

PREVIEW OF FIRST THREE PAGES  
OF CHAPTER FIVE

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EXPANSION OF THE RECORD [5.00.0]:

- A. THE RULE [5.10.0]: Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts (state prisoners) provides:
- a) In General. If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition. The judge may require that these materials be authenticated.
  - (b) Types of Materials. The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.
  - (c) Review by the Opposing Party. The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

Rule 7 of the Rules Governing 2255 Proceedings for the United States District Courts (federal prisoners) provides:

- (a) In General. If the motion is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the motion. The judge may require that these materials be authenticated.
- (b) Types of Materials. The materials that may be required include letters predating the filing of the motion, documents, exhibits, and answers under oath to written interrogatories propounded by the judge.

Affidavits also may be submitted and considered as part of the record.

- (c) Review by the Opposing Party. The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

B. PURPOSE [5.20.0]:

1. Obviate Need For Evidentiary Hearing [5.21.0]:  
Expanding the record enables the court to dispose of some habeas petitions not dismissed on the pleadings, thereby eliminating the need for an evidentiary hearing. See Adv. Comm. Notes to Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts; *see also Williams v. Woodford*, 306 F.3d 665, 688-89 (9th Cir. 2002) (expansion of the record is a permissible intermediate step that may avoid the necessity of an expensive and time consuming evidentiary hearing); *Boyko v. Parke*, 259 F.3d 781, 790 (7th Cir. 2001) (Rule 7 “can be used to introduce new factual information into the record in lieu of an evidentiary hearing”); *Brown v. Johnson*, 224 F.3d 461, 469 (5th Cir. 2000) (stating that expansion of the record can be used as a “paper hearing” in place of an evidentiary hearing).
2. To Assist The Court When An Evidentiary Hearing Is Ordered [5.22.0]: Expanding the record can be used as a means of preparing and assisting the court in conducting an evidentiary hearing. Adv. Comm. Notes to Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts. In § 2255 proceedings, “[i]t is less likely that the court will feel the need to expand the record in a § 2255 proceeding than in a habeas corpus proceeding, because the trial (or sentencing) judge is the one hearing the motion (see Rule 4) and should already have a complete file on the case in his possession. However, Rule 7 provides a convenient method for supplementing his file if the case warrants it.” Adv. Comm. Notes to Rule 7 of the Rules Governing Section 2255 Proceedings for the United States District Courts.

## C. RESTRICTIONS [5.30.0]:

1. Petitioner's Failure To Develop Factual Basis In State Court Proceedings [5.31.0] In the event that the petitioner wishes to submit additional evidence to the federal court – either in support of a new claim or to buttress an existing claim – he must demonstrate that he was not at fault in failing to develop that evidence in state court or, if he was at fault, the conditions prescribed by § 2254(e)(2) are met. This is required even if the petitioner seeks relief based on new evidence *without* an evidentiary hearing. *Holland v. Jackson*, 542 U.S. 649, 653 (2004); *see also Mark v. Ault*, 498 F.3d 775, 788-89 (8th Cir. 2007) (“the district court did not abuse its discretion in denying Mark's motion to expand the record because Mark has failed to satisfy the clear and convincing evidence standard under § 2254(e)(2) that must be met in order to comply with Rule 7”); *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1241-42 (9th Cir. 2005) (a petitioner “must comply with § 2254(e)(2) in order to expand the record under Rule 7”); *Boyko v. Parke*, 259 F.3d 781, 790 (7th Cir. 2001) (“When expansion of the record is used to achieve the same end as an evidentiary hearing, the petitioner ought to be subject to the same constraints that would be imposed if he had sought an evidentiary hearing”); *accord Cargle v. Mullin*, 317 F.3d 1196, 1209 (10th Cir. 2003).

But some courts have held that this limitation does not apply where the new evidence is not being offered to support the petitioner's claims on the merits. *See, e.g., Cristin v. Brennan*, 281 F.3d 404, 412 (3d Cir. 2002) (§ 2254(e)(2) not applicable to an evidentiary hearing on procedural default because it did not involve the factual basis of the claim); *Boyko v. Parke*, 259 F.3d 781, 790 (7th Cir. 2001) (finding that § 2254(e)(2) should not be applied when expansion of the record is sought for purposes other than introducing new evidence on the merits of a claim); *Charles v. Baldwin*, 1999 WL 694716, \*2 (D. Ore. Aug. 2, 1999). The Third Circuit, however, has stated that § 2254(e)(2) applies even if the evidence is not being offered to support the merits of the petitioner's claims. *Goldblum v. Klem*, 510 F.3d 204, 220 n.11 (3d Cir. 2007) (2-1 decision).