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FEDERAL HABEAS CORPUS MANUAL FOR CALIFORNIA STATE PRISONERS

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1. Introduction

A person held in custody by the state may file a petition for writ of habeas corpus in a United States district court to challenge violations of the Constitution or laws or treaties of the United States.[1] However, unlike California state habeas corpus, a federal habeas petition can only challenge a conviction or the length of a sentence (including some issues involving denial of prison sentence credits or parole).[2]

Federal habeas corpus law is complicated. There are rules that restrict state prisoners' rights to bring federal habeas cases and rules that restrict the federal courts' powers to overrule state court decisions. Many of these rules went into effect in 1996 as part of the Antiterrorism and Effective Death Penalty Act (AEDPA), which amended the federal habeas statutes that apply to state prisoners.[3]

This chapter provides only a general overview of federal habeas corpus procedure and substantive law. An excellent user-friendly resource on federal habeas is *Appeals and Writs in Criminal Cases* (CEB). A very comprehensive discussion of federal habeas law is found in Hertz and Liebman, *Federal Habeas Corpus Practice and Procedure* (Lexis Nexis Publishing).

2. Who May File a Petition

To bring a federal habeas petition, the petitioner must be "in custody" at the time the petition is filed.[4]

A person is "in custody" while confined in a prison or jail for a criminal conviction.[5] A person is also "in custody" while on probation or parole or on release on one's own recognizance.[6] Once a criminal sentence and any period of supervised release has been fully served, the petitioner is no longer "in custody" and generally cannot bring a petition.[7] The "in custody" requirement is not met if the only continuing requirement is to pay a fine or register as a sex offender.[8] However, an inmate can petition for habeas review of a previous conviction that

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[1] 28 U.S.C. § 2241 et seq., especially § 2254.

[2] *Preiser v. Rodriguez* (1973) 411 U.S. 475, 476-477, 490 [93 S.Ct. 1827, 36 L.Ed.2d 439]; *Bogovich v. Sandoval* (9th Cir. 1999) 189 F.3d 999, 1002.

[3] 28 U.S.C. § 2241 et seq.

[4] 28 U.S.C. § 2241(c); *Carafas v. LaVallee* (1968) 391 U.S. 234, 238 [88 S.Ct. 1556, 20 L.Ed.2d 554]; *Sailer v. Gunn* (9th Cir. 1977) 548 F.2d 271, 273, fn. 1.

[5] *U.S. ex rel. Wirtz v. Sheehan* (E.D. Wis. 1970) 319 F.Supp. 146, 147.

[6] *Spencer v. Kemna* (1998) 523 U.S. 1, 7 [118 S.Ct. 978, 140 L.Ed.2d 43] (parole); *Benson v. California* (9th Cir. 1964) 328 F.2d 159, 162 (probation); *Hensley v. Municipal Court* (1973) 411 U.S. 345, 351-353 [93 S.Ct. 1571, 36 L.Ed.2d 294] (own recognizance); *Justices of Boston Municipal Ct. v. Lydon* (1984) 466 U.S. 294, 300-301 [104 S.Ct. 1805, 80 L.Ed.2d 311] (own recognizance).

[7] *Williamson v. Gregoire* (9th Cir.1998) 151 F.3d 1180, 1183.

[8] *Ibid*.

has been fully served if that conviction is being used to enhance his sentence on a current conviction for which he is confined.[9]

Detention in a mental hospital on a civil commitment generally meets the "in custody" requirement.[10] This includes commitments following a verdict of not guilty by reason of insanity or a verdict that a person is a Mentally Disordered Offender (MDO) or Sexually Violent Predator (SVP).

An immigration hold placed during a criminal incarceration does not amount to being "in custody" on the immigration case, and thus a state prisoner cannot challenge the hold via a federal habeas petition.[11] On the other hand, a prisoner who is serving a sentence in one jurisdiction and has a detainer for an unserved sentence in another jurisdiction, is deemed to be "in custody" on the second case for the purposes of federal habeas.[12]

If a prisoner is discharged from custody after filing a petition challenging a criminal conviction, courts will not dismiss the case as moot because there may be negative "collateral consequences" of the conviction.[13] This rule has also been applied to an SVP civil commitment.[14]

In cases involving other matters – such as parole revocations or loss of credits due to disciplinary violations – a court will not assume that there are "collateral consequences" after the petitioner's term is discharged. The court will dismiss the petition as moot unless the petitioner can show that there are actual continuing consequences of the parole revocation or disciplinary finding.[15] This standard is difficult to meet.[16]

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[9] *Pogue v. Ratelle* (S.D. Cal. 1999) 58 F.Supp.2d 1140; Brock v. Weston (9th Cir.1994) 31 F.3d 887; U.S. v. Price (9th Cir.1995) 51 F.3d 175; *Custis v. U.S.* (1994) 511 U.S. 485, 497 [114 S.Ct. 1732, 128 L.Ed.2d 517]; but see *Maleng v. Cook* (1989) 490 U.S. 488, 492 [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, 1448-1449.

[10] *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.

[11] *Garcia v. Taylor* (9th Cir. 1994) 40 F.3d 299, 303-304.

[12] *Maleng v. Cook* (1989) 490 U.S. 488, 493-494 [109 S.Ct. 1923, 104 L.Ed.2d 540].

[13] *Carafas v. LaVallee* (1968) 391 U.S. 234, 237-238 [88 S.Ct. 1556, 20 L.Ed.2d 554]; *Selam v. Warm Springs Tribal Correctional Facility* (9th Cir. 1998) 134 F.3d 948, 951; *Chacon v. Wood* (9th Cir. 1994) 36 F.3d 1459, 1463; *Sailer v. Gunn* (9th Cir. 1977) 548 F.2d 271, 273.

[14] *Carty v. Nelson* (9th Cir. 1995) 426 F.3d 1064, 1071.

[15] *Spencer v. Kemna* (1998) 523 U.S. 1, 8-9 [118 S.Ct. 978, 140 L.Ed.2d 43]; *Lane v. Williams* (1982) 455 U.S. 624, 631 [102 S.Ct. 1322, 71 L.Ed.2d 508]; *Cox v. McCarthy* (9th Cir. 1987) 829 F.2d 800, 803. A prisoner may also file a petition for writ of certiorari in the United States Supreme Courtdirectly following an appeal of a criminal conviction or civil commitment; however, the likelihood of United States Supreme Court review is extremely small.

[16] See, e.g., *Spencer v. Kemna* (1998) 523 U.S. 1, 14-16 [118 S.Ct. 978, 140 L.Ed.2d 43] (rejecting argument that parole revocation had continuing collateral consequences because it could be used as a factor in future sentencing or parole proceedings or for impeachment; also rejecting claim that moot petition should be allowed to proceed because civil rights action for money damages could not be brought unless the parole vocation was deemed invalid by habeas proceeding); *Maciel v. Cate* (2013) 731 F.3d 928, 932 (no continuing consequence of expired parole term); *Burnett v.*

3. Grounds for a Petition

A state prisoner can bring a federal habeas petition to challenge a state criminal conviction or sentence.[17] Indeed, habeas corpus is usually the only federal action available to a person who seeks release from prison or from an MDO or SVP commitment.[18] A state prisoner can also file a federal habeas petition challenging an action by prison officials that affects how long the prisoner is incarcerated, such as disciplinary loss of credit or a parole revocation. Otherwise, federal habeas corpus *cannot* be used to challenge state prison or parole conditions. The appropriate federal action for raising such issues is a federal civil rights case.

The legal claims in the petition must be based on rights guaranteed by the United States Constitution or federal statutes. The federal courts must follow the decisions of the United States Supreme Court, the regional Court of Appeals (in California, this is the Ninth Circuit Court of Appeals), and the federal district court where the petition is filed. Cases decided by other federal courts can be persuasive, but are not binding law. State court cases will be considered only if the federal courts have not previously considered the issue in depth.

There is one important exception to the general rule that prisoners can bring federal habeas claims on any federal constitutional grounds. Violations of the U.S. Constitution's Fourth Amendment right to be free from unreasonable search and seizure may not be challenged in a federal habeas corpus petition if there has been a full and fair review of the issue by the state courts.[19] However, if a prisoner's trial or appellate attorney failed to competently challenge an unconstitutional search or seizure, then the prisoner may be able to bring a habeas petition for a Sixth Amendment claim of ineffective assistance of counsel.[20]

Federal habeas corpus cannot be used to bring claims based on violations of state laws, statutes, or regulations. However, in many circumstances petitioners may be able to argue that a violation of a state law also resulted in denial of a federal constitutional right like the right to due process.[21] But not all state law errors violate federal due process. A notable example is that the correct application of the "some evidence" standard in California parole suitability cases is a matter of state law only, and not a federal due process right. Thus, a life prisoner who has been denied parole cannot file a federal habeas petition arguing that the decision was not supported by

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Lampert (9th Cir. 2005) 432 F.3d 996, 999-1000 (petition challenging deferral of parole date was rendered moot by prisoner's release and his subsequent incarceration for violating parole); *Wilson v. Terhune* (9th Cir. 2003) 319 F.3d 477, 480 (petition moot where prisoner challenged a prison disciplinary finding but all of the punishments for the disciplinary violation had been completed or withdrawn; the "collateral consequences" suggested by the petitioner were either based on the fact of the underlying behavior (an escape) or too speculative to justify habeas relief); *Munoz v. Rowland* (9th Cir. 1997) 104 F.3d 1096, 1098 (rejecting argument that former prisoner's challenge to segregation based on gang affiliation should not be moot because the gang validation could be a basis for segregation during future incarceration).

[17] A federal court has no jurisdiction to hear a state prisoner's petition that challenges only a restitution order, because the prisoner is not challenging his or her custody. *Bailey v. Hill* (9th Cir. 2010) 599 F.3d 976, 979.

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

[19] *Stone v. Powell* (1976) 428 U.S. 465, 489-495 [96 S.Ct. 3037, 49 L.Ed.2d 1067].

[20] *Kimmelman v. Morrison* (1986) 477 U.S. 365, 368 [106 S.Ct. 2574, 91 L.Ed.2d 305].

[21] *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [112 S.Ct. 475, 481, 116 L.Ed.2d 385]; and see *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175].

some evidence.[22] However, lifers can still file federal habeas petitions to argue that they have been deprived of the federal due process rights to an opportunity to be heard, to examine the evidence in advance, and to receive notice of the reasons why parole was denied.[23]

4. Standard of Review of State Court Decisions

As discussed in section 5, a state prisoner who wants to bring a federal habeas petition must first raise the claims in the state courts. When the federal court reviews the petition, it has limited power to overturn the state court decisions in the case. A federal court may not grant a petition for writ of habeas corpus on any claim that has been decided on the merits in state court, unless:

> (1) The state court decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. The governing law is the law as it stood at the time the state court issued its decision, not at the time when the habeas petition is being considered.[24]
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> or
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> (2) The state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.[25] A federal court will presume that a determination of a factual issue made by a state court was correct. However, a petitioner may overcome this presumption by clear and convincing evidence that the factual finding was incorrect.[26]

To meet these standards, a prisoner must show that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[27] If there is a valid ground for upholding

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[22] *Swarthout v. Cooke* (2011) 562 U.S. 216 [131 S.Ct. 859, 862, 178 L.Ed.2d 732].

[23] *Ibid*.

[24] 28 U.S.C. § 2254(d)(1); *Greene v. Fisher* (2011) __ U.S. __ [132 S.Ct. 38, 43, 181 L.Ed.2d 336]; *Williams v. Taylor* (2000) 529 U.S. 362, 410 [120 S.Ct. 1495, 146 L.Ed.2d 389]. *Schriro v. Landrigan* (2007) 550 U.S. 465, 473 [127 S.Ct. 1933, 167 L.Ed.2d 836]; *Thompson v. Runnels* (9th Cir. 2013) 705 F.3d 1089, 1096. When deciding if a constitutional principle is "clearly established," a federal court may rely only on U.S. Supreme Court precedents, and may not rely on decisions of lower federal courts. *Lopez v. Smith* (2014) __ U.S. __ [135 S.Ct. 1; __ L.Ed.2d __]. As part of the deferential review, a federal court must presume that a state court had 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].This limit on federal court habeas review has been upheld as constitutional. *Crater v. Galaza* (9th Cir. 2007) 491 F.3d 1119, 1124.

[25] 28 U.S.C. § 2254(d)(2); *Williams v. Taylor* (2000) 529 U.S. 362, 410 [120 S.Ct. 1495, 146 L.Ed.2d 389]. *Schriro v. Landrigan* (2007) 550 U.S. 465, 473 [127 S.Ct. 1933, 167 L.Ed.2d 836].

[26] 28 U.S.C. § 2254(e)(1).

[27] *Harrington v. Richter* (2011) 562 U.S. 86 [131 S.Ct. 770, 787, 178 L.Ed.2d 624]; *Premo v. Moore* (2011) 562 U.S. 115 [131 S.Ct. 733, 739, 178 L.Ed.2d 649].

the state court's decision, the federal court will reject the habeas claim even if there are valid grounds for overturning the decision.[28]

If a claim was denied by the state courts on procedural grounds, but is heard by a federal court under an exception allowing relief from procedural default (see § 6), the federal court does not have to apply this deferential standard of review and review is not limited to the record that was before the state court.[29]

In cases in which a state court denied a prisoner's claim on the merits, federal court review may be based only on the record that was before the state court.[30] There is an exception if (1) the claim relies on a new rule of constitutional law that is made retroactive to cases on collateral review or relies on facts that could not have been previously discovered through the exercise of due diligence, *and* (2) the facts underlying the claim would establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the petitioner guilty.[31] In such cases, an evidentiary hearing may be held.

5. Exhaustion of State Remedies

A state prisoner must "exhaust" all state court remedies before filing a federal habeas petition.[32] This requirement ensures that state courts have the opportunity to correct any constitutional errors in the criminal proceedings and respects the right of state courts to resolve issues on independent state procedural grounds.

A. Requirements for Exhaustion

To meet the exhaustion requirement, the petitioner must have provided the highest state court with an opportunity to rule on the issues in the case.[33] 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.[34] The person does not need to present the same claim again in state habeas corpus proceedings.[35]

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[28] *Parker v. Matthews* (2012) __ U.S. __ [132 S.Ct. 2148, 2151, 183 L.Ed.2d 32].

[29] *Gentry v. Sinclair* (9th Cir. 2012) 705 F.3d 884, 896, 899.

[30] *Cullen v. Pinholster* (2011) __ U.S. __ [131 S.Ct. 1388, 1398, 179 L.Ed.2d 557].

[31] 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].

[32] 28 U.S.C. § 2254(b)(1)(A); *Baldwin v. Reese* (2004) 541 U.S. 27, 29 [124 S.Ct. 1347, 158 L.Ed.2d 64].

[33] *McQuown v. McCartney* (9th Cir. 1986) 795 F.2d 807, 809.

[34] *Roman v. Estelle* (9th Cir. 1990) 917 F.2d 1505, 1506; see generally *O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 842 [119 S.Ct. 1728, 144 L.Ed.2d 1]; *Carrothers v. Rhay* (9th Cir. 1979) 594 F.2d 225, 228. The person does not need to have filed a petition for certiorari asking the United States Supreme Court to review the direct appeal case. *Fay v. Noia* (1963) 372 U.S. 391, 435 [83 S.Ct. 822, 9 L.Ed.2d 837].

[35] *Brown v. Allen* (1953) 344 U.S. 443, 447 [73 S.Ct. 397, 97 L.Ed. 469]; *Lopez v. Schriro* (9th Cir. 2007) 491 F.3d 1029, 1040.

If an issue has not been presented to the state courts through a direct appeal followed by a petition for review then a petitioner can exhaust state remedies by filing habeas corpus petitions in the California state courts. A state habeas petition must be filed before filing a federal habeas case if the error was not or could not be raised on appeal or if no petition for review was filed after the state court of appeal decision. For example, a person who wants to challenge a prison disciplinary credit loss must first exhaust the state habeas process because the credits issue cannot be reviewed by direct appeal in state court.

When the California Supreme Court denies a petition for review or habeas corpus petition, then state remedies usually have been exhausted. However, if a state court denies an appeal or petition on state law *procedural* grounds, then state remedies have not been exhausted because the highest state court has not ruled on the actual merit of the issues in the case. § 6 discusses the options when a case has been procedurally defaulted in state court.

A person filing a claim in state court, who may want to file a federal habeas case in the future, should make sure to present the state court claims in a way that will preserve federal habeas rights. The state court actions should explicitly set forth all of the potential federal legal claims and the specific facts upon which they are based.[36] It is best to say in every state court brief filed at every level that the claim is federal, citing the governing section of the U.S. Constitution or federal statute and at least one or two federal cases.[37]

The exhaustion requirement is strictly applied. However, an exception may be allowed when exhausting remedies would be futile. To show that raising the claim in the state courts would be futile, a petitioner must show that the California Supreme Court has recently or consistently resolved the issue adversely to petitioner *and* that there are no new U.S. Supreme Court decisions addressing the issues and no other indication that the state courts will change their position.[38]

B. Procedures When Claims Have Not Been Exhausted

If a petitioner has not exhausted state remedies, the state can consent to have the federal court hear the case without exhaustion.[39] If the state does not waive the exhaustion requirement, the federal court must dismiss the petition on procedural grounds without prejudice to refile the

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[36] *Duncan v. Henry* (1995) 513 U.S. 364, 366 [115 S.Ct. 887, 130 L.Ed.2d 865]. The requirement applies to pro se petitioners. *Lyons v. Crawford* (9th Cir. 2000) 232 F.3d 666, 669.

[37] See also *Baldwin v. Resse* (2004) 541 U.S. 27, 31 [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 claim); *Castillo v. McFadden* (9th Cir. 2005) 399 F.3d 993, 1000 (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, 915 (federal law claims not fairly presented when raised for first time in petition for review to state supreme court); *Peterson v. Lampert* (9th Cir. 2002) 277 F.3d 1073, 1076 (same).

[38] *Lynce v. Mathis* (1997) 519 U.S. 433, 436, n. 4 [117 S.Ct. 891, 137 L.Ed.2d 63].

[39] 28 U.S.C. § 2254(b)(2) and (3).

petition after state remedies have been exhausted.[40] The court cannot deny the petition on the merits unless it is clear that the petitioner's claim is frivolous.[41]

There are special procedures when a petitioner files a "mixed" federal habeas petition that includes some exhausted claims and some unexhausted claims. The federal court must give the petitioner the choice of amending the petition to proceed on only the exhausted claims or having the case dismissed so that the petitioner may return to state court to exhaust all the claims.[42] In the Ninth Circuit courts, a petitioner can also request a stay-and-abeyance procedure. This procedure allows the court to dismiss the unexhausted claims, then hold off on any further action to permit the petitioner time to exhaust the claims and then amend his petition to add those claims again. This procedure benefits a petitioner where it would be difficult or impossible to file an amended petition within the statutory time limits.[43] However, a court has no duty to advise the petitioner about the stay-and-abeyance procedure or explain how to request a stay.[44]

A petitioner who uses the stay and abeyance procedure can sometimes exhaust state remedies for new issues not raised in the original petition and then amend the petition to include the new issues. The rule is that the new issues may be allowed if they "relate back" to the original petition. Issues relate back if they arise out of the same "conduct, transaction or occurrence" challenged in the original petition.[45] But an issue does not "relate back" where the legal claim is different even though it may concern the same testimony.[46] Also, new issues do not relate back if they assert new grounds for relief separated in both "time and type" from those grounds set forth in the original pleading.[47]

Another situation in which a petitioner can ask for a stay to exhaust state remedies is when new evidence is discovered after a federal habeas petition has already been filed. If the petitioner could not previously have discovered the evidence through reasonable efforts, the

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[40] 28 U.S.C. § 2254(b) and (d); *Slack v. McDaniel* (2000) 529 U.S. 473, 485 [120 S.Ct. 1595, 146 L.Ed.2d 542]; *Stewart v. Martinez-Villareal* (1998) 523 U.S. 637, 644 [118 S.Ct. 1618, 140 L.Ed.2d 849]; *Rose v. Lundy* (1982) 455 U.S. 509, 510 [102 S.Ct. 1198, 71 L.Ed.2d 379]; *Anthony v. Cambra* (9th Cir. 2000) 236 F.3d 568, 574.

[41] *Cassatt v. Stewart* (9th Cir. 2005) 406 F.3d 614, 624.

[42] *Rose v. Lundy* (1982) 455 U.S. 509, 520 [102 S.Ct. 1198, 71 L.Ed.2d 379]; *Henderson v. Johnson* (9th Cir. 2013) 710 F.3d 872, 873; *Jefferson v. Budge* (9th Cir. 2005) 419 F.3d 1013, 1015.

[43] *Rhines v. Weber* (2005) 544 U.S. 269, 277 [125 S.Ct. 1528, 161 L.Ed.2d 440] (if petitioner had good cause for failure to exhaust potentially meritorious claims, and petitioner did not delay intentionally, court may grant request for stay and abeyance); *Olivera v. Giurbino* (9th Cir. 2004) 371 F.3d 569, 573 (failure to grant stay and abeyance is abuse of discretion); see also *Pace v. DiGuglielmo* (2005) 544 U.S. 408, 416 [125 S.Ct.1807, 161 L.Ed.2d 669] (confusion about timeliness of filing may constitute "good cause").

[44] *Pliler v. Ford* (2004) 542 U.S. 225, 231 [124 S.Ct. 2441, 159 L.Ed.2d 338]; *Raspberry v. Garcia* (9th Cir. 2006) 448 F.3d 1150, 1153.

[45] *Mayle v. Felix* (2005) 545 U.S. 644, 657 [125 S.Ct. 2562, 162 L.Ed.2d 582].

[46] *Hebner v. McGrath* (9th Cir. 2008) 543 F.3d 1133, 1138.

[47] *Mayle v. Felix* (2005) 545 U.S. 644, 649 [125 S.Ct. 2562, 162 L.Ed.2d 582].

district court should stay the proceedings to allow the petitioner to exhaust state remedies by presenting the new evidence and any new related claims in the state courts.[48]

Another situation in which a petitioner can ask for a stay to exhaust state remedies is if he can provide evidentiary support to show good cause for failure to exhaust his state remedies, such as that his post-conviction counsel was ineffective in failing to discover evidence of petitioner's abusive upbringing and history of mental illness.[49]

A prisoner cannot appeal a court order staying a habeas corpus proceeding pending exhaustion until after the court enters a final judgment on the habeas petition.[50]

6. Procedural Defaults in State Court and Seeking Relief From Procedural Defaults

As discussed in § 6, state prisoners who want to file federal habeas petitions must first exhaust state judicial remedies. However, sometimes the state courts refuse to address the legal issues because of procedural problems. For example, a state court might find that an issue was forfeited by failure to object during the trial or sentencing or might find that an appeal or petition was not timely filed. If a state court decides a case on "adequate and independent" state law procedural grounds, then state remedies have not been exhausted because the court has not ruled on the actual issues in the case.[51] In some cases, a petitioners can seek relief from such procedural defaults so that they can still proceed with federal habeas cases.

A. Decisions on Procedural Grounds

Sometimes it is easy to tell if the state court denied relief on procedural grounds. Often, the state court decision will plainly state a procedural reason or will cite a law or controlling case for denial on a procedural ground.[52] In other cases, it may not be clear whether a court has denied a petition on the merits or on procedural grounds. For example, the California Supreme Court frequently denies petitions for review and petitions for writ of habeas corpus with one-line orders (called "postcard denials") that do not show the court's reason for denying the petition. Such a postcard denial is not necessarily a denial on the merits rather than on procedural grounds.[53] But where the state Supreme Court states that it has considered the prisoner's habeas petition and relief is not warranted, the fair interpretation is that the Court denied the claim on the merits.[54] Also, unless the state court expressly states that it is relying on a procedural bar, the

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[48] *Gonzalez v. Wong* (9th Cir. 2011) 667 F.3d 965, 977.

[49] *Blake v. Baker* (9th Cir. 2014) 745 F.3d 977, 980-984.

[50] *Thompson v. Frank* (9th Cir. 2010) 599 F.3d 1088, 1090.

[51] *Powell v. Lambert* (9th Cir. 2004) 357 F.3d 871, 874.

[52] *Harris v. Reed* (1989) 489 U.S. 255, 264 [109 S.Ct. 1038, 103 L.Ed.2d 308]; *Nitschke v. Belleque* (9th Cir. 2012) 680 F.3d 1105, 1109; *Kim v. Villalobos* (9th Cir. 1986) 799 F.2d 1317, 1320-1321; *Harris v. Superior Court* (9th Cir. 1974) 500 F.2d 1124, 1128.

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

[54] *Chambers v. McDaniel* (9th Cir. 2008) 549 F.3d 1191, 1195-1199; see also *Greene v. Lambert* (9th Cir.

Ninth Circuit construes an ambiguous state response as acting on the merits of the claim.[55] Also, when a state court rejects some claims on the merits but does not expressly address another federal claim raised by the prisoner, there is a rebuttable presumption that the federal claim was decided on the merits.[56]

Not all types of state law procedural denials are sufficient to bar federal habeas relief. A federal court may refuse to hear a claim only if the state courts have decided the issue on state law procedural grounds that are "adequate and independent."[57] To be "independent," the state court's decision must be based in state law that is independent of federal law.[58] To be "adequate," the procedural rule must be clearly and consistently applied by the state courts.[59] A state procedural rule can be adequate even if judges can exercise discretion to excuse a failure to comply with the rule.[60] There can be disputes about which state procedural rules are "adequate." For example, the California doctrine that a person may not bring a habeas claim on an issue that was already considered on direct appeal is *not* an adequate procedural ground because the state courts sometimes make exceptions for cases involving fundamental constitutional rights.[61] In contrast, California's rule that a state habeas petition must be filed without substantial delay now constitutes an "independent and adequate" state law ground for denial of a habeas petition.[62]

The initial burden of asserting that an issue had been procedurally defaulted is on the state. The burden then shifts to the petitioner to show why the state procedural grounds were not "adequate and independent." Ultimately, the state bears the burden of proving that an issue had been procedurally defaulted.[63]

A prisoner may be able to show that a claim was not defaulted if the state courts' reason for denying the claim is clearly mistaken, even if there was some other possible procedural default that was not discussed by the state court.[64]

2002) 288 F.3d 1081, 1087 (order could be characterized as denial on the merits even though it was curt and ambiguous).

[55] *Smith v. Oregon Bd. of Parole and Post-Prison Supervision, Superintendent* (9th Cir. 2013) 736 F.3d 857, 859

[56] *Johnson v. Williams* (2013) __U.S. __ [133 S.Ct. 1088, 1094, 185 L.Ed.2d 105].

[57] *Stewart v. Smith* (2002) 536 U.S. 856, 858 [122 S.Ct. 2578, 153 L.Ed.2d 762]; *Coleman v. Thompson* (1991) 501 U.S. 722, 729 [111 S.Ct. 2546, 115 L.Ed.2d 640]; see, e.g., *Carter v. Giurbino* (9th Cir. 2004) 385 F.3d 1194, 1197 (California rule that sufficiency of evidence claims cannot be considered unless raised on direct appeal is independent and adequate state procedural bar).

[58] *Michigan v. Long* (1983) 463 U.S. 1032, 1038.

[59] *Johnson v. Mississippi* (1988) 486 U.S. 578, 587; *James v. Kentucky* (1984) 466 U.S. 341, 348-349.

[60] *Beard v. Kindler* (2009) 558 U.S. 53, 60 [130 S.Ct. 612, 175 L.Ed.2d 417].

[61] *Hill v. Roe* (9th Cir. 2003) 321 F.3d 787, 789; *Park v. California* (9th Cir. 2000) 202 F.3d 1146, 1151-1152; see also *Powell v. Lambert* (9th Cir. 2004) 357 F.3d 871, 879 (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).

[62] *Walker v. Martin* (2011) 562 U.S. 307 [131 S.Ct. 1120, 1128, 179 L.Ed.2d 62].

[63] *Bennett v. Mueller* (9th Cir. 2002) 322 F.3d 573, 586.

[64] *Cone v. Bell* (2009) 556 U.S. 449, 467 [129 S.Ct. 1769, 173 L.Ed.2d 701].

If a federal court decides that a claim is procedurally barred, dismissal of the claim should be without prejudice to future refiling, unless it is clear that the procedural problem cannot be remedied.[65]

B. Seeking Relief from Procedural Default

Even if the state courts have decided the case on an independent and adequate procedural ground, a petitioner may still be able to pursue federal habeas relief.

If the procedural problem can be corrected, the petitioner must try to solve the problem and get the state court to rule on the issues.[66] For example, if the state court dismissed habeas claims for not being sufficiently specific, then the petitioner should file a new more detailed habeas petition in the state court.[67]

Some state court procedural problems cannot be cured. For example, if a court of appeal refused to decide an evidentiary claim because no objection was made at trial, the issue has been forfeited and cannot be revived. Similarly, if a state court denies a habeas petition as untimely because the petitioner waited a long to time file it, there is nothing that can be done to correct the procedural problem. However, if these default problems can be characterized as a habeas claim of ineffective assistance, such as failure to raise a claim of error or failure to discover evidence, the procedural default might be excused.[68] This excuse for procedural default can apply to ineffective assistance of trial, appellant, or post-conviction counsel.[69]

Even if the procedural problem cannot be corrected, federal courts may grant relief from a state procedural default if the petitioner can show good cause for not complying with the state procedural rule and actual prejudice from the default. For example, there may be good cause for relief if the procedural default was due to abandonment by counsel without notice or a similar factor beyond the petitioner's control.[70] Federal courts may also excuse a procedural default where a state generally requires prisoners to raise an issue by state habeas corpus rather than on

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[65] *Cassatt v. Stewart* (9th Cir. 2005) 406 F.3d 614, 624.

[66] *Sweet v. Cupp* (9th Cir. 1981) 640 F.2d 233, 237-238.

[67] *Kim v. Villalobos* (9th Cir. 1986) 799 F.2d 1317, 1319.

[68] *Ha Van Nguyen v. Curry* (9th Cir. 2013) 736 F.3d 1287, 1291 (failure of appellate counsel to raise a claim on appeal); *Woods v. Sinclair* (9th Cir. 2014) 764 F.3d 1109, 1137 (failure to discover evidence).

[69] *Ibid*.

[70] *Maples v. Thomas* (2012) __ U.S. __ [132 S.Ct. 912, 924, 181 L.Ed.2d 807]; *Edwards v. Carpenter* (2000) 529 U.S.446, 451 [120 S.Ct. 1587, 146 L.Ed.2d 518]; *Coleman v. Thompson* (1991) 501 U.S. 722, 753 [111 S.Ct. 2546, 115 L.Ed.2d 640]; *Wainwright v. Sykes* (1977) 433 U.S. 72, 87 [97 S.Ct. 2497, 53 L.Ed.2d 594]; *Strickler v. Greene* (1999) 527 U.S. 263, 268 [119 S.Ct. 1936, 144 L.Ed.2d 286] (good cause to excuse procedural default where prosecutor did not disclose exculpatory material); *Murray v. Carrier* (1986) 477 U.S. 478, 488 [106 S.Ct. 2639, 91 L.Ed.2d 397] (same); *Manning v. Foster* (9th Cir. 2000) 224 F.3d 1129, 1133 (prison officials' interference with a petitioner's access to administrative remedies can be cause for a procedural default).

direct appeal, but does not guarantee appointment of counsel or effective assistance by counsel for the habeas proceeding.[71]

A federal court may also address a procedurally defaulted claim if there is new evidence showing that the petitioner is actually innocent.[72] The petitioner must show it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence.[73] It is possible to meet this standard with evidence that "casts a vast shadow of doubt" about the reliability of the state's proof of guilt.[74] However, even new evidence impeaching the prosecution's witnesses does not necessarily require relief from procedural default if the federal court does not think that the new evidence would have changed the outcome of the trial.[75]

7. When to File: Time Limits and Tolling Provisions

There are strict time limits (called "statute of limitations") for filing a federal habeas corpus petition. However, the federal habeas statute does allow some circumstances in which time is "tolled," meaning that the time does not count toward the deadline. There are also some situations in which courts may toll the time limits in the interests of fairness; this is called "equitable" tolling. Calculating the actual deadline in cases in which part of the time was "tolled" can be quite complicated. For petitioners petitioning for habeas review of a misdemeanor conviction, the one-year statute of limitations begins once the state Supreme Court denies their state habeas petition and the United States Supreme Court denies certiorari or the 90-day period for petitioning for certiorari expires.[76]

A federal court may, on its own motion consider whether a federal habeas petition is timely. However, before dismissing a petition as untimely, the court must give the parties notice and an opportunity to show why the petition should not be dismissed as untimely. If the court does not address an untimeliness concern on its own motion, then the state may raise it as a

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[71] *Trevino v. Thaler* (2013) __ U.S. __ [133 S.Ct. 1911, 1918, 185 L.Ed.2d 1044] (where state procedures make it unlikely that defendant had a meaningful opportunity to raise ineffective assistance claim on direct appeal, there is good cause to excuse procedural default if the defendant had no counsel or counsel was ineffective during the state collateral-review proceedings); *Martinez v. Ryan* (2012) __ U.S. __ [132 S.Ct. 1309, 1315, 182 L.Ed.2d 272]; *Sexton v. Cozner* (9th Cir. 2012) 679 F.3d 1150, 1157; *Lopez v. Ryan* (9th Cir. 2012) 678 F.3d 1131, 1137.

[72] *Schlup v. Delo* (1995) 513 U.S. 298, 314 [115 S.Ct. 851, 130 L.Ed.2d 808] (new evidence showing innocence); *Griffin v. Johnson* (9th Cir. 2003) 350 F.3d 956, 961 (newly presented evidence, as well as newly discovered evidence can be considered under *Schlup*); *La Grand v. Stewar*t (9th Cir. 1998) 133 F.3d 1253, 1261 (procedural default will be set aside if petitioner can show actual prejudice).

[73] *Schlup v. Delo* (1995) 513 U.S. 298, 333 [115 S.Ct. 851, 130 L.Ed.2d 808]; *House v. Bell* (2006) 547 U.S. 518, 536 [126 S.Ct. 2064, 165 L.Ed.2d 1]. 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, 393 [124 S.Ct. 1847, 158 L.Ed.2d 659].

[74] *Carriger v. Stewart* (9th Cir. 1997) 132 F.3d 463, 477.

[75] *Smith v. Baldwin* (9th Cir. 2007) 510 F.3d 1127, 1139; *Sistrunk v. Armenakis* (9th Cir. 2002) 292 F.3d 669, 673.

[76] *McMonagle v. Meyer* (9th Cir. 2014) 766 F.3d 1151, 1154.

defense in its first responsive pleading by arguing that the petitioner has not met the timelines.[77] If a state deliberately waives the right to challenge a petition as being untimely, the federal court may not on its own motion dismiss the petition on untimeliness grounds.[78]

A. Time Limits

There are several different events that can trigger the start of the one-year period.[79] The timeline rules apply to each claim on an individual basis, so sometimes different claims may have different deadlines.[80]

A federal habeas petition is timely if the petition is filed within one year and 90 days after the California Supreme Court files an order denying a petition for review in a criminal appeal case; the additional 90 days is for the period of time in which the appellant could have filed a petition for writ of certiorari in the United States Supreme Court.[81] If a petition for certiorari is filed, the one-year deadline does not start running until the petition for certiorari is denied.

If a state court reverses all or part of a sentence and remands the case for re-sentencing, the one-year timeline for the case does not begin to run until the re-sentencing and any new direct appeal from the re-sentencing has concluded.[82]

If a person does not timely appeal or timely petition for review, the federal habeas timeline starts running when the time for filing the notice of appeal or the petition for review expired.[83] In California, this means that if the defendant did not pursue the criminal case on direct appeal, the federal habeas timeline started to run 60 days after the judgment was pronounced.[84] If the defendant pursued a direct appeal, but did not file a timely petition for review in the

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[77] Fed. Rules Civ. Proc., rules 8(c) and 12(b), 28 U.S.C.; *Day v. McDonough* (2006) 547 U.S. 198, 207 [126 S.Ct. 1675, 164 L.Ed.2d 376]; *Morrison v. Mahoney* (9th Cir. 2005) 399 F.3d 1042. For purposes of this rule, "responsive pleadings" do not include a motion to dismiss due to failure to exhaust state remedies, a stipulation to stay the proceedings, or an opposition to a motion to reopen the case following exhaustion. *Randle v. Crawford* (9th Cir. 2010) 604 F.3d 1047, 1052.

[78] *Wood v. Milyard* (2012) __ U.S. __ [132 S.Ct. 1826, 1834, 182 L.Ed.2d 733].

[79] 28 U.S.C. § 2244(d)(1).

[80] *Mardesich v. Cate* (9th Cir. 2012) 668 F.3d 1164, 1169.

[81] *Clay v. U.S.* (2003) 537 U.S. 522, 527-528 [123 S.Ct. 1072, 155 L.Ed.2d 88]. If the California Supreme Court reopens direct review of a case, the one-year timeline starts anew when the state Supreme Court issues its final decision in the case. *Thomson v. Lea* (9th Cir. 2012) 681 F.3d 1093, 1093-1094.

[82] See *Burton v. Stewart* (2007) 549 U.S. 147, 156-158 [127 S.Ct. 793, 166 L.Ed.2d 628].

[83] *Hemmerle v. Schriro* (9th Cir. 2007) 495 F.3d 1069, 1073. When a state court dismisses a case because the notice of appeal was untimely filed, the dismissal decision does not "restart" the one-year timeline. *Randle v. Crawford* (9th. Cir. 2010) 604 F.3d 1047, 1055. However, if a state court allows a case to go forward even though the notice of appeal was filed late, the one-year timeline starts does not start running until the appeal case is finished. *Jimenez v. Quarterman* (2009) 555 U.S. 113, 119 [129 S.Ct. 681, 172 L.Ed.2d 475].

[84] Cal. Rules of Court, rule 8.104.

California Supreme Court, then the clock presumably starts running either 40 or 60 days after the Court of Appeal decision was issued.[85]

In a case where there is no right to a direct appeal in court – such as a denial of parole suitability or a prison disciplinary decision resulting in a credit loss – the federal habeas timeline begins to run when the prison or parole officials' decision becomes final. If any type of administrative appeal is available, then the clock will not start to run until either the deadline for filing or re-filing an administrative appeal expires or the administrative appeal is decided at the highest level.[86]

Other events can trigger the one-year timeline. If new facts about the case are discovered, then the time starts to run on the date the facts first "could have been discovered" through "the exercise of due diligence."[87]

The one-year timeline for raising a claim can also start when a newly recognized legal right is created by the U.S. Supreme Court.[88] However, 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 deadline.[89]

The most uncommon event that can start the one-year timeline is the date that an "unconstitutional impediment" to filing was removed.[90]

Courts may excuse a failure to comply with the one-year timeline for claims of actual innocence.[91] Any unjustifiable delay on the prisoner's part may be considered as a factor in determining whether actual innocence has been reliably shown, but is not an absolute bar to relief. A petitioner invoking this exception "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."[92]

A petition is deemed filed when it is delivered to prison authorities for mailing.[93] Even if the document never actually gets delivered to the court, a prisoner gets the benefit of this "prison

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[85] There is no published case on this. However, 40 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. Cal. Rules of Court, rules 8.264(b) and 8.500(e).

[86] *Shelby v. Bartlett* (9th Cir. 2004) 391 F.3d 1061, 1063; *Redd v. McGrath* (9th Cir. 2003) 343 F.3d 1077, 1081 (note: since this case was decided, the BPH has abolished its administrative appeal procedure).

[87] 28 U.S.C. § 2244(d)(1); *Lee v. Lampert (9th Cir. 2011) 653 F.3d 929, 933*.

[88] 28 U.S.C. § 2244(d)(1).

[89] *Shannon v. Newland* (9th Cir. 2005) 410 F.3d 1083, 1087.

[90] 28 U.S.C. § 2244(d)(1).

[91] *Vosgien v. Persson* (9th Cir. 2014) 742 F.3d 1131, 1133; *Stewart v. Cate* (9th Cir. 2014) 757 F.3d 929, 939.

[92] *McQuiggin v. Perkins* (2013) __ U.S. __ [133 S.Ct. 1924, 1935, 185 L.Ed.2d 1019].

[93] *Houston v. Lack* (1988) 487 U.S. 266, 270 [108 S.Ct. 2379, 101 L.Ed. 245]; *Miles v. Prunty* (9th Cir. 1999) 187 F.3d 1104, 1106, fn. 2; *Hernandez v. Spearman* (9th Cir. 2014) 764 F.3d 1071, 1074.

mailbox rule" as long as he or she follows up after failing to receive a response from the court within a reasonable period of time.[94]

B. Statutory Tolling

Federal habeas law states that the time during which a "properly filed application for State post-conviction or other collateral review" with respect to the judgment or claim is "pending" shall not count toward the one-year time limits for filing a federal habeas petition.[95] In other words, for example, if a state court is reviewing a judgment on habeas review, that time during which the court is doing the review does not count towards the one-year deadline. The federal habeas timeline is tolled even if the post-conviction proceeding does not include the claim that is later asserted in the federal habeas petition.[96] Stopping the timeline clock during such periods is called statutory tolling.

The most common situation for statutory tolling is when a person files a state habeas petition, either joined with a direct appeal or independent of any direct appeal. Generally, "properly filed" means that the state habeas petition complied with the procedural laws and rules that set the requirements for the time of filing, the form of the document, the location and type of court in which it must be filed, and any filing fee.[97]

To be "properly filed," a state habeas petition must be timely.[98] Generally, so long as a petitioner proceeds in a timely fashion, statutory tolling covers the entire period from the date the initial state habeas petition is filed through refiling in the court of appeal and state supreme court,

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[94] *Huizar v. Carey* (9th Cir. 2001) 273 F.3d 1220, 1123.

[95] 28 U.S.C. § 2244(d)(2). A motion to vacate an illegal sentence qualifies for statutory tolling. *Tillema v. Long* (9th Cir. 2001) 253 F.3d 494, 499.

[96] *Tillema v. Long* (2001) 253 F.3d 494, 502.

[97] For example, a state court habeas petition was not properly filed until the necessary verification was submitted and the court officially filed the petition, even though the court received the petition without a verification a week earlier. *Zepeda v. Walker* (9th Cir. 2009) 581 F.3d 1013, 1016.

The issue of whether a petition has been "properly filed" is separate from the issues of whether the claims in the petition are procedurally barred; thus, sometimes a petition has been properly filed even if the state courts denied the claims on procedural grounds. *Artuz v. Bennett* (2000) 531 U.S. 4, 8 [121 S.Ct. 361, 148 L.Ed.2d 213].

[98] *Allen v. Siebert* (2007) 552 U.S. 3, 5 [128 S.Ct. 2, 169 L.Ed.2d 329] (timeline is not tolled by an untimely state habeas petition, regardless of whether the state time rule is mandatory or discretionary); *Cross v. Sisto* (9th Cir. 2012) 676 F.3d 1172, 1177; *Lakey v. Hickman* (9th Cir. 2011) 633 F.3d 782, 786; *White v. Martel* (9th Cir. 2010) 601 F.3d 882, 883. If there was disagreement in the state courts as to whether the petition was timely, the decision of the highest state court determines the matter. *Campbell v. Henry* (9th Cir. 2010) 614 F.3d 1056, 1060-1061.

including the time between a lower court's decision and refiling at the next level.[99] When the state supreme court habeas decision becomes final, the federal habeas clock begins to run.[100]

California's lack of any set deadline for filing a state habeas corpus petition or re-filing a petition to a higher court after a denial has led to a lot of disagreements about the circumstances in which a state habeas corpus petition is "properly filed" and when it is "pending." Over time, courts have established some general principles in this arena.

If a state habeas petition is rejected by the state court as untimely, it is not "properly filed." There is no statutory tolling for the time preceding the petition.[101]

However, even if the state courts address the issues in a habeas petition or do not mention untimeliness, federal courts still can decide that not all of the time between filings is statutorily tolled if there were "unreasonable" delays.[102] A period of 30 or 60 days between a lower court denial and filing in a higher court is presumptively reasonable.[103] But there is no bright-line rule about how much delay is unreasonable and courts have reached various conclusions in different circumstances.[104]

More complications arise when a prisoner files multiple rounds of state court habeas proceedings. Whether the period between the rounds is tolled depends on when the various sets of habeas actions were filed and what issues were raised. If a person completes a full round of petitions and then brings a new round of petition raising different claims, the time between the

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[99] *Carey v. Saffold* (2002) 536 U.S. 214, 219 [122 S.Ct. 2134, 153 L.Ed.2d 260]; *Noble v. Adams* (9th Cir. 2012) 676 F.3d 1180, 1183; see also *Brown v. Poole* (9th Cir. 2003) 337 F.3d 1155, 1158 (state habeas petition was pending, and statutory tolling applied, during time petition was temporarily removed from the court calendar at the petitioner's request while awaiting the result of new parole hearing).

[100] A California Supreme court order denying a habeas petition becomes final immediately in cases in which no order to show cause was issued. If an order to show cause was issued, then the decision becomes final 30 days after it was issued. Cal. Rules of Court, rule 8.532.

The federal habeas timeline is not tolled further to allow a state habeas petitioner to file a petition for writ of certiorari in the United States Court. Even if a petitioner does file a certiorari petition from a state habeas case, the time limits are not tolled while that petition is pending. *Lawrence v. Florida* (2007) 549 U.S. 327, 331 [127 S.Ct. 1079, 166 L.Ed.2d 924].

[101] *Pace v. DiGuglielmo* (2005) 544 U.S. 408, 418 [125 S.Ct.1807, 161 L.Ed.2d 669]; *Bonner v. Carey* (9th Cir. 2005) 425 F.3d 1146, 1148.

[102] *Carey v. Saffold* (2002) 536 U.S. 214, 225 [122 S.Ct. 2134, 153 L.Ed.2d 260]; *Evans v. Chavis* (2006) 546 U.S. 189, 197 [126 S.Ct. 846, 163 L.Ed.2d 684].

[103] *Evans v. Chavis* (2006) 546 U.S. 189, 201 [126 S.Ct. 846, 163 L.Ed.2d 684].

[104] *Chaffer v. Prosper* (9th Cir. 2010) 592 F.3d 1046, 1048 (no tolling for 115 days between denial of habeas petition by superior court and refiling in the court of appeal, or for 101 days between denial of petition by the court of appeal and filing in the California Supreme Court); *Waldrip v. Hall* (9th Cir. 2008) 548 F.3d 729, 734 (no tolling during an unjustified eight-month delay between denial of habeas petition by a lower court and refiling in the California Supreme Court); *Gaston v. Palmer* (9th Cir. 2006) 447 F.3d 1165, 1167 (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 complex case).

end of the first round and the start of the second round is not tolled.[105] If a person files two separate rounds of petitions on the same claims, the gaps between the two rounds are tolled only if the second set of petitions simply attempted to correct deficiencies in the original petition and the time between the two rounds was not unreasonable.[106] If several overlapping sets of timely petitions are filed, the prisoner will most likely be entitled to tolling until the last set of petitions is decided.[107]

C. Equitable Tolling

The federal habeas timeline may be extended in the interests of justice if the prisoner pursued his or her case diligently, but "extraordinary circumstances" beyond the prisoner's control made it impossible to file the federal habeas petition on time.[108] This is called "equitable tolling." Note that if equitable tolling excuses only part of a long delay, then the federal habeas petition still might not be deemed timely.[109]

A person's mental impairment may justify equitable tolling, depending on how severe the impairment is and the degree to which it affects the person's ability to meet the timeline.[110] The petitioner must show diligence in pursuing the petition to the extent he or she was able to do so, and that the mental impairment made it impossible to meet the filing deadline under the totality of the circumstances, including consideration of any reasonably available types of assistance.[111]

Lack of access to the case file or to adequate legal materials can be grounds for equitable tolling. A petitioner who is seeking equitable tolling on this ground should explain why the

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[105] *Biggs v. Duncan* (9th Cir. 2003) 339 F.3d 1045, 1048; see also *Welch v. Carey* (9th Cir. 2003) 350 F.3d 1079, 1082 (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).

[106] *Banjo v. Ayers* (9th Cir. 2010) 614 F.3d 964, 969-971; *Hemmerle v. Schriro* (9th Cir. 2007) 495 F.3d 1069, 1075; *King v. Roe* (9th Cir. 2003) 340 F.3d 821, 823.

[107] See *Delhomme v. Ramirez* (9th Cir. 2003) 340 F.3d 817, 819; *Stancle v. Clay* (9th Cir. 2012) 692 F.3d 948, 953 (gaps between filings of petitions does not count towards one-year deadline if the later petition is filed to elaborate facts relating to the first petition or if the petitioner was attempting to correct deficiencies in the first petition and the petition was deemed timely); *Hernandez v. Spearman* (9th Cir. 2014) 764 F.3d 1071, 1077 (same).

[108] *Holland v. Florida* (2010) 560 U.S. 631, 633 [130 S.Ct. 2549, 177 L.Ed.2d 130]; *Nedds v. Calderon* (9th Cir. 2012) 678 F.3d 777, 780; *Spitsyn v. Moore* (9th Cir. 2003) 345 F.3d 796, 799.

[109] *Rudin v. Myles* (9th Cir. 2014) 766 F.3d 1161, 1174.

[110] *Bills v. Clark* (9th Cir. 2010) 628 F.3d 1092, 1100 (equitable tolling where prisoner had low IQ and low literacy so severe he was unable to understand timeliness requirement); *Roberts v. Marshall* (9th Cir. 2010) 627 F.3d 768, 772 (no equitable tolling even though prisoner was taking psychotropic medications, where no indication prisoner was unable to function well enough to file timely petition); *Espinoza-Matthews v. California* (2005) 432 F.3d 1021, 1024 (petitioner's mental health were important factors in considering tolling); *Laws v. LaMarque* (9th Cir. 2003) 351 F.3d 919 (state prisoner was entitled to further factual development of or an evidentiary hearing on the issue of whether his mental illness prevented him from timely filing petition for writ of habeas corpus); *Forbess v. Franke* (9th Cir. 2014) 749 F.3d 837, 840 (severe mental delusions that prevented petitioner from understanding filing rules justified equitable tolling); *Yow Ming Yeh v. Martel* (9th Cir. 2014) 751 F.3d 1075, 1078 (mental illness not severe enough to merit equitable tolling; petitioner showed awareness of basic legal concepts and he repeatedly sought administrative and judicial remedies).

[111] *Stancle v. Clay* (9th Cir. 2012) 692 F.3d 948, 958.

circumstances prevented filing a timely petition and what diligent steps were taken to file a petition as soon as possible.[112] Ordinary limits on access to a law library and copying facilities due to placement in segregation will not result in tolling.[113]

A prisoner's lack of knowledge that the state courts had decided his or her case may be grounds for equitable tolling if the prisoner acted diligently once he learned about the decision.[114]

Equitable tolling is not justified where an attorney negligently gives wrong advice to a prisoner about the federal habeas deadline.[115] However, equitable tolling may be appropriate if an attorney acts egregiously and the prisoner was diligent in his attempts to get the petition filed. This might occur when an attorney is hired to file a federal habeas petition or promises to file a petition, but fails to do so, especially if the attorney disregards the client's requests for information or to return the case file until after the deadline has passed.[116]

Equitable tolling may also be granted when a prisoner relies on a federal court's incorrect advice or ruling about the habeas timelines.[117] Similarly, time may be tolled if the federal court erroneously dismisses the petition or gives incorrect information on the consequences of a

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[112] See *Chaffer v. Prosper* (9th Cir. 2010) 592 F.3d 1046, 1049 (no tolling where delay was due to prisoner's reliance on jailhouse lawyers who were busy or transferred); *Waldron-Ramsey v. Pacholke* (9th Cir 2009) 556 F.3d 1008, 1011 (denial of tolling where prisoner did not act diligently); *Bryant v. Schriro* (9th Cir. 2007) 499 F.3d 1056, 1060 (petitioner failed to show how lack of access to case law caused delay and failed to show due diligence); *Roy v. Lampert* (9th Cir. 2006) 465 F.3d 964, 969 (hearing proper where sufficient allegations that claims were diligently pursued and extraordinary circumstance existed); *Mendoza v. Carey* (9th Cir. 2006) 449 F.3d 1065, 1069 (lack of Spanish-language materials may merit equitable tolling); *Yow Ming Yeh v. Martel* (9th Cir. 2014) 751 F.3d 1075, 1078 (limited English proficiency did not merit equitable tolling); *Whalem/Hunt v. Early* (9th Cir. 2000) 233 F.3d 1146, 1148 (remanding case because district court was in a better position to determine whether there were facts and impediments that merited equitable tolling); *Stillman v. LaMarque* (9th Cir. 2003) 319 F.3d 1199, 1201 (petitioner entitled to equitable tolling because of prison officials' misconduct in breaking promise to obtain signature in time for filing); *Lott v. Mueller* (9th Cir. 2002) 304 F.3d 918, 922 (deadline may be tolled during period in which petitioner lacked access to legal files).

[113] *Ramirez v. Yates* (9th Cir. 2009) 571 F.3d 993, 998.

[114] *Ibid.; Gibbs v. Legrand* (9th Cir. 2014) 767 F.3d 879, 886 (attorney's failure to notify petitioner that state supreme court had denied appeal consisted abandonment of petitioner and excused petitioner's failure to file habeas petition within statutory deadline); *Rudin v. Myles* (9th Cir. 2014) 766 F.3d 1161, 1172 (three year delay in filing habeas petition justified where petitioner did not know that attorney had abandoned her appeal).

[115] *Frye v. Hickman* (9th Cir. 2001) 273 F.3d 1144, 1146.

[116] *Doe v. Busby* (9th Cir. 2011) 661 F.3d 1001, 1011; *Porter v. Ollison* (9th Cir. 2010) 620 F.3d 952, 960; *Spitsyn v. Moore* (9th Cir. 2003) 345 F.3d 796, 801; see also *U.S. v. Battles* (9th Cir. 2004) 362 F.3d 1195, 1197 (equitable tolling may apply where trial counsel withheld trial transcripts from petitioner).

[117] *Sossa v. Diaz* (9th Cir. 2013) 729 F.3d 1225, 1230 (prisoner entitled to equitable tolling after he reasonably relied on district court's orders setting filing dates for an amended petition); *Nedds v. Calderon* (9th Cir. 2012) 678 F.3d 777, 782 (equitable tolling may apply where petitioner relies on precedent that is later overturned); *Harris v. Carter* (9th Cir. 2008) 515 F.3d 1051, 1054 (prisoners entitled to equitable tolling where they relied on Ninth Circuit's then-effective interpretation of the timeline, which was later overruled by the U.S. Supreme Court); *Townsend v. Knowles* (9th Cir. 2009) 562 F.3d 1200, 1205 (same). However, there was no equitable tolling where a prisoner neither showed that he relied on the Ninth Circuit's prior incorrect interpretation of the law nor showed good cause for a further delay in filing after the U.S. Supreme Court overruled the Ninth Circuit. *Lakey v. Hickman* (9th Cir. 2011) 633 F.3d 782, 787.

dismissal to pursue exhaustion.[118] To get tolling, a petitioner must still be diligent in pursuing exhaustion in state court.[119] Also, equitable tolling is not justified if the court does not affirmatively mislead the prisoner.[120] However, failure to notify the petitioner that he can abandon his unexhausted claims and proceed with his exhausted claims, where the district court is dismissing the petition as contained both exhausted and unexhausted claims, will merit equitable tolling so long as the petitioner is pursuing his federal habeas remedies with diligence.[121]

8. Restrictions on Multiple Petitions

A prisoner should attempt to bring all the federal habeas claims for a case in one petition. However, if new claims arise or become exhausted after a petition has been filed but while it is still pending, the federal court may allow the petitioner to amend the petition to add the new claims.[122]

There are a few situations in which a prisoner can file multiple petitions without violating the rule prohibiting "successive" petitions. A new petition can be filed following an amended judgment or a resentencing.[123] A petition challenging prison officials' calculation of a release date is not a "successive" petition even if the prisoner has previously filed a petition challenging the underlying conviction and sentence.[124]

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[118] *Tillema v. Long* (9th Cir. 2001) 253 F.3d 494, 503 (equitable tolling where court dismissed mixed petition without giving the petitioner the option of proceeding on only the exhausted claims); *Smith v. Ratelle* (9th Cir. 2003) 323 F.3d 813, 819 (prisoner entitled to equitable tolling because court misled him to believe he could dismiss his petition, exhaust his claims, and then re-file even though the time limits had already expired).

[119] *Guillory v. Roe* (9th Cir. 2003) 329 F.3d 1015, 1018; *Fail v. Hubbard* (9th Cir. 2002) 315 F.3d 1059, 1062.

[120] *Ford v. Pliler* (9th Cir. 2009) 590 F.3d 782, 786 (prisoner not entitled to equitable tolling where federal court did not affirmatively misadvise him, even though court failed to warn that the deadline had expired and that voluntarily dismissing the petition would bar prisoner from pursuing the claims); *Brambles v. Duncan* (9th Cir. 2005) 412 F.3d 1066, 1070 (prisoner not entitled to equitable tolling when court failed to inform him of all consequences of choosing to have a mixed petition dismissed, but did not affirmatively mislead the petitioner); *Pliler v. Ford* (2004) 542 U.S. 225, 231 [124 S.Ct. 2441, 159 L.Ed.2d 338] (federal habeas court was not required to warn petitioner, that the court would have no power to consider motion to stay petition unless he opted to amend it and dismiss the then-unexhausted claims, and that petitioner's federal claims would be time-barred, absent cause for equitable tolling, upon his return to federal court if he opted to dismiss the petitions without prejudice and return to state court to exhaust all of his claims).

[121] Butler v. Long (9th Cir. 2014) 752 F.3d 1177, 1181.

[122] See, e.g., *Willis v. Collins* (5th Cir. 1993) 989 F.2d 187, 188; *Diaz v. U.S.* (11th Cir. 1991) 930 F.2d 832, 835. When a *pro se* prisoner files a second petition before a prior petition has been decided, the new petition should be deemed to be a motion to amend the original petition rather than as a successive petition. *Woods v. Carey* (9th Cir. 2008) 525 F.3d 886, 889.

[123] *Wentzell v. Neven* (9th Cir. 2012) 674 F.3d 1124, 1126.

[124] *Hill v. Alaska* (9th Cir. 2002) 297 F.3d 895, 899.

Otherwise, a person who wants to bring a second habeas petition must apply for permission to do so from the Ninth Circuit Court of Appeals.[125] If the Ninth Circuit denies the motion, the petitioner cannot ask for rehearing or request review in the U.S. Supreme Court.[126]

There are very limited circumstances in which a person will be allowed to proceed with a second petition. Any claim that has been previously raised and denied on the merits in a federal habeas petition will be dismissed.[127] Any claim that has previously been dismissed due to procedural default (see § 6 will be dismissed.[128] There are only a few grounds that will allow a person to bring a second petition:

the claim relies on a new retroactive rule of constitutional law,[129] or

the claim relies on new facts that could not previously have been discovered through reasonable efforts *and* the new facts show by clear and convincing evidence that no reasonable fact-finder would have found the person guilty if those facts had been presented at trial.[130]

Even if successive petitions are allowed, the petitioner must still meet the time limits for filing. Time when a federal habeas petition is pending does not toll the timeline for filing a second habeas petition.[131]

9. Where to File the Petition

A federal petition for writ of habeas corpus challenging a criminal judgment should be filed in the federal district court for the region where the person was convicted and sentenced. A petition challenging a decision by prison or parole officials should be filed in the district court for the region where the person is incarcerated. An address list attached to this manual contains a list of the federal courts and the counties and institutions in their regions.

A habeas petition may be transferred from one district to another "in the furtherance of justice."[132]

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[125] 28 U.S.C. § 2244(b)(3); *Felker v. Turpin* (1996) 518 U.S. 651, 662 [116 S.Ct. 2333, 135 L.Ed.2d 827].

[126] 28 U.S.C. § 2244(b)(4).

[127] 28 U.S.C. § 2244(b)(1); *Moormann v. Schriro* (9th Cir. 2012) 672 F.3d 644, 647; *Allen v. Ornoski* (9th Cir. 2006) 435 F.3d 946, 955 (successive petition barred).

[128] *Henderson v. Lampert* (9th Cir. 2004) 396 F.3d 1049, 1053.

[129] 28 U.S.C. § 2244(b)(2); *Tyler v. Cain* (2001) 533 U.S. 656, 662 [121 S.Ct. 2478, 150 L.Ed.2d 632] (new case could not be basis for successive petition because it did not apply retroactively).

[130] 28 U.S.C. § 2244(b)(2); *Pizzuto v. Blades* (9th Cir. 2012) 673 F.3d 1003, 1009; *Bible v. Schriro* (9th Cir. 2011) 651 F.3d 1060, 1063; *Cooper v. Calderon* (9th Cir. 2002) 308 F.3d 1020, 1024 (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).

[131] *Duncan v. Walker* (2001) 533 U.S. 167, 172 [121 S.Ct. 2120, 150 L.Ed.2d 251].

[132] 28 U.S.C. § 2241(d).

10. Who Should be Named as Respondent

A petitioner must name the "state officer having custody" as the respondent.[133] Typically, this is the warden of the facility in which the petitioner is incarcerated.[134] However, the Director of the CDCR also may be named as the respondent.[135]

11. Forms and Procedures for Filing a Petition

The district courts have created official forms for state prisoners to use when filing federal habeas petitions.[136] Each district has its own form and filing instructions. Prisoners who are filing habeas petitions on their own *must* use these forms. The forms are also useful for attorneys because they show what must be included in a petition. The habeas corpus petition forms and instructions for the federal district courts in California should be available in every prison law library. Free copies of the forms may be obtained by writing to the clerk of the court. Most of the courts also have the forms and rules available on their websites.

The petitioner should state the facts and legal grounds specifically but concisely and should attach as exhibits documents that help prove the case. If a petition is too vague, the court can dismiss the case. However, the court should first allow the prisoner an opportunity to amend the petition to correct the problem, unless the court determines that there is no possible valid legal claim.[137]

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 can get permission to file without paying the fee. This is called *in forma pauperis* status. To get *in forma pauperis* status, a petitioner must fill out and file a form listing any income or property. The petitioner must attach a copy of his or her trust account statement showing transactions for the last six months and a certificate signed by a prison staff member.[138] The *in forma pauperis* application forms for the federal district courts in California should be available in each prison law library and from the federal court clerks or federal court websites.

It is not necessary for the prisoner to serve the petition on the respondent. If the court allows the petition to proceed, it will serve the petition on the respondent.[139]

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[133] 28 U.S.C. § 2254; Federal Rules of Habeas Corpus, rule 2(a).

[134] *Stanley v. California* (9th Cir. 1994) 21 F.3d 359, 360.

[135] *Ortiz-Sandoval v. Gomez* (9th Cir. 1996) 81 F.3d 891, 895.

[136] Federal Rules of Habeas Corpus, rule 2(c).

[137] *Jarvis v. Nelson* (9th Cir. 1971) 440 F.2d 13, 14; *Ballard v. Nelson* (9th Cir. 1970) 423 F.2d 71, 73.

[138] A prisoner who is nearing the AEDPA filing deadline and is having problems getting prison staff to provide the supporting 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 without a filing fee. Federal Rules of Habeas Corpus, rule 3(b). The prisoner should then be allowed to file the rest of the *in forma pauperis* documents within a reasonable period of time.

[139] Federal Rules of Habeas Corpus, rule 4.

12. Requesting an Attorney

There generally is no right to an attorney in a federal habeas case (except for cases involving the death penalty).[140] There are exceptions – the court must appoint an attorney if necessary for effective discovery, if an evidentiary hearing is necessary, or if necessary for due process.[141]

Federal judges have discretion to appoint an attorney in other extraordinary circumstances if doing so is in the interests of justice. A court making such a determination will consider the strength and complexity of the issues and the petitioner's ability to articulate the claims.[142]

A person usually must file a habeas corpus petition showing a real possibility of constitutional error before a court will consider appointing an attorney. When filing a habeas petition, a person who wants an attorney should file a motion for appointment of counsel and a declaration saying why the petitioner cannot effectively represent himself or herself. If the request is denied, the petitioner might want to renew the request after the respondent files a motion to dismiss or an answer.

A petitioner cannot appeal from the denial of a request for an attorney until after the district court decides the habeas petition.[143]

13. Procedures After a Petition is Filed

When the petition is filed, the court will screen it to make sure that all the basic procedural requirements have been met and that the case raises a viable legal claim.

If the court allows the petition to proceed, it will issue an order giving the respondent an opportunity to file briefing. The respondent can either file a motion to dismiss the petition due to a procedural defect or file an "answer" responding to the legal and factual issues in the petition. If the respondent files an answer, the respondent must state what records are available for the case and attach any relevant state court transcripts, briefs and decisions.[144]

The petitioner will then have an opportunity to file either an opposition to a motion to dismiss or a reply (called a "traverse") to the respondent's answer.[145] The petitioner should serve the respondent by mail with a copy of any document filed in the court.

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[140] *Chaney v. Lewis* (9th Cir. 1986) 801 F.2d 1191, 1196.

[141] Federal Rules of Habeas Corpus, rule 6(a) (discovery) and rule 8(c) (evidentiary hearing); *Eskridge v. Rhay* (9th Cir. 1965) 345 F.2d 778, 782 (due process); *Dillon v. U.S.* (9th Cir. 1962) 307 F.2d 445, 447 (due process).

[142] 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, 1234.

[143] *Kuster v. Block* (9th Cir. 1985) 773 F.2d 1048, 1049.

[144] Federal Rules of Habeas Corpus, rule 5(a)-(d).

[145] Federal Rules of Habeas Corpus, rule 5(e).

Usually, the court orders will set forth the deadlines for further briefing. A petitioner who cannot meet a deadline can file a request asking the court to grant an extension of time.

The federal court can order the parties to produce additional documents or evidence. This is called an order for "discovery."[146] In limited circumstances (see § 4), the court may also allow the parties to "expand the record" by filing additional documents or holding evidentiary hearings to develop the facts.[147]

The federal judge may ask the parties to consent to have the case heard by a magistrate judge. If consent is given, the magistrate judge will conduct the proceedings and will make findings and recommendations, which the federal district court judge will adopt or reject.[148]

14. Motions for Modification or Relief

If a habeas petition is denied, the prisoner may file a motion for relief from the judgment in some circumstances. For example, if a new United States Supreme Court decision changes the federal landscape on a point of law concerning habeas review, a federal court may grant a motion for reconsideration of a prior denial of habeas review, given the new change in law.[149]

If the motion for relief from the judgment is based on a claim of mistake or excusable neglect, newly discovered evidence, or fraud or misconduct by an opposing party, then the motion must be filed no later than a year after the entry of judgment.[150] Otherwise, a motion for relief from the judgment merely must be made within a "reasonable time."[151]

On the other hand, a district court may grant habeas relief by remanding the case to the state court and ordering release of the prisoner or alternatively modification of the judgment by the state to a lawful conviction.[152] If the state fails to comply with this order, the state can instead

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[146] 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].

[147] Federal Rules of Habeas Corpus, rules 7 and 8.

[148] 28 U.S.C. § 636; Federal Rules of Habeas Corpus, rule 10.

[149] Fed. Rules Civ. Proc., rule 60(b), 28 U.S.C.; *Schad v. Ryan* (9th Cir., Feb. 26, 2013, 07-99005) 2013 WL 791610, at *1. However, such a motion must be justified by exceptional circumstances, *Ryan v. Schad* (2013) 133 S.Ct. 2548, 2549, and cannot be used to get around the bar on successive petitions on the same issue. *Schad v. Ryan* (9th Cir. 2013) 709 F.3d 855, 857. A motion for relief is not a successive habeas petition if the motion challenges only the court's ruling on the application of the federal habeas time limits. *Gonzalez v. Crosby* (2005) 545 U.S. 524, 533 [125 S.Ct. 2641, 162 L.Ed.2d 180].

[150] Fed. Rules Civ. Proc., rule 60(c), 28 U.S.C.

See, e.g., Fed. Rules Civ. Proc., rule 60(b), 28 U.S.C.; see also *Phelps v. Alameida* (9th Cir. 2009) 569 F.3d 1120, 1134 (prisoner entitled to reconsideration where Ninth Circuit panels reached varying outcomes in similar cases pending at same time, legal issue was subsequently resolved in prisoner's favor, and prisoner acted diligently in pursuing case).

See, e.g., *Harvest v. Castro* (9th Cir. 2008) 531 F.3d 737, 740.

request a modification of the order for an extension of time, if the state can show cause under rule 60 of the Federal Rules of Civil Procedure.[153]

15. Appealing From a Denial

A person may appeal from a "final order" in a federal habeas corpus proceeding.[154] The petitioner must file two documents: a notice of appeal and a request for a certificate of appealability.

A. Notice of Appeal

To appeal from a denial of a federal habeas petition, a petitioner must file a notice of appeal in the federal district court within 30 days after the entry of the district court's final order.[155] As with other federal habeas documents, a *pro se* prisoner's notice of appeal is deemed to be"filed"when it is delivered to prison authorities for mailing.[156]

A petitioner who cannot meet the 30-day deadline may request an extension of time or permission to file a late notice of appeal. The request must be made within 60 days after the district court order. The petitioner must show that failure to meet the filing deadline was due to excusable neglect or good cause.[157] The time for filing the notice of appeal can be extended no longer than the
60th day after the district court judgment was entered or the 10th day following an order granting an extension of time.[158]

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[153] *Id*. at p. 744; Fed. Rules Civ. Proc., rule 60, 28 U.S.C.

[154] 28 U.S.C. § 2253. An order by a federal district court requiring a new parole hearing is not a final judgment and thus cannot be appealed. *Prellwitz v. Sisto* (9th Cir. 2011) 657 F.3d 1035, 1038. (Note that this case involved an order issued before *Swarthout v. Cooke* (2011) 562 U.S. 216 [131 S.Ct. 859, 862, 178 L.Ed.2d 732] held that California lifers cannot bring federal habeas petitions challenging denials of parole suitability for lack of some evidence).

[155] Fed. Rules App. Proc., rule 4(a), 28 U.S.C.; 28 U.S.C. § 2107; *Browder v. Illinois Dept. of Corrections* (1978) 434 U.S. 257, 265 [98 S.Ct. 556, 54 L.Ed.2d 521].

[156] *Houston v. Lack* (1988) 487 U.S. 266, 270 [108 S.Ct. 2379, 101 L.Ed. 245]; *Caldwell v. Amend* (9th Cir. 1994) 30 F.3d 1199, 1201.

[157] Fed. Rules App. Proc., rule 4(a)(5), 28 U.S.C.; *Browder v. Illinois Dept. of Corrections* (1978) 434 U.S. 257, 265 [98 S.Ct. 556, 54 L.Ed.2d 521]; *Pratt v. McCarthy* (9th Cir. 1988) 850 F.2d 590, 592-593; *Malone v. Avenenti* (9th Cir. 1988) 850 F.2d 569, 571; *Felix v. Cardwell* (9th Cir. 1976) 545 F.2d 92, 93; *Mendez v. Knowles* (9th Cir. 2009) 556 F.3d 757, 765 (prisoner allowed to file a late notice of appeal where attorney had put the notice in the mail several days before the deadline, but the notice arrived at the court, which was just across town, one day late). "Excusable neglect" for failure to timely file notice of appeal is where the failure is due to negligence is excusable taking into account all relevant circumstances. *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership* (1993) 507 U.S. 380, 395.

[157] If a prisoner fails to timely file a notice of appeal because of abandonment by his or her attorney, a district court can also grant relief from the judgment under the "catch-all" clause of Rule 60(b)(6) of the Federal Rules of Civil Procedure. *Mackey v. Hoffman* (9th Cir. 2012) 682 F.3d 1247, 1253.

[158] Fed. Rules App. Proc., rule 4(a)(5)(B), 28 U.S.C.

The notice of appeal must identify the name and court number of the case being appealed, the name of the person bringing the appeal, and the court in which the appeal will be filed (for California cases, this is the Ninth Circuit Court of Appeals).[159]

With the notice of appeal, the petitioner must either pay filing and docketing fees (currently a total of $255) or get permission to proceed *in forma pauperis*.[160] A prisoner who has already been granted permission to proceed *in forma pauperis* for the habeas petition does not have to file a new *in forma pauperis* request for the appeal unless there have been significant changes in the prisoner's financial status.[161]

B. Certificate of Appealability

In addition to filing a notice of appeal, a petitioner who wants to appeal must obtain a certificate of appealability (a "COA").[162]

The district court must grant or deny a COA when it enters a final order in the habeas case. Before making the order, the court may ask the parties to submit briefing on whether a certificate should be issued.[163]

If the district court refuses to issue a COA, the petitioner should file a request for a COA in the Ninth Circuit Court of Appeals.[164] The court can deny or grant a COA on an issue-by-issue basis. Thus, the petitioner must specifically ask for a COA for each issue being appealed.[165]

To get a COA for claims that were denied on the merits, the petitioner must make a substantial showing that a constitutional right has been denied and indicate which facts support the claim.[166]

To get a COA for claims that were denied on procedural grounds, the prisoner must show that (1) reasonable jurists could debate whether the district court was correct in its procedural

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[159] Fed. Rules App. Proc., rule 3(c)(1), 28 U.S.C.

[160] 28 U.S.C. §§ 1913 (docket fee), 1915(a) (*in forma pauperis* status), and 1917 (filing fee).

[161] Fed. Rules App. Proc., rule 24(a)(3).

[162] 28 U.S.C. 2253(c).

[163] Federal Rules of Habeas Corpus, rule 11(a).

[164] Fed. Rules App. Proc., rule 22(b). The COA request may be decided by a single judge or a panel of judges. *Santiago Salgado v. Garcia* (9th Cir. 2004) 384 F.3d 769, 772.

[165] 28 U.S.C. § 2253(c). Life prisoners who are challenging parole suitability denials or reversals are *not* exempt from the COA requirement. *Hayward v. Marshall* (9th Cir. 2010) 603 F.3d 546, 553 (overruled on other grounds).

A court of appeals judge's failure to indicate on the COA which specific issues are appealable does not deprive the court of appeals of the power to adjudicate the appeal. *Gonzalez v. Thaler* (2012) __ U.S. __ [132 S.Ct. 641, 649, 181 L.Ed.2d 619].

[166] 28 U.S.C. § 2253(c); Fed. Rules App. Proc., rule 22(b).

ruling, *and* (2) reasonable jurists could debate whether the habeas petition stated a valid claim that a constitutional right was denied.[167]

C. Requesting an Attorney

If the district court appointed an attorney for the petitioner for the habeas case, the appointment will generally extend to the appeal.[168] 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 Court of Appeals. The petitioner must show that appointment of counsel is necessary because the issues are important and complex.[169]

16. 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 asking the United States Supreme Court to review the case. The petition must be filed 90 days after the appellate court issues its final decision.[170] The petition must include a description of the issues, a statement of jurisdiction, and the reasons why the issues are of such wide importance that the Court should hear the case.[171] Instructions and forms for filing a *pro se* petition for writ of certiorari are available on the U.S. Supreme Court website.[172]

A person who is seeking a writ of certiorari must either pay a filing fee or request permission to proceed *in forma pauperis* in the Supreme Court. The Court's forms for *pro se* prisoners include a motion for *in forma pauperis* status. If a person abuses the system by filing large numbers of frivolous certiorari petitions, the Court may ban the petitioner from filing any further *in forma pauperis* petitions.[173]

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[167] *Slack v. McDaniel* (2000) 529 U.S. 473, 483 [120 S.Ct. 1597; 146 L.Ed.2d 542].

[168] 18 U.S.C. § 3006A.

[169] 18 U.S.C. § 3008A(c); *Dillon v. U.S.* (9th Cir. 1962) 307 F.2d 445, 450.

[170] U.S. Supreme Ct. Rules, rule 13.3.

[171] U.S. Supreme Ct. Rules, rule 14.1

[172] U.S. Supreme Court website at www.supremecourtus.gov/casehand/guideforifpcases.pdf.

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

Federal District Courts in California

United States District Court for the Central District,

Eastern Division
3470 Twelfth Street
Riverside, CA 92501
California Institute for Men, California Institute for Women, California Rehabilitation Center, Chuckawalla Valley State Prison, CSP-Ironwood,

Western Division
312 North Spring Street #G-8
Los Angeles, CA 90012
California Men's Colony, CSP-Los Angeles County

United States District Court for the Eastern District,

Sacramento Division
501 "I Street, Suite 4-200
Sacramento, CA 95814
California Correctional Center, California Health Care Facility, California Medical Facility, Deuel Vocational Institute, Folsom State Prison, High Desert State Prison, Mule Creek State Prison, CSP-Solano, CSP-Sacramento

Fresno Division
2500 Tulare Street #1501
Fresno, CA 93721
Avenal State Prison, CSP-Corcoran, California Correctional Institution, Central California Women's Facility, Kern Valley State Prison, North Kern State Prison, Pleasant Valley State Prison, Sierra Conservation Center, Substance Abuse Treatment Facility, Valley State Prison, Wasco State Prison

United States District Court for the Northern District

San Francisco Division
United States District Court
450 Golden Gate Avenue
San Francisco, CA 94102-3483
Pelican Bay State Prison, San Quentin State Prison,

Oakland Division
United States District Court
1301 Clay Street, Suite 400 South
Oakland, CA 94612

San Jose Division
United States District Court
280 South 1st Street
San Jose, CA 95113
Correctional Training Facility, Salinas Valley State Prison

United States District Court for the Southern District

880 Front Street, Suite 4290
San Diego, CA 92101
Richard J. Donovan Correctional Facility, Calipatria State Prison, Centinela State Prison

Federal Court of Appeals

Ninth Circuit Court of Appeals
U.S. Court of Appeals Building
PO Box 193939
San Francisco, CA 94119

United States Supreme Court

United States Supreme Court
1 First Street NE
Washington, DC 20543