



PRISON LAW OFFICE
General Delivery, San Quentin CA 94964
Telephone (510) 280-2621 • Fax (510) 280-2704
www.prisonlaw.com

Director:
Donald Specter

Staff Attorneys:
Susan Christian
Rebekah Evenson
Steven Fama
Penny Godbold
Megan Hagler
Alison Hardy
Kelly Knapp
Millard Murphy
Sara Norman
Judith Rosenberg
Zoe Schonfeld
E. Ivan Trujillo

Your Responsibility When Using this Information:

When we wrote this Informational Material we did our best to give you useful and accurate information because we know that prisoners often have difficulty obtaining legal information and we cannot provide specific advice to all the prisoners who request it. The laws change frequently and are subject to differing interpretations. We do not always have the resources to make changes to this material every time the law changes. If you want legal advice backed by a guarantee, try to hire a lawyer to address your specific problem. If you use this pamphlet it is your responsibility to make sure that the law has not changed and is applicable to your situation. Most of the materials you need should be available in your institution law library.

FEDERAL HABEAS CORPUS

INFORMATION EXCERPTED AND ADAPTED FROM

**THE CALIFORNIA STATE PRISONERS HANDBOOK,
FOURTH EDITION (2008)**

Board of Directors

Penelope Cooper, President • Michele WalkinHawk, Vice President • Marshall Krause, Treasurer
Honorable John Burton • Felecia Gaston • Christiane Hipps • Margaret Johns
Cesar Lagleva • Laura Magnani • Michael Marcum • Ruth Morgan • Dennis Roberts

FEDERAL HABEAS CORPUS

TABLE OF CONTENTS

Introduction	2
Who May File: The “In Custody” and Current Controversy Requirements	2
Who May Be Named as Respondent	4
Exhaustion of State Remedies	4
Requirements for Exhaustion	5
Procedures When Some or All Claims Have Not Been Exhausted	7
Procedural Defaults and Options For Seeking Relief	8
Filing Time Limits and Tolling Provisions	10
General Time Limits	10
Statutory Tolling for a Pending State Court Habeas Petition	12
Equitable Tolling	14
Restrictions on Multiple Petitions	16
Grounds for Issuance	17
Standard of Review of State Court Decisions	19
Where To File the Petition	20
Forms and Procedure For Filing and Proceeding With the Petition	20
Requesting Appointment of an Attorney	23
Appealing After Denial of a Petition	24
Notice of Appeal	24
Certificate of Appealability	25
Appointment of an Attorney	26
Petition for Writ of Certiorari in the U.S. Supreme Court	26
List Federal Court Addresses	27

Introduction¹

Any person held in custody may file a petition for writ of habeas corpus in a United States district court to challenge violations of the Constitution, laws, or treaties of the United States.² However, federal habeas corpus can be used only to attack the legality or duration of a criminal conviction or sentence. Unlike California state habeas corpus, federal habeas corpus cannot be used to challenge prison conditions unless the prisoner's claim challenges the length of custody itself (such as an issue regarding the denial of time credits or denial of parole). Habeas corpus is the only federal remedy available to a prisoner who seeks an immediate or speedier release from prison.³

Federal habeas corpus law is quite complicated and there are many rules that restrict the rights of prisoners to bring federal habeas petitions and the powers of the federal courts to overrule state court decisions. Many of the restrictions are the result of the enactment of the "Antiterrorism and Effective Death Penalty Act" (AEDPA), which took effect in April 1996.⁴ This law amended the federal habeas statutes that apply to state prisoners (28 U.S.C. § 2241 et seq.) and added special statutes that apply only to capital cases from states meeting certain requirements (28 U.S.C. §§ 2261-2266).⁵

Who May File: The "In Custody" and Current Controversy Requirements

In order for a court to hear a federal habeas petition, the petitioner must show that he or she is "in custody," meaning currently suffering from the constraint of a conviction.⁶

Generally the determination of whether a petitioner is "in custody" is based on the petitioner's status at the time the petition is filed.⁷ A person is "in custody" while incarcerated for the conviction or while on probation or parole.⁸ If a habeas petitioner is suffering no present restraint from a conviction because the sentence imposed, including any parole or probation period, has fully expired, then the petitioner is not "in custody" and generally cannot bring a petition. If a prior criminal sentence has fully expired and the petitioner is now in custody on a

¹ This Informational Material provides only a general overview of federal habeas corpus procedure and substantive law. For an excellent resource book on federal habeas matters, refer to Liebman and Hertz, Federal Habeas Corpus Practice and Procedure (5th ed. 2005 and annual supplements, Lexis Nexis Publishing).

² 28 U.S.C. § 2241 et seq., especially § 2254. In 1977 a series of rules governing procedures for applications for writs of habeas corpus went into effect. 28 U.S.C. § 2254 and the pertinent rules are contained in the same volume of the annotated codes.

³ Preiser v. Rodriguez (1973) 411 U.S. 475, 500 [93 S.Ct. 1827; 36 L.Ed.2d 439].

⁴ AEDPA does not apply to non-capital habeas cases filed prior to AEDPA's effective date. Lindh v. Murphy (1997) 521 U.S. 320 [117 S.Ct. 2059; 138 L.Ed.2d 481].

⁵ AEDPA also overhauled the habeas procedures for federal prisoners. 28 U.S.C. § 2254.

⁶ 28 U.S.C. § 2241(c).

⁷ Carafas v. LaVallee (1968) 391 U.S. 234 [88 S.Ct. 1556; 20 L.Ed.2d 554]; Sailer v. Gunn (9th Cir. 1977) 548 F.2d 271.

⁸ Spencer v. Kemna (1998) 523 U.S. 1, 7 [118 S.Ct. 978; 140 L.Ed.2d 43].

new conviction, the prisoner is no longer “in custody” on the original charge, even if the new sentence has been enhanced or lengthened due to the previously discharged conviction.⁹ However, if a prisoner is serving a sentence in one jurisdiction and has a detainer for an unserved sentence in another jurisdiction, he or she is “in custody” on the second case for the purpose of being allowed to bring a federal habeas petition on that matter.¹⁰

Non-criminal types of detention frequently meet the “in custody” requirement. Civil commitment to a mental hospital, such as commitment pursuant to a plea of not guilty by reason of insanity or a determination that a person is a Mentally Disordered Offender or Sexually Violent Predator, meets the custody requirement.¹¹ Custody pursuant to an immigration order for exclusion or deportation counts as custody.¹² However, the majority of federal courts, including the Ninth Circuit Court of Appeals, have held that an immigration hold placed during a criminal incarceration does not amount to “custody” allowing a prisoner to challenge the hold via a habeas petition.¹³

A related requirement is that the case present an active “controversy” under article III, § 2, of the U.S. Constitution; where there is no active controversy, a case is “moot” and may be dismissed.¹⁴ Where the petition challenges a criminal conviction, courts assume that there are “collateral consequences” of the conviction and will not dismiss such a case as moot even if the petitioner is discharged from the prison term and parole while the petition is pending in court.¹⁵ Also, a challenge to a Sexually Violent Predator (SVP) civil commitment was deemed to have continuing consequences even though the petitioner subsequently had been released from the commitment.¹⁶

However, in cases involving matters other than criminal convictions — such as parole revocations or loss of credits due to placement in segregation or a disciplinary violation — courts will not assume that there are “collateral consequences” after the petitioner’s term is

⁹ Maleng v. Cook (1989) 490 U.S. 488 [109 S.Ct. 1923; 104 L.Ed.2d 540]; Allen v. Oregon (9th Cir. 1998) 153 F.3d 1046, 1048-1049; Feldman v. Perrill (9th Cir. 1990) 902 F.2d 1445. It is a separate question whether a petitioner who is in custody for a new conviction may use federal habeas corpus to “collaterally” attack the validity of a prior conviction used to enhance the new term. Generally, the answer is no. Custis v. United States (1994) 511 U.S. 485, 497 [114 S.Ct. 1732; 128 L.Ed.2d 517]; but see Pogue v. Ratelle (S.D. Cal. 1999) 58 F.Supp.2d 1140.

¹⁰ Maleng v. Cook (1989) 490 U.S. 488 [109 S.Ct. 1923; 104 L.Ed.2d 540].

¹¹ Duncan v. Walker (2001) 533 U.S. 167, 176 [121 S.Ct. 2120, 150 L.Ed.2d 251]; Brock v. Weston (9th Cir. 1994) 31 F.3d 887, 890; Tyars v. Finner (9th Cir. 1983) 709 F.2d 1274, 1279.

¹² United States v. Jung Ah Lung (1988) 124 U.S. 621, 626.

¹³ Garcia v. Taylor (9th Cir. 1994) 40 F.3d 299, 303-304; Prieto v. Gluch (6th Cir. 1990) 913 F.2d 1159, 1162-1164; Campillo v. Sullivan (8th Cir. 1988) 853 F.2d 593, 595; but see Vargas v. Swan (7th Cir. 1988) 854 F.2d 1028, 1032-1033 (stating that immigration detainer may establish custody for habeas purposes).

¹⁴ Burnett v. Lampert (9th Cir. 2005) 432 F.3d 996, 999-1000.

¹⁵ Carafas v. LaVallee (1968) 391 U.S. 234 [88 S.Ct. 1556; 20 L.Ed.2d 554]; Sailer v. Gunn (9th Cir. 1977) 548 F.2d 271; Selam v. Warm Springs Tribal Correctional Facility (9th Cir. 1998) 134 F.3d 948; Chacon v. Wood (9th Cir. 1994) 36 F.3d 1359.

¹⁶ Carty v. Nelson (9th Cir. 1995) 426 F.3d 1061, 1071.

entirely discharged. In such cases, courts will dismiss a petition as moot unless the petitioner can show that there are actual continuing injuries consequent to the disciplinary or parole action.¹⁷ The standard can be difficult to meet; for example, the U.S. Supreme Court rejected arguments that a prior parole revocation had continuing collateral consequences because it could be used as a factor in future parole proceedings, in future sentencings, for impeachment in court proceedings, or in a criminal charge based on the parole violation.¹⁸ In another case, a habeas corpus petition was held to be moot where a prisoner challenged a prison disciplinary finding of guilt and the court found that all of the punishments for the disciplinary violation had been completed or withdrawn. The court found that the “collateral consequences” put forth by the petitioner were either based on the fact of the underlying behavior (an escape) or too speculative to justify relief.¹⁹ A court rejected the argument that a released prisoner’s challenge to placement in segregation based on gang affiliation should not be held to be moot because the gang validation could result in segregation during future incarceration.²⁰ The U.S. Supreme Court also has rejected the claim that a moot petition should be allowed to proceed even where it is necessary to establish the invalidity of a disciplinary or parole revocation charge as a prerequisite to filing a civil rights action for money damages.²¹

Who May Be Named as Respondent

The rules governing federal habeas for state prisoners require a prisoner to name the “state officer having custody” of him or her as the respondent.²² Typically, this person is the warden of the facility in which the petitioner is incarcerated.²³ However, the Director of the CDCR also may be named as the respondent.²⁴

Exhaustion of State Remedies

A state prisoner who wishes to file a federal habeas corpus petition must “exhaust” all state judicial remedies before filing a habeas petition in federal court. The exhaustion requirement gives state courts the opportunity to correct any constitutional errors in the state’s criminal proceedings and respects the right of state courts to resolve issues on independent state grounds.

¹⁷ Spencer v. Kemna (1998) 523 U.S. 1 [118 S.Ct. 978; 140 L.Ed.2d 43]; Lane v. Williams (1982) 455 U.S. 624 [102 S.Ct. 1322; 71 L.Ed.2d 508]; Cox v. McCarthy (9th Cir. 1987) 829 F.2d 800.

¹⁸ Spencer v. Kemna (1998) 523 U.S. 1, 14-16 [118 S.Ct. 978; 140 L.Ed.2d 43].

¹⁹ Wilson v. Terhune (9th Cir. 2003) 319 F.3d 477.

²⁰ Munoz v. Rowland (9th Cir. 1997) 104 F.3d 1096.

²¹ Spencer v. Kemna (1998) 523 U.S. 1 [118 S.Ct. 978; 140 L.Ed.2d 43].

²² Federal Rules of Habeas Corpus, rule 2(a); 28 U.S.C. § 2254.

²³ Stanley v. California Supreme Court (9th Cir. 1994) 21 F.3d 359, 360 (citing Brittingham v. United States (9th Cir. 1992) 982 F.2d 378, 379).

²⁴ Ortiz-Sandoval v. Gomez (9th Cir. 1996) 81 F.3d 891.

Requirements for Exhaustion

To meet the exhaustion requirement, the petitioner must be able to show that he or she provided the highest state court with an opportunity to rule on the issues in the case or that there were no state remedies available.²⁵ In California, a person challenging a criminal conviction or sentence can exhaust state remedies by a direct appeal to a state Court of Appeal followed by a petition for review in the California Supreme Court.²⁶ This usually will exhaust state court remedies (for possible exceptions, see “Procedural Defaults and Options For Seeking Relief,” below). The petitioner generally need not present the same claim to state courts again via state habeas corpus proceedings.²⁷ Nor does the petitioner need to file a petition for certiorari to the U.S. Supreme Court.²⁸

If a federal constitutional issue has not been presented to the state Supreme Court in a petition for review — because the issue was not raised on appeal, no petition for review was filed, or the issue is one for which there is no direct judicial appeal (such as a challenge to a prison disciplinary credit loss or a denial of parole suitability) — then the petitioner must exhaust state remedies by filing habeas petitions in the California state courts before filing a federal habeas petition. A petitioner generally will have to “go up the ladder” by first filing the petition in the Superior Court. If the petition is denied in the Superior Court, it then must be re-filed in the Court of Appeal. If the petition is denied in the Court of Appeal, the petitioner can present the issues in a petition for review or by an original petition for habeas corpus filed in the Supreme Court.²⁹ When the state Supreme Court denies the petition for review or the original petition, then state remedies usually have been exhausted (but, for possible exceptions, see “Procedural Defaults and Options For Seeking Relief,” below).

Because the federal courts can only hear legal claims based on federal law, prisoners must take care to present the issues to the state courts in a manner that will ensure they have been “federalized.”³⁰ To exhaust state remedies for federal habeas purposes, the “substance of the federal claim” must be “fairly presented” to the state courts.³¹ This means that the state court actions should explicitly set forth all potential federal claims and the specific facts upon which

²⁵ McQuown v. McCartney (9th Cir. 1986) 795 F.2d 807, 809 (citations omitted).

²⁶ Roman v. Estelle (9th Cir. 1990) 917 F.2d 1505; see also O’Sullivan v. Boerckel (1999) 526 U.S. 838 [119 S.Ct. 1728; 144 L.Ed.2d 1] (to exhaust remedies, state prisoners must seek discretionary review in state supreme court when that review is part of ordinary appellate process).

²⁷ Brown v. Allen (1953) 344 U.S. 443 [73 S.Ct. 397; 97 L.Ed. 469]; Lopez v. Schriro (2007) 491 F.3d 1029 (petitioner presented state court with “substantial equivalent” of claim presented in federal court).

²⁸ Fay v. Noia (1963) 372 U.S. 391 [83 S.Ct. 822; 9 L.Ed.2d 837]; Carrothers v. Rhay (9th Cir. 1979) 594 F.2d 225.

²⁹ In re Catalano (1981) 29 Cal.3d 1 [171 Cal.Rptr. 667]; In re Michael E. (1975) 15 Cal.3d 183, 193, n. 15 [123 Cal.Rptr. 103].

³⁰ The requirement of explicit federalization is not diminished for a pro se petitioner. Lyons v. Crawford (9th Cir. 2000) 232 F.3d 666.

³¹ Picard v. Conner (1971) 404 U.S. 270, 275, 277-278.

they are based.³² In order to avoid the possibility of failing to fully exhaust a claim, it is best to state directly that the claim is federal in all the state court briefing.³³ In making it clear that a claim is federal, it is not sufficient to cite state court opinions that apply federal law. To ensure that the federal claim will have been exhausted, it is suggested that the petitioner, when presenting the case in the state courts:

- rely on federal court cases analyzing the pertinent constitutional issues;
- rely on state court cases analyzing the constitutional issues in similar fact situations;
- assert claims in the particular terms relevant to a specific constitutional right and cite the governing federal constitutional or statutory provision; and
- allege a pattern of facts that is well within the mainstream of constitutional litigation.³⁴

The factual basis for the claim also must have been fairly presented in the state courts. If the federal habeas petition contains facts different from those presented in state court, the federal court likely will find that there has been a failure to exhaust remedies.³⁵ However, a petitioner may provide further facts to support a claim in federal district court, as long as those facts do not “fundamentally alter the legal claim already considered by the state courts.”³⁶

One of the very few exceptions to the exhaustion requirement is when exhausting remedies would be futile. To show that it would be futile to raise a claim in the state courts, a petitioner must show that: (1) the California Supreme Court recently or consistently has addressed the issue and resolved it adversely to the petitioner; and (2) there are no intervening U.S. Supreme Court decisions specifically addressing the petitioner’s issues or any other indications that the state courts will change their opinion.³⁷

³² Duncan v. Henry (1995) 513 U.S. 364, 366 [115 S.Ct. 887; 130 L.Ed.2d 865].

³³ Peterson v. Lampert (9th Cir. 2002) 277 F.3d 1073; see also Baldwin v. Resse (2004) 541 U.S. 27 [124 S.Ct. 1347; 157 L.Ed.2d 64] (federal claim not fairly presented if court must read beyond the petition or brief to find presence of such a claim); Castillo v. McFadden (9th Cir. 2005) 399 F.3d 993 (no exhaustion unless petitioner presented the federal claim “within the four corners of his appellate briefing”); Casey v. Moore (9th Cir. 2004) 386 F.3d 896 (federal law claims not fairly presented when raised for first time in petition for review to state supreme court).

³⁴ Daye v. Attorney General of State of New York (1982) 696 F.2d 186, 194.

³⁵ Pappageorge v. Sumner (9th Cir. 1982) 688 F.2d 1294.

³⁶ Vasquez v. Hillery (1986) 474 U.S. 254, 260 [106 S.Ct. 617; 88 L.Ed.2d 598].

³⁷ Lynce v. Mathis (1997) 519 U.S. 433, 436, n. 4.

Procedures When Some or All Claims Have Not Been Exhausted

If a petitioner has not exhausted state remedies on all claims presented in the federal habeas petition, the federal district court must dismiss the petition.³⁸ However, the state can waive the exhaustion requirement by expressly consenting to a hearing of the case without exhaustion.³⁹ When a claim is found to be unexhausted, and the state does not waive the exhaustion requirement, a federal court must dismiss the case on procedural grounds without prejudice to later re-filing after state remedies have been exhausted. The court cannot deny the claim on the merits unless it is perfectly clear that the petitioner's claim is frivolous.⁴⁰

There are special procedures when a petitioner files a "mixed" federal habeas petition that includes both exhausted and unexhausted claims. The petition must be dismissed without prejudice; the district court must give the petitioner the choice of amending the petition to present only the exhausted claims or having the court dismiss the case so that the petitioner may return to state court to exhaust all the claims.⁴¹ In the federal courts within the Ninth Circuit, the petitioner can request that the court use a "stay and abeyance" procedure. This procedure allows the court to order dismissal of the unexhausted claims, then stay further action to permit the petitioner time to exhaust those claims and then amend his or her petition to include those claims again. This procedure is particularly appropriate if outright dismissal of the case would be likely to prevent the petitioner from being able to re-file a petition within statutory time limitations.⁴² However, the court has no duty to advise the petitioner about this option or the technical requirements of dismissing a petition and making a stay motion.⁴³

A related issue is whether a petitioner who uses the stay and abeyance procedure may exhaust state remedies for new issues not raised in the original petition and then amend the petition to include the entirely new issues. Such new issues may be allowed if they "relate back" to the original petition. Amendments relate back if they arise out of the same "conduct, transaction or occurrence" set forth in the original pleading. However, amendments do not relate back when they assert new grounds for relief separated in both time and type from those grounds set forth in the original pleading.⁴⁴

³⁸ 28 U.S.C. § 2254(b) and (d); McNeeley v. Arave (9th Cir. 1988) 842 F.2d 230; Rose v. Lundy (1982) 455 U.S. 509 [102 S.Ct. 1198; 71 L.Ed.2d 379].

³⁹ 28 U.S.C. § 2254(b)(2) and (3).

⁴⁰ Cassatt v. Stewart (9th Cir. 2005) 406 F.3d 614.

⁴¹ Rose v. Lundy (1982) 455 U.S. 509 [102 S.Ct. 1198; 71 L.Ed.2d 379]; Jefferson v. Budge (9th Cir. 2005) 419 F.3d 1013.

⁴² Kelly v. Small (9th Cir. 2003) 315 F.3d 1063; see also Rhines v. Weber (2005) 544 U.S.269 [125 S.Ct. 1528; 161 L.Ed.2d 440] (if petitioner had good cause for failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that petitioner engaged in intentionally dilatory litigation tactics, federal court may grant request for stay and abeyance); Olivera v. Giurbino (9th Cir. 2004) 371 F.3d 569; Pace v. DiGuglielmo (2005) 544 U.S. 408 [125 S.Ct.1807; 161 L.Ed.2d 669].

⁴³ Pliler v. Ford (2004) 542 U.S. 225 [124 S.Ct. 2441; 159 L.Ed.2d 338]; Raspberry v. Garcia (9th Cir. 2006) 448 F.3d 1150.

⁴⁴ Mayle v. Felix (2005) 545 U.S. 644 [125 S.Ct. 2562; 162 L.Ed.2d 582].

Procedural Defaults and Options For Seeking Relief

As discussed above, a state prisoner who wants to bring a federal habeas petition first must exhaust state judicial remedies. However, in some cases, a petitioner may have difficulty getting the state courts to address the issues in the case because of procedural problems. This section discusses some possible procedural default issues and ways in which a petitioner may be able to seek relief from procedural default.

As described above, a state Supreme Court denial of a petition for review or habeas petition usually will exhaust state court remedies and allow a petitioner to proceed to federal court. However, if the state court denies the case on state law procedural grounds, state remedies have not been exhausted — denial on a procedural ground means that the highest court has not ruled on the actual issues of the case.⁴⁵ Thus, if a state court denial plainly states procedural reasons for denial, or even contains a citation to a case that concerns a procedural issue, a federal court will find that the state petition was denied on procedural grounds and that the petitioner has failed to exhaust administrative remedies.⁴⁶ In other cases, it will not always be clear whether the California Supreme Court has denied a petition on the merits or on procedural grounds. For example, the Court frequently denies petitions for review and petitions for writ of habeas corpus with one-line orders (“postcard denials”) that do not indicate the Court’s reason for refusing to hear the case or for denying the petition. In the past, such a denial has been presumed to be on the merits of the issues raised in the petition, unless the underlying Court of Appeal decision, or the last reasoned decision in a habeas case, was made on procedural grounds.⁴⁷ However, the U.S. Supreme Court recently rejected an argument that a postcard denial necessarily can be presumed to be a denial on the merits rather than a denial on procedural grounds.⁴⁸

If the state courts indeed have decided the case on procedural grounds, then the petitioner’s options will depend on whether or not the procedural problem can be corrected. If the procedural deficiency can be corrected, the petitioner must pursue any possible means of curing the procedural default and getting the state court to rule on the issues.⁴⁹ For example, if the California Supreme Court denies a habeas corpus petition with a citation to In re Swain (1949) 34 Cal.2d 300, 304, which holds that a court may dismiss claims that are not sufficiently specific, then the petitioner should file a new, more detailed habeas petition in order to get a decision on the merits.⁵⁰

On the other hand, some state court procedural problems never can be cured. For example, if a criminal defendant files a direct appeal arguing that prejudicial evidence was

⁴⁵ Powell v. Lambert (9th Cir. 2004) 357 F.3d 871, 874.

⁴⁶ Harris v. Reed (1989) 489 U.S. 255 [109 S.Ct. 1038, 1042-1045; 103 L.Ed.2d 308]; Harris v. Superior Court (9th Cir. 1974) 500 F.2d 1124; Kim v. Villalobos (9th Cir. 1986) 799 F.2d 1317.

⁴⁷ Hunter v. Aispuro (9th Cir. 1992) 982 F.2d 344, 348; La Rue v. McCarthy (9th Cir. 1987) 833 F.2d 140, 143; McQuown v. McCartney (9th Cir. 1986) 795 F.2d 807; Harris v. Superior Court (9th Cir. 1974) 500 F.2d 1124, 1128.

⁴⁸ Evans v. Chavis (2006) 546 U.S. 189, 197-198 [126 S.Ct. 846; 163 L.Ed.2d 684].

⁴⁹ Sweet v. Cupp (9th Cir. 1981) 640 F.2d 233, 237-238.

⁵⁰ Kim v. Villalobos (9th Cir. 1986) 799 F.2d 1317, 1319.

admitted, and the Court of Appeal finds that the claim was forfeited and refuses to hear it because no objection to the evidence was made at trial, and a subsequent state habeas corpus petition raising the issue is denied because habeas corpus may not function as a second appeal, then there is nothing the prisoner can do to correct the procedural problem. Similarly, if the California Supreme Court denies a state habeas petition as being untimely because the petitioner waited a long time to file it, there is nothing that can be done to correct the procedural problem.

When state courts have denied the claims based on “adequate and independent” state law procedural grounds, the federal courts may refuse to hear and decide federal petition claims; this is because the state courts have not ruled on the federal issues in the case and the federal courts cannot review state courts’ decisions concerning state law.⁵¹ The initial burden of asserting that there is a procedural bar is on the state; the burden then shifts to the petitioner to show any reason why the state procedural grounds were not “adequate and independent.” Ultimately, the state bears the burden of proof for the issue.⁵² To be an “adequate” ground triggering the procedural bar, the state law procedural rule must be clearly and consistently applied by the state courts. There are areas of dispute. For example, the rule that a petitioner may not bring a state habeas claim on an issue that already was considered on direct appeal does not necessarily create an adequate state procedural ground barring federal review because the state courts sometimes make exceptions to the rule for cases involving fundamental constitutional matters.⁵³ The courts also have held that the rule that a habeas petitioner must justify any “substantial delay” is not sufficiently clearly and consistently applied to create a federal habeas procedural bar, unless and until the state can show otherwise.⁵⁴

If a federal court does decide that a claim is procedurally barred, it should dismiss the claim without prejudice to future re-filing unless it is perfectly clear that the procedural problem cannot be remedied.⁵⁵

Relief from procedural default may be granted by the federal courts only in limited circumstances. One situation in which relief from default may be granted is when the petitioner can show both good cause for not complying with the state procedural rule and actual prejudice from the default. For example, a petitioner may be able to show good cause for relief from

⁵¹ Stewart v. Smith (2002) 536 U.S. 856 [122 S.Ct. 2578; 153 L.Ed.2d 762]; Coleman v. Thompson (1991) 501 U.S. 722 [111 S.Ct. 2546; 115 L.Ed.2d 640]; see, e.g., Carter v. Giurbino (9th Cir. 2004) 385 F.3d 1194 (denial under California rule that sufficiency of evidence claims cannot be considered unless raised on direct appeal is the independent and adequate state procedural bar).

⁵² Bennett v. Mueller (9th Cir. 2002) 322 F.3d 573; see also Bennett v. Mueller (C.D. Cal. 2005) 364 F.Supp.2d 1160 (finding California courts do not consistently apply timeliness bar to habeas corpus claims, and denial of claims on untimeliness ground does not bar adjudication of the claims in a federal habeas petition).

⁵³ Hill v. Roe (9th Cir. 2003) 321 F.3d 787; Park v. California (9th Cir. 2000) 202 F.3d 1146, 1151-1152; see also Powell v. Lambert (9th Cir. 2004) 357 F.3d 871 (courts may look outside of published case law to determine actual practice of state courts as to whether a procedural rule is clearly and consistently applied).

⁵⁴ King v. Lamarque (9th Cir. 2006) 464 F.3d 963.

⁵⁵ Cassatt v. Stewart (9th Cir. 2005) 406 F.3d 614.

default if procedural default was due to ineffective assistance of counsel or some factor beyond the petitioner's control.⁵⁶

Another situation in which a federal court may address a procedurally defaulted claim is where failure to do so would result in the conviction of one who is actually innocent.⁵⁷ In Schlup v. Delo, the U.S. Supreme Court held that procedurally barred claims can be heard on the merits if it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence.⁵⁸ The Ninth Circuit has held that it is possible to meet this standard with evidence that "casts a vast shadow of doubt" by calling into question the reliability of the proof of guilt.⁵⁹ However, although new evidence impeaching the prosecution's trial witnesses may get a petitioner through the Schlup gateway, it does not necessarily do so. If the court does not think that the new evidence would have changed the outcome of the trial, it does not have to review the petitioner's claims on the merits. Thus, courts appear to have significant discretion in this area.⁶⁰

Filing Time Limits and Tolling Provisions

General Time Limits

Prior to the passage of AEDPA in 1996, there was no set time limit for filing a federal habeas petition, although delayed petitions could be denied if there were prejudice to the state and no good reason for the delay.⁶¹ AEDPA now imposes a one-year statute of limitations for filing a federal habeas petition. The time runs from the latest of one of several possible events: (1) the conclusion of direct review or expiration of time for seeking such review; (2) the date that an unconstitutional impediment to filing was removed; (3) the date that a newly recognized right was created by the U.S. Supreme Court; or (4) the date that the facts behind the claim "could have been discovered" through "the exercise of due diligence."⁶²

⁵⁶ Edwards v. Carpenter (2000) 529 U.S.446 [120 S.Ct. 1587; 146 L.Ed.2d 518]; Stickler v. Greene (1999) 527 U.S. 268 [119 S.Ct. 1936; 144 L.Ed.2d 286]; Coleman v. Thompson (1991) 501 U.S. 722, 753 [111 S.Ct. 2546; 115 L.Ed.2d 640]; Murray v. Carrier (1986) 477 U.S. 478 [106 S.Ct. 2639; 91 L.Ed.2d 397]; Wainwright v. Sykes (1977) 433 U.S. 72 [97 S.Ct. 2497; 53 L.Ed.2d 594]; Manning v. Foster (9th Cir. 2000) 224 F.3d 1129, 1133.

⁵⁷ La Grand v. Stewart (9th Cir. 1998) 133 F.3d 1253; Schlup v. Delo (1995) 513 U.S. 298 [115 S.Ct. 851; 130 L.Ed.2d 808].

⁵⁸ Schlup v. Delo (1995) 513 U.S. 298 [115 S.Ct. 851; 130 L.Ed.2d 808]; Murray v. Carrier (1986) 477 U.S. 478 [106 S.Ct. 2639; 91 L.Ed.2d 397]. Before addressing any claims of actual innocence, a court must address any non-defaulted claims that might result in comparable relief. Dretke v. Haley (2004) 541 U.S. 386 [124 S.Ct. 1847; 158 L.Ed.2d 659]; House v. Bell (2006) 547 U.S. 518 [126 S.Ct. 2064; 165 L.Ed.2d 1].

⁵⁹ Carriger v. Stewart (9th Cir. 1997) 132 F.3d 463, 477.

⁶⁰ Sistrunk v. Armenakis (9th Cir. 2001) 279 F.3d 1063; see also Griffin v. Johnson (9th Cir. 2003) 350 F.3d 956 (newly presented evidence, as well as newly discovered evidence, can be considered under Schlup).

⁶¹ Federal Rules of Habeas Corpus, rule 9(a); see also Harris v. Pulley (9th Cir. 1988) 852 F.2d 1546; Terry v. Enomoto (9th Cir. 1984) 723 F.2d 697.

⁶² 28 U.S.C. § 2244(d)(1).

As a general rule, a federal habeas petition is timely in a California criminal appeal case if the petition is filed within one year and 90 days from the date that the California Supreme Court issued an order denying a timely petition for review; the additional 90 days is for the period of time in which the petitioner could have filed a petition for writ of certiorari in the U.S. Supreme Court.⁶³

A California Supreme Court decision in an unrelated case that clarifies state substantive or procedural law in a manner favorable to a petitioner does not trigger a new one-year statute of limitations.⁶⁴

A pleading is deemed filed when it is delivered to prison authorities for mailing.⁶⁵ A prisoner who delivers a petition to prison authorities gets the benefit of the prison “mailbox rule” as long as he or she follows up if he or she fails to receive a response from the court after a reasonable amount of time. This is true even if the document never was delivered to or filed by the court.⁶⁶

A federal court may, on its own motion, consider the timeliness of a state prisoner’s habeas petition; before acting on its own initiative to dismiss a petition as untimely, the court must give the parties fair notice and an opportunity to show why the limitation period should not yield dismissal of the untimely petition. If the court does not address timeliness on its own motion, the state may raise a statute of limitations defense by arguing that a petitioner has not met AEDPA’s time limits.⁶⁷

In some circumstances, the federal habeas corpus time limits are “tolled,” which means the clock does not run for that period. The most common circumstance in which time limits are tolled is when a person files a state habeas petition or other state collateral attack, either in conjunction with a direct appeal or independently. Another type of tolling is “equitable tolling,” where the filing deadlines may be tolled in the interests of justice because a petitioner was unable to meet the deadline. Calculating the actual filing date in cases in which all or part of the preceding time period was tolled can be quite complicated. The following subsections will discuss the different types of tolling.

⁶³ Clay v. United States (2003) 537 U.S. 522, 527-528 [123 S.Ct. 1072; 155 L.Ed.2d 88]. In the unusual case in which a petition for certiorari is filed in the U.S. Supreme Court, the AEDPA deadline will not start running until the petition is denied or, alternatively, the case is decided on its merits.

⁶⁴ Shannon v. Newland (9th Cir. 2005) 410 F.3d 1083.

⁶⁵ Houston v. Lack (1988) 487 U.S. 266 [108 S.Ct. 2379; 101 L.Ed. 245]; Miles v. Prunty (9th Cir. 1999) 187 F.3d 1104.

⁶⁶ Huizar v. Carey (9th Cir. 2001) 273 F.3d 1220.

⁶⁷ Day v. McDonough (2006) 547 U.S. 198 [126 S.Ct. 1675; 164 L.Ed.2d 376].

Statutory Tolling for a Pending State Court Habeas Petition

AEDPA's one-year statute of limitations is tolled while a "properly filed" state habeas petition or other petition for relief is "pending."⁶⁸ However, in the California courts there is no specific deadline for filing a state habeas corpus petition (or most other types of petitions for extraordinary relief) or for re-filing a petition to a higher state court. This has led to disagreement about when a California state habeas corpus petition is "properly filed" and "pending."

The first question is, When does the AEDPA clock begin to run? In a criminal case, the AEDPA clock begins to run when the last decision in the direct appeal process becomes final and non-appealable. As discussed above, if the defendant files a timely petition for review in the California Supreme Court, the case becomes final 90 days after the California Supreme Court issues the order denying review. If the defendant does not pursue the criminal case on direct appeal at all, then the clock presumably starts to run when the time for filing a direct appeal from the judgment expires — usually 60 days after the sentence is entered.⁶⁹ If the defendant files a direct appeal in the Court of Appeal, but does not file a timely petition for review in the California Supreme Court, then judgment becomes final and the clock starts running either 40 or 60 days after the Court of Appeal decision is issued.⁷⁰

In a case where there is no court direct appeal process — such as a challenge to a life parole denial or a prison disciplinary decision in which credits were lost — the AEDPA clock begins to run when the prison or parole official's decision becomes final; if any administrative appeal of the matter is available, then the clock starts to run when the administrative appeal is decided. The clock will continue to run until the petitioner files a "properly filed" habeas petition in a state court.⁷¹

Once the petitioner files a state court habeas petition, the next question is, During what parts of the habeas process is the AEDPA time limit tolled? Generally, as long as a petitioner proceeds in a timely fashion, the tolling covers the entire period from the date the first habeas petition is filed until the petition is rejected by the state Supreme Court, including during the

⁶⁸ 28 U.S.C. § 2244(d)(2). A motion to vacate an illegal sentence qualifies as a state request for relief that results in statutory tolling of the AEDPA time limits under 28 U.S.C. § 2244(d)(2). Tillema v. Long (9th Cir. 2001) 253 F.3d 494.

⁶⁹ California Rules of Court, rule 8.104.

⁷⁰ Forty days is the deadline for filing a petition for review and 60 days is the deadline for the court to grant review on its own motion. California Rules of Court, rules 8.264(b) and 8.500(e).

⁷¹ Redd v. McGrath (9th Cir. 2003) 343 F.3d 1077 (note: since this case was decided, the BPH has abolished its administrative appeal procedure); Shelby v. Bartlett (9th Cir. 2004) 391 F.3d 1061.

time between a lower court's decision and the timely presentation of the issues to the next level.⁷² However, the time preceding an untimely petition is not statutorily tolled.⁷³

If the state court specifically rejects a petition as being untimely, then some or all of the preceding period will not be tolled automatically (although the petitioner may be eligible for equitable tolling, as discussed below). However, in other circumstances, it can be a tricky question whether a habeas petition was timely filed or re-filed to a higher court. In the past, if a state court denied a petition on the merits or simply issued a "postcard" denial without mentioning the reasons why, then the federal courts assumed that the petition was denied on the merits and not time-barred. However, the U.S. Supreme Court more recently has held that a petition denied by the state courts on the merits or without reasoning was not necessarily timely; therefore, the Court has instructed federal judges to determine whether any of the filing delays in a case were "unreasonable."⁷⁴ The Court has indicated that a period of 30 or 60 days between a lower court denial and the filing of a habeas petition in a higher court is presumptively reasonable.⁷⁵ Otherwise, there is no "bright-line" rule about how much delay is "unreasonable," and courts have reached various decisions in different circumstances.⁷⁶

Another area of litigation concerns the question of where a state court habeas petition was "properly filed" and thus invoked the statutory tolling provisions. "Properly filed" means that the petitioner filed the petition in compliance with the applicable laws and rules governing filings, such as the rules that prescribe the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and any required filing fee. The question whether an application has been "properly filed" is separate from the question whether the claims contained in the application are meritorious and free of procedural bar; in some circumstances, a petition may have been properly filed even if the state courts eventually find that the claims are procedurally barred.⁷⁷ However, a state petition that is rejected by a California state court for lack of timeliness or due diligence is inherently not "properly filed" and does not entitle the petitioner to tolling, even if there are circumstances in which a state court might grant an exception to the filing deadlines.⁷⁸

⁷² Carey v. Saffold (2002) 536 U.S. 214 [122 S.Ct. 2134; 153 L.Ed.2d 260]. A state habeas petition remained pending, and thus the one-year limitation period for habeas relief was statutorily tolled, during the time that the petition was temporarily removed from the court calendar at the petitioner's request while she was awaiting the result of a state parole hearing. Brown v. Poole (9th Cir. 2003) 337 F.3d 1155.

⁷³ Bonner v. Carey (9th Cir. 2005) 1145 F.3d 425.

⁷⁴ Carey v. Saffold (2002) 536 U.S. 214 [122 S.Ct. 2134; 153 L.Ed.2d 260]; Evans v. Chavis (2006) 546 U.S. 189 [126 S.Ct. 846; 163 L.Ed.2d 684].

⁷⁵ Evans v. Chavis (2006) 546 U.S. 189 [126 S.Ct. 846; 163 L.Ed.2d 684].

⁷⁶ Gaston v. Palmer (9th Cir. 2006) 447 F.3d 1165 (no tolling for unexplained gaps of 15 months, 18 months, and 10 months); Culver v. Director of Corrections (C.D. Cal. 2006) 450 F.Supp.2d 1135, 1140-1141 (intervals of 97 and 71 days between state petitions were unreasonable); Osumi v. Giurbino (C.D. Cal 2006) 445 F.Supp.2d 1152, 1158-1159 (96- and 98-day intervals were not unreasonable in case with lengthy briefs).

⁷⁷ Artuz v. Bennett (2000) 531 U.S. 4, 8 [121 S.Ct. 361; 148 L.Ed.2d 213].

⁷⁸ Pace v. DiGuglielmo (2005) 544 U.S. 408 [125 S.Ct.1807; 161 L.Ed.2d 669]; Bonner v. Carey (9th Cir. 2005) 425 F.3d 1146.

Additional complications arise when a prisoner brings multiple rounds of habeas or other post-conviction proceedings in the state courts. AEDPA's limitation period is tolled during the pendency of a state proceeding challenging the pertinent judgment, even if the particular proceeding does not include a claim later asserted in the federal habeas petition.⁷⁹ In one case, where a prisoner completed a full round of state petitions and then brought a new state court habeas petition raising completely different claims, the time between the end of the first round of petitions and the start of the second round was not deemed to be tolled.⁸⁰ On the other hand, when a prisoner filed a petition and then filed several overlapping sets of petitions while the first round of petitions was pending, and review of the subsequent petitions was completed before the first set was decided, the prisoner was entitled to tolling during the full time that his original round of petitions was pending.⁸¹

The final question is, When does the California Supreme Court denial of the habeas issues become "final"? A California Supreme Court order denying a habeas petition becomes final immediately in cases in which no order to show cause is issued; if an order to show cause is issued, then the decision becomes final 30 days after issuance of the order.⁸² The AEDPA time limits then will begin to run. Unlike a case on direct appeal, the limitation period is not tolled further to allow a state habeas petitioner to file a petition for writ of certiorari in the U.S. Supreme Court. Indeed, even if a petitioner does file a certiorari petition, the AEDPA time limits are not tolled while that petition is pending.⁸³

Equitable Tolling

In addition to tolling the filing deadline during state habeas and other proceedings, AEDPA allows "equitable tolling" where "extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time."⁸⁴

A court should consider whether to grant equitable tolling when a petitioner is proceeding in pro se, has little education, or is illiterate; the claim is novel; or the statute in question is new.⁸⁵ A petitioner's mental incompetence or placement in administrative

⁷⁹ Tillema v. Long (2001) 253 F.3d 494, 502.

⁸⁰ Biggs v. Duncan (9th Cir. 2003) 339 F.3d 1045; see also Welch v. Carey (9th Cir. 2003) 350 F.3d 1079 (no tolling for four-year period between denial of petition in superior court (with no further pursuit of those issues) and filing of petition raising different issues in state supreme court).

⁸¹ Delhomme v. Ramirez (9th Cir. 2003) 340 F.3d 817.

⁸² California Rules of Court, rule 8.532. Adoption of this court rule in 2003 superceded older cases that had held that a California Supreme Court habeas denial did not become final for 30 days. See, e.g., Bunney v. Mitchell (9th Cir. 2001) 262 F.3d 973; Allen v. Lewis (9th Cir. 2001) 295 F.3d 1046; Jorss v. Gomez (9th Cir. 2002) 311 F.3d 1189.

⁸³ Lawrence v. Florida (2007) ___ U.S. ___ [127 S.Ct. 1079; 166 L.Ed.2d 924].

⁸⁴ See Spitsyn v. Moore (9th Cir. 2003) 345 F.3d 796, 799.

⁸⁵ Brown v. Roe (9th Cir. 2002) 279 F.3d 742.

segregation also can justify a grant of equitable tolling.⁸⁶ Lack of access to adequate legal materials could be grounds for equitable tolling.⁸⁷ A petitioner who is seeking equitable tolling should attempt to explain why the circumstances prevented him or her from filing a timely petition and what diligent steps he or she took to file a petition as soon as possible.⁸⁸ Petitioners should be aware that if equitable tolling is found to excuse only part of a long delay, then the federal petition still might not be deemed timely under AEDPA.

If a petitioner asks the advice of an attorney, and the attorney miscalculates the AEDPA deadline or wrongly advises the petitioner that there is no statute of limitations on a habeas petition, there is no ground for equitable tolling.⁸⁹ However, equitable tolling is appropriate where an attorney is retained to file a petition, but fails to do so and disregards the client's requests to return the files until well after the filing deadline has passed.⁹⁰

Equitable tolling disputes sometimes arise in cases in which a federal court errs or misinforms a petitioner about the options for proceeding on unexhausted claims. Time may be equitably tolled if an original petition containing some exhausted and some unexhausted claims is dismissed by the federal court and the court fails to give the petitioner the option of proceeding on only the exhausted claims.⁹¹ In one case, a prisoner was entitled to equitable tolling because the district court erroneously led him to believe that he could dismiss his petition, exhaust his claims in state court, and then re-file in federal court even though the statute of limitations already had expired when the district court issued its ruling;⁹² however, to get tolling in such circumstances, a petitioner still must be diligent in pursuing exhaustion in state court.⁹³ On the other hand, a prisoner was not entitled to equitable tolling when a district court merely

⁸⁶ Laws v. LaMarque (9th Cir. 2003) 351 F.3d 919; Espinoza-Matthews v. People of the State of California (2005) 432 F.3d 1021 (petitioner's mental health and placement in administrative segregation for his own safety were important factors).

⁸⁷ Whalem/Hunt v. Early (9th Cir. 2000) 233 F.3d 1146; see also Lott v. Mueller (9th Cir. 2002) 304 F.3d 918 (deadline may be tolled during period in which petitioner lacked access to legal files); Stillman v. LaMarque (9th Cir. 2003) 319 F.3d 1199 (petitioner entitled to equitable tolling because of prison officials' misconduct in breaking promise to obtain signature in time for filing); Mendoza v. Carey (9th Cir. 2006) 449 F.3d 1065 (lack of Spanish-language materials may merit equitable tolling); Roy v. Lampert (9th Cir. 2006) 465 F.3d 964 (evidentiary hearing proper where sufficient allegations that claims were diligently pursued and extraordinary circumstance existed).

⁸⁸ See, e.g., Bryant v. Schriro (9th Cir. 2007) 499 F.3d 1056 (petitioner failed to show how lack of access to case law caused delay and failed to show due diligence in filing).

⁸⁹ Frye v. Hickman (9th Cir. 2001) 273 F.3d 1144.

⁹⁰ Spitsyn v. Moore (9th Cir. 2003) 345 F.3d 796; see also United States v. Battles (9th Cir. 2004) 362 F.3d 1195 (remanding for fact-finding as to whether former attorney's withholding of transcripts was "extraordinary circumstances" justifying equitable tolling).

⁹¹ Tillema v. Long (9th Cir. 2001) 253 F.3d 494.

⁹² Smith v. Ratelle (9th Cir. 2003) 323 F.3d 813.

⁹³ Guillory v. Roe (9th Cir. 2003) 329 F.3d 1015; see also Fail v. Hubbard (9th Cir. 2002) 315 F.3d 1059.

failed to inform him of all the consequences of choosing to have a mixed petition dismissed in order to exhaust state remedies, but did not affirmatively mislead him about the filing deadline.⁹⁴

Restrictions on Multiple Petitions

A petitioner should attempt to bring all the federal habeas claims for a case in one petition, and there are few circumstances in which a prisoner will be allowed to file multiple federal habeas petitions.

If new claims arise or become exhausted after a petition has been filed but is still pending, a federal court may permit the petitioner to amend the petition and add the new claims.⁹⁵ Also, as discussed previously, a person whose petition was dismissed by a federal court for failure to exhaust state court remedies can file a new habeas petition after complying with the exhaustion requirement (provided that the time limits have been met or tolled).⁹⁶

Some other situations do not actually involve successive petitions on the same issue, allowing a petitioner to file multiple petitions. A petition challenging calculation of a prisoner's release date is not a "successive" petition even if the prisoner previously has filed a petition challenging his or her underlying conviction and sentence.⁹⁷ Similarly, a life prisoner presumably can bring a new habeas petition each time parole is denied because each petition challenges a different underlying parole denial decision. A motion for relief from a federal court judgment is not the equivalent of a successive habeas petition if the motion challenges only the federal district court's ruling on the application of the statute of limitations and does not add grounds for relief from the conviction or attack the federal district court's resolution of a claim on the merits.⁹⁸

Otherwise, a California petitioner who previously has filed a habeas petition and who wants to bring a second habeas petition in federal district court must apply for permission to do so from the Ninth Circuit Court of Appeals.⁹⁹ If the Ninth Circuit denies the motion, the petitioner has no right to ask for a rehearing or to request review in the U.S. Supreme Court.¹⁰⁰

⁹⁴ Brambles v. Duncan (9th Cir. 2005) 412 F.3d 1066; see also Pliler v. Ford (2004) 542 U.S. 225 [124 S.Ct. 2441; 159 L.Ed.2d 338] (district court does not commit prejudicial error when it fails to inform a pro se prisoner that absent equitable tolling, his federal claims would be time-barred on return to federal court).

⁹⁵ See, e.g., Willis v. Collins (5th Cir. 1993) 989 F.2d 187; Diaz v. United States (11th Cir. 1991) 930 F.2d 832.

⁹⁶ Stewart v. Martinez-Villareal (1998) 523 U.S. 637 [118 S.Ct. 1618; 140 L.Ed.2d 849]; Slack v. McDaniel (2000) 529 U.S. 473 [120 S.Ct. 1595; 146 L.Ed.2d 542]; Anthony v. Cambra (9th Cir. 2000) 236 F.3d 568.

⁹⁷ Hill v. Alaska (9th Cir. 2002) 297 F.3d 895.

⁹⁸ Gonzalez v. Crosby (2005) 545 U.S. 524 [125 S.Ct. 2641; 162 L.Ed.2d 180]; see also Federal Rules of Civil Procedure, rule 60(b).

⁹⁹ 28 U.S.C. § 2244(b)(3); Felker v. Turpin (1996) 518 U.S. 651 [116 S.Ct. 2333; 135 L.Ed.2d 827].

¹⁰⁰ 28 U.S.C. § 2244(b)(4).

Under AEDPA, any claim that previously has been raised and denied on the merits in a federal habeas petition will be dismissed.¹⁰¹ A habeas petition filed after a previous petition has been dismissed for state procedural default also will be dismissed as a “successive” petition.¹⁰² New claims raised in a successive petition also will be dismissed, unless (1) the claims rely on new retroactive rules of constitutional law; or (2) the factual basis for the claim could not have been discovered previously through due diligence and those facts show by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the petitioner guilty.¹⁰³

Finally, even if successive petitions are allowed, the petitioner still must meet the AEDPA time limits for filing. Time during which one federal habeas petition is pending does not toll the time limits for filing a later habeas petition.¹⁰⁴

Grounds for Issuance

A state prisoner can bring a federal habeas petition to challenge the lawfulness of a state criminal conviction, disciplinary loss of credit, or parole revocation or denial. The legal claims in the petition must be based on rights guaranteed by the U.S. Constitution or federal statutes. The rights of the U.S. Constitution are very broad, and the annotated United States Code, 28 U.S.C. § 2254, contains several hundred notes of cases dealing with grounds for issuance of a federal habeas writ.

There is one important exception to the general rule that prisoners can bring federal habeas claims on any federal constitutional ground. Violations of the Fourth Amendment guarantee against unreasonable searches and seizures may not be challenged in a federal habeas corpus petition if there has been a full and fair hearing and review of the issue by the state courts.¹⁰⁵ However, if a prisoner’s trial or appellate attorney failed to adequately challenge an unconstitutional search and seizure, then the prisoner may be able to bring a habeas petition with Sixth Amendment claims of ineffective assistance of counsel based on the attorney’s failure to litigate the search and seizure claim.¹⁰⁶

A prisoner also may challenge a state court verdict on the ground that there was insufficient evidence to support the conviction. Such a claim is based on the federal

¹⁰¹ 28 U.S.C. § 2244(b)(1).

¹⁰² Henderson v. Lampert (9th Cir. 2004) 396 F.3d 1049, cert. denied, 546 U.S. 884 [126 S.Ct. 199; 163 L.Ed.2d 189]).

¹⁰³ 28 U.S.C. § 2244(b)(2); Allen v. Ornoski (9th Cir. 2006) 435 F.3d 946 (claim found to be a successive petition and therefore barred); Tyler v. Cain (2001) 533 U.S. 656 [121 S.Ct. 2478; 150 L.Ed.2d 632] (new case on jury instructions does not apply retroactively without explicit statement by court, and therefore did not allow successive petition to be filed); Cooper v. Calderon (9th Cir. 2002) 308 F.3d 1020 (when a petitioner was aware at the time of trial of the confession of another person to the crime, that confession is not new evidence under 28 U.S.C. § 2244(b) and a successive petition will not be heard).

¹⁰⁴ Duncan v. Walker (2001) 533 U.S. 167 [121 S.Ct. 2120; 150 L.Ed.2d 251].

¹⁰⁵ Stone v. Powell (1976) 428 U.S. 465 [96 S.Ct. 3037; 49 L.Ed.2d 1067].

¹⁰⁶ Kimmelman v. Morrison (1986) 477 U.S. 365 [106 S.Ct. 2574; 91 L.Ed.2d 305].

constitutional right to due process, which protects a criminal defendant against conviction except when there is evidence that is sufficient to support a conclusion that every element of the crime has been established beyond a reasonable doubt. In reviewing such an argument, a federal court must decide whether there was sufficient evidence for a rational trier of fact to find the petitioner guilty beyond a reasonable doubt of the elements of the criminal offense as defined by the state criminal codes.¹⁰⁷ Challenge also may be brought based on claims that evidence presented at trial was false, such as when a witness recants prior testimony.¹⁰⁸

Violations of state law evidentiary rules or statutory requirements are not grounds for a federal habeas case. However, such violations can be addressed in a federal habeas petition if they resulted in denial of the federal constitutional rights to due process and fundamental fairness.¹⁰⁹

In deciding federal legal issues, federal courts look to court cases that interpret them, particularly the decisions of the U.S. Supreme Court, the Court of Appeals that presides over the district court (in California, this is the Ninth Circuit Court of Appeals), and other decisions by the federal district court where the petition is filed. Cases decided in other district courts and other Courts of Appeal can be persuasive, but a district court is not bound to follow them. State court cases will be considered only if there are no previous federal discussions of the issue presented, or if they include thorough discussions of a point not considered in depth by the federal courts.

Finally, for most types of issues, a federal petitioner must be able to show “actual prejudice.” In other words, the court must find that the error had a “substantial and injurious effect or influence in determining the jury’s verdict.”¹¹⁰ The burden of proof is on the state to show that an error did not substantially influence the jury’s decision, and doubt should be resolved in favor of the petitioner.¹¹¹ In a few circumstances — for example, where a jury instruction might have allowed the jury to convict on evidence amounting to less than proof beyond a reasonable doubt — the conviction will be reversed automatically, without any need to show actual prejudice.¹¹²

¹⁰⁷ Jackson v. Virginia (1979) 443 U.S. 307, 318-319 [90 S.Ct. 2781; 61 L.Ed.2d 560].

¹⁰⁸ United States ex rel. Sostre v. Festa (9th Cir. 1975) 513 F.2d 1313; United States ex rel. Rice v. Vincent (2d Cir. 1974) 491 F.2d 1326.

¹⁰⁹ Estelle v. McGuire (1991) 502 U.S. 62, 70 [112 S.Ct. 475, 481; 116 L.Ed.2d 385]; Hicks v. Oklahoma (1980) 447 U.S. 343 [100 S.Ct. 2227; 65 L.Ed.2d 175].

¹¹⁰ Kotteakos v. United States (1946) 328 U.S. 750 [66 S.Ct. 1239; 148 L.Ed.2d 536]; Brecht v. Abrahamson (1993) 507 U.S. 619 [113 S.Ct. 1710; 123 L.Ed.2d 353]; Fry v. Pliler (2007) ___ U.S. ___ [127 S.Ct. 2321; 168 L.Ed.2d 16].

¹¹¹ O’Neal v. McAninch (1995) 513 U.S. 432 [115 S.Ct. 992; 130 L.Ed.2d 947].

¹¹² Sullivan v. Louisiana (1993) 508 U.S. 275 [113 S.Ct. 2078; 128 L.Ed.2d 182]; Arizona v. Fulminante (1991) 499 U.S. 279, 331 [111 S.Ct. 1246; 113 L.Ed.2d 302] (giving examples of structural defects); Ramirez v. Hatcher (9th Cir. 1998) 136 F.3d 1209.

Standard of Review of State Court Decisions

As discussed previously, a state prisoner who wants to bring a federal habeas petition first must bring his or her claims in the state courts. When the federal court reviews the petition, it must give deference to the state court decisions on federal issues that already have been made in the case.¹¹³

The passage of AEDPA in 1996 established increasingly deferential standards restricting a federal court's review of a state court's decision. Those standards address the degree of deference to be given to state court legal conclusions, factual findings, and mixed questions of law and fact. In reviewing the state court decisions, the federal court may not grant a petition for writ of habeas corpus on any claim that has been adjudicated on the merits in state court, unless the state court case:

- resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the U.S. Supreme Court. This language governs the deference to be given to state court conclusions of law; or
- resulted in a decision that was based on an unreasonable application of the facts in light of the evidence presented in the state court proceeding. This language sets forth the standard to be applied to issues that involve mixed questions of law and fact.¹¹⁴

A federal court will presume that a determination of a factual issue made by a state court is correct. In order to overcome this presumption, a petitioner has to set forth clear and convincing evidence that the factual finding is incorrect.¹¹⁵ The presumption that state court determinations of fact are correct may be rebutted with arguments that the state court did not properly determine the facts because the petitioner was prevented from presenting evidence or had insufficient opportunity to be heard on the merits of the factual dispute. A petitioner therefore can rebut the presumption that the state court's findings of fact are correct by showing that he or she was prevented from presenting evidence or had insufficient opportunity to have the merits of the factual dispute heard.¹¹⁶

If it is not clear from the state court record whether the trial court made adequate findings of fact, then "the district court must try to reconstruct findings from the state court's

¹¹³ As part of the deferential review, a federal court must presume that a state court applied its own precedential case law in interpreting a state statute, even if the state court did not cite to such authorities. Bell v. Cone (2005) 543 U.S. 447, 455-456 [125 S.Ct. 847; 160 L.Ed.2d 881].

¹¹⁴ 28 U.S.C. § 2254(d); Williams v. Taylor (2000) 529 U.S. 362, 410 [120 S.Ct. 1495; 146 L.Ed.2d 389]; Schriro v. Landrigan (2007) ___ U.S. ___ [127 S.Ct. 1933; 167 L.Ed.2d 836]; see also Teague v. Lane (1989) 489 U.S. 288 [109 S.Ct. 1060; 103 L.Ed.2d 334] (where law not clearly established until after judgment became final, new U.S. Supreme Court case holding did not apply retroactively to petitioner). These limits on federal court habeas review have been upheld as constitutional. Crater v. Galaza (9th Cir. 2007) 491 F.3d 1119.

¹¹⁵ 28 U.S.C. § 2254(e)(1).

¹¹⁶ Jones v. Wood (9th Cir. 1997) 114 F.3d 1002.

legal findings and to make its own findings if it cannot adequately do so. Ordinarily, an evidentiary hearing should be held for this purpose.”¹¹⁷ However, an evidentiary hearing will not be held if the petitioner “failed to develop” a claim’s factual basis in the state court proceedings due to lack of diligence or some other fault attributable to the prisoner or his or her counsel, unless the petitioner can show that the claim relies on a new retroactive rule of constitutional law or on evidence that could not have been discovered previously and that the facts underlying the claim would establish by clear and convincing evidence that, in the absence of the error, no reasonable fact-finder would have found the petitioner guilty.¹¹⁸

Where To File the Petition

A petition for a federal writ of habeas corpus may be filed in one of two places: the federal district court in the area in which the petitioner is incarcerated or the federal district court in the area in which the state court of conviction and sentencing is located. A list of the federal courts, and the areas and institutions that they cover, is included at the end of this Informational Material.

A habeas petition may be transferred from one district to another “in the furtherance of justice.”¹¹⁹ For example, a petition filed in the district of confinement may be transferred to the district of conviction if the court determines that an evidentiary hearing will be necessary and transfer will allow petitioner to subpoena local policemen and other witnesses and permit appointment of counsel familiar with local procedures.¹²⁰

Forms and Procedure For Filing and Proceeding With the Petition

The district courts have created official forms for state prisoners to use when filing federal habeas petitions; each district has its own form and filing instructions.¹²¹ State prisoners who are filing habeas petitions must use these forms. The forms also are useful for attorneys because they set out clearly all the procedural requirements that must be met before a court will consider a petition on the merits. The habeas corpus petition forms and instructions for the federal district courts in California should be available in every institution’s law library. Free copies of the forms also may be obtained by writing to the clerk of the court where the petition is to be filed. The district court clerks also may supply copies of the relevant local court rules; many courts also have the forms available on their websites.

There is a \$5.00 fee for filing a petition for writ of habeas corpus in federal court. A prisoner who has little or no money may be granted permission to file without paying a filing

¹¹⁷ Taylor v. Cardwell (9th Cir. 1978) 579 F.2d 1380.

¹¹⁸ 28 U.S.C. § 2254(e)(2); Williams v. Taylor (2000) 529 U.S. 362, 420 [120 S.Ct. 1479; 146 L.Ed.2d 435].

¹¹⁹ 28 U.S.C. § 2241(d).

¹²⁰ Laue v. Nelson (N.D. Cal. 1968) 279 F.Supp. 265. It is safest to file in the district of conviction, since a petition can be delayed for months when ordered transferred to another district.

¹²¹ Federal Rules of Habeas Corpus, rule 2(c).

fee; this is called proceeding “in forma pauperis.”¹²² To obtain in forma pauperis status, a petitioner must fill out and file a form listing his or her income and property. The petitioner also must attach a copy of his or her trust account statement showing transactions for the last six months, as well as a certificate signed by a prison staff member.¹²³ The in forma pauperis forms for the federal district courts in California should be available in every prison law library; the forms may also be available by writing to the district court clerks or on the district courts’ websites.

It is not necessary for the prisoner to serve the petition on any other party. If the court does not dismiss the petition, it will serve the petition and any court orders for further briefing on the respondent.¹²⁴

The petitioner should state the facts of the case specifically and concisely and may attach as exhibits any documents that help prove the case. If a petitioner asserts a potentially valid claim, but does so in a vague and non-detailed manner, the court can dismiss the case.¹²⁵ However, the court should first grant the petitioner leave to amend the petition and correct the problem unless the court determines that there is no possible valid claim that can be raised.¹²⁶

The following are some additional guidelines a petitioner should keep in mind when preparing a federal habeas petition:

- In general, the facts are best presented in separate paragraphs in the order in which the events actually happened. The facts should be clear, specific, and concrete — not argumentative, overly dramatic, generalized, or full of the petitioner’s personal interpretations. The statement of facts generally should not include legal citations, but should include reference to procedural facts showing exhaustion of necessary state administrative or judicial remedies.
- If any fact is supported by a document, the document should be attached as an exhibit and the statement of facts should refer to it.¹²⁷ If an important and relevant document is not available to the petitioner, the statement of facts should explain why. If there are a lot of exhibits, it is a good idea to prepare a list of the exhibits.

¹²² The PLRA filing fee provisions, which require prisoners bringing civil actions to pay full filing fees, even if they are permitted to proceed in forma pauperis, do not apply to federal habeas corpus cases. Naddi v. Hill (9th Cir. 1997) 106 F.3d 275.

¹²³ A prisoner who is nearing the AEDPA filing deadline and having difficulty getting prison staff to provide the paperwork for the in forma pauperis application should go ahead and file the petition and in forma pauperis declaration. The court clerk must accept the petition. Federal Rules of Habeas Corpus, rule 3(b). The prisoner then should be allowed to send the rest of the in forma pauperis documents within a reasonable period of time.

¹²⁴ Federal Rules of Habeas Corpus, rule 4. Although the rule does not specifically state this, it is normal practice for the court to mail copies of court orders to both the respondent and petitioner.

¹²⁵ Ballard v. Nelson (9th Cir. 1970) 423 F.2d 71.

¹²⁶ Jarvis v. Nelson (9th Cir. 1971) 440 F.2d 13.

¹²⁷ In re Duvall (1995) 9 Cal.4th 464 [37 Cal.Rptr.2d 259]; see also In re Sixto (1989) 48 Cal.3d 1247, 1252 [259 Cal.Rptr. 491]; In re Love (1974) 11 Cal.3d 179, 183-184 [113 Cal.Rptr. 89].

- If statements by people other than the petitioner are necessary to document the factual allegations, declarations of those people should be attached as exhibits to the petition. (A declaration is simply a written statement of information that the writer swears to be true.)
- The petitioner should also set forth a short summary of the “grounds” or “contentions,” meaning the legal issues on which the claim is presented. Each main argument should be summarized in one sentence that states the basic nature of the action being challenged and the specific law it violates. For example, if the petition challenges a criminal conviction, one contention might be, “The trial attorney’s failure to interview and present an important witness violated petitioner’s Sixth Amendment right to the effective assistance of counsel.” As a tactical matter, the prisoner generally should present only the strongest three or four issues; raising numerous weak arguments is likely to distract the court from giving its full attention to the stronger arguments.
- After stating the contentions, the petitioner should set forth a request for relief that states exactly what the petitioner wants the court to do. If a petitioner is filing in pro per (without a lawyer), the request for relief should include a request for appointment of counsel. In addition, the petitioner should include a request for “any other relief that may be proper or necessary,” so that the court has the option of ordering relief other than that specifically requested.
- Following the prayer for relief, the petitioner can present a “Memorandum of Points and Authorities in Support of the Petition.” This memorandum should describe the relevant legal authorities — cases, constitutions, statutes, or regulations — and discuss how they apply to the facts of the case.

In many cases, the federal district court judge will ask the parties to consent to have the case heard by a magistrate judge. The magistrate judge will conduct the proceedings in the case and make findings and recommendations about the case, which the federal district court judge then can adopt or reject.¹²⁸

If the court allows the petition to proceed, it will issue an order giving the respondent an opportunity to either move to dismiss the petition due to procedural defects or respond to the issues raised in the petition. The respondent’s brief on the merits is called an “answer.” As part of the answer, the respondent must state what prior court records are available and attach any relevant transcripts and lower court briefs and decisions.¹²⁹ The petitioner then will have an opportunity to file an opposition to any motion to dismiss or a reply to the respondent’s answer.¹³⁰ Usually the court orders will set forth deadlines for the parties to file their briefs, and the parties can request extensions of time if they are unable to meet the deadlines. The parties should serve each other with copies of any documents filed in the court.

¹²⁸ 28 U.S.C. § 636; Federal Rules of Habeas Corpus, rule 10.

¹²⁹ Federal Rules of Habeas Corpus, rule 5(a)-(d).

¹³⁰ Federal Rules of Habeas Corpus, rule 5(e).

In state court, a petitioner always should file a denial (also known as a “traverse”) to the respondent’s answer, denying the truth of the respondent’s allegations and re-alleging the facts set out in the petition.¹³¹ The role of the traverse is less significant in federal habeas proceedings, and there is no requirement that a traverse be filed. Nonetheless, it usually is a good idea for a petitioner to address the respondent’s arguments by filing a traverse.

The federal courts can order the parties to produce additional documents or evidence; this is called an order for “discovery.”¹³² The courts also can allow the parties to “expand the record” by presenting additional evidence, or hold evidentiary hearings to develop the facts of the case.¹³³

Requesting Appointment of an Attorney

There is no absolute right to an attorney in federal habeas cases, except for those involving the death penalty.¹³⁴ However, an attorney must be appointed and paid by the court if an evidentiary hearing is necessary,¹³⁵ if an attorney is required for effective use of discovery,¹³⁶ or if an attorney is required to achieve due process, particularly in complex cases.¹³⁷ Federal judges also have discretion to appoint an attorney in other extraordinary circumstances if doing so is in the interests of justice. Courts making such a determination will consider the strength of the issues, the petitioner’s ability to articulate the claims, and the complexity of the issues.¹³⁸ A petitioner usually must file a petition alleging facts that show a real possibility of constitutional error before a court will consider appointing an attorney.

A petitioner can request appointment of an attorney by filing a motion and supporting declaration setting forth the reasons why the petitioner cannot effectively represent him- or herself and why counsel should be granted. If the request is denied, the petitioner might want to consider renewing it after the respondent files a motion to dismiss or an answer.

Denial of a request for an attorney is not immediately appealable.¹³⁹

¹³¹ See California Rules of Court, rule 4.551(e).

¹³² Federal Rules of Habeas Corpus, rule 6; Bracy v. Gramley (1997) 520 U.S. 899, 908-909 [117 S.Ct. 1793; 138 L.Ed.2d 97].

¹³³ Federal Rules of Habeas Corpus, rules 7 and 8.

¹³⁴ Chaney v. Lewis (9th Cir. 1986) 801 F.2d 1191.

¹³⁵ Federal Rules of Habeas Corpus, rule 8(c).

¹³⁶ Federal Rules of Habeas Corpus, rule 6(a).

¹³⁷ Eskridge v. Rhay (9th Cir. 1965) 345 F.2d 778; Dillon v. United States (9th Cir. 1962) 307 F.2d 445.

¹³⁸ 18 U.S.C. § 3006A; 28 U.S.C. §§ 1915(d) and 2254(h); Federal Rules of Habeas Corpus, rule 8(c); Bashor v. Risley (9th Cir. 1984) 730 F.2d 1228. Federal statutes set the rates and limits for compensation of appointed counsel. See 18 U.S.C. § 3006A(d).

¹³⁹ Kuster v. Block (9th Cir. 1985) 773 F.2d 1048.

Appealing After Denial of a Petition

A petitioner may appeal from a “final order” in a federal habeas corpus proceeding.¹⁴⁰ In most cases, the petitioner must file two documents: a notice of appeal and a request for a certificate of appealability.

Notice of Appeal

To appeal from denial of a federal habeas petition, the petitioner must file a notice of appeal with the federal district court within 30 days after the entry of the final order.¹⁴¹ A pro se prisoner’s notice of appeal is deemed to be “filed” at the moment of delivery to prison authorities for forwarding to the district court.¹⁴²

If the petitioner fails to meet the deadline, he or she can ask for an extension of time. The request must be made within 60 days after the district court order, and the petitioner must show that the failure to meet the filing deadline was due to excusable neglect or good cause.¹⁴³ In the Ninth Circuit, the standard for determining excusable neglect is quite strict.¹⁴⁴ The deadline will be extended no longer than the 60th day after the district court judgment or the 10th day following an order granting an extension.¹⁴⁵

The notice of appeal must identify the party taking the appeal, the name and court number of the judgment being appealed, and the court to which the appeal will be filed (in California prisoner habeas cases, this is the Ninth Circuit Court of Appeals).¹⁴⁶ Along with the notice of appeal, the petitioner either must pay filing and docket fees (currently totaling \$255) or file a request to proceed in forma pauperis.¹⁴⁷ Petitioners who were granted permission to proceed in forma pauperis in the district court usually remain on in forma pauperis status for the appeal and do not have to file a new request.¹⁴⁸

¹⁴⁰ 28 U.S.C. § 2253.

¹⁴¹ Federal Rules of Appellate Procedure, rule 4(a); 28 U.S.C. § 2107; Browder v. Director, Illinois Dept. of Corrections (1978) 434 U.S. 257, 265 [98 S.Ct. 556; 54 L.Ed.2d 521].

¹⁴² Houston v. Lack (1988) 487 U.S. 266 [108 S.Ct. 2379; 101 L.Ed. 245](a pro se prisoner’s control over the processing of his notice necessarily ceases as soon as he hands it over to the prison authorities); see also Caldwell v. Amend (9th Cir. 1994) 30 F.3d 1199.

¹⁴³ See Browder v. Director, Illinois Dept. of Corrections (1978) 434 U.S. 257, 265 [98 S.Ct. 556; 54 L.Ed.2d 521]; Felix v. Cardwell (9th Cir. 1976) 545 F.2d 92; see also Malone v. Avenenti (9th Cir. 1988) 850 F.2d 569.

¹⁴⁴ See Pratt v. McCarthy (9th Cir. 1988) 850 F.2d 590, 592-593 (court requires both extraordinary circumstances preventing a timely filing and injustice resulting from denying the appeal).

¹⁴⁵ Federal Rules of Appellate Procedure, rule 4(a)(5)(B).

¹⁴⁶ Federal Rules of Appellate Procedure, rule 3(c)(1).

¹⁴⁷ 28 U.S.C. §§ 1913 (docket fee), 1915(a) (in forma pauperis status), and 1917 (filing fee).

¹⁴⁸ Federal Rules of Appellate Procedure, rule 24(a)(3).

Certificate of Appealability

Under AEDPA, in addition to filing a notice of appeal, a petitioner who wants to appeal usually must request and be granted a “certificate of appealability” (sometimes called a “COA”).¹⁴⁹ There is one important exception – a life prisoner who is challenging a denial of parole does not need to obtain a COA.¹⁵⁰

The petitioner first should request a certificate of appealability from the district court. If denied, the certificate of appealability may be presented to the Ninth Circuit Court of Appeals.¹⁵¹

The COA may be denied or granted on an issue-by-issue basis. Thus, the petitioner must specifically request a COA as to each issue he or she wishes to appeal. To obtain a certificate of appealability for habeas claims that were denied on the merits, the petitioner must make a substantial showing of the denial of a constitutional right and indicate which specific facts satisfy this requirement.¹⁵²

Courts use a somewhat more complicated test for determining whether to grant a COA for a habeas issue that was denied on procedural grounds. A COA can issue if the prisoner can show that:

- reasonable jurists would find it debatable whether the district court was correct in its procedural ruling; and
- reasonable jurists would find it debatable whether the petition states a valid claim of denial of a constitutional right. The court should look at the face of the complaint to determine whether the petitioner has facially alleged the denial of a constitutional right.

If this “modest” standard is satisfied, then the court should grant a COA.¹⁵³

¹⁴⁹ 28 U.S.C. § 2253(c). When a petitioner filed the petition before the effective date of AEDPA, but filed the appeal after the effective date, AEDPA applied to the procedure in the case. Morris v. Woodford (9th Cir. 2000) 273 F.3d 826; see also Slack v. McDaniel (2000) 529 U.S. 473 [120 S.Ct. 1595; 146 L.Ed.2d 542].

¹⁵⁰ Rosas v. Nielson (9th Cir. 2005) 428 F.3d 1229.

¹⁵¹ The COA request may be denied or granted by a single judge or a panel of judges. Santiago Salgado v. Garcia (9th Cir. 2004) 384 F.3d 769.

¹⁵² 28 U.S.C. § 2253(c); Federal Rules of Appellate Procedure, rule 22(b). The language of the statute and appellate rule appear to be contradictory in that the statute requires the certificate to be issued by a circuit court judge while the rule states that the certificate may be issued by a district court judge. Circuits that have addressed the issue have decided that the district court should first determine whether to issue a certificate of appealability; if the district court denies the request for a certificate, the petitioner may request one from the circuit court. See United States v. Asrar (9th Cir. 1997) 116 F.3d 1268; Grant-Chase v. Commissioner (1st Cir. 1998) 145 F.3d 431, 435.

¹⁵³ Slack v. McDaniel (2000) 529 U.S. 473 [120 S.Ct. 1597; 146 L.Ed.2d 542].

Appointment of an Attorney

If the district court appointed an attorney for the petitioner, the appointment generally will extend to the appeal.¹⁵⁴ If the prisoner was in pro se in the district court, he or she may file a request for appointment of an attorney in the Ninth Circuit. The petitioner must show that the issues are sufficiently important and complex to make appointment of counsel necessary.¹⁵⁵

Petition for Writ of Certiorari in the U.S. Supreme Court

A federal habeas petitioner who does not succeed on appeal may file a petition for writ of certiorari in the U.S. Supreme Court. The petition must be filed 90 days after the entry of the appellate court judgment.¹⁵⁶ The petition must include a description of the issues, a statement of jurisdiction, the facts, and the reasons why the court should hear the case.¹⁵⁷

A petitioner may request permission to proceed in forma pauperis in the Supreme Court; however, if a petitioner abuses the system by filing large numbers of frivolous petitions, the Court may ban the petitioner from filing any further in forma pauperis petitions.¹⁵⁸

¹⁵⁴ 18 U.S.C. § 3006A.

¹⁵⁵ 18 U.S.C. § 3008A(c); Dillon v. United States (9th Cir. 1962) 307 F.2d 445.

¹⁵⁶ Supreme Court Rules, rule 13.3.

¹⁵⁷ Supreme Court Rules, rule 14.1. Instructions and forms for filing a pro se petition for writ of certiorari are available on the U.S. Supreme Court website at www.supremecourtus.gov/casehand/guideforifpcases.pdf.

¹⁵⁸ Supreme Court Rules, rule 39; see In re Demos (1991) 500 U.S. 16 [111 S.Ct. 1569; 114 L.Ed.2d 20].

Federal District Courts

United States District Court for the Central District, Eastern Division

3470 Twelfth Street

Riverside, CA 92501-3000

www.cacd.uscourts.gov

California Institute for Men, California Institute for Women, California Rehabilitation Center, Chuckawalla Valley State Prison, CSP-Ironwood, California Men's Colony

United States District Court for the Central District, Western Division

312 North Spring Street #G-8

Los Angeles, CA 90012-4793

www.cacd.uscourts.gov

CSP-Los Angeles County

United States District Court for the Eastern District, Sacramento Office

501 "I" Street, Suite 4-200

Sacramento, CA 95814

www.caed.uscourts.gov

CSP-Solano, California Medical Facility, Mule Creek State Prison, California Correctional Center, High Desert State Prison, Folsom State Prison, Deuel Vocational Institute

United States District Court for the Eastern District, Fresno Office

2500 Tulare Street #1501

Fresno, CA 93721

www.caed.uscourts.gov

CSP-Corcoran, Substance Abuse Treatment Facility, Sierra Conservation Center, Pleasant Valley State Prison, California Correctional Institution, Kern Valley State Prison, North Kern State Prison, Wasco State Prison, Central California Women's Facility, Valley State Prison for Women, Avenal State Prison

United States District Court for the Northern District

450 Golden Gate Avenue

San Francisco, CA 94102-3483

www.cand.uscourts.gov

Pelican Bay State Prison, San Quentin State Prison, Correctional Training Facility, Salinas Valley State Prison

United States District Court for the Southern District

880 Front Street, Suite 4290

San Diego, CA 92101-8900

www.casd.uscourts.gov

Richard J. Donovan Correctional Facility, Centinela State Prison, Calipatria State Prison

Federal Court of Appeals

Ninth Circuit Court of Appeals

P.O. Box 193939

San Francisco, CA 94119-3939

www.ca9.uscourts.gov

United States Supreme Court

United States Supreme Court

1 First Street NE

Washington, DC 20543

www.supremecourtus.gov