratley v. Crouse, 365 F.2d 320 (10th Cir. 1966).
\textsuperscript{176} In re Fullen, 17 N.M. 405, 132 P. 1137 (1913).
\textsuperscript{177} The practice followed in the First Judicial District, where most of the writs of habeas corpus are filed, is to examine carefully applications for writs of habeas corpus and to appoint counsel for indigent petitioners. Observation, Judge Donnelly, District Judge, First Judicial District.
obtain an adequate or fair hearing without counsel, or if it appears that he would be unable to present his contentions properly or logically, counsel must be appointed.\textsuperscript{179} The court may, in its discretion, require the petitioner to post a bond to cover costs and expenses in case the action is unsuccessful.\textsuperscript{180}

After the petition and the writ have been filed, the writ of habeas corpus must be personally served upon the named respondents in accordance with the rules relating to service in such cases.\textsuperscript{181} Unless free process is obtained, fees must be tendered for service of the writ and production of the prisoner.\textsuperscript{182}

A New Mexico statute requires that, in habeas corpus cases involving criminal detention, the district attorney be given notice of the time and place at which the writ is made returnable.\textsuperscript{183} This statutory notice requirement is limited to district attorneys residing in the county. If the district attorney is not present, notice must be given to any person interested in the continued custody of the petitioner.\textsuperscript{184}

\textbf{F. Form and Service of the Writ}

The form and content of the writ of habeas corpus in New Mexico are set out in the statutes.\textsuperscript{185} Normally, the writ is issued by the clerk of the district court where the petition has been filed.\textsuperscript{186} The writ

\begin{verbatim}
184. Id.

The State of New Mexico

To: ______________________________

You are commanded to have the body of ______________________________, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatever name the said Petitioner shall be called or charged, before the Honorable ______________________________, Judge of the District Court, on ______________________________, 1981, at _______ County Courthouse, to do, and receive that shall then and there be considered concerning the Petitioner, and have then and there this Writ.

Return on this Writ shall be made by ______________________________, 19____.

Witness the Honorable ______________________________, District Judge, Division _______ Judicial District, County of ______________________________, State of New Mexico, attested by hand and seal of this Court this _______ day of ______________________________, 19____.

Clerk of the District Court
By: ______________________________

Deputy Clerk

186. N.M.R. Civ. P. 65 provides that a writ, apparently including the writ of habeas corpus, shall only issue on the written approval of the district judge endorsed on the writ and shall bear the court seal. See also N.M. Stat. Ann. § 44-1-31 (1978).
\end{verbatim}
must be directed to the person detaining the petitioner and cannot be addressed to anyone who does not have custody.\textsuperscript{187} A comparison of this rule with the rule to determine the proper respondent to be named in the petition for habeas corpus suggests that, in certain situations, the respondent may not be the proper person to be named on the writ, or that additional names should be added to the writ. The petition must name as respondent the person having custody, power to produce the petitioner \textit{and} power to discharge the petitioner if the petition is granted. The writ must name the person who has the petitioner in his or her actual custody and has the power to physically produce the petitioner at the hearing on the writ.\textsuperscript{188} Typically, the writ is addressed to the warden of the penitentiary where the prisoner is confined or to the sheriff of the county in whose jail the prisoner is incarcerated. For example, if the petition for habeas corpus challenges the validity of a purported revocation of parole, the parole board should be named as a respondent in addition to the warden of the penitentiary. However, the only name that is required to be stated on the writ is that of the warden, because only he has custody of the petitioner.

The writ usually is served by the sheriff of the county where the person addressed on the writ resides or maintains his office. However, under a supreme court rule, the writ also may be served by any person not a party to the action who is over the age of eighteen, and who is specifically designated by the court to perform such service.\textsuperscript{189}

A statute prohibits the refusal to obey a writ of habeas corpus due to defects in form.\textsuperscript{190} A writ is deemed legally sufficient if the person having custody of the prisoner is designated either by name, by official position, or by appropriate words and description.\textsuperscript{191} The statute also provides that anyone who is served with a writ of habeas corpus "shall be deemed to be the person to whom it is directed, although it is directed to him by a wrong name or description, or to another person."\textsuperscript{192}

A court clerk, judge or official having custody who fails to issue or to comply with the directive of a writ may be subject to personal liability for statutory damages.\textsuperscript{193} Several statutes specify that damages

\begin{flushleft}
\textsuperscript{189}. N.M.R. Civ. P. 4(d). See also N.M. Stat. Ann. § 44-1-32 (1978), which appears to impose the additional requirement that the person serving the writ be an elector of this state and that in certain cases fees allowed by law be tendered for the production of the prisoner.
\textsuperscript{191}. Id.
\textsuperscript{192}. Id.
\end{flushleft}
may be allowed for failure to comply with the directives of a writ.\textsuperscript{194} A court may order the arrest and incarceration of a person who is served with a writ directed to him but refuses or neglects to obey the writ, fails to produce the party named in the writ, or fails to make a full and explicit return of the writ within the time required.\textsuperscript{195} This individual may be held in jail until he responds to the writ or otherwise complies with its provisions.\textsuperscript{196}

By statute,\textsuperscript{197} if a sheriff neglects to return a writ, the court may appoint someone else to execute the writ, and the sheriff may be committed to the jail of any county other than his own.\textsuperscript{198} The legislature has also provided that any order for the discharge of a prisoner may be enforced by means of attachment: the disobedient party shall be ordered to pay the aggrieved party $1000.00, in addition to any special damages the person may have sustained.\textsuperscript{199} Anyone who transfers or conceals the prisoner with intent to elude the service of the writ is liable to the aggrieved party for $400.00, recoverable in a civil action.\textsuperscript{200} Any officer or person who refuses to deliver a copy of any order or process, when proper fees are tendered, is liable for $200.00 to the person detained.\textsuperscript{201} The person to whom a writ is directed has the duty to comply with the writ, and disobedience or evasion may constitute contempt of court.\textsuperscript{202} Service of the writ imposes the duty upon the recipient to produce the person who is the subject of the writ, unless he is sick or infirm and cannot, without danger, be brought before the court.\textsuperscript{203}

\textit{G. Return of a Writ}

Every individual named as a respondent in a petition for habeas corpus who is served with a writ is required to file a written, verified return with the court issuing the writ.\textsuperscript{204} In some states a failure to file a return may bar dismissal of the petition for habeas corpus,\textsuperscript{205} but this is not the rule in New Mexico. In this jurisdiction, if the peti-

\begin{footnotesize}
\begin{enumerate}
\item[196.] Id.
\item[198.] Id.
\item[202.] There is a paucity of cases in this area. \textit{See Annot.} 84 A.L.R. 807, 812 (1933), Wright v. State, 3 Ala. App. 140, 57 So. 1023 (Ct. App. 1912). However, the power of the court to use its contempt power is generally recognized. \textit{State ex rel. Reynolds v. County Court of Kenosha, 11 Wis. 2d 560, 105 N.W.2d 876 (1960).}
\item[205.] Smith v. Anderson, 317 F.2d 172 (D.C. Cir. 1963).
\end{enumerate}
\end{footnotesize}
tioner has stated a *prima facie* case in his petition, the burden shifts to the respondent to show at the hearing a valid basis for continuing the restraint or confinement of the petitioner.\(^{206}\) Because the filing of a return is mandated by statute, the court may order the respondent to file the return upon penalty of contempt of court.\(^{207}\) By statute, if a person neglects to "make a full and explicit return" an attachment shall be issued for his or her arrest.\(^{208}\)

A return, if carefully drafted and timely filed, performs the important function of delineating the factual issues in dispute. When correctly drafted, the return may eliminate the need for a hearing to resolve disputed issues of fact. Because evidentiary hearings are time-consuming and difficult to schedule in a crowded court docket, and the delays encountered in setting evidentiary hearings are often viewed by petitioners as unreasonable and frustrating, care should be exercised to draft the return in the manner most likely to obviate the necessity of a hearing. Rather than being seen as a civil answer\(^{209}\) where all one needs to do is admit, deny or plead insufficient information, the return should be viewed as an opportunity to present uncontroverted evidence to the court. For example, affidavits may be filed with the return to aid the court in determining the factual issues. New Mexico appears to encourage this practice.\(^{210}\)

The contents of the return are prescribed by statute.\(^{211}\) Greater detail is required in a return than in a civil answer. The return must include a statement indicating whether the respondent has the party to whom the writ applies in his custody, control or under restraint.\(^{212}\) The return also must specify the legal basis and authority for the imprisonment or restraint.\(^{213}\) If the person is detained, a copy of the writ, a warrant or a written document justifying the detention must be attached to the return.\(^{214}\) If the petitioner is no longer in the control of the person upon whom the writ was served, the return must state the name of the person to whom the petitioner was transferred, and the time, reason and authority for the transfer.\(^{215}\)


\(^{209}\) It has been suggested that the return to a writ of habeas corpus is similar to an answer in a civil action. See Marshall v. Geer, 140 Colo. 305, 344 P.2d 440 (1959). This suggestion is misleading as to the true function of a return.

\(^{210}\) N.M. Stat. Ann. § 44-1-9 (1978), by its language, would clearly suggest this and such a practice is not uncommon in federal courts.


\(^{212}\) Id.

\(^{213}\) Id.

\(^{214}\) Id.

\(^{215}\) Id.
A well-drafted return will expedite the habeas corpus proceeding, but a timely filed return is essential. The New Mexico legislature created a mystery of legislative enactment when it provided that a return to a writ shall be made within the time required by the provisions of the chapter on habeas corpus. The only reference to time made in the chapter is as follows:

If the writ is returnable at a certain day, such return shall be made, and such prisoner produced at the time and place specified therein; if he is returnable forthwith, and the place is within twenty miles of the place of service, such return shall be made and such prisoner produced within twenty-four hours, and the like time shall be allowed for every additional twenty miles.

Apparently, this legislative command is never followed even if it is understood. In a habeas corpus proceeding a prompt return, usually on short notice, has always been expected.

The practice followed in New Mexico is to serve the return on the petitioner as he or she enters the courtroom for the evidentiary hearing. This practice defeats both the spirit and usefulness of the return. Preferably, the courts should state in the writ a time certain for the filing of the return which should be well before the matter is to be heard.

H. Answering the Return

The answer to a return is called a traverse. At common law, the petitioner, upon receipt of the written return, filed a traverse detailing his claims that the return was improper or incorrect. The filing of a traverse to the return is a right accorded a petitioner by the New Mexico statutes. Unfortunately, the right seldom is used and rarely is available because the return either is not carefully drafted or is not timely filed. Although it is not necessary to raise an issue of law in the traverse, the petitioner must challenge the factual allegations stated in the return if an issue of fact is to be raised. If the habeas corpus hearing is to proceed efficiently, the suggestions made for drafting and filing a return also should be considered when drafting a traverse. In other states, the traverse has been found to be analogous to

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218. N.M.R. Civ. P. 65(f) and (i), which apparently apply to habeas corpus, do suggest time limits for the filing of a responsive pleading, such as a return. The normal time period for filing the return would appear to be no less than seven days or more than 30 days.
to an answer in a civil proceeding, with the added function of narrowing and eliminating facts until issues are thus joined.\textsuperscript{222} The adoption of a similar policy in New Mexico would be helpful in the development and evolution of the writ of habeas corpus in this state.

I. The Hearing

While federal courts have the power to hold evidentiary hearings\textsuperscript{2,23} concerning habeas corpus claims, there is no absolute requirement that such a hearing be held.\textsuperscript{2,24} In cases where the state courts have conducted a full and fair hearing on a state petitioner’s application for post-conviction relief, the petitioner is not entitled to an evidentiary hearing in federal court unless the judge determines that a hearing should be held.\textsuperscript{2,25} Apparently, the practice in New Mexico is that all habeas corpus petitions will be heard at an evidentiary hearing.\textsuperscript{2,2,6} This requirement severely distorts and delays habeas corpus practice. Efficient prehearing practices could eliminate a significant number of evidentiary hearings and allow the issues to be presented to the court by brief or oral argument. In federal court, if an evidentiary hearing is not necessary, the petitioner may not need to be present at the oral argument.\textsuperscript{2,2,7} The result of this policy has been to improve the speed and efficiency of habeas corpus proceedings for petitioners, courts and attorneys alike.

At the time of the hearing the petitioner is brought before the district court which will hear the evidentiary issues. Habeas corpus hearings are tried to the court without a jury.\textsuperscript{2,2,8} The general rules of evidence apply, and the burden of proof is upon the petitioner to allege and prove, by a preponderance of the evidence,\textsuperscript{2,2,9} facts which will warrant the granting of the relief requested.\textsuperscript{2,3,0} The court, in considering the petition and the evidence, will resolve every question of sufficiency in favor of the validity of the judgment.

\textsuperscript{222}In re Lewallen, 152 Cal. Rptr. 528, 590 P.2d 383 (1979); In re Saunders, 88 Cal. Rptr. 633, 472 P.2d 921 (1970).
\textsuperscript{224}Id.
\textsuperscript{226}While such hearings are not required, it is the normal practice to hold them. Observation, Thomas Donnelly, Judge, New Mexico Court of Appeals.
\textsuperscript{227}United States v. Hayman, 342 U.S. 205 (1952).
\textsuperscript{228}See State v. Sweat, 78 N.M. 512, 433 P.2d 229 (Ct. App. 1967), where the court held that the right to trial by jury existed at the time of the enactment of the state constitution, or where such right has been expressly provided by law. See N.M. Const. art. 2, § 12.
\textsuperscript{230}Smith v. Abram, 58 N.M. 404, 271 P.2d 1010 (1954). See also Tapia v. Rodriguez, 446 F.2d 410 (10th Cir. 1971).
attacked,\textsuperscript{231} except in cases where it is clearly shown that the judgment or sentence was void.\textsuperscript{232} A presumption exists in favor of the validity of the proceedings if they are not invalid on their face.\textsuperscript{233} There is also a presumption that judicial proceedings, official judgments, or sentences issued by other courts were regular and correct.\textsuperscript{234} A further presumption is made in favor of the legality of detention or imprisonment.\textsuperscript{235} It has been held also that "as to jurisdictional questions, a judgment under which a prisoner is held is aided by the same presumptions as in other cases of collateral assault. If the record is silent as to jurisdictional facts, jurisdiction is presumed."\textsuperscript{236}

In a habeas corpus proceeding, a court may receive evidence outside the record in order to establish the absence or loss of jurisdiction through denial of any rights guaranteed a prisoner in a trial under either the Constitution of the United States or of New Mexico.\textsuperscript{237} For example, if prosecutorial promises were made to induce a plea of guilty, and these promises are not contained in the record, evidence of these actions may be presented in a habeas corpus proceeding.\textsuperscript{238}

At the conclusion of an evidentiary hearing on a habeas corpus petition, the court should make and enter findings of fact and conclusions of law.\textsuperscript{239} Because these hearings are civil in nature, Rule 52 of the Rules of Civil Procedure for the District Courts requires the adoption of specific findings of fact and conclusions of law. The court's decision will stand unless the findings are clearly erroneous or not supported by substantial evidence.\textsuperscript{240}

\textbf{J. Appellate Review of Habeas Corpus}

At common law, orders granting or denying a writ of habeas corpus were not subject to appellate review.\textsuperscript{241} In New Mexico, the right to an appeal from a final order granting habeas corpus is reviewable only as provided for by rule of the court.\textsuperscript{242} There is no right to appellate

\begin{itemize}
  \item \textsuperscript{231} Smith v. Abram, 58 N.M. 404, 271 P.2d 1010 (1954).
  \item \textsuperscript{232} Id.
  \item \textsuperscript{233} State ex rel. Soto v. Heffernan, 41 N.M. 219, 67 P.2d 240 (1937).
  \item \textsuperscript{234} Smith v. Abram, 58 N.M. 404, 271 P.2d 1010 (1954).
  \item \textsuperscript{235} Johnson v. Cox, 72 N.M. 55, 380 P.2d 199 (1963); State ex rel. Soto v. Heffernan, 41 N.M. 219, 67 P.2d 240 (1936).
  \item \textsuperscript{236} In re Cica, 18 N.M. 452, 457, 137 P. 598, 599 (1913).
  \item \textsuperscript{237} Orosco v. Cox, 75 N.M. 431, 405 P.2d 668 (1965).
  \item \textsuperscript{238} State v. Benavidez, 87 N.M. 223, 531 P.2d 957 (Ct. App. 1975); Orosco v. Cox, 75 N.M. 431, 405 P.2d 668 (1965).
  \item \textsuperscript{239} State v. Hardy, 78 N.M. 374, 431 P.2d 752 (1967). Failure to request findings of fact and conclusions of law may severely hamper any subsequent application to the supreme court because of the court's belief that such a hearing should function as an appeal.
  \item \textsuperscript{240} Id.
  \item \textsuperscript{241} Notestine v. Rogers, 18 N.M. 462, 138 P. 207 (1914).
  \item \textsuperscript{242} N.M.R. Civ. App. P. 3.
\end{itemize}
review where the order challenged in a habeas corpus action is not final.\textsuperscript{243} There is no right of appeal to the New Mexico Supreme Court by a petitioner from the denial of habeas corpus in the district court; however, an original petition for habeas corpus subsequently may be filed with the supreme court raising the same grounds relied upon in the petition to the district court.\textsuperscript{244} By a rule of the supreme court,\textsuperscript{245} the state may appeal an order providing for the release of a prisoner, but the appeal does not operate as a stay of execution of the order discharging the petitioner.

An exception to the rule denying appellate review in habeas corpus proceedings has been recognized.\textsuperscript{246} In New Mexico, a decision in a habeas corpus proceeding for child custody is a final judgment and is appealable,\textsuperscript{247} because the order issued following the habeas corpus proceeding is \textit{res judicata} as to the specific issues ruled upon by the court.\textsuperscript{248}

A significant distinction exists between the right of appeal in the state courts and that right in the federal district courts. Federal prisoners have the right to appeal from a federal district court decision denying a petition for habeas corpus.\textsuperscript{249} There is, however, a requirement that state prisoners who have been denied habeas corpus relief in federal court must obtain a certificate of probable cause from the same federal court in order to effect an appeal.\textsuperscript{250} If the certificate is not granted by the federal district court, the petitioner may appeal to a circuit court for the issuance of the certificate.\textsuperscript{251} In habeas corpus proceedings the federal courts have followed appellate rules for civil cases which require that the notice of appeal be filed within thirty days of the entry of final judgment.\textsuperscript{252}

V. EVOLVING APPLICABILITY OF THE WRIT

The circumstances in which habeas corpus will issue have been expanded by both statutory law and judicial precedent beyond those

\begin{itemize}
  \item \textsuperscript{243} California v. Clements, 83 N.M. 764, 497 P.2d 975 (1972).
  \item \textsuperscript{244} State v. Sisk, 79 N.M. 167, 441 P.2d 207 (1968); \textit{Ex parte} Nabors, 33 N.M. 324, 267 P. 58 (1928).
  \item \textsuperscript{245} N.M.R. Civ. App. P. 3.
  \item \textsuperscript{246} Albright v. Albright, 45 N.M. 302, 115 P.2d 59 (1941); Evens v. Keller, 35 N.M. 659, 6 P.2d 200 (1931).
  \item \textsuperscript{247} Albright v. Albright, 45 N.M. 302, 115 P.2d 59 (1941).
  \item \textsuperscript{248} Evens v. Keller, 35 N.M. 659, 6 P.2d 200 (1931).
  \item \textsuperscript{249} 28 U.S.C. \S\S 2253; 2255 (1976).
  \item \textsuperscript{250} 28 U.S.C. \S 2253 (1976).
  \item \textsuperscript{251} \textit{Id.}; Wright v. Dickson, 336 F.2d 878 (9th Cir. 1964), \textit{cert. denied}, 386 U.S. 1012 (1967); Anderson v. Jones, 281 F.2d 684 (6th Cir. 1960).
  \item \textsuperscript{252} Zimmer v. Langlois, 331 F.2d 424 (1st Cir. 1964); Mead v. Cox, 310 F. Supp. 233 (D.C. Va. 1970); Fed. R. App. Prac. 4(a).
\end{itemize}
HABEAS CORPUS IN NEW MEXICO

recognized at common law. Initially, habeas corpus proceedings were restricted to cases challenging the legality either of a prisoner's original conviction or of his restraint or confinement. In Coffin v. Reichard, a federal court held, however, that habeas corpus relief may be granted to remedy unlawful conditions of a prisoner's confinement even though the petitioner is not entitled to release from prison.

Following the decision in Coffin, there has been a perceptible and growing readiness on the part of state and federal courts to grant habeas corpus relief in cases challenging prison confinement or treatment of inmates. Before Coffin, the courts had followed a general "hands off" policy in these cases where the petitioner was not eligible for release. The United States Supreme Court, in 1969, allowed habeas corpus to be used to challenge the solitary confinement of a prison inmate in violation of prison regulations. State courts, including those in New Mexico, subsequently have granted relief by habeas corpus where conditions of imprisonment constituted cruel and unusual punishment in violation of the Eighth Amendment.

The evolving nature of this relief has been recognized by the United States Supreme Court, and the expansion of the scope of these actions has been given wide effect in both state and federal courts. The state courts in New Mexico have responded to federal court decisions expanding the role of habeas corpus by recognizing a broadened scope of habeas corpus relief. In Sneed v. Cox, the New Mexico Supreme Court expanded the scope of habeas corpus by holding that the writ was proper, even though the petitioner had not demonstrated a right to immediate release from custody, and that the writ could be


The original view of habeas corpus attack upon detention under a judicial order was a limited one. The relevant inquiry was confined to determining simply whether or not the committing court had been possessed of jurisdiction. ... But, over the years the writ of habeas corpus evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law, even though imposed pursuant to conviction by a court of competent jurisdiction.

411 U.S. at 485.
employed to correct an erroneous sentence or to assert a right to credit for time served.\textsuperscript{259}

The promulgation of court rules by the New Mexico Supreme Court as well as legislative enactments, have restricted access to the writ by providing other remedies of post-conviction relief that must be sought before petitioning for habeas corpus. However, the ultimate effect of recent decisions by the New Mexico Supreme Court is to recognize an expanded role for habeas corpus in the state courts of New Mexico, even though the adoption of legislative and judicial post-conviction remedies make the procedural employment of habeas corpus somewhat more complicated.\textsuperscript{260}

CONCLUSION

The enduring right of an individual deprived of his liberty to petition the courts for review by habeas corpus has been an important legal instrument for safeguarding individual freedom. The significance of the great writ in American jurisprudence has been characterized succinctly by the United States Supreme Court:

\begin{quote}
[I]ts capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and law makers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected. . . . There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus. . . .”\textsuperscript{261}
\end{quote}

Although other forms of post-conviction relief have been fashioned by the courts to provide remedies similar to those afforded by habeas corpus, none has attained its breadth or universality.

\textsuperscript{259} Sneed v. Cox, 74 N.M. 659, 397 P.2d 308 (1964).