

PREVIEW OF FIRST THREE PAGES  
OF CHAPTER ONE

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JURISDICTION AND RELATED MATTERS [1.00.0]:

A. THE CUSTODY REQUIREMENT [1.10.0]:

1. The Rule [1.11.0]: In order to obtain habeas relief under sections 2241(c)(3), 2254(a), or 2255 of title 28, the prisoner must demonstrate that he is “in custody.”
2. “Custody” Defined [1.12.0]: The term “custody” encompasses not only individuals subject to immediate physical imprisonment, but also those subject to restraints not shared by the public generally that significantly confine and restrain freedom. *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 510 (1982); *Jones v. Cunningham*, 371 U.S. 236, 239-43 (1963).
3. Requirement Is Jurisdictional [1.13.0]: The custody requirement is jurisdictional. *Maleng v. Cook*, 490 U.S. 488, 490 (1989) (*per curiam*); *Williamson v. Gregoire*, 151 F.3d 1180, 1182 (9th Cir. 1998).
4. Timing Of When Custody Requirement Must Be Satisfied [1.14.0]: In order to satisfy the custody requirement, the petitioner must be in custody at the time the petition is filed in federal court. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). This requirement is strictly enforced. *Scanio v. United States*, 37 F.3d 858, 86-61 (2d Cir. 1994) (declining to apply Fed. R. Civ. P. 6(a) – extending period of time in which to file paper when last day falls on a Saturday, Sunday, holiday, or day when clerk’s office is inaccessible – to petitioner whose period of supervised release ended on date clerk’s office was closed, even though petition was filed within extended period authorized by Fed. R. Civ. P. 6(a)). But once the petition is filed in federal court, it does not matter if the petitioner is later released from custody for purposes of the “in custody” requirement. *Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968).

5. Custody Requirement Applies To Both Citizens And Aliens [1.15.0]: The federal habeas statutes draw no distinction between American citizens and aliens held in state or federal custody. *Rasul v. Bush*, 542 U.S. 466, 480-81 (2004) (applying § 2241).
6. Petitioner's Claim Must Involve The Right To Be Released [1.16.0]: In addition to the petitioner being in custody when the petition is filed, his claim must assert the right to be released. *United States v. Kramer*, 195 F.3d 1129, 1130 (9th Cir. 1999) (prisoner was not permitted to challenge restitution order even though he was serving prison sentence when the petition was filed because habeas claim did not involve the right to be released); *accord Blaik v. United States*, 161 F.3d 1341, 1342 (11th Cir. 1998); *United States v. Segler*, 37 F.3d 1131, 1137 (5th Cir. 1994).
7. Each Claim Must Be Analyzed Separately [1.17.0]: Each claim independently must involve the right to be released from custody. A petitioner cannot avoid this requirement by joining cognizable claims with non-cognizable ones. Cognizable claims "do not run interference for non-cognizable claims." *United States v. Thiele*, 314 F.3d 399, 402 (9th Cir. 2002); *see also Kaminski v. United States*, 339 F.3d 84, 88-89 (2d Cir. 2003); *United States v. Hatten*, 167 F.3d 884, 887 (5th Cir. 1999); *Barnickel v. United States*, 113 F.3d 704, 706 (7th Cir. 1997); *Smullen v. United States*, 94 F.3d 20, 25-26 (1st Cir. 1996).
8. Application Of The Custody Requirement [1.18.0]:
  - a. Circumstances Where Custody Requirement Is Satisfied [1.18.1]:
    - 1) Incarceration [1.18.2]: Incarceration pursuant to the conviction or sentence challenged in the petition, *see Withrow v. Williams*, 507 U.S. 680 (1993), or incarceration under sentence of death and challenging either the conviction or sentence, *see Richmond v. Lewis*, 506 U.S. 40 (1992), satisfy the custody requirement. This includes service members in custody after having been convicted in a military court and having

exhausted review within the military system. *Clinton v. Goldsmith*, 526 U.S. 529, 537 n.11 (1999).

- 2) Probation And Parole [1.18.3]: A person who is on parole or probation at the time he files his federal habeas petition satisfies the custody requirement. *Jones v. Cunningham*, 371 U.S. 236, 240-43 (1963) (holding that parole satisfies the "in custody" requirement); accord *Chaker v. Crogan*, 428 F.3d 1215, 1219 (9th Cir. 2005); see also *Caldwell v. Dretke*, 429 F.3d 521, 527 (5th Cir. 2005) (probation and deferred adjudicated probation orders satisfy the "in custody" habeas requirement); *Fowler v. Sac. Co. Sheriff's Dep't*, 421 F.3d 1027, 1033 n.5 (9th Cir. 2005) ("a petitioner is 'in custody' for the purposes of habeas jurisdiction while he remains on probation"); *Jackson v. Coalter*, 337 F.3d 74, 79 (1st Cir. 2003) (probation satisfies custody requirement).
- 3) Detention On A Parole Warrant, Bail Or O/R Release [1.18.4]: Detention on a parole warrant, *Mars v. Mounts*, 895 F.2d 1348, 1351 n.3 (11th Cir. 1990), bail or O/R release, *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 300-02 (1984); *Lefkowitz v. Newsome*, 420 U.S. 283, 286 n.2, 292 n.8 (1975); *Hensley v. Municipal Court*, 411 U.S. 345, 351-53 (1973); or bond, *Oyler v. Allenbrand*, 23 F.3d 292, 293-94 (10th Cir. 1994); *Malinovsky v. Court of Common Pleas*, 7 F.3d 1263, 1265 (6th Cir. 1993), satisfy the "custody" requirement.
- 4) Rehabilitation [1.18.5]: A person sentenced to a rehabilitation program satisfies the custody requirement. *Dow v. Cir. Ct. of the First Circuit*, 995 F.2d 922, 923 (9th Cir. 1993) (sentence to alcohol rehabilitation program for fourteen hours constitutes custody); *Wottlin v. Fleming* 136 F.3d 1032, 1034 n.1 (5th Cir. 1998) (petitioner released to half-way house deemed in custody).
- 5) Consecutive Sentences [1.18.6]: A prisoner may challenge the conviction underlying a sentence that he