

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

15-CR-F

RICHARD C. WESLEY
UNITED STATES CIRCUIT JUDGE

585-243-7910
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October 26, 2015

Honorable John D. Bates
Chair, Advisory Committee on Civil Rules
United States District Court
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I recently had a case that called into question the interpretation of Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts. Under this rule, it is unclear whether a 2255 petitioner has an absolute right to file a reply to a respondent's answer.

The full text of Rule 5 reads as follows (emphasis added):

RULE 5. THE ANSWER AND THE REPLY

- (a) When Required. The respondent is not required to answer the motion unless a judge so orders.
- (b) Contents. The answer must address the allegations in the motion. In addition, it must state whether the moving party has used any other federal remedies, including any prior post-conviction motions under these rules or any previous rules, and whether the moving party received an evidentiary hearing.
- (c) Records of Prior Proceedings. If the answer refers to briefs or transcripts of the prior proceedings that are not available in the court's records, the judge must order the government to furnish them within a reasonable time that will not unduly delay the proceedings.
- (d) Reply. The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.**

One plausible reading of subsection (d) is that a petitioner may submit a reply, provided that he or she wishes to do so. Another plausible reading is that a petitioner may submit a

reply, provided that the judge allows the petitioner to do so. The ambiguity appears rooted in differing interpretations of the word “may.” “May” could mean that a petitioner is permitted—but not required—to file a reply. Alternatively, “may” could mean that a petitioner is allowed—if granted permission by the court—to file a reply.

The federal district courts that have encountered this ambiguity are presently divided on its resolution. Several courts have concluded that Rule 5(d) affords a 2255 petitioner the absolute right to file a reply. *See, e.g., United States v. Hosseini*, 2013 U.S. Dist. LEXIS 89148, at *2 (N.D. Ill. June 25, 2013) (“In accordance with Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts, [the petitioner] is entitled to file a reply to the government’s detailed response if he desires to do so.”); *United States v. Andrews*, 2012 U.S. Dist. LEXIS 179244, at *6 (N.D. Ill. Dec. 19, 2012) (“It is reasonable to read [Rule 5(d)] as requiring the district court to provide the petitioner with the opportunity to reply. If that is the correct reading, we may have erred in ruling on the § 2255 motion without considering a reply”).

Other courts have concluded that a reply is not required under Rule 5(d). *See, e.g., Simmons v. United States*, No. 12 Civ. 04693 (ILG), 2014 WL 4628700, at *1 (E.D.N.Y. Sept. 15, 2014) (“[Rule 5(d)]’s plain language does not mandate a reply.”); *Terrell v. United States*, No. 3:12-cv-233-FDW, No. 3:09-cr-172-FDW-1, 2014 WL 1203286, at *1 (E.D.N.C. Mar. 24, 2014) (“There is . . . no absolute right for a Petitioner to file a Reply to the Government’s Response in an action brought under § 2255.”). At least some of these courts hold that whether a 2255 petitioner may file a reply depends on the circumstances or is a matter of discretion for the judge. *See, e.g., United States v. Crittenton*, Crim. Act. No. 03-349-2, Civ. Act. No. 07-3770, 2008 WL 343106, at *2 (E.D. Pa. Feb. 7, 2008) (“No court has held that Rule 5(d) entitles a petitioner to submit a reply under all circumstances.”); *United States v. Martinez*, Crim. No. 11-131(2) (SRN/AJB), 2013 WL 3995385, at *2 (D. Minn. Aug. 5, 2013) (“[W]hether to allow the moving party to file a reply brief is within the Court’s discretion.”).

It is my view that Rule 5(d) entitles a petitioner to submit a reply regardless of a court’s express permission. The confusion appears to be fueled at least in part by the portion of Rule 5(d) providing that the court will set a time limit for submission of the reply. The Advisory Committee Notes to the 2004 Amendment, however, help clarify that the court’s discretion to set time limits does not grant the court discretion to deny entirely a 2255 petitioner’s right to reply:

[R]evised Rule 5(d) adopts the practice in some jurisdictions *giving the movant an opportunity to file a reply* to the respondent's answer. Rather than using terms such as "traverse," *see* 28 U.S.C. Sec. 2248, to identify the movant's response to the answer, the rule uses the more general term "reply." The Rule prescribes that the court set the time for such responses, and in lieu of setting specific time limits in each case, the court may decide to include such time limits in its local rules.

These Notes support a reading of Rule 5(d) that permits (but does not require) a petitioner to reply. Furthermore, the language of Rule 5(d) is strikingly similar to that of Federal Rule of Appellate Procedure 28(c), which provides that "[t]he appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed." Fed. R. App. P. 28(c). The language "appellant may file a brief in reply," which certainly entitles an appellant to reply, is parallel to "[t]he moving party may submit a reply" in Rule 5(d).

The broader jurisprudential question underlying this issue is whether parties to a 2255 proceeding are entitled to a full round of briefing. By denying a 2255 petitioner the right to reply, a court essentially assumes that nothing the petitioner might raise in reply could possibly change the outcome of the 2255 proceeding. This does not strike me as the Committee's intended result.

I raise this matter with you for the Committee's consideration.

Sincerely,

Richard C. Wesley
United States Circuit Judge

Cc: Honorable Jeffrey S. Sutton, Chair, Committee on Rules of Practice and Procedure
Professor Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure
Professor Edward H. Cooper, Reporter, Advisory Committee on Civil Rules
Professor Richard L. Marcus, Associate Reporter, Advisory Committee on Civil Rules