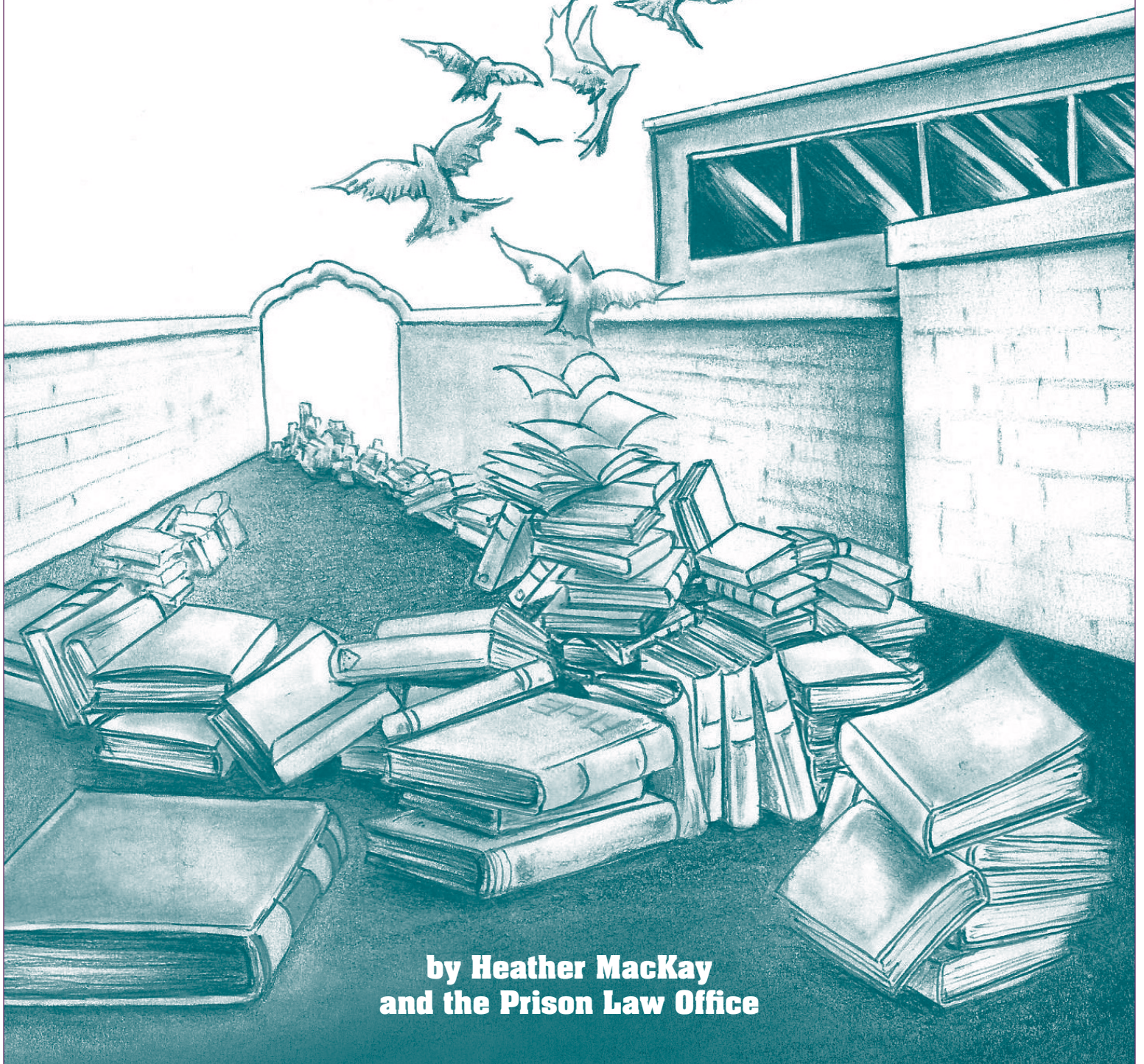


# The California Prison and Parole Law Handbook



by Heather MacKay  
and the Prison Law Office

# THE CALIFORNIA PRISON & PAROLE LAW HANDBOOK

BY HEATHER MACKAY  
&  
THE PRISON LAW OFFICE

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The Prison Law Office is a non-profit public interest law firm that strives to protect the rights and improve the living conditions of people in state prisons, juvenile facilities, jails and immigration detention in California and elsewhere. The Prison Law Office represents individuals, engages in class actions and other impact litigation, educates the public about prison conditions, and provides technical assistance to attorneys throughout the country.

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## **YOUR RESPONSIBILITY WHEN USING THIS HANDBOOK**

When we wrote *The California Prison and Parole Law Handbook*, we did our best to provide useful and accurate information because we know that people in prison and on parole often have difficulty obtaining legal information and we cannot provide specific advice to everyone who requests it. However, the laws are complex change frequently, and can be subject to differing interpretations. Although we hope to publish periodic supplements updating the materials in the Handbook, we do not always have the resources to make changes to this material every time the law changes. If you use the Handbook, 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 a prison law library or in a public county law library.

# CHAPTER 15

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## 15.1 Introduction

State court petitions for writ of habeas corpus are one of the most useful legal actions for people incarcerated in California prisons and people on parole. State habeas corpus petitions can be used to challenge criminal convictions or sentences, civil commitments, unlawful actions by prison or parole officials, or bad prison conditions. State habeas issues can be based on state law, federal law, or both. The procedures are fairly simple and speedy, and if a state habeas case reaches a certain stage, the court may be required to appoint a free lawyer to represent the person who filed the petition. If the court decides to grant the petition, the order it will issue is called a “writ.”

A state court petition for writ of mandate or prohibition is a less common type of legal action that can be used in some circumstances to force a state official to perform a duty required by the law. A petition for writ of mandate or prohibition is particularly useful when the petitioner is not in any type of custody and therefore cannot file a habeas petition. For example, such a petition can be filed by interested citizens or by a person who has been discharged from their sentence but is still subject to registration requirements or required to pay fines. A mandate petition might also be used to obtain a remedy not available through habeas corpus, such as return of property taken by prison staff.

The final sections of this chapter briefly describe some special types of post-conviction motions that may be useful to people challenging their convictions: motions for DNA testing of evidence and motions for post-conviction discovery of evidence.

An excellent book with detailed descriptions of the law and procedure for California state habeas and mandate petitions is *Appeals and Writs in Criminal Cases*, published and updated regularly by the Continuing Education of the Bar (CEB) (2100 Franklin St., Suite 500, Oakland, CA 94612-3098 or 1-800-232-3444).

## STATE PETITIONS FOR WRIT OF HABEAS CORPUS

### 15.2 Overview of State Habeas Corpus

California habeas corpus actions have a broad scope: “Every person unlawfully imprisoned or restrained of his liberty, under any pretense, may prosecute a writ of habeas corpus to inquire into the cause of his or her imprisonment or restraint.”<sup>1</sup> A person in prison or jail can file a habeas corpus petition to get a court to order prison or jail officials to do something, such as vacating a disciplinary finding, granting conduct credits, providing medical care, allowing visitation, or transferring to safe housing. State habeas petitions can be used to challenge a parole condition imposed by the California Department of Corrections and Rehabilitation (CDCR) or Board of Parole Hearings (BPH), a BPH denial of parole, or a Governor’s reversal of a parole grant. In addition, habeas corpus petitions can sometimes be used to challenge a conviction or sentence, a Sexually Violent Predator (SVP) or Mentally Disordered Offender (MDO) civil commitment, or a parole or post-release community supervision (PRCS) revocation. State habeas cases usually have a title of “*In re*” followed by the name of the person who is the petitioner.

Habeas corpus cannot be used to seek money compensation for injuries or lost or damaged property.<sup>2</sup> A person who is seeking money damages for injuries should file a federal civil rights (“§ 1983”) action (see Chapter 17) or a state tort lawsuit (Chapter 18). A person who wants the CDCR to return or pay for property lost or destroyed by prison staff might file a state court petition for writ of mandate (see §§ 15.30-15.46), a state tort lawsuit (Chapter 18), a small claims lawsuit (§ 18.11), or in very rare cases, a federal civil rights action (Chapter 17).

### 15.3 Who May File a Petition

Any person who is “in custody” of California state or local officials may file a state petition for writ of habeas corpus challenging the judgment that is the basis for the custody or challenging the conditions of the custody.<sup>3</sup> People in state prisons and county jails are obviously “in custody.” People

<sup>1</sup> Penal Code § 1473(a); see also California Constitution, Article 1, § 11 (“Habeas corpus may not be suspended unless required by public safety in cases of rebellion or invasion”).

<sup>2</sup> See *Flores v. California Dept. of Corrections and Rehabilitation* (2014) 224 Cal.App.4th 199, 206 [168 Cal.Rptr.3d 204] (state tort lawsuit is a proper action to seek return of or compensation for property wrongfully confiscated as contraband); *Escamilla v. California Dept. of Corrections and Rehabilitation* (2006) 141 Cal.App.4th 498, 509-510 [46 Cal.Rptr.3d 408] (treating state habeas petition seeking compensation for lost property as petition for writ of mandate).

<sup>3</sup> Even a person who has been declared a vexatious litigant under Code of Civil Procedure § 391 still has the right to file a petition for writ of habeas corpus without any additional procedural barriers. *In re Bittaker* (1997) 55 Cal.App.4th 1004, 1006 [64 Cal.Rptr.2d 679].

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who are on conditional release, such as people on parole, post-release community supervision (PRCS), or probation, and people released on bail or their own recognizance are also “in custody.”<sup>4</sup> So are people who have been civilly committed to state hospitals under SVP or MDO laws.<sup>5</sup> Even a person who is physically in another state or in a federal facility may still be in California “custody” if the custody is authorized in some way by the State of California.<sup>6</sup>

A person who is no longer “in custody” for the conviction being challenged cannot file a state habeas corpus petition, even if a collateral (in-direct) consequence of the conviction is affecting the person negatively. For example, a person who only owes criminal fines is not “in custody” unless the person can be imprisoned for failure to pay.<sup>7</sup> Having a registration requirement does not amount to being “in custody,” even though failure to register can result in a new conviction.<sup>8</sup> Also, a person who has finished serving a term in prison or county jail and is in federal detention for deportation proceedings is not in state custody, even if the deportation proceeding is due to the conviction.<sup>9</sup> People who are not in state custody may be able to raise their claims by filing a state petition for writ of mandate (see §§ 15.30-15.46).

An organization such as an association or labor union cannot file a state habeas corpus petition on behalf of a person or group of people in a state prison.<sup>10</sup> Only in exceptional circumstances may a petition be brought by someone other than the person who is in custody; exceptional circumstances usually involve incompetent persons whose interests are not protected by other means.<sup>11</sup>

### 15.4 Issues that May be Raised: Challenges to Criminal Judgments, Civil Commitments, or Parole/PRCS Revocations

A state petition for writ of habeas corpus can be used to challenge a criminal conviction or sentence, an SVP or MDO commitment, or a parole, PRCS, or probation revocation. However, as

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<sup>4</sup> See generally *People v. Villa* (2009) 45 Cal.4th 1063, 1069 [90 Cal.Rptr.3d 244]; *In re Jones* (1962) 57 Cal.2d 860, 861, fn. 1 [22 Cal.Rptr. 478] (person on parole); *In re Hochberg* (1970) 2 Cal.3d 870, 874, fn. 3 [87 Cal.Rptr. 681] (person on probation); *In re Petersen* (1958) 51 Cal.2d 177, 181-182 (bail); *In re Smiley* (1967) 66 Cal.2d 606, 612 [58 Cal.Rptr. 579] (own recognizance).

<sup>5</sup> *People v. Qawi* (2004) 32 Cal.4th 1, 12-13 [7 Cal.Rptr.3d 780] (person classified as MDO challenged involuntary medication via habeas corpus); *People v. Johnson* (2015) 235 Cal.App.4th 80, 88 [185 Cal.Rptr.3d 135] (SVP commitment may be challenged by habeas corpus); *People v. Talheim* (2000) 85 Cal.App.4th 400, 404-405 [102 Cal.Rptr.2d 150] (same).

<sup>6</sup> *People v. Villa* (2009) 45 Cal.4th 1063, 1073 [90 Cal.Rptr.3d 244]; *In re Shapiro* (1975) 14 Cal.3d 711, 715 [122 Cal.Rptr. 768] (person on parole was in state custody where he was in federal detention based on California parole detainer).

<sup>7</sup> *Lloyd v. Superior Court* (1982) 133 Cal.App.3d 896, 899, fn.1 [184 Cal.Rptr. 467] (order to pay fine not custody); *In re Catalano* (1981) 29 Cal.3d 1, 8-9 [171 Cal.Rptr. 667] (fine ordered payable in 30 days upon threat of arrest was custodial restraint).

<sup>8</sup> *People v. Picklesimer* (2010) 48 Cal.4th 330, 339 [106 Cal.Rptr.3d 239]; *In re Douglas* (2011) 200 Cal.App.4th 236, 248 [132 Cal.Rptr.3d 582] (applying rule where person in custody on new case for failing to register); *In re Stier* (2007) 152 Cal.App.4th 63, 82-83 [61 Cal.Rptr.3d 181].

<sup>9</sup> *People v. Villa* (2009) 45 Cal.4th 1063, 1071-1073 [90 Cal.Rptr.3d 344]; *In re Azurin* (2001) 87 Cal.App.4th 20, 26 [104 Cal.Rptr.2d 284].

<sup>10</sup> *In re Coleman* (1974) 12 Cal.3d 568, 572, fn. 2 [116 Cal.Rptr. 381].

<sup>11</sup> *Michelle K v. Superior Court* (2013) 221 Cal.App.4th 409, 431-435 [164 Cal.Rptr.3d 232]; *In re Hop* (1981) 29 Cal.3d 82, 87 [171 Cal.Rptr. 721]; *In re Harrell* (1970) 2 Cal.3d 675, 689 [87 Cal.Rptr. 504].

discussed in § 15.5, habeas corpus cannot substitute for a direct appeal or be used to present an issue previously raised and rejected on appeal, except in limited circumstances. This means that habeas corpus usually can be used only for legal claims that depend on either new facts that were not in the record on appeal or on changes in the law that occurred after the judgment became final. This section summarizes some of the most common issues raised in such cases.

Denial of the right to competent representation by an attorney (known as ineffective assistance of counsel or “IAC”) is an issue commonly raised in habeas corpus petitions. Framing an issue as an IAC claim can help a petitioner overcome an argument by the state that an issue was forfeited because no objection or motion was made during the original proceedings.<sup>12</sup> To win an IAC claim, a person must show that (1) the attorney’s performance fell below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that but for the attorney’s errors the result would have been more favorable.<sup>13</sup> A person who makes an IAC claim will usually need to present additional evidence or declarations to rebut the presumption that the attorney had a valid tactical reasons for their actions.<sup>14</sup>

Another circumstance in which a person may want to file a habeas petition is when important new evidence about the case discovered. Sometimes a person can show that the reason the evidence was not discovered prior to trial was due to the trial attorney’s IAC in failing to investigate the case fully. Other times, the defense may not have learned about the evidence before the trial because the prosecutor improperly failed to disclose it.<sup>15</sup> In other cases, it may be discovered that evidence presented by the prosecution was actually false.<sup>16</sup> Occasionally, new evidence arises that simple was unavailable at the time of trial.<sup>17</sup>

A third common use of a state petition for writ of habeas corpus is to enable a person to get the benefit of a favorable change in the law.<sup>18</sup> However, not all changes in the law apply retroactively. The general rule for new statutes is that the law does not apply retroactively (to cases that are already final), unless the legislature or the voters specifically say the law applies retroactively.<sup>19</sup> For changes to the law that reduce criminal punishment for a particular crime, there is a general rule that the change

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<sup>12</sup> See *In re Seaton* (2004) 34 Cal.4th 193, 199-200 [17 Cal.Rptr.3d 633].

<sup>13</sup> *Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052; 80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218 [233 Cal.Rptr. 404].

<sup>14</sup> *People v. Pope* (1979) 23 Cal.3d 412, 426 [152 Cal.Rptr. 732]; see, e.g., *People v. Williams* (1999) 77 Cal.App.4th 436, 462 [92 Cal.Rptr.2d 1]; *People v. Mendoza-Tello* (1997) 15 Cal.4th 264, 267-268 [62 Cal.Rptr.2d 437].

<sup>15</sup> *United States v. Bagley* (1985) 473 U.S. 667, 674-678 [105 S.Ct. 3375; 87 L.Ed.2d 481]; *In re Seaton* (2004) 34 Cal.4th 193, 200 [17 Cal.Rptr.3d 633]. This is commonly called a “Brady” claim. See *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194; 10 L.Ed.2d 215]; see also *In re Pratt* (1999) 69 Cal.App.4th 1294 [82 Cal.Rptr.2d 260]; *In re Brown* (1998) 17 Cal.4th 873, 879-880 [72 Cal.Rptr.2d 698].

<sup>16</sup> Penal Code § 1473(b)-(e); *In re Wright* (1978) 78 Cal.App.3d 788 [144 Cal.Rptr. 535].

<sup>17</sup> Penal Code § 1473(b).

<sup>18</sup> *In re Walsh* (1996) 49 Cal.App.4th 1096 [57 Cal.Rptr.2d 214]; *In re Saldana* (1997) 57 Cal.App.4th 620 [67 Cal.Rptr. 183].

<sup>19</sup> Penal Code § 3.



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applies to cases that are not yet final unless the legislature or voters intended otherwise.<sup>20</sup> As for new legal principles announced by a court, changes to constitutional law apply to new cases and to cases that are not yet final when the new rule was created, unless the courts specifically say otherwise.<sup>21</sup> New judicial rules usually don't apply retroactively to cases that were already final when the new rule was announced, except that there may be retroactive application of (1) new substantive rules that forbid punishment for certain acts or certain people and (2) new procedural rules that are "implicit in the concept of ordered liberty."<sup>22</sup>

There are two limits on habeas petitions regarding evidentiary issues. First, the question of whether evidence was obtained through an illegal search and seizure in violation of the federal constitution's Fourth Amendment cannot be raised on state habeas corpus.<sup>23</sup> Second, a claim that the evidence was insufficient to support the conviction cannot be litigated in a state habeas petition.<sup>24</sup>

### 15.5 Procedural Defaults and Exceptions for Challenges to Criminal Judgments, Civil Commitments, or Parole/PRCS Revocations

There are some procedural rules limiting the use of state habeas corpus to challenge criminal judgments, as well as some exceptions to those rules.

First, as a general rule, a state petition for writ of habeas corpus cannot substitute for a direct appeal. This means that a habeas petition usually cannot be filed on issues that could have been (but were not) argued based solely on the information in the trial court record and raised in a direct appeal from the conviction, civil commitment, or revocation proceeding.<sup>25</sup> Note that this does not bar a petitioner from raising ineffective assistance by trial or appellate counsel in failing to object to errors, make motions, investigate facts, present evidence, or make legal arguments, as ineffective assistance of counsel (IAC) is a new independent issue that requires introduction of additional information about trial counsel's deficiencies and any reasons for their actions.<sup>26</sup> Second, a habeas petition cannot act as a second appeal by raising the same issues that were previously argued and rejected in a direct appeal.<sup>27</sup>

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<sup>20</sup> *In re Estrada* (1965) 63 Cal.2d 740 [48 Cal.Rptr. 172]. A case is not yet final if it is still on appeal, a petition for review of the appeal is still pending in the California Supreme Court, or a petition for writ of certiorari for the appeal has or still could be filed in the U.S. Supreme Court. *People v. Vieira* (2005) 35 Cal.4th 264, 305-306 [25 Cal.Rptr.3d 337]; see also *In re Brown* (2012) 54 Cal.4th 314 [142 Cal.Rptr.3d 824] (*Estrada* rule did not apply to increases in good conduct credit); *People v. Conley* (2016) 63 Cal.4th 646 [203 Cal.Rptr.3d 622] (by creating process for people to petition for resentencing under more favorable new Three Strikes Laws, voters expressed intent for *Estrada* rule not to apply).

<sup>21</sup> *Griffith v. Kentucky* (1987) 479 U.S. 314, 322 [107 S.Ct. 708; 93 L.Ed.2d 649].

<sup>22</sup> *Teague v. Lane* (1989) 489 U.S. 288, 300-311 [109 S.Ct. 1060; 103 L.Ed.2d 334]; see e.g., *Montgomery v. Louisiana* (2016) 577 U.S. \_\_\_ [136 S.Ct.718; 193 L.Ed.2d 599] (new judicial rule prohibiting mandatory LWOP terms for juveniles applied to cases that are already final); *In re Lucero* (2011) 200 Cal.App.4th 38 [132 Cal.Rptr.3d 499] (new judicial rule limiting scope of first degree felony murder applied to cases already final).

<sup>23</sup> *In re Reno* (2012) 55 Cal.4th 428 [146 Cal.Rptr.3d 297]; *In re Harris* (1993) 5 Cal.4th 813 [21 Cal.Rptr.2d 373].

<sup>24</sup> *In re Reno* (2012) 55 Cal.4th 428 [146 Cal.Rptr.3d 297]; *People v. Stannorth* (1974) 11 Cal.3d 588 [114 Cal.Rptr. 250].

<sup>25</sup> *In re Harris* (1993) 5 Cal.4th 813, 829 [21 Cal.Rptr.2d 373]; *In re Dixon* (1953) 41 Cal.2d 756.

<sup>26</sup> *In re Harris* (1993) 5 Cal.4th 813, 832-835 [21 Cal.Rptr.2d 373].

<sup>27</sup> *In re Reno* (2012) 55 Cal.4th 428, 476-477 [146 Cal.Rptr.3d 297]; *In re Harris* (1993) 5 Cal.4th 813, 824-829 [21 Cal.Rptr.2d 373]; *In re Waltrens* (1965) 62 Cal.2d 218, 225 [42 Cal.Rptr. 9].

Third, a petitioner who loses a habeas case cannot file another habeas petition raising the same legal issue based on the same facts.<sup>28</sup>

Courts may make exceptions to these procedural bars. The four established exceptions are that a habeas corpus action may still be brought if:

- ◆ the issue constitutes a fundamental constitutional error, “where the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process.” Such errors are akin to “structural errors” for which automatic reversal is required in criminal appeal cases.
- ◆ the conviction or sentence was rendered by a court lacking fundamental jurisdiction, meaning the court simply did not have the authority to decide the case;
- ◆ the court acted in excess of its jurisdiction, such as entering a conviction or selects a sentence that is not authorized by the law; there are many potential legal bases for arguing that a conviction or sentence was unauthorized; or
- ◆ there has been a change in the law affecting the petitioner.<sup>29</sup>

## 15.6 Issues that May be Raised: Challenges to Prison or Parole Conditions, Policies, or Actions

By filing a petition for a writ of habeas corpus, a person in prison or on parole may ask a court to establish and enforce any legal right regarding prison or parole.<sup>30</sup> A petition may be based on federal or state constitutions, statutes, cases, or regulations. For example, petitions have been brought to challenge attorney visiting restrictions,<sup>31</sup> denial of an impartial disciplinary hearing officer,<sup>32</sup> and lack

<sup>28</sup> *In re Clark* (1993) 5 Cal.4th 750, 769 [21 Cal.Rptr.2d 509].

<sup>29</sup> *In re Reno* (2012) 55 Cal.4th 428, 478 [146 Cal.Rptr.3d 297]; *In re Harris* (1993) 5 Cal.4th 813, 829-838 [21 Cal.Rptr.2d 373]. See also *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [111 S.Ct. 1246; 113 L.Ed.2d 302] (discussing standard for structural errors). For an example of a court lacking fundamental jurisdiction, see *In re Hoddinott* (1996) 12 Cal.4th 992 [50 Cal.Rptr.2d 706] (court had no jurisdiction to sentence on probation violation due to probation officer’s failure to notify the court within 30 days of receiving Penal Code § 1203.2a demand for sentencing). Examples of unauthorized convictions or sentences include *In re Lynch* (1972) 8 Cal.3d 410 [105 Cal.Rptr. 217] (sentence was unconstitutionally cruel and unusual); *In re Brown* (1973) 9 Cal.3d 612 [108 Cal.Rptr. 465] (given undisputed facts, conviction unauthorized because the law did not prohibit the petitioner’s conduct); *In re Kay* (1970) 1 Cal.3d 930 [83 Cal.Rptr. 686] (conviction based on constitutionally overbroad interpretation of statute); *In re Demillo* (1975) 14 Cal.3d 598 [121 Cal.Rptr. 725] (unauthorized conviction where statute of limitations was violated); *In re Birdwell* (1996) 50 Cal.App.4th 926 [58 Cal.Rptr.2d 244] (unauthorized first degree murder conviction where jury did not enter verdict on degree); *In re Hess* (1955) 45 Cal.2d 171 (unauthorized sentence imposed for crime that was not charged or proven); *In re Huffman* (1986) 42 Cal.3d 552 [229 Cal.Rptr. 789] (sentence not authorized by any statute); *In re Haygood* (1975) 14 Cal.3d 802 [122 Cal.Rptr. 760] (sentence term erroneously calculated); *In re Adams* (1975) 14 Cal.3d 629 [122 Cal.Rptr. 73] (invalid multiple punishment for single criminal act).

<sup>30</sup> *In re Davis* (1979) 25 Cal.3d 384 [158 Cal.Rptr. 384]; *In re Harrell* (1970) 2 Cal.3d 675, 682 [87 Cal.Rptr. 504]. California courts still retain jurisdiction to decide habeas corpus cases involving claims of inadequate medical care, even though a federal court appointed a Receiver to take control of California’s prison medical care system. *In re Estevez* (2008) 165 Cal.App.4th 1445 [83 Cal.Rptr.3d 479].

<sup>31</sup> *In re Roark* (1996) 48 Cal.App.4th 1946 [56 Cal.Rptr.2d 582].

<sup>32</sup> See *People v. Superior Court (Hamilton)* (1991) 230 Cal.App.3d 1592 [281 Cal.Rptr. 900].

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of evidence to support a gang validation.<sup>33</sup> A habeas petition may also be used to challenge a BPH finding of unsuitability for parole<sup>34</sup> or to challenge an unlawful condition of parole.<sup>35</sup> Many other examples of state habeas petitions are cited throughout this *Handbook*.

If a petitioner is no longer suffering from the wrong that is the subject of the petition, courts can dismiss the petition as being “moot.”<sup>36</sup> However, a petitioner should argue that the case is not moot if not all of the relief requested in the petition has been provided or there are on-going problems closely related to the original claims.<sup>37</sup>

Even when a case is moot, a person can ask a court to exercise its discretion to decide the legal issues presented by the petition because otherwise it is likely that those issues will not ever be reviewed. There are two types of situations in which courts are likely to hear a moot case. One is where the same problem is likely to arise again for the same person.<sup>38</sup> A second is where the issue is likely to affect many people and come up over and over again, and the petitioner’s case is a good example of the problem and thoroughly presents that the facts and law.<sup>39</sup> Thus, a petitioner in these circumstances should argue that it is in the courts’ interest to resolve the dispute rather than face repeated cases raising the same issue.

### **15.7 Exhaustion of Administrative Remedies Requirement for Challenges to Prison or Parole Conditions, Policies, or Actions**

A state habeas corpus petitioner who wants to challenge prison or parole conditions, prison or parole policies, or actions taken by prison or parole staff usually must first “exhaust administrative remedies” by completing any available administrative appeal process.<sup>40</sup> This requirement does not apply to petitions challenging criminal convictions or sentences, civil commitments, parole or PRCS revocations, or other actions taken by a court.

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<sup>33</sup> *In re Cabrera* (2013) 216 Cal.App.4th 1522 [158 Cal.Rptr.3d 121].

<sup>34</sup> *In re Lawrence* (2008) 44 Cal.4th 1181 [82 Cal.Rptr.3d 169].

<sup>35</sup> *In re Taylor* (2015) 60 Cal.4th 1044 [184 Cal.Rptr.3d 682].

<sup>36</sup> See, e.g., *In re Miranda* (2011) 191 Cal.App.4th 757 [120 Cal.Rptr.461]; *In re Stevens* (2004) 119 Cal.App.4th 1228, 1240 [15 Cal.Rptr.3d 168].

<sup>37</sup> See *In re Estevez* (2008) 165 Cal.App.4th 1445 [83 Cal.Rptr.3d 479] (claim of inadequate medical care was allowed to proceed even though the person had subsequently undergone the requested surgery, since the person had also asked for proper post-surgical care and alleged in subsequent pleadings that such was not being provided).

<sup>38</sup> See e.g., *In re Scott* (2004) 119 Cal.App.4th 871, 877, fn. 1 [15 Cal.Rptr.3d 32] (deciding challenge to parole suitability denial even though lifer had subsequently had another hearing and again been denied parole).

<sup>39</sup> See, e.g., *In re Garcia* (1998) 67 Cal.App.4th 841, 843-844 [79 Cal.Rptr.2d 357] (deciding case involving CDCR policy on correspondence between people in California prisons); *People v. Superior Court (Hamilton)* (1991) 230 Cal.App.3d 1592 [281 Cal.Rptr. 900] (deciding case involving which prison staff may hear disciplinary matters). *In re Stevens* (2004) 119 Cal.App.4th 1228, 1240 [15 Cal.Rptr.3d 168] (deciding case to provide guidance on scope of parole conditions limiting internet use); see also *Alfredo A. v. Superior Court* (1994) 6 Cal.4th 1212, 1218-1219 [26 Cal.Rptr.2d 623] [discussing reasons for deciding otherwise moot case regarding short-term pre-trial detention].

<sup>40</sup> *In re Strick* (1983) 148 Cal.App.3d 906, 911 [196 Cal.Rptr. 293]; *In re Dexter* (1979) 25 Cal.3d 921, 925 [160 Cal.Rptr. 118]; *In re Muszalski* (1975) 52 Cal.App.3d 500, 503-505, 508 [125 Cal.Rptr. 286].

A person who wants to exhaust administrative remedies must figure out what, if any administrative appeal process is available, and pursue the administrative appeal to the highest level. A person who wants to challenge a CDCR action, condition, or policy should pursue a CDCR Form 602 (most issues), Form 602-HC (health care) or Form 1824 (disability accommodation). For challenges to most Board of Parole Hearings (BPH) policies or decisions, there is no administrative appeal process and thus no administrative remedies to exhaust. However, the BPH does have administrative appeal processed for requests for disability accommodations, challenges to factual errors in risk assessments (psychological evaluations), and challenges to denial of non-violent offender (Prop. 57) parole or youth offender parole. The administrative remedies procedures are described in more detail in Chapter 1.

There are circumstances in which courts can and should make exceptions to the exhaustion of administrative remedies requirement for state habeas (and mandate) petitions.<sup>41</sup> In such situations, courts can allow a case to proceed even though the person has not completed the administrative appeal process. Commonly recognized exceptions include the following:

- ◆ No administrative remedy is available or the administrative appeal process is inadequate to address the issue.<sup>42</sup>
- ◆ Seeking an administrative remedy would be futile because the action is consistent with a clear agency policy or rule or officials have consistently defended the policy or rule against similar challenges.<sup>43</sup> This exception does not apply if it is reasonably possible the agency will change or override its policy based on the facts of a particular case.<sup>44</sup>
- ◆ Taking the time to exhaust administrative remedies would cause an unreasonable risk of irreparable harm to the person.<sup>45</sup> Risk of irreparable harm might exist where medical or safety concerns are causing great pain or high risk of serious injury, or where a person is

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<sup>41</sup> *Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 834 [112 Cal.Rptr. 761].

<sup>42</sup> *Glendale City Employee's Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 342-343 [124 Cal.Rptr. 513] (issue fell outside scope of matters covered by city grievance procedure); *In re Hudson* (2006) 143 Cal.App.4th 1, 7-8 [49 Cal.Rptr.3d 74] (regional parole administrator did not respond at second level of review and regulations did not specify what if any further action the person on parole should take); *In re Mitchell* (2000) 81 Cal.App.4th 653, 655-656 [97 Cal.Rptr.2d 41] (interpretation of statute restricting prison credits was judicial function, particularly since CDCR had denied prior appeals by stating that concerns should be addressed to courts); *In re Strick* (1983) 148 Cal.App.3d 906, 911 (similar).

<sup>43</sup> *In re Trejo* (2017) 10 Cal.App.5th 972, 979 [216 Cal.Rptr.3d 855]; *In re Mitchell* (2000) 81 Cal.App.4th 653, 655-656 [97 Cal.Rptr.2d 41]; *In re Locks* (2000) 79 Cal.App.4th 890, 893-894 [94 Cal.Rptr.2d 495], abrogated on other grounds by *In re Qawi* (2004) 32 Cal.4th 1 [7 Cal.Rptr.3d 780]; *In re Arias* (1986) 42 Cal.3d 667, 678-679 [230 Cal.Rptr. 505], superseded by statute on other grounds, see *Thompson v. California Dept. of Corrections* (2001) 25 Cal.4th 117, 130 [105 Cal.Rptr.2d 46]; *In re Thompson* (1985) 172 Cal.App.3d 256, 262-263 [218 Cal.Rptr. 192]; *In re Reina* (1985) 171 Cal.App.3d 638, 642 [217 Cal.Rptr. 535]; *In re Dexter* (1979) 25 Cal.3d 921, 925 [160 Cal.Rptr. 118].

<sup>44</sup> *Bockover v. Perko* (1994) 28 Cal.App.4th 479, 491 [34 Cal.Rptr.2d 423]; *In re Serna* (1978) 76 Cal.App.3d 1010, 1014 [143 Cal.Rptr. 350].

<sup>45</sup> *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 296-297; *Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 834 [112 Cal.Rptr. 761]. Note that there are also procedures for requesting expedited processing of administrative appeals regarding emergency matters (§ 1.15 and urgent health care needs (§ 1.25)).

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being held past their lawful release date. The fact that a constitutional right is being violated does not in itself necessarily amount to irreparable harm.<sup>46</sup>

It is usually a good idea for a person in prison or on parole to at least start the administrative appeal process before filing a habeas petition, even if a court might allow an exception to the exhaustion requirement. Filing an appeal will show that the petitioner at least is attempting to resolve the problem. Also, if the court denies the petition due to failure to exhaust administrative remedies, a person with an administrative appeal already underway will be able to get back into court more quickly and won't risk having their appeal rejected as untimely.

A person who files a state habeas corpus petition before completing the administrative appeal process should explain in the petition why the court should make an exception to the exhaustion requirement. They should also describe any efforts that have been made to inform prison or parole officials about the problem. They should attach any documents that help support their claim that the court should go ahead and hear the case.

### 15.8 Limits on Filing Multiple Petitions

If a court denies a petition for writ of habeas corpus, it usually will summarily (without further briefing or a hearing) deny any new petition raising the same claim, unless new facts have been discovered or the law has changed after the first petition was decided.<sup>47</sup> Courts also discourage piecemeal filing of multiple petitions on different issues in the same case.<sup>48</sup> However, the courts have discretion to allow multiple petitions. In particular, a court should consider a new petition if the previous denial was due to a procedural problem that has since been fixed.<sup>49</sup> Also, successive petitions may be permitted if: (1) there was significant constitutional error without which no reasonable jury would have convicted petitioner, (2) the petitioner is actually innocent, (3) the death penalty was imposed by a court that had a grossly misleading profile of the petitioner without which it would not have imposed the death penalty, or (4) the petitioner was convicted or sentenced under an invalid statute.<sup>50</sup>

### 15.9 When to File the Petition

There is no set time limit for filing a state petition for writ of habeas corpus.<sup>51</sup> However, courts require a person to be diligent by seeking relief within a “reasonable” amount of time or without “substantial delay.”<sup>52</sup> Courts measure the timeliness of a petition from the date that the petitioner

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<sup>46</sup> See *In re Serna* (1978) 76 Cal.App.3d 1010, 1014-1015 [143 Cal.Rptr. 350].

<sup>47</sup> Penal Code § 1475; *In re Reno* (2012) 55 Cal.4th 428, 466 [146 Cal.Rptr.3d 297]; *In re Terry* (1971) 4 Cal.3d 911, 921 n. 1 [95 Cal.Rptr. 31]; *In re Swain* (1949) 34 Cal.2d 300; *In re Miller* (1941) 17 Cal.2d 734; *In re Fain* (1983) 139 Cal.App.3d 295 [188 Cal.Rptr. 653].

<sup>48</sup> *In re Clark* (1993) 5 Cal.4th 750, 774 [21 Cal.Rptr.2d 509].

<sup>49</sup> *In re Crow* (1971) 4 Cal.3d 613 [94 Cal.Rptr. 254]; but see Penal Code § 1475.

<sup>50</sup> *In re Reno* (2012) 55 Cal.4th 428, 472 [146 Cal.Rptr.3d 297].

<sup>51</sup> *In re James* (1952) 38 Cal.2d 302.

<sup>52</sup> *In re Reno* (2012) 55 Cal.4th 428 [146 Cal.Rptr.3d 297]; *In re Harris* (1993) 5 Cal.4th 813 [21 Cal.Rptr.2d 373].



knew or should have known the information supporting the claim.<sup>53</sup> For example, if there is a change in the law that applies retroactively, the petitioner should file their claim based on the new law within a reasonable time after the date on which the change took effect.<sup>54</sup>

If there has been substantial delay, the petitioner generally must show good cause for the delay by explaining why the petition was not filed earlier.<sup>55</sup> However, this requirement does not apply to a claim of “sentencing error amounting to an excess of jurisdiction,” because there is a rule that a court may correct a sentence that is not authorized by law whenever the error comes to the court’s attention.<sup>56</sup> Also, even without good cause for delay, a court will consider a state habeas case if: (1) there was significant constitutional error without which no reasonable jury would have convicted petitioner, (2) the petitioner is actually innocent, (3) the death penalty was imposed by a court that had a “grossly misleading profile of the petitioner” without which it would not have imposed the death penalty, or (4) the petitioner was convicted or sentenced under an invalid statute.<sup>57</sup>

People who might want to follow an unsuccessful state habeas petition with a federal habeas petition should be aware of the strict federal habeas timelines (see §§ 16.9-16.11).

## 15.10 Where to File the Petition

The California Supreme Court, the courts of appeal and the superior courts all have power to issue writs of habeas corpus.<sup>58</sup> As a practical matter, it is almost always best to file the initial habeas corpus petition in a county-level superior court, rather than in a court of appeal or the California Supreme Court. Higher level courts will generally refuse to hear a petition that was not previously brought in and denied by a lower court, especially if the case involves factual disputes.<sup>59</sup>

People challenging criminal convictions or sentences or civil commitments should file in the county where they were convicted or committed. People in prison or on parole who are challenging CDCR or BPH actions usually should file in the superior court for the county where they are

<sup>53</sup> *In re Douglas* (2011) 200 Cal.App.4th 236 [132 Cal.Rptr.3d 582]; *In re Lucero* (2011) 200 Cal.App.4th 38 [132 Cal.Rptr.3d 499].

<sup>54</sup> *In re Lucero* (2011) 200 Cal.App.4th 38 [132 Cal.Rptr.3d 499] (petition filed ten months after change in law went into effect deemed timely because petitioner had limited legal access).

<sup>55</sup> *In re Reno* (2012) 55 Cal.4th 428 [146 Cal.Rptr.3d 297]; *In re Clark* (1993) 5 Cal.4th 750 [21 Cal.Rptr.2d 509]; *In re Swain* (1949) 34 Cal.2d 300; *In re Moss* (1985) 175 Cal.App.3d 913 [221 Cal.Rptr. 645]; *In re Sanders* (1999) 21 Cal.4th 697 [87 Cal.Rptr.2d 899] (good cause for delay in a capital case where an attorney had essentially abandoned the petitioner).

<sup>56</sup> *In re Harris* (1993) 5 Cal.4th 813, 842 [21 Cal.Rptr.2d 373].

<sup>57</sup> *In re Reno* (2012) 55 Cal.4th 428 [146 Cal.Rptr.3d 297].

<sup>58</sup> California Constitution, Article VI, § 10; Penal Code § 1508; *Griggs v. Superior Court* (1976) 16 Cal.3d 341 [128 Cal.Rptr. 223]; *In re Van Heflin* (1976) 58 Cal.App.3d 131 [128 Cal.Rptr. 257]. A superior court can take jurisdiction over an issue even when an appeal is pending, so long as the issue is not being raised on appeal and is based on facts outside the record. *In re Carpenter* (1995) 9 Cal.4th 634 [38 Cal.Rptr.2d 665]; but see *People v. Mayfield* (1993) 5 Cal.4th 220 [19 Cal.Rptr.2d 877] (superior court couldn’t grant habeas in capital case while same issue pending on appeal in Supreme Court, even where there was evidence outside appellate record).

<sup>59</sup> *In re Hillery* (1962) 202 Cal.App.2d 293 [20 Cal.Rptr. 759]. Also, when a petition that requires an evidentiary hearing is filed in a court of appeal or the Supreme Court, the court may order that the case be sent to the county superior court for resolution. *In re Orosco* (1978) 82 Cal.App.3d 924 [147 Cal.Rptr. 463]; see also *People v. Singer* (1990) 226 Cal.App.3d 23 [275 Cal.Rptr. 911].

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incarcerated or where they under supervision.<sup>60</sup> However, people with life sentences who are challenging the denial, reversal, or rescission of parole suitability should file in the county where they were convicted and sentenced.<sup>61</sup> Fortunately, even if a person files in the wrong county, that court should transfer the petition to the appropriate court.<sup>62</sup>

One exception to the general rule of filing the petition first in the superior court is that a person who has an on-going direct appeal of a conviction and wants to raise habeas issues challenging the conviction may file their petition in the court of appeal and ask that the appeal and petition be consolidated into one proceeding.<sup>63</sup>

A list of the addresses of all the state courts and the CDCR prisons in those court districts, is attached as Appendix 15-A.

### 15.11 Filling Out the Official Petition Form

There is an official form (Judicial Council Form HC-001) that can be used for filing a state petition for writ of habeas corpus. A copy of the form is attached as Appendix 15-B. Courts require that *pro per* or *pro se* petitioners (people who are not represented by a lawyer) use this form.<sup>64</sup> Lawyers who file habeas petitions on behalf of their clients are not required to use the form, so long as their petitions contain all the required information.<sup>65</sup>

The HC-001 form is fairly simple. However, the form is mainly designed for challenges to a conviction or sentence, so it requests detailed information regarding the petitioner's criminal case proceedings, which often will not be relevant to issues concerning prison or parole policies. The form also has little space in which to explain the facts or the legal grounds of the case. Thus, a person who is challenging prison or parole matters should complete the form and then also attach additional pages with a full statements of facts, contentions and prayer for relief, memorandum of points and authorities, and any supporting documents.

A sample non-form petition is included as Appendix 15-C, and the following sections discuss the parts of the petition in more detail.

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<sup>60</sup> Courts sometimes make exceptions to this general practice. See *In re Coca* (1978) 85 Cal.App.3d 493 [149 Cal.Rptr. 465] (person incarcerated in Solano County, who had a grave illness that was the subject of orders by the sentencing court in San Bernardino County, was allowed to proceed with a medical care petition in the county of conviction).

<sup>61</sup> *In re Roberts* (2005) 36 Cal.4th 575 [31 Cal.Rptr.3d 458].

<sup>62</sup> *Griggs v. Superior Court* (1976) 16 Cal.3d 341, 347 [128 Cal.Rptr. 223]; *In re Serna* (2001) 94 Cal.App.4th 836, 839 [115 Cal.Rptr.2d 22].

<sup>63</sup> *People v. Cotton* (1990) 230 Cal.App.3d 1072 [284 Cal.Rptr. 757]. If the appellate court dismisses the writ without prejudice, petitioner may re-file the petition in the superior court while the appeal is still pending. *People v. Baker* (1988) 206 Cal.App.3d 493 [253 Cal.Rptr. 615].

<sup>64</sup> California Rules of Court, rule 4.551(a)(1) and (2).

<sup>65</sup> California Rules of Court, rule 4.551(a)(2).

## 15.12 Identifying the Petitioner and Respondent

The *petitioner* is the person who is filing the case. The petition should state the petitioner's name, that the petitioner is a person who is incarcerated, on parole or other type of supervision, or under a civil commitment in the custody of the state of California, and the name and location of the institution where the petitioner is housed or the county where the petitioner is on parole or supervision.

The *respondent* is the official with custody of the person. For petitions filed by people in prison or on parole, the respondent can be the prison warden or the CDCR director, even if the petition challenges a conviction, a BPH action, or a Governor's parole reversal. People housed out-of-state can name the CDCR Director as the respondent. For cases alleging inadequate medical care, the petition should name as respondents both the court-appointed federal Receiver who controls the CDCR medical care system and the prison warden or CDCR Director.<sup>66</sup>

## 15.13 Writing the Statement of Facts and Attaching Supporting Documents

The petition must describe the facts of the case and should be supported by attached documents supporting the factual claims.

The statement of the facts should describe all facts important to the issues in the case, including facts showing exhaustion of administrative remedies or explaining why administrative remedies have not been exhausted (see § 15.7). The facts should not include legal arguments or citations. Further discussion of how to write a factual statement and gather supporting documents for a court case is at §§ 19.8-19.12.

It is very important to refer in the statement of facts to documents which can prove the facts of the case and describe the facts they show.<sup>67</sup> These "exhibits" can be identified by letters or numbers (such as "Exhibit A" or "Exhibit 1"), and copies of the exhibits should be attached to the petition, after the petition itself but before the proof of service. If there are more than a few exhibits it is a good idea to put a list of all the exhibits right before the exhibits themselves.

Exhibits can be documents like CDCR chronos, rule violation reports, trial or parole hearing transcripts, medical records, or copies of administrative appeals. If the case involves CDCR or BPH policies which are not in Title 15 of the California Code of Regulations, the petitioner should try to attach copies of those policies. If a relevant document is not available to the petitioner, the statement of facts should explain what attempts the petitioner has made to get the document and why those attempts were unsuccessful.

Exhibits can also be written statements from people (including the petitioner) who have information about what happened. Such a statement is called "declaration" or "affidavit." A declaration should set forth the person's statement and then end with the words: "I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on [date] at [name of city and state]." The person making the statement must sign and date the declaration.

<sup>66</sup> *In re Estevez* (2008) 165 Cal.App.4th 1445 [83 Cal.Rptr.3d 479].

<sup>67</sup> *In re Dwall* (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].

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For example, a petition challenging denial of visiting might include a declaration from the visitor about why the reason given for the denial is not true. As another example, a person who is claiming that their lawyer misled them about the benefits of taking a plea bargain might include their own declaration, and perhaps also a declaration from the lawyer, regarding what was or was not discussed.

### 15.14 Setting Forth the Contentions and Prayer for Relief

After the statement of facts, the petitioner should set forth the “contentions,” meaning the legal grounds for the claim. Each main legal claim should be summarized in one sentence that says what action is being challenged and what laws were violated. For example, if a petitioner is challenging a disciplinary finding of guilt, one of the contentions might be, “The failure to appoint an investigative employee violated 15 CCR § 3315(d) and petitioner’s right to due process.” If the petition challenges a criminal conviction, one contention might be, “The trial attorney’s failure to present an important witness violated petitioner’s Sixth Amendment right to effective assistance of counsel and Fifth Amendment right to present a defense.” A petitioner can present multiple legal contentions in a petition. However, as a tactical matter, raising numerous weak arguments is not likely to be helpful, and it is generally better to present only the strongest three or four issues.

People who want to preserve their right to later pursue their claims in a federal habeas corpus petition should try to figure out a basis for presenting the issues as being based at least partly on the federal constitution or federal statutes. (See §§ 16.3-16.4 regarding claims that can be raised on federal habeas and the federal habeas standard for reviewing state court decisions.)

After the contentions are stated, the petitioner should set forth a “prayer” or request for relief that states exactly what the petitioner wants the court to do. For example, if a rule violation finding of guilt is challenged, the petitioner could request that the court order the CDCR to vacate the finding of guilt, remove all records of the finding from the Central File, and restore any good conduct credit that was lost for the rule violation. The prayer for relief should also include a request for “any other relief that may be proper or necessary,” so that the court has the option of ordering other types of relief that the court might deem to be appropriate.

As part of the prayer for relief, a petitioner can ask the court to order “discovery,” meaning an order requiring the state to produce documents or prepare transcripts important to the case. The petitioner can also ask the court to hold an evidentiary hearing to resolve factual disputes. However, the court is not likely to grant such a request unless the court issues an order to show cause and the petitioner can demonstrate why the information is necessary.<sup>68</sup> Discovery is discussed in § 15.23 and evidentiary hearings are discussed in § 15.24.

If a petitioner is filing *pro per* (without a lawyer), the request for relief should also include a request for appointment of counsel for the rest of the habeas proceedings. See § 15.17 for more information about requesting appointment of counsel.

A sample set of contentions and prayer for relief are contained in Appendix 15-C.

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<sup>68</sup> *People v. Gonzales* (1991) 51 Cal.3d 1179, 1259-1260 [275 Cal.Rptr. 729]; *Miller v. Hamm* (1970) 9 Cal.App.3d 860, 871 [88 Cal.Rptr. 538].

## 15.15 Making the Verification

Every application for writ of habeas corpus must be “verified.” The verification is a statement of the petitioner declaring the truth of the allegations in the petition.<sup>69</sup> The verification must be signed by the petitioner under penalty of perjury (with a signature following the words “I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on [date] at [name of city and state].”). In limited circumstance, the verification may instead be made by the petitioner’s lawyer or a third party acting as the petitioner’s “next friend.”<sup>70</sup>

The exact wording necessary for a verification is printed at the bottom of the last page of the official habeas form (see Appendix 15-B), and also in the sample written petition (see Appendix 15-C).

## 15.16 Writing the Points and Authorities

After the verification, the petitioner should present a “Memorandum of Points and Authorities.” The memorandum should be organized into sections under headings similar or identical to those in the “Contentions” part of the petition. The memorandum describes the relevant legal authorities such as state or federal cases, constitutions, statutes, or regulations. The memorandum should also discuss how the laws apply to the facts of the case. In a prison or parole issue case, the memorandum should demonstrate how the law requires the prison or parole officials to act or not act in a certain way toward petitioner. For some issues, the petitioner may need to compare their circumstances to those of other persons covered by the law, or may need to discuss the purpose of the and how it was intended to be applied.

The sample petition in Appendix 15-C includes a memorandum of points and authorities. Chapter 19 provides an overview of how the law is structured and how to research the law, and § 19.29 provides tips how to write a legal argument.

## 15.17 Requesting Appointment of a Lawyer

A state habeas corpus petitioner who wants to have a lawyer represent them, but who cannot afford to hire one, and should request that the court appoint a lawyer to represent them.<sup>71</sup> A request for counsel can be included in the prayer for relief (§ 15.14). In addition, the petitioner should make the request in a separate document filed with the petition and titled “Declaration of Indigency and Request for Appointment of Counsel.” A sample is included as Appendix 15-D.

After person files a state habeas petition, if the court issues an order to show cause (see § 15.20), the court must appoint an attorney for an unrepresented petitioner who want and attorney but does not have enough money to hire one. The court will pay the attorney.<sup>72</sup>

<sup>69</sup> Penal Code §§ 1474-1475; see also *People v. Madaris* (1981) 122 Cal.App.3d 234, 241 [175 Cal.Rptr. 869].

<sup>70</sup> Penal Code § 1474; *In re Davis* (1979) 25 Cal.3d 384 [158 Cal.Rptr. 384]; see also *People v. McCarthy* (1986) 176 Cal.App.3d 593 [222 Cal.Rptr. 291].

<sup>71</sup> See *Charlton v. Superior Court* (1979) 93 Cal.App.3d 858 [156 Cal.Rptr. 107].

<sup>72</sup> See *Charlton v. Superior Court* (1979) 93 Cal.App.3d 858 [156 Cal.Rptr. 107]; California Rules of Court, rule 4.551(c)(2).



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Also, if a person finds an attorney to handle their habeas case for free (not appointed by the court), in some cases, the court may award the hired attorney fees at the end of the case.<sup>73</sup>

Unfortunately, in most situations there is no federal constitutional right that appointed or hired counsel actually provide effective assistance in a state habeas case.<sup>74</sup>

### 15.18 Requesting an Expedited Hearing or a Preliminary Injunction

If the court does not summarily deny the petition, it will usually take at least several months after the petition is filed for both sides to submit briefing, hearing to be held (if needed), and the court to make a decision. However, if it is very important that the court act quickly, the petitioner can ask the court to expedite (fast-track) the proceedings and/or to issue a preliminary injunction ordering the respondent to take some type of action while the case is still underway. For example, such requests might be appropriate in cases challenging an upcoming transfer to a facility where the person's life would be in danger, an on-going failure to provide life-sustaining medical care, or a credit error that is keeping the person in prison past their lawful release date.

When a petitioner asks a court to decide the case more quickly than the normal time frame, this is called a “request for an expedited proceeding.” The request should be set forth on the first page of the petition, just after the case name. The petitioner should explain why a short time frame is necessary to avoid significant harm. If there is a last possible date before some irreparable harm is likely to happen, then the petition should state that date.

In matters of great urgency, the petitioner can ask the court to issue a preliminary injunction ordering officials to do or not do something while the court is fully considering the case.<sup>75</sup> A petitioner who wants to request a preliminary injunction should file a separate document requesting a preliminary injunction that describes the emergency and asks the court to exercise its broad power to grant preliminary relief. The petitioner should file the request for a preliminary injunction along with the habeas petition.

### 15.19 Filing and Serving the Petition

When the petition, supporting documents, and related requests (as described in §§ 15.11-15.18) are completed, the petitioner must file them by mailing them to the appropriate court or having someone hand-deliver them to the court.<sup>76</sup> There is no filing fee for a petition for writ of habeas corpus filed in state court.<sup>77</sup> It is a good idea for the petitioner to also send the court an extra copy of the first pages of the petition and any related requests, along with a self-addressed stamped envelope.

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<sup>73</sup> Code of Civil Procedure § 1021.5; see also *In re Head* (1986) 42 Cal.3d 223, 229 [228 Cal.Rptr. 184].

<sup>74</sup> *Martinez v. Schriro* (9th Cir. 2010) 623 F.3d 731.

<sup>75</sup> Penal Code § 1484 [court in a habeas proceeding has “full power and authority . . . to do and perform all other acts and things necessary to a full and fair hearing and determination of the case”]; see e.g., *In re Alcalá* (1990) 222 Cal.App.3d 345, 352 & n.4 [271 Cal.Rptr. 674] (noting that temporary restraining order had been issued); *Fancette v. Dunbar* (1967) 253 Cal.App.2d 338, 340, 346 [61 Cal.Rptr. 97] (affirming preliminary injunction issued in habeas case).

<sup>76</sup> If a person is represented by a lawyer, the lawyer may be required or allowed to file and serve documents through some type of electronic filing system.

<sup>77</sup> Government Code § 6101.

The court clerk can stamp the filing date on the pages and return them to the petitioner so that they will have proof that the court received and filed the petition. The petitioner should also keep a copy of everything they send to the court.

At the same time the petitioner files the case with the court, they may need to “serve” (send a copy to) the respondent with the petition and other documents and file a “proof of service” with the court. “Service of process” means sending the case documents to the other parties in the case, and a “proof of service” is a form that lets the court know that the documents have been sent to the other parties. Documents in state habeas corpus cases can be served by regular U.S. mail. A sample “Proof of Service” form for documents served by mail is included as Appendix 15-E.

The service requirements for a habeas petition depends on what type of action is being challenged:

- ◆ A petitioner who is filing in the superior court and challenging conditions of confinement need not serve the petition and related requests on the respondent. Instead, the petitioner should provide the court with an extra copy of each item. If the court orders the prison or parole officials to respond to the petition, it will send the extra copies to the attorney general.
- ◆ A petitioner who is challenging a criminal conviction/ sentence, civil commitment, or parole/PRCS revocation in the superior court should serve the petition and related requests on the district attorney for the county of conviction at the same time they send those documents to the court. The petitioner should fill out and attach a proof of service to the original petition or request that is being sent to the court.<sup>78</sup>
- ◆ If the petition is being filed in the court of appeal or California Supreme Court, the petitioner should serve the petition and related requests on the state attorney general at the time they send the petition to the court. If the petition challenges a conviction or sentence, the petitioner should also serve the petition on the district attorney. A proof of service should be filled out and attached to the original petition that is sent to the court.

The addresses for the attorney general’s and district attorneys’ offices should be available in any law library. The major legal newspapers all publish lawyer directories that include such addresses. Addresses are also available on the internet.

## 15.20 The Court’s Options: Summary Denial, Request for Informal Response, or Order to Show Cause

A court is supposed to take some sort of action on a habeas petition within 60 days after the petition is filed.<sup>79</sup> If the court does not act within 60 days, the petitioner should send a “notice and request for ruling” to the court. The notice must include (1) a declaration stating the date the petition was filed, (2) the date the notice is being filed, (3) a statement indicating that the petitioner has not

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<sup>78</sup> Penal Code § 1475.

<sup>79</sup> California Rules of Court, rule 4.551(a)(3)(A). The petitioner can inquire about the name of the judge assigned to review the petition and can ask for a different judge if they can show a good faith belief that the assigned judge is prejudiced and cannot provide a fair or impartial hearing. Code of Civil Procedure § 170.6; *Maas v. Superior Court* (2016) 1 Cal.5th 962 [209 Cal.Rptr.3d 571].

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received a ruling, and (4) a copy of the original petition. Once the court receives a complete “notice and request for ruling,” the case should be assigned to a judge and calendared for a decision to be made within 30 days.<sup>80</sup>

In responding to a habeas corpus petition, the court will take one of the following three actions:

- ◆ If the petition does not show adequate grounds for relief, the court can summarily deny it without any further proceedings. The court must explain the reason for the denial.<sup>81</sup>
- ◆ If it appears that the petition might show valid grounds for relief, and the court wants more information, the court may order the respondent to submit an informal response. The usual deadline for submitting the informal response is 15 days, though the court may set a shorter or longer deadline. If the court orders an informal response, the petitioner will have 15 days after the informal response is filed to file an informal reply; this timeline can be shortened or lengthened.<sup>82</sup> Thus, the petitioner should review the informal response and file an informal reply, which can be in the form of a simple letter. If more time is needed to prepare an informal reply, the petitioner should request that the court grant a short extension of time.<sup>83</sup> The petitioner should serve the informal reply by mailing a copy to the respondent and sending a proof of service to the court. The court must then either deny the petition or issue an order to show cause within 45 days after the informal response was filed.<sup>84</sup>
- ◆ If the superior court that thinks the petition may have merit, it must issue an “order to show cause” (“OSC”). An order to show cause can be issued either directly after the petition is filed or after informal briefing has been submitted. The respondent is entitled to an opportunity to be heard formally, so a court cannot grant a habeas petition without issuing an order to show cause and giving the respondent an opportunity to file a return.<sup>85</sup> The order to show cause directs the state officials to present to the court any reasons why the relief requested by the petitioner should not be granted.<sup>86</sup> A court cannot require prison or parole officials to address potential grounds for relief that were not raised in the habeas petition. Instead, if the court believes there are important legal issues that were

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<sup>80</sup> California Rules of Court, rule 4.551(a)(3)(B).

<sup>81</sup> California Rules of Court, rule 4.551(g). Court commissioners, who are lesser judicial officials than judges, have the authority to summarily deny petitions for writ of habeas corpus or writ of mandate. Code of Civil Procedure § 259; *Gomez v. Superior Court* (2012) 54 Cal.4th 293 [142 Cal.Rptr.3d 808].

<sup>82</sup> California Rules of Court, rule 4.551(b).

<sup>83</sup> California Rules of Court, rule 4.551(h) (authorizing courts to shorten or extend time).

<sup>84</sup> California Rules of Court, rule 4.551(a)(5).

<sup>85</sup> *In re Campbell* (2017) 11 Cal.App.5th 742 [217 Cal.Rptr.3d 752] (court could not grant petition without first issuing an OSC); *In re Scott* (1994) 27 Cal.App.4th 946 [33 Cal.Rptr.2d 27].

<sup>86</sup> California Rules of Court, rule 4.551(c); *In re Hochberg* (1970) 2 Cal.3d 870 [87 Cal.Rptr. 681]; *People v. Romero* (1994) 8 Cal.4th 728 [35 Cal.Rptr.2d 270].

not raised in the petition, the court can invite the petitioner to file a supplemental or amended petition raising additional claims.<sup>87</sup>

## 15.21 Reviewing the Respondent's Return

When a court issues an order to show cause, the attorney general or district attorney will be ordered to file a “return” on behalf of the respondents. A court will usually give the respondents 30 days to file a return unless the petitioner shows that the case should be expedited (see § 15.18); alternatively, the respondent may request an extension of time to prepare the return.<sup>88</sup> The return should set forth any facts and legal grounds supporting the conviction or sentence or justifying the prison or parole officials' actions.<sup>89</sup>

## 15.22 Writing the Denial (also called a Reply or Traverse)

Once the respondent files the return, the petitioner will usually have 30 days to file another brief; the petitioner can ask the court to grant additional time to file if necessary.<sup>90</sup> The petitioner's response is officially called a “denial,” but is sometimes also called a “reply” or “traverse.” A petitioner should always file a denial of the respondent's allegations and re-allege the facts stated in the petition.<sup>91</sup> If a petitioner fails to file a denial, the court may deem the return's allegations to be true and deny the petition.<sup>92</sup>

In the denial, the petitioner should state that the allegations of the petition are incorporated in the denial, deny any claims made in the return, and confront any new issues raised in the return. The denial should include a memorandum of points and authorities responding to the legal arguments presented in the return. The petitioner can also attach as exhibits any additional documents or declarations necessary to support the case. A sample denial is included in Appendix 15-F.

If the facts of the case are in dispute, then the denial should include a request that the court hold an evidentiary hearing to hear witness testimony and/or order discovery (production of evidence) (see §§ 15.23-15.24). To support such requests, the petitioner should state the nature of the evidence to be produced and how it will support the allegations.<sup>93</sup>

The petitioner should serve the denial by mailing a copy to the respondent and sending a proof of service to the court.

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<sup>87</sup> *Board of Prison Terms v. Superior Court (Ngo)* (2005) 130 Cal.App.4th 1212, 1241-1242 [31 Cal.Rptr.3d 70].

<sup>88</sup> California Rules of Court, rule 4.551(d), (h).

<sup>89</sup> Penal Code § 1480; *People v. Duvall* (1995) 9 Cal.4th 464, 475-476 [37 Cal.Rptr.2d 259]; *In re Lewallen* (1979) 23 Cal.3d 274, 277 [152 Cal.Rptr. 528].

<sup>90</sup> California Rules of Court, rule 4.551(e), (h).

<sup>91</sup> See California Rules of Court, rule 4.551(e).

<sup>92</sup> California Rules of Court, rule 4.551(e); *In re Duvall* (1995) 9 Cal.4th 464 [37 Cal.Rptr.2d 259]; *In re Lawler* (1979) 23 Cal.3d 190, 194 [151 Cal.Rptr. 833]; see, e.g., *In re Wesley W.* (1981) 125 Cal.App.3d 240 [181 Cal.Rptr. 401].

<sup>93</sup> *In re Eli* (1969) 71 Cal.2d 214 [77 Cal.Rptr. 65].

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After the denial has been filed, the court has 30 days to either make a decision or order an evidentiary hearing.<sup>94</sup>

### 15.23 Asking for Discovery

A petitioner who thinks the respondent possesses evidence that will help the petitioner's case can ask the court to order the respondent to produce that evidence; this is called a request for "discovery." Examples of information that can be obtained through discovery are copies of official documents, transcripts of prior administrative or court hearings, or answers to questions asked by the petitioner. The power to order discovery in a habeas case arises only after the court has issued an order to show cause.<sup>95</sup> This is a state law provision, as there is no federal constitutional right to discovery in a state habeas corpus proceeding.<sup>96</sup>

Examples of cases in which discovery has been granted include a case in which a person was able to obtain discovery of the Executive Case Summary prepared by the BPH for the Governor's review of a grant of parole.<sup>97</sup> In another group of cases, a court ordered the BPH to produce thousands of parole suitability hearing transcripts as relevant to the question of whether the BPH had a widespread practice of failing to apply the parole suitability and unsuitability factors properly.<sup>98</sup>

A court does not have authority to order prison officials to either disclose or not rely on confidential information from prison informants. Instead, the court should allow the prison officials to file the confidential information under seal and then hold an *in camera* (closed chamber, without the petitioner or petitioner's attorney present) hearing to determine how much can be disclosed to the petitioner's attorney without revealing the identity of the informants.<sup>99</sup>

A court's refusal to order discovery that is necessary to a full and fair consideration of the case can be challenged by filing a petition for writ of mandate arguing that the court abused its discretion to order discovery. Petitions for writ of mandate are discussed at §§ 15.30-15.46.

### 15.24 Evidentiary Hearing

If the habeas case does not involve any disputed material (important) facts, the court may decide the case without an evidentiary hearing. An evidentiary hearing must be held only if a hearing

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<sup>94</sup> California Rules of Court, rule 4.551(f).

<sup>95</sup> Penal Code § 1484; *In re Scott* (2003) 29 Cal.4th 783, 814 [129 Cal.Rptr.2d 605]; *In re Avena* (1996) 12 Cal.4th 694, 730 [49 Cal.Rptr.2d 413]; *Board of Prison Terms v. Superior Court (Ngo)* (2005) 130 Cal.App.4th 1212, 1241-1242 [31 Cal.Rptr.3d 70]. However, there are two laws that allow courts to order discovery prior to the filing of a habeas petition: (a) courts can order post-conviction DNA testing of evidence, and (b) courts may order post-conviction discovery in cases challenging convictions with sentences of death or life in prison without the possibility of parole (LWOP), upon a showing of unsuccessful good faith efforts to obtain the materials from trial counsel. These special types of discovery are further discussed in §§ 15.47-15.48.

<sup>96</sup> *In re Lawley* (2008) 42 Cal.4th 1231, 1249 [74 Cal.Rptr.3d 92].

<sup>97</sup> *In re Elkins* (2006) 144 Cal.App.4th 475, 522, fn. 12 [50 Cal.Rptr.3d 503].

<sup>98</sup> See *In re Lewis* (2009) 172 Cal.App.4th 13 [91 Cal.Rptr.3d 72].

<sup>99</sup> *Ochoa v. Superior Court* (2011) 199 Cal.App.4th 1274 [132 Cal.Rptr.3d 233].



is needed to resolve a factual dispute.<sup>100</sup> Because a court might not hold an evidentiary hearing, it is important a petitioner should attach to the petition and denial as much evidence as possible, including declarations of witnesses.

If the court decides to hold a hearing, both the petitioner and respondent may use subpoenas to require witnesses to attend the hearing or produce documents at the hearing.<sup>101</sup>

The rules of evidence at a habeas corpus hearing sometimes are quite relaxed, compared to criminal trials. The court must “hear such proof ...as the justice of the case may require...”<sup>102</sup> A petitioner may be allowed to produce a wide variety of evidence supporting their position or credibility. Individual judges can vary widely in what they will find to be relevant. One specific rule is that administrative officers performing a quasi-judicial function (such as deciding whether to find a person suitable for parole) may not be called as witnesses to be questioned about their mental processes.<sup>103</sup>

A court’s refusal to order an evidentiary hearing needed for full and fair consideration of the case can be challenged by filing a petition for writ of mandate arguing that the court abused its discretion. Petitions for writ of mandate are discussed at §§ 15.30-15.46.

## 15.25 The Court’s Decision

If the court’s decision is in petitioner’s favor, the court will either write an order granting relief or ask petitioner’s attorney to write an order for the court to sign.

A court may reconsider and potentially vacate an order granting habeas relief if the respondent files a motion to reconsider within 60 days from the date of the order.<sup>104</sup>

If the respondent does not file an appeal and obtain a stay of the court’s order (see § 15.26), the order granting relief will take effect. In a case involving prison or parole issues, the attorney general or the district attorney should inform the officials about the order and ensure that it is followed. In practice, notification and compliance may not happen in a timely fashion without some action by the petitioner. Thus, the petitioner or the petitioner’s attorney should ensure that the prison or parole officials are aware of the order granting the petition. The petitioner or their attorney can communicate with the attorney general or district attorney or with the prison litigation coordinator to move things along. If the prison or parole officials still do not comply with the order, the petitioner or attorney could try filing a motion in the court seeking enforcement of the order.

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<sup>100</sup> California Rules of Court, rule 4.551(f); *In re Johnson* (1992) 1 Cal.4th 689 [4 Cal.Rptr.2d 170]; *In re Rboades* (2017) 10 Cal.App.5th 896, 907-908 [217 Cal.Rptr.3d 187].

<sup>101</sup> Penal Code § 1484.

<sup>102</sup> Penal Code § 1484.

<sup>103</sup> *Hornung v. Superior Court* (2000) 81 Cal.App.4th 1095, 1099 [97 Cal.Rptr.2d 382].

<sup>104</sup> *Jackson v. Superior Court* (2010) 189 Cal.App.4th 1051 [118 Cal.Rptr.3d 81].

## 15.26 If the Petition is Granted: Direct Appeal by the Respondent

If a habeas corpus petition is granted, the respondent can appeal the decision.<sup>105</sup> A respondent has 60 days from the date of the order to file a notice of appeal.<sup>106</sup>

When the respondent files an appeal, they may file a petition for writ of supersedeas asking the court of appeal to “stay” the order granting relief. If a stay is granted, the order will not take effect unless and until the appeal is resolved in petitioners’ favor.<sup>107</sup> The burden is on the state to prove a stay is necessary in that “the fruits of a reversal would be irrevocably lost unless the status quo is maintained.” However, it is inappropriate to stay an order if the party that won the case originally court level would suffer disproportionate injury assuming the case is later affirmed.<sup>108</sup> The court of appeal may give the habeas corpus petitioner an opportunity to file a response to the petition for writ of supersedeas before ruling on the issue.

## 15.27 If the Petition is Denied: Filing a New Habeas Corpus Petition in the Court of Appeal

A petitioner cannot file an appeal from an order denying habeas relief.<sup>109</sup> However, the petitioner can seek further review by filing a new habeas corpus petition in the next highest court.<sup>110</sup> Thus, if the superior court denied relief, the petitioner can file a new petition in the court of appeal for the district in which the superior court is located. Appendix 15-A lists the addresses of court of appeals and which counties are covered by each court of appeal district.

There is no set timeline to file a petition in the court of appeal. However, the petitioner should file in the court of appeal as soon as possible in order to avoid denial of the petition as untimely (see § 15.9) and meet the timeline for filing a federal habeas corpus petition if the state courts do not provide relief (see §§ 16.9-16.11). A good practice is to file the petition in the court of appeal no later than 60 days after the superior court denial.

As in the superior court, a petitioner who is not represented by an attorney should use the Judicial Council Form HC-001 (see § 15.11 and Appendix 15-B). If possible, a petitioner who is not represented by an attorney should include any needed additional pages setting forth facts and arguments. The new petition should include all the information that was in the original petition and denial. It should also say in the statement of facts that a petition on the same issue was filed and denied in the superior court, and the superior court decision should be attached to the petition as an exhibit. Any relevant documents produced in discovery and a transcript of any hearing held in the lower court should also be filed as exhibits. A petitioner without funds should be able to get a transcript of an evidentiary hearing free of charge simply by sending a request asking the court to order the court

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<sup>105</sup> Penal Code § 1506; California Rules of Court, rule 8.388.

<sup>106</sup> California Rules of Court, rule 8.104(a).

<sup>107</sup> See Penal Code §§ 1506-1507.

<sup>108</sup> *Nuckolls v. Bank of California* (1936) 7 Cal.2d 574, 578; *Private Investors v. Homestake Mining Co.* (1936) 11 Cal.App.2d 488, 492.

<sup>109</sup> Penal Code § 1506; see also *In re Crow* (1971) 4 Cal.3d 613, 621 n. 8 [94 Cal.Rptr. 254].

<sup>110</sup> *People v. Gallardo* (2000) 77 Cal.App.4th 971 [92 Cal.Rptr.2d 217]; *People v. Garrett* (1998) 67 Cal.App.4th 1419 [79 Cal.Rptr.2d 803].

reporter to prepare and provide a transcript for the purposes of taking the case to a higher level court.<sup>111</sup> If the court does not comply, the petitioner can try filing a motion in the court of appeal asking the court to order preparation of a hearing transcript.

A petitioner who is not represented by an attorney and is filing in the court of appeal need send only the original petition and exhibits.<sup>112</sup> It is a good practice to serve the petition on the respondent by mailing a copy of the petition to the attorney general's office. If the petitioner serves the petition, the petitioner should send a proof of service to the court.

Once the petition is filed with the court of appeal, the procedure is quite similar to that in the superior court, as described in §§ 15.20 to 15.25. However, there is no set timeline for a court to take action on the petition.

If no evidentiary hearing was held in the superior court, the court of appeal will conduct an independent review of the issues.<sup>113</sup> If an evidentiary hearing was held, the court of appeal will review the superior court's factual findings to see whether they were supported by substantial evidence, and will independently review any questions of law.<sup>114</sup>

If no petition was brought in the superior court, or if the superior court failed to hold an evidentiary hearing or order discovery necessary to resolve material disputes about the facts, the court of appeal may issue an order to show cause directed to the superior court. The superior court should then hold a hearing to decide the factual issues and should issue an order that includes a statement of reasons supporting its decision.<sup>115</sup>

Alternatively, the court of appeal (or the California Supreme Court, if the petition is being heard there) may appoint a "referee" to make necessary factual determinations.<sup>116</sup> The referee will review evidence and hear arguments by both sides and make findings. The referee's report and findings and a transcript of the hearing will be filed with the court. Any party may file a brief raising objections to the referee's report. The referee's findings of fact are not binding, and the court may reach a different conclusion after they examine the evidence.

## 15.28 Filing a Petition for Review in the California Supreme Court

If a habeas petition is denied in the court of appeal, there are two ways for the petitioner to ask the California Supreme Court to consider the case: filing a petition for review or filing a new habeas petition. The easiest option is a petition for review, but there are strict filing deadlines.

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<sup>111</sup> *Gardner v. California* (1969) 393 U.S. 367 [89 S.Ct. 580; 21 L.Ed.2d 601].

<sup>112</sup> California Rules of Court, rule 8.380(c). An attorney who files a petition either must use the court's electronic filing system or get a hardship exception and then follow the court rules for formatting and the number of copies to be filed. California Rules of Court, rule 8.71; California Rules of Court, rule 8.384.

<sup>113</sup> *In re Rosenkrantz* (2002) 29 Cal.4th 616, 677 [128 Cal.Rptr.2d 104]; *In re Smith* (2003) 114 Cal.App.4th 343, 360-361 [7 Cal.Rptr.3d 655].

<sup>114</sup> *In re Collins* (2001) 86 Cal.App.4th 1176, 1181 [104 Cal.Rptr.2d 108].

<sup>115</sup> *Rose v. Superior Court of Los Angeles County* (2000) 81 Cal.App.4th 564 [96 Cal.Rptr.2d 843].

<sup>116</sup> *In re Riddle* (1962) 57 Cal.2d 848 [22 Cal.Rptr. 472]. Examples of questions submitted to a referee can be found in *In re Hurlie* (1977) 20 Cal.3d 317 [142 Cal.Rptr. 443] and *In re Branch* (1969) 70 Cal.2d 200 [74 Cal.Rptr. 238].

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Either the habeas petitioner or the habeas respondent can file a petition for review.<sup>117</sup> When a petition for review is filed, the case record from the court of appeal will be sent to the Supreme Court. The petitioner will not have to supply copies of all the exhibits or the prior briefing. The petition for review should focus on why the Supreme Court should step in to decide the legal issue presented by the case; the person asking for review should try to show that the state courts have issued differing opinions or that the issue is of wide importance.<sup>118</sup> The petition should start with brief statement of when the court of appeal decision was issued, whether the decision was published, and the basic action taken by the court (for example, the petition for writ of habeas corpus was denied). This should be followed by a one or two sentence statement of each of the “issues presented for review,” followed by an explanation of the “grounds for review” (why it is important for the Supreme Court to decide the issues) and arguments describing the issues in more detail. The court of appeal opinion should be attached to the petition for review.<sup>119</sup> The petition cannot be more than 30 pages long if typewritten or more than 8,400 words if written on a computer.<sup>120</sup> The person asking for review should file an original petition and supporting documents, plus 10 copies of the petition and 2 copies of any supporting documents.<sup>121</sup> The address for the California Supreme Court is in Appendix 15-A. The person must also serve a copy of the petition on the attorney general’s office and on the superior court and court of appeals that heard and decided the matter.<sup>122</sup>

The petition for review must be filed within 10 days after a summary denial by the court of appeal or within 40 days after a denial in which the court of appeal issued an order to show cause and wrote an opinion.<sup>123</sup> The rules of court allow the other party to file an answer to a petition for review within 20 days after the petition is filed and for the filing of a reply within 10 days after the answer is filed;<sup>124</sup> in practice the attorney general’s office rarely files an answer to a petition for review.

The California Supreme Court will usually take up to 60 days to decide whether to grant or deny the petition. However, the court can extend this timeline to up to 90 days after the petition is filed.<sup>125</sup>

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<sup>117</sup> Penal Code §§ 1506-1507; California Rules of Court, rule 8.500(a)(1).

<sup>118</sup> See California Rules of Court, rule 8.500(b).

<sup>119</sup> California Rules of Court, rule 8.504(b).

<sup>120</sup> California Rules of Court, rule 8.504(d). The rule allows the court to grant a request for a longer petition upon a showing of good cause.

<sup>121</sup> California Rules of Court, rule 8.380(c). An attorney who files a petition either must use the court’s electronic filing system or get a hardship exception and follow the court rules for formatting and the number of copies to be filed. California Rules of Court, rule 8.71; California Rules of Court, rule 8.384.

<sup>122</sup> California Rules of Court, rule 8.500(f).

<sup>123</sup> California Rules of Court, rule 8.499; California Rules of Court, rule 8.500(e). This time cannot be extended, though the court may relieve a party from failure to timely file the petition if the time for the court to order review on its own motion has not expired. California Rules of Court, rule 8.500(e)(3). The time for the court to order review on its own motion is 30 days after the court of appeal decision becomes final; the court may extend this timeline. California Rules of Court, rule 8.512(c).

<sup>124</sup> California Rules of Court, rule 8.500(a).

<sup>125</sup> California Rules of Court, rule 8.512(b).

## 15.29 Filing a New Habeas Corpus Petition in the California Supreme Court

As discussed in § 15.28, a person can request that the California Supreme Court consider a habeas case by filing a petition for review. Alternatively, a person can file a new petition for writ of habeas corpus in the California Supreme Court. The habeas petition should be on the same form (HC-001) and include the same information and exhibits as the petitions filed in the lower courts, plus a copy of the court of appeal decision and any new evidence presented in the court of appeal. The petitioner must file an original and 10 copies of the petition and any reply brief, but only an original and two copies of supporting documents.<sup>126</sup> If a person in prison has problems getting copies of the petition, they may try sending as many copies as they can get along with a letter to the court clerk explaining why they are unable to obtain the required number of copies. The address for the California Supreme Court is in Appendix 15-A.

It is a good practice to serve the petition on the respondent by mailing a copy of the petition to the attorney general's office. If the petitioner serves the petition, the petitioner should send a proof of service to the court.

There is no set deadline for filing a habeas corpus petition in the California Supreme Court. However, the petitioner should file as soon as possible so that the California Supreme Court will not deny the petition as being unduly delayed and to meet time limits if the person later wants to file a federal habeas petition on the issues (see §§ 16.9- 16.11). A good practice is to file the new petition no later than 60 days after the court of appeal issues its decision.

The process by which the Supreme Court will consider the petition is somewhat similar to the process in the lower courts. (See generally §§ 15.20-15.25.) However, there is no set timeline for the California Supreme Court to take action on the petition.

If the California Supreme Court denies a petition for review or a habeas corpus petition (or a petition for writ of mandate) concerning a matter that affects the length of the person's incarceration, the person may be able to file a federal habeas petition seeking review of the state courts' decisions. Detailed information on federal habeas corpus is in Chapter 16.

## STATE PETITIONS FOR WRIT OF MANDATE

### 15.30 Overview of State Petitions for Writ of Mandate

The writ of mandate (also called a writ of mandamus) is an important tool in preserving people's rights because it can be used to compel a public official to perform their lawful duties. However, its practical use is restricted to a fairly narrow realm of cases. Virtually all challenges to criminal convictions, civil commitments, or prison and parole policies and actions can be brought through habeas corpus; because mandate is procedurally more complicated, people who are in prison or on parole should almost always file a habeas corpus petition rather than a mandate petition. However, a petition for writ of mandate is useful in some circumstances, particularly when the petitioner is someone other than a person in prison or on parole, when the issue is applicable to many

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<sup>126</sup> California Rules of Court, rule 8.44(a)(2)-(3). An attorney who files a petition either must use the court's electronic filing system or get a hardship exception and follow the rules for formatting and number of copies.



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similarly-situated people, when a statute specifically states that mandate is the proper means of review, or when there is no other adequate legal means for the petitioner to get relief.

This chapter includes a general description of the grounds on which a writ can be issued and the procedural process, focusing on petitions challenging prison or parole actions, with minor attention to petitions regarding post-judgment matters related to felony criminal convictions (there are different procedures and consideration for mandate petitions concerning pre-judgment felony petitions and petitions concerning infractions, misdemeanors, or limited civil actions). In addition, this chapter includes brief discussion of other types of writ proceedings that are closely related to mandamus, including administrative mandamus and writs of prohibition. Detailed discussion of the law and procedures can be found in *California Civil Writs* and *Appeals and Writs in Criminal Cases*, published and updated periodically by the Continuing Education of the Bar (CEB) (2100 Franklin St., Suite 500, Oakland, CA 94612-3098 or 1-800-232-3444). Note, however, that the book focuses on writs in criminal cases, rather than in prison or parole matters.

### 15.31 Who May File a Petition

Anyone who has been denied a clear legal right may file a petition for a writ of mandate. There is no “in custody” requirement (as there is for habeas petitions), so a person can file a mandate petition challenging a state action even they are not currently in prison or a state hospital, or on parole or other supervision, based on the relevant charge, conviction, or civil commitment.<sup>127</sup>

Furthermore, a petitioner need not have any personal interest in the action if the matter concerns a public right and the aim of the petition is to force a public official perform their official duties; any citizen can seek to enforce such a right.<sup>128</sup> This allows individual citizens and advocacy groups to seek to challenge and enforce laws affecting other groups of people.<sup>129</sup>

### 15.32 Issues that May be Raised

To obtain a writ of mandate, the petitioner must show (1) there is no other “plain, speedy, and adequate legal remedy, in the ordinary course of law”; (2) the respondent has a “clear, present, and usually ministerial duty” (a duty the law requires the respondent to do); and (3) the petitioner has a “clear, present, and beneficial right” to have the official perform that duty. A petitioner may file a petition for writ of mandate against any government branch, agency, or official, including courts and

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<sup>127</sup> *People v. Picklesimer* (2010) 48 Cal.4th 330, 339 [106 Cal.Rptr.3d 239] (mandate petition to challenge constitutionality of sex offender registration by person no longer in custody); *Harris v. Superior Court* (2017) 14 Cal.App.5th 142 [222 Cal.Rptr.3d 192] (mandate petition seeking to force court to appoint counsel to represent person in appeal of restitution order in a case for which he was not in custody); *Netzley v. Superior Court* (2008) 160 Cal.App.4th 348 [72 Cal.Rptr.3d 773] (mandate petition by person in Oregon prison seeking dismissal of California charges due to claim that California failed to comply with interstate detainer laws).

<sup>128</sup> *Board of Social Welfare v. County of Los Angeles* (1945) 27 Cal.2d 98.

<sup>129</sup> *Legal Services for Prisoners with Children v. Bowen* (2009) 170 Cal.App.4th 447 [87 Cal.Rptr.3d 869] (challenging broad denial of voting to all people convicted of felonies); *League of Women Voters v. McPherson* (2006) 145 Cal.App.4th 1469 [52 Cal.Rptr.3d 585] (seeking to compel director of elections to accept voter registrations for people in jails who were qualified to vote); *American Friends Service Committee v. Procnier* (1973) 33 Cal.App.3d 252 [109 Cal.Rptr. 22], disapproved on other grounds in *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47 [3 Cal.Rptr.2d 264] (petition to force the CDCR to comply with legal procedures for enacting new regulations).

prison or parole officials.<sup>130</sup> The duty involved may arise from the federal constitution or federal laws that apply to the state, state statutes, or state regulations. However, a petition for writ of mandate will be denied if there is no legal duty that can be enforced.<sup>131</sup> Sometimes a person will file a habeas petition that should have been brought as a mandate petition or vice versa. Courts can exercise discretion to overlook the improper title and deem the wrongly-filed petition to be the correct type of petition.<sup>132</sup>

Petitions for writ of mandate have been used to challenge the lawfulness of prison and parole regulations or policies.<sup>133</sup> They also are a means to get prison, jail, police, or parole officials to comply with their legal duties, including following their own regulations.<sup>134</sup> For example, one use of mandate petitions is to force the CDCR to properly process and respond to administrative appeals.<sup>135</sup> A petition for writ of mandate also may be used to get the CDCR to return property or its value in money (called a claim for “specific recovery of property”) that was taken for administrative reasons (such as during a transfer or segregation placement) and lost or damaged by prison staff.<sup>136</sup> However, if property was confiscated as contraband, a person cannot use a petition of mandate to seek return of the property or compensation for its loss, as there is no ministerial duty for the officials to return contraband.<sup>137</sup>

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<sup>130</sup> Code of Civil Procedure §§ 1085-1086; *Loder v. Municipal Court* (1976) 17 Cal.3d 859, 863 [132 Cal.Rptr. 464]. Since habeas corpus is an “extraordinary remedy,” the availability of habeas relief does not necessarily bar a person from bringing a petition for writ of mandate when the issue concerns the failure of a public official to perform a legal duty. *Villery v. Department of Corrections and Rehabilitation* (2016) 246 Cal.App.4th 407, 416 [200 Cal.Rptr.3d 896].

<sup>131</sup> See, e.g., *Wasko v. California Department of Corrections* (1989) 211 Cal.App.3d 996, 1005 [259 Cal.Rptr. 764] (writ denied where law did not require that diagnostic study be prepared by psychologist rather than correctional counselor).

<sup>132</sup> *Berman v. Cate* (2010) 187 Cal.App.4th 885 [114 Cal.Rptr.3d 49]; *In re Stier* (2007) 152 Cal.App.4th 63, 82-83 [61 Cal.Rptr.3d 181]; *Escamilla v. California Department of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 511 [46 Cal.Rptr.3d 408].

<sup>133</sup> *Menefield v. Board of Parole Hearings* (2017) 13 Cal.App.5th 387 [220 Cal.Rptr.3d 442] (challenge to BPH regulation on a parole unsuitability factor as violating due process and administrative procedures law); *Molar v. Gates* (1979) 98 Cal.App.3d 1 [159 Cal.Rptr. 239] (challenging jail policy of providing minimum security jail facilities for men but not for women as violating equal protection).

<sup>134</sup> *Galzinski v. Somers* (2016) 2 Cal.App.5th 1164 [207 Cal.Rptr.3d 191] (compelling police department to follow their published procedures for addressing citizen complaints); *In re Brindle* (1979) 91 Cal.App.3d 660 [154 Cal.Rptr. 563] (forcing prison officials to allow public defender access to people in jail custody); *Bradshaw v. Duffy* (1980) 104 Cal.App.3d 475 [163 Cal.Rptr. 559] (forcing jail officials to inform people incarcerated in county jail of policy preventing trustees from honor farm placement); *Gee v. Brown* (1975) 14 Cal.3d 571 [122 Cal.Rptr. 231] (seeking to have parole authorities comply with laws as to when counsel must be appoint for parole rescission hearing); *Bailey v. Loggins* (1982) 32 Cal.3d 907 [187 Cal.Rptr. 575] (compelling prison officials to obey the constitution and state statutes when censoring prison-published newspapers); *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 732 [188 Cal.Rptr. 130] (compelling prison officials to comply with Administrative Procedures Act before transferring people under new classification policy).

<sup>135</sup> See, e.g., *Villery v. California Dept. of Corrections and Rehabilitation* (2016) 246 Cal.App.4th 407 [200 Cal.Rptr.3d 896]; *Menefield v. Foreman* (2014) 231 Cal.App.4th 211 [180 Cal.Rptr.3d 3]; *Wright v. California* (2004) 122 Cal.App.4th 659 [19 Cal.Rptr.3d 92].

<sup>136</sup> *Escamilla v. California Dept. of Corrections and Rehabilitation* (2006) 141 Cal.App.4th 498 [46 Cal.Rptr.3d 408].

<sup>137</sup> *Flores v. California Dept. of Corrections and Rehabilitation* (2014) 224 Cal.App.4th 199, 205-208 [168 Cal.Rptr.3d 204].

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People can also use a petition for writ of mandate to force other sorts of public officials to do their official duties.<sup>138</sup>

Other uses of mandate include challenging the constitutionality of criminal procedures or other laws.<sup>139</sup>

People can use a petition for writ of mandate to make a court to do its duties, such as hearing and deciding cases within its jurisdiction or following laws that protect rights to litigate issues, to have fair hearings, or to other benefits required by law.<sup>140</sup>

Petitions for writ of mandate are also used to challenge courts' decisions in criminal case proceedings before the trial is held, such as challenging denial of motions to suppress evidence, to dismiss charges, or to disqualify a particular judge.<sup>141</sup> Mandate can also be used to seek various types of relief after a criminal case is closed, such as seeking a court order for the return of property wrongfully seized or kept by the police.<sup>142</sup>

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<sup>138</sup> *Holmes v. California Victim Compensation and Government Claims Board* (2015) 239 Cal.App.4th 1400 [192 Cal.Rptr.3d 24]. (seeking to set aside denial of government claim for damages); *League of Women Voters v. McPherson* (2006) 145 Cal.App.4th 1469 [52 Cal.Rptr.3d 585] (seeking to compel election officials to accept voter registrations from people in jails who were qualified to vote); *Mack v. Younger* (1978) 21 Cal.3d 102, 118 [145 Cal.Rptr. 674] (mandate used to compel attorney general to comply with law on expungement of records).

<sup>139</sup> *Briggs v. Brown* (2017) 3 Cal.5th 808 [221 Cal.Rptr.3d 465] (challenging constitutionality of changes to death penalty appeal and habeas procedures); *Legal Services for Prisoners with Children v. Bowen* (2009) 170 Cal.App.4th 447 [87 Cal.Rptr.3d 869] (challenging broad denial of voting to all people convicted of felonies).

<sup>140</sup> *Payne v. Superior Court* (1976) 17 Cal.3d 908 [132 Cal.Rptr. 405] (mandate petition used to make court determine whether petitioner's right of access to the courts was denied when civil judgment was entered against him while he was unable to obtain an attorney or appear to defend himself due to incarceration); *Cox v. Superior Court* (2016) 1 Cal.App.5th 855 [205 Cal.Rptr.3d 188] (challenging court's improper decision deeming a person's civil complaint against prison officials to be a habeas corpus petition, effectively depriving the person of the ability to win money damages); *Rose v. Superior Court* (2000) 81 Cal.App.4th 564 [6 Cal.Rptr.2d 843] (challenging court's failure to hold necessary evidentiary hearing or state reasons for denial of habeas corpus petition); *Reaves v. Superior Court* (1971) 22 Cal.App.3d 587 [99 Cal.Rptr. 156] (mandate used to force court to process habeas petitions from people in prison and stop delegating that responsibility to the district attorney); see also *Burnett v. Superior Court* (1974) 12 Cal.3d 865 [117 Cal.Rptr. 556] (challenging court's refusal to rule on motion, to set aside charges in criminal proceeding); *Martinez v. Superior Court* (1973) 36 Cal.App.3d 683 [111 Cal.Rptr. 678]. (mandate used compel trial court to hold proceedings to determine whether petitioner should be allowed to withdraw guilty plea); *Scott A. v. Superior Court* (1972) 27 Cal.App.3d 292 [103 Cal.Rptr. 683] (mandate used to compel court to seal records); *Parks v. Superior Court* (1971) 19 Cal.App.3d 188 [96 Cal.Rptr. 645] (mandate used to compel court to follow rule requiring it to set aside guilty verdict after juvenile honorably discharged from youth authority); *Smith v. Superior Court* (1968) 68 Cal.2d 547 [68 Cal.Rptr. 1] (mandate used to stop court from dismissing appointed attorney over both the attorney's and defendant's objection).

<sup>141</sup> See, e.g., Penal Code § 1538(i) (challenge to unlawful search and seizure); Penal Code § 999a (challenge to preliminary hearing finding of probable cause); Code of Civil Procedure § 170.3(d) (challenge to disqualify judge); *Owens v. Superior Court* (1980) 28 Cal.3d 238 [168 Cal.Rptr. 466] (dismissal of charges due to violation of speedy trial right).

<sup>142</sup> *Espinosa v. Superior Court* (1975) 50 Cal.App.3d 347 [123 Cal.Rptr. 448]; *Flack v. Municipal Court* (1967) 66 Cal.2d 981, 983-984 [59 Cal.Rptr. 872].

As with a habeas petition, courts will usually deny a mandate petition that is moot because the issue already has been resolved.<sup>143</sup> Courts may make exceptions for issues that are likely to recur in the future and which the courts are otherwise unlikely to resolve.<sup>144</sup>

### 15.33 Issues that May be Raised: Writ of Prohibition

A related type of action is a petition for writ of prohibition. Writs of prohibition are used to stop or prevent proceedings that would be outside a court's jurisdiction, including enforcement of statutes that are plainly unconstitutional.<sup>145</sup> The writ of prohibition is not available to review an already-completed judicial proceeding.<sup>146</sup>

The procedure for bringing a petition for writ of prohibition is virtually identical to that for a petition for writ of mandate.<sup>147</sup> If a petitioner is unsure whether to ask for a writ of mandate or writ of prohibition, the easy solution is to call the petition a "petition for writ of mandate or prohibition." Courts are quite liberal in granting the correct type of writ even if the petitioner has misidentified the type of relief that is being sought.<sup>148</sup>

### 15.34 Issues that May be Raised: Administrative Mandamus

A special type of writ of mandate is called "administrative mandamus." The same procedural rules apply to petitions for writ of mandate and petitions for administrative mandamus.<sup>149</sup>

Administrative mandamus is an action in which a writ of mandate is used to review a "quasi-judicial" or "adjudicatory" decision made by an administrative agency, meaning a matter in which the agency decided an individual case by applying agency rules to a specific set of facts.<sup>150</sup> The hallmarks of an adjudicatory decision are a hearing, the taking of evidence, and the exercise of discretion to determine facts and apply rules to those facts.<sup>151</sup> For example, a finding a person guilty of a prison rule violation or finding a person with a life sentence unsuitable for parole are "quasi-

<sup>143</sup> *Bruce v. Gregory* (1967) 65 Cal.2d 666, 670 [56 Cal.Rptr. 265].

<sup>144</sup> *In re William M.* (1970) 3 Cal.3d 16 [89 Cal.Rptr. 33].

<sup>145</sup> Code of Civil Procedure §§ 1102-1103; *Rockwell v. Superior Court* (1976) 18 Cal.3d 420 [134 Cal.Rptr.650] (prohibition used to stop use of unconstitutional death penalty laws); *Allen v. Superior Court* (1976) 18 Cal.3d 520 [134 Cal.Rptr. 774] (prohibition writ to prevent a court from ordering defendant to give prosecutor unauthorized discovery); *Barber v. Municipal Court* (1979) 24 Cal.3d 742 [157 Cal.Rptr. 658] (prohibition used to prevent undercover police officer from attending confidential attorney-client meetings).

<sup>146</sup> *Crittenden v. Municipal Court* (1963) 216 Cal.App.2d 811 [31 Cal.Rptr.280].

<sup>147</sup> See Code of Civil Procedure § 1105 (mandate procedures applicable to writs of prohibition).

<sup>148</sup> See, e.g., *Owens v. Superior Court* (1959) 52 Cal.2d 822, 827 ("If the facts justify such relief it is immaterial that defendant has prayed for the wrong remedy, and we treat this petition [for writ of prohibition] as a writ of mandate.").

<sup>149</sup> *Woods v. Superior Court of Butte County* (1981) 28 Cal.3d 668 [170 Cal.Rptr. 484].

<sup>150</sup> Code of Civil Procedure § 1094.5; *Strumpsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28 [112 Cal.Rptr. 805].

<sup>151</sup> *Harris v. Civil Service Commission* (1998) 65 Cal.App.4th 1356 [77 Cal.Rptr.2d 366].

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judicial” decisions. In contrast, an administrative appeal decision is not “quasi judicial” because appeals do not require a hearing.<sup>152</sup>

However, since one of the requirements of administrative mandamus is that there is no other ordinary remedy available, courts are inclined to treat most petitions for administrative mandamus filed by people in prison or on parole as petitions for writ of habeas corpus. Accordingly, there are few reported cases in which people incarcerated in California have successfully used administrative mandamus.<sup>153</sup>

When an administrative mandamus action affects “vested” fundamental rights, a court must independently review the evidence to see if the administrative decision was lawful, rather than simply looking to see if the decision was supported by substantial evidence.<sup>154</sup> Where the question is whether the official abused their discretion in reaching a decision, the court will look to see whether the findings are supported by substantial evidence in light of the whole record.<sup>155</sup> These standards of review are more favorable to petitioners than the standards that are used in habeas corpus cases, in which courts must uphold the decisions of prison and parole officials if those decisions are supported by “some evidence.”<sup>156</sup>

### 15.35 Exhaustion of Administrative Remedies

As with a petition for writ of habeas corpus, a person usually must exhaust any available administrative remedies before filing a petition for a writ of mandate.<sup>157</sup> See §§ 1.2-1.3 for detailed information about the exhaustion requirement and Chapter 1 generally for information about the CDCR and BPH administrative appeal processes.

### 15.36 When to File the Petition

A recent case examined the question of the timeline for filing a petition for writ of mandate challenging the actions of prison or parole officials. In that case, the petitioner sought to force the CDCR to process his administrative appeal of a rule violation finding of guilt. The court held that the statute of limitations for a writ of mandate depends upon the nature of the obligation sought to be enforced. The court applied the three-year limitation period for an action based upon a duty created by statute. The court rejected the CDCR’s claim that the case should be time-barred due to delay even

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<sup>152</sup> *Wasako v. California Department of Corrections* (1989) 211 Cal.App.3d 996, 1005 [259 Cal.Rptr. 764].

<sup>153</sup> However, there is a case in which a juvenile was allowed to use administrative mandamus to challenge a BPH decision overriding her court commitment to the youth authority and transferring her to adult prison. *Mardesich v. California Youthful Offender Parole Board* (1999) 69 Cal.App.4th 1362 [82 Cal.Rptr.2d 1367].

<sup>154</sup> *Bixby v. Pierno* (1971) 4 Cal.3d 130, 144 [93 Cal.Rptr. 234]; *O’Connor v. State Teachers’ Retirement System* (1996) 43 Cal.App.4th 1610 [51 Cal.Rptr.2d 540].

<sup>155</sup> Code of Civil Procedure § 1094.5(c).

<sup>156</sup> *Superintendent v. Hill* (1985) 472 U.S. 445, 545-456 [105 S.Ct. 276; 86 L.Ed.2d 356]; *In re Rothwell* (2008) 164 Cal.App.4th 160, 166 [78 Cal.Rptr.3d 723]; *In re Lawrence* (2008) 44 Cal.4th 1181, 1218-1221 [82 Cal.Rptr.3d 169].

<sup>157</sup> *Sail’er Inn, Inc., v. Kirby* (1971) 5 Cal.3d 1, 7 [95 Cal.Rptr. 329] (mandate ordinarily will issue only after exhaustion of administrative remedies, but there are recognized exceptions).

though the petitioner had filed within the three-year period, as the court found that the CDCR had not shown that it was prejudiced by any delay.<sup>158</sup>

As a general rule, a petition challenging a court's action should be filed within the same 60-day time period as for a notice of appeal (see § 14.2). However, a court may accept a mandate petition filed after that timeline if a person provides exceptional reasons for not filing earlier and does not unreasonably delay in filing.<sup>159</sup>

For petitions involving many criminal procedure matters, there are specific filing deadlines set forth in the statutes that govern the specific issues.<sup>160</sup>

### 15.37 Where to File the Petition

A writ of mandate may be issued by a state superior court, court of appeal, or the California Supreme Court.<sup>161</sup>

Except in unusual circumstances, people who are challenging actions by prison or parole officials (or other types of government officials) should file the petition in the superior court in the county where the problem occurred; this usually will be the county where they are incarcerated or where they are on parole.<sup>162</sup>

If the respondent is a court, then the petition should be filed in the next highest court that covers the area in which the lower court is located. Thus, an action by a superior court usually should be challenged by a petition filed in a court of appeal. Addresses of the state courts and the prisons in those counties are in Appendix 15-A. The contents of the petition should be the same as for a petition filed in the superior court and the petitioner should serve the respondent and any real party in interest. The petitioner should send an original and four copies of the petition to the court of appeal.<sup>163</sup> The rest of the proceedings in the court of appeal are similar to those in the superior court. However, if a petition involving factual disputes is filed in the court of appeal, the court will remand

<sup>158</sup> *Kao v. California Department of Corrections and Rehabilitation* (2016) 244 Cal.App.4th 1326 [198 Cal.Rptr.3d 862].

<sup>159</sup> *Volkswagen of America, Inc. v. Superior Court* (2001) 94 Cal.App.4th 695, 701 [94 Cal.App.4th 695]; *People v. Superior Court (Clements)* (1988) 200 Cal.App.3d 491, 495-497 [246 Cal.Rptr.122]; *Wagner v. Superior Court* (1993) 12 Cal.App.4th 1314, 1317 [16 Cal.Rptr.2d 534]. Note that in regards to petitions concerning some criminal issues, there are specific deadlines created by the governing statutes.

<sup>160</sup> See, e.g., Penal Code § 1405(k) (challenge to denial of post-conviction DNA testing); Penal Code § 1538(i) (challenge to unlawful search and seizure); Penal Code § 999a (challenge to preliminary hearing finding of probable cause); Code of Civil Procedure § 170.3(d) (challenge to disqualify judge).

<sup>161</sup> California Constitution, Article VI, § 10. Code of Civil Procedure § 1085. The appellate divisions of superior courts also have jurisdiction over writ of mandate proceedings in infraction, misdemeanor and limited civil appeal cases. Rules for writs filed in the appellate division of the superior court are in California Rules of Court, rules 8.930-8.936. Some (but not all) superior courts also use these rules of procedure.

<sup>162</sup> See *Tharp v. Superior Court* (1982) 32 Cal.3d 496 [186 Cal.Rptr. 335]; *Stoneham v. Rusben* (1982) 137 Cal.App.3d 729, 733-734 [188 Cal.Rptr. 130].

<sup>163</sup> California Rules of Court, rule 8.44(b). If it is impossible for a *pro se* petitioner to get copies in a timely matter, they can try sending the original along with a letter explaining the situation and asking the court to file the petition without the extra copies. Also, an attorney filing a mandate petition should follow any court rules requiring attorneys to submit documents through electronic filing.

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(send) the case to the superior court or to a judge acting as a referee to decide the facts. The findings and judgment of the court will be set forth in a written opinion.

If a petition could first have been filed in a lower court, but was not, the petitioner must state good reasons why the higher court should decide the case. For example, the California Supreme Court may act on petitions for writs of mandate that were not filed previously in the lower courts when the issues are of statewide importance and have to be resolved promptly.<sup>164</sup> The petitioner should serve the petition on the respondent and real party in interest and send a proof of service to the court. The petitioner should file the original petition and 10 copies with the court.<sup>165</sup>

### 15.38 Preparing the Petition and Supporting Documents

A petition for writ of mandate should include a title page stating the name of the court in which the case is being filed, the name of the parties, and the type of petition being filed. The format of the petition is similar that of a state habeas corpus petition, such as the sample in Appendix 15-C; however, there is no need for the petitioner to assert that they are in some type of custody. It may be helpful to refer to the discussion of the various parts of such a petition in §§ 15.12-15.18.

If the petition challenges the action of an agency official, that official should be named as the respondent.<sup>166</sup> If the petition challenges an action by a court, the court (not the individual judge) should be named as respondent; in other words, the respondent would be “the Santa Clara County Superior Court,” not “Judge Jones.” Often there will be a “real party in interest,” who is not the respondent but is a party in the underlying dispute and has an interest in the outcome of the case.<sup>167</sup> For example, if a person files a mandate petition to force the court to follow its lawful duty to appoint counsel in state habeas corpus case, the warden who is the respondent in the habeas case would be a “real party in interest.” In other criminal or civil commitment matters, the People of the State of California might be the real party in interest. The petition should identify any possible real party in interest.

The mandate petition must contain the following allegations:

- ◆ the petitioner has an interest in the matter, either as an individual or as a representative of a group;
- ◆ the respondent has an official duty and that there is legal authority requiring the respondent to fulfill that duty;
- ◆ the (1) the petitioner was entitled to performance of a duty, (2) the petitioner made a demand for that performance, and (3) the respondent failed to do their duty;

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<sup>164</sup> See *Briggs v. Brown* (2017) 3 Cal.5th 808, 822 [221 Cal.Rptr.3d 465]; *Legislature v. Eu* (1991) 54 Cal.3d 492 [286 Cal.Rptr. 283].

<sup>165</sup> California Rules of Court, rule 8.44(a)(2).

<sup>166</sup> See, e.g., *Bravo v. Cabell* (1974) 11 Cal.3d 834 [114 Cal.Rptr. 618].

<sup>167</sup> See *Redevelopment Agency v. California Commission on State Mandates* (1996) 43 Cal.App.4th 1188, 1196-1197 [51 Cal.Rptr.2d 100].

- ◆ a statement that the petitioner has exhausted any administrative remedies, with a description of what was done to seek administrative relief and/or reasons why exhaustion is not possible or why the court should allow the case to proceed without exhaustion;<sup>168</sup>
- ◆ an statement that there is no other plain, speedy, and adequate legal remedy;<sup>169</sup> if the petitioner could have directly appealed from the decision, they will need to explain why the lower court acted in excess of its jurisdiction or why the issues are of great public importance and must be resolved promptly;<sup>170</sup>
- ◆ a prayer for relief, including a statement of what the petitioner wants the court to order the respondent to do. This should include a request that the court issue an alternative writ or order to show cause, grant a peremptory writ, or grant any other relief that is in the interests of justice;
- ◆ a verification signed by the petitioner or a “next friend” (see discussion of verifications in § 15.15).<sup>171</sup>

The petitioner may file written points and authorities setting forth legal arguments supporting the petition.

As with a habeas petition, a person filing a writ of mandate may request that the court issue a preliminary injunction or temporary restraining order while the case is pending further proceedings.<sup>172</sup>

As with a habeas petition, a person filing a petition for writ of mandate should attach as exhibits a copy of any written order or decision that is being challenged, any documents that support the petitioner’s position or are necessary for the court to understand the case, and copies of all administrative appeals and responses. If the petitioner has a transcript of a relevant prior trial or hearing, the transcript should also be attached as an exhibit.

### 15.39 Filing and Serving the Petition

A person filing a mandate petition in the superior court should send the original and one copy of the petition and supporting documents.

There is no filing fee in mandate cases related to a criminal case.<sup>173</sup> However, the court may charge a filing fee for other types of mandate petitions. A person who does not have enough money to pay fees can ask the court to waive the fees. The court form and instruction sheet for requesting a fee waiver are in Appendix 15-G

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<sup>168</sup> See *Sail’er Inn, Inc., v. Kirby* (1971) 5 Cal.3d 1, 7 [95 Cal.Rptr. 329] (“ordinarily mandamus will issue only after the final order or decision of the administrative agency. . . .”); *People v. Tate* (1994) 29 Cal.App.4th 1678 [35 Cal.Rptr.2d 250].

<sup>169</sup> Code of Civil Procedure § 1086; *Provencher v. Municipal Court* (1978) 83 Cal.App.3d 132 [147 Cal.Rptr. 615].

<sup>170</sup> *People v. Superior Court (Howard)* (1999) 70 Cal.App.4th 136, 147 [82 Cal.Rptr.2d 481]; *Mauro B. v. Superior Court* (1991) 230 Cal.App.3d 949, 953-954 [281 Cal.Rptr. 507].

<sup>171</sup> Code of Civil Procedure § 1086.

<sup>172</sup> See, e.g., *Stoneham v. Rusben* (1982) 137 Cal.App.3d 729, 732 [188 Cal.Rptr. 130].

<sup>173</sup> *Bravo v. Cabell* (1974) 11 Cal.3d 834, 840 [114 Cal.Rptr. 618].



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The petitioner must serve the petition on each respondent and any real party in interest before or at the same time that the petition is sent to the court for filing. Service of the petition may be by mail.<sup>174</sup> When the respondent is a court, the petition should be served on the presiding judge of the court, not on the individual judge whose action is being challenged. If the respondent is a county official, the agency they work for or the county counsel's office generally can accept service. When the respondent is the CDCR or BPH, service should be made on the CDCR Secretary or other high-level CDCR official; the Attorney General should also be served.

When the petitioner sends the petition to the court for filing, they should attach a "proof of service" stating that the petition has been served on the respondent and on any real party in interest.<sup>175</sup> A sample proof of service form is attached as Appendix 15-E.

### 15.40 The Court's Options: Summary Denial, Alternative Writ or Order to Show Cause, or Peremptory Writ

In response for a petition for writ of mandate, the court may (1) summarily deny the petition without further hearing, (2) issue an "alternative writ" or "order to show cause," or (3) grant a "peremptory writ."<sup>176</sup> There is no set timeline for a court to take action.

A court may summarily deny a petition that does not set forth potentially good grounds for relief.<sup>177</sup> A court may also summarily deny a mandate petition if direct appeal or some other form of relief is available;<sup>178</sup> alternatively, if the case could have been brought as a habeas corpus petition, the court may simply treat the matter as a habeas action, as discussed in § 15.32. However, if no other form of relief is available, a court may not deny an apparently meritorious petition that is presented in the procedurally correct manner.<sup>179</sup>

If a court decides the petitioner may have a good claim, the court usually will issue an alternative writ or an order to show cause. An alternative writ is an order in which the court commands the respondent to either do the act that they are allegedly required to perform or explain why they need not do so.<sup>180</sup> An order to show cause commands the respondent to explain to the court why the relief sought in the petition should not be granted.<sup>181</sup> The only practical difference between the two types of orders is that an alternative writ must be served by the moving party on the other side with a "notice of acknowledgment" for the recipient to fill in and return. When the court issues either an

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<sup>174</sup> Code of Civil Procedure § 1107; Code of Civil Procedure §§ 1011-1013.

<sup>175</sup> Code of Civil Procedure § 1107. However, the statute states that if no proof of service is attached, the court may use its discretion to allow the petition to be filed without proof of prior service

<sup>176</sup> Code of Civil Procedure §§ 1087-1088; Code of Civil Procedure § 1105; *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1239[82 Cal.Rptr.2d 85].

<sup>177</sup> *Landau v. Superior Court* (1998) 81 Cal.App.4th 191, 200-201 [97 Cal.Rptr.2d 657]. Court commissioners, who are lesser judicial officials than judges, have the authority to summarily deny petitions for writ of mandate. *Gomez v. Superior Court* (2012) 54 Cal.4th 293 [142 Cal.Rptr.3d 808].

<sup>178</sup> *People v. Medina* (1972) 6 Cal.3d 484, 491 [99 Cal.Rptr. 630].

<sup>179</sup> *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 113 [40 Cal.Rptr.2d 839].

<sup>180</sup> Code of Civil Procedure § 1087.

<sup>181</sup> *Lewis v. Superior Court* (1999) 19 Cal.4th 1232 [82 Cal.Rptr.2d 85]; *Hagan v. Superior Court* (1960) 53 Cal.2d 498 [2 Cal.Rptr. 288].

alternative writ or order to show cause, it will usually set a timeline for the filing of further documents in the case.<sup>182</sup>

In very rare situations, a court may issue a peremptory writ, ordering the respondent to take the requested action without giving the respondent or real party in interest an opportunity to file a form return.<sup>183</sup> The court will grant such relief only where the petitioner's entitlement to relief is so obvious that no purpose could reasonably be served by further consideration of the issue. The parties that will be adversely affected must be given 10 days notice that the petitioner is seeking an issuance of a peremptory writ and must be given an opportunity to file an opposition.<sup>184</sup> Because peremptory writs are rare, the further discussion of procedures will focus on cases in which the court issues an alternative writ or order to show cause.

### 15.41 Reviewing the Respondent's Preliminary Opposition or Return

When a petition for writ of mandate has been served by mail, the court must give the respondent or any real party in interest 10 days in which to file a preliminary opposition before it issues an alternative writ or a peremptory writ.<sup>185</sup>

If the court does issue an alternative writ or order to show cause, it will then direct the respondent to file a return addressing the claims raised in the petition.<sup>186</sup> The court will set a time line for the return, usually 30 days.<sup>187</sup> If the petition challenges a court ruling, the return will usually be filed by the real party in interest.<sup>188</sup> If the return fails to answer or contradict the petitioner's allegations, the court will accept those allegations as true.<sup>189</sup>

### 15.42 Writing the Reply

If the respondent or real party in interest files a preliminary opposition, the court may allow the petitioner to file a reply or may act without awaiting a reply.

If the respondent or real party in interest files a return, the petitioner will have an opportunity to file a reply brief.<sup>190</sup> The petitioner should file always a reply to the respondent's opposition or return denying the truth of any facts that are in dispute or allegations made by the respondent; the reply can

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<sup>182</sup> Code of Civil Procedure § 1087; Code of Civil Procedure § 1104; Code of Civil Procedure § 1108.

<sup>183</sup> Code of Civil Procedure § 1088.

<sup>184</sup> Code of Civil Procedure §§ 1087-1088; *Lewis v. Superior Court* (1999) 19 Cal.4th 1232 [82 Cal.Rptr.2d 85]; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178-179 [203 Cal.Rptr.626].

<sup>185</sup> Code of Civil Procedure § 1107; Code of Civil Procedure § 1013.

<sup>186</sup> Code of Civil Procedure § 1089.

<sup>187</sup> Code of Civil Procedure § 1089.5.

<sup>188</sup> *Rose v. Superior Court of Los Angeles County* (2000) 81 Cal.App.4th 564, 570 [96 Cal.Rptr.2d 843] (inappropriate for court whose action is being challenged to file its own return).

<sup>189</sup> Code of Civil Procedure § 462; *Rodriguez v. Municipal Court* (1972) 25 Cal.App.3d 521, 526 [102 Cal.Rptr. 45].

<sup>190</sup> Code of Civil Procedure § 1091.

## § 15.43

also include additional exhibits. If no reply is filed or the reply does not deny the respondent's factual allegations, the court will accept as true the factual allegations in the return.<sup>191</sup>

### 15.43 Evidentiary Hearing or Oral Argument

If petition raises only questions of law or does not involve disputed material facts, the court can decide the case on the written record and pleadings.<sup>192</sup> However, if there are material facts in dispute, the court should hold a hearing which can be in front of the court or, in the court's discretion, the trial can be in front of a jury.<sup>193</sup> At the hearing, the parties may call witnesses and subpoena documents.<sup>194</sup> The petitioner has the burden of proving any disputed facts or allegations by a preponderance of the evidence.<sup>195</sup>

The court may allow the parties to present oral argument following issuance of an alternative writ or order to show cause.<sup>196</sup>

### 15.44 The Court's Decision

The court may state its tentative decision orally or in writing. The court will announce whether a "statement of decision" with written findings of fact and conclusions of law will be prepared. Any party may also request that the court issue a written statement of decision, can make proposals about the content of the statement; after a proposed statement is issued, any party can file objections to it.<sup>197</sup>

The losing party will normally be required to show the court that it has complied with the writ issued by the court. The court retains jurisdiction to make any order necessary and proper for the complete enforcement of the writ,<sup>198</sup> so a petitioner who believe the respondent has not adequately complied with the writ may ask the court to take action to enforce the writ.<sup>199</sup>

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<sup>191</sup> *California Portland Cement Co. v. State Board of Equalization* (1967) 67 Cal.2d 578, 582, fn. 5 [63 Cal.Rptr. 5]; *Lotus Car Ltd. v. Municipal Court* (1968) 263 Cal.App.2d 264, 268 [69 Cal.Rptr. 384].

<sup>192</sup> Code of Civil Procedure § 1094; *Lotus Car Ltd. v. Municipal Court* (1968) 263 Cal.App.2d 264, 267-268 [69 Cal.Rptr. 384].

<sup>193</sup> Code of Civil Procedure §§ 1088- 1090; *Lotus Car Ltd. v. Municipal Court* (1968) 263 Cal.App.2d 264, 268 [69 Cal.Rptr. 384].

<sup>194</sup> Code of Civil Procedure § 1091; see *Lassen v. Alameda* (1957) 150 Cal.App.2d 44; see also Code of Civil Procedure § 1109 (the rules of discovery for civil actions are applicable to writ proceedings).

<sup>195</sup> Evidence Code § 115.

<sup>196</sup> See *Kowis v. Howard* (1992) 3 Cal.4th 888, 899 [12 Cal.Rptr.2d 728].

<sup>197</sup> Code of Civil Procedure § 632; California Rules of Court, rule 3.1590.

<sup>198</sup> Code of Civil Procedure § 1097; *County of Inyo v. City of Los Angeles* (1976) 71 Cal.App.3d 185, 205 [139 Cal.Rptr. 396].

<sup>199</sup> Code of Civil Procedure § 1097; *County of Inyo v. City of Los Angeles* (1976) 71 Cal.App.3d 185, 205 [139 Cal.Rptr. 396]; *Stoneham v. Rusben* (1984) 156 Cal.App.3d 302, 306 [203 Cal.Rptr. 20] (describing further orders made to get CDCR to comply with writ of mandate); *Molar v. Gates* (1979) 98 Cal.App.3d 1, 25 [159 Cal.Rptr. 239].

Compensation for attorney fees may be sought if the petitioner prevails in a mandate proceeding.<sup>200</sup>

### 15.45 If the Petition is Denied: Filing a Direct Appeal in the Court of Appeal

When a superior court denies a petition for writ of mandate or prohibition, the petitioner can file a direct appeal in the court of appeal that covers that region; likewise, if the court grants the petition, the respondent can appeal.<sup>201</sup> The person who files the appeal can ask the court of appeal to stay the writ while the further proceedings are pending.<sup>202</sup> Information about the timelines and procedures for direct appeals are in Chapter 14. A list of the state courts of appeal and the counties they cover is in Appendix 15-A.

As in the superior court, the petitioner may file a request for waiver of filing fees (see § 15.39).

### 15.46 Filing a Petition for Review in the California Supreme Court

If the court of appeal denies a petition for writ of mandate, the person can file a petition for review in the California Supreme Court. The procedure, time limits, and format for filing a petition for review are the same as those for filing a petition for review after denial of a habeas corpus petition (see § 15.28).

## OTHER POST-CONVICTION PROCEEDINGS

### 15.47 DNA Testing Motions

Subject to certain exceptions, biological material collected as evidence in a felony criminal investigation must be preserved as long as any person connected with the case is in prison.<sup>203</sup> Some people who believe they were wrongfully convicted may be able to get such evidence tested for DNA.<sup>204</sup>

<sup>200</sup> Code of Civil Procedure § 1021.5 *Olney v. Municipal Court* (1982) 133 Cal.App.3d 455, 463-464 [184 Cal.Rptr. 78]; *In re Head* (1986) 42 Cal.3d 223 [228 Cal.Rptr. 184].

<sup>201</sup> Code of Civil Procedure § 904.1; *U.D. Registry, Inc. v. Municipal Court* (1994) 50 Cal.App.4th 671 [57 Cal.Rptr.2d 788]; *Dhillon v. John Muir Health* (2017) 2 Cal.5th 1109, 1113-1114 [218 Cal.Rptr.3d 119]; see also *Kao v. California Department of Corrections and Rehabilitation* (2016) 244 Cal.App.4th 1326 [198 Cal.Rptr.3d 862] (petitioner allowed to appeal from dismissal of petition); *Flores v. California Dept. of Corrections and Rehabilitation* (2014) 224 Cal.App.4th 199, 205-208 [168 Cal.Rptr.3d 204] (same). Note that there are some circumstances in which denial of a petition for writ of mandate is not appealable, and must be pursued by a new petition for writ of mandate in the appellate court; those situations involve grant or denial of a writ concerning an infraction or misdemeanor case or a limited civil case. California Code of Civil Procedure § 904.3.

<sup>202</sup> See *Wilder v. Superior Court* (1979) 92 Cal.App.3d 90, 97 [154 Cal.Rptr. 494].

<sup>203</sup> Penal Code § 1417.9 (this statute took effect in 2001). Retention of DNA evidence is not required in misdemeanor cases. 88 Ops.Cal.Atty.Gen. 77 (2005).

<sup>204</sup> Penal Code § 1405; see also *Morrison v. Peterson* (9th Cir. 2015) 809 F.3d 1059 (statutory requirements to obtain DNA testing do not violate due process).

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There are two organizations in California who investigate cases of people who believe that they are factually innocent and that DNA can exonerate them. These are:

The Northern California Innocence Project  
Santa Clara Law School  
500 El Camino Real  
Santa Clara, CA 95053  
www.law.scu.edu/ncip

California Innocence Project  
California Western School of Law  
225 Cedar St.  
San Diego, CA 92101  
www.californiainnocenceproject.org

A person may file a motion for appointment of counsel to investigate and, if appropriate, prepare a motion for post-conviction DNA testing. The court must appoint a lawyer if the person (1) states that they are not the person who committed the crime, (2) explains how DNA testing is relevant to the claim of innocence, (3) states that they have not previously been appointed an attorney to prepare a DNA motion, and (4) shows that they do not have funds to hire an attorney.<sup>205</sup>

If the court denies a motion for appointment of counsel, the person may file a direct appeal in the court of appeal, following the same procedures as for appeal from a criminal judgment, as described in Chapter 14.<sup>206</sup> Alternatively, the person may file a petition for writ of habeas corpus challenging the denial of appointment of counsel.<sup>207</sup>

To request DNA testing, a person must make a written motion in the trial court where they were convicted. The motion must: (1) state that the person is innocent and not the perpetrator of the crime; (2) explain why the person's identity was or should have been a significant issue in the case; (3) make a reasonable attempt to identify the evidence to be tested and the specific type of DNA testing sought; (4) explain in light of all the evidence, how the DNA testing would raise a reasonable probability that the verdict or sentence would have been more favorable if the DNA test result had been available at the time of the conviction; (5) reveal the results of any previous DNA or biological testing that was done by either the prosecution or defense; and (6) state whether any other motion for testing was filed and the outcome of that motion.<sup>208</sup> The person filing the motion or their attorney may ask the court to order the prosecutor to make reasonable efforts to obtain provide records of prior DNA testing and copies of evidence logs showing the current location of biological evidence.<sup>209</sup>

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<sup>205</sup> Penal Code § 1405(b); *In re Kinnamon* (2005) 133 Cal.App.4th 316, 321, 324 [34 Cal.Rptr.3d 802].

<sup>206</sup> See Penal Code § 1237 (allowing appeal from post-judgment order affecting substantial rights).

<sup>207</sup> *In re Kinnamon* (2005) 133 Cal.App.4th 316, 321, 324 [34 Cal.Rptr.3d 802].

<sup>208</sup> Penal Code § 1405(a), (d); see also Penal Code § 1405 (g) (circumstances in which court must grant DNA testing motion); *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1049 [77 Cal.Rptr.3d 226] (to show materiality, person was is only required to demonstrate that the DNA testing “would be relevant to, rather than dispositive of, the issue of identity;” person is not required to show a favorable result would conclusively establish innocence.); *Joiner v. Superior Court* (2013) 217 Cal.App.4th 759 [158 Cal.Rptr.3d 778] (courts should apply the “reasonable probability” standard liberally to permit post-conviction DNA testing of evidence in questionable cases).

<sup>209</sup> Penal Code § 1405(c).

The court has the discretion to order a hearing on the DNA motion.<sup>210</sup> If the court orders DNA testing, the person may have to pay for the costs of the tests; however, if they are indigent, then the state made be ordered to pay the testing costs.<sup>211</sup>

If the court denies a motion for DNA testing, the person can challenge the decision by filing a petition for writ of mandate in the court of appeal within 20 days after the order denying DNA testing (see §§ 15.30-15.46).<sup>212</sup> A decision denying DNA testing is reviewed for abuse of discretion.<sup>213</sup>

A person may challenge the constitutionality of a state's DNA evidence discovery statute in a § 1983 federal civil rights suit.<sup>214</sup> However, a person may not use a § 1983 action to challenge a state court's decision denying a request to obtain DNA testing.<sup>215</sup>

## 15.48 Post-Conviction Discovery Motions

If a person has a sentence of death or life in prison without the possibility of parole, a court may order discovery prior to the filing of a habeas petition. To get such a discovery order, the person must file a motion that (1) identifies the specific materials being requested; (2) shows a “reasonable basis” to believe that the requested materials actually exist” and are in the possession of the prosecutor and the law enforcement authorities who were involved in the case, and (3) shows that the person has made an unsuccessful good faith effort to obtain the requested discovery materials from their trial lawyer.<sup>216</sup> There is no timeliness requirement for a post-conviction discovery motion.<sup>217</sup>

The person seeking discovery must pay for copies of the documents. However, if the person does not have enough funds to do so, the discovery should be provided and the trial court should develop a plan for the person to reimburse the costs over time.<sup>218</sup>

If the court denies a motion for post-conviction discovery, the person may file a petition for writ of mandate in the court of appeal (see §§ 15.30-15.46).<sup>219</sup> The person must convince the appellate court that the items they seek are materials to which they would have been entitled at time of trial.<sup>220</sup>

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<sup>210</sup> Penal Code § 1405(f).

<sup>211</sup> Penal Code § 1405(j).

<sup>212</sup> Penal Code § 1405(k); but see *In re Antilia* (2009) 176 Cal.App.4th 622, 629-631 [97 Cal.Rptr.3d 849] (allowing person to proceed where his attorney had promised to seek review but erroneously filed a notice of appeal rather than a timely petition for writ of mandate and person showed diligence in trying to remedy the problem).

<sup>213</sup> *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1047 [77 Cal.Rptr.3d 226].

<sup>214</sup> *Skinner v. Switzer* (2011) 562 U.S. 521 [131 S.Ct. 1289; 179 L.Ed.2d 283].

<sup>215</sup> *Cooper v. Ramos* (9th Cir. 2012) 704 F.3d 772.

<sup>216</sup> Penal Code § 1054.9; *Barnett v. Superior Court* (2010) 50 Cal.4th 890 [114 Cal.Rptr.3d 576]; *In re Steele* (2004) 32 Cal.4th 682, 691-696 [10 Cal.Rptr.3d 536].

<sup>217</sup> *Callin v. Superior Court* (2011) 51 Cal.4th 300, 303-305 [120 Cal.Rptr.3d 135].

<sup>218</sup> *McGinnis v. Superior Court* (2017) 7 Cal.App.5th 1240, 1245-1247 [213 Cal.Rptr.3d 644]; *Davis v. Superior Court* (2016) 1 Cal.App.5th 881, 888-889 [205 Cal.Rptr.3d 193].

<sup>219</sup> See *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 895-896 [114 Cal.Rptr.3d 576].

<sup>220</sup> *Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 367 [51 Cal.Rptr.3d 637].

**CALIFORNIA STATE COURTS**  
*(and state prisons in those court districts)*

**California State Superior Courts**

<i>Superior Courts</i>	<i>CDCR Facilities</i>
<b>Alameda County Superior Court</b> 1225 Fallon Street Oakland, CA 94612	
<b>Alpine County Superior Court</b> 14777 State Route 89, P.O. Box 518 Markleeville, CA 96120	
<b>Amador County Superior Court</b> 500 Argonaut Lane Jackson, CA 95642	Mule Creek State Prison (MCSP)
<b>Butte County Superior Court</b> One Court Street Oroville, CA 95965	
<b>Calaveras County Superior Court</b> 400 Government Center Drive San Andreas, CA 95249	
<b>Colusa County Superior Court</b> 532 Oak St. Colusa, CA 95932	
<b>Contra Costa County Superior Court</b> 725 Court Street Martinez, CA 94553-1233	
<b>Del Norte County Superior Court</b> 450 H Street, Room 209 Crescent City, CA 95531	Pelican Bay State Prison (PBSP)
<b>El Dorado County Superior Court</b> 495 Main Street Placerville, CA 95667	
<b>Fresno County Superior Court</b> 1100 Van Ness Fresno, CA 93724-0002	Pleasant Valley State Prison (PVSP)
<b>Glenn County Superior Court</b> 526 West Sycamore Street Willows, CA 95988	
<b>Humboldt County Superior Court</b> 825 Fifth Street Eureka, CA 95501	
<b>Imperial County Superior Court</b> 939 West Main Street El Centro, CA 92243	Calipatria State Prison (CAL) CSP – Centinela (CEN)
<b>Inyo County Superior Court</b> 168 North Edwards Street Independence, CA 93526	

<i>Superior Courts</i>	<i>CDCR Facilities</i>
<b>Kern County Superior Court</b> 1415 Truxtun Avenue Bakersfield, CA 93301	California Correctional Inst. (CCI) Kern Valley State Prison (KVSP) North Kern State Prison (NKSP) Wasco State Prison (WSP)
<b>Kings County Superior Court</b> 1640 Kings County Drive Hanford, CA 93230	Avenal State Prison (ASP) CSP – Corcoran (COR) Subst. Abuse Treatment Facility (SATF)
<b>Lake County Superior Court</b> 255 North Forbes Street Lakeport, CA 95453	
<b>Lassen County Superior Court</b> 220 South Lassen Street Susanville, CA 96130	California Correctional Center (CCC) High Desert State Prison (HDSP)
<b>Los Angeles County Superior Court</b> <i>(main criminal)</i> 210 W. Temple Street Lancaster, CA 90012	CSP – Los Angeles County (LAC)
<b>Madera County Superior Court</b> 200 South G Street Madera, CA 93637	Central Cal. Women’s Facility (CCWF) Valley State Prison (VSP)
<b>Marin County Superior Court</b> 3501 Civic Center Dr., P.O. Box 4988 San Rafael, CA 94913	San Quentin State Prison (SQSP)
<b>Mariposa County Superior Court</b> 5088 Bullion Street, P.O. Box 28 Mariposa, CA 95338-0028	
<b>Mendocino County Superior Court</b> 100 North State Street, Rm 108 Ukiah, CA 95482	
<b>Merced County Superior Court</b> 2260 N Street Merced, CA 95340-3744	
<b>Modoc County Superior Court</b> 205 South East Street Alturas, CA 96101	
<b>Mono County Superior Court</b> P.O. Box 1037 Mammoth Lakes, CA 93546	
<b>Monterey County Superior Court</b> <i>(criminal)</i> 240 Church St. Salinas, CA 93901	Correctional Training Facility (CTF) Salinas Valley State Prison (SVSP)
<b>Napa County Superior Court</b> 825 Brown Street Napa, CA 94559	
<b>Nevada County Superior Court</b> 201 Church Street, Suite 7 Nevada City, CA 95959	
<b>Orange County Superior Court</b> <i>(criminal)</i> P.O. Box 1138 Santa Ana, CA 92702	



<i>Superior Courts</i>	<i>CDCR Facilities</i>
<b>Placer County Superior Court</b> 10820 Justice Center Dr. P.O. Box 619072 Roseville, CA 95661	
<b>Plumas County Superior Court</b> 520 Main Street, Room 104 Quincy, CA 95971	
<b>Riverside County Superior Court</b> ( <i>criminal</i> ) 4100 Main Street Riverside, CA 92501	California Rehabilitation Ctr. (CRC) Chuckawalla Valley State Prison (CVSP) Ironwood State Prison (ISP)
<b>Sacramento County Superior Court</b> 720 9th Street Sacramento, CA 95814	CSP – Sacramento (SAC) Folsom State Prison (FSP)
<b>San Benito County Superior Court</b> 440 5th Street Hollister, CA 95023	
<b>San Bernardino County Superior Court</b> 247 West Third Street San Bernardino, CA 92415	California Institution for Men (CIM) California Institution for Women (CIW)
<b>San Diego County Superior Court</b> 220 W. Broadway San Diego, CA 92101	Richard J. Donovan Corr. Fac. (RJD)
<b>San Francisco County Superior Court</b> ( <i>criminal</i> ) 850 Bryant Street Francisco, CA 94103	
<b>San Joaquin County Superior Court</b> 222 East Weber Avenue #303 Stockton, CA 95202	Deuel Vocational Institution (DVI) California Health Care Facility (CHCF)
<b>San Luis Obispo County Superior Court</b> 1035 Palm Street, Room 385 San Luis Obispo, CA 93408	California Men’s Colony (CMC)
<b>San Mateo County Superior Court</b> 400 County Center Redwood City, CA 94063	
<b>Santa Barbara County Superior Court</b> P.O. Box 21107 Santa Barbara, CA 93121	
<b>Santa Clara County Superior Court</b> 191 North First Street San Jose, CA 95113	
<b>Santa Cruz County Superior Court</b> 701 Ocean Street Santa Cruz, CA 95060	
<b>Shasta County Superior Court</b> 1500 Court Street Redding, CA 96001	
<b>Sierra County Superior Court</b> 100 Courthouse Square P.O. Box 476 Downieville, CA 95936	

<i>Superior Courts</i>	<i>CDCR Facilities</i>
<b>Siskiyou County Superior Court</b> 311 4th St. P.O. Box 1026 Yreka, CA 96097	
<b>Solano County Superior Court</b> 600 Union Avenue Fairfield, CA 94533	California Medical Facility (CMF) CSP - Solano (SOL)
<b>Sonoma County Superior Court</b> 600 Administration Drive, #107J Santa Rosa, CA 95403	
<b>Stanislaus County Superior Court</b> P.O. Box 3488 Modesto, CA 95353	
<b>Sutter County Superior Court</b> 1175 Civic Center Blvd. Yuba City, CA 95993	
<b>Tehama County Superior Court</b> 445 Pine Street, P.O. Box 170 Red Bluff, CA 96080	
<b>Trinity County Superior Court</b> 11 Court Street, P.O. Box 1258 Weaverville, CA 96093	
<b>Tulare County Superior Court</b> 221 S. Mooney, Room 303 Visalia, CA 93291	
<b>Toulumne County Superior Court</b> 41 West Yaney Avenue Sonora, CA 95370	Sierra Conservation Center (SCC)
<b>Ventura County Superior Court</b> P.O. Box 6489 Ventura, CA 93006	
<b>Yolo County Superior Court</b> 1000 Main Street Woodland, CA 95695	
<b>Yuba County Superior Court</b> 215 Fifth Street, Suite 200 Marysville, CA 95901	

## California State Courts of Appeal

<i>Courts of Appeal</i>	<i>CDCR Facilities</i>	<i>Counties</i>
<b>First District Court of Appeal</b> 350 McAllister Street San Francisco, CA 94102	California Medical Facility (CMF) CSP - Solano (SOL) Pelican Bay State Prison (PBSP) San Quentin State Prison (SQSP)	Alameda Mendocino Contra Costa Napa Del Norte San Humboldt Francisco Lake San Mateo Marin Solano Sonoma
<b>Second District Court of Appeal</b> 300 Spring St, Fl. 2, North Tower Los Angeles, CA 90013	CSP – Los Angeles County (LAC)	Los Angeles Santa San Luis Obispo Barbara Ventura
<b>Third District Court of Appeal</b> 914 Capitol Mall, 4th Fl. Sacramento, CA 95814	California Correctional Ctr. (CCC) California Health Care Fac. (CHCF) CSP – Sacramento (SAC) Deuel Vocational Inst. (DVI) Folsom State Prison (FSP) High Desert State Prison (HDSP) Mule Creek State Prison (MCSP)	Alpine Plumas Amador Sacramento Butte o Calaveras San Colusa Joaquin El Dorado Shasta Glenn Sierra Lassen Siskiyou Modoc Sutter Mono Tehama Nevada Trinity Placer Yolo Yuba
<b>Fourth District Court of Appeal, Div. 1</b> 750 B Street, Suite 300 San Diego, CA 92101	Calipatria State Prison (CAL) CSP – Centinela (CEN) Richard J. Donovan Corr. Fac. (RJD)	Imperial San Diego
<b>Fourth District Court of Appeal, Div. 2</b> 3389 12th Street Riverside, CA 92501	California Inst. for Men (CIM) California Inst. for Women (CIW) California Men’s Colony (CMC) California Rehabilitation Ctr. (CRC) Chuckawalla Valley St. Prison (CVSP) Ironwood State Prison (ISP)	Inyo Riverside San Bernardino
<b>Fourth District Court of Appeal, Div. 3</b> P.O. Box 22055 Santa Ana, CA 92702		Orange

<i>Courts of Appeal</i>	<i>CDCR Facilities</i>	<i>Counties</i>
<b>Fifth District Court of Appeal</b> 2424 Ventura Street Fresno, CA 93721	Avenal State Prison (ASP) California Correctional Inst. (CCI) Central Cal. Women's Facility (CCWF) CSP – Corcoran (COR) Kern Valley State Prison (KVSP) North Kern State Prison (NKSP) Pleasant Valley State Prison (PVSP) Sierra Conservation Center (SCC) Subst. Abuse Treatment Fac. (SATF) Valley State Prison (VSP) Wasco State Prison (WSP)	Fresno Kern Kings Madera Mariposa Merced Stanislaus Tulare Tuolumne
<b>Sixth District Court of Appeal</b> 333 West Santa Clara St., Suite 1060 San Jose, CA 95113	Correctional Training Facility (CTF) Salinas Valley State Prison (SVSP)	Monterey San Benito Santa Clara Santa Cruz

### California State Supreme Court

	<i>CDCR Facilities</i>	<i>Counties</i>
<b>California Supreme Court</b> 350 McAllister Street San Francisco, CA 94102	(All CDCR facilities)	(All California counties)

Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

CDC or ID Number: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(Court)

**PETITION FOR WRIT OF HABEAS CORPUS**

_____
Petitioner
vs.
_____
Respondent

No. \_\_\_\_\_

(To be supplied by the Clerk of the Court)

**INSTRUCTIONS—READ CAREFULLY**

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the superior court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the superior court, you should file it in the county in which you are confined.

- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the superior court, you only need to file the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal in paper form and you are an attorney, file the original and 4 copies of the petition and, if separately bound, 1 set of any supporting documents (unless the court orders otherwise by local rule or in a specific case). If you are filing this petition in the Court of Appeal electronically and you are an attorney, follow the requirements of the local rules of court for electronically filed documents. If you are filing this petition in the Court of Appeal and you are *not* represented by an attorney, file the original and one set of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and 10 copies of the petition and, if separately bound, an original and 2 copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.

Approved by the Judicial Council of California for use under rule 8.380 of the California Rules of Court (as amended effective January 1, 2007). Subsequent amendments to rule 8.380 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

**This petition concerns:**

- A conviction  Parole
- A sentence  Credits
- Jail or prison conditions  Prison discipline
- Other (specify): \_\_\_\_\_

1. Your name: \_\_\_\_\_
2. Where are you incarcerated? \_\_\_\_\_
3. Why are you in custody?  Criminal conviction  Civil commitment

*Answer items a through i to the best of your ability.*

- a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
- b. Penal or other code sections: \_\_\_\_\_
- c. Name and location of sentencing or committing court:  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
- d. Case number: \_\_\_\_\_
- e. Date convicted or committed: \_\_\_\_\_
- f. Date sentenced: \_\_\_\_\_
- g. Length of sentence: \_\_\_\_\_
- h. When do you expect to be released? \_\_\_\_\_
- i. Were you represented by counsel in the trial court?  Yes  No *If yes, state the attorney's name and address:*  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

4. What was the LAST plea you entered? (Check one):  
 Not guilty  Guilty  Nolo contendere  Other: \_\_\_\_\_

5. If you pleaded not guilty, what kind of trial did you have?  
 Jury  Judge without a jury  Submitted on transcript  Awaiting trial



7. **Ground 2 or Ground** \_\_\_\_\_ *(if applicable):*

Lined area for writing ground 2 or ground (if applicable).

a. **Supporting facts:**

Lined area for supporting facts.

b. **Supporting cases, rules, or other authority:**

Lined area for supporting cases, rules, or other authority.



8. Did you appeal from the conviction, sentence, or commitment?  Yes  No If yes, give the following information:

a. Name of court ("Court of Appeal" or "Appellate Division of Superior Court"):

\_\_\_\_\_

b. Result: \_\_\_\_\_ c. Date of decision: \_\_\_\_\_

d. Case number or citation of opinion, if known: \_\_\_\_\_

e. Issues raised: (1) \_\_\_\_\_

(2) \_\_\_\_\_

(3) \_\_\_\_\_

f. Were you represented by counsel on appeal?  Yes  No If yes, state the attorney's name and address, if known:

\_\_\_\_\_  
\_\_\_\_\_

9. Did you seek review in the California Supreme Court?  Yes  No If yes, give the following information:

a. Result: \_\_\_\_\_ b. Date of decision: \_\_\_\_\_

c. Case number or citation of opinion, if known: \_\_\_\_\_

d. Issues raised: (1) \_\_\_\_\_

(2) \_\_\_\_\_

(3) \_\_\_\_\_

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

11. Administrative review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500.) Explain what administrative review you sought or explain why you did not seek such review:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

b. Did you seek the highest level of administrative review available?  Yes  No

*Attach documents that show you have exhausted your administrative remedies.*

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court?  Yes If yes, continue with number 13.  No If no, skip to number 15.

13 a. (1) Name of court: \_\_\_\_\_  
(2) Nature of proceeding (for example, "habeas corpus petition"): \_\_\_\_\_  
(3) Issues raised: (a) \_\_\_\_\_  
(b) \_\_\_\_\_  
(4) Result (attach order or explain why unavailable): \_\_\_\_\_  
(5) Date of decision: \_\_\_\_\_

b. (1) Name of court: \_\_\_\_\_  
(2) Nature of proceeding: \_\_\_\_\_  
(3) Issues raised: (a) \_\_\_\_\_  
(b) \_\_\_\_\_  
(4) Result (attach order or explain why unavailable): \_\_\_\_\_  
(5) Date of decision: \_\_\_\_\_

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

16. Are you presently represented by counsel?  Yes  No If yes, state the attorney's name and address, if known:  
\_\_\_\_\_  
\_\_\_\_\_

17. Do you have any petition, appeal, or other matter pending in any court?  Yes  No If yes, explain:  
\_\_\_\_\_  
\_\_\_\_\_

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:  
\_\_\_\_\_  
\_\_\_\_\_

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: \_\_\_\_\_

  
(SIGNATURE OF PETITIONER)

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form

Save this form

Clear this form

[Your Name]  
[Your Mailing Address]  
In Pro Per

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF \_\_\_\_\_

In re

No.

[Place your name here]

PETITION FOR WRIT OF HABEAS  
CORPUS AND MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF.

On Habeas Corpus

INTRODUCTION

[Give a brief explanation of what the petition is about. If possible, the petition should be typed and double-spaced; if it is hand-written, please write neatly.]

**EXAMPLE:**

1. Petitioner was found guilty at a prison disciplinary hearing of battery on an officer. Petitioner was denied his due process rights to have witnesses present at his hearing in violation of the U.S. Constitution's Fourteenth Amendment as interpreted in Wolff v. McDonnell (1974) 418 U.S. 539, Penal Code section 2932, subdivision (c)(3) and Title 15, California Code of Regulations, section 3315(e).

II.  
PARTIES

[Identify yourself, the prison in which you are being held, and the name of the warden and/or secretary of the CDCR.]

**EXAMPLE:**

2. Petitioner \_\_\_\_\_, is a prisoner of the State of California incarcerated at [name of the prison].

3. \_\_\_\_\_ is the warden of \_\_\_\_\_ prison and the legal custodian of petitioner.

4. \_\_\_\_\_ is the Secretary of the California Department of Corrections and Rehabilitation (CDCR) and is responsible for the operation of each of its state prisons, including \_\_\_\_\_ prison.

III.  
STATEMENT OF FACTS

[Give a complete description of the situation, including all the relevant facts. Describe the facts of your problem in the order that they occurred, starting with the first relevant event and going up through the facts about what administrative appeals you filed and the responses you receive. Include exact dates and full names to the extent possible. Number each paragraph in order. Whenever you state a fact that can be backed up by a document that you have, describe the document right after stating the fact, and attach the document to the end of the memorandum as an exhibit. Documents that may help your case could be prison or court records, medical records, or sworn statements (called “declarations”) made “under penalty of perjury” by witnesses or experts. Number or Letter the Exhibits in Order; if there are a lot of Exhibits you should also include a page that lists all the exhibits.]

**EXAMPLE:**

Prior to and at the disciplinary hearing, petitioner asked that he be allowed to present witness John Doe – a prisoner who petitioner believes saw the events that were charged as a “battery on an officer.” The hearing officer ignored these requests, without giving any reason. (See rule violation report, CDCR form 128-G, dated 00/00/00, attached as Exhibit A.”]

IV.  
CONTENTIONS

[List the main legal arguments that you will be making]

**EXAMPLE:**

- I. PETITIONER WAS DENIED HIS FEDERAL AND STATE DUE PROCESS RIGHTS BECAUSE PRISON OFFICIALS REFUSED HIS REQUEST TO HAVE JOHN DOE TESTIFY AS A WITNESS AT HIS DISCIPLINARY HEARING.

V.  
PRAYER FOR RELIEF

[Describe what you want the court to do.]

**EXAMPLE:**

Petitioner is without remedy save by writ of habeas corpus.

WHEREFORE, petitioner prays the Court:

1. issue a writ of habeas corpus;
2. declare the rights of the parties;
3. reverse the guilty finding of the disciplinary charge;
4. restore the 150 days of conduct credits that were forfeited due to the guilty finding;
5. expunge all references to the disciplinary charge from petitioner's prison file;
6. appoint counsel and award reasonable attorney fees; and
7. grant any other and further relief the Court deems proper.

DATED:

Respectfully submitted,

[Signature]

[petitioner's name]

VERIFICATION

I, [petitioner's name], state:

I am the petitioner in this action. I have read the foregoing petition for writ of habeas corpus and the facts stated therein are true of my own knowledge, except as to matters that are therein stated on my own information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at [name of city where you are located] on [date].

\_\_\_\_\_  
Petitioner

\_\_\_\_\_  
CDCR Number

## MEMORANDUM OF POINTS AND AUTHORITIES

[Along with the petition and verification, you should file a memorandum discussing the law and how the facts that are described in your petition show that your rights were violated. This document does not have to be very long or fancy. You should stick to the most important and relevant legal doctrines and discuss how the general legal principles apply to the facts of your case. The example below is for reference purposes only. Do not copy this memorandum because it may not apply to your situation or the law that is cited may become outdated.]

### **EXAMPLE:**

- I. PRISON OFFICIALS DENIED PETITIONER DUE PROCESS BY REFUSING TO GRANT PETITIONER'S REQUEST TO HAVE JOHN DOE TESTIFY AS A WITNESS AT HIS DISCIPLINARY HEARING, IN VIOLATION OF THE U.S. CONSTITUTION'S FOURTEENTH AMENDMENT AS INTERPRETED IN WOLFF V. MCDONNELL (1974) 418 U.S. 539, PENAL CODE SECTION 2932 SUBDIVISION (c)(3) AND CALIFORNIA CODE OF REGULATIONS, TITLE 15, SECTION 3315(e).

In Wolff v. McDonnell (1974) 418 U.S. 539, 566, the Supreme Court stated that “[an] inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institution safety or correctional goals.” The United States Supreme Court later re-affirmed that the federal constitution’s Fourteenth Amendment due process clause protects prisoners’ rights to present friendly witnesses at their disciplinary hearings unless prison officials have a legitimate reason for excluding the requested witnesses. (Ponte v. Real (1985) 471 U.S. 491, 506). The court recognized that the right to call witnesses can be limited where institutional safety or correctional goals would be compromised, but cautioned that due process would be undermined by denying witnesses without explanation:

[T]o hold that the Due Process Clause confers a circumscribed right on the inmate to call witnesses at a disciplinary hearing and then conclude that no explanation need ever be vouched for the denial of that right...would change an admittedly circumscribed right into a privilege conferred in the unreviewable discretion of the disciplinary board. We think our holding in Wolff, supra, meant something more than that.

(Ponte v. Real, supra, 471 U.S. at pp. 498-499.)

Penal Code section 2932, subdivision (c)(3) adheres to the Supreme Court’s holdings in Wolff and Ponte by requiring that the “The prisoner may request witnesses to attend the hearing and they shall be called unless the person conducting the hearing has specific reasons to deny

this request. The specific reasons shall be set forth in writing and a copy of the document shall be presented to the prisoner.”

Further, Title 15 of the California Code of Regulations, section 3315(e)(1) states that a prisoner may request the presence of both friendly and adverse witnesses at the disciplinary hearing, and that the requested witnesses “shall be called” unless the person conducting the hearing denies the request for one of the following reasons: the appearance would endanger the witness, the official determines the witness has no relevant or additional information, or the witness is unavailable. Additionally, section 3315(e)(2), states that if the prisoner’s request for witnesses is denied, “the reasons shall be documented on the RVR (rule violation report).”

In this case, petitioner was accused of a disciplinary violation of committing a battery on an officer by grabbing his arm; petitioner asserted at the hearing that he accidentally touched Officer Brown when he lost his footing while trying to get out of the officer’s way. (See Exhibit A [RVR dated 00/00/00.]) Prior to and at the hearing, petitioner requested that John Doe, a prisoner who lives just down the tier from where the incident happened, be called as a witness. (See Exhibit A.) Petitioner made this request because he believes Doe saw the interaction between himself and Officer Brown that formed the basis for the disciplinary violation charge. (See Exhibit B [declaration of petitioner].) However, hearing Officer Lt. Green ignored petitioner's request and denied him the opportunity to present John Doe as a witness, without giving any reason for this action. Lt. Green then found petitioner guilty of the charged disciplinary violation, and took away 150 days of his good conduct credits. (See Exhibit A.) Respondents later claimed that denying petitioner’s request for a witness was appropriate because “it is doubtful the witness could have observed the incident from several cells away...” (See Exhibit C [602 administrative appeal and responses].) However, this reasoning cannot support a denial of a witness where Wolff v. McDonnell, supra, 418 U.S. at p. 566, requires, the presence of a witness when called by an inmate unless the testimony of a witness would be “unduly hazardous to institutional safety or correctional goals.” Moreover, the hearing officer did not make any such finding at the time of the hearing or document such a finding on the record. Furthermore, the claim that it is “doubtful” that John Doe observed the incident is speculative and not supported by any evidence showing that Doe could not provide relevant or additional information. Petitioner would have attempted to get a declaration from Doe regarding his actual observations to submit with this administrative appeal and with this petition, but was unable to



do so because petitioner was in administrative segregation following the rule violation charge, was then re-housed in a different building, and petitioner has not seen Doe since the date of the incident.

In petitioner's case, the disciplinary hearing was a classic swearing match: Officer Brown offered his version of the facts and petitioner offered his version. Under these circumstances, testimony from a non-involved third-party observer of the incident is highly relevant, and perhaps critical, to the question of whether petitioner in fact intentionally touched Officer Brown or was an aggressor in the incident. The denial of Doe's testimony at petitioner's hearing was improper and prejudicial to his defense.

#### CONCLUSION

For the above-stated reasons, the relief sought in the petition should be granted.

DATED:

Respectfully submitted,

[Signature]  
[Type name]  
In Pro Per

[Petitioner's Name and CDCR #]

[Petitioner's Mailing Address]

In Pro Per

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF \_\_\_\_\_

In re

[Petitioner's name]

On Habeas Corpus

No.

REQUEST FOR APPOINTMENT OF  
COUNSEL AND DECLARATION OF  
INDIGENCY

I, [petitioner's name], declare that I am a petitioner to the above-referenced matter, that I am incarcerated at [name of prison], and that I am indigent and unable to afford counsel. My total assets are \$\_\_\_\_\_ and my income is \$\_\_\_\_\_ per month.

I hereby request that counsel be appointed in this matter so that my interests may be protected by the professional assistance required. In addition, when a court issues an order to show cause, counsel must be appointed for an indigent petitioner who requests counsel. California Rules of Court, rule 4.551(c)(2).

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on [date].

[Petitioner's Signature]

**Proof of Service by Mail**

[Case Name and Court Number]

I declare that:

I am a resident of \_\_\_\_\_ in the county of \_\_\_\_\_,  
California. I am over the age of 18 years. My residence address is:

\_\_\_\_\_.

On \_\_\_\_\_, I served the attached \_\_\_\_\_ in said  
case by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully paid,  
in the United States mail at \_\_\_\_\_

addressed as follows:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_.

I declare under penalty of perjury under the laws of the State of California that the  
foregoing is true and correct, and that this declaration was executed on the date  
of \_\_\_\_\_ at \_\_\_\_\_, California.

\_\_\_\_\_  
[Type or Print Name]

\_\_\_\_\_  
[Signature]

[Petitioner's Name and CDCR #]  
[Mailing Address]

In Pro Per

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF \_\_\_\_\_

In re

[Your name]

No. [case number]

On Habeas Corpus

DENIAL AND EXCEPTION TO THE RETURN  
AND  
SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

For [his/her/their] denial and exception to the return to the order to show cause, petitioner states:

EXCEPTION

Respondent has failed to set forth sufficient facts or law to show cause why the relief requested in the petition should not be granted.

DENIAL

[In separate paragraphs, you should specifically address – either admitting or denying – the statements in each paragraph of the Return.]

**EXAMPLE:**

I.

Petitioner admits for purposes of this action only the allegations in paragraph I of the Return that he was convicted in \_\_\_ county, is serving a 10 year prison term and is currently housed at \_\_\_\_\_ prison, except that petitioner denies that he is lawfully incarcerated.

II.

Petitioner denies the allegations contained in paragraph II of the return.

III.

Petitioner admits the allegations contained in paragraphs III, IV, and V of the return.

IV.

Petitioner realleges and incorporates by reference herein all the allegations and contentions set forth in the petition.

WHEREFORE, petitioner requests that the relief prayed for in the petition be granted.

DATED:

Respectfully submitted,  
[Signature]  
[Type name]

[Attach a Memorandum of Points and Authorities to the Denial and Exception to the Return. The Memorandum should address the legal arguments made by the Attorney General or District Attorney. For a format, please refer to the Memorandum of Points and Authorities included in the Sample Habeas Corpus Petition].

## INFORMATION SHEET ON WAIVER OF SUPERIOR COURT FEES AND COSTS

If you have been sued or if you wish to sue someone, if you are filing or have received a family law petition, or if you are asking the court to appoint a guardian for a minor or a conservator for an adult or are an appointed guardian or conservator, and if you (or your ward or conservatee) cannot afford to pay court fees and costs, you may not have to pay them in order to go to court. If you (or your ward or conservatee) are getting public benefits, are a low-income person, or do not have enough income to pay for your (or his or her) household's basic needs *and* your court fees, you may ask the court to waive all or part of those fees.

1. To make a request to the court to waive your fees in superior court, complete the *Request to Waive Court Fees* (form FW-001) or, if you are petitioning for the appointment of a guardian or conservator or are an appointed guardian or conservator, complete the *Request to Waive Court Fees (Ward or Conservatee)* (form FW-001-GC). If you qualify, the court will waive all or part of its fees for the following:
  - Filing papers in superior court (other than for an appeal in a case with a value of over \$25,000)
  - Making and certifying copies
  - Sheriff's fee to give notice
  - Court fee for telephone hearing
  - Reporter's fee for attendance at hearing or trial, if a reporter is provided by the court.
  - Assessment for court investigations under Probate Code section 1513, 1826, or 1851.
  - Preparing, certifying, copying, and sending the clerk's transcript on appeal.
  - Holding in trust the deposit for a reporter's transcript on appeal under rule 8.833 or 8.834.
  - Making a transcript or copy of an official electronic recording under rule 8.835
  - Giving notice and certificates
  - Sending papers to another court department
  - Having a court-appointed interpreter in small claims court
2. You may ask the court to waive other court fees during your case in superior court as well. To do that, complete a *Request to Waive Additional Court Fees (Superior Court)* (form FW-002) or *Request to Waive Additional Court Fees (Superior Court) (Ward or Conservatee)* (form FW-002-GC). The court will consider waiving fees for items such as the following, or other court services you need for your case:
  - Jury fees and expenses
  - Fees for court-appointed experts
  - Other necessary court fees
  - Fees for a peace officer to testify in court
  - Court-appointed interpreter fees for a witness
3. If you want the Appellate Division of Superior Court or the Court of Appeal to review an order or judgment against you and you want the court fees waived, ask for and follow the instructions on *Information Sheet on Waiver of Appellate Court Fees, Supreme Court, Court of Appeal, Appellate Division* (form APP-015/FW-015-INFO).

### IMPORTANT INFORMATION!

- **You are signing your request under penalty of perjury. Answer truthfully, accurately, and completely.**
- **The court may ask you for information and evidence.** You may be ordered to go to court to answer questions about your ability, or the ability of your ward or conservatee, to pay court fees and costs and to provide proof of eligibility. Any initial fee waiver you or your ward or conservatee are granted may be ended if you do not go to court when asked. You or your ward's or conservatee's estate may be ordered to repay amounts that were waived if the court finds you were not eligible for the fee waiver.
- **Public benefits programs listed on the application form.** In item 5 on the *Request to Waive Court Fees* (item 8 of the *Request to Waive Court Fees (Ward or Conservatee)*), there is a list of programs from which you (or your ward or conservatee) may be receiving benefits, listed by the abbreviations they are commonly known by. The full names of those programs can be found in Government Code section 68632(a), and are also listed here:
  - Medi-Cal
  - Food Stamps—California Food Assistance Program, CalFresh Program, or SNAP
  - Supp. Sec. Inc.—Supplemental Security Income (not Social Security)
  - SSP—State Supplemental Payment
  - County Relief/General Assistance—County Relief, General Relief (GR) or General Assistance (GA)
  - IHSS—In-Home Supportive Services
  - CalWORKS—California Work Opportunity and Responsibility to Kids Act
  - Tribal TANF—Tribal Temporary Assistance for Needy Families
  - CAPI—Cash Assistance Program for Aged, Blind, or Disabled Legal Immigrants

- **If you receive a fee waiver, you must tell the court if there is a change in your finances, or the finances of your ward or conservatee.** You must tell the court within five days if those finances improve or if you, or your ward or conservatee, become able to pay court fees or costs during this case. (File *Notice to Court of Improved Financial Situation or Settlement* (form FW-010) or *Notice to Court of Improved Financial Situation or Settlement (Ward or Conservatee)* (form FW-010-GC) with the court.) You may be ordered to repay any amounts that were waived after your eligibility, or the eligibility of your ward or conservatee, came to an end.
- **If you receive a judgment or support order in a family law matter:** You may be ordered to pay all or part of your waived fees and costs if the court finds your circumstances have changed so that you can afford to pay. You will have the opportunity to ask the court for a hearing if the court makes such a decision.
- **If you win your case in the trial court:** In most circumstances the other side will be ordered to pay your waived fees and costs to the court. The court will not enter a satisfaction of judgment until the court is paid. (This does not apply in unlawful detainer cases. Special rules apply in family law cases and in guardianships and conservatorships. (Government Code, section 68637(d), (e), and Cal. Rules of Court, rule 7.5.)
- **If you settle your civil case for \$10,000 or more:** Any trial court waived fees and costs must first be paid to the court out of the settlement. **The court will have a lien on the settlement in the amount of the waived fees and costs.** The court may refuse to dismiss the case until the lien is satisfied. A request to dismiss the case (use form CIV-110) must have a declaration under penalty of perjury that the waived fees and costs have been paid. Special rules apply to family law cases.
- **The court can collect fees and costs due to the court.** If waived fees and costs are ordered paid to the trial court, or if you fail to make the payments over time, the court can start collection proceedings and add a \$25 fee plus any additional costs of collection to the other fees and costs owed to the court.
- **The fee waiver ends.** The fee waiver expires 60 days after the judgment, dismissal, or other final disposition of the case or earlier if a court finds that you or your ward or conservatee are not eligible for a fee waiver. If the case is a guardianship or conservatorship proceeding, see California Rules of Court, rule 7.5(k) for information on the final disposition of that matter.
- **If you are in jail or state prison:** Prisoners may be required to pay the full cost of the filing fee in the trial court but may be allowed to do so over time. See Government Code section 68635.

If you are getting public benefits, are a low-income person, or do not have enough income to pay for your household's basic needs and your court fees, you may use this form to ask the court to waive your court fees. The court may order you to answer questions about your finances. If the court waives the fees, you may still have to pay later if:

- You cannot give the court proof of your eligibility,
- Your financial situation improves during this case, or
- You settle your civil case for **\$10,000** or more. The trial court that waives your fees will have a lien on any such settlement in the amount of the waived fees and costs. The court may also charge you any collection costs.

**1 Your Information** (person asking the court to waive the fees):

Name: \_\_\_\_\_  
 Street or mailing address: \_\_\_\_\_  
 City: \_\_\_\_\_ State: \_\_\_\_ Zip: \_\_\_\_\_  
 Phone: \_\_\_\_\_

**2 Your Job**, if you have one (job title): \_\_\_\_\_

Name of employer: \_\_\_\_\_  
 Employer's address: \_\_\_\_\_

**3 Your Lawyer**, if you have one (name, firm or affiliation, address, phone number, and State Bar number): \_\_\_\_\_

a. The lawyer has agreed to advance all or a portion of your fees or costs (check one): Yes  No

b. (If yes, your lawyer must sign here) Lawyer's signature: \_\_\_\_\_  
*If your lawyer is not providing legal-aid type services based on your low income, you may have to go to a hearing to explain why you are asking the court to waive the fees.*

**4 What court's fees or costs are you asking to be waived?**

- Superior Court (See *Information Sheet on Waiver of Superior Court Fees and Costs* (form FW-001-INFO).)  
 Supreme Court, Court of Appeal, or Appellate Division of Superior Court (See *Information Sheet on Waiver of Appellate Court Fees* (form APP-015/FW-015-INFO).)

**5 Why are you asking the court to waive your court fees?**

- a.  I receive (check all that apply; see form FW-001-INFO for definitions):  Food Stamps  Supp. Sec. Inc.  SSP  Medi-Cal  County Relief/Gen. Assist.  IHSS  CalWORKS or Tribal TANF  CAPI
- b.  My gross monthly household income (before deductions for taxes) is less than the amount listed below. (If you check 5b, you must fill out 7, 8, and 9 on page 2 of this form.)

Family Size	Family Income	Family Size	Family Income	Family Size	Family Income	If more than 6 people at home, add \$450.00 for each extra person.
1	\$1,264.59	3	\$2,164.59	5	\$3,064.59	
2	\$1,714.59	4	\$2,614.59	6	\$3,514.59	

- c.  I do not have enough income to pay for my household's basic needs and the court fees. I ask the court to: (check one and you **must** fill out page 2):
- waive all court fees and costs  waive some of the court fees  
 let me make payments over time

**6**  Check here if you asked the court to waive your court fees for this case in the last six months. (If your previous request is reasonably available, please attach it to this form and check here.)

**I declare under penalty of perjury under the laws of the State of California that the information I have provided on this form and all attachments is true and correct.**

Date: \_\_\_\_\_

Print your name here

Sign here





Case Number: \_\_\_\_\_

Your name: \_\_\_\_\_

If you checked 5a on page 1, do not fill out below. If you checked 5b, fill out questions 7, 8, and 9 only. If you checked 5c, you **must** fill out this entire page. If you need more space, attach form MC-025 or attach a sheet of paper and write Financial Information and your name and case number at the top.

7  Check here if your income changes a lot from month to month. If it does, complete the form based on your average income for the past 12 months.

8 Your Gross Monthly Income

a. List the source and amount of any income you get each month, including: wages or other income from work before deductions, spousal/child support, retirement, social security, disability, unemployment, military basic allowance for quarters (BAQ), veterans payments, dividends, interest, trust income, annuities, net business or rental income, reimbursement for job-related expenses, gambling or lottery winnings, etc.

- (1) \_\_\_\_\_ \$ \_\_\_\_\_
(2) \_\_\_\_\_ \$ \_\_\_\_\_
(3) \_\_\_\_\_ \$ \_\_\_\_\_
(4) \_\_\_\_\_ \$ \_\_\_\_\_

b. Your total monthly income: \$ \_\_\_\_\_

9 Household Income

a. List the income of all other persons living in your home who depend in whole or in part on you for support, or on whom you depend in whole or in part for support.

Table with columns: Name, Age, Relationship, Gross Monthly Income. Rows (1) through (4) with blank lines for entry.

b. Total monthly income of persons above: \$ \_\_\_\_\_

Total monthly income and household income (8b plus 9b): \$ \_\_\_\_\_

To list any other facts you want the court to know, such as unusual medical expenses, etc., attach form MC-025 or attach a sheet of paper and write Financial Information and your name and case number at the top. Check here if you attach another page. Important! If your financial situation or ability to pay court fees improves, you must notify the court within five days on form FW-010.

10 Your Money and Property

- a. Cash \$ \_\_\_\_\_
b. All financial accounts (List bank name and amount): (1) \_\_\_\_\_ \$ \_\_\_\_\_ (2) \_\_\_\_\_ \$ \_\_\_\_\_ (3) \_\_\_\_\_ \$ \_\_\_\_\_
c. Cars, boats, and other vehicles (Table with columns: Make / Year, Fair Market Value, How Much You Still Owe)
d. Real estate (Table with columns: Address, Fair Market Value, How Much You Still Owe)
e. Other personal property (jewelry, furniture, furs, stocks, bonds, etc.): (Table with columns: Describe, Fair Market Value, How Much You Still Owe)

11 Your Monthly Deductions and Expenses

- a. List any payroll deductions and the monthly amount below: (1) \_\_\_\_\_ \$ \_\_\_\_\_ (2) \_\_\_\_\_ \$ \_\_\_\_\_ (3) \_\_\_\_\_ \$ \_\_\_\_\_ (4) \_\_\_\_\_ \$ \_\_\_\_\_
b. Rent or house payment & maintenance \$ \_\_\_\_\_
c. Food and household supplies \$ \_\_\_\_\_
d. Utilities and telephone \$ \_\_\_\_\_
e. Clothing \$ \_\_\_\_\_
f. Laundry and cleaning \$ \_\_\_\_\_
g. Medical and dental expenses \$ \_\_\_\_\_
h. Insurance (life, health, accident, etc.) \$ \_\_\_\_\_
i. School, child care \$ \_\_\_\_\_
j. Child, spousal support (another marriage) \$ \_\_\_\_\_
k. Transportation, gas, auto repair and insurance \$ \_\_\_\_\_
l. Installment payments (list each below): Paid to: (1) \_\_\_\_\_ \$ \_\_\_\_\_ (2) \_\_\_\_\_ \$ \_\_\_\_\_ (3) \_\_\_\_\_ \$ \_\_\_\_\_
m. Wages/earnings withheld by court order \$ \_\_\_\_\_
n. Any other monthly expenses (list each below): Paid to: How Much? (1) \_\_\_\_\_ \$ \_\_\_\_\_ (2) \_\_\_\_\_ \$ \_\_\_\_\_ (3) \_\_\_\_\_ \$ \_\_\_\_\_

Total monthly expenses (add 11a - 11n above): \$ \_\_\_\_\_